

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In re
Am-Us Company, Inc.
fka Orchem, Inc.

Case No. 96-10459

Debtor(s)

Chapter 11 (Judge Aug)

ORDER GRANTING FEE APPLICATIONS

This matter is before the Court on the final fee applications of Herzfeld & Rubin, counsel for the official committee of unsecured creditors (Doc. 356), Porter, Wright, Morris & Arthur, local counsel for the official committee of unsecured creditors (Doc. 360), Frost, Brown & Todd, attorneys for the Debtor (Doc. 358), the interim fee application of Developmental Specialists, Inc. (Doc. 355), creditor State of Ohio Department of Taxation's objections thereto (Docs. 368, 372, 370, and 366), and Herzfeld & Rubin and Porter, Wright's responses (Docs. 380, 376). A hearing was held on April 10, 2001.

Herzfeld & Rubin is seeking fees of \$135,873.69 and expenses of \$4,763.46. Porter, Wright is seeking fees of \$588,458.50 and expenses of \$41,091.43. Frost, Brown is seeking fees of \$112,593.00 and expenses of \$17,594.32. Developmental Specialists is seeking fees of \$142,781.50 and expenses of \$16,887.32. The estate has an approximate total balance of \$800,000 available for distribution.

The State has objected to all the fee applications on the general premise that the fees are excessive in light of the limited assets available for distribution. The State contends that because the amount of professional fees exceeds the value of the estate that the work done by the professionals is, per se, not beneficial to the estate. The State advocates the use of a formula whereby a percentage of the \$800,000 amount would be made available for distribution to the unsecured creditors. In the alternative, the State has requested that the value of the estate as of the petition filing date or a date shortly thereafter should be preserved for the benefit of the unsecured creditors.¹ The United States Trustee has recommended that the Court

¹ At the hearing, this amount was estimated to range between \$200,000 and \$300,000. This amount did not appear to take into account a \$250,000 claim by Mays Chemical Company that was ultimately disallowed as a result of the committee's efforts.

adopt either of the two proposals suggested by the State.

Professionals may only be awarded fees for “reasonable compensation for actual, necessary services.” 11 U.S.C. §330(a)(1)(A). “In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including . . . whether such services were necessary to the administration of, or beneficial at the time at which the service was rendered . . .” 11 U.S.C. §330(a)(3)(C). The Code also instructs that the court may allow “compensation different . . . after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.” 11 U.S.C. §328(a). Thus, the Code requires that professional fees be reasonable both at the time the professional service was rendered and at the conclusion of such employment, when viewed with the benefit of hindsight.

At the hearing, local counsel for the committee presented a detailed chronology of the legal work done by both law firms for the committee.² Summarily stated, the committee and its counsel reasonably believed that the prosecution of the two separate adversary proceedings against Mays Chemical Company and Oscar Robertson were in the committee’s best interest. This is especially true with regard to the proceeding against Mr. Robertson as it was reasonably believed that a recovery of \$1,600,000 was to be obtained. The committee was met with “scorched earth” defenses in both proceedings, which greatly added to their cost. Although the committee ultimately prevailed against Mays Chemical, the ultimate settlement reached during Mays’ pending appeal of a judgment against it, proved to be less favorable to the committee than initially anticipated. With regard to the proceeding against Mr. Robertson, a critical agreement “forgotten” by all involved entities resulted in a net loss to the estate. Finally, counsel for the committee also engaged in protracted claims objection work under the reasonable belief that a distribution to the unsecured creditors would be made.

In view of the above, we conclude that the work done by Herzfeld & Rubinfeld and Porter, Wright was necessary and beneficial to the estate, both at the time the work was done and when viewed with the benefit of hindsight.

² Exhibit A to Porter, Wright’s response also presents a useful chart denoting the legal work done by both law firms by topic and the resulting financial “recovery”.

An additional important factor present in this particular chapter 11 case is the fact that this was a committee-driven, as opposed to a debtor-driven, case.³ All work done by Herzfeld & Rubin and Porter, Wright was done with the permission of the committee. It goes without saying that the committee acts on behalf of all the unsecured creditors, including the State. We note that if the State, or any creditor, or the United States Trustee believed at any time in the course of this bankruptcy proceeding that estate assets were being wasted, a motion to convert the case to one under chapter 7 could have been filed. *See* 11 U.S.C. §1112.

We acknowledge the logic of the State's concept that some amount of money should be set aside for distribution to the unsecured creditors. This logic is especially compelling when it appears in the early stages of a case that some distribution to unsecured creditors is likely. However, the estimation of such a potential distribution is guesswork. Similarly, the use of a percentage formula is arbitrary. More importantly, there is no legal basis for such an imposition against an estate.

The State also generally contends that the work done by the professionals was highly duplicative. We find that the applicants have successfully rebutted this contention. *See* Doc. 376, p. 3-11.

Additional issues raised by the State relating to the role of Developmental Specialists in this bankruptcy case were not the focus of the arguments at the hearing. In any event, we find the State's arguments to be unpersuasive.

Accordingly, the fee applications shall be GRANTED.

IT IS SO ORDERED.

Dated: April 19, 2001

³ Due to the hiring of a new partner by Frost, Brown, the law firm "acquired" a conflict of interest and was no longer able to actively participate in the handling of the chapter 11 case.