UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

EDWARD JOHN NOBLE HOSPITAL — CASE NO. 91-00192

Debtor — Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On June 8, 1993, Ernst & Young, C.P.A. ("E&Y") filed a Motion for Order Confirming Payment of Fees And Disbursements To Accountants ("Fee Motion"). E&Y, which had been appointed as Debtor's accountants by Order of this Court dated March 8, 1991, making their appointment effective March 6, 1991, sought a fee of $78,820.00 and reimbursement of expenses in the sum of $6,337.00.

The Fee Motion was returnable before the Court at a motion term held in Syracuse, New York on June 29, 1993. The United States Trustee ("UST") filed an Objection to the Fee Motion and appeared in opposition.

In the Fee Motion, E&Y contends that all of the services rendered to the Debtor were "standard routine service" which were paid for in the ordinary course of Debtor's business, rather than services designated as non-routine bankruptcy related services for which payment must await prior Court approval based upon submission of contemporaneous time records and following notice to creditors. E&Y asserted that all such non-routine bankruptcy related services were performed by Debtor's internal management personnel. E&Y's Fee Motion seeks only ratification, not authorization for payment of, the sums previously paid.

The UST objects to the Fee Motion and argues that the Order of March 8, 1991 did not authorize payment of E&Y's fees in the absence of prior Court approval based upon contemporaneous time records, citing the final paragraph of that Order. The UST further asserts that such a practice by a professional is contrary to the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") and the Federal Rules of Bankruptcy Procedure.

On the initial return date of the Fee Motion, E&Y agreed to provide the Court and the UST with time records in support of the Fee Motion. Thereafter, the Fee Motion was adjourned numerous times. Between September 8th and September 16, 1993, E&Y filed and served documents entitled "Summary of Ernst & Young Hours Incurred and Fees". At the motion term held on October 12, 1993, the Court reserved decision on the Fee Motion. No further objections have been filed.

While most of the issues raised by the UST's Objection are somewhat moot by virtue of E&Y's voluntary submission of time records, the dispute over payment prior to Court authorization remains.

E&Y point to the Affidavit of Merlin C. Tousant ("Tousant") filed in support of E&Y's appointment, as distinguishing between "Standard Routine Service" and "Non-Routine Services Related to Bankruptcy" and requesting that it be permitted to bill for the former services and be paid "in the ordinary course of business as work progresses and on terms as applied prior to bankruptcy." (See Affidavit of Merlin C. Tousant sworn to February 25, 1991 at ¶6).

Conversely, the UST cites to the language of the Court's Order Authorizing Employment of Accountants dated March 8, 1991 which, while directing that compensation to E&Y be paid in accordance with the Tousant Affidavit, further directed that the compensation "shall be fixed upon application to the Court, and shall be based upon daily contemporaneous time records."

While a debtor in Chapter 11 may incur and pay post-petition expenses incurred in the ordinary course of its business absent prior court approval, bankruptcy courts are generally unwilling to view professional fees as falling within the generic definition of "ordinary course of business" expenses. A distinction is frequently made between payments for services rendered in connection with the day to day operation of the debtor's business and the

services of those who deal with the actual reorganization of the debtor's estate. Payment of the former requires no prior court approval, while payment of the latter generally professional fees, requires prior approval. See In re Pacific Forest Industries, Inc., 95 B.R. 740, 743 (Bankr. C.D.Cal. 1989), In re Northeast Dairy Co-op Federation, Inc., 74 B.R. 149, 153 (Bankr. N.D.N.Y. 1987).

In the matter sub judice, E&Y, at the time of the appointment, intended to distinguish between what it considered routine or presumably non-reorganizational services and non-routine reorganizational services seeking payment for the routine services without the prior approval of this Court.

Interestingly, in its Fee Motion, E&Y asserts that all of the services it rendered between March 6, 1991 and May 27, 1993 were routine in nature and non-routine services relating to the Chapter 11 case of the Debtor were "handled by management internally". See Application of Merlin C. Tousant sworn to June 4, 1993 at ¶8).

While E&Y's approach to payment of its professional fees in this case was unusual, it was by no means unique. The Bankruptcy Appellate Panel ("BAP") of the Ninth Circuit Court of Appeals approved a similar approach in In re Knudsen, 84 B.R. 688 (9th Cir. BAP 1988). There, debtor's counsel convinced the BAP, based upon the existence of certain factors not alleged to be present here, that it should be permitted to bill the debtor monthly for its services and obtain payment subject to review by the bankruptcy court at three month intervals. In approving the method of compensation sought by debtor's counsel, the BAP observed, "The critical factor is that fees must not be finally allowed (i.e. they must be subject to repayment) until a detailed application is filed, an opportunity for objection has been provided and the court has reviewed the application." Id. at pg. 671.

In the matter before the Court, E&Y seeks to put a different spin on the Knudsen rationale by contending that their services should be viewed as routine ordinary course expenses of doing business, similar to post-petition taxes, wages, and trade debt, thereby avoiding court scrutiny other than an after-the-fact rubber stamp.

While it is not inconceivable that a professional such as E&Y might render so-called routine non-reorganizational services within the context of a

Chapter 11 case, entitling it to periodic payment in the absence of prior scrutiny by a debtor's creditors and the bankruptcy court, the very fact that E&Y sought appointment pursuant to Code §327 undermines its current posture that it is not also subject to the requirements of Code §330. Additionally, the fact that Debtor had internal management capable of performing accounting functions, suggests that any services performed by E&Y should not be viewed as routine and wholly unrelated to the administration of the Chapter 11 case.

Turning to the time records allegedly supplied by E&Y, the Court notes they reflect a total of 33 hours of pre-appointment time, which, at the respective hourly rates of the personnel involved results in a disallowance of $3,497.00. In addition, during June, July and September of 1992, there was a duplication of 13 hours by "DM" at the rate of $50.00 per hour for a disallowance of $650.00. Thus, the Court will reduce E&Y's fee by $4,417.00 and approve payment in the sum of $74,673.00.

Finally the Fee Motion seeks approval of reimbursement of expenses in the sum of $6,337.00, however, there is no itemization of such expenses in accord with Local Rule 17(b) and, therefore, no reimbursement of expenses is approved.

Thus E&Y is directed to refund to the Debtor all sums paid to it in excess of $74,673.00 within thirty (30) days of the date of this Order.

IT IS SO ORDERED.

Dated at Utica, New York
this   day of December, 1993

STEPHEN D. GERLING
U.S. Bankruptcy Judge