IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IN RE
WINTERSILKS, INC.,

OPINION AND ORDER

Debtor.

00-C-0106-C

UNITED STATES TRUSTEE,

Appellant,

v.

WINTERSILKS, INC.,

Appellee.

- -

This is an appeal from a ruling of the United States Bankruptcy Judge that debtor Wintersilks, Inc. is required to pay post-confirmation quarterly fees that are calculated on the basis of payments made pursuant to a confirmed plan and not on all disbursements made by the debtor. The United States Trustee challenges the bankruptcy judge's ruling as an erroneous reading of 28 U.S.C. § 1930(a)(6), which authorizes the United States Trustee to collect quarterly fees from parties that file for Chapter 11 bankruptcy protection. The statute

provides for calculating the fees on a graduated scale on the basis of "disbursements" made by the debtor during the preceding quarter while the case is open, with a minimum fee of $250 for any quarter in which disbursements are less than $15,000 and up to as much as $10,000 for any quarter in which disbursements total $5,000,000 or more. The question raised on this appeal is whether the term "disbursements" applies to *all* payments made by a reorganized debtor, including those made in the ordinary course of business after a Chapter 11 plan has been confirmed but before the case has been closed, or whether, as the bankruptcy court held, the term applies only to post-confirmation payments that are made pursuant to the plan of reorganization.

I conclude that although there were good policy reasons that would have supported a decision by Congress to limit the calculation of fees to amounts paid out only pursuant to a plan of reorganization, Congress chose instead to amend the statute in a way that made the fee provisions applicable to all payments made by a reorganized debtor until its case is converted, dismissed or closed.

For the purpose of deciding the appeal, I find the following facts from the record.

FACTS

WinterSilks, Inc. filed a voluntary petition for reorganization under Chapter 11 of the

Bankruptcy Code in July 1998. Its First Amended Modified Plan of Reorganization plan was confirmed on February 22, 1999. Pursuant to the plan, WinterSilks, Inc. merged into WinterSilks of Jacksonville, Inc. and then into WinterSilks, L.L.C. On September 21, 1999, seven months after confirmation of the plan, the bankruptcy court held a hearing on WinterSilks' Application for Final Decree and Order of Substantial Consummation. The United States Trustee objected to the application on the ground that the debtor had not paid post-confirmation quarterly fees in the amounts the trustee believed were collectible under 28 U.S.C. § 1930(a)(6). The new WinterSilks resisted payment of any fees, arguing that it was not the same company that had sought protection and had not agreed to accept liability for the fees. Alternatively, it argued that if it was liable for any fees it was liable for only the minimum fee because § 1930(a)(6) applies only to post-confirmation disbursements made pursuant to the plan of reorganization and its disbursements under the plan were less than $15,000 during the quarters at issue. (The parties stipulated that if WinterSilks, L.L.C. was responsible for any post-confirmation fees, it was responsible for only the quarters ending June 30, 1999 and September 30, 1999.) On December 23, 1999, the bankruptcy court denied the application for a final decree and ruled that 1) the reorganized debtor, WinterSilks, L.L.C., had succeeded to all of WinterSilks, Inc.'s liabilities and obligations, including post-confirmation quarterly fees; and 2) WinterSilks' fees were to be calculated only on the basis of those disbursements it had

made pursuant to the plan. In other words, payments made in the ordinary course of business were exempted from the fee calculation. In a separate order entered the same day, the bankruptcy judge denied WinterSilks' application for a final decree, pending its payment of the fees due the United States Trustee. The bankruptcy court added that the final decree would be granted once the fees were paid as required.

The United States Trustee moved to alter and amend the bankruptcy judge's decision; his motion was denied orally on January 18, 2000. On January 19, 2000, the bankruptcy court entered a final decree and certificate of substantial consummation. On January 27, 2000, the trustee filed a notice of appeal of the bankruptcy court's December 23 and January 18 rulings. He took no appeal from the final decree. WinterSilks has not appealed the bankruptcy judge's determination that it is liable for post-confirmation fees.

OPINION

A threshold issue must be addressed. WinterSilks contends that the United States Trustee's appeal is moot because he did not appeal the final decree, which, according to WinterSilks, is the order that prejudices the United States. In WinterSilks' view, because the final decree closed the bankruptcy case and provided that WinterSilks had paid all amounts owing to the trustee, the failure to appeal from the final decree leaves the trustee without a

remedy: even if he prevails on this appeal, he would remain bound by the bankruptcy judge's order that WinterSilks has complied with its obligations under § 1930(a)(6).

In response, the trustee focuses on the two orders it is appealing, arguing that "'the concept of finality operates somewhat differently in the bankruptcy context: Certain bankruptcy orders are deemed final before the estate is finally closed.'" Opp'n Br. of Appellant, dkt. #8, at 2 (quoting In the Matter of Official Committee of Unsecured Creditors of White Farm Equipment Co., 943 F.2d 753, 755 (7th Cir. 1991)). The trustee argues that there is no mootness problem if the district court finds that the bankruptcy judge erred because judicial relief would not upset settled expectations of creditors and third parties. Cf. Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 841 F.2d 92, 96 (4th Cir. 1988) (substantial implementation of reorganization plan rendered plaintiff's appeal moot after plaintiff failed to post supersedeas bond required for stay of implementation).

The trustee is correct in arguing that the two orders are appealable under bankruptcy law and that relief would not upset settled expectations. Both the original order and the order denying the trustee's motion to amend are the kind of orders that meet the "flexible finality" required for the appeal of bankruptcy orders. See generally 16 Charles Alan Wright et al., Federal Practice and Procedure § 3926.2; see also In re Jartran, 886 F.2d 859, 861-62 (7th Cir. 1989) (holding that disposition of a creditor's claim is "final" for purposes of appeal under 28

U.S.C. § 158(d) when claim has been accepted and valued and only ministerial tasks remain) (citing In re Morse Electric Co., 805 F.2d 262 (7th Cir. 1986)). Once the bankruptcy court had determined the manner in which WinterSilks' post-confirmation quarterly fees would be calculated, nothing more remained to be done except the ministerial task of applying the fee to the covered disbursements.

It does not appear that requiring WinterSilks to pay additional fees for the quarters between the confirmation of its plan and the final decree would upset the plan of reorganization. WinterSilks has not adduced any evidence that it would. Therefore, there is no problem of mootness in that sense.

The only question is whether, by not including the final decree in his notice of appeal, the trustee is bound by that decree. If he is, then his appeal from the two orders is moot, not because a decision on his appeal would upset settled expectations of creditors and third-parties, but because the final decree would still be in effect and would be the determinant of WinterSilks' liability. On this point, the trustee says only that this court can always reverse and remand the matter to the bankruptcy court with instructions to reopen the case pursuant to 11 U.S.C. § 350(b) to require payment in full of the outstanding quarterly fees.

It appears that the trustee is correct in asserting that his failure to appeal the final decree does not mean he cannot obtain relief from that decree, odd as that might seem to non-

bankruptcy judges. Unlike Fed. R. Civ. P. 60, § 350(b) has no time limitations for reopening a judgment and no strict criteria for doing so. Instead, the statute allows for reopening for a broad range of reasons: "to administer assets, to accord relief to the debtor, or for other cause." Id. Requests to reopen bankruptcy estates or to modify or vacate orders lie within the sound discretion of the bankruptcy court. See, e.g., Hawkins v. Landmark Finance Co., 727 F.2d 324 (4th Cir. 1984); Bartle v. Markson, 357 F.2d 517 (2d Cir. 1966). Moreover, reviewing courts may award fees even after a bankruptcy case has been dismissed. See U.S.A. Motel Corp. v. Danning, 521 F.2d 117, 119 (9th Cir. 1975) (per curiam). Taking into consideration the fact that the effect of a final decree is not so conclusive as entry of a final judgment at the district court level, that such a decree is always subject to reopening at the discretion of the bankruptcy court and that the entry of a final decree does not bar the awarding of fees, I conclude that the trustee's failure to appeal from the final decree does not moot his appeal from the two preceding orders.

The substantive question raised on appeal is whether Congress intended that the quarterly fees prescribed in § 1930(a)(6) were to apply to all of the post-confirmation disbursements made by a debtor who has sought Chapter 11 protection, even those made in the ordinary course of business. To understand the argument, some background on § 1930(a)(6) is necessary.

The fee provisions of § 1930(a)(6) are not new. They have been in place since 1986, when the position of United States Trustee was created. Before 1996, the statute provided for the payment of fees for each quarter until a plan was confirmed or the case was dismissed or converted. In 1996, in an effort to raise more revenue and offset the cost of monitoring Chapter 11 proceedings, Congress amended the statute by deleting confirmation of a plan as an event that ended the debtor's obligation for fees. The result was that the debtor remained obligated to pay quarterly fees until the case was dismissed or converted. See Balanced Budget Downpayment Act, I, Pub. L. No. 104-00, Title II, § 211, 110 Stat. 26, 37-38. (The statute made no provision for terminating the fee obligation when a case was closed but the courts have read such a provision into the statute. See, e.g., In re P.J. Keating, Inc., 205 B.R. 663, 667 (Bankr. D. Mass. 1997) (any other reading would mean that fees would continue ad infinitum, which would be nonsensical).)

The statute does not make it explicit that the fees are to be based on *all* disbursements made by a debtor who has Chapter 11 protection, including those made in the ordinary course of business after a reorganized debtor's plan has been confirmed and the debtor is carrying on business as a new entity. However, the majority of bankruptcy courts, all but one of the district courts to consider the question and the one court of appeals that has ruled on the question have read the statute as representing Congress's intent to make the fee provisions applicable

to all payments made after confirmation. See In re Celebrity Home Entertainment, 210 F.3d 995, 998 (9th Cir. 2000) (Congress's goal was to raise revenue under statute by extending quarterly fees into the post-confirmation period; if term "disbursement" is limited to payments by bankruptcy estate, amendment would have only minimal impact because most reorganized debtors would have to pay only minimum quarterly fee based on no disbursements). See also In re Maruko, 219 B.R. 567, 573 (S.D. Cal. 1998), rev'g 206 B.R. 225 (Bankr. S.D. Cal. 1997) (finding no reason to limit kinds of disbursements subject to quarterly fee); In re Boulders on the River, 218 B.R. 528, 539 (D. Or. 1997), rev'g 205 B.R. 948 (Bankr. D. Or. 1997) (legislative history does not support limitation of quarterly fees to disbursements made by bankruptcy estate; Congress would not have amended statute if it had intended post-confirmation fees to be limited to statutory minimum); In re Postconfirmation Fees, 224 B.R. 793, 799 (Bankr. E.D. Wash. 1998) (en banc) (narrow definition of disbursements would frustrate Congress's efforts to increase revenues to support United States Trustee system); In re A.H. Robins Co., 219 B.R. 145, 151-52 (Bankr. E.D. Va. 1998) (reading disbursements as including payments made in the ordinary course of business is "most consistent with the Amendment's purpose of funding the [United States Trustee] system"); In re Hess' Sons, 218 B.R. 354, 360 (Bankr. D. Md. 1998) (word disbursement is ambiguous; § 1930 is revenue measure; ambiguities in revenue measures are to be interpreted so as to maximize revenues);

In re Gates Community Chapel of Rochester, Inc., 212 B.R. 220, 225 (Bankr. W.D.N.Y. 1997) (when Congress amended the statute, its intent was simply to "extend the same payment obligations imposed during the pre-confirmation period into the post-confirmation period") (citing In re P.J. Keating Co., 205 B.R. at 665); In re Sedro-Woolley Lumber Co., 209 B.R. 987, 989 (Bankr. W.D. Wash. 1997) (plain language of statute does not limit source of disbursement to property of estate or limit payments to those made under plan).

The bankruptcy courts that have rejected the majority position on the meaning of "disbursements" have taken one of two approaches. The first of these is represented by the bankruptcy court opinion in Maruko, 206 B.R. 225, that § 1930(a)(6) does not apply to post-confirmation disbursements because the only disbursements covered by the statute are those made by the bankruptcy estate and after confirmation, the bankruptcy estate ceases to exist. The holding in Maruko relies on St. Angelo v. Victoria Farms, 38 F.3d 1525 (9th Cir. 1994), modified, 46 F.3d 969 (9th Cir. 1995), which held that a debtor was obligated to pay § 1930(a)(6) fees on the sale proceeds of property that had been distributed indirectly by others, rather than by the United States Trustee. In reversing the lower courts' decisions that the fees did not apply to such proceeds, the court of appeals held that "a plain reading of [§ 1930(a)(6)] shows that Congress clearly intended 'disbursements' to include *all* payments from the bankruptcy estate." Id. at 1534. In Maruko, the bankruptcy court reasoned that St.

Angelo was decided before the amendment to § 1930(a)(6) was enacted; Congress is presumed to be aware of all judicial interpretations of statutory language; therefore, it knew that the court of appeals had defined disbursements as payments from a bankruptcy estate; this was judicially created law that Congress could displace only by an explicit provision. See also In re Celebrity Duplicating Services, Inc., 216 B.R. 942, 944 (C.D. Calif. 1997), rev'd sub nom., In re Celebrity Home Entertainment, Inc., 210 F.3d 995 In re Boulders on the River, Inc., 205 B.R. at 951.

This reading of St. Angelo has had its critics, see, e.g., In re Maruko, Inc., 219 B.R. at 571 (reversing bankruptcy court on ground that when court of appeals decided St. Angelo, it was not considering issue of post-confirmation payments as disbursements); In re Boulders on the River, Inc., 218 B.R. at 537 (reversing bankruptcy court and questioning its reliance on dicta in St. Angelo after Congress had altered fundamental nature of § 1930(a)(6)); In re Sedro-Woolley Lumber Co., 209 B.R. at 989 (attributing substantive meaning to words "of the estate" in St. Angelo imputes intention to court of appeals it could not have formed in then-existing circumstances). In In re P.J. Keating Co., 205 B.R. at 666-67, the bankruptcy court noted that because the original version of § 1930(a)(6) applied only to pre-confirmation debtors, it was predictable that in St. Angelo, the court of appeals would read the statute as referring to payments *from the bankruptcy estate.* "Until confirmation, all payments made in the

operation of a business necessarily come from the estate." Id. at 667. The bankruptcy court went on to hold that when Congress amended the statute, it intended that payments made in the operation of the business would continue to be subject to a quarterly fee even if they were not being made by the bankruptcy estate; in no other way would Congress achieve its objective of increasing revenues. See id.

The critics had it right. In April 2000, after this case was fully briefed, the Court of Appeals for the Ninth Circuit held in In re Celebrity Home Entertainment, Inc., 210 F.3d 995, that the language in St. Angelo has no precedential value in determining whether Congress intended the term "disbursements" to apply to more than payments from the bankruptcy estate. Id. at 998. The court of appeals agreed with those courts that had refused to extend St. Angelo to a situation that could not have been foreseen when it was decided. See id. at 999. The court explained that when it said in St. Angelo that Congress had intended disbursements to include all payments from the bankruptcy estate, it had not said "that disbursements are *limited* to payments from a bankruptcy estate. Id. at 998. (Emphasis added.)

Other bankruptcy courts that have rejected the majority interpretation of "disbursements" have taken an approach similar to the one used by the bankruptcy court in this case. See In re WinterSilks, Inc., 243 B.R. 351 (Bankr. W.D. Wis. 1999); see also In re Munford, Inc., 216 B.R. 913, 919 (Bankr. N.D. Ga. 1997); In re Jamko, Inc., 207 B.R. 758

(Bankr. S.D. Fla. 1996), rev'd sub nom. Walton v. Jamko, Inc., 240 B.R. 645 (S.D. Fla. 1999); In re SeaEscape Cruises, LTD., 201 B.R. 321 (Bankr. S.D. Fla. 1996). In WinterSilks, the bankruptcy court cited approvingly the reasoning of the bankruptcy court in In re Pettibone, unpublished order (Bankr. N.D. Ill. Aug. 16, 1999), opin. withdrawn and reissued, 244 B.R. 906 (Bankr. N.D. Ill. 2000), to the effect that the amount of quarterly fees should be correlated with the bankruptcy plan and process, so that a debtor would pay more fees while in the pre-confirmation process than it would pay in the post-confirmation process in which little or no monitoring is done by the United States Trustee. See WinterSilks, 243 B.R. at 357-58. The bankruptcy court held that although "the statute does not limit measuring disbursements only to those made from the 'estate,' which terminates upon confirmation, it also does not permit the reach of the bankruptcy court's influence for the purpose of this 'tax' beyond the bounds of its influence for other purposes." See id. at 358. The bankruptcy court added that its jurisdiction over the debtor extended only to insuring that the reorganized debtor is meeting its obligations under the plan and § 1930(a)(6) cannot serve as support for imposing a fee upon a reorganized debtor except in the context of a plan of reorganization. See id. In its view, the plan is the law of the case and disbursements are measured through the plan, which provides the definition of disbursements and therefore, does not cover payments made outside the plan in the ordinary course of business. See id. at 359. See also In re

Munford, Inc., 216 B.R. at 919 (legislative purpose of raising fees must be harmonized with the reorganized debtor's right to fresh start; this can be accomplished by interpreting language as subjecting to fees only funds paid after confirmation to carry out plan of reorganization); In re Betwell Oil & Gas Co., 204 B.R. 817, 819 (Bankr. S.D. Fla. 1997) (refusing to read statutory language as subjecting post-confirmation payments to fees because treating post-confirmation payments as disbursements would be grossly unfair tax upon general business operations of reorganized debtor who is no longer operating under court supervision; moreover, bankruptcy court lacks authority to compel debtor to file reports after entry of confirmation order).

The approach followed by the bankruptcy court in this case is both fair and logical. As a policy matter, it makes perfect sense. The difficulty is that nothing in the language of the statute, the statute's context or the legislative history suggests that Congress intended to limit the reach of the statute in this way. Rather, all indications point to a deliberate decision to impose a fee on *all* disbursements made by reorganized debtors before their cases terminate. The point made in cases such as Boulders on the River remains valid. Why would Congress have bothered to amend the statute as it did if it had intended merely to enable United States Trustees to collect the minimum fees set by the statute? See Boulders on the River, 218 B.R. at 539.

Congress is presumed to have as good an understanding as any court of the purposes of

the bankruptcy system and the importance of providing a fresh start to debtors. Despite this understanding, it saw revenue enhancement as a greater need in 1996 and acted accordingly. It would negate those efforts if this court were to interpret the fundamental change in the law that Congress enacted as relating only to disbursements made pursuant to a plan. One may disagree with Congress's decision to expand the fee obligation to all the disbursements of reorganized debtors and regret its adverse effect on debtors who have achieved confirmation of a plan and are making a fresh start. One may question the fairness of imposing higher fees on debtors after they no longer need the close supervision of the bankruptcy court. As legitimate as these concerns may be as a matter of policy, they do not supply any legal reasons for reading the statutory language of § 1930(a)(6) restrictively. I conclude, therefore, that the language of § 1930(a)(6) must be read as applying to all disbursements, including those made in the ordinary course of business.

ORDER

IT IS ORDERED that the motion of debtor-appellee WinterSilks, Inc. to dismiss the appeal filed by the United States Trustee is DENIED and the decision of the United States Bankruptcy Court limiting WinterSilks, L.L.C. to payment of post-confirmation fees that are based solely on disbursements made pursuant to its plan of reorganization is REVERSED. The

bankruptcy court is directed to impose and collect fees calculated on the basis of all disbursements made by the reorganized debtor during the quarters ending June 30, 1999 and September 30, 1999.

Entered this _____ day of June, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge