

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Willard Wesley Winters Jr. and Kay Paulette Winters Goffena
Case Number: 93-13743
Chapter : 7
Judge Code: SA
First Meeting Location: Albuquerque
Reference Number: 7 - 93-13743 - SA

Document Information		
Number:	757	
Description:	Memorandum Opinion In Support of [758-1] Order Denying Debtors' Objection to that Portion of the Proof of Claim of Office of the United States Trustee for Section 1930(a)(6) Fees for Period After June 3, 1997.	
Size:	10 pages (20k)	
Date Received:	09/12/2000 01:19:00 PM	Date Filed: 09/12/2000 Date Entered On Docket: 09/13/2000
Court Digital Signature		View History
42 48 90 ec 60 99 52 b2 41 fd 67 68 c2 8e f9 d5 95 4d 0b 0b 71 e8 78 e8 ed 77 83 55 11 d9 30 d6 5b 51 fa 0e 6c d5 6a c7 96 9e 35 c0 3b a6 f0 4d 44 77 b3 77 36 a6 08 87 20 cd e9 27 2b 91 06 e6 84 ee 08 44 34 1e fd cf f5 d5 4f 88 16 42 f0 64 c3 59 33 2f ab 11 63 88 d0 0e 29 ca 54 92 bd 0a fc 14 83 f7 36 7c f8 c0 d7 ae 5b d0 ab ab 73 58 5d 26 c2 ac 96 79 42 36 5f 30 32 25 5d 04 33 f0		
Filer Information		
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
WES WINTERS,
Debtor.

No. 7-93-13743 S

**MEMORANDUM OPINION IN SUPPORT OF
ORDER DENYING DEBTORS' OBJECTION
TO THAT PORTION OF THE PROOF OF CLAIM OF
OFFICE OF THE UNITED STATES TRUSTEE
FOR § 1930(a)(6) FEES FOR PERIOD AFTER JUNE 3, 1997**

The issue presented for decision is whether this Chapter 7 estate is liable for § 1930(a)(6) fees for the period following (1) the entry of an order converting the case from chapter 11 to chapter 7 and (2) the entry of an order staying the conversion order pending a decision on the merits of the appeal of the conversion order. Because the Chapter 7 estate is solvent, the Debtors have pursued the claim objection, rather than the Chapter 7 trustee. Puccini & Meagle, P.A. represents the Debtors; the Office of the United States Trustee (Leonard Martinez-Metzgar) represents itself ("United States Trustee").

BACKGROUND

On December 27, 1993, the Debtors filed a voluntary petition under Chapter 11 of the Code. Puccini & Meagle, P.A. substituted in as Chapter 11 counsel in December 1995. The Debtors continued as debtors in possession until, on June 3, 1997, an order was entered converting the case to a Chapter 7

case. On June 6, 1997, the Debtors filed a notice of appeal, seeking reversal of the conversion order. The Debtors then obtained an order from United States Magistrate Judge Don J. Svet (based on the failure of the United States Trustee to respond to the Debtors' moving papers) staying the June 3, 1997 order pending resolution of the appeal. That order was filed on August 27, 1997. On October 28, 1998, United States District Judge Santiago Campos filed his order dismissing the appeal on the merits. The entry of that order ended the August 27, 1997 stay order.

Following the entry of the June 3 conversion order, and despite the entry of the stay order, the case proceeded as if it were a Chapter 7 case;¹ e.g., (a) the Debtors filed no operating reports, nor did the United States Trustee demand any such filing; (b) no § 1930 fees were paid, nor did the United States Trustee make any demands for such fees until it filed its proof of claim in this Chapter 7 case on December 1, 1998; (c) the initial Chapter 7 trustee and his successor were substituted for the Debtors in pending United States District Court cases in which the estate was a plaintiff; (d) payments to the Chapter 11 professionals ceased and the Chapter 11

¹ The list of actions taken is taken from Debtors' Memorandum filed July 14, 2000; the United States Trustee did not dispute the accuracy of the list.

accountant ceased further services; (e) the Chapter 7 trustees took possession of the estate's funds, and continued to administer the case, including conducting a § 341 meeting and paying virtually all the claims of the estate; and (f) the trustees and their counsel were paid for their services.² On December 1, 1998, the United States Trustee filed a proof of claim in this Chapter 7 case, seeking among other things payment of the 28 U.S.C. § 1930(a)(6) fees for the period comprised of the last two quarters of 1997 and the four quarters of 1998. The parties have resolved all aspects of the proof of claim with the exception of the issue addressed in this memorandum. Resolution of this issue will permit the case to be closed.

DISCUSSION

Debtors argue that the stay order did not change the result of the conversion order, but only "temporarily suspended" its effect. According to the Debtors, the

² The record provided to this Court does not show what parties were notified of the entry of the August 27, 1997 stay order from the Magistrate Judge. There is no docket entry in this case announcing the entry of the August 27 order in the appeal. Nor have the parties provided any explanation about how the case effectively proceeded under Chapter 7 in the face of the stay order. The case was assigned to the undersigned judge on December 16, 1998 (along with the rest of the prior judge's caseload); this judge first learned (in theory) of the August 27 stay order when the Debtors filed their objection to the United States Trustee's proof of claim on May 9, 2000.

dismissal of the appeal means that the grant of the stay pending appeal "is of no consequence." The Debtors further argue that the case in effect became and was conducted as a Chapter 7 case from June 3, 1997 onward, and that the Code (and presumably 28 U.S.C. § 1930(a)(6) as well) does not contemplate payment of fees to both the United States Trustee and a Chapter 7 trustee. Alternatively the Debtors argue that if the Court requires payment of the § 1930 fees, then the Court must require the Chapter 7 trustees and their counsel to disgorge the fees paid them.

The United States Trustee argues that the Debtors wanted the stay in order to at least delay a Chapter 7 trustee from taking control of the estate and to avoid the danger of losing the appeal on mootness grounds. The United States Trustee also argues that the Debtors are precluded from contesting payment of the fees by the doctrine of judicial estoppel.

Dealing with the United States Trustee's arguments first, the Court agrees with the statement of why the Debtors would want a stay. But the United States Trustee does not address directly the fact that the very result that the stay was supposed to prevent nevertheless occurred; that is, the case was treated as a Chapter 7 case from June 3, 1997 onward, despite the stay order. And the Tenth Circuit does not

recognize the doctrine of judicial estoppel. Goffland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corporation), 119 F.3d 852, 858 (10th Cir. 1997); Dewey v. Dewey (In re Dewey), 223 B.R. 559, 566 n. 9 (10th Cir. BAP 1998) (doctrine of judicial estoppel not recognized in Tenth Circuit except in limited circumstances).

Both parties concede they have been unable to find a case precisely on point. But the United States Trustee argues that the case with the facts closest on point is In re Clark, 1995 WL 495951 (D.C.N.D. Ill. 1995), in which a Chapter 11 debtor appealed an order converting the case to a Chapter 7 case and obtained from the district court a stay pending appeal. The same person had been appointed as both the Chapter 11 and Chapter 7 trustee, and filed an interim fee application for compensation for both his Chapter 11 and Chapter 7 work. Id., at 6, 9. The district court ruled that “[b]ecause the conversion from Chapter 11 to Chapter 7 had been stayed, [the trustee’s] authority to act as a Chapter 7 trustee and request Chapter 7 fees had also been stayed.” Id., at 9.

The ruling in the Clark case is certainly consistent with the general case law of stays on appeal: the entry of a stay pending appeal prevents the appealed order from taking effect. 10 Collier on Bankruptcy, ¶ 8005.01 at 8005-2 (15th Ed. Rev.

2000) ("However, the losing party is permitted to seek a stay of the judgment, so that matters are held in status quo pending an appeal."). Indeed, the Debtors concede that the stay effects a "stopping" or a "temporary suspension" of the order it is directed at. Memorandum in Support of Debtors' Objection to the Proof of Claim for Payment of Chapter 11 United States Trustee Fees After Conversion of Case to Chapter 7, filed July 14, 2000, at 5. Thus it is certainly not the case that "[t]he fact that the Debtors were given a Stay pending their appeal is of no consequence." Id., at 7.

The June 3 conversion order had the effect of converting the Chapter 11 case to one under Chapter 7; the August 27 stay order had the effect either of retroactively preventing the conversion order from going into effect (although no retroactivity language appears in the stay order) or of restoring the case to its Chapter 11 status.³ For some

³ Given that § 1930(a)(6) requires payment of the fee "for each quarter (including any fraction thereof). . . ," it makes no difference whether the case is considered to have been converted to Chapter 7 and then converted back, or never converted at all. It might be argued that a narrow parsing of the further language of § 1930(a)(6) requiring payment of the fee "until the case is converted" would allow a reconversion of the case to Chapter 11 without the need to pay fees during the "second" Chapter 11 phase of the case. That argument would overlook the spirit and purpose of 28 U.S.C. § 1930, which was intended by Congress to fund a substantial part of the bankruptcy process. Further, it would focus too literally on (one interpretation of) the words of the statute. As

reason, the Debtors then failed to take any action to treat the case as a Chapter 11 case. Instead, they acquiesced in the conduct of the case as a Chapter 7 case, including by not objecting to the fee applications filed by the trustees for themselves and their counsel. But that acquiescence did not and could not have the effect of reinstating the case to Chapter 7; the Debtors presumably had the ability to get the stay order set aside at any time after its entry but they did not do so. Thus § 1930(a)(6) continued to be applicable to the case.

Perhaps under some other circumstances it would be appropriate not to require the Debtors to pay the fees. Compare In re Burk Development Company, Inc., 205 B.R. 778 (Bankr. M.D. La. 1997) (debtor had confirmed plan prior to change in the language of § 1930(a)(6) which previously ended fee requirement upon confirmation of plan) with Foulston v. Harness (In re Harness), 218 B.R. 163 (D. Kan. 1998) (payment

Circuit Judge Learned Hand allegedly observed, "It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." The quotation is taken from Daniel J. Bussel, "Plain-meaning" Cases Lead to Costly and Flawed Amendments to the Bankruptcy Code, A.B.I. Journal Vol. XIX, No. 6 (July/August 2000), at 1 (arguing that overemphasis by courts, including the United States Supreme Court, on textual analysis has led to several misinterpretations of statutes that Congress has had to remedy).

of fees required even though plan confirmed prior to effective date of amendment to statute). But in this instance when the Debtors had obtained the stay and at any time could have sought its enforcement or alternatively could have sought to undo the stay, thereby effecting the conversion, it is not inappropriate to require them to pay the fees.

Contrary to the Debtors' argument, they clearly are not being punished for having appealed the trial court's decision. Memorandum in Support of Debtors' Objection to the Proof of Claim for Payment of Chapter 11 United States Trustee Fees After Conversion of Case to Chapter 7, filed July 14, 2000, at 7, 8. Rather, the United States Trustee merely seeks the enforcement of the statute which embodies an important Congressional policy dealing with the funding of the United States Trustee system.⁴ This Court should not lightly disregard the funding mechanism chosen by Congress that supports the oversight system represented by the Office of the United States Trustee. United States Trustee v. Hudson Oil

⁴ 28 U.S.C. § 1930 was amended by the passage, on January 26, 1996, of the Balanced Budget Downpayment Act, I, Pub.L. No. 104-99, 110 Stat. 26, 37-38 (1996), the purpose of which act was an attempt to assist in balancing the federal budget. In re Burk Development Company, Inc., 205 B.R. at 780. Of course, despite the fact that it now appears that there may be a surplus in the federal budget for the next few years, Congress has evidenced no intention of repealing the fee requirement.

Company, Inc. (In re Hudson Oil Company, Inc.), 210 B.R. 380, 384 (D. Kan. 1997) (Congress established the self-funding structure for the United States Trustee program so that the users of the system, rather than the general public, should pay for it.).

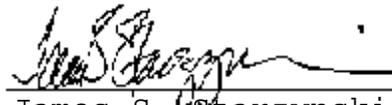
Debtors persuasively argue that it is incongruous to have the Debtors paying Chapter 11 fees for the same period of time as the Chapter 7 trustees and their counsel were paid. It is indeed incongruous. But it was the Debtors who obtained the stay order and then did nothing about it, in effect allowing the trustees and their counsel, and the Court and others as well, to virtually complete the case as a Chapter 7 case. It is simply too late and unfair to the trustees and their counsel to not pay them for the work they have done to pay the remaining creditors and conclude the case, as a condition for requiring the Debtors to comply with the statute.

CONCLUSION

The Chapter 7 estate - effectively, the Debtors in this solvent estate - must comply with the requirements of the statute, 28 U.S.C. § 1930(a)(6), by paying the six quarters of fees. Since the Debtors do not dispute the amount of the fees to be paid but only whether the fees should be paid at all,

Memorandum in Support of Debtors' Objection to the Proof of

Claim for Payment of Chapter 11 United States Trustee Fees
After Conversion of Case to Chapter 7, filed July 14, 2000, at
4, the Court will enter an order denying the Debtors'
objection to that portion of the United States Trustee's
December 1, 1998 proof of claim and ordering that the Chapter
7 trustee pay \$2,750.00 to the United States Trustee.



James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date stamped above, a true and
correct copy of the foregoing was either electronically
transmitted, faxed, delivered or mailed to the following:

Leonard K. Martinez-Metzgar
PO Box 608
Albuquerque, NM 87103-0608

Louis Puccini, Jr.
P.O. Box 30707
Albuquerque, NM 87190-0707

Walter L. Reardon, Jr.
3733 Eubank Blvd. NE
Albuquerque, NM 87111-3536

Yvette Gonzales
PO Box 1037
Placitas, NM 87043-1037



Mary B. Anderson