

In the United States Bankruptcy Court

for the Northern District of Iowa

MARLIN R. NICHOLS
DIANE L. NICHOLS
Debtor(s).

Bankruptcy No. L88-00954W

Chapter 13

ORDER RE IRS'S MOTION TO ALTER OR AMEND JUDGMENT

On April 26, 1995, the above-captioned matter came on for hearing pursuant to assignment. Present at the hearing were Carol F. Dunbar, the Chapter 13 Trustee; Ana Maria Martel for the IRS; and John Schmillen, Assistant U.S. Trustee. The matter before the Court is the IRS's Motion to Alter or Amend Judgment, which raises a trustee fee issue. After hearing the arguments of counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

Debtors sold their residence pursuant to the provisions of their confirmed Chapter 13 plan. The IRS received a direct payment from the sale and the Trustee distributed the remainder of the proceeds. The IRS objected to the Trustee's distributions, claiming that its claim had priority. The Court ruled on September 28, 1994 that the IRS claim did not have priority over the claims paid. In its Motion to Alter or Amend Judgment, the IRS requested, among other things, that the Court reconsider whether the Trustee was entitled to collect a fee based on the direct payment the IRS received at closing. After denying the remainder of the IRS's motion, the Court determined that this issue should be addressed separately after requests for rehearing in In re Wagner, 36 F.3d 723 (8th Cir. 1994), were resolved. That ruling is now final and this matter is ripe for adjudication.

The pertinent language of Debtors' Chapter 13 plan is as follows:

Debtor shall within the five years under the Plan, list and sell his residence at 325 Grand Blvd., Evansdale, Iowa 50707, his homestead, and shall apply such amounts as necessary to fully satisfy all priority claims, the allowed secured claims and 10% of the allowed unsecured claims.

The IRS demanded immediate, direct payment from the sale proceeds at the time of closing or it would not sign the necessary releases. The Trustee was concerned that the sale would collapse if she did not agree to the direct payment. She asserts that both she and Debtors' attorney understood that she would collect her trustee's fee both from the amount of proceeds which she distributed and from the amount paid directly to the IRS at closing.

The IRS asserts that the Trustee is not entitled to a fee on the direct payment it received at closing. It also asserts that the Trustee did not earn a fee from the sale proceeds because she was not involved in facilitating the sale and was not present at closing.

The United States Trustee supports the Trustee's position. He states that the Trustee agreed to immediate payment to the IRS because she was concerned about delaying the closing. He also states that Trustee fees are based on amounts received under the plan, not on the Trustee's marketing efforts.

CONCLUSIONS OF LAW

In Wagner, the Eighth Circuit concluded that statutory language allows Chapter 12 debtors to make direct payments to creditors. 36 F.3d at 727. It further held that, pursuant to 28 U.S.C. § 586(e)(2), the Chapter 12 standing trustee may collect a percentage fee only from plan payments "received by" the trustee. Id. at 728. These conclusions are also applicable to Chapter 13 debtors. In re Aberegg, 961 F.2d 1307, 1309 (7th Cir. 1992); In re Jutila, 111 B.R. 621, 624 (W.D. Mich. 1989). Sec. 1322 gives the court discretion to permit debtors to pay some creditors directly. Aberegg, 961 F.2d at 1309. The Chapter 13 standing trustee collects a fee only from the funds the trustee actually receives. Id.

The first question raised is whether Debtors' confirmed plan allows direct payment to the IRS. See Wagner, 36 F.3d at 727. According to § 1326(c), "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan." This language recognizes the Code's preference that, in general, payments provided for in a Chapter 13 plan will be paid through the trustee. In re Harris, 107 B.R. 204, 206 (Bankr. D. Neb. 1989).

The Court has reviewed the pertinent language of Debtors' plan, set out above. Although the language is not entirely clear, the Court concludes that the plan does not "otherwise provide" for direct payment under § 1326(c). Thus, under the plan, proceeds from the sale of Debtors' residence were to be paid to the Trustee for disbursement to creditors.

Instead of waiting for payment through the Trustee, the IRS demanded immediate payment before issuing releases necessary for closing. Apparently, the Trustee and Debtors' attorney agreed to the immediate payment in order to facilitate the sale. However, the Trustee did not agree to waive her right to a fee on the payment to the IRS.

Creditors are bound by the provisions of a Chapter 13 plan as confirmed and may not later demand different treatment. In re Edwards, 162 B.R. 868, 872 (Bankr. D. Colo. 1993); 11 U.S.C. § 1327(b). The Code and Bankruptcy Rules set out specific procedures necessary for modification of a confirmed plan which the IRS has not initiated in this case to justify direct payment contrary to plan provisions. Edwards, 162 B.R. at 872; see 11 U.S.C. §§ 1329, 1325(a); Fed. R. Bankr. P. 2002(a)(6). The Court concludes that Trustee fees should be calculated according to the provisions of the plan. The Trustee is entitled to collect fees as if all proceeds of the sale were "received by" the Trustee for disbursement, as the plan envisions.

The IRS also argues that the Trustee did not earn a fee from the sale proceeds because she was not sufficiently involved with the sale of the property. A majority of courts have concluded that judicial review of standing trustee's fees is not authorized by 28 U.S.C. § 586(e). In re Schollett, 980 F.2d 639, 645 n.7 (10th Cir. 1992) (considering debtor's argument that \$15,000 fee for writing seven checks over five years was unreasonably high). The court is without authority to determine or in any way adjust the compensation of the standing trustee. In re Citrowske, 72 B.R. 613, 615 (Bankr. D. Minn. 1987). The Trustee is entitled to her statutory fee on the plan payment arising from the sale proceeds, regardless of the amount of her involvement in the sale of the property.

In summary, Chapter 13 plans may, subject to Court approval, provide for direct payments to creditors by including explicit language overcoming the Code's preference that payments be made

through the standing trustee. The standing trustee may not collect a percentage fee from such direct payments. The Court will not review or adjust the standing trustee fees which are set by 28 U.S.C. § 586. In this case, Debtors' plan did not provide for the direct payment to the IRS. Therefore, the Trustee may collect her percentage fee from the payment made to the IRS from the sale of property.

WHEREFORE, the IRS's Motion to Alter and Amend Judgment is DENIED.

FURTHER, the Trustee is entitled to her percentage fee on the direct payment made to the IRS from the proceeds of the sale.

SO ORDERED this 5th day of June, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge