In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

JEFFREY B. CUTLER and LISA C. CUTLER	Bankruptcy No. 94-50227XS
Debtor(s).	Chapter 13
MICHAEL C. LANDON and MICHELLE D. LANDON	Bankruptcy No. 94-50227XS
Debtor(s).	Chapter 13

RULING:

STANDING TRUSTEE'S MOTIONS TO RECONSIDER

In these two chapter 13 cases, the standing trustee asks the court to reconsider its orders regarding the allowances of trustee's fees. Joint hearing on the motions was held June 26, 1997 in Cedar Rapids. Eric W. Lam appeared for Carol F. Dunbar, the standing trustee. The U.S. Trustee was represented by John Schmillen. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

The Landon Case

Michael and Michelle Landon filed their chapter 13 petition on February 15, 1994. The Landons obtained confirmation of their proposed plan and a subsequent modification thereof (docket nos. 5, 13, 24 and 31). Debtors converted their case to chapter 7. Dunbar, the standing trustee for the chapter 13 case, filed her final report showing the receipt of $2,308.82 from the debtors and her distribution of $2,053.43 to creditors under the plan. Dunbar showed her 10 per cent trustee's fee as $228.15. She determined her fee by applying the fee percentage to the monies received by her from debtors but not to $27.24 which she turned over to the chapter 7 trustee after conversion. She took trustee's fees on the monies taken by her for trustee's fees.

I determined that the fee calculation was contrary to our Circuit Court's ruling in Pelofsky v. Wallace, 102 F.3d 350 (8th Cir. 1996). I, therefore, issued an order on April 10, 1997 in which I found that the correct fee was $205.34 (10% of the monies distributed under the plan) and by which I required the standing trustee to turn over to the chapter 7 trustee the excess fee of $22.81. The trustee filed a motion asking that I reconsider my order (docket no. 43).

The Cutler Case

Jeffrey and Lisa Cutler obtained confirmation of their chapter 13 plan on July 15, 1994 (docket no. 17). The debtors completed their plan in 1997 having paid $8,280.00 to the standing trustee. Dunbar filed her final report in March 1997 (docket no. 22) showing the net receipt of $8,280.00, her disbursements under the plan of $7,452.00, and a trustee's fee of $828.00 calculated on payments made to her. There were no objections to her final report. I calculated that the correct fee under Pelofsky v. Wallace, id., was $82.80, and I issued an order requiring distribution of that amount in accordance with the plan (docket no. 27).

Although it was not stated in the order, distribution of that amount would entitle the trustee to additional fees of $7.53. Because she already had taken excess fees, the effect of my order was to require her to distribute $75.27 more to creditors, not $82.80.

Seven creditors filed unsecured claims aggregating $91,804.84 (Claims Report, docket no. 19). The largest claim was for $74,595.13 filed by Terry Farms, Inc. The next largest was filed by St. Luke's Medical Center for $11,165.03. Id. Correction of the distribution would result in the following final payments:

St. Luke's Medical Center	$ 9.15
Terry Farms, Inc.	61.16
Surgical Consultants	2.50
Michael & Burke's	.21
Morningside Bank & Trust	2.05
Citicorp Retail Sales	.16
Sioux City Radiological	.04
Total	$75.27

The standing trustee filed a Motion to Reconsider asking that the fees be calculated only on funds disbursed since Pelofsky v. Wallace was issued on December 12, 1996 (docket no. 30). Only $329.13 was distributed to creditors after that date. Dunbar calculates that the excess fees on that amount are $3.65 (Motion, docket no. 30).

Both Cases

The standing trustee says she has nearly 300 pending chapter 13 cases to which Pelofsky would apply. She estimates that retroactive application of Pelofsky would require her to distribute more than $12,000 to creditors from fees she took prior to the issuance of Pelofsky.

In calculating fees based on her receipts, Dunbar was following a directive of the U.S. Trustee for this region. Moreover, the bankruptcy judges of this district routinely approved final reports calculated in this manner. I recall no objection to a final report ever being filed for the reason that the trustee's fees had been miscalculated. The standing trustee would incur nonreimbursable out-of-pocket expenses in recalculating the correct trustee's fees in pending cases if she hired clerical help rather than perform the recalculations herself. In some cases, where final distribution has already been made, there would be additional mailing and check costs. There was insufficient evidence to quantify the anticipated additional expenses.

To correct previous miscalculations in each case, the trustee would issue a check to each creditor holding an allowed unsecured claim. A check would be issued at the time of a final distribution regardless of the amount due. Fed.R.Bankr.P. 3010(b).

The standing trustee asks the court to apply factors set out in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), to determine that the Circuit Court's decision in Pelofsky not be applied to cases filed before it was decided. In Chevron, a three-factor test was employed to determine whether a decision should be applied prospectively only. The factors considered are:

1. whether the decision to be applied nonretroactively established "a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed...."
2. whether retrospective application "will further or retard" the operation of the rule in question, and
3. whether the retroactive application would cause substantial inequity.

Chevron Oil Co. v. Huson, 404 U.S. at 106-107, 92 S.Ct. at 355.

I disagree with the standing trustee's contention that I have the authority to apply Pelofsky only prospectively. Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517 (1993); Michel v. Federated Dept. Stores, Inc. (In re Federated Dept. Stores, Inc.), 44 F.3d 1310, 1317 (6th Cir. 1995).

Even if I could, I would not do so in the two cases before the court. I agree that the trustee relied in good faith on the direction of the U.S. Trustee and on this court's previous approvals of final reports. But in Landon, I see no substantial inequity to the trustee in calculating the correct chapter 13 fee and in paying the correct remainder of funds to the chapter 7 trustee. In Cutler, the costs of recalculation and payment do not appear to be substantial.

Regardless, Harper, *supra*, requires that Pelofsky be applied to all pending cases. I do not consider, and the trustee has not argued, that the trustee's incorrect calculation of her fee at the time of distribution strips the bankruptcy court of its authority to determine fees upon the filing of a final report. 11 U.S.C. § 330(a)(1).

I am somewhat sympathetic with the trustee's argument regarding the financial burden placed on her for recalculating distributions in nearly 300 cases. This is especially so in cases where all distributions in a case were made prior to the Pelofsky decision. In such cases, the trustee would have not only the recalculation burden, but also the burden of making and delivering additional checks. And in such cases, a recalculation may produce only an insignificant increase in distribution to a creditor. The extent of the burden on the trustee may be different in every case depending on the number of unsecured creditors, the amounts of money distributed and to be distributed, and perhaps other factors. These same factors also affect the detriment to creditors if a recalculation is not performed. The same concern for the trustee's burden is not present where miscalculations took place after the Circuit Court issued Pelofsky. Nonetheless, it is not possible from the evidence presented at the hearing to determine a balance of hardships between the creditors and the trustee in all other cases.

I write this not to indicate that I could or would apply Chevron factors in ruling on the accuracy of final reports, but to say that the standing trustee and the U.S. Trustee might understandably exercise some discretion in determining which case distributions should be recalculated. Where all case

distributions were made prior to the issuance of Pelofsky and the benefit to creditors is small, perhaps the standing trustee, with the U.S. Trustee's approval, will not present a final report that shows a recalculated fee. Where the difference to creditors is truly small, it is unlikely that creditors will object. However, once the accuracy of the fee is called into question, it is the court's responsibility to require that the fee is calculated correctly and appropriate distributions made.

On the other hand, in cases where distributions remained to be made after the issuance of Pelofsky, recalculations are necessary, but the preparation and delivery of additional checks are not. Under such circumstances, the extra effort of recalculation should not prevent the creditors from getting correct distributions.

Inasmuch as I conclude that I lack the authority to apply the Circuit Court's decision in Pelofsky v. Wallace prospectively only,

IT IS ORDERED that the standing trustee's motions for reconsideration are denied.

SO ORDERED THIS 28 DAY OF JULY 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to Eric Lam, Carol Dunbar, Wil Forker, Don Molstad and U.S. Trustee.