For Opinion See 493 F.3d 1313

United States Court of Appeals, Eleventh Circuit.
MILLER BUCKFIRE & CO., LLC, Applicant for Professional Fees-Appellee,
v.
CITATION CORPORATION, Debtor-Appellant.
No. 06-15108-FF.
November 13, 2006.

Appeal From the United States District Court For the Northern District of Alabama, Case No. 2:06-cv-00582 The Honorable Judge J. Foy Guin, Jr., Judge Presiding

Brief of the United States Bankruptcy Administrator, Northern District of Alabama, as Amicus Curiae in Support of Appellants and in Support of Reversal

Valrey W. Early, III, U.S. Bankruptcy Administrator, Northern District of Alabama, 1800 Fifth Avenue, North, Birmingham, Alabama 35203, Tel: 205-714-3826.J. Thomas Corbett, Chief Deputy US Bankruptcy Administrator, Northern District of Alabama, 1800 Fifth Avenue, North, Birmingham, Alabama 35203, Tel: 205-714-3838.

***ii** *TABLE OF CONTENTS*

TABLE OF AUTHORITIES ... iii

STATEMENT REGARDING ORAL ARGUMENT ... v

STATEMENT OF INTEREST OF *AMICUS CURIAE* ... 1

STATEMENT OF THE ISSUES ... 4

SUMMARY OF ARGUMENT ... 4

ARGUMENT AND AUTHORITIES ... 5

CONCLUSION ... 17

CERTIFICATE OF COMPLIANCE ... 18

CERTIFICATE OF SERVICE ... 19

***iii** *TABLE OF AUTHORITIES*

CASES

In re B. U.M. International, Inc., 229 F.3d 824 (9th Cir. 2000) ... 14

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

In re Condor Systems, Inc., 302 B.R. 55, 71 (Bankr.N.D.Cal. 2003) ... 7

In re Estes, 57 B.R. 158 (Bankr. N.D. Ala. 1986) ... 8

In re Envirodyne Industries, Inc., 150 B.R. 1008 (Bankr.N.D.Ill. 1993) ... 8

In re EWC, Inc., 138 B.R. 276 (Bankr.W.D.Okl. 1992) ... 9

In re Federal Mogul-Global, Inc., 348 F.3d 390 (3d Cir. 2003) ... 14

In re Filene's Basement, Inc., 239 B.R. 850, 856 (Bankr.D.Mass. 1999) ... 8

Jove Engineering, Inc. v. IRS, 92 F.3d 1539, 1553 (11th Cir. 1996) ... 13

In re Leslie Fay Companies, Inc., 175 B.R. 525, 537 (Bankr.S.D.N.Y.1994) ... 9, 10

In re Tinley Plaza Associates, L.P., 142 B.R. 272 (Bankr.N.D.Ill. 1992) ... 7, 9

STATUTES

11 U.S.C. §105 ... 13

11 U.S.C. §327(a) ... 8

11 U.S.C. §328(c) ... 9, 12, 13, 14, 15

11 U.S.C. §§330 ... 2, 5, 11, 12, 13, 14, 16

***iv** 11 U.S.C. §331 ... 2

Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §302(d)(3)(I), 100 Stat. 3119, 3123 ... 3

Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, §317, 104 Stat. 5104, 5116-16 ... 3

RULES

Bankruptcy Rule 2014(a) ... 4, 5, 6, 7, 10, 11, 17

MISCELLANEOUS

Judicial Conference Regulations Governing the Bankruptcy Administrator Program §1.04(c) ... 3

Judicial Conference Regulations §3.01(j)(4), (5)(A),(B) ... 2

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Judicial Conference Regulations §3.01(k) ... 2

***V** *STATEMENT REGARDING ORAL ARGUMENT*

The *amicus curiae* Bankruptcy Administrator agrees with Citation that oral argument is necessary in this case. In compliance with Fed. R. App. P. 29(g), the *amicus curiae* Bankruptcy Administrator respectfully requests this Court's permission to participate in the oral argument of this case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The United States Bankruptcy Administrator (hereinafter "BA"), an officer of an agency of the United States, submits this brief as an *amicus curiae,* pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and 11th Cir. Fed. R. App. P. 28-1 and 29-2 , to address the effect of the District Court's ruling on this case and others like it, as well as its implications for the effectiveness and stability of the administration of the federal bankruptcy system in the Northern District of Alabama.

A. Identity of the *Amicus Curiae*

In compliance with Fed. R. App. 29(c)(3), the identity of the *amicus curiae* is Valrey W. Early, III, in his capacity as the United States Bankruptcy Administrator for the Northern District of Alabama.

B. *Amicus Curiae's* Interest in the Case

The BA, the Chief Deputy BA, and a staff of fifteen lawyers and analysts exercise estate administration oversight duties over an annual caseload averaging approximately 23,000 bankruptcy cases in the Northern District of Alabama. The duties of the BA set out in the Judicial Conference Regulations include responsibility for monitoring, filing pleadings and presenting arguments on the record concerning applications for the employment of professionals under 11 U.S.C. §327, and applications for compensation and reimbursement of expenses (hereinafter "fee applications") under 11 U.S.C. §§330 and 331. Judicial Conference Regulations §3.01(j)(4), (5)(A),(B). Additionally, the BA is tasked with acting in the public interest and actively seeking to prevent abuses in the bankruptcy system. Judicial Conference Regulations §3.01(k).

In the twenty years since the establishment of the BA program, the BA in the Northern District of Alabama has reviewed literally thousands of fee applications in cases under Chapter 7, Chapter 11, Chapter 12, and Chapter 13 of Title 11 of the United States Code (hereinafter "Bankruptcy Code"). The fee application in question in the instant matter is among those reviewed by the BA. As a statutory stakeholder, yet one with no pecuniary interest, the BA is tasked with providing recommendations to the court on the sufficiency and propriety of fee applications.

Though this case is brought ostensibly to resolve a single fee dispute in a single Chapter 11 case, the District Court's ruling could be applied much more broadly than perhaps it was intended, with negative consequences to the effective

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

administration of the bankruptcy system as a whole in the Northern District of Alabama. With extensive experience in this and other fee disputes, as well as in the general administration of the bankruptcy system in this District, the BA believes that these views regarding the scope and application of the District Court's ruling may assist in the resolution of this matter.

C. Statutory Authority to Appear as *Amicus Curiae*

The Bankruptcy Administrator Program is an estate administration oversight program in the Federal Judiciary. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §302(d)(3)(I), 100 Stat. 3119, 3123. Bankruptcy Administrators have standing to raise and appear and be heard on any issue in any case under Title 11 of the United States Code. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, §317, 104 Stat. 5104, 5116-16.

As established in 1987 by the Judicial Conference of the United States, "[t]he bankruptcy administrator, in performing the duties and exercising the authority conferred by statute and these regulations, serves as an independent, non-judicial officer of the Judiciary." Judicial Conference Regulations Governing the Bankruptcy Administrator Program § 1.04(c) (hereinafter "Judicial Conference Regulations").

STATEMENT OF THE ISSUES

(1) Whether the District Court's ruling constitutes a potentially damaging precedent with respect to the administration of bankruptcy cases in this district.

(2) Whether the District Court erred in affirming the bankrupty court's decision that Miller Buckfire's failure to disclose its prior relationship with Citation's controlling shareholder was not a violation of Bankruptcy Rule 2014(a) sufficient to warrant a reduction in fees or other penalty.

(3) Whether the District Court erred in reversing the bankruptcy court's decision which held that Miller Buckfire's requested "fixed fee" was unreasonable under 11 U.S.C. §330.

SUMMARY OF ARGUMENT

The bankruptcy court appropriately reviewed Miller Buckfire's fee application in accordance with the Code section under which Miller Buckfire was employed, and to which Miller Buckfire consented. The bankruptcy court's review under 11 U.S.C. §330 was thorough and complete, and resulted in a reasonable fee being awarded to Miller Buckfire for the services it rendered in the case. The bankruptcy court erred, however, in finding that Miller Buckfire had complied with Bankruptcy Rule 2014. Likewise, the District Court erred in affirming that ruling.

The effect of the District Court's ruling is to abrogate the requirements of Bankruptcy Rule 2014, and to strip the bankruptcy court of its authority to award fees under §330.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ARGUMENT

The District Court's ruling constitutes a potentially damaging precedent with respect to the administration of bankruptcy cases in this district. The District Court's opinion is not limited in any way; the breadth of the ruling renders it applicable to all fee applications filed in all bankruptcy cases. The ruling could be applied much more broadly than it was intended, with negative consequences on the administration of the bankruptcy system in general.

Two primary elements of the District Court's ruling bear scrutiny. The ruling neutralizes the duty of disclosure set out in Fed. R. Bankr. P. 2014(a). The ruling also operates to limit a bankruptcy court's ability to review fee applications as required by 11 U.S.C. §330.

I. *The Court's Ruling on Fed. R. Bankr. P. 2014(a)*

a. *The Disclosure Requirements of Bankruptcy Rule 2014*

Bankruptcy Rule 2014 requires a person seeking to be employed by a ***6** bankruptcy estate to provide two disclosures of its connections with the debtor, creditors, the Bankruptcy Administrator and the BA's employees, and any other parties in interest, as well as their respective attorneys and accountants. The first disclosure required by Rule 2014 must be of "all of the person's connections" (emphasis added), and must be contained in the person's application to be employed. The second disclosure must be of "the person's connections," without mention of the word "all." The second disclosure must be in the form of a verified statement of the professional to be employed, and must accompany the application to be employed. Fed. R. Bankr. P. 2014(a).

The District Court focused its attention on the second disclosure and disregarded the first. District Court Opinion at 9. In so doing, the District Court failed to give effect to the inclusion of "all" with respect to the first disclosure. Significantly, both of Miller Buckfire's disclosures omitted any reference to its connections with Kelso. The District Court erred by failing to apply the full plain language of Federal Rule of Bankruptcy Procedure Rule 2014(a) to the facts of this case.

b. *The Necessity of Disclosure*

In order to insure the effectiveness and efficiency of the bankruptcy system, the disclosure provisions of Rule 2014 must be strictly applied. No ***7** meaningful review can be made absent full disclosure. *See, In re Tinley Plaza Associates, L.P., 142 B.R. 272 (Bankr.N.D.Ill. 1992)* (holding that requirements of Rule 2014 must be strictly applied). Moreover, failing to strictly adhere to the requirements of Rule 2014 allows professionals to withhold information that may be of critical importance to the court and the litigants in determining the propriety of the requested employment. In this particular case, the record is clear that Miller Buckfire had significant and extensive prior connections with Kelso, the entity which controlled Citation's board of directors, and the entity which selected Miller Buckfire for this representation. Full disclosure of Miller Buckfire's connections with Kelso may have influenced the bankruptcy court's ultimate decision

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

concerning Miller Buckfire's retention. Miller Buckfire decided not to disclose the connection.

Miller Buckfire was not entitled to decide what to disclose. An applicant may not,

pick and choose which connections are irrelevant or trivial. No matter how trivial it appears, the professional seeking employment must disclose it. (citation omitted) .... [The financial adviser] has made the determination that there was no connection worth disclosing, and in doing so [the financial adviser] has broken the 'cardinal principle of Rule 2014(a)' - - [it] arrogated to itself a disclosure decision that the Court must make.(citation omitted)." *In re Condor Systems, Inc.,* 302 B.R. 55, 71 (Bankr.N.D.Cal. 2003).

Miller Buckfire decided not to disclose its connections with Kelso. ***8** As in the *Condor* case, Miller Buckfire "violated the cardinal principle of Rule 2014(a)."

Disclosure lies at the heart of the integrity of the bankruptcy system. *See, e.g., In re Estes,* 57 B.R. 158 (Bankr. N.D. Ala. 1986) ("The role of the courts in maintaining the integrity of a legal system cannot be abdicated and left to the Bar.") The matter of disclosure is separate from any consideration of the existence of a conflict of interest. The mandate of Rule 2014 is that a professional seeking employment must disclose *all* connections with parties in interest in the case, not just those which appear to involve actual conflicts. *See, e.g., In re Filene's Basement, Inc.,* 239 B.R. 850, 856 (Bankr.D.Mass. 1999) (holding that the requirements of Bankruptcy Rule 2014 "transcend those of §327(a), as they mandate disclosure of all connections with the [applicant] rather than being limited to those which deal with disinterestedness.").

The disclosure requirements of Rule 2014 must be strictly enforced. *In re Envirodyne Industries, Inc.,* 150 B.R. 1008 (Bankr.N.D.Ill. 1993). "What facts are relevant to the court's § 327(a) determination is for the court to decide and not the attorneys who wish to be employed as counsel for the debtor-in-possession. [citations omitted] As a result, courts require applications to employ counsel to strictly comply with Rule 2014(a)." ***9***In re Tinley Plaza Associates, L.P.,* 142 B.R. 272 (Bankr.N.D.Ill. 1992).

The duty to disclose is ongoing. A court may limit or deny compensation to a professional "if, *at any time* during such professional person's employment ... such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate ...." *See* 11 U.S.C. §328 (c)(emphasis added). *See, also, In re EWC, Inc.,* 138 B.R. 276 (Bankr.W.D.Okl. 1992); *In re Tinley Plaza Associates, L.P.,* 142 B.R. 272 (Bankr.N.D.Ill. 1992) ("... the duty to disclose continues beyond the initial stage of application to employ counsel.... If a conflict arises after attorneys are employed by the debtor-in-possession, such conflict must be disclosed to the court and the court must immediately disqualify the attorney." (citations omitted)).

c. "*No Harm, No Foul*" ?

The District Court affirmed the bankruptcy court's holding that Citation was not harmed by Miller Buckfire's failure to make proper disclosures. Both lower courts

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

erred by applying a "no harm, no foul" standard.

In the *Leslie Fay* case, a bankruptcy court sanctioned the law firm Weil Gotshal & Manges by requiring the firm to pay the costs of an investigation, in excess of $800,000, necessitated by the firm's failure to disclose all of its connections with certain creditors in the case. Reviewing the testimony of Weil ***10** Gotshal's partner, Harvey Miller, the court wrote that Mr. Miller,

... reminded me that he had spent the last 30 years upholding the integrity of this court. I believe him to have been truthful in that statement. But that does not excuse the firm's arrogating to itself the decision as to whether it had a conflict of interest with the case in general or with the Audit Committee investigation in particular. Weil Gotshal was mandated to reveal any connections which might cast any doubt on the wisdom of its retention and leave for the court the determination of whether a conflict existed. It did not comply with that obligation."

In re Leslie Fay Companies, Inc., 175 B.R. 525, 537 (Bankr.S.D.N.Y. 1994).

The court held that Weil Gotshal's failure to make proper disclosure mandated disallowance of the fees awarded to Weil Gotshal, even though the firm "caused the debtors no actual injury, and represented them in an exemplary fashion." *Leslie Fay*, 175 B.R. at 531.

Citation points out in its brief that harm did occur as a result of the lower courts' failure to enforce Rule 2014. Citation's negotiating position, already weakened by its financial condition, was further damaged by the fact that Miller Buckfire chose to conceal its connections with Kelso. Citation has incurred substantial expense and effort in unearthing the connection and bringing it to the courts' attention. The expense has potentially damaged Citation's creditors, whose recovery could be diminished due to administrative expenses incurred in this matter.

***11** More importantly, however, is the damage to the bankruptcy system that occurs when professionals skirt the requirements of the Code and Rules. The bankruptcy court has been caused to analyze, after the fact, the propriety of Miller Buckfire's employment, due simply to Miller Buckfire's decision to obscure its connections with Kelso.

By affirming the bankruptcy court's ruling, the District Court placed its imprimatur on Miller Buckfire's conduct. Because the ruling seems to have unlimited application, litigants in this district will lose the protections of Rule 2014. Left unchecked, the ruling could affect every employment application by all professionals in all of the Chapter 7, Chapter 11, Chapter 12 and Chapter 13 cases in this district. The resulting inefficiencies will greatly hamper the bankruptcy court's ability to effectively administer its cases. The District Court ruling was in error, and should be reversed.

II. *The District Court's Ruling on 11 U.S.C. §330*

a. *Miller Buckfire's Consent to Having Fees Set Under §330*

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

The District Court erred by basing its decision on a fixed fee arrangement that was never approved by the bankruptcy court. The District Court's emphasis on the rejected fixed fee contract indicates that the District Court insufficiently considered Miller Buckfire's *consent* to having its fees set under ***12** §330, as per the bankruptcy court's Retention Order. *See* Doc. 789 - Pg. 3.

The District Court ruled that, "at the end of the process," the bankruptcy court, rewrote the contract, and the bankruptcy court did not have the power to do so. Section 330 of the Bankruptcy Code allows the court to review the fee for reasonableness but does not allow the court to change the entire tenor of the contract. Nothing in the law forbids fixed fee contracts in the bankruptcy arena." District Court Opinion at 5.

To the extent that any "rewrite" occurred, the record is clear that it was not done "at the end of the process," but occurred *prior to and as a condition of* the bankruptcy court's approval of Miller Buckfire's employment. The record is equally clear that the bankruptcy court expressly rejected Miller Buckfire's attempt to have its compensation set under §328. Moreover, the Retention Approval Order was entered with Miller Buckfire's full consent, knowledge, and participation, and was consistent with the process employed by the bankruptcy court in compliance with its statutory duties in considering any proposed fixed fee contract for services. *See* Transcript of Hearing held Nov. 15, 2004 ("Retention Hearing Tr.") at 89-90, 98, attached as an addendum to the brief filed by Citation.

While fixed fee contracts are not prohibited in the bankruptcy arena, nothing requires a dissatisfied professional to perform services under employment terms which the professional deems unacceptable. Miller Buckfire was free to ***13** walk away from the "engagement," or even to request further review, if it felt that the bankruptcy court's Retention Approval Order was distasteful. Miller Buckfire did neither.

By requiring the bankruptcy court to enforce an employment contract which it had already rejected, the District Court restricted the bankruptcy court's authority to a perfunctory review of requested fees. The District Court's ruling essentially stripped the bankruptcy court of its ability to discharge its statutory obligations under §§328 and 330 of the Bankruptcy Code. Additionally, the ruling operates to deprive the bankruptcy court of its independent statutory powers expressly granted by Congress "to carry out the provisions of" the Bankruptcy Code "through any order, process or judgment that is necessary or appropriate" under §105 of the Bankruptcy Code. *Jove Engineering, Inc. v. IRS, 92 F.3d 1539, 1553 (11th Cir. 1996)*; 11 U.S.C. §105.

b. *Bankruptcy Courts' Authority Under §328 and §330*

The District Court erred in holding that §330 limited the bankruptcy court only to a review of the original employment contract presented by Miller Buckfire. The error was compounded by the Court's failure to recognize and acknowledge the plain language of §330, giving bankruptcy courts statutory authority to award compensation.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

***14** In ruling that the bankruptcy court had no authority to make any change in the compensation to be paid to Miller Buckfire, the District Court also overlooked the bankruptcy court's affirmative duty under §328(a) to review fee requests. The bankruptcy court not only exercised that authority, it correctly found that the fees requested were unreasonable. *See, In re Federal Mogul-Global, Inc.,* 348 F.3d 390 (3d Cir. 2003) (holding that a bankruptcy court is not required to simply acquiesce to the terms requested by the professional); *In re B.U.M. International, Inc.,* 229 F.3d 824 (9th Cir. 2000) (holding that an order which authorized employment while reserving the right to review compensation was not an unconditional approval of employment, and thus the court could review the fee application under §330).

A foundational element of bankruptcy is the equitable allocation of benefit, returns and costs. For that reason, Congress required that fees in bankruptcy cases be reviewed. Without the predictable application of §330, the balance of the equities is removed from the equation, arguably against the wisdom of Congress.

Another effect of the District Court's ruling is to permit professionals to create unreviewable fixed fee contracts, as in this case. Allowing professionals *carte blanche* to set fees by crafting agreements in order to escape review by the ***15** court equates to permitting professionals to work their way around Congressional requirements by using fixed fee arrangements. The effect of the District Court's opinion leaves the bankruptcy court to sit on the stoop and watch as the fox guards the henhouse.

By ruling that the bankruptcy court had no authority to change an applicant's compensation, the District Court ruling leaves the bankruptcy court no option other than to deny §328 employment applications *in toto* and tell the applicant to start over from square one. If affirmed, the result will be, at the very least, multiplicity of litigation, increased expense to bankruptcy estates, and diminished recovery for creditors.

The District Court's ruling seems to require the bankruptcy court to use a crystal ball on the day the professional asks to be employed, in order to determine whether the actions taken today will prove to have been appropriate when reviewed tomorrow. No court can be expected to know for a certainty all of the actions a professional may take over the life of a bankruptcy case. Yet the District Court seems to expect the bankruptcy court to have done just that.

The District Court's ruling divests the bankruptcy court of its oversight function, and its ability to make fully informed judgments on the cases before it. An opportunity for thorough review that allows the bankruptcy judge to ***16** use all of the provisions set out by Congress is obviated if professionals are allowed to structure their own compensation agreements around the provisions of the Bankruptcy Code. If the litigants know that their fixed fees will not be subjected to a meaningful review, the bankruptcy system as a whole suffers.

The District Court ruled that "[s]ection 330 of the Bankruptcy Code allows the court to review the fee for reasonableness but does not allow the court to change the entire tenor of the contract." District Court Opinion at 5. That type of review is as futile as a clock ticking in an empty house. Such a review is meaningless

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

absent the ability to award reasonable compensation to professionals employed by a bankruptcy estate.

Contrary to the District Court's Opinion, the bankruptcy court does have that authority. The court "may award to ... a professional person ... reasonable compensation for actual, necessary services rendered ...." 11 U.S.C. §330(a)(1)(A),(B). The District Court erred by failing to recognize and apply that authority. In focusing on a fixed fee contract that was culled by the bankruptcy court from the very beginning, the District Court disregarded the bankruptcy court's statutory authority to award fees.

***17** *CONCLUSION*

For the foregoing reasons, the United States Bankruptcy Administrator respectfully requests that this Court reverse the District Court's ruling on Miller Buckfire's fee award; that this Court affirm the bankruptcy court's reduction of Miller Buckfire's fees; and that this Court deny entirely or further reduce the fee awarded by the bankruptcy court, based on Miller Buckfire's violation of Bankruptcy Rule 2014.

MILLER BUCKFIRE & CO., LLC, Applicant for Professional Fees-Appellee, v. CITATION CORPORATION, Debtor-Appellant.
2006 WL 4127037 (C.A.11)

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.