

Furr's 01-10779 May 9, 2001
Follow-up hearing on hearing on May 4, 2001
JOE JAMESON BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable James Starzynski

James Burke, Law Clerk
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters
(505) 242-2809

Sara Edmonds X

Date:
Tuesday, May 9, 2001

In Re:
FURR'S
No 11-01-10779

CONTINUATION OF HEARING ON CLARIFICATION AS TO EMPLOYMENT OF SKADDEN, ARPS

Attorney for Debtor: R. Levin and R. Jacobvitz
Attorney for UCC: Bill Davis
Attorney for Heller: William Keleher
Attorney for UST: Ron Andazola and Leonard Martinez-Metzgar

Summary of Proceedings:

Exhibits _____

Testimony _____

MAY 4, 2001 LETTER WITHDRAWN

May 4, 2001 letter

Anything new from DIP, UCC, UST?

.....

Ct:

The “ethical wall” and 327(c):

in light of reaction to May 4 letter and the discussion at the May 8 hearing on it, have spent a lot of time thinking through that requirement and further examining 327(c), including Code itself, legislative history, treatises and case law. And all of that gets informed, as is the case every time a matter is presented to the court for decision, by the particular facts of the case. In this case, I have decided that the requirement set out in the May 4 letter should not be a requirement, and I will not require that.

Background for the original decision (May 4 letter):

Thought of Skadden restructuring group as completely independent, and that this would be no big deal, but learned from Levin yesterday how that firm and the Bankruptcy Restructuring Group works in more detail (eg, currently advising CSFB on a BR restructuring matter entirely unrelated to this case).

As judges, what we bring, and are expected by the courts that appointed us to bring, to cases, is our previous experience as a guide. One experience I had as a lawyer was as a post confirmation appointed estate administrator in which I had to deal with the liquidation of the non-exempt assets of a debtor. One of the secured creditors was Sunwest Bank. At the time my firm represented Sunwest Bank on unrelated matters, and all this was fully disclosed, but I still found it hard to deal with exactly the same person at the Bank in two different capacities. Turned out fine and there were certainly no ethical violations and in fact that relationship turned out to help the estate, but was harder than I had initially thought it would be. That was my experience. Apparently that same experience is not shared by everyone, although obviously it will vary from person to person.

In this case, the language of 327(c) clearly contemplates that my experience is not to be taken as a template invariably to be applied. 327(c) clearly contemplates the possibility of exactly that sort of situation in which I found myself and in which Mr. Levin and his group also are: that is, representing a creditor in a matter that is unrelated to the case in which the attorney represents the estate.

Talk a bit about 327(c):

Archetypical case is Mr. Davis – Nestle, ConAgra et al., then the UCC.

But language of statute is not limited to UCC; apparently applies to DIP also.

Nor does language of statute match the legislative history, which talks about “former” clients – and we are cautioned to disregard the legislative history when the language of the statute itself is clear, or at least not use the legislative history to change the statute.

327(c) also has anomalous provision: if objection, needs to be no “actual conflict”. But most courts analyze “adverse interest” in terms of “conflict of interest” (those are the terms or constructs in which courts think routinely, so it is natural they would view the language of “adverse interest” in those terms), making it clear that an “actual conflict”

precludes the employment. And since one is supposed to do the 327(a) analysis before the 327(c) analysis, in theory there should not be any “actual conflict” by the time that you get to 327(c). However, 327(c) does provide another opportunity and the suggestion of a context in which to look at the conflict issue again, which certainly does not hurt.

Talks about representation of “creditor”, but not equity security holder – should I read a negative pregnant into this? Have found very little case law that addresses that point exactly (see generally In re Roberts, 75 BR 402 [D. Utah en banc 1987]; In re Hoffman, 53 BR 564 [Bankr WD Ark 1985]), and not inclined to read a negative pregnant into the subsection. And other courts have ruled both ways on the issue by looking at the merits rather than by trying to find a construction of 327(c) which resolves the issue.

Issue raised yesterday about “discretion” and changing the decision within the acceptable limits of discretion. I stand by the analysis that I made yesterday about the limits of discretion and how that discretion is exercised and what that discretion really is, but I also think that if I am presented with additional facts or other considerations, that, with the passage of some time so I can think about it, it is permissible to change my mind on something if the facts or considerations justify it. That is why, for example, we have things like rule 59. And that is what has happened here.

Also on the issue of “discretion”, this decision may be construed by some to push the envelope, at least with respect to published decisions, and in this circuit, although I am quite comfortable that it is within the bounds of the limits set by the Code and the case law, including particularly that of the 10th Circuit. And it is the right decision.

My strong feeling is that Skadden will do a bang-up job for this estate, including for the DIP and its unsecured creditors. So the question is, is there something in the Code that precludes Skadden from performing this function? Close decision, concededly, but I don’t think there is anything in the Code that precludes Skadden from performing this function.

Actual vs potential conflicts (issue that arises by virtue of the language of 327(c) and by the way courts have analyzed “adverse interest” or “materially adverse interest”, and note that some courts have said that any conflict is an “actual” conflict (Kendavis Industries”), and one other has talked about “potential actual conflicts”: really is a spectrum here of potential conflicting interests that are either very remote or nonexistent, or are so immediate and demanding that they require disqualification. Made up eExample of Coca-Cola and Richard Levin. In other words, it is not just a black and white sort of thing with respect to conflicts.

That sort of addresses the Solv-Ex proposal of UST. If treat potential conflicts as 0 and actual conflicts as 1, then logically all the potential conflicts in the world do not add up to an actual conflict, and so could not have application of Solv-Ex approach. But it may be that a collection of “potential” conflicts can add up to something that would require disqualification. Don’t want to discount that theory. But it is not applicable here – don’t find that is a problem. And to extent Solv-Ex approach is read to support a standard of “appearance of conflict”, like “appearance of impropriety” which is no longer a valid standard, this Court would reject it.

The DIP Financing Order is not a problem. The concession is standard, this Debtor had to do this (had almost exsanguinated), and UCC still gets to review (PMF:

“empty Furr’s shopping bag”).

Preferential transfer is not an issue either – \$61m or such lesser amount as a final accounting turns up.

Question:

Statement by Mr. Levin that case law does not require waivers from equity or unsecured creditors but it does for secured creditors? – or the suggestion that there is a difference between the unsec and sec creditors for purposes of 327 analysis? My thought is that waivers cannot be used to get around requirements of 327(a), but may be useful or even required to meet state ethical rules, such as NM Rules of Professional conduct 16-110 and 16-107 (including for unsec creds).