UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

Platinum Management Corporation Case No. 95-13661 K

Debtor

On October 6, 1997, the Debtor made a motion before this Court for authority to retain counsel nunc pro tunc to October 1, 1995; the motion was made two years after the case was filed and only shortly after this Court approved the Debtor's liquidating plan. The only objection received by the Court came from the United States Trustee, who argued that counsel failed to show excusable neglect in failing to make such application at an earlier date.

The United States Trustee's objection regarding the application of the firm for nunc pro tunc employment is problematic. The United States Trustee should have objected to the Debtor's failure to obtain Court-approved counsel two years ago. This writer believes that the duty of the United States Trustee to ensure that no corporate Chapter 11 debtor act as a debtor-in-possession unless it has benefit of competent, disinterested legal counsel, is one of the most important substantive duties of the United States Trustee. This is because as among Chapters 7, 11, 12 and 13, Chapter 11 is the only chapter in which the estate is not overseen by a disinterested trustee.

The fact that any particular case might fall through the cracks in this regard in the United States Trustee's office is completely understandable. Mistakes happen, and there is no shame in them. However, 28 U.S.C. § 586(a)(3)(A) and (H), which direct the United States Trustee to monitor and comment upon fee applications and employment applications, contains

the qualifying phrase "whenever the United States Trustee considers it to be appropriate." While it is not for this Court to prescribe how the United States Trustee will apply that qualifying phrase, the Court would have commended the United States Trustee for declining to object to the nunc pro tunc application in this case as a matter of the exercise of sound judgment. Justice would have been better served in this case had the objection not been made. This is because although counsel's inadvertant failure to obtain approval of employment was surely the primary cause of the current dispute, it is clear that had the United States Trustee's office not suffered a mistaken lapse in its duty, counsel would have promptly followed suitable procedures two years ago and this dispute would never have arisen.

Nonetheless, the objection has been made and the Court will address the merits. I find that when no one other than the United States Trustee has objected to the retroactive appointment, and where the application is by the attorney for a Chapter 11 debtor-in-possession, and where counsel's inadvertant failure to obtain employment was compounded by the United States Trustee's failure to object to the failure of the debtor to obtain an order of the court confirming counsel's "disinterestedness," and where there transpired two years of vigorous activity by counsel and active participation therein by the United States Trustee (who even made a motion to convert the case at one time but did not include the failure to obtain court-approved counsel as grounds for conversion), and where the case was fully and properly administered as an orderly liquidation that led to confirmation of a distribution plan, and where counsel in fact is disinterested, these all combine to provide a "reasonable explanation" for the delay in seeking approval of employment.

The United States Trustee's focus on the cases of *In re Becklund,* No. 83-10628 (Bankr. W.D.N.Y. May 27, 1993), and *In re Dedee,* No. 93-12369 (Bankr. W.D.N.Y. Apr. 11, 1997), is misplaced. There is simply no analogy between a Chapter 7 trustee's failure to obtain prior approval of his employment of himself as his own attorney and the failure of a Chapter 11 debtor-in-possession to obtain court appointed counsel. This is true for at least five reasons. In no particular order they are:

(1) Because all of our trustees are attorneys, there is never any requirement that a trustee retain counsel. If a trustee were content only to receive commissions, he or she need not ever retain counsel. Corporate Chapter 11 debtors-in-possession, in contrast, must always obtain disinterested counsel.

(2) The disinterestedness of a trustee's counsel is never an issue in a Chapter 7 case where the trustee is the counsel because the trustee himself or herself must be disinterested in order to serve as such. Rather, the prior approval requirement is important in such instances to specify why the services of an attorney are required; this is principally to prevent "after-thought" that might provoke a trustee who had not intended to seek attorneys fees to change his or her mind upon discovering that there are more substantial assets than were originally thought.

(3) The most common objection as to fee applications for the trustee's attorney is whether the services for which compensation is claimed are services for which an attorney was necessary or whether they were services that the trustee should have performed *qua* trustee, compensible only through commissions. The prior specification of the services for which an attorney is required is often useful in resolving those objections; for example, it is useful where

the employment of counsel was approved for the purpose of suing a preference or fraudulent transfer, but the attorneys fee application also shows time billed on unrelated matters, such as the sale of physical assets, which arguably would not require the services of an attorney at all.

(4) The United States Trustee has virtually nothing to do with the appointment of counsel for a trustee in a Chapter 7 case and virtually no occasion to participate as a party in interest in a normal Chapter 7 case, and does not preside at the § 341 meetings. This is dramatically unlike the appointment of counsel for a corporate debtor-in-possession in a Chapter 11 case.

(5) Chapter 7 trustees are concerned with this specific issue every day of their working lives and are expected to follow the instructions given by the United States Trustee. To undermine that discipline without extraordinary cause would be to invite chaos in Chapter 7's (and Chapter 7's are the majority of cases filed in this district).

For all of the above reasons, the objection is overruled. The nunc pro tunc application is approved, and the requested fees and disbursements are approved in full.

SO ORDERED.

Dated: Buffalo, New York
January 5, 1998

/s/ Michael J. Kaplan

U.S.B.J.