No. 99-1907

In the Supreme Court of the United States

J.D. BEHLES & ASSOCIATES, PETITIONER

v.

ANGEL PROJECT I, LTD.,
AND UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION

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QUESTION PRESENTED

Whether the bankruptcy court erred in disallowing attorney's fees requested by petitioner as not "actual" or "necessary" within the meaning of 11 U.S.C. 330(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 203 F.3d 834 (Table). The district court's order adopting the magistrate judge's proposed analysis and recommended disposition is unreported (App., *infra*, 1a). The bankruptcy court's decision disallowing petitioner's fees in part (Pet. App. 16a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. A petition for rehearing was denied on March 1, 2000 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on May 30, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bankruptcy Code provides for the employment and compensation of professional persons, including attorneys, to assist in the administration and resolution of claims against a bankrupt estate. 11 U.S.C. 327-331. Section 330 of the Code generally provides that after notice and a hearing, the bankruptcy court may award "reasonable compensation for actual, necessary services rendered by the * * * attorney," as well as "reimbursement for actual, necessary expenses." 11 U.S.C. 330(a)(1). If the terms and conditions of such compensation have been approved in advance, however, the court may allow different compensation after the conclusion of the attorney's employment only "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. 328(a).

2. Petitioner, a law firm, represents the Property Owners Committee (POC) in Chapter 11 bankruptcy proceedings initiated by the Angel Fire Corporation, a holding company which operated a ski resort in northern New Mexico. Pet. 5; Pet. App. 8a. The bankruptcy court approved petitioner's application to represent the POC in September 1993 and authorized the estate to pay petitioner 75% of billed fees and 100% of billed costs on a monthly basis, with fee applications to be filed not less than every 180 days. App., *infra*, 2a-3a; see Pet. App. 9a.

3. This case involves three attorney's fees applications filed by petitioner in 1994 and 1995.* The applications requested approval of fees and costs amounting to a total of $1,044,860.23, of which $565,896.38 had already been paid in accordance with the bankruptcy court's order approving petitioner's employment. Pet. App. 9a-10a. After considering all three applications at a consolidated hearing over several days in July of 1995, the bankruptcy court awarded petitioner a total of $535,507.05. Pet. App. 33a. On appeal, the district court reversed and remanded for the entry of adequate findings of fact and conclusions of law. Pet. App. 6a.

On remand, a successor bankruptcy judge again awarded fees totaling $535,507.05. Pet. App. 31a. Citing Section 330, the bankruptcy court emphasized that the applications could be approved "only for actual and necessary services and expenses and the fees must be reasonable." Pet. App. 20a. The bankruptcy court explained that the objections to petitioner's applications in this case were "resolved by determining whether services and expenses were actual and necessary," since "[t]he objectors do not contend that the amount of time spent by [petitioner] on necessary services, or the firm's hourly rates, were unreasonable under the circumstances." Pet. App. 23a.

The bankruptcy court determined that while some of the efforts of petitioner and the POC "assisted in the final version of the negotiated plan [of reorganization], in large part the POC was not acting as creditors and

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* Petitioner filed a prior application, covering the period from September 21, 1993 to January 31, 1994, on February 25, 1994. The bankruptcy court approved all but approximately $3,000 of the fees and costs sought in that application, which is not at issue here. Pet. App. 9a.

significantly hindered and delayed resolution of the case." Pet. App. 25a. The court found that those aspects of petitioner's efforts did not benefit the estate and were thus "not compensable." Pet. App. 25a-29a (discussing petitioner's inappropriate activities in detail). The court also found that certain paralegal services for which petitioner sought compensation, as well as copying costs, were not actually incurred. Pet. App. 29a-30a. In the end, "although the evidence may have supported denial of a much greater portion of the applications," the court accepted the objectors' proposal to allow fees in the amount of $535,507.05, and ordered petitioner to return the excess. Pet. App. 30a-31a.

4. In an unpublished decision, the Tenth Circuit affirmed the district court's decision to approve the bankruptcy court's award. Pet. App. 1a-4a. The court agreed that "[a] determination of whether the claimed services were actual and/or necessary is dispositive of the issues presented in this case." Pet. App. 4a. Based upon its review of the record, the court of appeals found that the bankruptcy court's award was "reasonable compensation for the actual and necessary services rendered by [petitioner]." *Ibid.* On March 1, 2000, the court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 56a-57a.

ARGUMENT

The court of appeals' unpublished decision turns on fact-specific determinations concerning the appropriateness of the attorney's fees to be recovered in this bankruptcy case. Those determinations, which were properly made under the authority vested by the Bankruptcy Code, do not conflict with any decision of this Court or of any other court of appeals. Review by this Court is accordingly unwarranted.

1. Petitioner does not point to any infirmity in the bankruptcy court's analysis of whether its fees were actual and necessary within the meaning Section 330. Instead, petitioner contends (Pet. 9-10, 12) that the bankruptcy court could not have reduced its fees without a determination under Section 328(a) that the terms and conditions of its employment were "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. 328(a). See *Donaldson, Lufkin & Jenrette Sec. Corp.* v. *National Gypsum Co. (In re National Gypsum Co.)*, 123 F.3d 861, 862 (5th Cir. 1997); *Pitrat* v. *Reimers (In re Reimers*), 972 F.2d 1127, 1129 (9th Cir. 1992).

The determination of improvidence required by Section 328(a) only applies, however, when the bankruptcy court has previously approved the terms and conditions upon which a professional has been employed. There was no such prior approval in this case. The bankruptcy court's Sept. 30, 1993 order simply approved petitioner's employment and authorized the estate to "pay seventy-five percent (75%) of all attorney's fees, as well as one hundred percent (100%) [of all] costs and expenses, on a monthly basis, upon receipt by Debtor of statements rendered." App., *infra*, 8a. The order does not specify, much less approve, the rates petitioner was to charge, or the total compensation it was to receive. The order plainly does not provide petitioner with a blank check to receive compensation in any amount without further court oversight; on the contrary, the order specifically contemplates that petitioner's fees would be allowed only as provided for in subsequent "separate Order[s]" on subsequently filed fee applications. App., *infra*, 9a.

Because the bankruptcy court's order did "not expressly and unambiguously state specific terms and conditions * * * that are being approved pursuant to the first sentence of section 328(a)," the court was free to apply the standards of Section 330(a) "unfettered by the strictures of the second sentence of section 328(a)." *Zolfo, Cooper & Co.* v. *Sunbeam-Oster Co.*, 50 F.3d 253, 261 (3d Cir. 1995). Accord *Unsecured Creditors' Comm.* v. *Puget Sound Plywood, Inc.*, 924 F.2d 955, 960 (9th Cir. 1990) (absent "evidence that the court approved [the lawyer's] fee arrangement, § 328 is not applicable"). Indeed, even if the order approving petitioner's employment could be read to approve petitioner's hourly rates—and there is no evidence that this was the case—the court would still have been free to examine the hours expended and the services performed to determine whether they were "actual" and "necessary." 11 U.S.C. 330(a)(1)(A). See, *e.g.*, *Puget Sound Plywood*, 924 F.2d at 960 ("even if the bankruptcy court approved an hourly rate, if it did not fix the number of allowed hours, that matter still would be subject to the court's review"). As its opinion made clear, the bankruptcy court in this case resolved the objections to petitioner's fee requests "by determining whether services and expenses were actual and necessary, not whether the fees charged were reasonable." Pet. App. 23a.

As the Third Circuit recognized, the bankruptcy court has a "duty to conduct an independent examination of fee applications for services rendered." *Zolfo, Cooper & Co.*, 50 F.3d at 262. That duty "would be unduly restricted if employment authorization orders were routinely construed as binding the court to particular terms of employment." *Ibid.*

2. Relying on the First Circuit's decision in *Boston & Maine Corp.* v. *Moore*, 776 F.2d 2, 6-7 (1st Cir. 1985), petitioner asserts (Pet. 9) that the courts of appeals are split on the proper analysis for an award of attorney's fees under Sections 328(a) and 330(a). But the *Boston & Maine* decision—which petitioner presents as evidence that the First Circuit "adheres to the lodestar approach under Section 330(a), irregardless [*sic*] of Section 328(a), when reviewing applications for compensation" (Pet. 9)—involved compensation issues arising under the pre-1978 version of the Bankruptcy Code, which contained neither provision. See *Boston & Maine*, 776 F.2d at 5 (applying "former section 77 of the Bankruptcy Act of 1898").

Petitioner also contends that there are "differing opinions" among the bankruptcy courts "on the question of the impact of Section 328(a) on pre-approved fee arrangements." Pet. 10. But even if it could be shown that there were such a conflict among the bankruptcy courts, the matter would not ordinarily be one requiring this Court's review. See Robert L. Stern et al., *Supreme Court Practice* 180 (7th ed. 1993) (because bankruptcy judge decisions are subject to review by district courts and then courts of appeals, conflicts between such decisions do not ordinarily merit resolution by the Supreme Court).

In any event, as shown above, this case does not involve an order to which Section 328(a) would apply. It therefore is not a proper vehicle for addressing any issues that might arise under that provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

JACOB M. LEWIS
Attorney

JULY 2000

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1127 JC/RLP

BEHLES-GIDDENS, P.A., APPELLANT

v.

ANGEL FIRE CORPORATION, ET AL., APPELLEES

[Filed: July 15, 1998]

JUDGMENT

THIS MATTER came before the Court on Appellant's appeal, filed pursuant to 28 U.S.C. § 158. Pursuant to the Order that adopts the proposed findings and recommended disposition of the United States Magistrate Judge and which accompanies this Judgment,

IT IS THEREFORE ORDERED AND ADJUDGED that this case is dismissed with prejudice in its entirety.

/s/ JOHN EDWARDS CONWAY
JOHN EDWARDS CONWAY
Chief United States
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1127 JC/RLP

BEHLES-GIDDENS, P.A., APPELLANT

v.

ANGEL FIRE CORPORATION, ET AL., APPELLEES

[Filed: July 15, 1998]

ORDER

THIS MATTER having come before the Court on the proposed findings and recommended disposition of the United States Magistrate Judge, the Appellant having filed objections thereto and the Court having made a *de novo* review of the record, findings that the objections are not well-taken, and that the proposed findings and recommended disposition of the United States Magistrate Judge shall be adopted;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the proposed findings and recommended disposition of the United States Magistrate Judge are adopted by the Court and that this matter is dismissed with prejudice.

IT IS SO ORDERED.

/s/ JOHN EDWARDS CONWAY
JOHN EDWARDS CONWAY
Chief United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1127 JC/RLP

BEHLES-GIDDENS, P.A., APPELLANT

v.

ANGEL FIRE CORPORATION, ET AL., APPELLEES

[Filed: June 22, 1998]

MAGISTRATE JUDGE'S PROPOSED
ANALYSIS AND RECOMMENDED DISPOSITION[†]

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1. This is the second appeal in this matter. In my September 6, 1996 Proposed Analysis and Recommended Disposition (PRD), adopted by the District Court in Civ. No. 95-1154 SC/RLP, I concluded that the Bankruptcy Court had failed to set forth its reasons for the attorney fee award. Thus, I recommended that the

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[†] Within ten (10 days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections within the ten-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

matter be remanded for the factual and legal conclusions of that Court.

2. On August 11, 1997, after oral arguments, the Bankruptcy Court issued its Memorandum Opinion and Order ("August Order"). The Court set forth its factual findings and conclusions of law and awarded the same amount ($535,507.05 in attorney fees) as the previous judge, and this appeal followed.

3. On appeal, a District Court will reject a Bankruptcy Court's findings of fact only if they are clearly erroneous; conclusions of law are reviewed de novo. *Broitman v. Kirkland*, 86 F.3d 172, 174 (10th Cir. 1996). The issue in this case is the amount of attorney fees awarded to Appellant by the Bankruptcy Court. To determine counsel's eligibility for compensation, the court must first find that the fees were "necessary," i.e., that they benefitted the estate or were a required undertaking. *In re Lederman*, 997 F.2d 1321, 1323 (10th Cir. 1993); Bankruptcy Code, 11 U.S.C. § 330(a)(1) (the Court may award fees for "actual, necessary services"). If that answer is no, the inquiry stops. 997 F.2d at 1324. If the answer is yes, then the fees are analyzed to determine if they are "reasonable." Reasonableness turns on the lodestar calculation set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). 997 F.2d at 1323.

4. The Bankruptcy Court's August Order correctly sets forth the applicable law. The Court also goes through the facts supporting its decision, i.e., which services were actual, necessary, and reasonable; or, on the other hand, which services were not actual or not necessary.

5. I have reviewed the submissions of the parties in this appeal. Appellant's argument is that the Bankruptcy Court's findings of fact were clearly erroneous and the conclusions of law were incorrect. Numerous claimed factual errors are cited, but there is no analysis as to *why* this makes the Bankruptcy Court's decision not supported by substantial evidence. Appellee Angel Projects I, Ltd. makes the point that most of the claimed errors in factual findings are either not in error or are irrelevant to the decision at issue: whether the fees claimed were based on actual, necessary services. And, as Appellee U.S. Trustee points out, Appellant's argument that the legal analysis was improper appears to be based on the mistaken idea that this Court ordered the Bankruptcy Court to apply the lodestar without regard to whether such fees were based on services that were either actual or necessary.

6. Having reviewed the submissions of the parties and portions of the record I agree with Appellees that most of the claimed errors are really attacks on the analysis and conclusions of the Bankruptcy Court, i.e., that most of the claimed services were not actual (i.e., paralegal billing time, mailing expenses) or not necessary (i.e., the Property Owners' Committee's litigation activities).

7. As I pointed out in the PRD, this Court has a limited role in reviewing a Bankruptcy Court's award of attorney fees. The award is discretionary, and to support its award the Bankruptcy Court must set forth its factual findings and legal conclusions. The Bankruptcy Court has done so, and I find that the factual findings are not clearly erroneous and that the legal conclusions are correct.

RECOMMENDED DISPOSITION

I recommend that the appeal be denied and this case dismissed with prejudice.

/s/ RICHARD L. PUGLISI
RICHARD L. PUGLISI
United States Magistrate Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
THE DISTRICT OF NEW MEXICO

No. 11-93-12176 MA

IN RE:
ANGEL FIRE CORPORATION, DEBTOR
TAX I.D. No. 85-0226843

[Filed: Sept. 30, 1993]

ORDER ON MOTION TO EMPLOY COUNSEL FOR THE UNSECURED CREDITORS' COMMITTEE

THIS MATTER having come before the Court on Motion to Employ Counsel for the Property Owners' Committee, filed herein on September 21, 1993, and the Amended Motion filed subsequently, and the Court being satisfied that said law firm, Behles-Giddens, P.A., represents no interest adverse to Debtor or the Estate in the matters upon which it is to be employed, their employment is approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Estate is allowed to pay seventy-five percent (75%) of all attorney's fees, as well as one hundred percent (100%) costs and expenses, on a monthly basis, upon receipt by Debtor of statements rendered. The balance of the payment for the billings

shall be applied to the billings upon separate Order of this Court allowing the Attorney's Fee Applications, which Fee Applications will be filed at least every 180 days.

/s/ [*Illegible*]
BANKRUPTCY COURT JUDGE