UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re: ALLVEST CORPORATION, Debtors.	Case No. A02-01042-DMD Chapter 7

MEMORANDUM ON PENDING FEE APPLICATIONS

The J.W. creditors object to the allowance of the following three fee applications:

1) Motion to Approve Final Compensation of Special Counsel [Bose McKinney], filed August 13, 2008 [Docket No. 362];

2) Motion to Approve Final Compensation of Special Counsel [Bose McKinney] and Reimburse Brown Under § 503(b), filed August 13, 2008 [Docket No. 363]; and

3) Fifth Interim Fee Application of Burr, Pease & Kurtz, filed August 15, 2008 [Docket Nos. 369, 370 and 371].

The J.W. creditors contend that none of the fees and costs should be allowed because the fees were unnecessarily incurred in liquidating a claim which the trustee could have settled for $150,000.00 more in 2003. For the reasons stated below, I will overrule the objections of the J.W. creditors and grant the three applications.

Discussion

A bankruptcy court may award "reasonable compensation for actual, necessary services" rendered by a trustee's counsel, and may also authorize reimbursement for "actual, necessary expenses."[1] The bankruptcy court has an independent duty to examine requested fees and expenses and may award compensation that is less than the amount requested.[2] The J.W. creditors argue that no fees should be awarded for services which were expended on prosecuting and settling the Brown insurance claim, because this claim could have been settled five years ago for $150,000.00 more than what the trustee is getting for the claim now. In reviewing the history of this case, however, I conclude that this position is meritless.

This bankruptcy proceeding has had a long and contentious history. It started as an involuntary chapter 11 on October 3, 2002. The petitioning creditor, Evelyn Brown, held a state court judgment against the debtor, Allvest Corporation, in excess of $3 million. The judgment included more than $1 million in compensatory damages and $2 million in punitive damages. Another group of creditors, collectively referred to as the "J.W. creditors," had also obtained pre-petition state court judgments totaling approximately $1.2 million against Allvest. The J.W. creditors' judgments consisted of $58,090.00 in compensatory damages and $1 million in punitive damages. Neither of the judgments were paid by Allvest's insurer, Classic Fire and Marine. Classic was in liquidation. Brown and the J.W. creditors both filed claims in Classic's liquidation proceeding before this bankruptcy case commenced.

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[1] 11 U.S.C. § 330(a)(1).

[2] 11 U.S.C. § 330(a)(2).

After the involuntary petition was filed, on December 30, 2002, Kenneth Battley, serving as chapter 11 trustee, filed a motion to approve a settlement. The settlement was between the trustee, Brown, the J.W. creditors, and the debtor's principal, William Weimar, and his related entities. At the time the petition was filed, the J.W. creditors had been pursuing fraudulent conveyance and alter ego claims against Weimar, alleging that he had improperly diverted $20 million in Allvest assets. A state court injunction had been entered which prohibited Weimar from conveying or selling any assets. The settlement was intended to resolve all claims by the estate, Brown and the J.W. creditors against Weimar and his related entities.

The proposed settlement had been hastily negotiated. The trustee, Weimar, Brown and the J.W. creditors all participated in the negotiations. The motion to approve the settlement was filed on December 30, 2002. Because of tax implications to Weimar, the trustee sought approval of the settlement by December 31, 2002. Under the terms of the settlement, Weimar was to transfer sufficient assets to the trustee to pay all creditors except Brown and the J.W. creditors in full. It was anticipated that the estate would be further supplemented by insurance claims which the trustee could pursue. As part of the deal, Brown and the J.W. creditors agreed to adjust the normal pro-rata distribution that they would otherwise receive as general unsecured creditors. The agreement between these two creditors favored the J.W. creditors and reduced Brown's total claim against the estate.

The settlement agreement was approved on December 31, 2002, after a lengthy hearing and some last minute modifications. Under the terms of the agreement, and with their consent, Brown and the J.W. creditors became the only two impaired creditors in this

proceeding.[3] Both parties agreed that the settlement was fair and reasonable and represented an adequate return on their claims.[4]

More than two years after this settlement was approved, in 2005, the dispute regarding ownership of Brown's insurance claim surfaced. Brown argued that the claim was her separate property. The J.W. creditors contended Brown's claim was property of the bankruptcy estate by virtue of the settlement agreement. The trustee contended Brown's insurance claim was an asset of the estate by operation of law. Brown and the J.W. creditors filed cross motions on this issue. This court held an evidentiary hearing on the matter on November 9, 2005. Both the trustee, Kenneth Battley, and his counsel, John Siemers, testified as witnesses at the hearing.

In January, 2006, this court held in favor of the J.W. creditors, finding that Brown's insurance claim had become property of the estate under the terms of the settlement agreement. Brown appealed this ruling to the District Court, which affirmed this court's decision on July 31, 2006.[5] Brown appealed to the Ninth Circuit, which issued an unpublished opinion on September 6, 2007, affirming that Brown's insurance claim was transferred to the bankruptcy estate under the terms of the settlement.[6] After the appeal process had run, the trustee settled the Brown insurance claim for $755,000.00 on June 19, 2008, and the pending fee applications were thereafter filed.

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[3] *See* Findings and Conclusions on Approval of Settlement Agreement, filed Dec. 31, 2002 (Docket No. 74), at p. 2.

[4] *Id.*

[5] *Brown v. J.W., et al. (In re Allvest Corp.),* 8 A.B.R. 282 (D. Alaska 2006).

[6] *Brown v. J.W., et al.*, 247 Fed.Appx. 82, 2007 WL 2565063 (9th Cir. 2007).

It is against this background that the court considers the J.W. creditors' objections. They raise several points with regard to the fee applications. First, they claim the trustee could have settled the Brown insurance claim for $895,000.00 in 2003. The correspondence regarding the $895,000.00 offer leads me to conclude otherwise. The $895,000.00 figure was a settlement recommendation made in a letter from Classic Fire and Marine's insurance liquidator dated April 24, 2003.[7] This letter was addressed to Brown's state court counsel, Don Bauermeister. Bauermeister had filed Brown's insurance claim with the liquidator pre-petition. Bauermeister forwarded a copy of the letter to the trustee's counsel, John Siemers. Siemers had also received a letter directly from the liquidator regarding her settlement recommendation on a separate insurance claim for defense costs. In that letter, the liquidator proposed a settlement amount of $97,972.45.[8]

In both the Bauermeister and Siemers letters, the liquidator advised that objections to her recommendations needed to be filed within 60 days, and that she reserved the right to alter her recommendation based on new information. Both letters also advised that "[t]he process of reviewing each claim and resolving any disputes is quite lengthy and may take several years."[9] No distribution would be made on the insurance claims until all claims had been finally resolved by the liquidation court and a petition for distribution had been granted.

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[7] Trustee's Reply to Qualified Non-Opp'n to Mot. to Approve Settlement of Ins. Claim, filed June 3, 2008, (Docket No. 355), Ex. 5.

[8] *Id.*, Ex. 1.

[9] *Id.*, Exs. 1, 5.

Siemers responded to both of the liquidator's letters on June 12, 2003.[10] He advised her that the trustee believed the Brown insurance claim was estate property. He recommended, in light of Brown's and the trustee's competing interests, that the liquidator needed to reach agreement with both parties as to any settlement. He also stated that Rule 82 attorney fees and Rule 79 costs, estimated to be $307,350.30, needed to be added to the $895,000.00 settlement recommended by the liquidator.

The trustee's position regarding the Rule 82 fees was reasonable. The J.W. creditors have acknowledged that this is a common issue familiar to most Alaskan attorneys who address insurance disputes.[11] In fact, had the trustee *not* pursued the recovery of Rule 82 attorney fees and sought bankruptcy court approval of the liquidator's $895,000.00 settlement recommendation in 2003, I feel it is likely the J.W. creditors would have objected to the settlement amount precisely on this basis.

Further, I don't feel the trustee is guilty of unduly delaying the settlement of the Brown insurance claim. He had to contend with the treatment of this claim in two forums: the bankruptcy court and the liquidating court in Indiana. During the same time frame that Brown's appeal was pending before the District Court and then the Ninth Circuit, the liquidating court in Indiana concluded it was not bound by Brown's Alaska state court judgment and conducted a de novo review of the claim.

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[10] The J.W. Creditors' Qualified Non-Opp'n to Mot. to Approve Settlement of Ins. Claim, filed May 22, 2008 (Docket No. 354), Ex. 1.

[11] The J.W. Creditors' Opp'n to Trustee's Mot. to Employ Special Counsel Nunc Pro Tunc, filed Sept. 14, 2006 (Docket No. 331), at p.3.

The trustee sought authority to retain special counsel to prosecute the insurance claim in the Indiana forum while the Brown appeal was pending. The J.W. creditors objected to his first application, which was filed on August 25, 2006. They contended the trustee's motion was premature because it was based on the assumption that "there may be a need for the court in Indiana [which was handling the insurance receivership] to review the claim de novo at some time in the future."[12] They suggested that the trustee should hold off on the retention of special counsel until this contingency actually arose.[13]

In March, 2007, while Brown's appeal to the Ninth Circuit was still pending, the trustee filed a second motion to employ special counsel, seeking to employ Bose, McKinney & Evans to prosecute the Brown insurance claim. This application was granted, over objection of the J.W. creditors. They now contended that the trustee had unduly delayed filing the employment application.[14] This position was surprising, in light of the fact that just five months before they had contended the employment of special counsel was premature.

After special counsel was retained, several substantive issues were addressed in the Indiana liquidation proceeding, including clarification of who the real party in interest was on the Brown claim and whether Brown's state court judgment was entitled to full faith and credit in the insolvency proceeding.[15] Those issues were resolved and on May 2, 2008,

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[12] *Id.* at p. 2.

[13] *Id.*

[14] J.W. Creditors' Obj. to Trustee's Mot. to Employ Special Counsel Nunc Pro Tunc, filed Apr. 12, 2007 (Docket No. 342), at p.1.

[15] Trustee's Mot. to Approve Interim Compensation of Special Counsel [Bose McKinney], filed Dec. 21, 2007 (Docket No. 347), at p. 2.

the trustee filed his motion to approve the settlement of the Brown insurance claim for $755,000.00.

Based on my review of the record in this case, I conclude the trustee handled the Brown insurance claim in a reasonable manner. I also find that there is no merit to the J.W. creditors' complaint that the trustee didn't contest Brown's repeated appeals. The trustee's position with regard to the Brown insurance claim was that it was property of the estate by operation of law. He lost this argument; the J.W. creditors' position is the one that succeeded before this court and in both appeals. This was the J.W. creditors' flag to carry, rather than the trustee's, for two reasons. First, this case has become essentially a two party dispute, with only Brown and the J.W. creditors having a stake in the outcome. Second, both the trustee and his counsel had become witnesses in the dispute. Under the circumstances, the trustee's participation in the appeal, which would have resulted in additional administrative expenses, would have been both inappropriate and unreasonable.

In sum, I conclude that the trustee here did not "fumble" and his actions have not drained the estate. The J.W. creditors are understandably disappointed that they may not recover the full amount of their allowed claim in this case. However, from the time that they entered into the settlement in December, 2002, there has never been an assurance or guarantee from the trustee that they would, in fact, receive full payment. They acknowledged that their claim, along with Brown's, was impaired. The issue of who was entitled to the Brown insurance claim funds was a highly contested issue, on which reasonable minds could, and did, differ. The J.W. creditors' calculations that they could have been paid in full if the trustee had proceeded differently in this case simply aren't a basis for disallowance of the

fees and costs which have been requested here. The J.W. creditors' objection will be overruled and the fee applications will be granted.

DATED: October 16, 2008

BY THE COURT

/s/ Donald MacDonald IV
DONALD MacDONALD IV
United States Bankruptcy Judge

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10/16/08