

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 96-12653-MWV  
Chapter 7

Reginald L. Gaudette,  
Debtor

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*Assistant United States Trustee*

**MEMORANDUM OPINION**

The Court has before it the final fee application of special counsel to Richard R. Erricola, trustee in bankruptcy. Objections have been filed by the trustee, the United States Trustee, the United States Small Business Administration (“SBA”) and Birch Street Recovery Corporation, JAAJ Realty Corporation and GER Recovery Corporation (the last three collectively referred to as the “Birch Group”). The Court also has before it the Birch Street Recovery Corporation’s motion to release escrow funds. While the instant matters are found in the Reginald L. Gaudette Chapter 7 proceeding, the estate benefitted from the movant’s legal work in the R&R Associates of Hampton estate, Bk. No. 91-10983-MWV, which will be discussed herein.

### **JURISDICTION**

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

### **FACTS**

This Court approved the retention of William S. Gannon PLLC as special counsel to the trustee in the Chapter 7 proceeding on a contingency basis of 25% prior to trial or 33 1/3% if a matter went to trial. The Court also approved the retention of William S. Gannon PLLC in the R&R Associates of Hampton case on the same basis. The Gaudette bankruptcy estate is the only creditor in the R&R bankruptcy case. The Gaudette case was filed in 1996, and the R&R case was filed in 1991.

Without going into the details, the movant was successful in obtaining a judgment against third parties in the R&R case in the amount of \$412,000 plus interest, fees and costs, after extended litigation including two appeals to the First Circuit Court of Appeals. Protracted litigation was also pursued in the Gaudette case, which was settled prior to trial for \$200,000. In the Gaudette case, regular counsel to the trustee was successful in pension fund litigation, which resulted in the pension fund assets being brought into the Gaudette estate.

In the R&R litigation, this Court approved a settlement with some, but not all, of the defendants, which provided for the payment of \$275,000 and the assignment of certain claims which could provide additional recoveries to the R&R estate.

To date, the Court has approved the payment of a 25% contingency fee of \$50,000 based on the \$200,000 Gaudette settlement to the movant. The Court has also approved a 1/3 contingency fee in the R & R estate based on the \$275,000 payment, or \$91,575, resulting in total fees paid to date of \$141,575. The Court also approved the payment in the R&R estate of expenses of \$31,073.96, which expenses were

for work in both estates, but did not affect the distribution to other creditors since the Gaudette estate was the only creditor in the R&R estate.

Despite this Court's approval of the movant's representation on a contingency basis, the movant now seeks an award of additional fees on a number of theories, including fee shifting, common fund theory, *quantum meruit*, and the application of the contingency to all assets in the Gaudette estate. There is no question in the Court's mind that the movant incurred fees, if calculated on an hourly basis, far in excess of the contingency fees awarded to date.

The United States Trustee and the Chapter 7 trustee took the position that the employment was based on a contingency fee agreement and, to that extent and only to that extent, should the movant be compensated. The SBA and the Birch Group, which share equally in the balance of funds to be distributed to creditors, also took the United States Trustee's and the Chapter 7 trustee's position as well as they argued that they agreed to the settlement of the Gaudette case on the assumption that the movant would receive 25% of \$200,000, or \$50,000.

On May 23, 2005, the Court held a hearing on the trustee's interim account, which the Court approved but ordered a hold-back of \$150,000. This \$150,000 is the subject of the Birch Group motion for release of escrow funds.

### **DISCUSSION**

Section 328<sup>1</sup> of the Bankruptcy Code provides in part:

Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, 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.

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<sup>1</sup> All references to the "Bankruptcy Code" and all references to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended through October 16, 2005, 11 U.S.C. § 101, et seq.

11 U.S.C. § 328. The Court finds that the contingency fee agreement limited to the \$200,000 recovery in the Gaudette case was improvident in light of the developments in the litigation in both estates and that it would not have been anticipated at the time the agreement was approved. Surely, two trips to the circuit court of appeals and the ultimate reversal of this Court's opinion could not have been anticipated. The Court also finds that other parties to the case should be able to reasonably rely on a fee arrangement once approved by the Court. However, the language quoted above does provide the basis for a modification of any fee agreement originally executed. Weighing the two competing legitimate concerns, this Court awards the movant 25% of the \$150,000 being held in escrow, or \$37,500. In the R&R case, to the extent there are further recoveries, the movant shall also be entitled to a contingency fee on those recoveries. The Court further finds that the remaining creditors, the SBA and Birch Group, have benefitted by the efforts of the movant, and this further award is reasonable in light of that benefit.

The trustee is authorized to make distribution in accordance with this order, and the escrow is hereby released.

#### **CONCLUSION**

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 26th day of May, 2006, at Manchester, New Hampshire.

/s/ Mark W. Vaughn  
Mark W. Vaughn  
Chief Judge