UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROBERT J.G. KEENAN and
HOLLY R.J. KEENAN — Case No. 95-13708 K

Debtors

Norwest Financial New York, Inc. has opposed the application of Jeffrey Freedman, Attorneys at Law, for a one-third contingent fee in connection with the settlement of Dr. Keenan's personal injury claims.

In its March 29, 1996 "Opposing Memorandum," Norwest is silent regarding the most basic means by which pre-petition debts are accorded administrative expense status -- the assumption of executory contracts under 11 U.S.C. § 365. This Court has repeatedly held that for the estate to enjoy the fruits of pre-petition counsel's labors without paying counsel the agreed fee is to assume only the benefits of the pre-petition retainer agreement, but to reject its burdens. This is not permissible.

Assumption of a pre-petition retainer agreement is manifestly incompatible with a § 330 analysis. Such assumption has nothing to do whatsoever with 11 U.S.C. § 327 and § 330. Thus it is too blithe for a creditor to say: "We support the settlement, but oppose the fees." They are both part of one matter, when they come before the Court under 11 U.S.C. § 365.

The proper inquiry, at this point, is to roll the clock back to the date on which these arguments were heard and on which the Court approved the insurance settlements but deferred the

attorneys fees question for later argument.

We must now pretend that the insurance claim has not yet been settled. The question is whether the business judgment of the Debtors-in-Possession, in electing to assume the executory retainer agreement, should be sustained. It is not a strict balancing test, since the Court is not to substitute its discretion for that of the Debtors. There are a number of formulations of the business judgment test. Thus, one circuit court has stated that the bankruptcy court must accept a debtor's decision to reject an executory contract unless the court determines that the debtor's decision is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim or caprice.[1] The propriety of using the business judgment test for cases within the Second Circuit was upheld in the case of *Control Data Corp v. Zelman (In re Minges)*, 602 F.2d 38 (2d Cir. 1979).

In applying the test, the following considerations are relevant:

1. What claims (lien claims or otherwise) will Freedman have against the fund or against the Debtor's estate if the retainer agreement is rejected and the new counsel steps into his shoes?

2. Is new counsel likely to achieve a better result, worse result or the same result?

3. How much would new counsel likely cost on a time and

[1]*Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043 (4th Cir. 1985).

expense basis?[2]

4. When did pre-petition counsel know that the Debtors filed for relief under the Bankruptcy Code, with respect to the time that pre-petition counsel performed particular services with regard to the personal injury claim. This last consideration might be particularly important in an instance in which personal injury counsel could deliberately avoid § 327 and § 330 if, having done little in the personal injury case prior to learning of her client's Chapter 11 filing, she were to devote immediate attention to the personal injury case without seeking § 327 appointment, in hopes of getting paid the one-third contingency fee by means of § 365, instead of following the § 327/§ 330 route, which might result only in compensation on a time and expense basis.

In light of the fact that the Court itself prompted Freedman's concession that the personal injury claims would be settled first, and the matter of fees would be argued later, any consequent doubts should be resolved in Freedman's favor. For example, it was probably possible on the date of hearing to have found out how long the settlement was available, whether the matter was open to any further negotiation, etc. That is not possible now,

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[2]New counsel could be retained under § 327 on a contingent fee basis, but any terms or conditions of employment under § 327 can be revisited later under § 328(a) which, in pertinent part, permits the Court to review terms and conditions that "prove to have been improvident in light of developments not capable of being anticipated at the time" that such terms and conditions were approved.

and it must now be assumed that if a better result was to be obtained by a new counsel, it would have to be by new arguments, by litigation, or by some other means that are not reiterative of Freedman's efforts.

The Debtors or the applicant are to appear before the Court, in Part I, 310 U.S. Courthouse, 68 Court Street, Buffalo, New York, on April 25, 1996, at 2:00 p.m. to address these considerations, and to address any further (telephonic) arguments of the opposing creditor.

SO ORDERED.

Dated:Buffalo, New York
April , 1996

/s/Michael J. Kaplan
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U.S.B.J.