

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

IN RE GREGORY B. DUNCAN )  
and LAURIE L. DUNCAN, )  
 )  
Debtors, )  
\_\_\_\_\_ )

CV 09-94-M-DWM

STATE OF MONTANA )  
DEPARTMENT OF REVENUE, )  
 )  
Appellant, )

vs. )

ORDER

UNITED STATES TRUSTEE, )  
GREGORY B. And LAURIE L. )  
DUNCAN, and DARCY M. CRUM, )  
CHAPTER 7 TRUSTEE, )  
 )  
Appellees. )

**FILED**  
OCT 30 2009  
By PATRICK E. DUFFY, CLERK  
DEPUTY CLERK, MISSOULA

**I. Introduction**

Appellant, the Montana Department of Revenue (“the Department”), is a creditor in this Chapter 7 bankruptcy case. The Department appeals a decision of the Bankruptcy Court denying its request for attorney fees incurred by attorney Lynn Butler in protecting the Department’s secured claims. The Bankruptcy Court

denied the fee request, finding it was not reasonable.

## **II. Factual Background<sup>1</sup>**

Debtors Gregory and Laurie Duncan filed a Chapter 11 bankruptcy petition in September 2007. One of their Schedules listed the Department as a creditor holding priority claims. In December 2007, the Department moved to convert the case to Chapter 7. The Department was represented by two special assistant attorneys general, both of whom appeared at the hearing regarding the motion. The Department also filed several claims in the case, prepared by “Kim Davis, Bankruptcy Specialist.” There were no objections to these claims.

In March 2008, the United States Trustee moved to convert the case to Chapter 7, which the Department joined. Both assistant attorneys general again signed the motion. In March, attorney Lynn Butler began providing services to the Department, although both attorneys general continued to work on the case, and he moved to appear pro hac vice in this district. He began attending hearings on the case, although one or two Department attorneys were also always present.

Butler first appeared in Bankruptcy Court in April 2008. This hearing led to the resolution of several matters by a stipulation, which provided that the debtors

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<sup>1</sup> The following facts are summarized from the Bankruptcy Court’s Memorandum of Decision.

would pay creditors, including the Department, in full with interest and if the debtors defaulted, the case would convert to Chapter 7.

The Debtors later moved to set aside the Order approving the stipulation, and in August 2008, the Department objected to this motion and gave notice that the debtors had defaulted. Butler represented the Department through this portion of the proceedings, along with two assistant attorneys general. The Bankruptcy Court converted the case to Chapter 7, but stayed the conversion to allow debtors to conclude a property sale under the stipulation.

The case converted to Chapter 7, and the current U.S. Trustee, Darcy Crum, was appointed. In September 2008, Crum moved to sell the debtors' real and personal property. The Department did not object, but filed a response, signed by Butler, reserving the right to request money beyond the amount owed, including attorney fees. Both Butler and one of the assistant attorneys general appeared at the hearing on this motion. On October 24, 2008, the debtors' property was sold, and the Department received sufficient funds to pay its secured claims.

The Department then moved to recover attorney fees for Butler, requesting \$13,447.50 for his services. Both the U.S. Trustee and the debtors objected, arguing the fees were not reasonable. The Bankruptcy Court agreed and denied the fee request. The Department now appeals.

### III. Analysis

#### A. Standard of Review

This Court reviews a decision regarding an award of attorney fees to determine if the Bankruptcy Court abused its discretion or erroneously applied the law. In re Kord Enterprises II, 139 F.3d 684, 686 (9th Cir. 1998).

#### B. **The Bankruptcy Court did not abuse its discretion or erroneously apply the law when it denied the Department's request for attorney fees.**

The Department requested attorney fees pursuant to 11 U.S.C. § 506(b), which permits a Bankruptcy Court to award attorney fees in certain circumstances:

To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. § 506(b). The applicable Montana statute allows “reasonable fees” incurred by the Department in collecting on certain debts. Mont. Code Ann. §§ 708(3)(b), 701. To determine if fees are reasonable, a court should consider “whether the creditor incurred expenses and fees that fall within the scope of the fees provision in the agreement, and took the kinds of actions that similarly situated creditors might reasonably conclude should be taken.” In re Le Marquis Associates, 81 B.R. 576, 578 (9th Cir. 1987).

The Bankruptcy Code does not “disallow[] contract-based claims for attorney’s fees based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law.” Travelers Casualty & Surety Co. of Amer. v. Pacific Gas & Electric Co., 549 U.S. 443, 449 (2007). However, Travelers did not foreclose the possibility that “other principles of bankruptcy law might provide an independent basis for disallowing [a] claim for attorney’s fees.” Id. at 456.

The parties agree that most of the requirements of 506(b) are met. The only question is whether the request for fees by the Department was reasonable, as required by section 506(b). The Bankruptcy Court denied the fee request on the basis that it was not reasonable. The Department’s argument relies on the premise that the Bankruptcy Court created its own per se rule that attorney fees are not available when there is no objection or challenge to a claim such as the Department’s secured claims here. The Department asserts this conflicts with the plain language of section 506 and with Travelers.

Although the Bankruptcy Court considered the unchallenged nature of the claim, this was not the only reason for the decision. The Bankruptcy Court also considered other factors to determine if the Department “took the kinds of actions that similarly situated creditors might reasonably conclude should be taken.” Le Marquis Associates, 81 B.R. at 578. The Bankruptcy Court recognized that the


Department had a right to protect its claim, even where it was not in jeopardy, but also noted that “overworking the case for fees is not reasonable” and “the same result would have occurred if Butler provided no services.” Memo. of Dec. at 11. The Department’s claim was protected by the work of a bankruptcy specialist with the Department and three special assistant attorneys general, at least one of which always attended hearings in this matter. Id.

The Bankruptcy Court properly exercised its discretion because it focused on the excessive amount of attorney time and number of attorneys employed for the results obtained, in addition to the fact that the claim was unchallenged. These factors support the Bankruptcy Court’s finding that the fees were not reasonable, as required by section 506(b). Accordingly,

IT IS HEREBY ORDERED that the Bankruptcy Court’s Memorandum of Decision denying the Appellant’s request for attorney fees is AFFIRMED.

IT IS FURTHER ORDERED that the Appellant’s request for oral argument (dkt #12) is DENIED.

DATED this 30 day of October, 2009.

  
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Donald W. Molloy, District Judge  
United States District Court