



**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed April 28, 2004.**

**United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE:	§	
	§	
SENIOR LIVING PROPERTIES, LLC,	§	CASE NO. 02-34243-SAF-11
et al.,	§	
DEBTORS.	§	

**MEMORANDUM OPINION AND ORDER**

Jenkins & Gilchrist, a professional corporation, has filed an application, as supplemented, for the final allowance of compensation and reimbursement of expenses as counsel for the Official Committee of Unsecured Creditors of Senior Living Properties, LLC, et al. (SLP). 11 U.S.C. § 330(a). GMAC Commercial Mortgage Corporation filed an objection to the application. GMAC contends that Jenkins exceeded the scope of the committee's function, in part, and charged for overhead and for excessive conferences. The court conducted a hearing on the application on February 12 and 26, 2004. At the hearing, GMAC

stated that its objections would be resolved by a ten percent reduction in the application. Jenkens voluntarily reduced its application by \$50,000.

The determination of compensation and reimbursement of expenses under § 330(a) for professional persons employed under 11 U.S.C. § 1103 constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(A) and (O) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law required by Bankruptcy Rules 7052 and 9014.

To determine reasonable compensation under § 330(a) for the services rendered, the court must determine the "nature and extent of the services supplied by" the attorneys. In re First Colonial Corp. of Am., 544 F.2d 1291, 1299 (5th Cir. 1977), cert. denied, 431 U.S. 904 (1977). The court must also assess the value of the services. These two factors comprise the components for the lodestar calculation. See Cobb v. Miller, 818 F.2d 1227, 1231 (5th Cir. 1987). Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Hensley v. Eckerhart, 461 U.S. 424 (1983). To determine the hours reasonably expended, the court must assess the tangible benefit provided to the bankruptcy estate by the services rendered. In re Pro-Snax Distribs., Inc., 157 F.3d 414, 426 (5th Cir. 1998).

The court may then adjust the compensation based on the Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), factors. Blanchard v. Bergeron, 489 U.S. 87, 91-92 (1989). The Johnson factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. Id. Rather, the lodestar shall be presumed to establish a reasonable fee with adjustments made when required by specific evidence. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 554-55 (1986).

Jenkins has the burden to show that its requested compensation is reasonable and was necessary for the proper administration of the estate. In re Beverly Mfg. Corp., 841 F.2d 365, 371 (11th Cir. 1988). To assist the court in determining the reasonableness of the requested fees, the attorney is ethically obligated to exercise reasonable billing judgment. The law firm must make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise not necessary. Hensley, 461 U.S. at 434.

The SLP entities filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on May 14, 2002. The United States Trustee organized and appointed the committee on May 24, 2002. The committee retained Jenkins on June 13, 2002. The committee filed its application for authorization to employ Jenkins on July 5, 2002. By order entered July 17, 2002, the

court authorized the committee to employ Jenkins as of June 13, 2002.

By order entered August 8, 2003, the court confirmed SLP's Third Amended Plan of Reorganization, as modified. The plan went effective on November 19, 2003.

In its final application for compensation, Jenkins seeks compensation from its retention by the committee through the plan's effective date. Jenkins requests compensation of \$2,076,148.50 and reimbursement of expenses of \$97,599.86. In its supplemental application, Jenkins requests compensation through December 31, 2003. The supplement requests additional compensation of \$15,906 and reimbursement of expenses of \$873.48. Even though post-effective date, the work pertains to the review and consideration of the final compensation applications regarding the administration of the case and is accordingly considered as part of the final application, as contrasted with post-effective date work. Consequently, Jenkins seeks total compensation of \$2,092,054.50 and reimbursement of expenses of \$98,473.34.

Jenkins' blended hourly rate is \$350.76. That rate is within the range, albeit on the high side, customarily charged in this community by counsel of similar experience and is within the range of hourly rates approved in this case. The court finds the hourly rate reasonable.

Jenkins performed valuable and beneficial services to the committee and to the estate. As Andrew Jillson of the firm reported, the case did not begin with a soft landing in Chapter 11 but, rather, began as a train wreck. SLP had suggested to the committee that the case presented little value for unsecured creditors. If the unsecured creditors were to obtain a return, they would have to look to litigation. Despite this inauspicious beginning, fourteen months after the retention of committee counsel, the court had confirmed a plan, with \$20 million to be distributed to unsecured creditors, and litigation remaining to be liquidated. Although it objects to a portion of the fees, GMAC agrees with the beneficial nature of Jenkins' work. Accordingly, the court focuses on the objections.

GMAC contends that Jenkins charged the estate \$42,761 for overhead work which should be subsumed by counsel's hourly rates. In addition, GMAC objects to a portion of the \$228,406 in professional conferences. Jillson reported that Jenkins attempted to eliminate overhead charges by deducting \$13,000 of charges before submitting its final application. Jillson also explained the necessity of professional conferences given the size, nature and complexity of the case. Nevertheless, at the hearing, Jenkins voluntarily reduced its application by \$50,000. The court finds that the \$50,000 reduction resolves this component of GMAC'S objection.

GMAC also objects to the extent of Jenkins' work on the "alter ego" claims, on the insurance claims and on the personal injury claims. GMAC contends that Jenkins' work exceeded the scope of authority as directed by applicable court orders or duplicated or overlapped the work of special committee counsel.

### **Personal Injury Claims**

The court first addresses the personal injury claims. GMAC questions \$173,472 worth of charges in this category. The bankruptcy estate had to liquidate approximately eighty personal injury claims. By order entered September 4, 2002, the court approved a claims resolution procedure to attempt to resolve those claims. The court authorized the debtors to mediate the claims and, at their discretion, to settle the claims. To assist in the process, the court established a steering group, with a representative of the committee serving as a member of the steering group. Lynette Warman of the Jenkins firm served as the committee's representative. Order entered September 4, 2002, at ¶7. The court also recognized the right of the committee to review, object to and be heard on any stipulation of settlement reached by the debtors and a personal injury claimant. Order entered September 4, 2002, at ¶2.

Under the court-adopted claims resolution procedure, the debtors would schedule and engage in mediation with the personal injury claimant and the applicable insurer. The steering group

had the right to consent to the mediator. The debtors were obligated to consult with the steering group on the severity of a particular claim prior to scheduling the mediation for that claim. The debtors were also obligated to consult with the steering group before agreeing to settle a claim.

Under these procedures, the committee, either directly or through its representative on the steering group, played a considerable role in the personal injury claims process. Jenkens, primarily Warman, performed significant services in that regard. Nevertheless, GMAC objects to the services of actually attending and participating in the mediation sessions themselves as beyond the scope of the court's order entered September 4, 2002. The debtors had been charged with the task of actually mediating the claims on behalf of the bankruptcy estate. To that end, the debtors employed in-house counsel and special counsel at considerable albeit reasonable cost to the estate. The committee had been charged with serving as a representative on the steering group; consulting on the mediator, the timing of mediation, the severity of claims and proposed settlements; and with reviewing and being heard on settlements. That court-authorized assignment did not include active participation in the mediation process itself.

At the beginning of the personal injury mediation process, the bankruptcy estate faced a Catch 22 or chicken and egg

situation. The insurance carriers sought to rescind insurance coverage but agreed to mediate those coverage disputes. They hesitated to advance the coverage mediation without a sense of the magnitude of the allowed personal injury claims. The personal injury claimants, on the other hand, hesitated to advance the claims allowance mediation without a sense of the amount of available insurance coverage. With this standstill, the first round of personal injury mediation sessions did not result in settlements.

The committee and its counsel then met with the debtors and the other parties in interest to assess the alternative dispute resolution process. Wade Lemon, SLP's general counsel, in charge of the mediation process, testified that Warman's active involvement in the process broke the logjam. The parties recognized that the committee would ultimately broker a plan. The parties also recognized that the committee had been authorized to attend the insurance coverage mediation sessions. The committee retained independent advisors to assess the severity of the personal injury claims. Warman could thereby temper the competing considerations. Lemon testified that she brought credibility to the process. He testified that he spent hours with her in the claims allowance process. Once the logjam had been broken, the settlement process built momentum, with over seventy claims being settled by the date of confirmation. Lemon

concluded that Warman's work thereby benefitted the estate.

The order entered September 4, 2002, does not prohibit the committee from attending the mediation. But it directs the debtors to mediate on behalf of the estates with the committee having an advisory function on the steering group and a review function on settlement motions. Warman's work went beyond those functions. Yet, it benefitted the estate. The court must therefore balance the benefit to the estate with the scope of the work to be performed pursuant to court order. The court has no basis to speculate why the committee did not apply to the court to expand the scope of employment or even the committee's charge. A duly-noticed application would have given creditors an opportunity to be heard on the scope of the work before the time had been spent.

GMAC, claiming to be the largest unsecured creditor of the estate, recommends that the court balance those considerations by disallowing ten percent of the requested fees. In the case of the committee's consultant, Marshall Elkins, the court accepted the recommendation. After adjusting for overhead charges, the court, in effect, reduced Elkins' application by eight percent to account for work beyond the scope of his retention order. The court finds a similar adjustment warranted. The adjustment recognizes that Jenkens engaged in work charged to the debtor, but does so at a level that awards Jenkens over ninety percent of

the work in recognition of the benefit to the estate. The court therefore disallows \$13,877.76 of the work in this category, allowing \$159,594.24.

### **Insurance Coverage Claims**

GMAC objects to \$74,555 worth of services performed by Jenkens on insurance claims. GMAC contends that Jenkens duplicated services performed by other attorneys paid by the bankruptcy estate. By order entered September 10, 2002, the court authorized SLP to retain special counsel, with the consent of the steering committee, to negotiate, mediate and prosecute the insurance claims. The debtors retained Gardere Wynne Sewell, LLP, as special counsel for insurance issues. Gardere submitted a final fee application for \$1,695,587.20 for its services as special counsel. The court also directed the debtors and the committee to attend a mediation regarding the insurance disputes. The court directed the debtors, committee and the insurance companies to work cooperatively on discovery matters. Pursuant to this order, Jenkens performed services for the committee's representative on the steering group and for the committee's participation in the mediation and related discovery. GMAC does not object to Jenkens' work in connection with its role on the steering group or for supervisory matters concerning the insurance issues.

GMAC argues, however, that Jenkens should have limited its

mediation services to attending the mediation and to serving on the steering group and evaluating insurance settlement offers. GMAC maintains that Jenkins went beyond those functions to unnecessarily engage in discovery, thereby duplicating Gardere's work.

Beverly Godbey of the Gardere firm testified that Warman, in her capacity as the committee's representative on the steering group, facilitated the ultimate settlement of the insurance claims. The debtors, the committee and the steering group held different positions during the insurance negotiations. They were not always aligned. They negotiated at arms length. Gardere represented the debtors, not the steering group. At times, the debtors took positions regarding the insurance claims adverse to the steering group. Warman's role in the negotiations benefitted the estate, according to Godbey.

Jillson argued that the court's order entered September 10, 2002, contemplated a committee role greater than merely attending the mediation. The order directed the debtors, the insurance companies and the company to agree to the identity of the mediator. The court authorized the committee, as found above, to attend the mediation. The court did not bar the committee from initiating discovery. Jillson stated that the committee could not meaningfully perform its function under this order without participating in the discovery process. As a result, Jenkins

attended depositions, even though Gardere attended on behalf of the debtors. Godbey acknowledged that Jenkins could have reviewed the transcripts of the depositions. Nevertheless, given the court's authorization for the committee to be part of the insurance mediation process, the court cannot conclude that Jenkins' participation in the insurance-related discovery was not reasonable or necessary to play a meaningful role in the negotiations.

Jenkins has not requested compensation for more than one attorney to participate in the depositions. Several of the depositions were conducted by telephone conference, thereby reducing costs. The committee's role differed from the debtors' role, even though ultimately both sought the best return for the estate. The court finds the work reasonable and overrules GMAC's objection.

#### **Alter Ego Claims**

GMAC objects to \$46,897 worth of work performed by Jenkins on the alter ego claims. GMAC argues that this work duplicates the work of the committee's special counsel. By order entered September 4, 2002, the court provided that the "sole and exclusive authority to investigate, litigate, mediate, prosecute and settle the Alter Ego Claims . . . is transferred and assigned to the [committee]." Order, at ¶3. The court authorized the committee to employ The Marks Firm and Floyd, Isgur, Rios &

Wahrlich, P.C., to represent it as special counsel on the alter ego claims. By separate order also entered on September 4, 2002, the court directed the committee to attend a mediation on the alter ego claims with its counsel and special counsel. Jenkens represented the committee as its counsel.

GMAC contends that Jenkens should have limited its work to consulting and monitoring the progress on the resolution of the alter ego claims. GMAC further contends that Jenkens should not have engaged in substantive work, deferring to special counsel for that task. Jenkens' role differed from the Marks or Isgur firms' role. Jenkens had to consider the alter ego claims in the context of a resolution of the case, the confirmation of a plan and return to creditors. The Marks and Isgur firms had to consider the alter ego claims in the context of liquidating them for the most amount of money possible. While counsels' work would generally align, the functions differed. The court contemplated participation by both the committee's counsel and its special counsel. The court finds the work reasonable and overrules the objection.

No further adjustments need be made to the lodestar analysis under the Johnson factors.

The court disallows fees of \$63,877.76. The court awards Jenkens compensation of \$2,028,176.74. GMAC does not contest the reasonableness or necessity of the out of pocket expenses

requested by Jenkins. The court accordingly awards Jenkins reimbursement of expenses of \$98,473.34.

Based on the foregoing,

**IT IS ORDERED** that Jenkins & Gilchrist, a professional corporation, is awarded final compensation of \$2,028,176.74 and reimbursement of expenses of \$98,473.34. Jenkins shall be paid the net due after applying credit for all payments made during the course of the bankruptcy case.

###END OF ORDER###