



**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**

Marshall A. Elkins, James M. Docherty and David M. Wacksman filed applications for the final allowance of compensation and reimbursement of expenses as independent claims analysts/consultants for the Official Committee of Unsecured Creditors of Senior Living Properties, LLC, et al. 11 U.S.C. § 330(a). The committee supports the applications. GMAC Commercial Mortgage Corporation filed an objection to the applications. GMAC contends that Elkins' work exceeded the scope of the committee's function in the resolution of personal injury claims. GMAC also

contends that Docherty and Wacksman duplicated Elkins' work and engaged in excessive conferences. The court conducted a hearing on the applications on February 12, 2004. At the hearing, GMAC stated that its objections would be resolved by a ten percent reduction in the applications.

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).

Elkins, Docherty and Wacksman have the burden to show that their 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 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. 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. The court held that "[t]he Committee shall retain an Independent Claims Analyst/Consultant to advise the Committee as to the severity and risk of the personal injury and wrongful death claims against the Estate. The cost of the Independent Claims Analyst/Consultant shall be paid by the Estate. . . ." Order entered September 4, 2002, at ¶ 8.

On December 12, 2002, the committee filed an application to employ Elkins as its Independent Claims Analyst/Consultant. The committee requested that Elkins be authorized to retain independent contractors as necessary and appropriate to assist him. By order entered December 16, 2002, the court authorized the committee to employ Elkins and empowered Elkins to retain independent contractors. Elkins subsequently retained Docherty and Wacksman.

Elkins, assisted by Docherty and Wacksman, advised the committee as to the severity and risk of the personal injury claims. But, beyond that, Elkins actively participated in the mediation process, even though the court charged the debtors with

the task of mediating the claims, reserving for the committee the right to be heard regarding any settlements. Therein lies the gravamen of GMAC's objection to the applications.

The court first addresses several non-billable charges in Elkins' application. Elkins represented that he did not charge for secretarial services or for the preparation of any fee statements, applications or orders. However Elkins charged the estate at least \$665 for scheduling, which the court deems secretarial in nature and subsumed by Elkins' hourly billing rate of \$350. See, e.g., 12/13/02 review email for dates; 12/17/02 discuss scheduling; 12/26/02, discuss scheduling; 12/5/02 mediation scheduling; 1/3/03 scheduling; 2/23/03 scheduling. Elkins also charged \$455 for conflict checks, preparation of employment application and resume. The cost of obtaining employment is not billable to the estate.

GMAC also questions duplicative charges consulting with Docherty. Elkins necessarily had to assign work to and coordinate review with Docherty. But redundant time cannot be compensated. Elkins charged \$3,342.50 for redundant work in consultation with Docherty. Most of that work includes charges for consultations with Docherty concerning claims reviewed and charged by Elkins. The record does not establish a need for Elkins to have further consulted with Docherty concerning those claims. These charges also include reviewing files, preparing

for hearings and attending to calls among the individuals. The court recognizes that Elkins employed Docherty and Wacksman to provide him with support. But several time descriptions either reflect apparent overlap or redundant work or merely coordinating schedules, all of which should have been written off in the exercise of reasonable billing judgment. See, e.g., 1/4/03 redundant claim work 0.5 hours; 1/6/03, same, 0.4 hours; 2/21/03, review files 0.7; 2/23/03 attend calls 3.0; 2/24/03 attend calls 0.75; 3/9/03 redundant claim work 0.4; 3/10/03 redundant claim work 0.3; 3/26/03 redundant claim work 0.3; 8/27/03 trial preparation 0.2; 8/28/03 trial preparation 0.2.

Elkins, with Docherty and Wacksman's assistance, spent considerable time analyzing and advising the committee on the severity and risk of the personal injury and wrongful death claims, pursuant to their charge from the court. GMAC recognizes this work and does not object to the associated fees. These services include reviewing Texas law and case histories, reviewing Illinois histories, reviewing the claims generally, reviewing the settlements with comments to the parties, conferencing with the debtors, other parties in interest such as the Centre group, the committee and other professionals, providing ranges of valuations for claims, reviewing the so-called M charts and A charts and testifying in support of settlements. The consultants had to perform several of these

functions under time constraints because of court-imposed deadlines.

However, Elkins also actively participated in the mediation of several claims, billing the estate for preparation time for the mediation of particular claims and for attending the mediation sessions. The charges for the mediation-related services range from one hour for a claim to 5 hours, 7 hours, 7.5 hours, 9 hours, 10 hours, 10.5 hours, 10.7 hours, 19.7 hours, 19 hours, 16.2 hours, and 25.3 hours. By the court's reading of the time entries, the specific mediation charges totaled approximately \$60,935. GMAC objects to these services as beyond the scope of Elkins' employment. The debtors had been charged with the task of 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 selecting a representative for the steering group and with reviewing and being heard on settlements. Elkins was to advise the committee with regard to the severity and risk of the claim against the estate. That court-authorized assignment did not include active participation in the mediation process.

Committee counsel testified that the steering group and the insurance companies, as well as Centre, actually requested that Elkins perform an active role in the process, including attending

a week of mediation involving a group of claimants. Counsel testified that Elkins shaped the mediation process. Elkins' claims valuation ranges had been used by all the participants in the process. The mediation process actually proved successful in liquidating most of the claims. Elkins' work, while beyond the scope of the court's employment authorization, thereby benefitted the estate.

The court must therefore balance the benefit to the estate with the lack of authority to perform some of the work. 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, including the amounts the court would disallow as unbillable or overhead or duplicative or redundant. The recommendation is well-taken. Considering the court would disallow two percent of the charges based on the description of the work performed as found above, the additional eight percent constitutes a reasonable adjustment for work beyond the scope of employment while recognizing and compensating Elkins for providing a benefit to the estate. That awards Elkins ninety percent of his reported time. If applying the eight percent reduction just to his mediation time, it awards Elkins approximately sixty percent of that time.

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 does not contest Elkins' hourly rate. The court will find the hourly rate to be reasonable.

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

The court therefore awards Elkins compensation of \$260,410. There are no objections to Elkins' out of pocket expenses. The court accordingly awards Elkins reimbursement of expenses of \$25,736.38.

The court next addresses Docherty's and Wacksman's application. They request total compensation of \$53,120 and reimbursement of expenses of \$4,323.82. GMAC does not object to the reimbursement of expenses. GMAC does not contest the hourly rates charged by Docherty and Wacksman.

Docherty and Wacksman state in their application that they did not charge for secretarial services. However, they did charge \$1,030 for services subsumed by their hourly rates. These include \$120 on 1/9/03 establishing protocols for doing their work. Professional persons, in the exercise of reasonable billing judgment, may not charge for time spent organizing a new assignment. These also include 1/22/03 review and scheduling \$90; 1/24/03 scheduling \$60; 1/29/03 scheduling \$60; 2/18/03

scheduling \$60; 2/19/03 organizing file \$210; 2/21/03 telephone calls concerning transmitting information \$210; 2/23/03 transmitting information \$100 (estimate from time descriptions); and 9/25/03 and 9/26/03 e-mailing court for telephonic appearances \$120. They also charged \$975 for preparation of affidavits to obtain employment. The cost of obtaining employment is not billable to the estate.

From their time descriptions and from Elkins' time descriptions, they also duplicated or overlapped or provided redundant services which must be disallowed. They charged \$270 for working on a claim for which Elkins charged \$5,915. The application does not establish a need for this additional work. They also charged a total of \$2,385 for work on the M and A charts. Elkins charged \$21,875 for work on those charts. Again, the application does not establish a need for the additional work. The court disallows \$2,655 for work that appears duplicative, redundant or overlapping work performed by Elkins.

The court disallows a total of \$4,660 of charges. No further adjustments to the lodestar analysis need be made under the Johnson factors.

The court therefore awards Docherty and Wacksman compensation of \$48,460. The court awards Docherty and Wacksman reimbursement of expenses of \$4,323.82.

Based on the foregoing,

**IT IS ORDERED** that Marshall A. Elkins is awarded final compensation of \$260,410 and reimbursement of expenses of \$25,736.38. Elkins shall be paid the net due after applying credit for all payments made during the course of the bankruptcy case.

**IT IS FURTHER ORDERED** that James M. Docherty and David M. Wacksman are awarded final compensation of \$48,460 and reimbursement of expenses of \$4,323.82. Docherty and Wacksman shall be paid the net due after applying credit for all payments made during the course of the bankruptcy case.

###END OF ORDER###