UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:	)	CHAPTER 13
	)	CASE NO. 01-40125-JDW
STEVE MAJOR ATKINS and	)	
RENEE LAVONNE ATKINS,	)	
	)	
DEBTORS.	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtor: Newmark & Gastin
Post Office Box 8012
Savannah, Georgia 31412

For Movant: Benjamin Eichholz
Post Office Box 10244
Savannah, Georgia 31412

MEMORANDUM OPINION

This matter comes before the Court on the motion to settle a personal injury claim and application for employment of attorney. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(A). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

Renee Atkins, a Chapter 13 debtor, suffered a neck injury in a post-petition car accident. Her personal injury attorney, Benjamin S. Eichholz, represented her primarily through non-attorney office personnel, ultimately securing a settlement of $4,000. At issue in this case is whether the Court should approve Mr. Eichholz's employment and the settlement, including attorney fees and costs in the amount of $1,527.29.

Debtor filed a joint Chapter 13 petition on January 16, 2001, and a plan was confirmed in her case on June 6, 2001. Nearly 2 ½ years later, on December 1, 2003, Debtor was injured when the car in which she was a passenger was hit by a truck. The collision occurred while Debtor was on her lunch break. Although Debtor suffered some neck pain, she expected it to pass soon so she returned to work. When the pain did not subside, Debtor sought medical treatment after leaving work on the day of the accident. A doctor told her she had a form of whiplash and prescribed muscle relaxers. The pain continued, and a week later, Debtor returned to the doctor. He instructed her to keep taking the muscle relaxers and advised her that recovery would take time. After another week, Debtor visited the doctor again because she continued to suffer severe neck pain. This time

he referred her to a physical therapist.

During this time, Debtor was contacted by the insurance company for the driver who was at fault in the accident. The insurance company asked her about her injuries and her expected recovery time. It indicated a desire to settle with her but did not make a settlement offer. Debtor did not make any demands because she had not completed her treatment.

Meanwhile, Debtor began physical therapy three days a week. After about a month, the physical therapist told her nothing more could be done. Debtor, still in pain, returned to the doctor. He advised her to visit a chiropractor. Debtor's health insurance declined to cover chiropractic costs. Nevertheless, in late March 2004, Debtor went to Arrowhead Chiropractic Clinic. During Debtor's initial consultation, the chiropractor referred Debtor to an attorney. Debtor did not contact that particular attorney, but the next day, she went to Mr. Eichholz's office, which was near her workplace. She decided to seek legal advice rather than negotiating with the insurance company because her continued pain led her to believe her injury was more extensive than she originally thought.

Debtor's first contact with Mr. Eichholz's office occurred on March 30, 2004. She went to his office on that day and met with a paralegal. Debtor filled out a questionnaire and answered the paralegal's questions about the car accident and her subsequent medical treatment. After obtaining this background information, the paralegal referred Debtor to Whelan Chiropractic.

During her discussion with the paralegal, Debtor indicated she was in bankruptcy. Later the same day, she went to her bankruptcy attorney's office to tell him about the personal injury claim and to amend her schedules. The amendment was filed on April 4,

2004.

Debtor ceased going to Arrowhead Chiropractic and began going to Whelan, the chiropractic clinic recommended by Mr. Eichholz's office. She was satisfied with her treatment at Whelan. Debtor went to the chiropractor once or twice a week from April 2004, through November 2004, at which time she felt she had recovered. The chiropractor told Debtor that he would get paid out of any settlement she received from her personal injury claim, and she agreed to that arrangement.

After completing her chiropractic treatment in November 2004, Debtor returned to Mr. Eichholz's office and spoke to a paralegal. The paralegal advised Debtor that she would get copies of all Debtor's medical reports and bills directly from the providers. Debtor signed and understood papers authorizing Mr. Eichholz to negotiate with the insurance company on her behalf. In January 2005, Mr. Eichholz sent a demand letter to the insurance company. The letter listed medical bills totaling $6,152.14 and lost wages of $1,223.62 and demanded $35,000 to settle the case, which was a figure acceptable to Debtor. The insurance company responded in February with an offer to settle for $2,460.

In March or April 2005, a year after retaining Mr. Eichholz, Debtor talked with him by telephone. It was her first direct communication with Mr. Eichholz. He informed her of the $2,640 settlement offer and said he thought that amount was unacceptable. Debtor agreed and told Mr. Eichholz that she wanted to proceed to court. The next day, Debtor had a telephone conversation with another attorney from Mr. Eichholz's office, leaving her with the understanding that a suit would be filed on her behalf. The attorney did file suit on April 28, 2005. However, the defendant was never served because no effort was made to perfect

service.

Debtor heard nothing further for several months. Finally, in October 2005, Mr. Eichholz's paralegal called Debtor and told her that the insurance company was ready to settle for $3,400. The paralegal advised Debtor that $3,400 was the best offer she could expect and that the insurance company did not want to cover the chiropractic expenses. Nevertheless, Mr. Eichholz would try to negotiate a higher amount. The offer concerned Debtor because she did not begin to recover until she received chiropractic treatment. Debtor asked to speak with Mr. Eichholz but was told he was unavailable. She then consented to the $3,400. The paralegal asked Debtor to have her husband call the office and give his consent as well. Mr. Eichholz explained to the Court that the insurance company required the husband's consent to ensure that he would not later attempt to raise additional claims, such as loss of consortium. According to Debtor, when her husband called the law office, he gave instructions for them to pursue further negotiations. He did not consent to settle.

Debtor immediately began having concerns about the settlement. She testified that although she agreed to it, she was not fully aware of how the procedure worked. Therefore, she called Mr. Eichholz's office the next day to try to halt the settlement and get a better understanding of it. Debtor spoke to a paralegal, who said Mr. Eichholz would get back to her. The following day, Mr. Eichholz returned Debtor's call, telling her that she had authorized the settlement and could not change her mind. At that time, he also told her that the insurance company had increased the settlement to $4,000. Debtor heard nothing further from Mr. Eichholz. She testified that she did not feel satisfied that she had received

competent advice about her settlement and that nothing had been done to make her feel secure that her case was being handled properly.

Mr. Eichholz filed an application for approval of employment of attorney and a motion to settle personal injury claim on October 26, 2005. The motion to settle indicated that Mr. Eichholz would retain $1,527.29 of the $4,000. Debtor's medical providers would receive $1,940, and Debtor would receive the remaining $532.71. The Court held a hearing on December 7, 2005, and no objections were raised to the application or the motion.

Conclusions of Law

Neither the Chapter 13 Trustee nor Debtor's bankruptcy attorney opposed Mr. Eichholz's motions.[1] However, the Court has its own concerns about the competence of Mr. Eichholz's representation of Debtor. These concerns are not new. The Court has already reduced Mr. Eichholz's fees once this year because he provided a debtor with substandard legal services. In re Thornton, No. 04-51703 (Bankr. S.D. Ga. August 8, 2005) (Walker, J.). More recently, Judge Davis detailed a "pattern of conduct" by Mr. Eichholz that is inconsistent with competent legal representation and ordered that Mr. Eichholz no longer be granted retroactive approval of his representation of debtors in this Court. In re Bacon, No.

[1] Upon inquiry, the Court was told this lack of objection should not be interpreted as approval by Debtor's bankruptcy attorney or the Chapter 13 Trustee. As to the former, he told the Court he did not believe he was required to make a qualitative judgment about the services or settlement because Debtor was represented in the matter of the personal injury by another attorney. As for the Trustee, she had no interest in the proceeds and, therefore, exercised no judgment in response to the application. While the Court would have expected a different dynamic among this group of participants, the Court is left to conclude that the lack of objection should not be interpreted as approval.

03-44067 (Bankr. S.D. Ga. December 5, 2005) (Davis, J).

As it did in the Thornton case, the Court has before it three matters: the approval of Mr. Eichholz's employment, the approval of the settlement of the personal injury claim, and the allowance of attorney fees and costs. Section 327 of the Bankruptcy Code provides that "the trustee, with the court's approval, may employ ... professional persons ... to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C.A. § 327(a) (West 2004). By its terms, the statute does not seem to apply to attorneys hired by a Chapter 13 debtor. Thus, Mr. Eichholz's employment may not be subject to approval by the Court. See In re Bowker, 245 B.R. 192, 200 n.8 (Bankr. D.N.J. 2000); 3 Collier on Bankruptcy ¶ 327.01 (15th ed. rev'd 2005).

Similarly, Federal Rule of Bankruptcy Procedure 9019 provides for court approval of a compromise or settlement after notice and a hearing "[o]n motion by the trustee." For the same reasons that Section 327 seems inapplicable to Chapter 13 debtors, Rule 9019 likewise may be inapplicable. Thus, the Court may not be in a position to disapprove the settlement.

However, the Court does have statutory authority over Mr. Eichholz's fee. In fact, "the lack of necessity for court appointment heightens rather than diminishes the need for court supervision over the compensation process." In re Taylor, 216 B.R. 515, 523 (Bankr. E.D. Pa. 1998). Section 329 of the Bankruptcy Code provides as follows:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of

> such compensation.
>
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive....

11 U.S.C.A. § 329 (West 2004) (emphasis added). In this case, Debtor's personal injury suit includes a claim for lost wages. A Chapter 13 debtor's wages have a direct impact on her bankruptcy case. Thus, Mr. Eichholz's efforts to recover Debtor's lost wages are connected to the bankruptcy case.

Mr. Eichholz seeks fees of $1,333.33 (one-third of the settlement amount) and costs of $193.96. However, the Court is unpersuaded that Mr. Eichholz has done anything to earn those fees other than run Debtor through an assembly-line style procedure that appears to have provided no consideration to the individual circumstances of her case by an attorney. Furthermore, Mr. Eichholz's actions are inconsistent with the Georgia Rules of Professional Conduct. Rule 1.1 requires a lawyer to "provide competent representation to a client," which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Not one of those qualities has been evidenced by Mr. Eichholz in this case. Rule 1.4 requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation ...." This component is completely absent and totally negated by Mr. Eichholz's disregard for Debtor's objection and insistence that Debtor accept the $3,400 settlement.

In this case, Mr. Eichholz had a paralegal gather Debtor's medical records and prepare a brief demand letter to the insurance company. When the insurance company

responded with an unsatisfactory offer of settlement, Mr. Eichholz and another attorney in his office assured Debtor that a lawsuit would be filed. Although a complaint was filed, it was not served on the defendant, and no effort was made to later perfect service. Thus, if Debtor or the Court wanted to reject the settlement and pursue court action, Debtor may be barred by the statute of limitations. O.C.G.A. § 9-3-33 (1982); Northcutt v. Bennett, 177 Ga. App. 485, 486, 339 S.E.2d 763, 764 (1986). Not only does this reflect a complete lack of thoroughness, preparation, and competence, but it directly conflicted with Debtor's wishes.

When the insurance company made a better settlement offer, Mr. Eichholz and his staff rushed Debtor into making a decision. A paralegal, not Mr. Eichholz, conveyed the offer to Debtor and told her it was the best she could hope for. There is no evidence that Debtor was offered any time to think about the offer when she voiced her reluctance. In fact, when she asked to speak to Mr. Eichholz, she was told he was unavailable. The fact that she consented to the settlement without having all her questions answered is demonstrated by her efforts to get more information from Mr. Eichholz. It was Debtor's displeasure about the settlement that prompted Mr. Eichholz to call her back and inform her that she was out of options; the settlement was fixed and unchangeable. Essentially, she was unable to obtain the information necessary to make an informed decision and was later discouraged, if not prevented, from changing her mind.

Debtor in this case has been poorly served by Mr. Eichholz, if she has been served at all. Whether Mr. Eichholz is qualified to render competent legal services cannot be decided by the facts presented in this case or the Thornton case. Likewise, the facts in this case do

not support any conclusions as to the adequacy of the settlement. What is clear from the facts of the case, as in Thornton, is that Mr. Eichholz did not exercise proper care in evaluating Debtor's injury. In fact, no attorney in the office, including Mr. Eichholz, ever met Debtor personally until the hearing in this bankruptcy case to consider the settlement. Sadly, the same was true in the Thornton case.

Perhaps more severe injuries would have qualified this Debtor and the debtor in the Thornton case to a personal consultation with Mr. Eichholz. Conceding that a lawyer will sometimes represent a client he or she has never met, it does seem fair to require at a minimum that a lawyer in a personal injury case actually talk to the client, at least by telephone, before negotiating a settlement of the case. Understanding that soft-tissue injuries (so-called whiplash) can be quite similar from one case to the next and may not be expected to result in a significant verdict, it still seems appropriate at a minimum to expect an attorney to supplement a review of the client's medical records with a least one personal conversation before agreeing to settlement.

As for the appointment of attorney and approval of the settlement, the Court is not in a position to deny either request because the statute of limitations may prevent Debtor's personal injury case from being brought through another attorney. If the settlement is not approved, the claim may be rendered worthless.

While the Court is reluctant to allow any attorney fees in these circumstances, it will nevertheless grant Mr. Eichholz fees in the amount of $200 and costs in the amount of $193.96. This sum is based on the conclusion that the time spent in Debtor's representation by attorneys in Mr. Eichholz's office was limited to no more than four telephone calls.

An Order in accordance with this Opinion will be entered on this date.

Dated this 23rd day of December, 2005.

_____
James D. Walker, Jr.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that the attached and foregoing have been served on the following:

Newmark & Gastin
Post Office Box 8012
Savannah, Georgia 31412

Benjamin Eichholz
Post Office Box 10244
Savannah, Georgia 31412

Sylvia Ford Brown
Post Office Box 10556
Savannah, Georgia 31412

This 23rd day of December, 2005.

_____
Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court

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SOUTHERN DISTRICT OF GEORGIA
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	)	
DEBTORS.	)	

ORDER

In accordance with the Memorandum Opinion entered on this date, it is hereby ORDERED that Benjamin S. Eichholz shall be compensated in the amount of $200 for fees and $193.96 for costs incurred in his representation of Debtor in a personal injury case.

So ORDERED, this 23rd day of December, 2005.

_____
James D. Walker, Jr.
United States Bankruptcy Judge

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This 23rd day of December, 2005.

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Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court