

**In the United States Bankruptcy Court**  
**for the**  
**Southern District of Georgia**  
**Savannah Division**

In the matter of:	)	
	)	Chapter 13 Case
VANCE L. FULLER	)	
	)	Number <u>01-40412</u>
<i>Debtor</i>	)	

**ORDER ON MOTION TO SETTLE PERSONAL INJURY CLAIM**

Approval of Settlement

The Debtor's bankruptcy case was filed on February 9, 2001. His bankruptcy counsel is Barbara B. Braziel. On February 16, 2002, the Debtor suffered personal injuries in an automobile collision and hired Benjamin S. Eichholz as his attorney to pursue that personal injury action. Mr. Eichholz has not been approved as personal injury counsel for the Debtor, nor was he retained by the Trustee. On October 31, 2002, Mr. Eichholz filed a Motion seeking to settle the personal injury claim for \$12,500.00 and sought an award of thirty-three and a third percent of that as a contingent fee. At the hearing to consider approval of those matters on December 18, 2002, Ms. Braziel was present as was the Trustee, but neither the Debtor nor Mr. Eichholz appeared. Neither Ms. Braziel nor the Trustee had been provided with any substantive information regarding the settlement so as to be in a position to recommend it to the Court other than the fact that they were provided with documents by Mr. Eichholz's office showing that the Debtor had agreed to the settlement.

In light of the Debtor's consent to the settlement and the lack of any opposition from any party in interest, all of whom received notice, I conclude that the settlement should be approved in the amount of \$12,500.00.

#### Attorney's Fees

Mr. Eichholz seeks the Court's approval of a one-third contingent fee in this case. That request is denied for the reasons set forth herein.

First, Mr. Eichholz has not been approved as the Debtor's personal injury counsel. Under 11 U.S.C. § 329 attorneys representing any debtor have certain duties. Mr. Eichholz has not complied with the duties imposed by that section. Under subsection (b), the Court has the authority to regulate fees, including disallowance of any excessive fee or cancellation of the fee agreement. In that Mr. Eichholz failed to file the required disclosure, failed to file a copy of the fee agreement, and failed to appear at the hearing to explain the reasonable value of his services, I find that he is not, at this time, entitled to any fee.

Second, Mr. Eichholz did not timely seek approval of his employment under 11 U.S.C. § 327(a) or (e). Allowance of compensation to professionals appointed under Section 327 is regulated by Section 328 and by Section 330. However, if an attorney has not been properly retained and approved by the Court, disallowance of all fees is clearly authorized. *See, e.g., Land West, Inc. v. Coldwell Banker Commercial Group (In re Haley)*, 950 F.2d 588, 590 (9th Cir. 1991); *Lavender v. Wood Law Firm*, 785 F.2d 247, 248 (8th Cir. 1986); *In re 245 Assocs., LLC*, 188 B.R. 743, 749 (Bankr. S.D.N.Y. 1995). Some

courts have even applied what I consider a rather draconian rule which absolutely prohibits the payment of any fees to counsel who fail to get court approval for their services prior to rendering any service; however, application of that absolute rule has softened, even in the Second and Eighth Circuits, which generally adopt a *per se* rule disallowing fees to professionals who have not received prior approval of the bankruptcy court. *See, e.g., In re 245 Assocs.*, 188 B.R. at 749-50, 751-52 (characterizing requirement as *per se* rule in Second Circuit but concluding that excusable neglect standard adopted in Pioneer Investment Services Company v. Brunswick Associates, 507 U.S. 380, 387-95, 113 S. Ct. 1489, 1494-98, 123 L. Ed. 2d 74 (1993) for allowance of late claims should apply to *nunc pro tunc* employment applications); Lavender, 785 F.2d at 248-49 (stating that lack of prior approval ordinarily requires denial of compensation but noting equity power of bankruptcy court to enter *nunc pro tunc* order where necessitated by fundamental fairness).

I have held in the past and continue to believe that the approval of an attorney retroactively is both authorized and reasonable if the attorney is otherwise qualified to serve and would have been appointed earlier had a timely application been made. *See In re Concrete Prods., Inc.*, 208 B.R. 1000, 1008 (Bankr. S.D. Ga. 1996) (“The inquiry requires an applicant to demonstrate both the professional person’s suitability for appointment and the existence of excusable neglect sufficient to justify the failure to file a timely application.” (emphasis deleted)).

In this case it remains to be seen whether Mr. Eichholz can obtain retroactive approval of his employment in this case for the following reasons:

- 1) He has utterly failed to timely prosecute his Motion for Approval by failing to make an appearance when the case was called, by failing to obtain a continuance or excuse from this Court for non-appearing, and by failing to inform Debtor's bankruptcy counsel or the Trustee, or both, of the reasons why the Court should approve the settlement.
  
- 2) Mr. Eichholz stands in default and possibly contempt of this Court for failing to remit sums to a Debtor in another case, *see* In re Angela A. Montalvo, Ch.13 Case No. 01-43264, Order signed Nov. 1, 2002, and entered Nov. 5, 2002. That Order required Mr. Eichholz, for reasons stated in the Order, to remit \$467.00 which the Court had deemed to be an excessive portion of a fee in another case to Ms. Montalvo's bankruptcy counsel, John Pytte, who was to transmit those funds to the Debtor. At the hearing in this case, Mr. Pytte, who was in the courtroom, was questioned by the Court as to whether those funds had been received by his client, Ms. Montalvo. He represented to the Court that those monies have not been remitted by Mr. Eichholz. Mr. Eichholz's conduct in the Montalvo case is inexcusable in its own right. Mr. Pytte also revealed, upon further questioning by the Court, his belief that his client, Ms. Montalvo, has not received her share of the settlement proceeds which the Court approved payment of in May of this year. If correct, that delay is unreasonable, unexplained, and inexcusable on the part of Mr. Eichholz.
  
- 3) A similar fact pattern to that in the case at hand has emerged in the case of In re Glover, which will be the subject of a separate order entered by the Court, but it

reveals a pattern of conduct which calls into further question Mr. Eichholz's fitness for appointment as counsel in the case at hand.

- 4) Furthermore, in another recent case, in In re Beachcan, Chapter 7 Case Number 02-41701, Mr. Eichholz acted as counsel to the corporate debtor in a case which was more abusive than any this Court has witnessed in more than 16 years. The conduct was so utterly without foundation, or merit, or excuse, that this Court ordered sanctions against Debtor's president in the amount of \$1,000.00 to be paid to the Chapter 7 Trustee in the case. The evidence fully supported a similar award against Mr. Eichholz, but the Court imposed sanctions only on the client because he had engaged in similar conduct in the past, employing different counsel, and was clearly the more culpable individual.

For the foregoing reasons, any attorney's fee award in this case stands disallowed and Mr. Eichholz is ORDERED to remit \$8,268.33 to the Debtor instanter. The balance of the settlement in the amount of \$4,231.67 shall be remitted to the Chapter 13 Trustee instanter and held pending further order of the Court.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of December, 2002.