IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IN RE:	§	
	§	
EARLINE BIGBIE	§	Case No. 00-20720
	§	
Debtor	§	Chapter 7

MEMORANDUM OF DECISION

This matter came before the Court for hearing of "Hibernia National Bank's Application for Administrative Expenses" (the "Application") filed by Hibernia National Bank ("Hibernia") on November 26, 2001, and the objection filed thereto by Pilgrim Bank ("Pilgrim") on December 12, 2001, in the above-referenced Chapter 7 case of the Debtor, Earline Bigbie ("Debtor"). Hibernia's Application seeks an award of administrative expenses against the Chapter 7 bankruptcy estate of Earline Bigbie, pursuant to 11 U.S.C. §503(b)(3)(B) and §503(b)(4), arising from expense reimbursements totaling $3,503.22 and attorney's fees in the amount of $26,865.00 which Hibernia asserts that it incurred in prosecuting, and ultimately settling, certain objections to the Debtor's claims of exemption as well as an adversary complaint objecting to the Debtor's discharge. At the conclusion of the hearing conducted on January 9, 2002, the parties were given additional time within which to submit post-hearing briefs to the Court. At the conclusion of that period, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[1]

Factual Background

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code

[1] This Court has jurisdiction to consider the Application pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

on April 19, 2000. Timely objections to the Debtor's claim of exemptions were filed by the Chapter 7 Trustee, Jason R. Searcy, the East Texas Council of Governments, and by Hibernia. Those objections were tried, with Hibernia's counsel undoubtedly taking the lead for the benefit of the objecting parties. However, Hibernia's counsel was not at that time, and has not subsequently become, authorized to represent the bankruptcy estate pursuant to 11 U.S.C. §327. At the conclusion of the exemption hearing, the Court took the issues under advisement.

Hibernia had also timely filed a complaint objecting to the Debtor's discharge based upon the Debtor's alleged pre-petition fraudulent transfer of non-exempt assets into exempt annuities. During the pre-trial phase of the discharge adversary, and while the exemption matters were under advisement with the Court, the parties, with the assistance of a skilled mediator, reached an agreement to settle all of the pending objections to exemption, as well to settle the issues raised by Hibernia's objection to discharge.[2] Under the exemption settlement, the Chapter 7 bankruptcy estate will realize proceeds in excess of $138,000.00. The parties to the settlement further agreed to forego any objection to a subsequent Hibernia request for an award of an administrative expense based upon incurred fees and expenses in an amount not to exceed $30,000.00.

Hibernia filed such an application on November 26, 2001, ultimately contending that, because of the efforts of its counsel with regard to the exemption objections, a substantial benefit was conferred upon the bankruptcy estate through the addition of significant non-exempt assets which will increase the dividend to be paid to all creditors and that the costs of obtaining such results should be borne by the bankruptcy estate. However, Pilgrim Bank, another secured

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[2] Both of these settlements have now been approved without objection upon proper notice pursuant to Fed. R. Bankr. P. 9019.

creditor of the estate, but which was not a party to the settlements, objected to the Hibernia request, alleging that there simply is no statutory authority under which the Court could properly grant an administrative expense priority to Hibernia for recovery of its fees and expenses in a Chapter 7 case in light of the fact that Hibernia was never authorized to act on behalf of the Chapter 7 estate.

A hearing was held on this matter on January 9, 2002. The excellent quality of the legal services rendered by Hibernia's legal counsel in these matters has not been disputed, nor has the fact that the exemption settlement conferred a benefit upon the bankruptcy estate. Hibernia presented the testimony of the Chapter 7 Trustee who testified that he would have pursued the exemption objections had Hibernia not taken the lead, and that, because he charges a higher hourly rate, he would likely have incurred fees and expenses in excess of the amount sought by Hibernia in its Application. Notwithstanding such testimony, Pilgrim maintained that Hibernia's failure to seek prior court approval of its efforts to act on behalf of the bankruptcy estate prevented it from obtaining, under §503(b)(3)(B) of the Code, any administrative expense priority for its incurred expenses, and that Hibernia cannot be authorized to receive an administrative expense award under §503(b)(3)(D) because that subsection is limited to proceedings under Chapters 9 and 11.

Discussion

The parties have focused almost exclusively upon whether Hibernia may be authorized to recover its expenses under §503(b)(3)(B). Because the Court agrees that this is the only subsection of §503(b)(3) under which Hibernia could arguably be entitled to an administrative expense award for its incurred expenses and which could therefore serve as the necessary

prerequisite for the recovery of reasonable professional compensation under §503(b)(4), the Court will focus its analysis primarily upon this subsection.[3]

It is clear that a split of authority exists as to whether prior court approval of a creditor's representation of a bankruptcy estate, presumably under §327(c) of the Bankruptcy Code,[4] is required before a creditor may be authorized to receive an administrative expense priority for its expenses and fees under 11 U.S.C. §503(b)(3)(B) and §503(b)(4), respectively. The plain language of §503(b)(3)(B) requires prior court approval;[5] however, there is a line of cases which support the proposition that prior court approval is not an absolute prerequisite. *See In re Zedda*, 169 B.R. 605 (Bankr. E.D. La. 1994); *In re Antar*, 122 B.R. 788 (Bankr. S.D. Fla. 1990); *In re Johnson*, 72 B.R. 115 (Bankr. E.D.N.C. 1987); *In re Rumpza*, 54 B.R. 107 (Bankr. D.S.D. 1985); and *In re George*, 23 B.R. 686 (Bankr. S.D. Fla. 1982). As stated by *In re Schachter*, 228 B.R. 359, 364 (Bankr. E.D. Pa. 1999), however, "[t]hree of these decisions, specifically *Antar*,

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[3] No other subsection of §503(b)(3) could even remotely apply to Hibernia's claim, except for §503(b)(3)(D) which is expressly made applicable only "in a case under chapter 9 or 11 of this title."

[4] 11 U.S.C. §327 (c) states that:

> In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is an objection by another creditor or the United States Trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

[5] 11 U.S.C. §503(b) provides, in relevant part, that:

(b) After notice and a hearing, there shall be allowed administrative expenses . . . including —

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by —

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor.

Johnson, and *George*, acknowledge that prior appointment of counsel is generally a prerequisite to a §503(b)(3)(B) recovery, but they further hold that retroactive or *nunc pro tunc* appointment is appropriate under the circumstances of these cases." While the Court might be willing to forego prior employment approval under appropriate circumstances, it need not consider that option in this instance since Hibernia has not sought *nunc pro tunc* appointment in this case. Thus, these three cases cited by Hibernia are easily distinguishable and cannot be legitimately utilized in support of Hibernia's request.

Likewise, Hibernia relies upon *In re Romano*, 52 B.R. 590 (Bankr. M.D. Fla. 1985), for the proposition that "[o]ther Courts have also permitted recovery of administrative expenses without prior Court approval."[6] However, the *Romano* case does not truly stand for this proposition. Rather, the *Romano* Court supports the argument that prior court approval is a prerequisite for the recovery of administrative expenses under 11 U.S.C. §503(b)(3)(B). While *Romano* awarded compensation to a creditor for the reasonable value of legal services rendered during the debtor's case, those services occurred within the confines of a Chapter 11 proceeding and the award granted in that case was expressly made pursuant to the "substantial contribution" standard of 11 U.S.C. §503(b)(3)(D), a standard which cannot be invoked in the present Chapter 7 case. *See In re Romano,* 52 B.R. at 593-94. The *Romano* Court specifically considered and rejected an argument by the creditor that it was entitled to an administrative expense priority under §503(b)(3)(B), with the Court stating that "the better view is represented by the line of cases which hold that prior court approval is prerequisite to the allowance of a creditor's reasonable fees and expenses as an administrative priority pursuant to §503(b)(3)(B)." *Id.* at 593.

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[6] *See* Hibernia's Brief in Support of Application for Administrative Expenses, p. 2, ¶ IV.

The *Romano* Court concluded that ". . . although there is no doubt that these creditors successfully blocked this Debtor's discharge and were instrumental in the ultimate recovery of fraudulently transferred property, they are not entitled to recover fees and expenses pursuant to §503(b)(3)(B)." *Id.*

In *In re Rumpza*, the court simply ignored the specific language in the statute requiring court approval, stating that "[a]lthough Mr. Damgaard (the attorney for the creditors) did not obtain prior court approval, efforts such as these by creditors on behalf of the estate and resulting in a benefit to all creditors should be encouraged, and the Court will not deny him compensation on that basis." 54 B.R. at 109. There is no discussion by the *Rumpza* court as to why it felt authorized or was willing to ignore the plain language of §503(b)(3)(B). Clearly the *Rumpza* court felt that it was doing the "equitable" thing under the circumstances, but this Court believes that a bankruptcy court must always exercise due caution to insure that its equitable powers are being exercised in a manner consistent with the provisions of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 969, 99 L.Ed.2d 169 (1988). *See also*, *In re Dow Corning Corp.*, 244 B.R. 721, 742 (Bankr. E.D. Mich. 1999, aff'd in part and rev'd in part, 255 B.R. 445 (E.D. Mich. 2000); *In re Appletree Markets Inc.*, 139 B.R. 417, 421 (Bankr. S.D. Tex. 1992) [finding that "substantive relief must be available under the Bankruptcy Code before the equitable powers may be utilized"]. The conclusory statement of the *Rumpza* Court that "efforts such as these . . . should be encouraged" provides an insufficient basis for ignoring the clear statutory parameters of §503(b)(3)(B).

The final case relied upon by Hibernia, *In re Zedda*, 169 B.R. 605 (Bankr. E.D. La. 1994), is also the only cited case arising from within the Fifth Circuit. The *Zedda* Court held in a

Chapter 7 case that the "services provided by the creditor substantially benefitted the estate and assisted in the recovery of assets to the estate," and it therefore permitted the assessment of the attorneys' fees of the creditor against the bankruptcy estate despite the lack of prior court approval. *Id.* at 608. However, *Zedda* is distinguishable from the present case because it was not another creditor who brought the objection to the administrative expense request, but rather the unaffected debtors. This distinction allowed the *Zedda* Court to eliminate the sole objection to the request on the basis of the lack of the debtors' standing and to sidestep the thornier issues regarding prior court approval or the presence of an actual conflict of interest. In fact, the *Zedda* Court recognized that it was ignoring the plain language of §503(b)(3)(B) in its ruling, admitting that its result "does not fit squarely within the language of Section 503(b)(3) or (b)(4)." *Id.* This Court does not find its analysis persuasive.

Section 503(b) clearly states that before a creditor or any other entity can become entitled to an administrative expense priority for reasonable compensation for professional services under this section, that creditor's expenses must first be "allowable under paragraph (3) of this subsection." *See* 11 U.S.C. §503(b)(4). Looking at the language of §503(b)(3), only §503(b)(3)(B) offers Hibernia a legitimate basis for the recovery of its expenses. Without deciding whether court approval could be retroactively granted, subsection (b)(3)(B) clearly requires that court approval must be given, at <u>some</u> point in time, to authorize a creditor to take action to recover property for the benefit of a bankruptcy estate before an expense can qualify for an administrative expense priority, notwithstanding the fact that the estate ultimately benefits from that creditor's actions in the absence of such approval. As recognized by one known commentator,

> The requirement of court approval is consistent with the court's authority to supervise the administration of the bankruptcy process. It prevents creditors from acting on their own to recover assets with the expectation that the costs of doing so will be borne by the bankruptcy estate.

4 COLLIER ON BANKRUPTCY ¶ 503.10 [3] at p. 503-62 (15th ed. rev. 2001). That position is supported by the greater weight of jurisprudence in this area. *See In re Schachter*, 228 B.R. 359 (Bankr. E.D. Pa. 1999); *In re Jelinek*, 153 B.R. 279 (Bankr. D.N.D. 1993); *In re Robbins*, 151 B.R. 364 (Bankr. W.D. Va. 1993); *In re Kam*, 106 B.R. 207 (Bankr. D. Haw. 1989); *In re Fall*, 93 B.R. 1003 (Bankr. D. Or. 1988); *In re Monahan*, 73 B.R. 543 (Bankr. S.D. Fla. 1987); *In re Romano*, 52 B.R. 590 (Bankr. M.D. Fla. 1985); *In re Kentucky Threaded Products, Inc.*, 49 B.R. 118 (Bankr. W.D. Ky. 1985); *In re Spencer*, 35 B.R. 280 (Bankr. N.D. Ga. 1983); *In re Calumet Realty Co.*, 34 B.R. 922 (Bankr. E.D. Pa. 1983); and *In re Casale*, 27 B.R. 69 (Bankr. E.D.N.Y. 1983). While a retroactive approval might be available under certain circumstances, it is evident that prior approval is the intended and preferable route for the justifiable purpose of insuring that, upon the granting of such approval, any and all decisions which are subsequently made by the creditor with regard to the prosecution of that particular matter are rendered solely in deference to the best interests of the bankruptcy estate.

That never occurred in this case. Though it was obviously willing to "man the oars" in leading the efforts of various parties to prevent the Debtor's attempt to exempt certain properties from the scope of the bankruptcy estate, there is no evidence that Hibernia ever acted nor ever released its counsel to act in any manner other than in conjunction with Hibernia's own self-interests. Hibernia clearly benefitted from its own actions in regard to the exemption objections,

particularly given the small number of creditors in this case, because Hibernia knew that it would share in any increased distribution amounts realized from the retention of those properties by the bankruptcy estate. However, through every juncture in this proceeding, Hibernia elected to retain its ability to act or to forbear from taking action in order to achieve its own objectives in this case, independent of any concern as to whether such action or forbearance would inure to the benefit of the bankruptcy estate or to all creditors as a collective group. That is, of course, a legitimate course of action for any creditor to take, but it has a consequence. It deprives that creditor from subsequently seeking compensation from the bankruptcy estate, at least in a Chapter 7 case, even when those creditor objectives continuously mirror those held by the bankruptcy estate and the estate ultimately benefits from the services rendered by that creditor. *In re Conty*, 205 B.R. 329, 332 (Bankr. M. D. Fla. 1996) ["The mere benefit to the estate is insufficient grounds for reimbursement under § 503."]. Under §503(b)(3)(B), the creditor's retention of the right to act solely in conjunction with its own self-interests, regardless of whether that right is actually exercised, precludes any reimbursement from the proceeds of the bankruptcy estate. Hibernia retained such a right in this case. Therefore, it is not entitled to any administrative expense priority under 11 U.S.C. §503(b)(3)(B).

This result is not altered by the fact that §503(b) utilizes the word "including" in its opening sentence. While it is certainly true that the rules of construction set forth in §102(3) of the Bankruptcy Code expressly state that the words "includes" and "including" are not limiting, and that the categories enumerated in Section 503 are illustrative rather than exhaustive, this Court is of the opinion that such flexibility is designed to be exercised in circumstances which

are not directly addressed by §503(b).[7] Section 503(b) does, however, directly and specifically address the particular circumstances under which a creditor may receive a reimbursement of expenses and fees from a bankruptcy estate. For example, §503(b)(3)(D), together with §503(b)(4), conjunctively allow a creditor in a Chapter 9 or 11 case to recover its fees and expenses from the estate if it makes a "substantial contribution" in such case. Congress' express exclusion of Chapter 7 from the provisions of §503(b)(3)(D) must be construed as intentional and meaningful.[8] So too must the requirement of court approval expressed in §503(b)(3)(B) be construed as a deliberate and purposeful effort by Congress to limit the circumstances under which a creditor may seek recovery of its expenses when its actions result in the recovery of property for the benefit of the bankruptcy estate. Particularly because the priority status awarded under §503 is to be construed narrowly in order to hold administrative expenses to a minimum and thus preserve the estate assets for the benefit of all creditors, *see, e.g., In re Das A. Borden & Co.*, 131 F.3d 1459, 1464 (11th Cir. 1997), citing *Otte v. United States,* 419 U.S. 43, 53, 95 S.Ct.

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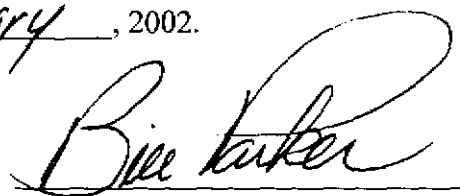
[7] It was such a special circumstance that was addressed in *Al Copeland Enterprises, Inc. v. Texas (Matter of Al Copeland Enterprises, Inc.)*, 991 F.2d 233, 238 (5th Cir. 1993), upon which Hibernia heavily relies, in which the Fifth Circuit properly recognized that "administrative expenses entitled to first priority status are not necessarily confined to those enumerated at 11 U.S.C. §503(b)," and affirmed the award of an administrative expense to the State of Texas based upon the bankruptcy estate's failure to pay sales taxes in compliance with the Texas Tax Code. That decision, however, does not support Hibernia's position in this case since there is a specific portion of §503(b) which addresses expense reimbursement for a creditor who recovers property for the benefit of a bankruptcy estate.

[8] In interpreting statutes, the United States Supreme Court has stated that a court's function "is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940). "The most compelling demonstration of congressional intent is the wording of the statute. . . . The court is bound by the plain language of the statute especially where, as here, there is nothing in the statute or its legislative history to indicate a contrary intent." *Hall Fin. Group, Inc. v. DP Partners, Ltd. Partnership (In re DP Partners, Ltd. Partnership)*, 106 F.3d 667, 670-71 (5th Cir. 1997) [construing 11 U.S.C. §503(b)(3)(D) according to its plain language]; *see also In re Peterson*, 152 B.R. 612 (Bankr. D.S.D. 1993) [discussing the plain meaning rule as it applies to §503(b)(3)(D)] .

247, 42 L.Ed.2d 212 (1974); and *In re Canton Jubilee, Inc.*, 253 B.R. 770, 775 (Bankr. E.D. Tex. 2000), the use of the term "including" in §503 cannot be properly interpreted to authorize an award of an administrative expense to a creditor which cannot otherwise meet the requirements specifically imposed by that statute in order to qualify for a reimbursement of expenses and fees from a bankruptcy estate. Any perceived inequities arising from such circumstances must properly be addressed by Congress, not by the courts. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46, 112 S.Ct. 1644, 1649, 118 L.Ed. 2d 280 (1992).

Accordingly, because Hibernia has not met its burden of proof by showing that it is entitled to an administrative expense priority under 11 U.S.C. §503(b), this Court concludes that Hibernia's Application must be denied. An appropriate order will be entered which is consistent with this opinion.

SIGNED this the 6th day of February, 2002.



BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

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	Jason R. Searcy, Atty for Chapter 7 Trustee	**Fax:**	**903-757-9559**
	Mitch Motley, Atty for ETCOG	**Fax:**	**903-236-8787**
	Donald Cothern, Atty for Debtor	**Fax:**	**597-0940**

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Debtor	§	Chapter 7

MEMORANDUM OF DECISION

This matter came before the Court for hearing of "Hibernia National Bank's Application for Administrative Expenses" (the "Application") filed by Hibernia National Bank ("Hibernia") on November 26, 2001, and the objection filed thereto by Pilgrim Bank ("Pilgrim") on December 12, 2001, in the above-referenced Chapter 7 case of the Debtor, Earline Bigbie ("Debtor"). Hibernia's Application seeks an award of administrative expenses against the Chapter 7 bankruptcy estate of Earline Bigbie, pursuant to 11 U.S.C. §503(b)(3)(B) and §503(b)(4), arising from expense reimbursements totaling $3,503.22 and attorney's fees in the amount of $26,865.00 which Hibernia asserts that it incurred in prosecuting, and ultimately settling, certain objections to the Debtor's claims of exemption as well as an adversary complaint objecting to the Debtor's discharge. At the conclusion of the hearing conducted on January 9, 2002, the parties were given additional time within which to submit post-hearing briefs to the Court. At the conclusion of that period, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[1]

Factual Background

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code

[1] This Court has jurisdiction to consider the Application pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).