

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
RICHARD & JAYNE WHITE,) CASE NO. BK99-40009
)
Debtor(s).) CH. 7

MEMORANDUM

Hearing was held in Omaha on July 24, 2001, on Coors Distributing of North Platte, Inc.'s ("Coors") Motion for Attorney's Fees and for Leave to File an Unsecured Claim (Fil. #265) and Resistance by Debtors (Fil. #271), and on the Debtors' Objection to the Unsecured Claim of Coors Distributing of North Platte, Inc. (Fil. #268) and Resistance by Coors Distributing of North Platte, Inc. (Fil. #272). Bert Blackwell appeared for the debtors. Allan Fugate appeared for Coors Distributing of North Platte, Inc. Philip Kelly appeared for the Chapter 7 Trustee. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (B).

I. ISSUES

A. Whether orders allowing fees are final orders and not subject to review or modification by the bankruptcy court.

B. Whether attorney's fees and costs for a litigating creditor can be allowed as an unsecured claim.

C. If so, what amount of the total fees incurred may be allowed.

II. DECISION

A. Prior fee orders are not final orders.

B. Applying Nebraska statutory authority, fees incurred by a litigating creditor may be allowed as an unsecured claim.

C. The creditor is allowed \$7,023.57 in attorney's fees and costs as an unsecured claim. The balance of the creditor's fee request, \$9,396.48, is not allowed.

III. DISCUSSION

A. Background

In this case, the bankruptcy estate consists of cash and real property that can be converted to cash. All secured and unsecured claims will be paid. The matter which is the subject of this memorandum is whether all or a portion of fees incurred by a creditor in litigation with the debtor may be allowed as an unsecured claim and paid by the Trustee.

The present motions are the most recent in a series of contested matters between the debtors and this creditor, all arising from the debtors' purchase of a pickup truck from Ross Perry Motors in May 1997. The sales contract was assigned to Coors. Debtors defaulted on the truck payments, and the creditor repossessed the vehicle. The debtors then filed a Chapter 13 bankruptcy case, which was subsequently converted to Chapter 7. The debtors challenged Coors' proof of claim, asserting that Coors could not legally charge 18 percent interest as a term of the parties' installment sales contract unless Coors was the seller or a licensed sales finance company. The Bankruptcy Court (Minahan, J.) ruled in favor of Coors in October 2000, granting it an allowed secured claim which included post-petition interest at the contract rate and attorney's fees and costs of \$7,023.57¹ under 11 U.S.C. § 506(b). That decision was affirmed by the Eighth Circuit's Bankruptcy Appellate Panel. White v. Coors Distrib. Co. (In re White), 260 B.R. 870 (B.A.P. 8th Cir. 2001).

Coors subsequently moved for allowance of additional attorney's fees and costs of \$5,945.40.² That request was granted in April 2001 (Mahoney, J.), permitting Coors to include the fees in an unsecured claim to the extent the amount of the secured claim plus allowed fees exceeded the value of the collateral. See Fil. #263. However, when Coors filed its fourth and final request for fees and moved the allowance of its unsecured claim, the debtors objected on the theory that there is no authority to allow any of the fees as an unsecured claim.

¹This amount is the sum of Coors' first and second requests for attorney's fees (Fils. #81 and 126), which were ruled on together.

²Coors' third request for fees (Fil. #252).

The parties agree that the value of the collateral was \$18,000. The principal amount owed to Coors on the debt is \$12,152.54, plus pre-petition interest of \$2,404.54, which brings the secured claim to \$14,557.08, and which leaves an equity cushion of \$3,442.92 for post-petition interest and attorney's fees.

Post-petition interest as of the hearing date amounted to \$5,573.52, which exceeds the available equity. Post-petition interest of \$3,442.92 will be allowed as part of Coors' secured claim. Any post-petition interest above that amount is disallowed. None of Coors' attorney's fees can be allowed as part of the secured claim because the value of the collateral is not greater than the amount of the creditor's claim to principal, pre-petition accrued interest, and \$3,442.92 of post-petition accrued interest.

Coors' fourth application for fees is now before the court. In it, the creditor seeks allowance of \$3,451.08 in attorney fees and expenses incurred in connection with the appeal to the B.A.P. The debtors object to the allowance of any portion of the third and fourth applications as an unsecured claim on the grounds that attorney's fees may not be allowed beyond the extent of the creditor's equity cushion in the collateral, unless there is statutory or other long-standing authority under state law for such an award. The debtors also assert that the order of April 19, 2001, purportedly permitting Coors to seek attorney's fees in excess of the equity cushion as an unsecured claim, was not a final, appealable order and is therefore subject to reconsideration at this time. The question of finality shall be dealt with first.

B. Finality

The question of whether an order is final "presents an unusual degree of difficulty because, in contrast to most other civil litigation, finality in bankruptcy is a more elusive concept." Iannochino v. Rodolakis (In re Iannochino), 242 F.3d 36, 43 (1st Cir. 2001).

Many courts consider three factors when deciding whether a bankruptcy court's order is final for purposes of district court or appellate court review. Maquoketa State Bank v. Hayes (In re Hayes), 220 B.R. 57, 60 (N.D. Iowa 1998). Those factors are: (1) the extent to which the order leaves the bankruptcy court nothing to do but execute the order; (2) the extent to which

delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) the extent to which reversal would require recommencement of the entire proceeding. These three components are known as the Koch test, after In re Koch, 109 F.3d 1285 (8th Cir. 1997).

The first element of the test, whether the bankruptcy court has anything left to do but execute the order, should be judged by reference to the particular dispute resolved by that order, not by reference to the entire bankruptcy proceeding. Hayes, 220 B.R. at 60. "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." In re Saco Local Dev. Corp., 711 F.2d 441, 444 (1st Cir. 1983) (quoted in Hayes, 220 B.R. at 61). See also Iannochino, 242 F.3d at 43 ("To be final, a bankruptcy court order need not resolve all the issue raised by the bankruptcy, though it must completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief." (internal quotations omitted)); Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277, 282 (5th Cir. 2000) ("[A]n appealed bankruptcy order must constitute either a final determination of the rights of the parties to secure the relief they seek, or a final disposition of a discrete dispute within the larger bankruptcy case for the order to be considered final." (internal quotations omitted)).

If nothing is left for the bankruptcy court to do except execute its order, then presumably the bankruptcy court's fact-finding and legal analysis regarding that dispute is at an end. Hayes, 220 B.R. at 61. However, that depends on what kind of dispute was resolved. Orders which finally resolve disputes over "what the debtor owes or owns, or who gets what from the bankruptcy estate . . . are final, since those disputes go to the core of the bankruptcy process, which is to collect and distribute the assets of the debtor in an orderly and statutorily pre-determined manner." Id. Orders that resolve matters other than the assets and liabilities of the estate or the relative priority of the estate's creditors are not final. Id. For instance, orders regarding motions to convert or motions for confirmation or motions to extend time to object to discharge are not final. Id.

In the context of attorney's fees, an interim award of attorney's fees to a debtor's attorney under 11 U.S.C. §§ 330 and 331 was found to be not final "because the order does not

fully resolve the attorney's claim, leaving open the possibility that the claim will later be enlarged through future fee applications." Iannochino, 242 F.3d at 44.

"[T]he question of whether a particular order granting compensation is interlocutory or final necessarily depends upon the circumstances of the case." In re Dahlquist, 751 F.2d 295, 297 (8th Cir. 1985).

In the present case, it is reasonable to conclude that the order dated April 19, 2001, was not a final order. While it dealt with the creditor's request for attorney's fees in the context of claims allowance, the motion requested fees only for a distinct time period. Fee applications had been filed and ruled on for previous periods and presumably would be filed for subsequent periods. Coors' fee requests have been made and allowed in stages. In that regard, the order of April 19 approved only the fees requested in the third application. Because the litigation was continuing at that point, it was clear that future requests for compensation could be expected.

Moreover, Coors had not filed its unsecured claim at that time, so the April 19 order cannot be viewed as making a claims determination affecting the distribution of the estate's assets. Either way, the issue of compensation for Coors' attorney was not fully resolved by the April 19 order. It therefore is not a final order.

In the present motion, the fourth fee application, Mr. Fugate is requesting fees of \$3,025 (27.5 hours of attorney time at \$110 per hour) and expenses of \$426.08. This fee application includes preparation for and travel to Omaha from North Platte to argue the appeal before the B.A.P. In performing the lodestar analysis on Mr. Fugate's previous applications for attorney's fees, Judge Minahan found \$110 to be a reasonable hourly rate given the applicant's experience in bankruptcy law and his familiarity with this case. Order of Oct. 11, 2000, at 4 (Fil. #242). For purposes of this application, Judge Minahan's previous ruling on the reasonableness of the hourly rate shall be followed. The number of hours expended also is reasonable. Therefore, if there is authority for allowing the amounts applied for in the third and fourth applications as unsecured claims, such amounts shall be allowed.

C. Attorney Fees as Administrative Expense

The Bankruptcy Code, at §§ 503(b)(3)(B) and 503(b)(4), permits a creditor to recover as an administrative expense its actual, necessary expenses and its attorney fees if it "recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor[.]" 11 U.S.C. § 503(b)(3)(B).

The language of the statute expressly requires prior court approval for the creditor's action. See, e.g., In re Lagasse, 228 B.R. 223, 225 (Bankr. E.D. Ark. 1998) ("Although there are a few cases in which the courts ignore this language in favor of a general policy of encouraging creditor involvement, . . . the better rule in applying section 503 is to apply the plain meaning of the statute." (citations omitted)); In re Schachter, 228 B.R. 359, 364 (Bankr. E.D. Pa. 1999) ("We therefore conclude that the weight of authority clearly supports the conclusion that court appointment of counsel must precede any successful application pursuant to § 503(b)(3)(B). . . Hence, [the creditor's] Motion can succeed only if it is able to establish that it is entitled to *nunc pro tunc* appointment under § 503(b)(3)(B).")

Here, there was no such request for or grant of approval. The ability to receive post-application approval is narrowly circumscribed. See Schachter, 228 B.R. at 365:

[A]ppointment of a professional person *nunc pro tunc* is appropriate only in the following circumstances:

"first, the bankruptcy court must find, after a hearing, that the applicant satisfied the disinterestedness requirements of section 327(a) and would therefore have been appointed initially; and, second, the court must, in the exercise of its discretion, determine that the particular circumstances presented are so extraordinary as to warrant retroactive approval.

"To guide the bankruptcy court in the exercise of its discretion regarding the existence of 'extraordinary circumstances,' we directed it to consider such factors as: whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without

approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors."

Schachter, 228 B.R. at 365 (quoting In re LaBrum & Doak, LLP, 227 B.R. 391 (Bankr. E.D. Pa. 1998) and In re Arkansas Co., 798 F.2d 645, 650 (3d Cir. 1986)).

None of these factors fall in Coors' favor. The creditor had the responsibility of seeking prior court approval but did not, and no obstructions to such application are evident from the record. In fact, it does not appear that recovery of these costs as an administrative expense was even contemplated until it became apparent that the equity cushion in Coors' collateral was insufficient to cover the mounting litigation costs.

Moreover, the amount of the fees requested in similar cases is compared to the benefit to the estate. If the fees constitute too great a percentage of the benefit, they are disallowed. See Lagasse, 228 B.R. at 225, where attorney's fees amounting to ninety percent of the benefit to the estate were found to be unreasonable. In the present case, the benefit to the estate resulting from the efforts of the attorney for Coors has not been calculated, although such benefit may have been considered in Judge Minahan's initial order approving fees.

Because this creditor has not met the express requirements of § 503(b)(3)(B), the fees will not be allowed as an administrative expense.

D. Attorney Fees as Unsecured Claim

Some courts have permitted undersecured creditors to recover their attorneys' fees as part of the creditors' general unsecured claims. See Joseph F. Sanson Inv. Co. v. 268 Ltd.(In re 268 Ltd.), 789 F.2d 674, 678 (9th Cir. 1986) ("Because § 501 contemplates that undersecured creditors may pursue the unsecured portion of their claims as unsecured creditors, we find that oversecured creditors with valid contractual fee claims may do the same."); Kentucky Higher Educ. Assistance Auth. v. Fears (In re Fears), 258 B.R. 371, 373-74 (W.D. Ky. 2001) (§ 501(b) does not preclude an unsecured creditor's claim for reasonable pre-petition collection fees); In re Byrd, 192

B.R. 917, 919 (Bankr. E.D. Tenn. 1996) (Contractual right to post-petition attorney's fees is a pre-petition claim, which is allowed under § 502. Section 506(b) does not create additional exceptions regarding claims allowance; it merely provides for classification of allowed claims as secured or unsecured.); In re Tricca, 196 B.R. 214, 219 (Bankr. D. Mass. 1996) (undersecured creditor could file general unsecured claim for attorney's fees recoverable under applicable Massachusetts statute). See also James Gadsden & Seigo Yamasaki, Recovery of Attorney Fees as an Unsecured Claim, 114 Banking L.J. 594 (1997); Sara J. Stubbe, Oversecured Creditor Attorneys' Fees & Costs Under Section 506(b), Practising Law Institute's 19th Annual Current Developments in Bankruptcy & Reorganization, 753 PLI/Comm. 373 at 392-93 (1997).

In Nebraska, attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure has been to permit such a recovery. Ryan v. Ryan, 600 N.W.2d 739, 746 (Neb. 1999); In re Lichty, 251 B.R. 76, 77 (Bankr. D. Neb. 2000). Customarily, attorney fees are awarded only to prevailing parties or assessed against a litigant who advances a claim which is frivolous or made in bad faith. Ryan, 600 N.W.2d at 746-47. See also Neb. Rev. Stat. §§ 25-824, -824.01.

Section 25-824(2) of the Nebraska statutes authorizes the assessment of attorney's fees and costs "against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith." Section 25-824(4) permits the court to impose attorney's fees and costs against an attorney or party who "brought or defended an action or any part of an action that was frivolous or . . . interposed solely for delay or harassment," or "who unnecessarily expanded the proceedings by other improper conduct."

"Frivolous," for purposes of § 25-824, means an improper motive or a legal position so wholly without merit as to be ridiculous. Blecha ex rel. Raney v. Blecha, 599 N.W.2d 829, 833 (Neb. 1999).

The Nebraska Supreme Court distinguishes claims which are merely unsuccessful from those which are frivolous. "A claim or defense that is simply without merit is not by definition frivolous." Snover v. Line, 546 N.W.2d 341, 349 (Neb. Ct. App. 1996) (quoting Shanks v. Johnson Abstract & Title, 407 N.W.2d

743, 747 (Neb. 1987)). "[A]ttorneys and litigants should not be inhibited in pressing novel issues or in urging a position that can be supported by a good-faith argument for an extension, modification or reversal of existing law[.]" Id.

The legislature recognized a similar potential for chilling the pursuit of justice, so it included the following paragraph in § 25-824:

(5) No attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state or if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that he or she would not prevail on such claim or action.

The relevant Nebraska statute contains a non-comprehensive list of factors to consider in deciding whether to assess attorney's fees under § 25-824(2) for frivolous claims or claims brought in bad faith. Those factors include:

- the extent to which any effort was made to determine the validity of the action or claim before it was asserted;
- the extent of any effort after the action was commenced to reduce the number of claims or defenses asserted or to dismiss claims or defenses lacking validity;
- the availability of facts to assist the party in determining the validity of a claim or defense;
- the relative financial positions of the parties;
- whether or not the action was prosecuted or defended in whole or in part in bad faith;
- whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;
- the extent to which the party prevailed with respect

to the amount of and number of claims in controversy;

- the amount or conditions of any offer of judgment or settlement relative to the amount or conditions of the ultimate relief granted by the court;
- the extent to which a reasonable effort was timely made to determine that all parties sued were proper parties owing a legally defined duty to the plaintiff or defendant; and
- the extent of any effort made after the commencement of an action to reduce the number of parties in the action.

Neb. Rev. Stat. § 25-824.01.

The reported cases applying § 25-824(2) seem to use "frivolous" and "bad faith" interchangeably; they do not offer a specific definition of "bad faith" in the attorneys' fees context. The only case to provide any guidance in that regard is Stratman v. Hagen, 376 N.W.2d 3, 7 (Neb. 1985): "We have held that attorney fees may be assessed against a party whom the court determines is responsible for conduct during the course of litigation which is vexatious and unfounded to the extent it constitutes bad faith toward the other party to the litigation."

After considering the facts and circumstances of this case, it is clear that Debtors' conduct throughout this case has been directed toward the goal of keeping their non-exempt assets away from their creditors. The evidence presented on the pending motions is compelling. It is clear from the Trustee's affidavit dated October 25, 1999; from the affidavit of the president of Coors Distributing dated August 31, 1999; and from the Order converting this case from Chapter 13 to Chapter 7 that Mr. Fugate's efforts on behalf of his client were instrumental in uncovering property of the estate which had not been included in the bankruptcy schedules. The debtors' failure to keep adequate financial records, to account for proceeds from an insurance policy, and to list or appropriately value certain personal property on their schedules contributed to the decision to convert this case to one under Chapter 7.

Such conduct on the part of the debtors constitutes bad faith under the Nebraska statutes because the debtors' concealment of assets was done to harass and frustrate

creditors, and it caused delay and additional court proceedings. Therefore, under Neb. Rev. Stat. §§ 25-824(2) and -824(4), Coors shall be awarded those attorney's fees and costs incurred in investigating and litigating the motion to convert. Those fees and costs are set forth in the first and second fee applications, and total \$7,023.57.

The remainder of the fees and expenses sought, as set forth in the third and fourth fee applications, appear to be related primarily to the debtors' objection to Coors' claim. Debtors' counsel asserts that his clients had a reasonable basis for pursuing the objection to Coors' claim, which involved the Nebraska Installment Sales Act. The record supports his assertion. Judge Minahan initially ruled that the underlying contract constituted an installment sales agreement. See Fil. #163. He subsequently reconsidered that conclusion, and after three more months of discovery and additional oral and written argument, he concluded that Coors was not subject to the requirements of that statute. See Fil. #242. The B.A.P. affirmed that decision with a four-page discussion of the Act, Coors' position as assignee of the contract, and the right to charge 18 percent interest on the contract. The B.A.P. opinion clarified the interpretation of Nebraska law on installment sales contracts. Since both Judge Minahan's decision and the B.A.P. decision were the first trial court and appellate level interpretations of the subject matter, the debtors appear to have had a reasonable basis for pursuing the objection to Coors' secured claim.

Regrettably, however, the litigation appears to have taken on a life of its own, with disputes over alleged set-off rights, the amount of the claim, and the allowance of attorney's fees. Coors' legitimate persistence in its attempt to collect the amount owed to it, and the vigorous litigation stance taken by the debtors, has resulted in more than \$16,000.00 in attorney's fees for a debt that totaled approximately \$14,500.00 on the petition date.

Because the debtors' initial objection to Coors' claim, and the litigation flowing therefrom, cannot be characterized as frivolous for purposes of Neb. Rev. Stat. § 25-824, there is no statutory or recognized procedural basis for allowing Coors to recover its attorney's fees related to that objection. Therefore, the requested fees previously approved in the April 2001 order and those requested in the fourth application, totaling together \$9,396.48, cannot be allowed as an unsecured

claim.

This unfortunate outcome for the creditor points up the risks inherent in litigating a claim, particularly when a creditor is forced to vigorously defend a valid claim. Here, Coors defended its claim all the way to the Bankruptcy Appellate Panel and back, at a significant cost in both time and money, yet is not allowed to recover the bulk of its expenses for doing so because neither the Bankruptcy Code nor the Nebraska statutes provide for it. This is remarkably unfair under the circumstances, but the bankruptcy court lacks authority to rewrite either the Bankruptcy Code or the Nebraska statutory scheme.

IV. CONCLUSION

IT IS ORDERED Coors Distributing of North Platte, Inc.'s Motion for Attorney's Fees and for Leave to File an Unsecured Claim (Fil. #265) is granted in part. Coors' claim as filed is allowed in the amount of \$7,023.57 as an unsecured claim. The Order and Journal Entry of April 19, 2001, are vacated to the extent they directed otherwise. Coors is allowed \$3,442.92 in post-petition interest as part of its secured claim. The remainder of the interest, fees, and costs sought by Coors are not allowed as part of its claims against the bankruptcy estate.

IT IS FURTHER ORDERED the Debtors' Objection to the Unsecured Claim of Coors Distributing of North Platte, Inc. (Fil. #268) is granted to the extent described above.

Separate journal entry to be filed.

DATED: September 6, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

Bert Blackwell, Atty. for Debtors, 308/345-5645

Philip Kelly, Ch. 7 Trustee, 308/635-1387

Copies mailed by the Court to:

United States Trustee

*Allen Fugate, Atty. for Coors Distr., 107 N. Dewey St.,

P.O. Box 82, North Platte, NE 69103-0082

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RICHARD & JAYNE WHITE,)	CASE NO. BK99-40009
)	A
<u>DEBTOR(S)</u>)	
)	Ch. 7
)	Filing No. 265, 268, 271, 272
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: September 6, 2001
<u>Defendant(s)</u>)	HEARING DATE: July 24, 2001

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Attorney's Fees and for Leave to File Unsecured Claim by Coors Distributing of North Platte, Inc. (Fil. #265) and Resistance by the Debtors (Fil. #271), and Debtors' Objection to Unsecured Claim of Coors Distributing (Fil. #268) and Resistance by Coors Distributing (Fil. #272).

APPEARANCES

Debtors: Bert Blackwell Chapter 7 Trustee: Philip Kelly
Coors Distributing of North Platte, Inc.: Allan Fugate

IT IS ORDERED:

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IT IS FURTHER ORDERED the Debtors' Objection to the Unsecured Claim of Coors Distributing of North Platte, Inc.

(Fil. #268) is granted to the extent described above.

See Memorandum filed this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

Bert Blackwell, Atty. for Debtors, 308/345-5645
Philip Kelly, Ch. 7 Trustee, 308/635-1387

Copies mailed by the Court to:

United States Trustee

*Allen Fugate, Atty. for Coors Distr., 107 N. Dewey St., P.O. Box
82, North Platte, NE 69103-0082

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.