

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
KINDRED HEALTHCARE, INC.,	)	Case Nos. 99-3199 (MFW) to
f/k/a VENCOR, INC., et al.,	)	99-3327 (MFW)
	)	
Reorganized Debtors.	)	(Jointly Administered Under
	)	Case No. 99-3199 (MFW)

MEMORANDUM OPINION<sup>1</sup>

This matter is before the Court on the Debtors' Motion to enforce the Confirmation Order and to hold Elise Epner, Administratrix of the estate of Jesse Epner ("the Claimant") and her attorneys in contempt for their alleged willful violation of the Confirmation Order by seeking to collect attorneys' fees and pre-judgment interest in the state court action brought by them. For the reasons set forth below, we grant the Motion in part.

I. FACTUAL BACKGROUND

On September 13, 1999, Vencor, Inc., and its affiliates (collectively "the Debtors") filed voluntary petitions for relief under chapter 11. The Debtors operated their businesses and managed their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

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<sup>1</sup> This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

Prior to the filing of their chapter 11 petitions, the Debtors had been sued by the Claimant in state court in Connecticut seeking compensatory damages, common law punitive damages, statutory punitive damages and attorneys' fees in connection with the death of Jesse Epner ("the State Court Action"). Mr. Epner was a resident of a nursing home facility owned or operated by the Debtors and died as a result of injuries suffered in a fire at that facility.

The filing of the chapter 11 cases stayed the State Court Action. In May 2000, the Debtors and the Claimant executed a stipulation which modified the automatic stay to permit the Claimant to proceed with the State Court Action to judgment, to collect from available insurance proceeds and to pursue any remainder from the Debtors in these cases. At the time of the filing of their bankruptcy cases, the Debtors had insurance to cover the Claimant's claims; however, their insurers - Reliance Insurance and Phico Insurance - were both subsequently declared insolvent.

On March 19, 2001, the Debtors' Fourth Amended Plan of Reorganization ("the Plan") was confirmed by Order of this Court. The Plan provided for bifurcation of personal injury claims. The punitive damages portion of the claims would not receive any distribution and would be discharged. The remainder of the claims would be paid in full, first from available insurance

proceeds and then the remainder, if any, in cash over a period of three years.

On April 8, 2003, the Debtors filed the instant Motion asserting that the Claimant was violating the terms of the Plan and the Confirmation Order by continuing to seek punitive damages in the State Court Action. The Claimant objected to the Debtors' Motion and a hearing was held on April 28, 2003, to consider the arguments of the parties.

## II. JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (L) & (O).

## III. DISCUSSION

Both parties agree that they are bound by the terms of the confirmed Plan. They disagree over the meaning and effect of the terms of that Plan. Therefore, we must examine the exact language utilized in the Plan.

Malpractice and other litigation claims were included in Class 3B which provided that "[w]ith respect to Allowed Class 3B Claims for and to the extent which [sic] insurance is available, such Allowed Class 3B Claims shall be paid in the ordinary course of the Reorganized Debtors' business to the extent of such insurance, when any such Claims become Allowed Claims and such

insurance proceeds become available; provided however, that to the extent insurance is not available or is insufficient, the payment schedule provided for in this section shall govern."

(Plan at § 5.02.) Class 3B claimants (to the extent insurance is not available) receive payment in full in quarterly installments over three years with interest from the Effective Date at 6%.

(Id.)

With respect to any claim for punitive damages, however, the Plan provides that "[e]ach holder of an Allowed Punitive Damage Claim shall receive no distribution under the Plan, in complete settlement, satisfaction and discharge of its Class 10 claims."

(Id. at § 5.10.) Punitive Damage Claims are defined as "any Claims arising before the Petition Date, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, to the extent that such fine, penalty, forfeiture or damages is not compensation for actual pecuniary loss suffered by the holder of such Claim. . . ." (Id. at p. 13.)

The Debtors assert that the Claimant is violating the Plan in two respects: by continuing to pursue punitive damages in the State Court Action and by seeking an award of pre-judgment interest in the case that continues to accrue post-petition. The Claimant asserts that both may be pursued.

A. Punitive Damages

In the State Court Action, the Claimant originally sought an award of punitive damages under both the common law and the Connecticut Unfair Trade Practices Act ("the CUTPA"). The count under the common law asserted that the Debtors' negligent and reckless acts caused the fire which resulted in Mr. Epner's death. The count under the CUTPA asserted that the Debtors operated the facility without proper licenses. Under each count, the Claimant sought both compensatory and punitive damages.

The Debtors assert that, after confirmation of the Plan, they advised the Claimant that the punitive damages requested were discharged by the Plan and demanded that they be withdrawn. (Declaration of O'Neal at ¶ 8.) The Claimant agreed to withdraw its claim for punitive damages under the CUTPA but continued to press for punitive damages under the common law. (Id. at ¶ 13.)

The Debtors assert that the Claimant's continued refusal to withdraw its request for punitive damages under the common law is a knowing, willful violation of the injunction provisions of the Plan and Confirmation Order and seeks an order of contempt against the Claimant and an award of attorneys' fees for prosecution of the instant motion. See, e.g., Cuffee v. Atlantic Bus. & Community Dev. Corp. (In re Atlantic Bus. & Community Dev. Corp.), 901 F.2d 325, 329 (3d Cir. 1990) (section 362(h) provides for imposition of award of attorneys' fees for willful violation

of automatic stay); Poole v. U.B. Vehicle Leasing, Inc. (In re Poole), 242 B.R. 104, 110 (Bankr. N.D. Ga. 1999) (punitive damages awarded against creditor for its bad faith violation of automatic stay and discharge injunction). See also, Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 249 v. Western Penn. Motor Carriers Ass'n, 660 F.2d 76, 84 (3d Cir. 1981) (attorneys' fees may be awarded for civil contempt for willful disobedience of a court order).

The Claimant asserts that her continued prosecution of the common law action for punitive damages is not in violation of the Plan or Confirmation Order. She asserts that under Connecticut common law "punitive damages" are limited to recovery of the costs of litigation (including attorneys' fees) less taxable costs (which are otherwise recoverable from the losing party). See, e.g., Berry v. Loiseau, 614 A.2d 414, 437 (Conn. 1992); Lord v. Mansfield, 717 A.2d 267, 270 (Conn. App. Ct. 1998). Thus, the Claimant asserts that although her complaint seeks "punitive damages" under Connecticut common law, they are really compensatory damages as they seek only to repay the Claimant for actual out of pocket expenses incurred by her as a result of the Debtors' wrongful acts, as opposed to seeking to punish the Debtors. See, e.g., Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., Inc., 477 A.2d 988, 1004 (Conn. 1984) (declining to expand common law punitive damages to include award that would

punish or deter plaintiff's bad conduct and concluding that "in limiting punitive damage awards to the costs of litigation less taxable costs, our rule fulfills the salutary purpose of fully compensating a victim for the harm inflicted on him"); Doroszka v. Lavine, 150 A. 692, 692-93 (Conn. 1930) ("in this state the purpose [of common law punitive damages] is not to punish the defendant for his offense but to compensate the plaintiff for his injuries, and so-called punitive or exemplary damages cannot exceed the amount of the plaintiff's expenses of litigation, less taxable costs"). Consequently, the Claimant argues that her pursuit of common law punitive damages does not conflict with the Plan which defines Punitive Damages that are included in Class 10 and discharged only "to the extent that such fine, penalty, forfeiture or damages is not compensation for actual pecuniary loss suffered by the holder of such Claim." (Plan at § 5.10 and p. 13; emphasis added.)

We agree with the Claimant. The Plan, by its plain terms, only discharged punitive damages that were not compensatory in nature. Connecticut common law punitive damages are only compensatory in nature rather than punitive. Therefore, we conclude that the Plan does not preclude the Claimant from asserting that claim in the State Court Action.

B. Pre-judgment Interest

The Debtors assert, however, that the Claimant is barred from asserting a claim for interest for several additional reasons. First, the Debtors assert that the Plan does not provide for any claimant to recover interest on their claims. However, this is not totally dispositive. To the extent a claimant is entitled to pre-petition interest (by contract or otherwise), it is simply part of the pre-petition unsecured claim. Further, the Plan does provide for all allowed unsecured creditors in Class 3B to receive interest on their claims from the Effective Date until payment is completed. (Plan at § 5.02.)

However, for the period between the filing of the petition and the effective date of the Plan, the Plan is silent on the allowance of any interest on unsecured claims. The Debtors assert this silence means none is allowable. We disagree. To the extent the claim would otherwise be allowable, there is nothing in the language of the Plan that provides that the claim is discharged. In contrast, the Plan expressly provided for discharge of punitive damages even though they were part of a pre-petition unsecured claim. Thus, the Debtors knew how to expressly exclude a portion of a claim, but did not do so with respect to interest.

The Debtors also assert that, under section 502(b)(2) of the Bankruptcy Code, unsecured creditors cannot recover interest on



their claims. Section 502(b)(2) provides that claims are disallowed to the extent they represent unmatured interest, i.e., interest that did not accrue before the petition date. 11 U.S.C. § 502(b)(2).<sup>2</sup>

Consequently, we agree with Judge Walsh's conclusion in Loewen Group that interest may not be collected by an unsecured creditor after the filing of the petition. In re Loewen Group Int'l Inc., 274 B. R. 427, 442-44 (Bankr. D. Del. 2002). Although Judge Walsh noted that the creditors in that case had no contractual or other basis to assert an entitlement to interest, we conclude that section 502(b)(2) expressly requires the disallowance of a claim for unmatured interest, even if it is premised on a contractual or other basis. This precludes the allowance of any interest claim by the Claimant after the petition date. Therefore, we conclude that even though the Claimant may be entitled to interest under Connecticut common law, such a claim must be disallowed to the extent it accrues after the petition date pursuant to section 502(b)(2) of the Bankruptcy Code.

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<sup>2</sup> In contrast, secured creditors may be entitled to post-petition interest under section 506(b) of the Bankruptcy Code. See, e.g., United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 372-73 (1988) ("Since [§ 506(b)] permits post-petition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest").

C. Attorneys' Fees

The Debtors assert that the Claimant is similarly barred from asserting a claim for post-petition attorneys' fees. First, the Debtors note that the Plan does not provide for any claimant to recover attorneys' fees. However, we again conclude that this is not dispositive. There is no express prohibition in the Plan on allowance of attorneys' fees as part of an unsecured claim. As with interest, the Debtors assert that this silence means none is allowable. For the reasons articulated above, however, we disagree. To the extent a claimant is entitled to attorneys' fees that accrued pre-petition (by contract or otherwise), it is simply part of the claim and the Plan, by its silence, did not discharge it. For attorneys' fees which arose after the filing of the petition, the Plan is also silent. To the extent the claim would otherwise be allowable, there is nothing in the language of the Plan that provides that the claim is discharged.

The Debtors assert, however, that such a claim is discharged because, under section 506(b) of the Bankruptcy Code, only secured creditors can recover attorneys' fees. 11 U.S.C. § 506(b). See, e.g., Loewen Group, 274 B. R. at 444-45. The Claimant argues that section 506(b) does not expressly bar claims for attorneys' fees by unsecured creditors (as section 502(b)(2) bars claims for interest). However, as Judge Walsh noted in Loewen, by providing specifically for the payment of attorneys'

fees to secured creditors in certain circumstances (i.e., when the value of their collateral exceeds the amount of their claim), Congress did evince an intent to disallow attorneys' fees to unsecured creditors. "If post-petition fees and costs were generally recoverable by all creditors, then Congress would not expressly provided [sic] for their recovery by oversecured creditors in § 506(b)." 274 B.R. at 444 n. 36.

We concur in this reasoning. Thus, we conclude that post-petition attorneys' fees are not recoverable by an unsecured creditor, even where they have a contractual or other legal basis for their allowance. Consequently, the Claimant may not recover from the Debtors any claim for post-petition attorneys' fees.

#### D. Sanctions

Since we have agreed with the Claimant's contentions in part (namely, that the Claimant may be entitled under Connecticut common law, and the Plan, to an award of pre-petition interest and attorneys' fees as part of its claim for compensatory damages), we cannot conclude that the Claimant's actions in pursuing those claims were in violation of any order of this court. It is only the post-petition portion of the interest and attorneys' fees that is not allowable. Rather than sanction the Claimant or her counsel, we will simply direct that the latter claims not be pursued since they are not allowable.

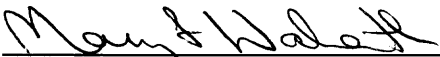
IV. CONCLUSION

For the foregoing reasons, we grant the Debtors' Motion in part and will enjoin the Claimant from pursuing any post-petition interest or attorneys' fees in the State Court Action.

An appropriate Order is attached.

BY THE COURT:

Dated: August 18, 2003

  
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Mary F. Walrath  
United States Bankruptcy Judge