



SO ORDERED.

SIGNED this 15 day of November, 2004.

Janice Miller Karlin

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)
)
MARIETTA FARMS, INC. d/b/a)
OBERLIN MILLING d/b/a)
CEDAR BLUFFS GRAIN,) **Case No. 02-41044-11**
)
Debtors.)
_____)

**MEMORANDUM AND ORDER SUSTAINING DEBTOR’S OBJECTION
TO CLAIM OF FARMERS ALLIANCE MUTUAL INSURANCE CO.**

This matter is before the Court on the Debtor’s Limited Objection to Claim of Farmers Alliance Mutual Insurance Co.¹ This matter constitutes a core proceeding² over which this Court has jurisdiction.³

¹Doc. 288.

²28 U.S.C. § 157(b)(2)(B).

³28 U.S.C. § 1334.

The issue is whether a fully unsecured creditor may receive post-petition interest on its claim in an insolvent estate by virtue of its pre-bankruptcy contract with a debtor. The Court holds it cannot.

I. FINDINGS OF FACT

On October 2, 2002, Farmers Alliance Mutual Insurance Co. (“Farmers Alliance”) filed its unsecured Proof of Claim for \$163,400 “plus attorney fees.”⁴ Farmers Alliance then amended its claim in June 2004, asserting a claim for \$132,429.19, consisting of \$110,000 plus \$22,429.19 attorney fees.⁵ Less than a month later, Farmers Alliance amended its Proof of Claim to \$55,000, plus \$22,429.19 in attorney fees, for a total claim of \$77,429.19.⁶ The parties agree that the attorney fee request consists entirely of attorney fees Farmers Alliance incurred post-petition, and which it claims it is entitled to receive pursuant to an indemnity agreement between it and Debtors. Although Debtors do not dispute the existence of the contractual agreement that would entitle Farmers Alliance to the attorney fees in question, outside of bankruptcy, Debtors filed a limited objection to the amended claim, asserting that Farmers Alliance’s right to assert such a claim is expressly limited by the provisions of the Bankruptcy Code, specifically 11 U.S.C. § 506.⁷

II. CONCLUSIONS OF LAW

⁴Claim 68.

⁵Claim 76.

⁶Claim 79.

⁷All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

Numerous courts have addressed the issue of whether an undersecured or unsecured creditor can seek post petition attorney fees from an insolvent estate, and the strong majority has held that they cannot make such a claim.⁸ The four main arguments for such a holding are well summarized by the court in *In re Pride Companies, L.P.*⁹ The first is the legal maxim “expressio unius est exclusio alterius,” meaning the expression of one is the exclusion of another. Because § 506(b) expressly provides that oversecured creditors may collect interest, attorneys’ fees and costs as part of its secured claim, the majority of courts have concluded that, if Congress intended for unsecured creditors to receive post-petition attorneys’ fees, it would have said so as explicitly as it authorized oversecured creditors to collect such fees in § 506(b).

Second, courts have found that the Supreme Court’s opinion in *United Savings Ass’n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*,¹⁰ where the Court disallowed postpetition interest to unsecured creditors, would apply equally to postpetition attorney fees, given the fact that § 506(b) makes no distinction between fees and interest. In *Timbers*, the Supreme Court held that “[s]ince this provision [§ 506(b)] permits postpetition 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.” Because § 506(b) clearly prohibits an unsecured creditor from recovering postpetition interest, and since that section also includes attorney’s fees, the majority of courts have concluded that the Supreme Court’s *Timbers* opinion, by implication, also prohibits the recovery by unsecured creditors of postpetition attorney’s fees.

⁸See *In re Pride Companies, L.P.*, 285 B.R. 366, 372 -374 (Bankr. N.D. Tex. 2002) (citing numerous cases).

⁹*Id.*

¹⁰484 U.S. 365 (1988).

Third, the majority decisions often point to § 502(b), which provides that the bankruptcy court “shall determine the amount of [a] claim as of the date of the filing of the petition,” as support for the proposition that attorneys’ fees incurred after the filing of the bankruptcy case may not be added to the creditor’s unsecured claim. Finally, the majority decisions rely upon the policy argument that payment of post-petition attorneys’ fees to only those unsecured creditors with a contractual or statutory right to fees would be contrary to the bankruptcy system’s “primary purpose” of bringing about “an equitable distribution of the bankrupt’s estate among creditors holding just demands.”¹¹

As Farmers Alliance argues, a minority of Courts have rejected the findings outlined above, and have held that an unsecured creditor may submit a claim against the bankruptcy estate for post petition attorney fees,¹² albeit with less preferable treatment than is allowed oversecured creditors with such claims. The basis for this conclusion is that nothing in the Code expressly prevents an unsecured creditor from asserting an unsecured claim for post-petition attorney fees, the word “claim” is broadly defined, and the Code allows “unmatured” and “unliquidated” claims to be estimated for purposes of allowance pursuant to § 502(c). Those courts also reason that because § 502(b) expressly disallows claims for unmatured interest, but does not mention post-petition attorney fees, the allowance of such fees is not prohibited.

Farmers Alliance asks the Court to adopt this minority approach and approve its claim for post-petition attorney fees. In the main decision Farmers Alliance relies upon, *In re New Power Co.*,¹³ a key

¹¹*In re Pride Companies*, 285 B.R. at 373 (citing *In re Sakowitz, Inc.*, 110 B.R. 268, 271 (Bankr. S.D. Tex.1989)).

¹²*See, e.g. In re New Power Co.*, 313 B.R. 496 (Bankr. N.D. Ga. 2004).

¹³*Id.*

fact, from this Court's perspective, is that that was a solvent estate, where all creditors were going to receive 100% of their claim, plus interest. So the dispute was whether the amount of the attorney fees should be paid out of the remaining assets, which would revert to the Debtor, or whether the fees should be paid to the creditor in accordance with the parties' pre-bankruptcy agreement. Although that Court held it would nevertheless hold that unsecured creditors' unsecured post-petition attorney fees were allowable, even if the estate was insolvent, it is material to this Court that the factual context of that attorney fee dispute involved a solvent debtor. Thus, that court impliedly disagreed with the policy decision enunciated above regarding like classes of creditors receiving like treatment in plan distributions.

This Court finds the majority position to be far more persuasive, and rejects the holding of the minority position. As an aside, and admittedly in dicta, this Court does agree with those courts holding that allowing a solvent debtor to retain estate funds without paying reasonable and necessary attorneys' fees attendant to defending a contested claim, to which the unsecured creditor would otherwise have been legally entitled outside of bankruptcy, would be unjust,¹⁴ but Marietta Farms is not a solvent debtor.

III. CONCLUSION

The Court finds that Farmers Alliance is not entitled to its claim for postpetition attorney fees from this insolvent estate, and, therefore, sustains Debtor's limited objection to Farmers Alliance's claim. Well established rules of statutory construction, as well as the Supreme Court's decision in *Timbers* and the

¹⁴See *In re Continental Airlines, Inc.*, 110 B.R. 276, 280 (Bankr. S. D. Tex. 1989) and *In re Carter*, 220 B.R. 411 (Bankr. D. N.M. 1998) (holding an unsecured creditor may recover attorney fees where (1) there is a surplus remaining in Chapter 11 estate after interest is paid out to the unsecured creditors, (2) collection of attorney fees is expressly provided for in an agreement between the parties, (3) fees are reasonable, and (4) fees were incurred in pursuit of establishing the validity and amount of creditor's unsecured claim, and not for simply monitoring case).

policy of the Bankruptcy Code, clearly show that only oversecured creditors are entitled to submit a claim for postpetition attorney fees in an insolvent estate based upon a contractual obligation. Because Farmers Alliance is an unsecured creditor, it is not entitled to submit a claim for postpetition attorney fees.

IT IS, THEREFORE, BY THIS COURT ORDERED that Debtor's Limited Objection to Claim of Farmers Alliance Mutual Insurance Co. (Doc. 288) is hereby sustained. Farmers Alliance Mutual Insurance Co.'s Amended Claim (Claim No. 79) is disallowed to the extent it seeks a claim for attorney fees in the amount of \$22,429.19, and is thus allowed in the amount of \$55,000.

IT IS SO ORDERED.

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