

interest (postpetition)
attorney fees (postpetition)

In re Binder Case No. 389-33799
Binder v. IPCA BAP No. 90-1759MeOV
9/13/91 BAP affirming J. Perris unpublished

The creditor's unsecured claim in this chapter 12 case was based upon a promissory note which included an attorney's fee provision. The creditor filed an amended proof of claim which included sums attributable to postpetition attorney fees and postpetition interest. Allowing postpetition interest would, in effect, compound the interest which had accrued prepetition.

The BAP held that the creditor's claim properly included postpetition attorney fees and costs related to federal law issues. As the estate was solvent, the award of postpetition interest was justified by the best interest test of § 1225(a)(4).

P91-22 (7)

NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

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OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re

BAP No. OR-90-1759-MeOV

BRYCE K. BINDER and
DARLENE M. BINDER,

Bk. No. 389-33799-P12

Debtors.

BRYCE K. BINDER and
DARLENE M. BINDER,

Appellants,

**AMENDED
MEMORANDUM**

v.

INTERSTATE PRODUCTION CREDIT
ASSOCIATION,

Appellee.

Argued and Submitted
November 16, 1990 at Seattle, Washington

Filed: July 1, 1991

Amended: SEP 13 1991

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. Elizabeth L. Perris, Bankruptcy Judge, Presiding
Before: MEYERS, OLLASON and VOLINN, Bankruptcy Judges

1 Chapter 12 Debtors appeal the award to an unsecured creditor
2 of post-petition attorney's fees and costs and of interest on the
3 entire claim allowed as of the date of confirmation. We **AFFIRM**.

4 This adversary proceeding arose from the Chapter 12 bankruptcy
5 petition of appellants Bryce and Darlene Binder ("Debtors"). The
6 appellee is Interstate Production Credit Association ("IPCA"), the
7 holder of a matured, unsecured promissory note which provides for
8 simple interest and costs of collection, including attorney's fees.

9 On February 2, 1990, the bankruptcy court entered an order
10 confirming Debtors' Chapter 12 plan. Debtors are balance sheet
11 solvent, but cash poor. The confirmed plan proposes that Debtors
12 will sell their ranch in three years in order to pay all claims in
13 full, including IPCA's allowed unsecured claim with interest on the
14 allowed claim.

15 IPCA filed an amended proof of claim in the amount of
16 \$366,352.93 as of February 2, 1990, the date of plan confirmation.
17 Of this claim, \$15,770.77 is comprised of post-petition, pre-
18 confirmation attorney's fees and costs incurred by IPCA in the
19 bankruptcy proceeding and \$14,703.49 of the claim represents post-
20 petition, pre-confirmation interest. The bankruptcy court allowed
21 IPCA's claim and awarded interest on the claim.

22 Debtors argue that post-petition attorney's fees and costs
23 related to federal law issues should have been disallowed under In
24 re Johnson, 756 F.2d 738, 741 (9th Cir. 1985), in which the court
25 denied attorney's fees to debtors for their efforts in opposing a
26 motion for relief from stay. In re Johnson applies to cases in

1 | which debtors seek attorney's fees and therefore is distinguishable
2 | from the instant case. In re Salazar, 82 B.R. 538 (9th Cir. BAP
3 | 1987).

4 | Despite the "dicta in In re Johnson," attorney's fees have
5 | often been awarded creditors for their actions in bankruptcy court.
6 | In re Le Marquis Associates, 81 B.R. 576, 580 n.4 (9th Cir. BAP
7 | 1987). In Salazar, for instance, the Panel granted attorney's fees
8 | to an oversecured creditor who had sought relief from stay. The
9 | Ninth Circuit in Matter of 268 Ltd., 789 F.2d 674 (9th Cir. 1986),
10 | held that a secured party was entitled to reasonable attorney's
11 | fees as part of its secured claim, and then could seek as an
12 | unsecured claim the portion of its contractual fee which exceeded
13 | the reasonable fee for attorney's services. And in Le Marquis
14 | Associates, supra, the Panel awarded attorney's fees to an
15 | oversecured creditor for its efforts in seeking relief from stay
16 | and opposing reorganization. Following these cases, we find no
17 | error in the award of reasonable attorney's fees to IPCA in
18 | accordance with the fee provision in its note. See 11 U.S.C. §
19 | 101(5)(A); In re United Merchants & Mfrs., Inc., 674 F.2d 134 (2d
20 | Cir. 1982); In re Lorenzo Bancshares, Inc., 122 B.R. 270, 273 (N.
21 | Tex. 1991)("equity demands that the Plaintiffs receive the
22 | attorney's fees to which they are entitled under Texas law before
23 | any distribution is made to or any property is retained by the
24 | shareholders . . ."); In re Continental Airlines Corp., 110 B.R.
25 | 276, 280 (S. Tex. 1989)(creditors should be entitled to attorney's
26 | fees when the debtor is solvent and the creditors would be entitled

1 to attorney's fees under state law but for the filing of the
2 bankruptcy case).

3 Debtors also appeal the award of interest on that portion of
4 appellee's claim comprised of pre-petition interest, contending
5 that IPCA may not lawfully receive interest on interest. An award
6 of post-petition interest from a solvent estate is dependent on the
7 equities of the case and is subject to reversal only for an abuse
8 of discretion. Matter of Beverly Hills Bancorp, 752 F.2d 1334,
9 1339 (9th Cir. 1984); In re San Joaquin Estates, Inc., 64 B.R. 534,
10 536 (9th Cir. BAP 1986).

11 We find no abuse of discretion as the interest award is
12 justified under the best interests of creditors test found in
13 Bankruptcy Code Section 1225(a)(4). This section provides that a
14 Chapter 12 plan is confirmable only if, as of the effective date of
15 the plan, the value of property to be distributed to each holder of
16 an allowed unsecured claim is not less than the amount that would
17 be paid to such claimant if the estate were liquidated under
18 Chapter 7 on such date.

19 The best interests of creditors test requires the court to
20 undertake a hypothetical liquidation analysis to determine the
21 amount that the holder of each unsecured claim would receive from
22 a Chapter 7 liquidation, taking into account all of the Bankruptcy
23 Code provisions that would have been relevant if the debtor had
24 filed under Chapter 7. 5 Collier on Bankruptcy at ¶1225.02 (15th
25 ed. 1979). Hence the court must take into account the fact that
26 interest is paid on unsecured creditors' claims under Bankruptcy

1 Code Section 726(a)(5). In re San Joaquin Estates, Inc., supra, 64
2 B.R. at 536. Section 726(a)(5) provides that property of the
3 estate shall be distributed as the fifth priority, in payment of
4 interest on claims paid under the first four paragraphs of Section
5 726(a).

6 The legislative history of Section 726 reveals that "claim" as
7 used in that section refers to principal plus interest.
8 Originally, the Senate included a provision in Section 726 which
9 expressly provided that the term "claim" should include interest.
10 The House deleted that language, finding it unnecessary "since a
11 right to payment for the interest due is a right to payment which
12 is within the definition of 'claim' in section 101(4). . ." 124
13 Cong.Rec.H. 11,098 (Sept. 28, 1978). In re Brinegar, 76 B.R. 176,
14 178-79 (Colo. 1987); In re Treister, 52 B.R. 735, 737 (S.N.Y.
15 1985); 4 Collier on Bankruptcy ¶726.03 (15th ed. 1979).

16 This is consistent with the language of Section 502 of the
17 Bankruptcy Code, which governs what is to be allowed as part of a
18 creditor's claim. Subsection (b) provides that the court shall
19 allow pre-petition claims "in such amount except to the extent
20 that-- (2) such claim is for unmatured interest . . ." (emphasis
21 added). Pre-petition (or matured) interest has therefore been
22 treated as part of the "claim." In re Larson, 862 F.2d 112, 119
23 (7th Cir. 1988).

24 In sum, because in a Chapter 7 case creditors would be paid
25 interest on a claim which is comprised of both principal and
26 interest, the best interests of creditors test justifies the

1 payment of interest on both principal and interest in a Chapter 12
2 case.

3 We so hold even though generally the accumulation of post-
4 petition interest is not allowed. Nicholas v. United States, 384
5 U.S. 678, 683 (1966). This reflects the broad equitable principle
6 that creditors should not be disadvantaged vis-a-vis one another by
7 legal delays attributable solely to the administration of the
8 bankruptcy laws. It is thought that obligations bearing relatively
9 high rates of interest should not be permitted to absorb the assets
10 of a bankrupt estate whose funds were already inadequate to pay the
11 principal of the debts owed by the estate. Nicholas v. United
12 States, supra, 384 U.S. at 683-84. However, the general rule has
13 significance only where the estate proves to be insolvent. In a
14 solvent estate, like the one at issue, payment of interest will not
15 affect other creditors, but will merely reduce the amount to be
16 distributed to Debtors as surplus.

17 Because the case of In re Laguna, 114 B.R. 214 (9th Cir. BAP
18 1990), concerns an insolvent estate, Debtors' citation to it is not
19 helpful to this appeal. Moreover, the Panel in Laguna disallowed
20 post-petition interest on pre-petition arrearages on two grounds
21 which do not apply to the instant case.

22 First, California law governed the Laguna security interest.
23 California prohibits compounding of interest unless there is a
24 specific agreement. The security interest in this case is governed
25 by Oregon law which does not prohibit compound interest. See,
26 e.g., Meskimen v. Larry Angell Salvage Co., 286 Or. 87 (1979) (error

1 to deny post-judgment interest on pre-judgment interest accrued on
2 a damages award).

3 Second, the Laguna court based its decision on Section
4 1322(b)(2), the provision which prohibits modification of the
5 rights of creditors holding a security interest solely in the
6 debtor's principal residence. The Panel in Laguna found that
7 payment of post-confirmation interest on pre-petition arrearages,
8 absent a contractual provision providing a right to such interest,
9 would constitute a prohibited modification. 114 B.R. at 218.
10 Section 1322(b)(2) does not apply here as this is a Chapter 12
11 case. There is no statutory section in Chapter 12 equivalent to
12 Section 1322(b)(2). In fact, Section 1222(b)(2) provides that a
13 plan may "modify the rights of holders of secured claims, or of
14 holders of unsecured claims, or leave unaffected the rights of
15 holders of any class of claims."

16 For the foregoing reasons, the bankruptcy court's award to
17 IPCA, including the award of attorney's fees and interest from the
18 solvent estate, is **AFFIRMED**.