

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 02-11299-JMD
Chapter 11

Timothy Carroll, DMD, P.C.,
Debtor

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MEMORANDUM OPINION

I. BACKGROUND

Timothy Carroll, DMD, P.C., the Debtor, is engaged in the practice of dentistry and is the solo practice of Dr. Timothy Carroll (“Dr. Carroll”). On or about December 17, 1999, the Debtor entered into an equipment financing agreement with Matsco Financial Corporation (the “Lender”), which resulted in a series of loan transactions totaling \$167,638.21. As part of the transaction with the Lender, Dr. Carroll and then wife Fatomeh Carroll signed personal guaranties.

On April 4, 2002, the Debtor filed for protection under Chapter 11 of the United States Bankruptcy Code. On August 12, 2002, Fatomeh Carroll filed a proof of claim in the amount of \$108,847.00 (the “Carroll Claim”). The Carroll Claim is based on Fatomeh Carroll’s asserted

right to contribution from the Debtor for amounts which Fatomeh Carroll may have to pay in the event the Debtor defaults on the financing agreement with the Lender.

On July 11, 2003, the Debtor filed an Objection to Fatomeh Carroll's claim (Doc. No. 100), seeking its disallowance. Fatomeh Carroll did not file a written response. On September 9, 2003, the Court held a hearing on the Debtor's Objection. At the hearing the Debtor asserted that the Carroll Claim should be disallowed under section 502(e)(1),² because the claim was contingent. Fatomeh Carroll argued that because the Lender had already instituted a state court proceeding to collect on the personal guaranty, the claim was no longer contingent. Therefore, she should be allowed a claim of \$88,606.90 minus the projected unsecured dividend paid to the Lender by the Debtor's Chapter 11 Plan.³

The issue before the Court is whether or not the Carroll Claim should be disallowed as contingent under section 502(e)(1)(B). This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

² Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

³ Pursuant to Court Order dated September 9, 2003 (Doc. No. 100), the Court allowed the Lender a secured claim of \$71,549.43 in accordance with the determination made in a previously held adversary proceeding (Adv. 02-1122-MWV), leaving the balance of \$88,606.90, as an unsecured claim. The disallowance of the Fatomeh Claim would increase the dividend to unsecured creditors from approximately 13% to 20%.

II. DISCUSSION

Section 502(e)(1)(B) provides as follows:

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor to the extent that--

...

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . .

The application of section 502(e)(1)(B) to disallow a claim requires that three elements be established: (1) the claim must be one for reimbursement or contribution; (2) the entity asserting the claim for reimbursement or contribution must be “liable with the debtor” on the claim; and (3) the claim must be contingent at the time of its allowance or disallowance. In re Drexel Burnham Lambert Group, 148 B.R. 982, 985 (Bankr. S.D.N.Y. 1992) (citing In re Provincetown-Boston Airlines, Inc., 72 B.R. 307, 309 (Bankr. M.D. Fla. 1987)).⁴

The first and second elements are not disputed by the parties. Neither the Debtor nor Fatomeh Carroll dispute the validity of her personal guaranty to the Lender. Therefore, the first and second elements under section 502(e)(1)(B) for the disallowance of a claim have been satisfied.

The third and final element, that the claim must be contingent to be disallowed, is disputed. The contingency in section 502(e)(1)(B) relates to both payment and liability. Drexel Burnham, 148 B.R. at 986; In re Pacor, Inc., 110 B.R. 686, 689 (Bankr. E.D. Pa. 1990).

If the primary obligee seeks payment from its guarantor, the guarantor may seek reimbursement or contribution from the debtor. Both the primary obligee and the guarantor have a claim against the debtor that arises from the same debt; the primary obligee has a

⁴ In In re Hemingway Transport, Inc., 993 F.2d 915, 922 (1st Cir. 1993), the First Circuit favorably cited In re Provincetown-Boston Airlines, Inc., for the determination of a “contingent” claim.

right to payment from the debtor that arises from the debtor, and the guarantor has a contingent right to reimbursement or contribution from the debtor which *may become noncontingent in the event that it fully satisfies the primary obligee's claim* . . . [this] ensures that the estate will not be liable to the primary obligor and the guarantor for the same debt.

4 Lawrence P. King, Collier on Bankruptcy ¶ 502.06[2][d] (15th ed. rev. 2002). Furthermore, as the court noted in In re Provincetown-Boston Airlines, Inc., “a contingent claim is by definition a claim which has not yet accrued and which is dependant upon some future event that may never happen.” 72 B.R. at 310. In the instant case that future event, a state court judgment, has not occurred. The Carroll Claim is contingent until liability is established and Fatomeh Carroll has paid the Lender. See Drexel Burnham, 148 B.R. at 987; Pacor, 110 B.R. at 689. “One who is secondarily liable may only secure distribution rights by paying the amount owed the creditor.” Drexel Burnham, 148 B.R. at 987 (quoting Pacor, 110 B.R. at 690).

The determination of what constitutes a contingent claim under the Bankruptcy Code is a federal question. However, the Court notes that under New Hampshire case law a guarantor is not entitled to reimbursement or contribution until the guarantor has paid the creditor. Rice v. Snow, 116 N.H. 69 (1976). Therefore, since liability has not been established and payment has not been made to the Lender by Fatomeh Carroll, the third and final element has been met and the Carroll Claim is disallowed under section 502(e)(1)(B).

III. CONCLUSION

For the reasons set forth above, the Court holds that the Carroll Claim as set forth in Proof of Claim 3 shall be disallowed. This opinion constitutes the Court's findings of fact and

conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: September 10, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge