

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
CIVIL ACTION
DOCKET NO. CV-10-53

("In re Possibilities Counseling Services,)
Inc. Provider Payment Litigation"))
)
NICOLE RICHMAN, JULIE)
HOWARD, JOHN THIBODEAU, and)
MARYANN CARROLL,)
on behalf of themselves and)
others similarly situated,)

Plaintiffs,)

v.)

POSSIBILITIES COUNSELING)
SERVICES, INC., WENDY L.)
BERGERON, AFFILIATE FUNDING,)
INC., EMILE L. CLAVET, KEVIN)
DEAN, and FOSTER CARE BILLING,)
LLC d/b/a/ PROVIDER FINANCIAL)

Defendants)

**ORDER GRANTING ATTACHMENT
AND ATTACHMENT ON TRUSTEE
PROCESS FOR THE BENEFIT OF THE
CERTIFIED PROVIDER CLASS**

Before the court is the Plaintiffs' Motion for Attachment and Attachment Upon Trustee Process, and the Defendants' opposition to it.

BACKGROUND

The Motion was filed in October 2010, but was not acted on for a variety of reasons. One of those reasons was that the case was filed as a proposed class action, and the amount of any attachment or attachment upon trustee process was therefore substantially contingent on whether the case proceeded as a class action. Another reason was that, starting soon thereafter, the State of Maine Department of Health and Human Services began paying funds into escrow supervised by the Referee under the direction of the Court, thereby creating security for payment to the proposed provider Class. In June 2011, the named Plaintiffs asked the court to

rule, and filed supplemental materials, on the October motion for attachment, and the Defendants filed supplemental materials in opposition.

Rules 4A and 4B of the Maine Rules of Civil Procedure require the court to reduce an attachment by the amount of insurance or assets shown to be available to satisfy the claim. Although the Referee has utilized the escrowed funds for payments, thereby reducing the available security for claims of the Class, most of those payment went to Class members, thereby also reducing the amounts of their claims.

ANALYSIS

The pending motion requires the court to determine whether the members of the certified Class (including the named Plaintiffs) are more likely than not to obtain judgment on their claims, and if so, in what likely amount. *See* M.R. Civ. P. 4A(c), 4B(c). The court also must determine what security is available to satisfy the claims.

1. Likelihood of Success

In terms of likelihood of success, the certified provider Class have shown that they likely to recover judgment, including interest and costs, at least as to Possibilities Counseling Services, Inc. (Possibilities). Their case against other defendants is less clear, but for reasons set forth in more detail in the analysis regarding security (*see 3. Available Security, infra*), it seems unnecessary to explore in depth the merits of the Plaintiffs' claims against other Defendants.

2. Likely Amount of Recovery

Both the attachment rule and the trustee process measure the entitlement to attachment and attachment upon trustee process in terms of the likely judgment, "including interest and costs." The reason why the inclusion of interest and costs is significant in this case is that a substantial part of the judgment that each Class member likely will receive will consist of an

award of interest and costs. At least for purposes of attachment analysis, the court has to look at the likely recovery, net of what has been paid before entry of judgment.¹

The certified Class consists of providers whose claims are limited to “damages in the amount of unpaid claims for payment submitted by the provider (including any claim that no processing fee should be deducted from the face amount of the claim), interest and costs.” What the court views as the likely recovery of Class members consists of at least two components, perhaps three in some cases:

- One component consists of interest on late payments, calculated at the statutory prejudgment rate (assuming there is no contract rate). Prejudgment interest is available as a matter of course, and the Referee has recently provided a figure of about \$18,000, to reflect prejudgment interest, and that figure increases at the prejudgment rate.
- A second component consists of court costs likely to be awarded. At least as to Possibilities, it seems clear that the Class members will be deemed prevailing parties. The major portion of court costs of which the court is aware consists of the Referee’s compensation and expenses. That cost, including the Referee’s most recent request for payment, is somewhat under \$20,000. That cost is likely to increase substantially as the case proceeds, as result of the following:
 - the Referee will likely need to prepare a report regarding payment to the providers, itemizing all claims and payments by provider;

¹ The court does not decide in this order whether the judgment—either that rendered as to the Class as a whole or those rendered as to individual Class members—should reflect the net unpaid amount as of the date of judgment, or the entire original amount due, with payments to be credited as a partial satisfaction of judgment. At least for purposes of deciding what amount is necessary to attach in order to secure payment, it is clearly the net amount of the claim as of the date of attachment, not the original figure, that should control.

- the Referee will likely need to calculate the interest awarded to each Class member;
- the Referee will likely need to testify at a hearing on his report.

This summary does not include the Referee's time spent responding to ongoing requests for information from counsel and Class members, and it also does not reflect the cost impact of pretrial discovery, a jury demand, and any contested hearings regarding any individual provider's claims and payment. It is admittedly not possible to pinpoint the likely future cost of the Referee's services, but a total figure of \$40,000 to \$50,000 (including the about \$19,000 in compensation authorized to date) seems reasonable. Other less substantial costs are likely to be awarded as well. For purposes of this order, the court determines that the Plaintiff Class has proved it is likely to be awarded \$45,000 for its costs as part of the judgment.

- A third component would be any amount still due to Class members. The Referee has indicated that nearly all of the claims known to him have been paid, but further claims appear to be forthcoming. However, as noted in the Class definition, Class members may have a valid claim that Possibilities (or subcontractors processing claims on behalf of Possibilities pursuant to its contract with providers) is not entitled to any compensation under its contract due to what the Class alleges is a material breach. *See Levine v. Reynolds*, 143 Me. 15, 23, 54 A.2d 514, 519 (1947) (holding that the party in material breach of contract not entitled to compensation for partial performance of the contract); *Veazie v. City of Bangor*, 51 Me 509, 512-13 (1863) ("No person has any right to any compensation for services rendered under a special contract, unless he has at least attempted, in good faith, to perform all its

conditions.”); *cf. Carvel Co. v. Spencer Press*, 1998 ME 74, ¶ 14 n.2, 708 A.2d 1033, 1036 (providing that willful breach of contract and bad faith prevents a party from recovering on a theory of quantum meruit). The court assigns a value to this component of \$50,000.

Adding these components results in a projected likely net collective recovery of \$113,000 for all Class members, including interest and costs.

3. *Available Security*

The obvious source of security consists of the escrow funds held by the Referee. Because Possibilities claims an interest in those funds, for purposes of this order only, the court regards the funds as available for attachment. Yet, there is a case to be made that funds already subject to the court’s control are “other security” available to satisfy a judgment, meaning that no attachment or attachment on trustee process should be granted. What seems entirely clear is that, to the extent Possibilities has an interest in at least \$113,000 of the funds the Referee is holding, the Class members do not need and are not entitled to an attachment of additional property, and the attachment, if there is one, can be limited to the funds now held by the referee. *See* M.R. Civ. P. 4A(d)(1), 4B(d)(1) (attachment limited to specific property).

Mainly to safeguard the Plaintiff Class’s priority position against subsequent attaching creditors, if any, who might seek recourse against the same funds, the court will grant the motion of the Class for attachment and attachment on trustee process, but direct that both forms of attachment be limited at this time to the funds held in escrow by the Referee.

IT IS HEREBY ORDERED:

1. The Motion for Attachment and Trustee Process of Plaintiffs on behalf of the certified Class of plaintiffs in this case is granted.

2. The Court hereby approves a writ of attachment and attachment upon trustee process against funds of Defendant Possibilities, Inc. in the amount of \$113,000.00.

3. The Court hereby directs that both forms of attachment be limited at this time to funds held in escrow by the Referee.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this Order in the docket.

Dated: 12 July 2011



Justice, Business and Consumer Court

Entered on the Docket: 7.13.2011
Copies sent via Mail Electronically