

**EIGHTEENTH ANNUAL
NORTHEAST SURETY AND FIDELITY
CLAIMS CONFERENCE**

SEPTEMBER 27th and 28th, 2007

**BANKRUPTCY POST-PETITION ATTORNEY'S FEES:
ARE THEY RECOVERABLE BY AN UNSECURED
FIDELITY INSURER?**

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INTRODUCTION

“. . . and that shows that there are three hundred and sixty-four days when you might get un-birthday presents--”

“Certainly,” said Alice.

“And only *one* for birthday presents, you know. There’s glory for you!”

I don’t know what you mean by “glory,” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant, ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean, neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

¹ **Note:** The views expressed in this article are those of the authors and do not necessarily reflect the views of CNA Insurance Company or any of its affiliated insurance companies. This article is for general informational purposes only. None of it constitutes legal advice, nor is it intended to create any attorney-client relationship between you and the author. You should not act or rely on this information concerning the meaning, interpretation, or effect of particular contractual language or the resolution of any particular demand, claim, or suit without seeking the advice of your own attorney.

Had Lewis Carroll cast a bankrupt debtor to play opposite Alice in *Through the Looking Glass*, Carroll likely would have had to rewrite the answer to Alice's last question as follows:

“Of course,” said Bankrupt Debtor, “particularly if you are trying to deny an unsecured creditor its post-bankruptcy petition attorneys’ fees.”

For years, bankrupt debtors have taken a *Through the Looking Glass* approach to interpreting the Bankruptcy Code provisions governing when claims are “allowed” and when a creditor has a “secured” claim in an effort to prevent unsecured creditors from recovering attorneys’ fees incurred after the date of the filing of the bankruptcy petition.

Section 502—entitled “Allowance of claims or interests”—provides that a claim against the debtor’s estate is “allowed” unless the debtor objects, in which case the claim should be allowed (after a properly noticed hearing) to the extent the claim does not fall within one of the enumerated exceptions. Section 506 of the Bankruptcy Code—entitled “Determination of secured status”—merely states that a creditor’s claim against a debtor’s bankruptcy estate is “secured” to the extent of the value of any lien the creditor has against property in which the debtor has an interest. That same section provides that a creditor who is oversecured (i.e., the value of the property against which the creditor has a lien exceeds the value of the creditor’s claim) also has a secured claim for attorneys’ fees and costs (whether incurred before or after the debtor files its voluntary petition for bankruptcy).

Bankrupt debtors—taking their cue from Humpty Dumpty—have managed to convince a majority of bankruptcy courts and federal district courts that sections 502 and 506—when read together—mean much more than the plain language of those sections suggests. In particular, bankrupt debtors claim Congress intended section 506 (apparently when read in conjunction with section 502) to be a complete bar to unsecured creditors recovering attorneys’ fees incurred after the debtor files for bankruptcy. Debtors have likewise managed to misread earlier decisions by the United States Supreme Court as implicitly approving debtors’ interpretation of sections 502 and 506. In other words, debtors have been able to convince a majority of bankruptcy courts that sections 502 and 506 “mean exactly what the debtors choose them to mean, nothing more nor less.”

Fortunately for unsecured creditors, a significant minority of bankruptcy courts have rejected debtors’ strained interpretation of sections 501 and 502. More importantly, the few federal circuit courts of appeal that have addressed an unsecured creditor’s ability to recover post-petition attorneys’ fees have interpreted the language of sections 502 and 506 according to their plain meaning and permitted unsecured creditors to recover post-petition attorneys’ fees. And now the United States Supreme Court has weighed in on an unsecured creditor’s ability to recover post-petition attorneys’ fees.

In *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, the United States Supreme Court held that federal bankruptcy law did not bar an unsecured creditor’s right to recover post-petition contractual attorneys’ fees. Although the *Travelers* Court did not directly address the meaning of sections 502 and 506 (at least as those sections have been construed by debtors), the Court’s analysis in permitting an unsecured creditor to recover post-petition attorneys’ fees: (i) runs completely counter to the analysis used by the majority of lower courts in prohibiting unsecured creditors from recovering post-petition attorneys’ fees;

and (ii) suggests that the Supreme Court would reject the majority’s approach to post-petition attorneys’ fees given the opportunity.

Until the Supreme Court has that opportunity, however, unsecured creditors are still in for a fight. To properly prepare themselves for that fight, unsecured creditors must—before filing a proof of claim—thoroughly familiarize themselves with: (i) the relevant Bankruptcy Code provisions; (ii) the four arguments principally advanced by debtors in support of their claim that unsecured creditors are prohibited from recovering post-petition attorneys’ fees; (iii) the analysis used by the Circuit Courts of Appeal in permitting unsecured creditors to recover post-petition attorneys’ fees; and (iv) the Supreme Court’s analysis in *Travelers*. Armed with that information, unsecured creditors are in the best position to convince courts that sections 502 and 506 mean what those sections say, not what debtors choose them to mean.

THE BANKRUPTCY CODE

Any discussion of whether an unsecured creditor is entitled to recover post-petition attorneys’ fees (pursuant to a pre-petition contract) must begin with a review of the applicable sections of the Bankruptcy Code. Sections 501 and 502 of the Bankruptcy Code govern the allowance of claims against the bankruptcy estate.² Section 501 provides that when a debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim against the debtor’s estate.³ Once a proof of claim has been filed, the court must then determine whether the claim is “allowed.” Section 502(a) provides that a creditor’s “claim” (for which a proof of claim has been timely filed under section 501) is “deemed allowed” unless the debtor objects.⁴ If the debtor objects, then the Court (after notice and a hearing) shall: (i) determine the amount of the claim; and (ii) “allow” the *claim except to the extent that the claim falls within one of nine enumerated categories*.⁵

If a claim is allowed (i.e., a proof of claim has been filed, and the claim does not fall within one of the enumerated exceptions), the next question is whether or not the claim is “secured.” Section 506 provides that an allowed claim “secured by a lien on property in which the estate has an interest . . . is secured to the extent of the value of such creditor’s interest in the estate’s interest in such property.”⁶ If a creditor’s claim exceeds the value of the debtor’s interest in the property, then the creditor is undersecured, and the creditor’s claim is separated into two parts: (i) a secured claim to the extent of the creditor’s collateral; and (ii) an unsecured claim for the balance of the creditor’s claim.⁷ If, on the other hand, the value of the debtor’s

² 11 U.S.C. §§ 501 & 502; *see also In re The New Power Co.*, 313 B.R. 496, 507 (Bankr. N.D. Ga. 2004).

³ A proof of claim is the vehicle by which a creditor provides proof of its “right to payment” from the debtor’s estate. The Bankruptcy Code defines “claim” as a “[r]ight to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” 11 U.S.C. § 101(5).

⁴ 11 U.S.C. § 502(a).

⁵ 11 U.S.C. § 502(b)(1)-(9).

⁶ 11 U.S.C. § 506(a) (emphasis added).

⁷ *Id.*

interest in the property exceeds the value of the creditor's claim, then the creditor's claim is oversecured, and section 506 provides, among other things, that:

[t]o the extent that an allowed secured claim is secured by property the value of which, after any recover under subsection (c) of [section 506], is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which the claim arose.⁸

Once a determination is made as to whether or not a claim is secured, the next step is to determine the order in which the claims against the debtor's estate will be paid from assets of the debtors' estate. Section 507 establishes the priority of the claims against the debtor's estate (i.e., administrative expense have priority over unsecured claims).⁹

APPLICATION OF THE BANKRUPTCY CODE BY THE COURTS

At first glance, the issue of whether unsecured creditors are entitled to recover post-petition attorneys' fees seems easily resolved by resort to—and application of—the plain language of the bankruptcy code. To begin with, an unsecured creditor's claim for post-petition attorneys' fees (pursuant to a pre-petition contract) is properly a claim within the meaning of section 101(5) because section 101(5) defines claim to include a "right to payment" that is "contingent," "unmatured," or "unliquidated."¹⁰

Next, the bankruptcy court looks to section 502 to determine whether the unsecured creditor's "claim" for post-petition attorneys' fees is "allowed." Under section 502, the bankruptcy court—assuming the debtor objects to the attorneys' fees claim—shall: (i) determine the amount of the claim; and (ii) *allow the claim except to the extent that the claim falls within one of nine enumerated categories*.¹¹ None of the nine enumerated exceptions specifically disallow post-petition attorneys' fees.¹²

Accordingly, the unsecured creditor should have an allowed claim for post-petition attorneys' fees, with the only questions remaining being the amount of the claim and whether

⁸ 11 U.S.C. § 506(b).

⁹ 11 U.S.C. § 507.

¹⁰ 11 U.S.C. § 101(5); see also *In re Bayly Corp.*, 163 F.3d 1205, 1208-09 (10th Cir. 1998) ("If a debtor becomes liable to a claimant before the bankruptcy petition is filed, but the liability is contingent on the occurrence of some future event, the claim to recover that debt is treated as a pre-petition claim even if the condition does not occur and the right to payment does not arise until after the bankruptcy petition is filed").

¹¹ 11 U.S.C. § 502(a).

¹² 11 U.S.C. § 502(b)(1)-(9). While section 502 does preclude claims for "unmatured interest," none of the enumerated exceptions are applicable to post-petition attorneys' fees. 11 U.S.C. § 502(b)(2). In fact, the only prohibition against attorneys' fees in section 502 is found in subsection (b)(4), which provides that courts shall allow claims except to the extent that claim is "for services of an insider or attorney of the debtor" and "exceeds the reasonable value of such services." *Id.*

or not the claim is secured. The issue regarding the amount of the claim is resolved by the bankruptcy court after notice and a hearing,¹³ while the determination of whether or not the allowed claim is secured is addressed in section 506.¹⁴

The Majority Rule: A Through the Looking Glass Approach to the Bankruptcy Code

Notwithstanding the plain language—and relatively straightforward application of—sections 502 and 506, Debtors have nevertheless been able to persuade the majority of lower courts (bankruptcy and district courts) that, in fact, unsecured creditors are not entitled to recover post-petition attorneys' fees and costs.¹⁵ In doing so, Debtors have relied on four primary arguments.

“When I use a word . . . it means just what I choose it to mean, neither more nor less.”—Part I

First, debtors have principally relied on the language in section 506(b) that states “to the extent that an allowed secured claim [is oversecured], there shall be allowed to the holder of such claim . . . any reasonable fees, costs, or charges provided for under the agreement” to argue that unsecured creditors are not entitled to post-petition attorneys' fees.¹⁶ Debtors use the legal maxim *expressio unius est exclusio alterius* (meaning “the expression of one is the exclusion of another”) to argue that Congress—by specifically permitting oversecured creditors to recover attorneys' fees (in section 506(b))—necessarily intended to deny unsecured or undersecured creditors the right to recover post-petition attorneys' fees.¹⁷ And debtors have been relatively successful with that argument.¹⁸ According to one court:

Congress provided for attorney fees only for the secured portion of such a claim. Congress must be presumed to have understood what it was doing. It could easily have provided for attorney fees for the unsecured portion of the claim as well as the secured

¹³ 11 U.S.C. § 502(a).

¹⁴ 11 U.S.C. § 506(a) (explaining that an allowed claim “secured by a lien on property in which the estate has an interest . . . is secured to the extent of the value of such creditor's interest in the estate's interest in such property”).

¹⁵ See *In re Pride Cos., L.P.*, 285 B.R. 366, 372 (Bankr. N.D. Tex. 2002); *In re Loewen Group, Int'l, Inc.*, 274 B.R. 427, 442-43 (Bankr. D. Del. 2004); *In re Saunders*, 130 B.R. 208, 210 (Bankr. W.D. Va. 1991); *In re Sakowitz*, 110 B.R. 268, 271 (Bankr. S.D. Tex. 1989); *In re Canaveral Seafoods, Inc.*, 79 B.R. 57, 58 (Bankr. M.D. Fla. 1987); *In re Marietta Farms, Inc.*, 2004 WL 30193960 (Bankr. D. Kan. Nov. 15, 2004).

¹⁶ See *In re Pride Cos., L.P.*, 285 B.R. at 372; *In re Hedged-Investments Assocs., Inc.*, 293 B.R. 523, 526 (D. Colo. 2003); *In re Loewen Group, Int'l, Inc.*, 274 B.R. at 444; *In re Saunders*, 130 B.R. at 210; *In re Sakowitz*, 110 B.R. at 272; see also 11 U.S.C. § 506(b).

¹⁷ See *In re Pride Cos., L.P.*, 285 B.R. at 372; *In re Hedged-Investments Assocs., Inc.*, 293 B.R. at 526; *In re Loewen Group, Int'l, Inc.*, 274 B.R. at 444; *In re Saunders*, 130 B.R. at 210; *In re Sakowitz*, 110 B.R. at 272.

¹⁸ See *In re Pride Cos., L.P.*, 285 B.R. at 372; *In re Hedged-Investments Assocs., Inc.*, 293 B.R. at 526; *In re Loewen Group, Int'l, Inc.*, 274 B.R. at 444; *In re Saunders*, 130 B.R. at 210; *In re Sakowitz*, 110 B.R. at 272.

portion. That it did not do so this Court feels is determinative of the issue.¹⁹

A number of other lower courts have likewise adopted this analysis as a basis for prohibiting unsecured creditors the right to recover post-petition attorneys' fees.²⁰

“When I use a word . . . it means just what I choose it to mean, neither more nor less.” Part II

Debtors also have relied on the language in section 502(b) stating that if an objection to a claim is made, the court shall determine the amount of such claim “*as of the date of the filing of the petition*” to argue that Congress did not intend for unsecured creditors to recover post-petition attorneys' fees.²¹ According to debtors, attorneys' fees incurred after the date a debtor files for bankruptcy (i.e., post-petition attorneys' fees) cannot be part of the claim because a creditor's claim is calculated as of the date a debtor files for bankruptcy.²²

“When I use a word . . . it means just what I choose it to mean, neither more nor less.” Part III

Debtors also claim the Supreme Court's decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*²³ supports their interpretation of sections 502 and 506 (i.e., that sections 502 and 506 only authorize secured creditors to recover post-petition attorneys' fees).²⁴ In *Timbers*, the Supreme Court held that because section 506(b) “permits postpetition interest to be paid only out of the ‘security cushion,’ the unsecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest.”²⁵ Because section 506(b) refers to both interest and attorneys' fees, debtors claim that the Supreme Court's decision in *Timbers*—by implication—prohibits the recovery of post-petition attorneys' fees.²⁶

¹⁹ *In re Sakowitz*, 110 B.R. 268, 272.

²⁰ *In re Loewen Group, Int'l, Inc.*, 274 B.R. at 444; *In re Smith*, 206 B.R. 113, 115 (Bankr. D. Md. 1997); *In re Southeast Banking Corp.*, 185 B.R. 452, 462-63 (Bankr. S.D. Fla. 1995).

²¹ *In re Pride Cos., L.P.*, 285 B.R. at 372; *In re Waterman*, 248 B.R. 567, 573 (8th Cir. BAP 2000); *In re Sakowitz*, 110 B.R. at 271.

²² *In re Pride Cos., L.P.*, 285 B.R. at 372; *In re Waterman*, 248 B.R. at 573; *In re Sakowitz*, 110 B.R. at 271.

²³ 484 U.S. 235 (1989).

²⁴ See *In re Pride Cos., L.P.*, 285 B.R. at 373; see also *Adams v. Zimmerman*, 73 F.3d 1164, 1177 (1st Cir. 1996); *In re Loewen Group, Int'l, Inc.*, 274 B.R. at 444; *In re Saunders*, 130 B.R. at 210; *In re Sakowitz*, 110 B.R. at 271.

²⁵ 484 U.S. at 372-73.

²⁶ See *In re Pride Cos., L.P.*, 285 B.R. at 373; *Adams*, 73 F.3d at 1177; *In re Loewen Group, Int'l, Inc.*, 274 B.R. at 444; *In re Saunders*, 130 B.R. at 210; *In re Sakowitz*, 110 B.R. at 271; *In re Woodemere Investors L.P.*, 178 B.R. 346, 356 (Bankr. S.D.N.Y. 1995).

“A man always has two reasons for what he does—a good one and the real one”²⁷

While debtors generally advance their argument that the language of sections 502 and 506 and (the Supreme Court’s decision in *Timbers*) prohibit unsecured creditors from recovering post-petition attorneys’ fees, Courts appear to have fallen back on debtors’ arguments that general policy considerations mandate disallowing claims for post-petition attorneys’ fees by unsecured creditors.

Courts have generally recognized that a prime policy of bankruptcy law is to “secure equality among the creditors of a bankrupt” debtor.²⁸ Debtors have argued that allowing certain types of unsecured creditors (generally holders of contract claims with attorneys’ fees provisions) to recover post-petition attorneys’ fees while denying post-petition attorneys’ fees to other types of unsecured creditors (such as tort claimants and trade creditors) would defeat the goal of securing equality among creditors.²⁹ According to one court:

It is not equitable to deplete everyone’s “pot,” only because of an asserted right granted by a contract. After all, bankruptcy routinely alters creditors rights, and this is simply a situation where the policy of ratable distribution and equitable treatment of the varying interests should override any asserted rights by unsecured creditors to recover attorneys’ fees.³⁰

This “perceived unfairness” in the treatment of unsecured claims has been a “significant factor motivating many courts to disallow post-petition attorney’s fees to unsecured creditors.”³¹

The Minority View: When Does Universal Agreement Among the Circuit Courts of Appeal Constitute the “Minority” View?

While the “majority of published opinions hold that an unsecured creditor may not recover postpetition attorneys’ fees from a bankruptcy estate,” no Court of Appeals has disallowed a claim for post-petition attorneys’ fees by an unsecured creditor.³² To the contrary,

²⁷ RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 297 (Suzy Platt ed. 1993)

²⁸ *Boese v. King*, 108 U.S. 379, 385-86 (1883).

²⁹ See *In re Pride Cos., L.P.*, 285 B.R. at 373; *In re Loewen Group, Int’l, Inc.*, 274 B.R. at 444; *In re Sakowitz*, 110 B.R. 268 at 271.

³⁰ *In re Pride Cos., L.P.*, 285 B.R. at 373.

³¹ *In re Pride Cos., L.P.*, 285 B.R. at 373 (citing James Gadsden, *Recovery of Attorney Fees as an Unsecured Claim*, 114 Banking L.J. 594, 603 (1997)).

³² A significant minority of courts also have rejected the “majority” rule. See *United Merchants & Mfrs., Inc. v. Equitable Life Assurance Soc’y of the U.S.*, 674 F.3d 134, 137-38 (2d Cir. 1982); *Martin v. Bank of Germantown*, 761 F.2d 1163, 1168 (6th Cir. 1985); *Matter of 268 Ltd.*, 789 F.2d 674 (9th Cir. 1986); *In re Byrd*, 192 B.R. 917, 919 (Bankr. E.D. Tenn. 1996); *Blair v. Bank One, N.A.*, 307 B.R. 906 (N.D. Ill. 2004); *Liberty Nat’l Bank & Trust Co. of Louisville v. George*, 70 B.R. 312, 317 (W.D. Ky. 1987); *In re Hunter*, 203 B.R. 150, 151 (Bankr. W.D. Ark. 1996); *Tri-State Homes, Inc. v. Mears*, 56 B.R. 24, 26 (Bankr. W.D. Wis. 1985); *In re Ely*, 28 B.R. 488, 491-92 (Bankr. E.D. Tenn. 1983); *In re Missionary Baptist Found. of Am., Inc.*, 24 B.R. 970, 971 (Bankr. N.D. Tex. 1982).

the only Circuit Courts of Appeal addressing this issue have, in fact, permitted unsecured creditors to recover post-petition attorneys' fees.³³ The seminal case upholding an unsecured creditor's right to recover post-petition attorneys' fees (pursuant to a pre-petition contract) is *United Merchants & Manufacturers., Inc. v. Equitable Life Assurance Society of the United States*.³⁴

In *United Merchants*, the Sixth Circuit specifically rejected the debtor's argument that section 506(b) limited recovery of post-petition attorneys' fees only to secured creditors (i.e., the *expressio unius est exclusio alterius* argument), noting that section 506(b) (which was not controlling because *United Merchants* was decided under the Bankruptcy Act of 1898) merely codified pre-Bankruptcy Code law that an oversecured creditor can assert, as part of its secured claim, its right to interests and costs.³⁵ According to the *United Merchants* Court, "[n]either [section 506(b)] nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorney's fees."³⁶

The Sixth Circuit also rejected the debtor's argument that allowing an unsecured contract creditor the right to recover post-petition attorneys' fees was somehow unfair to other unsecured creditors.³⁷ In particular, the Sixth Circuit explained:

We cannot agree that the policy of equitable distribution renders an unsecured creditor's otherwise valid contractual claim for collection costs unenforceable in bankruptcy. When equally sophisticated parties negotiate a loan agreement that provides for recovery of collection costs upon default, courts should presume, absent a clear showing to the contrary, that the creditor gave value, in the form of a contract term favorable to the debtor or otherwise, in exchange for the collection costs provision. Such a creditor should recover more in the division of the debtor's estate because it gave more to the debtor at the time it made the loan. Rather than providing an undeserved bonus for one creditor at the expense of others, allowing a claim under a collection costs provision merely effectuates the bargained-for terms of the loan contract.³⁸

³³ See *United Merchants & Mfrs., Inc.*, 674 F.3d at 137-38; *Martin*, 761 F.2d at 1168; see also *In re Welzel*, 275 F.3d 1308, 1319 (11th Cir. 2001) (implicitly recognizing an unsecured creditor's right to recover post-petition attorneys' fees as an unsecured claim); *Blair*, 307 B.R. at 907 ("[E]very federal circuit court of appeals that has [considered whether an unsecured creditor can recover post-petition attorneys' fees] has held that such fees do not fall into any of the exception categories [set forth in section 502(b)]").

³⁴ 674 F.2d at 137-38.

³⁵ *Id.*

³⁶ *Id.* at 138.

³⁷ In doing so, the *United Merchants* Court addressed two of debtors' four principal arguments for denying unsecured creditors' post-petition attorneys' fees. For additional analysis refuting those two arguments, as well as analysis refuting the remaining two arguments (the language in section 502(b) and the Supreme Court's decision in *Timbers*) see *In re The New Power Co.*, 313 B.R. 496, 507-09 (Bankr. N.D. Ga. 2004).

³⁸ *Id.* at 137.

The *United Merchants* Court also noted that the case law did not support a distinction between secured and unsecured creditors who seek to recover post-petition attorneys' fees and costs in bankruptcy.³⁹ Accordingly, the Sixth Circuit held that an unsecured creditor is allowed to recover post-petition attorneys' fees.

The *Travelers* Decision: Is There Reason for Hope?

Former United States Representative Joseph G. Cannon once remarked that “[a] majority can do anything.”⁴⁰ That certainly seems to be the approach taken by debtors when responding to claims by unsecured creditors for post-petition attorneys' fees. Any claim by an unsecured creditor to recover post-petition attorneys' fees will be undoubtedly met with the familiar refrain: “The majority of published opinions hold that an unsecured creditor may not recover postpetition attorneys' fees from a bankruptcy estate.” Of course, this “majority” rule approach largely—if not completely—ignores the fact that *no Circuit Court of Appeals decision adheres to the “majority” rule*. Never mind that debtors and courts alike are forced to contort the plain language of sections 502 and 506 to justify the “majority” rule.

Unsecured creditors may now have a new response when faced with the “majority” rule mantra. The United States Supreme Court, in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric*, was recently confronted with the issue of an unsecured creditor's ability to recover post-petition attorneys' fees. The Court in that case held that federal bankruptcy law does not disallow an unsecured creditor's right to recover post-petition attorneys' fees under a written indemnification agreement.⁴¹ The *Travelers* decision is promising because it allows the recovery of post-petition attorneys' fees by an unsecured creditor; however, the decision is not as helpful to unsecured creditors as it could have been because the Court was not given the opportunity to confront the “majority” rule head on. Nevertheless, a fair reading of the Court's decision strongly suggests that, if given the opportunity to address whether sections 502 and 506 preclude recovery of post-petition attorneys' fees by an unsecured creditor, the Court would likely side with the Circuit Courts of Appeal adhering to the “minority” rule.

In *Travelers*, Pacific Gas & Electric (“PG & E”) filed a voluntary Chapter 11 bankruptcy in April 2001.⁴² Travelers Casualty & Surety Company (“Travelers”) filed a claim in the PG & E bankruptcy based on a series of indemnity agreements PG & E executed in favor of Travelers in connection with a \$100 million surety bond that Travelers issued on PG & E's behalf to the California Department of Industrial Relations.⁴³ Pursuant to the various indemnity agreements,

³⁹ *Id.* at 137-38.

⁴⁰ RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 216 (Suzy Platt ed. 1993)

⁴¹ 127 S. Ct. 1199, 1202 (2007).

⁴² *Id.*

⁴³ *Id.* PG & E had elected to adopt a plan to self-insure payments of certain mandatory workers' compensation benefits, and as a consequence, PG & E was required to post security with the state ensuring ongoing payment of those benefits. *Id.* The surety bond Travelers issued made Travelers liable for up to \$100 million in workers' compensation benefits in the event PG & E defaulted. *Id.*

PG & E agreed to indemnify Travelers for any loss Travelers might incur in connection with issuing the surety bond, including any attorneys' fees Travelers incurred in pursuing, protecting, or litigating Travelers' rights in connection with those bonds.⁴⁴

While PG & E had not actually defaulted under the indemnity agreements at the time it filed for Chapter 11 bankruptcy, Travelers nevertheless filed its proof of claim against PG & E's estate to protect its rights in the event PG & E later defaulted on its workers' compensation payments.⁴⁵ In response to Traveler's claim, PG & E agreed to insert language into its reorganization plan and disclosure statement protecting Travelers' right to indemnification in the event PG & E defaulted on its workers' compensation obligations.⁴⁶

Travelers claimed, however, that PG & E subsequently altered the agreed upon language in a way that substantially diminished the protection Travelers had sought.⁴⁷ The parties ultimately were able to resolve the dispute after some litigation by entering into a stipulation that, in addition to addressing Travelers' substantive concerns regarding the language of PG & E's reorganization plan, also provided that Travelers "may assert its claim for attorneys' fees under the [i]ndemnity [a]greements" in connection with the litigation regarding PG & E's reorganization plan (subject to PG & E's right to object) as a general unsecured claim against PG & E.⁴⁸

Travelers subsequently amended its proof of claim seeking to recover its attorneys' fees incurred in connection with the PG & E bankruptcy (and litigating over the reorganization plan, in particular).⁴⁹ PG & E objected, arguing that Travelers could not recover attorneys' fees incurred litigating bankruptcy law issues.⁵⁰ The bankruptcy court agreed and rejected Travelers' claim for post-petition attorneys' fees. Travelers appealed to the district court, and the district court affirmed the bankruptcy court's decision, relying on the Ninth Circuit Court of Appeals' decision in *In re Fobian*, in which the Ninth Circuit held that "where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorneys' fees will not be awarded absent bad faith or harassment by the losing party."⁵¹ Travelers, in turn, appealed to the Ninth Circuit, which affirmed the district court's decision, likewise relying on its previous decision in *In re Fobian*.⁵² In particular, the Ninth Circuit held

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1202-03.

⁴⁹ *Id.* at 1203.

⁵⁰ *Id.*

⁵¹ 951 F.2d 1149 (9th Cir. 1991),

⁵² *Travelers Casualty & Surety Co. of Am. v. Pacific Gas & Electric Co.*, 167 Fed. Appx. 593 (9th Cir. 2006).

that because the fees claimed by Travelers were “governed entirely by federal bankruptcy law,” Travelers’ claim necessarily failed.⁵³

On appeal, the United States Supreme Court considered “whether the Bankruptcy Code disallows contract-based claims for attorney’s fees *based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law.*”⁵⁴ In considering that issue, the Supreme Court initially noted that a claim filed under section 501 of the Bankruptcy Code is deemed allowed, except to the extent the claim falls within one of the nine exceptions enumerated in section 502(b).⁵⁵ The only exception remotely applicable in *Travelers* was section 502(b)(1), which disallows any claim that is “unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or matured.”⁵⁶ The Supreme Court, however, quickly disposed of section 502(b)(1) as an impediment to Travelers’ recovery, explaining that section 502(b)(1) was generally understood to provide that any defense to a claim that is available outside of bankruptcy is also available inside of bankruptcy, and in any event, the bankruptcy court had not relied on section 502(b)(1) as a basis for denying Travelers’ attorneys’ fees claim.⁵⁷

Thus, the Supreme Court was left with the remaining issue of whether the *Fobian* rule provided a basis for denying Travelers’ unsecured claim for post-petition attorneys’ fees. The Court held that it did not.⁵⁸ In doing so, the Court noted that the *Fobian* rule “finds no support in the Bankruptcy Code, either in § 502 or elsewhere.”⁵⁹ Moreover, the Court observed that none of the cases relied upon by the Ninth Circuit in *In re Fobian* identified any basis for disallowing a contractual claim for attorneys’ fees incurred litigating issues of federal bankruptcy law.⁶⁰ Accordingly, the Court held that the Ninth Circuit erred in disallowing Travelers’ unsecured claim for post-petition attorneys’ fees based on the fact that the attorneys’ fees were incurred litigating issues of bankruptcy law.⁶¹

The Court’s holding in *Travelers* was somewhat anti-climatic, however, because PG & E abandoned its efforts to defend the *Fobian* rule at the Supreme Court.⁶² Instead, PG & E raised—for the first time in its brief submitted to the Supreme Court—its argument that section 506(b) categorically disallows unsecured claims for contractual attorney’s fees.⁶³ The Court,

⁵³ See *id.* at 594.

⁵⁴ *Travelers Casualty & Surety Co. of Am.*, 127 S. Ct. at 1204.

⁵⁵ *Id.*

⁵⁶ *Id.* (quoting 11 U.S.C. § 502(b)(1)).

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1208.

⁶² *Id.* at 1207.

⁶³ *Id.*

however, refused to address PG & E's argument because PG & E had not raised that argument below, and consequently, none of the lower courts had the opportunity to address that argument.⁶⁴

GOING FORWARD: ARMED FOR BATTLE

While the Travelers Court did not specifically address whether section 506(b) precludes an unsecured creditor from recovering post-petition attorneys' fees, its analysis in rejecting the *Fobian* rule is nonetheless useful in arguing against application of the "majority" rule—and it certainly suggests that the Court would reject the "majority" rule in favor of the "minority" rule given the opportunity. In fact, the Court's analysis in rejecting the *Fobian* rule appears to run completely counter to the analysis used by the majority of lower courts in prohibiting unsecured creditors from recovering post-petition attorneys' fees.

Recall, debtors—and the majority of bankruptcy courts—principally rely on the language in section 506(b) (which addresses whether or not a claim is "secured") providing that a secured creditor has an allowed claim for attorneys' fees to the extent the creditor is oversecured, claiming that such language clearly evidences Congress' intent to deny unsecured creditors a right to post-petition attorneys' fees. In other words, debtors contend Congress opted to provide an exception to the bankruptcy code by implication (*expressio unius est exclusio alterius*).

Contrary to the approach taken by debtors and the majority of lower courts, the *Travelers* Court explained that "where Congress has intended to provide . . . exceptions to provisions of the bankruptcy code, *it has done so clearly and expressly*."⁶⁵ In particular, the *Travelers* Court observed that the existence of section 502(b)(4), which expressly disallows certain claims for attorneys' fees (fees for services of the debtor's attorney to the extent the fees exceed the reasonable value of the services):

suggests that, in its absence, a claim for such fees would be allowed in bankruptcy to the extent enforceable under state law. The absence of an analogous provision excluding the category of fees covered by the *Fobian* rule suggests that the Code does not categorically disallow them.⁶⁶

The absence of an analogous provision excluding likewise suggests that the Bankruptcy Code does not categorically disallow them.

⁶⁴ *Id*

⁶⁵ *Id.* at 1206.

⁶⁶ See *id.* (citing 4 COLLIER'S ON BANKRUPTCY ¶ 506.04[3][a] at 506-118) (concluding that *Fobian* "inverts the proper analysis" by allowing attorney's fees only where they are expressly authorized by the Bankruptcy Code, and explaining that "a claim for attorney's fees arising in the context of litigating bankruptcy issues must be allowed if valid under state law").

CONCLUSION

Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again. “They’ve a temper, some of them—particularly verbs, they’re the proudest—adjectives you can do anything with, but not verbs—however, I can manage the whole lot of them! Impenetrability! That’s what I say!”

“Would you tell me, please,” said Alice “what that means?”

“Now you talk like a reasonable child,” said Humpty Dumpty, looking very much pleased. “I meant by ‘impenetrability’ that we’ve had enough of that subject, and it would be just as well if you’d mention what you mean to do next, as I suppose you don’t mean to stop here all the rest of your life.”

“That’s a great deal to make one word mean,” Alice said in a thoughtful tone.

“When I make a word do a lot of work like that,” said Humpty Dumpty, “I always pay it extra.”

Debtors have been making sections 502 and 506 work plenty of overtime to convince courts that those sections mean what debtors choose them to mean. And if they have been paying them extra like Humpty Dumpty, then debtors have been getting their money’s worth.

The days of sections 502 and 506 working overtime, however, may be over thanks to the Supreme Court’s decision in *Travelers*. Although it did not directly address debtors’ interpretation of sections 502 and 506, the *Travelers* Court’s analysis in permitting an unsecured creditor to recover post-petition attorneys’ fees is directly in line with the Circuit Courts of Appeal and significant minority of bankruptcy courts that have likewise permitted unsecured creditors to recover post-petition attorneys’ fees. Until the Supreme Court expressly rejects debtors’ interpretation of sections 502 and 506, however, unsecured creditors must continue to rely on the plain language of sections 502 and 506 and the circuit court decisions to convince bankruptcy courts that sections 502 and 506 mean what they say, not what debtors choose them to mean.

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