INTERPRETING BANKRUPTCY CODE SECTIONS 502 AND 506: POST-PETITION ATTORNEYS' FEES IN A POST-*TRAVELERS* WORLD

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INTRODUCTION

Issues concerning attorneys' fees in bankruptcy cases came to the fore in the Supreme Court's October 2006 term. Two successful petitions for certiorari[1] from the Ninth Circuit—both filed by attorney G. Eric Brunstad, Jr.[2]—raised issues concerning recovery of attorneys' fees incurred by unsecured creditors[3] or by

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[1] *See infra* text accompanying notes 5–24, 115–26.

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[3] References in this article to the "Bankruptcy Code" or to the "Code" are to title 11 of the United States Code. Section references are to sections of the Bankruptcy Code unless otherwise noted.

In the usual case a "creditor," as that term is defined in Bankruptcy Code section 101(10) and used in this article, will hold a claim that arose before the filing of the bankruptcy petition, a pre-petition claim. As defined in the Code, a "creditor" is a holder of a claim that arose "at the time of or before the order for relief concerning the debtor," section 101(10)(A), or whose claim is treated as having arisen at or before that time, section 101(10)(B), or who holds a "community claim," section 101(10)(C). In a voluntary case, the filing of the bankruptcy petition by an eligible debtor "constitutes an order for relief." 11 U.S.C. § 301 (2006). Voluntary cases make up more than 99.9% of bankruptcy filings, and thus the date of filing of the petition is almost always the same as the date of the order for relief. *See* 2006 Judicial Facts and Figures, http://www.uscourts.gov/judicialfactsfigures/2006/Table702.pdf (last visited Sept. 15, 2007) (showing less than a thousand involuntary petitions filed each year from 2000 to 2006, out of more than a million total filings each year). Thus "creditors" almost always hold pre-petition claims or claims that, under the sections referenced in section 101(10)(B), are treated as if they arose pre-petition. (Holders of "community claims" who are creditors under section 101(10)(C) will be holders of pre-petition claims, because (1) the definition of "community claim" includes the requirement that the claim arose before commencement of the bankruptcy case, see section 101(7), and (2) the case is commenced when the petition is filed, see sections 301, 302, and 303.)

The reference to unsecured creditors includes undersecured creditors here and throughout this article. In the typical case, when the value of the secured creditor's lien is less than the amount of the debt owed to the secured creditor, the secured creditor's claim will be bifurcated into a secured claim for the value of the lien—typically the value of the collateral minus the amount of any senior liens—and an unsecured claim for the remainder of the claim. *See* § 506(a). The Code's terminology centers more on secured and unsecured *claims* than on secured and unsecured *creditors*, in part because an undersecured creditor typically will hold both a secured claim and an unsecured claim. *See* § 506(a). The Code then treats the two claims held by the undersecured creditor separately, requiring different treatment for each. *Compare* § 1129(b)(2)(A) (providing required treatment of dissenting *secured* claim class) *with* § 1129(b)(2)(B) (providing required treatment of dissenting *unsecured* claim class). In some cases, not further discussed in this article, an undersecured creditor's claim may for some purposes be treated as if it were fully secured (see section 1111(b)(2) and the final sentence of section 1325(a)(5)). In addition, a secured creditor may hold an

debtors[4] after the filing of a bankruptcy petition. The result was one substantive opinion, *Travelers Casualty & Insurance Co. of America v. Pacific Gas & Electric Co.* ("*Travelers*"),[5] abrogating the Ninth Circuit's federal common law "Fobian rule,"[6] and one "GVR," *DeRoche v. Arizona Industrial Commission*[7] (in which certiorari was granted, the circuit court decision was vacated, and the case was remanded for further consideration in light of the Supreme Court's decision in *Travelers*).

Both cases involved treatment of post-petition attorneys' fees incurred by a party who, under non-bankruptcy law, would be entitled to recover such fees, whether by contract, or by statute, or otherwise.[8] Of course, ordinarily, under the American Rule, a party to litigation is responsible for the party's own attorneys' fees, "absent statute or enforceable contract,"[9] and absent one of the very few other bases[10] for an award of fees.[11] But in each case the Ninth Circuit had applied its Fobian rule to deny fees that would have been available under the American rule due to contract (*Travelers*) or state statute (*DeRoche*).[12]

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unrelated unsecured claim. Since the same person may be both a secured creditor and an unsecured creditor, a statutory provision requiring that the creditor be classified as one or the other could lack clarity.

[4] As used in this article and as defined in the Code, the debtor is the "person . . . concerning which a case under [the Bankruptcy Code] has been commenced." § 101(13).

[5] 127 S. Ct. 1199 (2007).

[6] *See* Fobian v. W. Farm Credit Bank (*In re* Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991) (refusing attorneys' fees award against solvent debtor in favor of undersecured mortgage holder whose mortgage included attorneys' fee clause, because fees were incurred in litigating "solely issues of federal bankruptcy law"), *overruled by* Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007); *see also infra* text accompanying notes 111–57.

[7] 127 S. Ct. 1873 (2007) (Mem.), *granting certiorari, vacating, remanding*, 434 F.3d 1188 (9th Cir. 2006).

[8] *Travelers*, 127 S. Ct. at 1205; DeRoche v. Ariz. Indus. Comm'n (*In re* DeRoche), 434 F.3d 1188, 1192 (9th Cir. 2006).

[9] Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975).

[10] *Id.* at 257–59 (discussing common fund rule, and discussing power of courts to award fees for "willful disobedience to a court order" or for actions taken by party "in bad faith, vexatiously, wantonly, or for oppressive reasons" (internal quotations and citations omitted)). The Court in *Alyeska* also noted that in federal cases based on diversity jurisdiction, state law providing for award of attorneys' fees should be followed, absent conflict with a federal statute or court rule. *Id.* at 259 n.31. "[T]he question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule." *Id.* Bankruptcy cases are not based on diversity jurisdiction, but substantive entitlements in bankruptcy usually are determined under state law. *See, e.g.*, 11 U.S.C. § 502(b)(1) (2006); *Travelers*, 127 S. Ct. at 1204–06.

[11] In addition, attorneys' fees sometimes are a part of the primary damages that are awarded, rather than being costs awarded for the "instant suit." In such cases, the attorneys' fees are classified as collateral legal expenses. Their recovery is not subject to the American Rule (or, under a less helpful analysis, they are covered by an additional exception to the American Rule). *See* David W. Robertson, *Court Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. MAR. L. & COM. 507, 513–16 (1996). It is possible that such fees simply are not the kind of fees dealt with in section 506(b), and that they should not be subject to the limitations on allowance of section 506(b) fees. *See infra* text accompanying note 233. This subject will be discussed more fully in a later article.

[12] *Travelers*, 127 S. Ct. at 1205; *DeRoche*, 434 F.3d at 1192; *cf.* Hoopai v. Countrywide Home Loans, Inc. (*In re* Hoopai), 369 B.R. 506, 511–12 (B.A.P. 9th Cir. 2007) (considering whether fees should be awarded in favor of over-secured mortgagee under § 506(b) or in favor of debtor, and holding that "the Supreme Court

Travelers Casualty & Surety Company ("Travelers") sought Supreme Court review of the Ninth Circuit's unpublished decision in *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.* ("the Ninth Circuit *Travelers* decision"),[13] dealing with whether such post-petition attorneys' fees incurred by an unsecured creditor are allowable claims in a bankruptcy case under section 502(b),[14] in particular when the fees are incurred in litigation of bankruptcy law issues. If so, then the allowable claim of a creditor who incurred such fees would be increased, thus entitling the creditor to a larger share of any distribution to unsecured claim holders in the bankruptcy case.[15] This result would harm the other creditors, but ordinarily would not affect the debtor.[16]

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in *Travelers* overruled the Ninth Circuit's *Fobian* rule and made clear that contract-based fees incurred in the course of litigating issues of federal bankruptcy law may be awarded pursuant to state law").

[13] 167 Fed. App'x 593 (9th Cir. 2006).

[14] As stated above in note 2, references in this article to the Bankruptcy Code or to the Code are to title 11 of the United States Code, and references to sections, unless otherwise noted, are to sections of the Bankruptcy Code.

[15] In a chapter 7 liquidation case, distributions are made on a pro rata (proportional or pari passu) basis to holders of unsecured claims that are of equal priority. Consider two holders of allowed unsecured claims, Alpha with a claim for $10,000 and Beta with a claim for $40,000. Assume each claim is a general unsecured claim—meaning that neither claim is a section 507(a) priority claim—and assume that neither claim is subordinated to the other (contractually or otherwise under section 510). To the extent there is a distribution to general unsecured claim holders in the chapter 7 case, Beta will receive four times as much as Alpha, because Beta's claim is four times as large. Each will receive the same percentage payment on its claim. *See* 11 U.S.C. § 726(b) (2006). If Alpha and Beta held the only general unsecured claims, and if $1,000 were available to be distributed to general unsecured claim holders, then Alpha would be entitled to receive $200, and Beta would be entitled to receive $800. (Note that Alpha would hold one fifth of the unsecured claims and would receive one fifth of the distribution. Beta would hold four fifths of the unsecured claims and would receive four fifths of the distribution.) The same would hold true in a chapter 11, 12, or 13 case, if Alpha's and Beta's claims were placed in the same class, see sections 1123(a)(4), 1222(a)(3), 1322(a)(3). If their claims were permissibly placed in different classes, then the Code often would prohibit unfairly different treatment of the claims. *See* § 1129(b)(1) (prohibiting unfair discrimination against class that has not accepted plan of reorganization by sufficient majority vote, as described in section 1126(c)); § 1222(b)(1) (prohibiting unfair discrimination against any class of claims except in one identified circumstance); § 1322(b)(1).

[16] If, as is usually the case, the debtor receives a discharge of the unsecured debt, the allowed amount of the debt ordinarily will not matter to the debtor, who will not be liable for it in any case after the discharge. *See, e.g.*, § 524(a). Thus courts often hold that debtors do not have standing to object to allowance of claims. *See* 5 COLLIER ON BANKRUPTCY ¶ 502.02[2][c] (Alan Resnick, et al. eds., 15th ed. rev. 2006); *see also* United States v. Jones, 260 B.R. 415, 419 (E.D. Mich. 2000).

If the debtor is solvent, so that allowed claims will be paid in full with the surplus going to the debtor under, for example, section 726(a)(6), then the total amount of the allowed claims will affect the debtor, and the debtor would have standing to object. *See* White v. Coors Distrib. Co. (*In re* White), 260 B.R. 870, 875 (B.A.P. 8th Cir. 2001). Similarly, the debtor will have standing to object to a claim when the debt for which it is filed is nondischargeable if the bankruptcy court may enter a money judgment against the debtor that will be enforceable against the debtor after the bankruptcy case—or if the claims allowance determination would be res judicata in a later collection suit by the creditor. *See* Normali v. O'Donnell (*In re* O'Donnell), 326 B.R. 901 (Table), No. 04-8054, 2005 WL 1279268, at *6 (B.A.P. 6th Cir. May 19, 2005). Even if the particular debt for which the claim is filed is not dischargeable, the debtor may have standing to object to the debt if *another* debt is nondischargeable. In such a case the debtor will want as large a distribution as possible to be made in the bankruptcy case on the nondischargeable debt, thus leaving the debtor owing as little as possible after the bankruptcy on that nondischargeable debt. As a result, the debtor would have a

In its unanimous decision in *Travelers*, the Supreme Court overruled *Fobian*.[17] But the Court refused to consider the broader question urged upon it by Pacific Gas & Electric ("PG&E").[18] The broader question, which the Court explicitly left open, is whether other bankruptcy principles preclude addition of post-petition attorneys' fees[19] to the allowable amount of an unsecured claim.[20] This article answers that question—which will be called the *United Merchants*[21] issue—with a clear "yes."

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financial interest in minimizing the amount of the other allowed claims. *See* Mulligan v. Sobiech, 131 B.R. 917, 920–22 (S.D.N.Y. 1991); COLLIER ON BANKRUPTCY, *supra* note 16, ¶ 502.02[2][c].

Tax considerations also may come into play. Discharge of debt (without paying it) often constitutes taxable income ("cancellation of debt" income), but it does not if the discharge occurs in a bankruptcy case. *See* I.R.C. § 108 (2006); MARK S. SCARBERRY, KENNETH N, KLEE, GRANT W. NEWTON & STEVE H. NICKLES, BUSINESS REORGANIZATION IN BANKRUPTCY: CASES & MATERIALS 731–32 (3d ed. 2006). It is true, however, that cancellation of debt in a bankruptcy case may cause the debtor's "tax attributes" (such as basis in property) to be reduced, which may cause the debtor to pay higher income taxes in the future. *See* I.R.C. § 108(b); SCARBERRY, KLEE, NEWTON & NICKLES, *supra*, at 732–34. Thus discharge of a larger debt rather than a smaller debt may have negative future tax consequences for the debtor.

[17] *See supra* text accompanying note 6.

[18] Travelers Cas. & Sur. Co. of Am. v. Pac. Gas and Elec. Co., 127 S. Ct. 1199, 1207 (2007).

[19] The reference to fees is to the kind of fees that would be allowed to a creditor under section 506(b) if the creditor seeking the fees were oversecured. Fees awarded as damages for collateral litigation expense may not be "fees" within the meaning of the term in section 506(b). *See supra* note 11; *infra* text accompanying note 233.

[20] *Travelers*, 127 S. Ct. at 1207–08.

[21] United Merchs. & Mfrs., Inc. v. Equitable Life Assurance Soc'y of the United States (*In re* United Merchs. & Mfrs., Inc.), 674 F.2d 134 (2d Cir. 1982). United Merchants filed its chapter XI bankruptcy petition before the effective date of the Code; thus it was governed by the old Bankruptcy Act, the Code's predecessor. *See infra* note 33. Two unsecured lenders sought allowance of claims for post-petition attorneys' fees (pursuant to a provision of the loan agreement) and also allowance of liquidated damages for default (equal to the pre-payment penalty that would have been due had the debtor prepaid the loans instead of defaulting). The bankruptcy court allowed the fees but disallowed the liquidated damages. The district court affirmed the disallowance of the liquidated damages, but reversed the allowance of the fees. The Second Circuit reversed the district court, holding that both the fees and the liquidated damages were allowable. With respect to post-petition fees, the Second Circuit rejected a policy argument and held that they were allowable as claims that were contingent as of the petition date, under a 1938 amendment to the old Bankruptcy Act, so long as they were enforceable under state law. The Second Circuit also rejected an argument that the newly enacted Code's section 506(b) suggested a different result, stating in dictum that "[n]either the statute [section 506(b)] nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorney's fees." *See* discussion *infra* Part IV (showing Second Circuit's dictum was incorrect.) The Second Circuit also argued that the Supreme Court's decision in Security Mortgage Co. v. Powers, 278 U.S. 149 (1928), indicated that post-petition fees could be allowed in favor of unsecured as well as secured creditors, even though as of 1928 claims that were contingent as of the petition date were not allowable. This is an over-reading of *Security Mortgage*. As a bankruptcy court has pointed out,

> [I]n *Security Mortgage Company*, the creditor was fully secured. The language of the Supreme Court to the effect that the character of the obligation to pay attorney fees presents no obstacle to enforcing it in bankruptcy, either as a provable claim or by way of a lien upon specific property is dicta as to the attorney fees being part of a provable claim. In addition, the Court could have been speaking of attorney fees earned by a creditor's attorney pre-petition in reliance on such a contractual provision. Such attorney's fees have become the obligation of the debtor pre-petition and can be proven like any other indebtedness.

The Bankruptcy Code provides a clear textual basis for precluding addition of such fees to the allowed amount of an unsecured claim.[22]

In the other successful petition for certiorari, debtors Mary and Eric DeRoche sought review of the Ninth Circuit's decision in DeRoche v. Arizona Industrial Commission (*In re* DeRoche) ("*DeRoche*").[23] In *DeRoche*, the Ninth Circuit relied on its federal common law Fobian rule to deny the debtors recovery of attorneys' fees for their successful bankruptcy litigation with the State of Arizona, even though an Arizona statute provided for recovery of attorneys' fees by prevailing parties in various kinds of litigation against the State.[24] Of course, because the debtors sought fees against a nondebtor, the *United Merchants* issue was not directly involved; the issue was not whether a claim for the fees would be allowed as a claim under section 502(b). Instead, the issue was whether Arizona would be held liable to the debtors for the amount of their attorneys' fees. Apparently any fees the DeRoches might have recovered from the State would not have belonged to the bankruptcy estate in their case, but would have been theirs to keep after the bankruptcy.

In re Sakowitz, 110 B.R. 268, 271 (Bankr. S.D. Tex. 1989) (citation omitted). The Second Circuit also relied on a 1979 Eighth Circuit case dealing with the very different issue whether post-petition fees may be imposed as a personal liability of the debtor on a nondischargeable debt and a 1968 Fifth Circuit case that the Second Circuit incorrectly cited as allowing an undersecured creditor's claim to include post-petition fees. *See* Worthen Bank & Trust Co. v. Morris (*In re* Morris), 602 F.2d 826 (8th Cir. 1979); LeLaurin v. Frost Nat'l Bank of San Antonio, 391 F.2d 687 (5th Cir.), *cert. denied*, 393 U.S. 979 (1968); *infra* text accompanying notes 123–25 (showing that cases dealing with fees on nondischargeable debts are inapposite); *infra* note 172 (discussing *LeLaurin*).

Other articles dealing with *Travelers* or the *United Merchants* issue include: Jennifer M. Taylor & Christopher J. Mertens, *Travelers and the Implications on the Allowability of Unsecured Creditors' Claims for Post-Petition Attorneys' Fees Against the Bankruptcy Estate*, 81 AM. BANKR. L.J. 123 (2007); Ralph Brubaker, *Allowance of Attorney's Fees to an Unsecured Creditor (Part II): Wrestling with the Issue Undecided by the Supreme Court*, 27 NO. 8 BANKRUPTCY LAW LETTER 1 (August 2007); William P. Weintraub, Fobian *Rule Is a Casualty of* Travelers*: The Supreme Court's Decision Raises New Questions for Bankruptcy Attorneys*, 16 NO. 6 BUSINESS LAW TODAY 61 (July/August 2007); Daniel Morman, *Unsecured Claims for Contractual Attorney's Fees Incurred in Bankruptcy Litigation*, 26 NO. 6 AM. BANKR. INST. J. 26 (July/August 2007); William C. Heuer, Qmect, Inc.*: Picking Up Where* Travelers *Left Off*, 26 NO. 6 AM. BANKR. INST. J. 32 (July/August 2007); "Erik" Weitung Hsu & David W. Elmquist, *Can an Unsecured Creditor Recover Attorneys' Fees? The Question Not Answered in* Travelers, 26 NO. 4 AM. BANKR. INST. J. 10 (May 2007); Michelle Campbell, Carrianne Basler & Kerri Lyman, *The* Travelers *Effect: Case Administration and Creditor Recoveries*, 26 NO. 4 AM. BANKR. INST. J. 28 (May 2007); Goeffrey L. Berman & Peter M. Gilhuly, *Recovering Attorneys' Fees and Costs in Bankruptcy Cases*, 19 AM. BANKR. INST. J. 32 (May 2000); Ray Geoffroy, *Comment, Show Me the Money: The Debate over Creditors' Postpetition Attorneys' Fees*, 14 BANKR. DEV. J. 425 (1998); James Gadsden & Seigo Yamasaki, *Recovery of Attorney Fees as an Unsecured Claim*, 114 BANKING L.J. 594 (1997); George W. Kuney, *Claims for Attorney Fees Under the Bankruptcy Code*, 4 J. BANKR. L. & PRAC. 203 (1995); Laura Davis Jones, Gregory K. Wingate, Nancy E. Whinnery & Natalie S. Wolf, *The Indenture Trustee in Chapter 11 Proceedings: Overview of Trustee's Right to Fees and Expenses, and Case Tactics and Strategies*, 399 PLI/REAL 469 (Feb.-March 1994); Liore Z. Alroy & J. Michael Mayerfeld, *Note, Contracted-for Post-Petition Attorneys' Fees and Collection Costs: United Merchants Revisited*, 1992 COLUM. BUS. L. REV. 309 (1992).

[22] *See infra* Part IV.C.

[23] 434 F.3d 1188 (9th Cir. 2006), *vacated and remanded*, 127 S. Ct. 1873 (2007).

[24] 434 F.3d 1188, 1191 (9th Cir. 2006).

The Ninth Circuit, on remand in *DeRoche*, will need to consider whether principles other than the abrogated Fobian rule may stand as an impediment to an award of attorneys' fees, where the award would constitute a personal liability of a party after the bankruptcy case. It is important to see, though, that the factual situation in *DeRoche* was not the usual one in which a party seeks an award of fees for bankruptcy litigation that will stand as a personal liability of a party, and thus it may not be a good case for development of a general rule.

The usual situation involves a creditor who seeks to hold a debtor liable for fees incurred in establishing that a debt is nondischargeable.[25] An award of fees in such a case creates a serious possibility that the purposes of the Bankruptcy Code will be undermined. The Code expressly allows for recovery of fees in many cases by *debtors* who prevail in dischargeability litigation,[26] but makes no such provision for *creditors* to recover fees. In addition, the legislative history of the Code shows that Congress was concerned that the prospect of being held liable for attorneys' fees would coerce debtors into reaffirming debts even where the debts likely were dischargeable; that would deprive debtors of the fresh start that the Code was designed to provide.[27] Thus the possibility must be considered that state law bases for award of fees against debtors in nondischargeability litigation are preempted. That possibility will be discussed in a later article.

Part II[28] of this article provides important context by explaining the gulf that is created by the filing of a bankruptcy petition, a gulf between the pre-petition world and the post-petition world. The real world cannot be divided so neatly, and thus the gulf is not completely impassable; but it is a key structural component of the Bankruptcy Code. Cases spanning the gulf, such as mass tort cases in which there is a period of time between exposure and injury, create real difficulties. The concept of a contingent claim involves crossing that gulf as well; a pre-petition contingent right to payment becomes fixed by events that happen post-petition. The complications thereby created for the *United Merchants* issue must be considered carefully.

Part III[29] describes the Supreme Court's *Travelers* decision, including what it decided and most importantly, what it did not decide. Part III concludes that *Travelers* left open for consideration all grounds other than the Fobian rule for deciding the *United Merchants* issue. Part III also provides a brief eulogy for the Fobian rule.

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[25] *See infra* notes 119–20 and accompanying text.

[26] *See* 11 U.S.C. § 523(d) (2006).

[27] *See* Martin v. Bank of Germantown (*In re* Martin), 761 F.2d 1163, 1167–68 (6th Cir. 1985) (holding that fees could be awarded against debtor in nondischargeability action, but admitting "[t]he congressional failure to award attorney's fees to prevailing creditors was not accidental," and noting concern of Congress "that creditors were using the threat of litigation to induce consumer debtors to settle for reduced sums, even though the debtors were in many cases entitled to discharge") (citing H.R. REP. NO. 95-595, at 131, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6092).

[28] *See infra* text accompanying notes 33–79.

[29] *See infra* text accompanying notes 80–161.

Part IV[30] describes the arguments that have been made and the case authority to date concerning the *United Merchants* issue (other than arguments and cases that deal with or apply the Fobian rule). It explains that some courts have embraced a misunderstanding of section 506(b) in order (1) to resolve a quandary created by their acceptance in certain situations of the "minority" position on the *United Merchants* issue (under which post-petition fees are allowed on unsecured claims) and (2) to permit a federal reasonableness standard to be applied to pre-petition fees, contrary to the provisions of the Code. Part IV then provides a textual argument for the "majority" position (under which such fees are not allowable), an argument that Part IV concludes is determinative.[31] Finally, Part IV explains that even though it might be thought that there are five potential problems with such a result, none of the problems casts serious doubt on the correctness of the "majority" position.

Part V[32] summarizes the conclusions of the article and describes the issues that will be discussed more fully in later articles.

I. THE GULF BETWEEN THE PRE-PETITION AND THE POST-PETITION WORLDS

Under the Bankruptcy Code, as under the old Bankruptcy Act,[33] the filing of a bankruptcy petition creates a kind of gulf between the pre-petition and the post-petition worlds.[34] A gulf is created as to what is owned, as to what is owed, and as to what may be done. With regard to what may be done, the automatic stay stops creditor collection activity on pre-petition debts,[35] leaving creditors where they were at the moment the petition was filed. Absent relief from the automatic stay[36] or an applicable exception,[37] creditors cannot demand payment of pre-petition debts,[38] cannot proceed with or initiate suits on such debts,[39] cannot obtain new liens on the debtor's property to secure such debts,[40] and cannot perfect or enforce existing liens.[41]

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[30] *See infra* text accompanying notes 162–237.

[31] The argument apparently has not been presented before, at least not in the form in which it is presented here.

[32] *See infra* text following note 243.

[33] National Bankr. Act of 1898, ch. 541, 30 Stat. 544 (as amended) (repealed 1979) ("old Bankruptcy Act"). The old Bankruptcy Act was the statutory scheme in effect before enactment of the Bankruptcy Code by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[34] For another statement of the importance of the distinction the Code makes between the pre-petition and post-petition periods see Brief for Respondent [PG&E]. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007) (No. 05-1429) 2006 WL 3825666, at *26.

[35] 11 U.S.C. § 362(a)(6) (2006).

[36] *See* § 362(d).

[37] *See* § 362(b).

[38] *Id.*

[39] *Id.*; § 362(a)(1)–(2).

[40] § 362(a)(5).

[41] *Id.* Neither may anyone take "any act to create, perfect, or enforce any lien against property of the estate," whether the debt is pre-petition or post-petition. § 362(a)(4).

With regard to what is owned (and by whom), property interests held, as of the moment of the filing, by the debtor are pulled into the bankruptcy estate that is created by the filing;[42] an individual debtor's post-petition earnings from personal services are not, in a chapter 7 case, nor generally are other property interests acquired by the debtor post-petition, unless derived from property of the estate or acquired for the estate.[43] Agreements to provide additional collateral for existing debts cease to have effect as of the moment of the filing, except to some extent with regard to property derived from existing collateral.[44] Unauthorized post-petition transfers of estate property generally are voidable.

There is also a gulf with regard to what is owed. Even the label "creditor" generally is reserved for those whose claims arose pre-petition (or are treated as having arisen pre-petition).[45] A proof of claim may be filed by a creditor (including one whose claim is treated as having arisen pre-petition);[46] in some cases another entity[47] may file a proof of a creditor's claim. But in general proofs of claim may not be filed for post-petition claims, and thus such claims may not be allowed so as to share in any distribution from the estate.[48] Further, in by far the greatest number of cases, the debtor receives a discharge of pre-petition[49] but not post-petition debts.[50]

Most importantly, for our purposes, the allowable amount of a claim in bankruptcy is, in most cases, fixed as of the filing date. When objection is made to a claim, the Bankruptcy Code provides in the language at the beginning of section

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[42] § 541(a)(1)–(2).

[43] *See id.*; §§ 541(a)(3)–(4), (6)–(7), 1115, 1207(a)(2), 1306(a)(2); *infra* text accompanying note 58. Note that property of the estate vests in the debtor on confirmation of a chapter 11, 12, or 13 plan absent plan provision or court order to the contrary. §§ 1141(b), 1227(b), 1327(b).

[44] *See* § 552.

[45] *See supra* note 3 (discussing application of term "creditor" as defined in the Bankruptcy Code).

[46] § 501(a), (d).

[47] "Entity" is broader than "person," as those terms are defined in the Code, because it includes governmental units, the U.S. trustee, estates, and trusts, in addition to persons. *See* § 101(15). The term "person" includes individuals, partnerships, and corporations; it also includes governmental units but only for certain specified purposes. *See* § 101(41).

[48] Note that filing of a proof of claim appears under section 502 to be a prerequisite to allowance. The Bankruptcy Rules make that explicit with regard to unsecured claims. FED. R. BANKR. P. 3002(a). In a chapter 9 or 11 case, if the debtor's schedules or list of creditors include a claim, then it is deemed filed, as long as it is not scheduled or listed as "disputed, contingent, or unliquidated." §§ 925, 1111(a).

[49] Debts that arise post-petition but that are treated (under the sections listed in section 101(10)(B)) as having arisen pre-petition also are discharged.

[50] About two thirds of all bankruptcy filings are chapter 7 cases, with chapter 13 cases making up the vast majority of the rest. *See* 2006 Judicial Facts and Figures, *supra* note 3, Table 7.2. Under section 727(b), only debts that arise before the date of the order for relief (which, as noted above in note 2 is the petition date in more than 99.9% of cases), or which are treated as having arisen before that date, are discharged. The chapter 13 discharge covers debts provided for in the plan (or disallowed), which could include post-petition claims that are filed. However, the choice whether to file a post-petition claim belongs to the holder of the claim, not the debtor. *See* § 1305. Few holders of post-petition claims will file them if they are to be discharged rather than paid under the chapter 13 plan. The chapter 11 discharge covers claims that arise before confirmation of the plan, section 1141(d)(1)(A), but most claims that arise post-petition will be administrative expense claims that must be paid in full in the plan rather than discharged. *See* §§ 503(b), 1129(a)(9)(A).

502(b)—in what will be called its "preamble"—that "the court . . . shall determine the amount of such claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount" absent a further basis for limiting or disallowing the claim.[51] An amount determined as of the petition date, as required by section 502(b)'s preamble, would not seem to include post-petition interest, fees, or costs. That conclusion is reinforced with respect to post-petition interest by section 502(b)(2), one of the further bases for limiting the amount of the claim: an allowed claim cannot include "unmatured interest." Given the earlier reference in section 502(b) to determination of the amount of the claim as of the petition date, it is apparent that section 502(b)(2)'s reference to "unmatured interest" is to interest unmatured as of the petition date.[52] Neither the preamble to section 502(b) nor section 502(b)(2) is superfluous, though they overlap in effect. Each can be seen to disallow the usual kind of post-petition interest. The preamble disallows other post-petition additions to an unsecured claim, such as late fees (and this article will argue, post-petition attorneys' fees that are incidental to an unsecured claim).[53] Section 502(b)(2) potentially goes further than the preamble by disallowing unamortized original issue discount that might, under state law, constitute a recoverable part of an obligation on its acceleration.[54]

The gulf between the pre-petition and post-petition worlds is not perfectly impassable. Sometimes a date somewhat before or after the petition date becomes the dividing line. For example, the making of certain setoffs and transfers, and the perfection of certain liens, within 90 days (or in some cases a year) before the petition date may be avoided, thus reversing the effect of a transfer or of the perfection of a lien and preserving to some degree a state of events as of that prior date.[55] Perfection of liens sometimes is allowed within a short period after the petition filing date.[56] In cases under chapters 11, 12, and 13, the discharge may

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[51] § 502(b).

[52] *See In re* Oakwood Homes Corp., 449 F.3d 588, 599–600 (3d Cir. 2006).

[53] *See, e.g.*, MacDonald v. First Interstate Credit Alliance, Inc. (*In re* MacDonald), 100 B.R. 714, 723–24 (Bankr. D. Del. 1989) (holding, *inter alia*, "cross-collateralization provisions are valid but the omnibus clause is unconscionable" and disallowing undersecured creditor's claim for post-petition late fees and post-petition attorney's fees), *aff'd in part, rev'd in part*, No. Civ. A. 89-369 LON, 1992 WL 12044050, at *1–2 (D. Del. Apr. 13, 1992) (remanding on unconscionability issue, stating with respect to attorneys' fees and late fees issues that bankruptcy court "had applied the appropriate legal standards and [that] its factual findings are not clearly erroneous," but remanding on that issue, as well, in case resolution of unconscionability issue might result in creditor being oversecured and thus potentially entitled to such fees).

[54] *See In re* Miller, 344 B.R. 769, 772–73 (Bankr. W.D. Va. 2006); COLLIER ON BANKRUPTCY, *supra* note 16, ¶ 502.03[3][b]].

[55] *See* 11 U.S.C. §§ 547(b)(4) & (e), 553 (2006).

[56] *See* §§ 362(b)(3), 544(a)(1), 546(b); U.C.C. § 9-317(a)(2), (e) (2003). Consider two hypothetical cases. (1) Suppose a creditor obtains a judgment and then obtains a writ of execution. The creditor then may levy on property owned by the judgment debtor. If that property turns out to be goods recently sold to the judgment debtor on secured credit, U.C.C. section 9-317(e) allows the secured party to defeat the creditor's judicial lien, even if the levy occurred before the secured party filed its financing statement, so long as the secured party does so within twenty days after delivery of the goods to the judgment debtor/purchaser. (2) Now suppose that there is no judicial lien creditor but that instead the purchaser files a bankruptcy petition shortly after purchasing the goods on secured credit. Section 544(a)(1) gives the trustee in bankruptcy (or

include debts arising after the filing of the petition but before confirmation of the plan in the case, though in most such cases the debts are paid in full under the plan and thus as a practical matter are not discharged.[57] The estate includes certain property to which the debtor becomes entitled within 180 days after the petition filing date (primarily inheritances, life insurance proceeds, and marital dissolution property distributions).[58]

In addition, the gulf is sometimes in a sense bridged (or ignored). Some of the debtor's pre-petition property interests do not pass into the estate and are retained by the debtor post-petition (primarily interests in certain education accounts, pension trusts, and other spendthrift trusts),[59] and an individual debtor may exempt back out of the estate some pre-petition property interests that passed into it.[60] Post-petition property interests that are related to pre-petition property interests also may cross the gulf; post-petition rents, proceeds and similar items with respect to property of the estate become property of the estate,[61] and such post-petition property interests also may become subject to a lien securing a pre-petition debt if the related property of the estate was subject to the lien as of the petition date.[62] Similarly, if the collateral securing a debt increases in value post-petition, the pre-petition secured claim holder ordinarily is entitled to the benefit of that increase.[63] Further, and of particular relevance to this article, a creditor whose pre-petition claim is secured by property worth more than the amount of the debt is entitled to have post-petition interest added to the pre-petition secured claim, along with "reasonable fees, costs, or charges," to the extent such fees, costs, or charges are "provided for under the agreement or State statute under which such claim arose."[64]

Other situations in which the gulf is crossed or potentially crossed, involve claims that might be thought to have arisen either pre-petition or post-petition, and

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debtor in possession in chapter 11) the rights of a judicial lien creditor who obtained a lien on the goods on the date the petition was filed. If the secured party had not yet filed its financing statement, it might seem that the secured party would lose its lien under section 544(a)(1). But section 546(b) makes the trustee's rights under section 544(a)(1) subject to U.C.C. section 9-317(e), and section 362(b)(3) grants the secured party an exception from the automatic stay so that it can file its financing statement and perfect its security interest. Thus, so long as the secured party files the financing statement within twenty days of the date the debtor received the goods, the secured party does not violate the automatic stay and will prevail over the trustee's section 544(a)(1) judicial lien creditor power.

[57] *See supra* note 50.

[58] § 541(a)(5). Note that in some cases receipt of such property may have been anticipated as of the date of the petition.

[59] *See* § 541(b)(5)–(6), (c)(2).

[60] *See* § 522.

[61] § 541(a)(6).

[62] *See* § 552. Note also that property acquired *by the estate* of course becomes property of the estate. § 541(a)(7). Note that the trustee or debtor in possession operates the business in a chapter 11 case on behalf of the estate using the estate's property, and thus property acquired by the trustee or debtor in possession becomes property of the estate, even if it is not technically rents or proceeds. Even earnings from the debtor's personal services in an individual chapter 11 case become property of the estate. *See* § 1115(a)(2).

[63] *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (holding pre-petition claim holder in chapter 7 case gets benefit of increase if collateral securing debt increases in value post-petition).

[64] § 506(b).

cases in which post-petition events may affect the amount or allowability of claims that in some sense arose pre-petition (and that therefore may be seen as pre-petition contingent claims). A woman is injured by a Dalkon Shield intrauterine device that she used pre-petition, but her injuries do not manifest themselves until after the petition is filed; is her claim a pre-petition claim?[65] An aircraft manufacturer knows that some of the planes it has already produced will crash in the future, and that in some such cases those injured will claim that the manufacturer is liable for marketing an allegedly defective aircraft; one such plane does crash during the manufacturer's bankruptcy reorganization but others may crash years in the future. Which victims or potential victims have pre-petition (or pre-confirmation) claims for purposes of sharing in the distribution and for purposes of the discharge of debts?[66]

Or suppose an unlikely actor—say a corporation engaged in providing home security services—spilled toxic wastes on real property that it had leased, and did so under circumstances that would not have given the environmental authorities any clue that such a spill had happened.[67] Then the corporation moved to a new location, filed a chapter 11 petition, confirmed a plan of reorganization, and continued in business at the new location with its prior debts discharged. Then the EPA discovers the pollution and sues the reorganized corporation, which pleads the bankruptcy discharge as a defense. Did the EPA have a claim before the plan was confirmed? If so, it was discharged; if not, it was not discharged. At least some courts would hold that the EPA did not have a claim as of the time of confirmation of the plan, unless the corporation's known activities created a reason for the EPA to think it needed to regulate the corporation[68] or perhaps not unless the corporation and the EPA had a sufficient relationship that such an environmental claim would be within the EPA's "fair contemplation."[69]

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[65] *See* Grady v. A.H. Robins, Inc. (*In re* A.H. Robins, Inc.), 839 F.2d 198, 199 (4th Cir. 1988) (answering "yes," at least for purposes of automatic stay, because conduct of debtor ultimately causing injury was pre-petition conduct). *But see* United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1004 (2d Cir. 1991) ("Accepting as claimants those future tort victims whose injuries are caused by pre-petition conduct but do not become manifest until after confirmation, arguably puts considerable strain not only on the Code's definition of 'claim,' but also on the definition of 'creditor'—an 'entity that has a claim against the debtor that *arose* at the time of or before the order for relief concerning the debtor.'" (emphasis supplied by court)).

[66] *See In re* Piper Aircraft Corp., 162 B.R. 619, 621 (Bankr. S.D. Fla.) (holding future victims do not have pre-petition claims that could be provided for in chapter 11 plan—even if such future victims would be injured due to the pre-petition manufacture of defective aircraft—because it was impossible to identify a pre-petition relationship between identified persons who would be injured in future and identified defective aircraft that would injure them), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd*, 58 F.3d 1573 (11th Cir. 1995); Piper Aircraft Corp. v. Calabro (*In re* Piper Aircraft Corp.), 169 B.R. 766 (Bankr. S.D. Fla. 1994) (holding person injured in crash that occurred during chapter 11 case but that involved an aircraft sold by debtor pre-petition had pre-petition claim); *accord*, Epstein v. Official Comm. of Unsecured Creditors (*In re* Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995).

[67] Imagine that the corporation was paid by some of its clients to dispose of toxic wastes secretly, and it did so by dumping them in the basement of its leased headquarters.

[68] The Second Circuit probably would apply something like that test. *See In re Chateaugay Corp.*, 944 F.2d at 1004–05.

[69] *See* Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 930–31 (9th Cir. 1993).

Suppose an accounting firm negligently failed to discover, in its pre-petition auditing of the debtor's financial statements, that the debtor's managers fraudulently created false financial statements; then a third party damaged by the fraud succeeds post-petition in holding the accounting firm liable for the third party's damages, thus giving the accounting firm the right to reimbursement from the debtor.[70] This is an indemnity case, in which the accounting firm should be held to have an allowable pre-petition unliquidated, contingent tort claim, a claim that becomes liquidated and fixed once the accounting firm is held liable.[71]

Now consider, at greater length, a contingent contract claim. Suppose a guarantor of a pre-petition debt owed by the debtor pays the creditor post-petition; under non-bankruptcy law, the guarantor becomes entitled only then to reimbursement by the debtor.[72] It seems, though, that the guarantor had a claim when the petition was filed, even before paying anything to the creditor. The guarantor has a right to payment that is contingent on an event—the making of payment to the creditor—and contingent rights to payment are claims.[73] Such a claim is not allowable so long as it remains contingent, and not allowable to the extent that it remains contingent.[74] Once the guarantor pays something to the creditor, the guarantor's contingent claim becomes fixed to the extent of the payment, because then under nonbankruptcy law the guarantor will be entitled to be reimbursed what the guarantor paid. And to the extent that the claim becomes fixed, it becomes allowable on the same basis as other claims.[75]

Note, though, that section 502(e)(2) explicitly provides that the claim will be allowable "the same as if such claim had become fixed before the date of the filing of the petition;"[76] similarly, the preamble[77] to section 502(b) provides that allowance of a claim under section 502(e)(2) is an exception to the normal rule that the amount of the claim is determined as of the petition date. That result *already*

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[70] *See* Avellini & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 337 (3d Cir. 1984) (holding claim was post-petition and seemingly denying existence of contingent tort claims). *Frenville* has been much and deservedly criticized. *See, e.g.*, *In re A.H. Robins*, 839 F.2d at 200–03 (declining to follow *Frenville*). Even the *Frenville* court admitted that had there been a contractual indemnity right, the claim for indemnity would have been a pre-petition claim. 744 F.2d at 336–37.

[71] Attorneys' fees incurred post-petition by the accountants should be allowable, assuming state law would give the accountants the right to recover them. Such post-petition fees are not governed by the American Rule and probably are not the kind of fees referenced in section 506(b). *See* discussion *supra* note 11; *infra* text accompanying note 233.

[72] *See* Block v. Tex. Commerce Bank Nat'l Ass'n (*In re* Midwestern Cos.), 102 B.R. 169, 171 (W.D. Mo. 1989); SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 496.

[73] *See* 11 U.S.C. § 101(5)(A) (2006); *In re Midwestern Cos.*, 102 B.R. at 171; SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 496.

[74] *See* § 502(e)(1)(B). The debt would be double counted for purposes of distribution, if both the creditor and the guarantor had allowable claims for the amount of the debt; each would receive a distribution. The debtor only received a single loan, and it is unfair to other creditors for a double share to be allocated to it simply because it was a guaranteed debt. *See* SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 496–97.

[75] *See* § 502(e)(2); SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 497.

[76] § 502(e)(2).

[77] *See supra* text accompanying note 51.

would seem to follow, because section 502(b)(2) provides that contingency of a claim is not a basis for disallowance; allowing a wholly contingent claim (one that was wholly contingent as of the petition date) only for the amount that was not contingent as of the petition date would be the same as disallowing the claim because of the contingency, because that amount by definition would be zero. And section 502(e)(1)(B) does not create a problem here that would require the Code to say that once the claim is fixed it should be allowed as if it had been fixed on the petition date. Section 502(e)(1)(B) only provides for disallowance to the extent a guarantor's claim (or similar claim) for reimbursement is contingent at the time the court considers whether to allow the claim. That can be done after the claim becomes fixed, or if waiting will cause too much delay, the contingent claim can be estimated under section 502(c). Thus section 502(e)(1)(B) would not prevent allowance of the claim once it becomes fixed. If the court heard the matter and disallowed the claim while it was contingent, the court could redetermine the claim under section 502(j) after the claim became fixed. If section 502(j)'s "cause" and "equities of the case" standards were seen as too restrictive, the drafters could have simply provided that the fixing of the claim provides an occasion for redetermination of the claim, independent of section 502(j). So why do section 502(e)(2) and the preamble to section 502(b) provide explicit direction to determine the amount of the claim as if were fixed at the petition date?

Apparently, the Code's drafters decided that its treatment of contingent claims could be confusing, and thus decided, with respect to this very important kind of contingent claim, to make matters clear. This may suggest that even the drafters were not sure that the Code's provisions on contingent claims—which cross the gulf between the pre- and post-petition worlds—always would have a clear and plain meaning. The difficulty courts have had with determining when a claim is a pre-petition contingent claim suggests that they were right; the concept of a contingent claim creates complications that the Code's language does not always resolve clearly.[78]

This is particularly important with respect to the *United Merchants* issue, because one argument for allowance of post-petition fees depends on an assumption that the Code's provisions on contingent claims have a particular plain meaning, such a very plain meaning that they override the plain meaning of sections 502(b) and 506(a)-(b). Not surprisingly, on close examination, that very plain meaning is not so plain.

What kinds of claims are the contingent claims that the drafters contemplated would be allowed, even though nothing is owing as of the petition date, with the amount of such a claim being estimated under section 502(c) or with the amount being determined after the claim becomes fixed? The cases dealing with future tort claims and environmental cleanup claims show that there are limits to the concept that any potential future right to payment should be treated in this way.

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[78] In this regard, consider notes 65–71 above, and the accompanying text.

Are there perhaps other limits, limits relevant to the *United Merchants* issue? Section IV.C. of this article shows that there are, but for now consider two fact patterns.

A credit card company seeks allowance of post-petition late fees and over-limit fees that, in the absence of a bankruptcy filing, would have been added to the debtor's credit card balance each month. The late fees and overlimit fees are simply not allowable.[79]

Or, finally, a creditor incurs post-petition attorneys' fees in connection with a pre-petition unsecured claim that arises from a contract that provides for recovery of such fees. Is the right to such fees an allowable pre-petition contingent claim that becomes an allowable fixed claim once the post-petition fees are incurred? That is a question we are left with after *Travelers*, and it requires us to resolve the *United Merchants* issue.

II. THE SUPREME COURT'S DECISION IN TRAVELERS CASUALTY & INSURANCE CO. OF AMERICA V. PACIFIC GAS & ELECTRIC CO.

A. The Facts and the Proceedings Below

PG&E self-insured for workers' compensation liability, but was required by state law to post bonds to ensure that injured workers would receive their benefits.[80] Travelers provided those bonds—in an amount of $100 million—pursuant to agreements that included a broad right of indemnity in favor of Travelers, including indemnity for attorneys' fees incurred by Travelers.[81] When PG&E filed its chapter 11 petition, it obtained authorization to continue to pay workers' compensation claims for workers injured before the filing of the petition, but neither the bankruptcy court nor the Code mandated such payments.[82] PG&E continued to pay those claims,[83] but there was no guarantee that it would continue to do so.

Travelers thus filed a proof of claim in PG&E's bankruptcy for its contingent right to reimbursement should it be required to pay anything under its bonds.[84] The proof of claim noted that Travelers had subrogation rights in addition to its contingent claim for reimbursement; if Travelers paid workers' compensation claims to workers, then Travelers not only would be entitled to reimbursement under its own indemnity rights; in addition, it would be subrogated to the workers' rights.[85] To protect its right to reimbursement and its subrogation rights, Travelers

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[79] *See supra* note 53 and accompanying text.

[80] Travelers Cas. & Ins. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199, 1202 n.1 (2007).

[81] *Id.* at 1202, 1202 n.1.

[82] Brief for Petitioner, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007), (No. 05-1429), 2006 WL 3387940, at *8 (noting that court did not require payments).

[83] *Travelers*, 127 S. Ct. at 1202.

[84] *Id.*

[85] Brief for Petitioner, *supra* note 82, at *11. The subrogation rights with regard to the pre-petition workers' compensation claims appear to be of value simply because they likely could be asserted after the bankruptcy case with regard to any right that injured workers would have under the plan against PG&E.

also filed proofs of claim on behalf of workers who had been injured pre-petition, for the workers' compensation benefits to which they were entitled.[86] "In response to Travelers' claim, and with the knowledge and approval of the Bankruptcy Court, PG & E agreed to insert language into its reorganization plan and disclosure statement to protect Travelers' right to indemnity and subrogation in the event of a default by PG & E."[87]

A dispute ensued, with Travelers asserting that PG&E had changed the agreed-upon language[88] and with PG&E objecting to Travelers' claim.[89] A stipulation resolved the dispute.

Subrogation rights may or may not be claims, and thus may or may not be dischargeable under section 1141(d). *Id.* at 11–12 n.6 (arguing they are not claims); 11 U.S.C. § 509(c) (2006) (referring to "an allowed claim . . . by way of subrogation under this section"); Acevedo v. Van Dorn Plastic Mach. Co., 68 B.R. 495, 497 (Bankr. E.D.N.Y. 1986) (suggesting that "Congress intended an extremely broad definition of 'claim' for bankruptcy administration, which would include a subrogation claim"). Of course, if the rights to which a party seeks subrogation are themselves discharged, it will do the party no good to be subrogated to nonexistent rights. In *Travelers* the workers' claims against PG&E arguably were not discharged, because the plan provided for their class to be unimpaired. *See* Brief for Petitioner, *supra* note 82, at *14–17. Subrogation rights with respect to nondischargeable debts survive. *See, e.g.*, Hartford Cas. Ins. Co. v. Fields (*In re* Fields), 926 F.2d 501, 504–05 (5th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991); Garton v. Zoglman (*In re* Zoglman), 78 B.R. 213, 215 (Bankr. W.D. Wis. 1987). The same should be true of debts that are not discharged because the plan provides for them not to be discharged. In any case, it seems Travelers would have a post-petition right to be subrogated to whatever rights the workers have against PG&E under the plan, to the extent PG&E pays the workers what they are owed by PG&E under the plan. That would follow from the basic principle that one who pays another's debt and is not a volunteer is entitled to subrogation. *See, e.g., In re Zoglman*, 78 B.R. at 215.

The contingent claim that Travelers held for reimbursement of payments that it might make to workers in the future was a claim—a disallowed claim under section 502(e)(1)(B) because it remained contingent—but a claim nonetheless. *See supra* note 73 and accompanying text. That disallowed claim was discharged when PG&E's plan was confirmed, and thus could not be asserted by Travelers afterward. *See* § 1141(d); SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 499–500 (discussing right to reimbursement but not subrogation). Although Travelers had the right to seek reconsideration of its disallowed claim for reimbursement in the event it had to pay the workers—which would make the claim no longer contingent to the extent of the payment and thus allowable under section 502(e)(2)—the right to seek reconsideration presumably would terminate on closing of the bankruptcy case, and the court might refuse to reopen the case to allow reconsideration. Thus it appears that its subrogation rights would be the only relatively sure protection for Travelers after closing of the bankruptcy case. Note that subrogation could not entitle Travelers to the benefit of any priority that workers might have asserted for their pre-petition workers' compensation claims, see section 507(d), and that such claims are not, in any event, priority claims. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2116 (2006).

[86] *See* Brief for Petitioner, *supra* note 82, at *12. If the workers failed to file timely claims—that is, if they failed to file claims by the "bar date" set by the court under Federal Rule of Bankruptcy Procedure 3003(c)(3)—their claims could be disallowed under section 502(b)(9). In that event Travelers would not have an allowable claim for reimbursement even if it paid the workers, see section 502(e)(1)(A), and its subrogation rights would be worthless, because the workers would have no rights to which Travelers could be subrogated. *See* Fed. R. Bankr. P. 3003(c)(2). Section 501(b) allowed Travelers to file a claim on behalf of the workers, if the workers failed to file their own claims by the bar date. Under Federal Rule of Bankruptcy Procedure 3005(a), Travelers would have had thirty days after the bar date to file claims on behalf of the workers. Neither the Code nor the Rules authorize a party like Travelers to file such a claim on behalf of another party before the bar date.

[87] *Travelers*, 127 S. Ct. at 1202.

[88] *See id.*

[89] Brief for Petitioner, *supra* note 82, at *16; Brief for Respondent, *supra* note 34, at *3.

Travelers agreed to disallowance of its contingent claim for reimbursement, which represented no real concession by Travelers; it was quite clear that the claim could not be allowed to the extent it remained contingent.[90] Travelers' point in filing the claim could not have been to have an immediately allowable claim for reimbursement of payments made to injured workers; Travelers had made no such payment. Rather, Travelers needed to file a claim by the claims filing bar date that could be the basis for later allowance under section 502(e)(2), in the event that PG&E defaulted in payment of workers' compensation claims and Travelers had to pay them.

PG&E stipulated that Travelers could assert its subrogation rights and file a claim for its attorneys' fees, but only subject to PG&E's right in each case to object.[91] Those were not real concessions by PG&E. There was a real concession, however, made by PG&E; apparently the stipulation required that the plan of reorganization to be proposed by PG&E leave unimpaired the class of pre-petition workers' compensation claims. That would ensure that PG&E would be obligated—by way of Travelers' subrogation rights—to reimburse Travelers for payments that Travelers might have to make on those workers' compensation claims, in the event that PG&E defaulted on them.[92]

Travelers then filed a claim for the attorneys' fee it had incurred in dealing with all of these matters.[93] PG&E again objected. The bankruptcy court disallowed the claim; the bankruptcy court accepted PG&E's argument (apparently based on the Fobian rule) that the fees could not be allowed because they were incurred for litigation of bankruptcy law issues.[94] "The District Court affirmed, relying on *In re Fobian*, 951 F.2d 1149 (C.A.9 1991), which held that 'where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal

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[90] *See* 11 U.S.C. § 502(e)(1)(B) (2006); *see also supra* note 85.

[91] *See* Brief for Respondent, *supra* note 34, at *5.

[92] *See supra* note 85.

[93] The nature of the attorneys' services for which Travelers seeks to have an allowed claim can be gleaned from Travelers' Brief for Petitioner. Here is a summary prepared by the author of this article:

> filing of Travelers' proof of claim, filing of proofs of claims of workers injured pre-petition, objection to PG&E's disclosure statement and appearance at hearing on its adequacy, negotiation of language for the disclosure statement and for the plan of reorganization that would leave workers' compensation claims class unimpaired and provide for Travelers to have subrogation rights, opposition to PG&E's objection to Travelers' claim and to Travelers' subrogation rights, objection to the proposed plan of reorganization, negotiations with PG&E to resolve PG&E's objections, filing of amended proof of claim (for attorneys' fees), litigation dealing with PG&E's objection to amended claim (in the bankruptcy court, in the district court, and in the Ninth Circuit), and presumably the litigation in the Supreme Court as well.

See Brief for Petitioner, *supra* note 82, at *10, 12–14, 16, 18–19. Travelers also provided PG&E with a detailed list of the attorneys' services for which it sought fees, by way of exhibits to a letter from Mr. Brunstad. *See* Joint Appendix, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007), (No. 05-1429), 2006 WL 3404627, at 120a–124a. Note that the Joint Appendix on Westlaw includes the letter but not the exhibits.

[94] *See* Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199, 1203 (2007).

bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party,' *id*., at 1153."[95]

The Ninth Circuit affirmed, relying on *Fobian*,[96] in a brief unpublished opinion that incorporated by reference legal reasoning from *DeRoche*[97] (which, as the Supreme Court noted, was decided by the same three-judge panel).[98] The Ninth Circuit *Travelers* decision recounted the arguments made by Travelers (that *Fobian* should be distinguished and that "Fobian was incorrectly decided").[99] Then the court noted that Travelers' arguments for fees were weaker than the arguments for fees in *DeRoche*. Travelers' attorneys' fees were incurred only in dealing with federal bankruptcy procedures, without any enforcement in the bankruptcy case of any state law obligations against Travelers. Apparently the court thought denial of fees was even more clearly appropriate when fees were incurred in federal procedural wrangling; the issues were not even substantive federal issues, let alone substantive state law issues for which fees could be awarded under the Fobian rule. And Travelers was not even a prevailing party, in the court's view.[100]

Then the court stated the Fobian rule: prevailing parties in bankruptcy proceedings may recover fees under state law (such as state contract law that makes an attorneys' fee provision enforceable) "if state law governs the substantive issues raised in the proceedings"[101] but not if the fees are incurred for "litigating issues 'peculiar to federal bankruptcy law.'"[102] The court repeated that the issues for which the fees were incurred were all bankruptcy law issues and ended with a prudential argument:

> Indeed, if unimpaired, non-prevailing creditors were authorized to obtain an attorney fee award in bankruptcy for inquiring about the status of unimpaired inchoate and contingent claims, the system would likely be overwhelmed by fee applications, with no funds available for disbursement to impaired creditors or debtor reorganization.[103]

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[95] *Id*. at 1203 (quoting Fobian v. W. Farm Credit Bank (*In re* Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991) (citation to appendix to petition for certiorari omitted)).

[96] *Id.*; Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 167 Fed. App'x 593, 594 (9th Cir. 2006) (holding "[b]oth the bankruptcy court and the district court correctly denied Travelers' claim for attorney fees").

[97] *See supra* note 23 and accompanying text.

[98] *Travelers*, 127 S. Ct. at 1203 n.2.

[99] The court was bound by the circuit's prior decision in *Fobian* (as a three-judge panel rather than an en banc court) and did not express any doubts about the correctness of the Fobian rule.

[100] *Travelers*, 167 Fed. App'x. at 594.

[101] *Id.* (quoting Ford v. Baroff (*In re* Baroff), 105 F.3d 439, 441 (9th Cir. 1997)).

[102] *Id.* (quoting Fobian v. W. Farm Credit Bank (*In re* Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991)).

[103] *Id.*

The court likely intended the comment to be hyperbolic. Of course State law generally does not permit fees to be awarded as a kind of cost of suit[104] to non-prevailing parties. Note also that an increase of some unsecured claims by inclusion of post-petition fees would not reduce the total value available for distribution to unsecured claim holders, except to the extent that litigation over fees would be costly to the bankruptcy estate, but it would diminish the percentage recovery by increasing the total amount of claims.

The reasoning incorporated from *DeRoche* provides some additional help in showing the Ninth Circuit's thinking. In *DeRoche*, the circuit court emphasized the American Rule—parties are responsible for their own attorneys' fees, with limited exceptions. Quoting the Supreme Court's *Alyeska* decision,[105] the court argued that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation."[106] The court noted that the Code "does not contain any provisions that create a general right for the prevailing party to be awarded attorney's fees in federal bankruptcy litigation."[107] The court recognized that there is an exception to the American Rule where a contract between the parties provides for an award of fees, but declared that "we consistently have refused to award fees when the substantive legal question was governed by federal bankruptcy law, rather than 'basic contract enforcement questions.'"[108] The court refused to apply a different analysis just because the attorneys' fee award was not being sought pursuant to contract but rather under a State statute that provided for fees to be awarded to prevailing litigants against the State.[109] The court rejected the DeRoches' claim that such a statute "represents an important state public policy that deserves more respect than private party contract arrangements for fee payments."[110]

B. Justice Alito's Opinion for a Unanimous Court

In a unanimous opinion written by Justice Alito, the Supreme Court reversed the Ninth Circuit's *Travelers* decision and abrogated the Fobian rule. The opinion describes the facts in a neutral way, embracing neither party's view of who had been

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[104] For a discussion of the difference between award of fees as "instant suit" costs and as primary damages, see note 11 above, and the text accompanying note 233 below. It is not always necessary to be a "prevailing party" in the matter in which fees are incurred for the fees to constitute a part of a primary damage award. Consider, for example, a retailer held liable in a products liability suit for marketing a defective product made by a manufacturer, where the manufacturer refuses a tender of defense, and where there are no allegations that the retailer is liable for any reason other than that it marketed a product that was defectively manufactured. Even the restrictive approach to implied indemnity for attorneys' fees allows the retailer to recover, from the manufacturer, the fees incurred by the retailer in unsuccessfully defending the products liability suit. *See* Piedmont Equip. Co. v. Eberhard Mfg. Co., 665 P.2d 256, 260 (Nev. 1983).

[105] *See supra* notes 9–10 and accompanying text.

[106] DeRoche v. Ariz. Indus. Comm'n (*In re* DeRoche), 434 F.3d 1188, 1191 (9th Cir. 2006).

[107] *Id.*

[108] *Id.* (quoting Fobian v. W. Farm Credit Bank (*In re* Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991) (citations omitted)).

[109] *Id.* at 1192–93.

[110] *Id.* at 1192.

responsible for the disputes below or of whether Travelers' incurring of attorneys' fees had been necessary.[111] The Court does note, however, that the stipulation between Travelers and PG&E "accommodate[ed] Travelers' substantive concerns," suggesting that at least some of Travelers' attorneys' work had been fruitful.[112] As noted above, that is in fact the case; the stipulation's provision that PG&E's plan would leave the class of workers' compensation claims unimpaired provided a real and substantive benefit to Travelers.[113] Thus the Court saw the case differently from the Ninth Circuit, which stated that Travelers had not prevailed on any of the issues.[114]

The Court then stated that it had granted certiorari to resolve a conflict among the circuits "regarding the validity of the *Fobian* rule."[115] In particular, the Court cited the Fourth Circuit as a circuit that had disagreed with the Ninth, in *Three Sisters Partners, L.L.C. v. Harden* (*In re Shangra-La, Inc.*).[116] There is, however, a strong argument that the decision in *Shangra-La* did not create a split in the circuits. The Fourth Circuit did reject the bankruptcy court's application of the Fobian rule, and appeared to criticize the Fobian rule generally, but there is no indication that Ninth Circuit would apply the Fobian rule to the issue in *Shangra-La*. The attorneys' fees in *Shangra-La* were sought as part of the compensation required under section 365(b)(1)(B) before a trustee in bankruptcy may assume a lease that is in default.[117] Section 365(b)(1)(B) does not give rise to a general unsecured claim; rather, the court simply cannot permit assumption of the lease absent payment of the required compensation by the trustee (or adequate assurance that the trustee will promptly pay it).[118] It does not appear that any circuit court decision has applied the Fobian rule to attorneys' fees sought under section 365(b)(1), and there is little reason to think the Ninth Circuit would so apply it.

Travelers demonstrated that there *was* a split in the circuits over the Fobian rule, but not over application of the Fobian rule to the particular issue in *Travelers*, the issue whether post-petition attorneys' fees are allowable under section 502(b). None of the other circuit court cases cited by Travelers in its petition for certiorari[119] as creating a circuit split involved allowance of claims in a bankruptcy

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[111] Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199, 1202–03 (2007).
[112] *Id*.
[113] *See supra* text accompanying note 92.
[114] *See supra* text accompanying notes 100, 103.
[115] *Travelers*, 127 S. Ct. at 1203.
[116] 167 F.3d 843 (4th Cir. 1999).
[117] *Id.* at 847.
[118] *See* 11 U.S.C. § 365(b)(1)(B) (2006).
[119] *See* Petition for Writ of Certiorari, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007), (No. 05-1429), 2006 WL 1272597, at 13. The petition cites the following circuit court cases to show a split with the Ninth Circuit: Cadle Co. v. Martinez (*In re* Martinez), 416 F.3d 1286 (11th Cir. 2005); Three Sisters Partners LLC v. Harden (*In re* Shangra-La, Inc.), 167 F.3d 843 (4th Cir. 1999); Alport v. Ritter (*In re* Alport), 144 F.3d 1163 (8th Cir. 1998); Davidson v. Davidson (*In re* Davidson), 947 F.2d 1294 (5th Cir. 1991); Transouth Fin. Corp. of Fla. v. Johnson, 931 F.2d 1505 (11th Cir. 1991); Jordan v. Se. Nat'l Bank (*In re* Jordan), 927 F.2d 221 (5th Cir. 1991); Martin v. Bank of Germantown (*In re* Martin), 761 F.2d 1163 (6th Cir. 1985); Worthen Bank & Trust Co., N.A. v. Morris (*In re* Morris), 602 F.2d 826 (8th Cir. 1979).

case under the Bankruptcy Code. One involved a chapter XIII case and was decided under the old Bankruptcy Act.[120] The other six all involved whether attorneys' fees could be awarded against a debtor, as a personal liability of the debtor, in a nondischargeability action. The circuit split over the Fobian rule was with regard to that issue.

It would seem unusual for the Supreme Court to grant certiorari to resolve a circuit split in a case that might not have been decided differently by the circuits that were split. However, on July 26, 2006, the day after the last brief was filed on Travelers' Petition for Certiorari,[121] the Sixth Circuit issued a decision that created a true circuit split, *Official Comm. of Unsecured Creditors v. Dow Corning Corp.* (*In re Dow Corning Corp.*).[122] Ironically, the Sixth Circuit's *Dow Corning* decision both created a true circuit split on the issue in *Travelers* and showed that there was not previously a true split on that issue. The Sixth Circuit in *Dow Corning* stated that its prior decision allowing recovery of post-petition fees in nondischargeability actions,[123] one of the nondischargeability cases cited by Travelers for the existence of a circuit split,[124] did not govern whether post-petition fees would be allowable as claims in the bankruptcy case: its prior decision was "a case concerning a dischargeability action against the debtor, as opposed to a claim against the general assets of the estate, and as such, involve[d] an entirely different set of policy considerations."[125] Thus even a circuit that issued one of the nondischargeability decisions cited by Travelers did not think such decisions were apposite to the issue that was before the Supreme Court in *Travelers*. The existence of a split in the nondischargeability cases thus was not the same as a split over allowance of claims. Nevertheless, the Sixth Circuit in *Dow Corning* did reject the Fobian rule with regard to allowance of post-petition fees on unsecured claims. That created a true circuit split and probably influenced the Supreme Court to grant certiorari, even though the most the Sixth Circuit would say in the end was that its decision was "arguably in tension with the Ninth Circuit."[126]

There would have been a similar difficulty with a grant of certiorari in *DeRoche* on the basis of a circuit split. *DeRoche* involved neither a nondischargeability action nor an issue of allowance of claims. Thus it is not clear that a direct circuit split could have been demonstrated on the facts of *DeRoche*, either.

Turning to the merits, the Supreme Court noted that the American Rule was subject to an exception where an "enforceable contract" provided for recovery of attorneys' fees. The Court cited its 1928 decision in *Security Mortgage Co. v.*

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[120] *See In re Morris*, 602 F.2d at 827.

[121] *See* Reply Brief, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007), (No. 05-1429), 2006 WL 2091677 (arguing that certiorari should be granted, and showing that it was filed on July 25, 2006).

[122] 456 F.3d 668 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007).

[123] Martin v. Bank of Germantown (*In re* Martin), 761 F.2d 1163 (6th Cir. 1985).

[124] *See supra* note 119.

[125] *In re Dow Corning*, 456 F.3d at 684.

[126] *Id.* at 686.

Powers[127] for the proposition that there is nothing special about attorneys' fees that would prevent them from being allowed like other debts in bankruptcy. And under the Code "it remains true that an otherwise enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise."[128] The issue before the Court was simply "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."[129] The Court's answer: A clear "no."[130]

The Court explained that a claim that is filed will be allowed, absent objection.[131] "[W]here a party in interest objects, the [bankruptcy] court 'shall allow' the claim 'except to the extent that' the claim implicates any of the nine exceptions enumerated in § 502(b)."[132]

The Court's brief quotations from section 502(b)'s preamble omitted language that is key to resolution of the *United Merchants* issue. Consider the relevant text of the preamble:

> [T]he court … shall determine the amount of such claim … as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that . . . .

The Court's quote omitted the references to determination of the amount of the claim "as of the date of the filing of the petition," and to allowance of the claim only "in such amount." No issue had properly been raised before the Court concerning those references; the only issue before the Court was whether Travelers' claim was properly disallowed "based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law."[133] Thus the question whether post-petition fees might not be allowable because they are not part of the claim "as of the date of the filing of the petition" was not before the Court. As the Court noted, application of the Fobian rule—validity of which was before the Court—did not turn on that question; the Fobian rule did not generally disallow claims for fees just because they were incurred post-petition.[134]

Having limited its consideration to the exceptions in section 502(b)(1)-(9), the Court proceeded to show that only section 502(b)(1) could possibly be relevant to

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[127] 278 U.S. 149, 154 (1928) ("The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy.").

[128] Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199, 1203–04 (2007) (citing COLLIER ON BANKRUPTCY, *supra* note 16).

[129] *Id.* at 1204.

[130] *Id.*

[131] *Id.*

[132] *Id.* (quoting 11 U.S.C. § 502(b) (2006)).

[133] *Id.* at 1204, 1207.

[134] *See id.* at 1207 n.4; *cf.* Weintraub, *supra* note 21, at 63 ("The Court's failure to discuss or even note the lead-in language of Bankruptcy Code section 502(b) is puzzling.").

the allowability of Travelers' claim. "Thus, Travelers' claim must be allowed under § 502(b) unless it is unenforceable within the meaning of § 502(b)(1)."[135]

In the next section of its opinion the Court explained section 502(b)(1): "This provision is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy."[136] The Court did not mean that there were some (though limited) exceptions to use of defenses that would have been available outside of bankruptcy,[137] but instead that there were some (though limited) circumstances in which grounds for disallowance that were not defenses available outside of bankruptcy might be available in bankruptcy for purposes of section 502(b)(1). Thus, if another provision of the Bankruptcy Code provided a basis for not allowing a claim, the claim could be disallowed under section 502(b)(1).[138]

The Court supported this interpretation of section 502(b)(1) by quoting from its 2000 decision in *Raleigh v. Ill. Dep't of Revenue*,[139] which itself quoted the Court's much-cited 1979 decision in *Butner v. United States*:[140]

> Indeed, we have long recognized that the "'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" Accordingly, when the Bankruptcy Code uses the word "claim"—which the Code itself defines as a "right to payment," 11 U.S.C. § 101(5)(A)—it is

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[135] *Travelers*, 127 S. Ct. at 1204.

[136] *Id.* (citing COLLIER ON BANKRUPTCY, *supra* note 16, at ¶ 502.03[2][b]).

[137] There are cases involving section 506(b), rather than section 502(b), holding that defenses available outside of bankruptcy are unavailable in bankruptcy. *See, e.g.*, Unsecured Creditors' Comm. 82-00261C-11A v. Walter E. Heller & Co. S.E., Inc. (*In re* K.H. Stephenson Supply Co.), 768 F.2d 580, 585 (4th Cir. 1985). The author is not aware of any such cases under section 502(b). The section of Collier on Bankruptcy to which the Court cited, ¶ 502.03[2][b], states that "[t]he effect of section 502(b)(1) is to make available to the trustee *any* defense to a claim that might have been available to the debtor." COLLIER ON BANKRUPTCY, *supra* note 16, at ¶ 502.03[2][b] (emphasis added). It also states that "[t]he types of defenses that are available to the debtor absent bankruptcy are too numerous and varied to summarize or adequately identify. The trustee can assert any of these defenses." *Id.* It does cite cases (in its footnote 15) that allow the trustee in bankruptcy, in objecting to a claim, to go behind a judgment in a way that a debtor outside of bankruptcy could not.

[138] Note that the Court rejected the Fobian rule as a bankruptcy law basis for disallowing claims precisely because it lacked textual support in the Bankruptcy Code. *See Travelers*, 127 S. Ct. at 1206.

[139] 530 U.S. 15 (2000).

[140] 440 U.S. 48 (1979). *Butner* deals with property interests rather than claims, which are property of the *claim holder* but do not ordinarily represent interests in the *debtor's* property, absent a lien, at least under nonbankruptcy law. *See* Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999); Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 21 (1995) (holding that bank's refusal to pay debt owed to its depositor was not taking of property from depositor's bankruptcy estate or exercise of control over any such property). Nevertheless, the bankruptcy laws rely heavily on state law with regard to claims, similarly to the way they do with regard to property interests. Note, however, that the Code provides greater protection for property interests than for claims, due to Fifth Amendment concerns, and perhaps other concerns. *See, e.g.*, Dewsnup v. Timm, 502 U.S. 410, 418–19 (1992).

> usually referring to a right to payment recognized under state law.[141]

After quoting *Butner* again, the Court cited and quoted *Vanston Bondholders Protective Committee v. Green*:[142] "What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law."[143]

The Court then concluded that disallowance of Travelers' claim under the Fobian rule was improper. The Ninth Circuit had not relied on any applicable nonbankruptcy law to justify the disallowance; "[n]or did it conclude that Travelers' claim was rendered unenforceable by any provision of the Bankruptcy Code."[144] The Court noted that the Fobian rule did not preclude allowance of post-petition attorneys' fees generally when permitted by state law, but only fees incurred with respect to bankruptcy law issues. Such a rule—of the Ninth Circuit's "own creation"—was not supported by the text of the Bankruptcy Code, nor was it even supported by the cases cited in *Fobian*.[145] "The absence of textual support is fatal for the *Fobian* rule."[146] The Court noted that no reason had been given that would overcome the presumption that a claim enforceable under state law is allowable in bankruptcy.

Section 502(b)(4) disallows certain attorneys' fees; the absence of a provision disallowing attorneys' fees for litigation of bankruptcy issues suggested, according to the Court, that "the Code does not categorically disallow them."[147] Congress certainly could have provided for such disallowance; but it did not. Congress "clearly and expressly" provides for exceptions to the Code when it intends to make an exception; but "the Code says nothing about unsecured claims for contractual attorney's fees incurred while litigating issues of bankruptcy law."[148]

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[141] *Travelers*, 127 S. Ct. at 1205.
[142] 329 U.S. 156, 161 (1946).
[143] *Travelers*, 127 S. Ct. at 1205.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 1206.
[147] *Id.*
[148] *Id.* (quoting FCC v. NextWave Personal Communications Inc., 537 U.S. 293 (2003)). The Court's invocation of the "clearly and expressly" rule probably was a rhetorical flourish designed to show the Court's displeasure with the Ninth Circuit's failure to attend to the Code's text. If an argument based on a provision of the Code had properly been before the Court—an argument that a provision of the Code does call for disallowance of claims like Travelers'—then it is unlikely that the Court would have applied the "clearly and expressly" rule. The Court's point is that when Congress sees a need to create an exception to a provision of the Code to protect concerns such as regulatory authority, Congress does so "clearly and expressly." The FCC asked the Court to read section 525(a) in a way that the Court thought unreasonable, in order to protect its regulatory authority and the effectiveness of its auction process. *See NextWave*, 537 U.S. at 301–02, 304. Reading the Code as the FCC asked, would, on the Court's view, have created a nontextual exception to the Code. When two Code provisions must be harmonized, there is generally no basis for saying that one is the rule and the other is the exception. We could hope that both sections would "clearly and expressly" communicate their meaning, and that those meanings would be consistent. But if we are left unsure as to

PG&E did not attempt to defend the Fobian rule.[149] Instead, PG&E argued that section 506(b) required disallowance of Travelers' post-petition fees.[150] That argument—addressing the *United Merchants* issue[151]—was not made below, nor was it raised in PG&E's opposition to the petition for certiorari.[152] The Fobian rule was "analytically distinct from, and fundamentally at odds" with the section 506(b) argument (even though both might lead to the same result in the case before the Court) because the Fobian rule would permit allowance of some post-petition fees on unsecured claims, but the section 506(b) argument would not.[153] PG&E was the beneficiary of a ruling below based on the Fobian rule and now sought to defend the judgment on a different theory; its section 506(b) argument was not "fairly included" within a grant of certiorari limited to resolution of a circuit split over the Fobian rule. The Court held that PG&E had "failed to identify any circumstances that would warrant an exception" to the usual rule that the Court "do[es] not consider claims that were neither raised nor addressed below."[154]

The Court's conclusion provides a crucial clarification. It would be possible to argue that the opinion to this point had limited the arguments that could be made on remand or in a later case against allowance of Travelers' claims or, in other cases, similar claims. The Court had stated that "Travelers' claim must be allowed under § 502(b) unless it is unenforceable within the meaning of § 502(b)(1),"[155] and that "[t]he absence of an analogous provision [analogous to section 502(b)(4)] excluding the category of fees covered by the Fobian rule likewise suggests that the Code does not categorically disallow them."[156] Did the Court mean that only section 502(b)(1) arguments could be considered in the future? Did it mean that at least some post-petition fees incurred by unsecured claim holders had to be allowed? (Or that the Code "suggests" that at least some such fees should be allowed?) The answer is "no." Because the Court refused to consider arguments on any issue other than the validity of the Fobian rule, it had decided nothing but that the Fobian rule was invalid:

> Accordingly, we express no opinion with regard to whether, following the demise of the Fobian rule, other principles of bankruptcy law might provide an independent basis for disallowing Travelers' claim for attorney's fees. We conclude only that the

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what they mean or as to how to harmonize them, there is no particular reason to prioritize one provision over another by categorizing one as the rule and the other as the supposed exception.

[149] *Travelers*, 127 S. Ct. at 1207.

[150] *Id.*

[151] *See supra* text accompanying note 21.

[152] *Travelers*, 127 S. Ct. at 1207.

[153] *Id.* at 1207, 1207 n.4.

[154] *Id.* at 1207. For similar reasons the Court also refused to consider PG&E's arguments that Travelers' fees were not incurred for necessary services and that the indemnity agreement did not allow recovery of such fees. *Id.* at 1207 n.5.

[155] *Id.* at 1204.

[156] *Id.* at 1206.

> Court of Appeals erred in disallowing that claim based on the fact that the fees at issue were incurred litigating issues of bankruptcy law.[157]

Thus the Court did not foreclose any arguments independent of the Fobian rule for disallowance of post-petition fees incurred by unsecured claim holders.

C. The Fobian Rule: A Brief Eulogy

The next part of this article, Part IV, considers those independent arguments First, though, something should be said on behalf of the spirit of the Fobian rule, by way of eulogy. The rule's origins were obscure. As the Supreme Court noted, Fobian itself did not seem firmly grounded in the prior case law. It had no support from the text of the Code—other than the argument from the negative, that the Code did not expressly and specifically authorize recovery of fees for litigation of bankruptcy issues. Why was it created, and why did its approach achieve a substantial measure of acceptance, including adoption by published court of appeals decisions from two other circuits, and by various decisions of other courts?[158]

Perhaps it was seen as providing at least some measure of protection against the consequences of deciding the *United Merchants* issue wholesale in favor of allowance of post-petition fees. Or perhaps its appeal flowed from a concern that bankruptcy policy would be undermined, and access to the federal bankruptcy process inhibited, if fees for litigating bankruptcy issues were allowed, especially if fees for litigating nondischargeability complaints could be imposed as a personal liability on debtors. Fees for litigation of state law matters could of course be awarded in state court litigation; allowing (or imposing) such fees for litigation of state law issues in bankruptcy courts would simply replicate the nonbankruptcy result, and would not deter participation in the bankruptcy process. But allowance (and especially imposition) of fees for litigation of bankruptcy law issues would create a new potential for fee recovery, not available outside of bankruptcy. Perhaps then the Fobian rule was an attempt to focus on the allowance (or imposition) of fees that would have the greatest impact on access to the federal bankruptcy courts.

Those concerns do not rise to the level that would justify preemption of state law in the context of the allowance of claims,[159] but it is possible that they may rise to that level in the context of the imposition of personal liability, especially on debtors in nondischargeability litigation. *DeRoche* did not involve

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[157] *Id.* at 1207–08.

[158] *See* BankBoston, N.A. v. Sokolowski (*ln re* Sokolowski), 205 F.3d 532, 535 (2d Cir. 2000); *In re* Sheridan, 105 F.3d 1164, 1167 (7th Cir. 1997) (taking same approach but not citing any Ninth Circuit cases); *see also* Agassi v. Planet Hollywood Int'l, Inc., 269 B.R. 543, 553 (D. Del. 2001); *In re* S.S., 271 B.R. 240, 245 (Bankr. D.N.J. 2002). The Fobian rule was even presaged in 1981 by the bankruptcy court's decision in *United Merchants*, which was reversed by the Second Circuit. *See* 674 F.2d 134, 139 (2d Cir. 1982).

[159] This issue will be discussed in a later article.

nondischargeability litigation, but it did involve the potential imposition of personal liability (on the State of Arizona, in that case) for fees.[160] Thus the argument for the Fobian rule, or something like it, was actually stronger in *DeRoche* than in *Travelers*. It still, though, was not strong enough, as will likely be determined on the remand to the Ninth Circuit. What could make it strong enough is an argument from the text of the Code (and with apologies to some members of the Court) the legislative history, showing that in a particular context the imposition of fees would undermine achievement of the bankruptcy law's purposes. There is relevant text and legislative history with regard to nondischargeabilty actions.[161] Whether they make the case for preemption persuasive will be discussed in a later article.

With the Fobian rule's eulogy delivered, this article turns to the *United Merchants* issue.

III. ALLOWABILITY OF POST-PETITION FEES ON UNSECURED CLAIMS: THE *UNITED MERCHANTS* ISSUE[162]

When read together, sections 502(b), 506(a), and 506(b) have a plain meaning that precludes the allowance of post-petition attorneys' fees on unsecured claims.[163] The explanation of why that is the case is not short, but the meaning that is determined from the explanation is still quite plain. Section IV.C. below gives that explanation. To some readers, it may seem so clear that it will be hard to understand why there has been such a controversy.

Section IV.B. below explains a misunderstanding of section 506(b) that may have prevented courts from seeing what otherwise would seem clear. In addition, the allowability of contingent claims allows an argument to be made that the apparent plain meaning of sections 502(b), 506(a), and 506(b) is in conflict with other provisions of the Code.

Section IV.A. discusses the conventional arguments and the authorities dealing with the controversy, other than *Travelers* and *DeRoche*, and apart from the Fobian rule.

A. The Controversy

1. The Case Authority, and the "Majority" Position Rejecting Post-Petition Fees on Unsecured Claims

Even apart from the now-abrogated Fobian rule, there has been substantial controversy over the *United Merchants* issue—whether an unsecured claim holder

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[160] *See supra* text accompanying note 23–24.
[161] *See supra* text accompanying notes 26–27.
[162] *See supra* text at note 21.
[163] This plain meaning argument may not prevent a claimant from including post-petition collateral legal expenses in an unsecured claim. *See supra* note 11; *infra* text accompanying note 233.

who incurs post-petition attorneys' fees in connection with its claim, and who has a basis for recovering the fees by contract or statute or otherwise—may have the fees added to its allowed unsecured claim in a bankruptcy case.[164] Unsecured claim holders seeking to do so face an immediate and daunting challenge: Bankruptcy Code section 502(b) requires that the allowed amount of a claim be determined as of the date of the filing of the bankruptcy petition, and as of that date the post-petition fees had not yet been incurred. In addition, the Code specifically allows such fees to be added to the secured claims of oversecured creditors, but does not specifically authorize their addition to unsecured claims.

Nevertheless, some courts—particularly where the debtor is solvent[165]—have allowed post-petition fees to be added to unsecured claims.[166] Some of the cases involve claims for indemnity[167] under which an award of attorneys' fees may be

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[164] *See* SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 78 n.24.

[165] *See* UPS Capital Bus. Credit v. Gencarelli (*In re* Gencarelli), 501 F.3d 1, 6–7 (1st Cir. 2007) (1st Cir. 2007); Official Comm. of Unsecured Creditors v. Dow Corning Corp. (*In re* Dow Corning Corp.), 456 F.3d 668, 682 (6th Cir. 2006) (finding arguments against allowance of post-petition fees persuasive but for solvency of debtor); *In re* Fast, 318 B.R. 183, 194 n.9 (Bankr. D. Colo. 2004) (allowing post-petition fees only because case "involve[d] a debtor who concealed assets and a persistent creditor who helped the estate become solvent"); *In re* New Power Co., 313 B.R. 496, 510 n.2 (Bankr. N.D. Ga. 2004) (concluding post-petition fees and costs recoverable under nonbankruptcy law could be added to unsecured claim, holding creditor had right to certain post-petition costs totaling $190 but not to attorneys' fees under applicable nonbankruptcy law, and noting "[e]ven if the Court concluded that unsecured creditors may not generally seek payment of attorneys' fees as an unsecured claim, the Court would adopt … an exception for solvent debtors"); *In re* Cont'l Airlines Corp., 110 B.R. 276, 281 (Bankr. S.D. Tex. 1989) (allowing post-petition fees as matter of policy where estate was solvent, by analogy to entitlement to post-petition interest where estate is solvent); Liberty Nat'l Bank & Trust Co. v. George, 70 B.R. 312, 317 (W.D. Ky. 1987) (awarding post-petition fees in case involving solvent debtor but under analysis that did not depend on solvency); *cf.* McDonald v. Lorenzo Bancshares, Inc. (*In re* Lorenzo Bancshares, Inc.), 122 B.R. 270, 273 (Bankr. N.D. Tex. 1991) (following *Continental* and *Missionary Baptist*, cited below in note 167, and awarding post-petition fees to be recovered ahead of shareholders in event debtor turned out to be solvent before taking fees into account); *In re* Carter, 220 B.R. 411, 418 (Bankr. D.N.M. 1998) (involving solvent debtor and finding *Continental Airlines* analysis persuasive, but limiting allowance of post-petition fees to those incurred in establishing validity and amount of claim, as opposed to those incurred in litigation over value of property to be distributed to creditor under plan).

[166] *See* Joseph F. Sanson Inv. Co. v. 268 Ltd. (*In re* 268 Ltd.), 789 F.2d 674, 677 (9th Cir. 1986); *New Power Co.*, 313 B.R. 496, 507 (Bankr. N.D. Ga. 2004); *In re* Byrd, 192 B.R. 917, 919 (Bankr. E.D. Tenn. 1996); *In re* Indep. Am. Real Estate, Inc., 146 B.R. 546, 556 (Bankr. N.D. Tex 1992); *In re* Ladycliff Coll., 46 B.R. 141, 143 (Bankr. S.D.N.Y.), *aff'd*, 56 B.R. 765 (S.D.N.Y. 1985); *In re* Ely, 28 B.R. 488, 491–92 (Bankr. E.D. Tenn. 1983); *cf.* Homestead Partners, Ltd. v. Condor One, Inc. (*In re* Homestead Partners, Ltd.), Inc., 200 B.R. 274, 277 n.2 (Bankr. N.D. Ga. 1996) (stating in dictum: "The Court having found no exception to the contrary within section 502(b), the 'shall' language of the section would appear to demand that no such exception be inferred and that the pursuit of post-petition fees be permitted on an unsecured basis."). See also cases cited above in note 165 and below in notes 167, 172, and 176. For a discussion of *In re 268 Ltd.*, see the text below accompanying notes 194–98.

[167] *See* Woburn Assocs. v. Kahn (*In re* Hemingway Transp., Inc.), 954 F.2d 1 (1st Cir. 1992); *In re* Missionary Baptist Foundation of America, Inc., 24 B.R. 970 (Bankr. N.D. Tex 1982). This article uses the term "indemnity" as Professor Robertson uses it in his article, cited above in note 11: "[T]he term *indemnity* is used in its modern sense denoting recompense to the indemnitee for exposure to liability, rather than in the older and broader usage simply meaning compensation." Robertson, *supra* note 11, at 536 (footnote omitted).

seen as "collateral legal expenses" (part of the primary damage award)[168] rather than as "instant suit costs"[169] subject to the American Rule. It is possible that allowance of post-petition fees in such cases has nothing to do with the controversy presently being discussed.[170] In other cases, courts relied on the theory that the right to recover such fees is a kind of pre-petition contingent claim under the Code that is allowable once the contingency, the incurring of the fees, occurs,[171] thus turning the contingent claim into a fixed claim.[172]

The clear majority of the courts that have rendered holdings on the *United Merchants* issue under the Code, where the debtor is insolvent, have refused to allow post-petition fees on unsecured claims,[173] and that is often called the

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[168] *See supra* note 11; *infra* text accompanying note 233.

[169] *See supra* note 11; *infra* text accompanying note 233.

[170] *See supra* note 11; *infra* text accompanying note 233.

[171] Even before the occurrence of the contingency, a contingent claim may be allowed in an estimated amount, see section 502(c)(1), but that occurred with respect to fees only in one of the cases reviewed by the author, a case decided under the statutory scheme that preceded the Bankruptcy Code. *See infra* note 172, second paragraph; *see also Missionary Baptist*, 24 B.R. at 971 (involving filing of estimated contingent claims but no claims allowance process until claims had been amended to reflect actual amounts, after contingent claims had become fixed claims).

[172] *See, e.g., In re* Byrd, 192 B.R. 917, 919 (Bankr. E.D. Tenn. 1996); *In re* Keaton, 182 B.R. 203, 210 (Bankr. E.D. Tenn. 1995), *aff'd*, 212 B.R. 587 (E.D. Tenn. 1997), *vacated as moot*, 145 F.3d 1331 (6th Cir. 1998) (unreported opinion referenced in table, No. 97-6244, text available on Westlaw) (dismissing appeal as moot, vacating district court decision, and remanding with order for district court to vacate bankruptcy court decision). *Byrd* and *Keaton* both rely heavily on United Merchs. & Mfrs, Inc. v. Equitable Life Assurance Soc'y of the United States (*In re* United Merchs. & Mfrs., Inc.), 674 F.2d 134 (2d Cir. 1982), which was decided under the old Bankruptcy Act. *See supra* note 21. At least one other reported case allowed post-petition fees to be added to unsecured claims under the old Bankruptcy Act. *See* Worthen Bank & Trust Co. v. Morris (*In re* Morris), 602 F.2d 826, 829 (8th Cir. 1979); *cf.* LeLaurin v. Frost Nat'l Bank of San Antonio, 391 F.2d 687, 691 (5th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968).

In *LeLaurin*, a bankruptcy referee, in a case governed by the old Bankruptcy Act, had allowed an addition of $25,000 in post-petition attorneys' fees to the bank's unsecured claim, which was the referee's estimate of the bank's anticipated reasonable attorneys' fees recoverable under an attorneys' fee clause. *Id.* After the bankruptcy distributions were complete, the bank had received no more than $2,930 on account of the $25,000 increase in its unsecured claim. *Id.* The bank paid its attorney only $2,500, leaving it with about $430 of the amount received from the estate on account of the estimated fees. *Id.* The bank sued the attorney in state court seeking a declaration of the amount owed the attorney. *Id.* at 690. The attorney then sued the bank in federal court, claiming that he should be paid the full $25,000. *Id.* Holding that the award of $25,000 was not res judicata against the bank with regard to the amount of the fees, the Fifth Circuit affirmed the district court's decision to allow the state court to determine the amount of the fees, and to require the bank to return to the estate any part of the $430 that it was not required, by the state court, to pay to the attorney. *Id.* at 689, 692. *LeLaurin* is some evidence of a practice of allowing post-petition fees on unsecured claims, but it does not appear that the issue of the propriety of such an allowance was before either the district court or the Fifth Circuit in the attorney's suit. *See* Pride Cos. v. Johnson (*In re* Pride Cos.), 285 B.R. 366, 371 n.2 (Bankr. N.D. Tex. 2002); *In re* Sakowitz, 110 B.R. 268, 274 (Bankr. S.D. Tex. 1989).

[173] *See* Finova Group, Inc. v. BNP Paribas (*In re* Finova Group, Inc.), 304 B.R. 630, 638 (D. Del. 2004); *In re* Hedged Invs. Assocs., Inc., 293 B.R. 523, 527–28 (D. Colo. 2003) (affirming disallowance of undersecured creditor's claim for post-petition fees, finding reasoning in *Sakowitz* "compelling," but also discussing and perhaps relying partially on Fobian rule); *In re* Elec. Mach. Enters., 371 B.R. 549, 554 (Bankr. M.D. Fla. 2007) (deciding the issue post-*Travelers*); *In re* Miller, 344 B.R. 769, 771–73 (Bankr. W.D.Va. 2006); *In re* Loewen Group, Int'l, Inc., 274 B.R. 427, 443–44 (Bankr. D. Del. 2004) (overruled on other grounds), *In re* Oakwood Homes Corp., 449 F.3d 588 (3d Cir.), *cert. denied*, 127 S. Ct. 736 (2006); *In re* Marietta Farms, Inc., No. 02-41044-11, 2004 WL 3019360, at *2–3 (Bankr. D. Kan. Nov. 15, 2004); *In re*

"majority position." The numbers are much more even if decisions involving solvent debtors—most of which allowed fees only because of the solvency[174]—are counted. It is hard to know how to count all the cases from the Ninth Circuit—and elsewhere[175]—that applied the Fobian rule, which allowed some post-petition fees and disallowed others.[176]

2. The Conventional Arguments for the "Majority" Position, with Commentary

Several of the decisions point out that most courts that take the "majority" position do so in reliance on four arguments.[177] First, they argue that section 506(b)'s authorization only for oversecured creditors to receive post-petition fees should be interpreted as a denial of such fees on unsecured claims (whether unsecured claims held by undersecured creditors or unsecured claims held by wholly unsecured creditors). Though this is not often stated in connection with this argument, the point potentially is more than just an invocation of the old *expressio unius* maxim. Rather, it is similar to the point made by the Supreme Court in *NextWave*, and quoted by the Supreme Court in *Travelers*. There is a rule in the Bankruptcy Code—in section 502(b)—that the allowable amount of a claim is to be determined as of the petition date. That amount would not seem to include attorneys' fees that have not yet been incurred as of the petition date. If Congress intended to make an exception to this rule, it would have done so "clearly and explicitly."[178] The Code does not provide "clearly and explicitly" for post-petition fees to be allowed on unsecured claims; instead, it provides explicitly only for post-

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Kindred Healthcare, Inc., Nos. 99-3199 (MFW), 99-3327 (MFW), 2003 WL 22000598, at *3 (Bankr. D. Del. Aug. 18, 2003); Pride Cos. v. Johnson (*In re* Pride Cos.), 285 B.R. 366, 377 (Bankr. N.D. Tex. 2002); Chemical Bank v. First Trust of N.Y. Nat'l Ass'n (*In re* Southeast Banking Corp.), 188 B.R. 452, 464 (Bankr. S.D. Fla. 1995), *aff'd.*, 212 B.R. 682 (S.D. Fla. 1997) (holding bankruptcy court's rejection of allowance of post-petition fees was correct), *rev'd on other grounds and question certified*, 156 F.3d 1114 (11th Cir. 1998); *In re* Woodmere Investors Ltd. P'ship, 178 B.R. 346, 355–56 (Bankr. S.D.N.Y. 1995); *In re* Saunders, 130 B.R. 208, 213–14 (Bankr. W.D. Va. 1991); *In re* Sakowitz, 110 B.R. 268, 275 (Bankr. S.D. Tex. 1989); Woerner v. Farmers Alliance Mut. Ins. Co. (*In re* Woerner), 19 B.R. 708, 713 (Bankr. D. Kan. 1982); *cf.* Adams v. Zimmerman, 73 F.3d 1164, 1177 (1st Cir. 1996) (determining post-petition fees are not allowable on unsecured claims in bankruptcy, concluding FDIC bank insolvency context is analogous to bankruptcy context, and therefore refusing to award post-insolvency attorneys' fees against FDIC in bank insolvency proceedings); *In re* Waterman, 248 B.R. 567, 573 (B.A.P. 8th Cir. 2000) (stating, probably in dictum, that post-petition fees are not allowable); *In re* Plymouth House Health Care Ctr., No. 03-19135, 2005 WL 2589201, at *5 (Bankr. E.D. Pa. Mar. 15, 2005) (stating, in dictum or perhaps as part of *ratio decidendi* that post-petition fees are not allowable).

[174] *See supra* note 165.

[175] *See supra* note 158.

[176] One court within the Ninth Circuit has come down on the "minority" side post-*Travelers*, holding that post-petition fees are allowable on unsecured claims. *See In re* Qmect, Inc., 368 B.R. 882, 888 (Bankr. N.D. Cal. 2007).

[177] *See Elec. Mach. Enters.*, 371 B.R. at 550–52; *In re Pride Cos.*, 285 B.R. at 372.

[178] *See supra* note 148 and accompanying text.

petition fees to be allowed on oversecured claims, leaving a strong negative impression with regard to allowance of post-petition fees on unsecured claims.[179]

If this were a brief, that would be a good place to stop, but this is not a brief. As noted above, the "clearly and explicitly" argument in *Travelers* probably was a rhetorical flourish—perhaps a well-deserved way of taking the Ninth Circuit to task for its inattention to the statutory text. But it does not seem to be an argument that should be used in harmonizing Code sections.[180] As will be seen, the proponents of the "minority" position argue that section 502(b)(1) rules out disallowance of claims merely because they are contingent; that must mean that wholly contingent claims—which by their nature have a zero amount on the petition date—are not to be disallowed simply because the contingency has not yet occurred. And allowing them in every case at a zero amount would in fact be to disallow them. If post-petition fees are within the category of contingent claims to be allowed at least in some cases in the amount that turns out to be owed after post-petition occurrence of the contingency, then we may need to harmonize the sections. Thus the first argument does not seem to resolve the issue.

Second, courts that take the "majority" position argue that the Supreme Court's decision in *United Savings Ass'n v. Timbers*[181] requires disallowance of post-petition fees, except in favor of oversecured creditors:

> In *Timbers*, the Supreme Court held that section 506(b) prohibits an unsecured creditor from collecting postpetition interest: "[s]ince this provision [section 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." 484 U.S. 365, 372–73, 108 S. Ct. 626, 631, 98 L. Ed.2d 740 (1988). As section 506(b) clearly prohibits an unsecured creditor from recovering postpetition interest, and since section 506(b) speaks identically to attorney's fees as it does to interest, some courts have concluded that the Supreme Court's *Timbers* opinion by implication likewise prohibits the recovery by the unsecured creditor of postpetition attorney's fees.[182]

This argument—stated by Judge Jones in *Pride Companies* as the typical argument made in "majority" position cases rather than as his own argument—has some force; the parallelism between post-petition interest and post-petition fees is striking and will play a key role in the textual argument developed below. But their textual treatment is not quite parallel, as Judge Jones noted later in the opinion. There is a

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[179] For a similar argument, but one that, happily in the author's view, does not rely on the "clearly and explicitly" rule, see *In re* Miller, 344 B.R. 769, 773 (Bankr. W.D.Va. 2006).

[180] *See supra* note 148.

[181] 484 U.S. 365 (1988).

[182] *In re Pride Cos.*, 285 B.R. at 373 (alterations in original).

specific section that disallows post-petition interest: section 502(b)(2), which disallows "unmatured interest."[183] No specific provision disallows post-petition fees. And the Supreme Court in *Timbers*, when it noted, as quoted above, that there is a "general rule disallowing postpetition interest," gave a citation that is omitted from the indented quote: "See 11 U.S.C. § 502(b)(2)."[184] Apparently Judge Jones omitted it from the citation because most of the "majority" position cases have not understood how it potentially undermines their argument from *Timbers*. Apparently he wanted to present the argument first and then deal with the potential problem later in the opinion, which he did,[185] but the force of the argument is substantially weakened.

Third, courts taking the "majority" position argue that section 502(b)'s mandate to determine the amount of a claim "as of the date of the filing of the petition," should be taken seriously, at face value. Post-petition attorneys' fees cannot be part of what is owed on the petition date, before they are incurred. This argument has already been discussed above, in connection with the first argument. It has force, especially given the structural feature that informs much of the Code, the gulf between the pre- and post-petition worlds.[186] But it could be in conflict with the provisions of the Code that deal with contingent claims; that is discussed above,[187] and discussed further in section IV.C. below.

The fourth, and typically final, argument made by "majority" position courts is a policy argument.[188] Of course the Court in *Travelers* dealt a resounding blow against creation of bankruptcy rules untethered to text, but the majority position policy argument does not stand alone; the first three arguments (and the textual argument develop in section IV.C. below) tether it to the Code's text. Further, it is tethered to basic purposes of the Code that can be gleaned from its overall text. Those policies then can be used to help harmonize the parts of the Code where a potential conflict among Code provisions may create ambiguity. It is also important to see that the bankruptcy laws are a system, a system designed to function for purposes that are more or less clear. It is not always possible for Congress, in creating such a complex system, to avoid using language that if taken in a wooden and literal way—without concern for context, history, and the nature of the system in which the words are to function—will undercut those purposes and make the system dysfunctional. The Court dealt with one such problem in *BFP v. Resolution Trust Corp.*[189] The Court considered the system in which the words of the

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[183] *See* 11 U.S.C. § 502(b)(2) (disallowing unmatured interest); *In re Pride Cos.*, 285 B.R. at 375. There is an argument, however, that section 502(b)(2) was not necessary to the disallowance of post-petition interest in general but rather just to disallowance of the kind of post-petition interest called unamortized original issue discount. *See infra* note 54 and accompanying text.

[184] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 373–74 (1988).

[185] *See In re Pride Cos.*, 285 B.R. at 375.

[186] *See supra* Part II, text accompanying notes 33–79.

[187] *See supra* text following note 180.

[188] *See, e.g., In re Pride Cos.*, 285 B.R. at 373–74.

[189] 511 U.S. 531 (1994).

fraudulent transfer section, section 548, were to function, including the history of the subject, and reached a sensible result.[190]

There is an argument that the need to harmonize sections 502(b), 506(a), and 506(b), on the one hand, with provisions of the Code dealing with contingent claims on the other hand, could create an ambiguity in the Code's meaning, and open up a possibility that the "minority" position would be an acceptable interpretation of the Code. There is in fact a textual argument, developed in section IV.C. below, that should be determinative in establishing the correctness of the "majority" position. Section IV.D. below establishes that the supposed need to harmonize provisions of the Code does not create an ambiguity that would undermine the "majority" position. But if there is ambiguity that cannot otherwise be resolved, it certainly would be proper to consider policy arguments. Those arguments deal with policy concerns that are embedded in many provisions of the Code—concerns for the "practical impact … on the administration of a bankruptcy case" and for equality of treatment of creditors.[191]

There typically are relatively few oversecured creditors in bankruptcy cases. Under the "majority" position, post-petition fees are allowed only in favor of those few creditors (out of the value of their own collateral as the Court in *Timbers* pointed out).[192] Expand that, under the "minority" position, to nearly all the contract creditors in every case, because attorneys' fee clauses are so common,[193] and there could be a serious problem of administration. It seems reasonable to think that Congress would have expected the system to be able to deal with post-petition fee applications from a few oversecured creditors, but unlikely that Congress expected it to have to deal with so many.

The equality concerns are equally real. The Code does not, on its face, discriminate against tort claimants, except that they are not likely to be oversecured creditors entitled to post-petition interest and fees. Thus the Code on its face leaves tort creditors on a level playing field with most contract creditors. The minority

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[190] In fact (to continue with the fraudulent transfer example) a wooden, ahistorical, plain-meaning interpretation of section 548 could lead to most tort claims (and perhaps all nonrestitutionary claims) being eliminated in bankruptcy. After all, if an insolvent debtor receives less than reasonably equivalent value in exchange for taking on an obligation, the obligation is voidable under section 548(a)(1)(B), and that is the rule even for the involuntary incurring of an obligation, see section 548(a) (applying to obligations incurred "voluntarily or involuntarily"), which might well describe the obligation taken on when a negligent driver runs over someone in a crosswalk. Only a sadistic driver would even arguably derive any value from running over the victim. But the Code of course contemplates the allowance of tort claims, see sections 507(a)(10), 524(g)–(h), and this wooden interpretation of the language of section 548 would be unreasonable.

[191] *In re* Elec. Mach. Enters., Inc., 371 B.R. 549, 551–53 (Bankr. M.D. Fla. 2007). *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2109, 2117 (2006) (noting, in both majority and dissenting opinions, Bankruptcy Code's policy of equality of distribution among creditors, at least, according to dissent, among similarly situated creditors).

[192] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 374 (1988).

[193] Such clauses would quickly be expanded to cover bankruptcy litigation, to the extent their language may not at present. *See* Brief in Support of Respondent for *Amici Curiae* Professors Richard Aaron, Jagdeep S. Bhandari, Susan Block-Lieb, Ralph Brubaker, Erwin Chemerinsky, S. Elizabeth Gibson, Kenneth N. Klee, Robert M. Lawless, Nancy B. Rapoport & Ettie Ward, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007), (No. 05-1429), 2006 WL 3805866, at *18–19.

position, if accepted, would put tort creditors (and others without attorneys' fee clauses) at a real disadvantage, especially in cases in which there are substantial assets available to provide value for unsecured claim holders. The contract creditors who have attorneys' fee clauses could be reimbursed for a substantial part of their cost of participating in the case, but tort creditors would not (unless their claims arose under a statute that provided broadly for fees).

As noted, sections C and D of this Part IV show that there is no ambiguity that would require resort to policy arguments in order to support the "majority" position. In any event, there must be ambiguity for the *"minority"* position to be plausible. As section IV explains, only a misunderstanding of section 506(b) (or an overly aggressive reading of the Code's contingent claim provisions that would render them inconsistent with more specific Code provisions dealing with post-petition fees) could create the needed ambiguity. Thus it is important to identify the section 506(b) misunderstanding, in hopes of clearing it up.

B. The Section 506(b) Misunderstanding: Resolving a Quandary Caused by Acceptance of the "Minority" Position, and Creating a Federal Reasonableness Standard for Pre-Petition Fees

The misunderstanding is to the effect that section 506(b) has nothing to do with allowing any claim; supposedly only section 502(b) provides for allowance. A careful reading of the text of sections 502(b), 506(a), and 506(b) will act as a powerful corrective; and section IV.C. below shows that in fact it is section 506(b), not 502(b), that allows post-petition fees, where they are allowed (along with post-petition interest, costs and charges). But the misunderstanding suggests that section 506(b) merely classifies post-petition fees as secured, to the extent they are reasonable (assuming there is sufficient collateral value and that the fees are "provided for under the agreement or State statute under which" the creditor's claim arose).

Under such an approach, section 506(b) can serve double duty with respect to fees claimed by a secured creditor. First, it can classify post-petition fees as secured (or not). Second, it can be used to police the reasonableness of *pre-petition* fees, by classifying them as unsecured to the extent they are recoverable under state law but unreasonable in the view of the court, under a *federal* standard. This attempt to create a vehicle for reviewing the reasonableness of pre-petition fees under a federal standard makes section 506(b) incoherent. That was not its designed function, and its text must be ignored in order to press it into that service.

The problem begins with the Ninth Circuit's 1986 decision in *Joseph F. Sanson Inv. Co. v. 268 Ltd.* (*In re 268 Ltd.*),[194] an early "minority" position case. An involuntary bankruptcy petition was filed against the owner of real property; the owner then defaulted on the mortgage (technically a deed of trust), and the property was sold for $1 million more than the amount of the mortgage. The mortgage

[194] 789 F.2d 674 (9th Cir. 1986).

provided that the mortgage holder would be entitled to attorneys' fees of 5% of the balance owing, which was almost $200,000. The mortgage holder sought that amount in post-petition attorneys' fees under section 506(b), but the bankruptcy court determined that a reasonable fee was only $20,000, and thus allowed the mortgage holder's secured claim to be supplemented by only that amount. The district court affirmed, as did the Ninth Circuit, holding that reasonableness was to be determined under federal law, not state law. That holding probably was correct,[195] but in a curious foreshadowing of its ill-fated 1991 *Fobian* decision, the court stated that "when Congress intended state law standards to apply in bankruptcy it did so explicitly."[196]

The Ninth Circuit then held that the portion of the post-petition fees that had been determined to be unreasonable would be allowable under section 502(b) as an unsecured claim. The court noted that "[w]hen read literally, subsection (b) arguably limits the fees available to the oversecured creditor. When read in conjunction with § 506(a), however, it may be understood to define the portion of the fees which shall be afforded secured status. We adopt the latter reading."[197] Thus the court assigned section 506(b) a function rather than adhering to its text.

The circuit court assumed, with little analysis, that unsecured claim holders could add post-petition fees to their claims, if permitted by state law. The circuit court then argued that "to bar [the oversecured creditor] from seeking the balance of its fees as an unsecured claim would make it worse off in bankruptcy than it would have been if its claim were unsecured."[198] The problem was circular and of the court's own making. By assuming the correctness of the "minority" position on the *United Merchants* issue with regard to unsecured claims, the court placed itself in a quandary. If section 506(b) and not section 502(b) allowed fees to oversecured creditors, then the oversecured creditor could not have the unreasonable portion of its fees (after a determination of reasonableness under a federal standard) allowed as an unsecured claim under section 502(b). But, under the "minority" position, holders of unsecured claims could have post-petition fees allowed so long as they were permitted by state law, even if they would have been unreasonable under a federal standard, because the applicable law under section 502(b) would be state, not federal, law.

To get out of this quandary and satisfy its sense of justice, the court ignored what it recognized to be the apparent meaning of the text of section 506(b). Had the court taken the "majority" position, there would have been no need to ignore the meaning of the text of section 506(b). Oversecured creditors would have been entitled only to reasonable post-petition fees (under a federal standard), and

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[195] *See* First W. Bank & Trust v. Drewes (*In re* Schriock Constr., Inc.), 104 F.3d 200, 202 (8th Cir.1997).
[196] *In re 268 Ltd.*, 789 F.2d at 677.
[197] *Id.* at 678.
[198] *Id.* Consider also the Supreme Court's rejection in *Timbers* of a similar argument; the Court noted that if the holder of a secured claim were not treated as well under the Code as the holder of an unsecured claim, the secured claimant could always waive the lien. *See* 484 U.S. 365, 379 (1988).

unsecured creditors would not have been entitled to any post-petition fees. There would have been no quandary.

The next step in the misunderstanding was taken in 2001 by the en banc Eleventh Circuit in *Welzel v. Advocates Realty Invs., LLC* (*In re Welzel*).[199] In *Welzel*, the court held that the section 506(b) federal reasonableness standard governed not only post-petition attorneys' fees, but also *pre-petition* attorneys' fees to the extent included in a secured claim. Thus pre-petition attorneys' fees that were unreasonable under a federal standard would be demoted from being part of the secured claim to being part of the unsecured claim.

Note that pre-petition fees should be part of the amount of the creditor's claim as of the date of the filing of the petition. Thus they should be allowed under section 502(b) (absent a basis in section 502(b) for disallowing them) and then become part of the creditor's allowed secured claim under section 506(a) to the extent there is sufficient collateral value. Section 502(b)(4) disallows unreasonable fees for services of the debtor's insiders or the debtor's attorneys, but it does not generally disallow fees on a federal reasonableness standard. Thus it seems that debts for pre-petition fees not covered by section 502(b)(4) should be allowable to the extent enforceable under state law,[200] and nothing in section 506(a) would prevent the debts from being considered part of the allowed secured claim. Thus the result in *Welzel* inappropriately extends a federal rule into an area left to state law by the Code.

It is true that section 506(b) does not explicitly describe the fees, costs, and charges with which it deals as *pre-petition* fees, costs, and charges, but the same is true of interest allowable under section 506(b). Explicit reference was unnecessary, because pre-petition interest, fees, costs, and charges enforceable under applicable (usually state) law would already be included in the allowed secured claim pursuant to sections 502(b) and 506(a); thus they would not have to be added under section 506(b). In any event, nothing in the text of section 506(b), or in the relationship among sections 502(b), 506(a), and 506(b), suggests that section 506(b) can operate somehow to demote allowed secured claims, once they have been allowed under sections 502(b) and 506(a).

The court's analysis is in fact very brief for such an important en banc decision. It is apparent that the court thought federal oversight of the reasonableness of attorneys' fees was necessary. The court lost sight of the primacy of state law with regard to allowance of pre-petition claims; it echoed the unfortunate statement from the Ninth Circuit's *268 Ltd.* decision by stating, "when Congress intended for state law to control in the bankruptcy context, it said so with candor."[201] The *Travelers* Court would likely think the Eleventh Circuit got it exactly backwards.

At least three of the four key cases relied upon by the court in *Welzel* do not support its result. *268 Ltd.* involved post-petition fees and did not even hint that

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[199] 275 F.3d 1308 (11th Cir. 2001) (en banc).
[200] *See* Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199, 1206 (2007).
[201] *Welzel*, 275 F.3d at 1315.

pre-petition secured fees would be subject to section 506(b)'s federal reasonableness requirement. The same is true of *First W. Bank & Trust v. Drewes* (*In re Schriock Constr., Inc.*),[202] and *Unsecured Creditors' Comm. 82-00261C-11A v. Walter E. Heller & Co. S.E., Inc.* (*In re K.H. Stephenson Supply Co.*).[203] The fourth case, *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc.* (*In re Hudson Shipbuilders, Inc.*),[204] may have involved pre-petition fees; the right to the percentage attorneys' fees (15%) vested pre-petition according to the mortgage document, but the attorneys' services apparently were performed post-petition. The court did not discuss whether the fees were considered to be pre-petition or post-petition, but just applied section 506(b) to set them at a reasonable amount. Further, the court in *Hudson* noted that the same result would be reached under state law.[205] Thus the court in *Welzel* did not seem to be on strong ground when it stated that "[s]uch consistent conclusions among the circuits indicates that our statutory interpretation of 11 U.S.C. § 506(b) does not stray from the mark."[206] That was true with respect to application of a federal reasonableness standard under section 506(b), but definitely not true with respect to application of section 506(b) to pre-petition attorneys' fees.

The final circuit court misunderstanding of section 506(b) is found in *UPS Capital Business Credit v. Gencarelli* (*In re Gencarelli*).[207] *Gencarelli* "concern[ed] a commercial lender's right to receive a bargained-for prepayment penalty from a solvent debtor."[208] The prepayment penalty was triggered during the chapter 11 case, when sale of assets yielded enough money to pay creditors, including oversecured creditor UPS Capital, in full. Substantial funds were left over for Gencarelli, but UPS Capital demanded a $200,000 prepayment penalty, which was enforceable under state law. The First Circuit treated the prepayment penalty as a fee for purposes of section 506(b). The court held that any part of the prepayment penalty that was unreasonable would have to be paid in any event, because UPS Capital would be entitled to an unsecured claim for the unreasonable part, which would be paid out of the surplus from the sale. The court was convinced that unsecured claim holders would be entitled to recover post-petition fees in such a case involving a solvent debtor, and thought it would defy common sense to deny an oversecured creditor the same right.

The court could have achieved that result by adopting the "minority" position, by noting that section 506(b) allowed a claim for a reasonable prepayment fee as part of UPS Capital's secured claim to the extent of the collateral's value, and then by treating the remainder as a claim allowable under section 502(b) in full because it was enforceable under state law. That would have been incorrect, because the

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[202] 104 F.3d 200 (8th Cir.1997).
[203] 768 F.2d 580 (4th Cir.1985).
[204] 794 F.2d 1051 (5th Cir.1986).
[205] *Id.* at 1059 n.7.
[206] *Welzel*, 275 F.3d at 1315.
[207] 501 F.3d 1 (1st Cir. 2007).
[208] *Id.*

"minority" position is incorrect, and it would have involved an implicit misunderstanding of section 506(b). But it would not have done the violence to the Code's text and to the relationships among sections 502(b), 506(a), and 506(b) that the analysis set forth by the court did.

Remarkably, in light of the division of the cases on the *United Merchants* issue, the court stated that "[t]here is universal agreement that whereas section 506 furnishes a series of useful rules for determining whether and to what extent a claim is secured (and, therefore, entitled to priority), it does not answer the materially different question of whether the claim itself should be allowed or disallowed."[209] That is simply incorrect. The cases that take the "majority" position hold that if section 506 does not allow post-petition fees, then they are not allowed. Of course in a sense even the "majority" position courts rely on section 502(b); they note that post-petition fees are not part of the amount of the debt "at the time of the filing of the petition,"[210] and therefore are never allowable under section 502(b); the only question for them is whether they are allowable under section 506(b).

The First Circuit embroiled itself in the same circularity that the Ninth Circuit fell into in *268 Ltd.* The First Circuit assumed that unsecured claim holders could obtain post-petition fees, and then had to depart from the text of the Code to make sure that holders of secured claims got treatment at least as favorable:

> We add that disallowing claims in their entirety based on section 506(b) defies common sense. It is apodictic that "unsecured creditors may recover their attorneys' fees, costs and expenses from the estate of a solvent debtor where they are permitted to do so by the terms of their contract and applicable non-bankruptcy law." *Official Comm. of Unsecured Creditors v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 456 F.3d 668, 683 (6th Cir.2006). Thus, under the statutory scheme envisioned by the debtor (and adopted by the lower courts), unsecured creditors would be permitted to reap the full benefit of their contractual bargains through the medium of section 502, while oversecured creditors would be uniquely singled out for unfavorable treatment by the operation of section 506(b). There is no conceivable explanation as to why Congress might have wanted oversecured creditors to be treated in so draconian a fashion. Creating that sort of uneven playing field would be antithetic to the general policy of the Code, which strongly favors oversecured creditors.[211]

The court went on to point out that it thought it was its role to make sure that a solvent debtor did not use the Code to change any of its legal obligations:

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[209] *Id.* at 5.
[210] 11 U.S.C. § 502(b) (2006).
[211] *In re Gencarelli*, 501 F.3d at 6.

> Let us be perfectly clear. This is a solvent debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations as long as those obligations are legally enforceable under applicable non-bankruptcy law.[212]

These statements of grand principle should be anchored in a persuasive textual analysis, as perhaps they were in *Dow Corning*,[213] rather than in the notion that solvent debtors are not entitled to receive any relief under the Code. The Code contains no requirement that debtors be insolvent;[214] a solvent debtor may nevertheless be in financial difficulty, seek relief under the Code in good faith,[215] and modify the rights of creditors.[216]

C. The Textual Argument for the "Majority" Position and Against the Minority Position's Misunderstanding of Section 506(b)

Section 502(b) allows or disallows claims without regard to whether they are secured by a lien—without regard to whether they are oversecured, undersecured, or not secured at all. Thus we can see what section 502(b) means, and how it functions, by considering how it works together with sections 506(a) and 506(b) in cases in which the claim is secured at least to some extent by a lien. If, in that context, post-petition attorneys' fees are not allowable under section 502(b), then they also are not allowable under section 502(b) in cases in which the claim is completely unsecured.

In fact, sections 502(b), 506(a), and 506(b) have a plain meaning under which post-petition interest, fees, costs, and charges become part of an allowed claim only as a result of being allowed in favor of an oversecured creditor under section 506(b). The Code sections work together in a step-wise manner and provide a systematic approach to allowance of claims.[217]

In the first step, section 502(b) provides for a claim to be allowed in an "amount" determined by the court "as of the date of the filing of the petition." For

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[212] *Id.* at 7.

[213] *See Official Comm. of Unsecured Creditors v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 456 F.3d 668, 671–72 (6th Cir.2006) (noting creditors held claims in class that had rejected plan, thus invoking fair and equitable standard, which, by its terms, includes but is not limited to explicit requirements of section 1129(b), creating possibility that allowance of fees could be required in such cases as part of fair and equitable standard).

[214] *See* § 109.

[215] The First Circuit itself so held only two months before deciding *Gencarelli*. *See* Fields Station LLC v. Capitol Food Corp. (*In re* Capitol Food Corp.), 490 F.3d 21, 25–26 (1st Cir. 2007).

[216] *See* SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 62–63.

[217] PG&E presented a similar, but incomplete, argument in its Brief for Respondent in *Travelers*. Brief for Respondent, *supra* note 34, at *18–19. Professor Brubaker pieces together a somewhat similar argument from the arguments made in the "majority" position cases. *See* Brubaker, *supra* note 21 and text accompanying Brubaker's footnotes 61–76.

that language to be meaningful, there must be at least some situations in which claims that would grow, under nonbankruptcy law, after the filing of the petition, nevertheless are allowed only in their amount as of the petition filing date, with increased amounts that otherwise would become part of the claim post-petition not being allowed under section 502(b). The remainder of the textual analysis shows that post-petition attorneys' fees fall within that limitation and are not allowed under section 502(b).

The amount of the allowed claim as determined under section 502(b) then is used in section 506(a), in the second step of the Code's systematic approach, which determines the amount of the creditor's secured claim and the amount of the creditor's unsecured claim, if any. Note that section 506(a) refers to "the allowed claim of a creditor," where that claim is secured by a lien or subject to a right of setoff in favor of the creditor. That is an apparent reference to section 502(b), the primary section of the Code that provides for allowance of creditors' claims, and for the determination of the amount in which they are allowed.

In order to determine the amount of the secured claim and the amount, if any, of the unsecured claim, under section 506(a), two amounts must be determined and compared. The amount of the allowed claim must be determined, and the value of the collateral must be determined. Then section 506(a) calls for a comparison of those amounts, with the allowed claim being a secured claim to the extent of the value of the collateral (or right of setoff), and an unsecured claim for the remainder, if any. There simply is nowhere else to get the amount of the allowed claim, other than section 502(b). In addition, section 506(a) provides the standard for valuing the collateral. As the Supreme Court held in *Associates Commercial Corp. v. Rash*, the first sentence of section 506(a) explains what is to be valued, and the second sentence explains how it is to be valued.

Thus section 506(a) takes the amount of the section 502(b) allowed claim and either treats it as wholly secured (if the value of the collateral or amount of the setoff right is equal to or greater than the amount of the allowed claim), or else bifurcates it (if the value of the collateral or amount of the setoff right is less than the amount of the allowed claim.) As a result, section 506(a) deals with every dollar of claim that is allowed under section 502(b).

Section 506(b) then takes the third step. If, under the section 506(a) analysis, the value of the collateral (minus any surcharge on the collateral under section 506(c))[218] exceeds the allowed amount of the claim, then the creditor is entitled to have allowed to it post-petition interest, and, under appropriate circumstances, reasonable post-petition fees, costs, and charges. Thus section 506(b) provides in such cases for allowance of an additional amount beyond the amount allowed under section 502(b). The clear implication is that post-petition interest, fees, costs, and charges cannot already be part of the section 502(b) claim if they are to be added to it by section 506(b).

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[218] *See* § 506(b)–(c).

It is clear that section 506(b) acts to allow post-petition *interest* to be added to the amount of the section 502(b) secured claim where the creditor is oversecured. Even absent the language of the preamble of section 502(b)—requiring that the amount of the claim be determined as of the petition filing date—the allowed claim under section 502(b) could not already include post-petition interest. Section 502(b)(2) makes plain that no such unmatured interest is allowable under section 502(b). Only some other section, then, could add post-petition interest to the claim, and that is exactly what section 506(b) does, in the case of an oversecured creditor. Section 506(b) does so by providing that such interest "shall be allowed."[219]

Now consider the "reasonable fees, costs, and charges" dealt with by section 506(b). The same three words—not just an identical phrase but the exact same words—describe what section 506(b) does with "reasonable fees, costs, and charges" when the claim is oversecured. The section provides that they "shall be allowed" just as post-petition interest "shall be allowed," so long as they are provided for under the relevant agreement or state statute. Those three words must mean the same thing with regard to such "reasonable fees, costs, and charges" that they mean with respect to post-petition interest: the "reasonable fees, costs, and charges" are to be added to the claim as determined under section 502(b).[220]

Consider the Supreme Court's 1989 decision in *United States v. Ron Pair Enterprises, Inc.*[221] Here is what the Court had to say about the effect of section 506(b):

> The relevant phrase in § 506(b) is: "[T]here 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 under which such claim arose." "Such claim" refers to an oversecured claim. The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of postpetition interest is unqualified. Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose. Therefore, in the absence of an agreement, postpetition interest is the only added recovery available.[222]

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[219] *See* Taylor & Mertens, *supra* note 21, at 151.

[220] *See* Brubaker, *supra* note 21, text in paragraph following paragraph at Brubaker's footnote 67.

[221] 489 U.S. 235 (1989).

[222] *Id.* at 241. Note that section 506(b) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, section 712(d), 119 Stat. 99, to provide for reasonable fees, costs, and charges not only if the agreement under which the claim arose so provides, but also if the state statute under which the claim arose so provides.

Note that it is section 506(b), limited in effect to "oversecured claim[s]," that both "entitles" the oversecured claim holder to post-petition interest and "gives" the oversecured claim holder the right to fees. Both interest and fees are considered "added recover[ies]"—amounts added by section 506(b). As the Court noted earlier in the opinion, "[s]ection 506(b) allows a holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, 'interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'"[223] The Court understood the plain meaning of the text: section 506(b) adds interest and (in an appropriate case)[224] fees to the "prepetition amount" of the claim. And of course section 502(b) determines that pre-petition amount; it provides for the amount of the claim to be determined "as of the date of the filing of the petition."

Thus the amount of the secured claim held by oversecured creditors prior to application of section 506(b) cannot include post-petition fees. If it did, then section 506(b) could not add them again (without absurdly allowing them in a double amount), and thus it could not perform the function that its language calls for it to perform.

Because post-petition fees are not allowed by section 502(b) but rather by section 506(b), we are left with the clear conclusion that post-petition fees cannot be allowed in favor of undersecured creditors or wholly unsecured creditors, neither of whom receive any benefit from section 506(b). That conclusion establishes, as a matter of the plain meaning of sections 502(b), 506(a), and 506(b), as they deal with claims, that post-petition fees are not allowable on unsecured claims. It establishes the correctness of the "majority" position.

The alternative analysis urged by some of the courts that take the "minority" position on the *United Merchants* issue is that section 506(b) does not add or allow any amount of claim; all such amounts are added or allowed by section 502(b), and section 506(b)'s function is only to classify such amounts as secured or unsecured.[225] That argument is plainly wrong with respect to post-petition interest, which cannot be allowed under section 502(b), as noted above. It could only be accepted with regard to post-petition fees if there were a basis for interpreting section 506(b) as *adding* post-petition interest but only *classifying* post-petition fees. There is no reasonable interpretation of the three words "shall be allowed"

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[223] *Ron Pair*, 489 U.S. at 239–40.

[224] The Court's decision has been criticized—by the dissenters in the case, among others—for relying on punctuation to distinguish between interest, on the one hand, and reasonable fees, costs, and charges, on the other. *See id.* at 249–52; *see also* Daniel J. Bussel, *Textualism's Failures:A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 894–97 (2000). It does not matter for purposes of this article whether the Court correctly relied on the placement of commas or correctly held, under the version of section 506(b) then in effect, that interest could be allowed under section 506(b) even absent an agreement for payment of interest. The point is simply that the Court recognized that section 506(b), to the extent applicable, adds interest and fees to the previous amount of the claim; it does not classify a previously allowed claim.

[225] *See, e.g.*, UPS Capital Bus. Credit v. Gencarelli (*In re* Gencarelli), 501 F.3d 1, 5–6 (1st Cir. 2007); *In re* New Power Co., 313 B.R. 496, 507–09 (Bankr. N.D. Ga. 2004).

that would cause them to "allow" post-petition interest but only "classify" post-petition fees.

Further, the notion that section 506(b) only classifies claims that have already been allowed under section 502(b) would defeat the obvious purpose of section 506(b) in many cases, or else lead to an absurd circular application of section 506(b) to no effect. Consider the creditor with a $100,000 claim as of the petition date secured by collateral worth $106,000. Assume that one year after the petition is filed the court must determine the amount of the allowed secured claim for purposes of plan confirmation. Assume that post-petition interest to that date would be $8,000 (an 8% annual rate), and that reasonable post-petition fees provided for under the loan agreement would be $7,000. If section 502(b) allows the post-petition fees (but of course not the post-petition interest), as courts that take the minority position argue, then the allowed amount of the claim would be $107,000. If the analysis then moves to section 506(a), the claim will be divided into a $106,000 secured claim and a $1,000 unsecured claim. But if section 506(b) then is used to further determine whether the post-petition fees are secured or unsecured, it seems they must be classified as unsecured; note that the value of the collateral does not exceed the amount of the $106,000 allowed secured claim at all, but is just equal to it; thus there is no excess and no basis for classifying post-petition fees as secured!

The result then either would be that section 506(b) would have no function—that it would just leave the $6,000 secured claim alone and would have no effect[226]—or that it would reclassify the $6,000 in secured claim (for post-petition fees) as unsecured. That would leave the creditor with only a $100,000 secured claim, even though the collateral is worth $106,000, contrary to what everyone agrees is the purpose of section 506(b). So perhaps then we could reapply section 506(b), now that the allowed secured claim is less than the value of the collateral, and reclassify the $6,000 as secured. The incoherence of applying section 506(b) twice just in order to get back to the original result under section 506(a) shows that this interpretation cannot be correct.[227]

D. Five Potential Problems with the "Majority" Position

There are, however, five potential problems with the majority position that must be considered before the analysis is finished. This section shows that none of them cast serious doubt on the correctness of the majority position as established by the textual argument given in section IV.C.

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[226] If the $6,000 fee would be recoverable under non-bankruptcy law but unreasonable under federal bankruptcy standards, then section 506(b) could make a part of it not allowable as a secured claim. *See* Brubaker, *supra* note 21, text accompanying Brubaker's footnotes 73–76. That would not eliminate the incoherent results noted in the rest of the paragraph.

[227] Arguments that the "minority position" makes section 506(b) superfluous have long been made by "majority" position courts. *See, e.g., In re* Saunders, 130 B.R. 208, 210 (Bankr. W.D. Va. 1991).

First, if it is not proper to interpret section 506(b) so as to be superfluous, then it also cannot be proper to interpret section 502(b)(2) so as to be superfluous. The "majority" position, and the textual analysis provided in Part IV.C. would be subject to criticism if they made section 502(b)(2) superfluous, but they do not. The preamble to section 502(b) disallows post-petition interest, fees, costs, charges, and many other kinds of post-petition increases in the amount of claims. The effect of section 502(b)(2) overlaps the effect of the preamble to some extent with respect to post-petition interest, but it also ensures that unamortized original issue discount is disallowed, even if under nonbankruptcy law it would be considered a recoverable part of the claim as of the petition date, and thus otherwise allowable under section 502(b).[228]

Second, though a plain meaning interpretation of sections 502(b), 506(a), and 506(b) may indeed lead to the conclusion that the majority position is correct, perhaps a plain meaning interpretation of section 101(5)(A) and of other sections dealing with contingent claims may lead to the opposite conclusion. In that event there would be a need to harmonize the provisions of the Code, and perhaps the minority position would be tenable. There is, however, no such plain meaning with respect to contingent claims, a subject that, as is shown above[229]—and as will be discussed further in a later article—is murky at best. As others have noted, it is not obvious that a right to post-petition fees should be seen as a contingent claim when its very existence, and its amount, are within the control of the creditor, and not subject to the occurrence of any event other than the creditor's choice.[230] The right to fees—past and future—is indeed a claim as of the petition date, and thus it is discharged,[231] but that does not mean that its allowable amount must be determined as of any date other than the petition date. Fees incurred to that point are part of the allowable amount of the pre-petition claim; fees incurred after that point are not allowable, except as provided by section 506(b).

As we have seen, post-petition fees cannot be treated as allowable contingent claims under section 502(b) without disrupting the operation of sections 502(b), 506(a), and 506(b). Note that section 506(b) deals specifically with post-petition fees. If there were a need to harmonize it with section 101(5)(A), it would control, as the more specific section. In addition, proponents of the "minority" position are unlikely to accept a view that would make post-petition late fees and overlimit fees

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[228] *See supra* note 54; *supra* text accompanying notes 51–54.

[229] *See supra* text accompanying notes 65–79.

[230] *See, e.g.*, Brief for Respondent, *supra* note 34, at *16.

[231] *See In re* Kindred Healthcare, Inc., Nos. 99-3199(MFW), 99-3327 (MFW), 2003 WL 22000598, at *4 (Bankr. D. Del. 2003) (holding claim for post-petition attorneys' fees was not allowable but was discharged). Similarly, late fees imposed due to failure to make unsecured credit card payments during a bankruptcy case are not allowable, yet no serious claim has ever been made that they are not discharged. *See supra* note 53 and accompanying text. In addition, to the extent fees are ancillary to a discharged debt, they would be discharged. *See* Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987) (quoting earlier Eighth Circuit case for proposition that "[a]ncillary obligations such as attorneys' fees and interest may attach to the primary debt; consequently, their status [whether or not they are discharged] depends on that of the primary debt").

on credit cards—perhaps imposed by the credit card issuer's mere making of a notation in its file—into allowable claims that were contingent at the time of the petition filing and then become fixed each month. Such fees are not allowable,[232] but they could be under an overly expansive concept of contingent claims. One approach that would prevent them from being allowed would be to refuse to consider a claim to be contingent where the claim arises solely from the combination of the debtor's failure to pay the debt and a decision taken unilaterally by the creditor; such an approach also would prevent post-petition fees from being seen as contingent claims. The question whether such an approach or a different one should be taken is the subject of a later article.

Third, a view that post-petition fees may only be allowed under section 506(b) could create difficulties in dealing with claims for indemnity. However, as noted above,[233] and as will be discussed more fully in a later article, claims for post-petition fees that are recoverable as "collateral legal expenses" should not be considered to be section 506(b) "fees." Many situations in which post-petition fees would be part of an indemnity claim would thus not be affected by section 506(b) and could be included as contingent claims, allowable under section 502(b).

Note that the post-petition interest with which section 506(b) deals is described as "interest on such claim." Thus it would be interest that is ancillary to the primary claim. The fees, costs, and charges listed in section 506(b) also should be interpreted to be items that are ancillary to the claim in bankruptcy. For example, Travelers might have become involved in litigation with workers over their entitlement to workers' compensation claims. The fees Travelers incurred in such litigation would properly be considered part of Travelers' primary damages as against PG&E; it would not represent costs of the "instant litigation" with PG&E but rather "collateral legal expense." Suppose Travelers succeeded in the litigation with a worker, so that the appropriate forum determined that the worker was not entitled to workers' compensation benefits (perhaps because the worker's injuries occurred on a weekend ski trip rather than on the job, as the worker had claimed). Travelers would then be owed nothing by PG&E for reimbursement for payments made to the worker (of which there were none), but still would be entitled under its agreement with PG&E to reimbursement of its attorneys' fees in that other litigation. Such fees are not ancillary to Travelers' contingent claim against PG&E, but rather ancillary to the worker's disputed claim against Travelers. They thus should be considered collateral legal expenses, allowable under section 502(b).

Fourth, it seems that all the courts that have considered post-petition fees in the context of a solvent debtor have allowed them to be added to unsecured claims.[234] If the analysis provided above requires rejection of that nearly unanimous authority, it might need to be rethought. Or perhaps courts that have decided to make equitable exceptions to the Code's provisions where the debtor is solvent will need to return

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[232] *See supra* note 53 and accompanying text, note 228.
[233] *See supra* note 11, text accompanying notes 167–70.
[234] *See supra* note 165.

to the provisions of the Code. This issue will be considered more fully in a later article.

However, one basis for allowing such fees in solvent chapter 7 cases is by analogy to the treatment of post-petition interest on unsecured claims.[235] Section 726(a)(5) requires payment of post-petition interest on allowed unsecured claims out of the property of the estate—even though the post-petition interest is not allowed under section 502(b)—before any remaining surplus is distributed to the debtor. Whether courts are authorized to enlarge section 726(a)(5) to include attorneys' fees may be doubted, but the analogy to post-petition interest works in favor of the "majority" rule. Post-petition interest is allowable as part of the creditor's claim under the statutory system created by sections 502(b), 506(a), and 506(b) only in favor of oversecured creditors; if fees are treated analogously, post-petition fees similarly are allowable only in favor of oversecured creditors, and the "majority" position is thus vindicated, even if fees must be paid in some cases by analogy to section 726(a)(5).

There also is an argument in chapter 11 cases that dissenting classes of unsecured claims are entitled, under the intentionally open-ended "fair and equitable" requirement of section 1129(b),[236] to payment of fees where the debtor is solvent.[237] Again, the validity of that argument may be questioned, but it does not undercut the "majority" position; it does not require that post-petition fees be allowed under section 502(b), but only that they be paid as part of the required fair and equitable treatment of a dissenting unsecured claim class.[238]

Thus it seems likely that the decisions allowing post-petition fees where the debtor is solvent may, to the extent they are correct, be consistent with the "majority" rule. There does not seem to be such an inconsistency that it would be necessary to consider abandoning the plain meaning of sections 502(b), 506(a), and 506(b).

The fifth potential problem with the majority position would arise if a refusal to allow post-petition fees on unsecured claims would be inconsistent with the pre-Code law, as Congress would have understood it in 1978 when Congress enacted

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[235] *See, e.g.*, *In re* Cont'l Airlines Corp., 110 B.R. 276, 279–80 (Bankr. S.D. Tex 1989).

[236] *See* Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L.J. 229, 230–31 (1990) (noting text of section 1129(b)(2), judicial opinions construing it, and legislative history all show that explicit requirements of section 1129(b)(2)—which, according to that section, are "included" within meaning of "fair and equitable"—do not exhaust phrase's meaning).

[237] *See* Official Comm. of Unsecured Creditors v. Dow Corning Corp. (*In re* Dow Corning Corp.), 456 F.3d 668, 683 (6th Cir. 2006).

[238] There are well-established uncodified requirements of the fair and equitable standard. One of them requires that a bonus distribution be made, in addition to distributions that provide full present-value payment of the amount of the allowed unsecured claims in a dissenting class. Full present value plus a bonus must be given where the plan (1) deprives a dissenting class of seniority rights that it previously enjoyed and (2) provides for a distribution to junior parties, including the debtor or the debtor's stockholders. *See* Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L.J. 229, 232–34 (1990); SCARBERRY, KLEE, NEWTON & NICKLES, *supra* note 16, at 871, 879.

the Code.[239] It appears, however, that there was only one reported case as of 1978 holding that post-petition fees would be allowed in favor of an unsecured creditor, and even it can be harmonized with the "majority" position, because it involved collateral legal expenses. Just as a single swallow does not make a spring, a single distinguishable case does not establish a firm practice that Congress would necessarily have thought it had to address explicitly in legislative history.[240] Of course, *United Merchants*[241] was decided after enactment of the Code, though it applied the pre-Code law.[242] It is also significant that the attorneys for the unsecured creditors who sought fees in *United Merchants* conceded that there was no reported case in which such fees had been allowed; had there been a widely-followed

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[239] *See, e.g.*, Cohen v. de la Cruz, 523 U.S. 213, 221 (1988) (stating "[w]e, however, 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure'" (citation omitted)).

[240] For a careful discussion of the pre-Code history, see Brubaker, *supra* note 21, text accompanying Brubaker's footnotes 41–59.

[241] *Id.*

[242] In its petitioner's brief, Travelers argued that there was such a practice. *See* Brief for Petitioner, *supra* note 82, at 43–44. However, only one of the cases cited by Travelers (other than *United Merchants*) allowed post-petition fees in favor of what apparently was an unsecured creditor. *See* Hartman v. Utley, 335 F.2d 558, 560–61 (9th Cir. 1964). In that case a surety sought attorneys' fees incurred "in satisfying its obligation under the bond," fees which should be considered allowable collateral legal expenses without regard to the *United Merchants* issue. *See supra* note 11, text accompanying note 233. In fact, the district court in *United Merchants* distinguished *Hartman* on essentially that ground:

> *Hartman v. Utley* (9th Cir. 1964) 335 F.2d 558, from which claimants extensively quote (and which [Bankruptcy] Judge Babitt found to be 'tangentially relevant') has in fact no relevance at all to the problem before us. The attorney's fees there at issue had nothing to do with processing a claim in a court of bankruptcy. They had been incurred by the claimants, who had gone surety for the bankrupt, in defending (or otherwise processing) claims that had been made against it by other creditors of the bankrupt.

In re United Merchs. & Mftrs., Inc., 10 B.R. 312, 315 n.3 (S.D.N.Y. 1981), *rev'd*, 674 F.2d 134 (2d Cir. 1982). The Second Circuit in *United Merchants* also apparently did not believe that *Hartman* directly supported the allowance of attorneys' fees on unsecured claims; it cited *Hartman* only in a footnote and only with a "cf." *United Merchs.*, 674 F.2d at 138 n.5.

The other cases cited by Travelers on this point were: (1) a 1983 Eleventh Circuit decision applying the pre-Code law to allow fees that had vested pre-petition, *Mills v. East Side Investors* (*In re East Side Investors*); (2) a 1976 Second Circuit case in which a secured creditor who may have been oversecured was allowed fees incurred "protecting its interest as a secured creditor," *James Talcott, Inc. v. Wharton* (*In re Continental Vending Machine Corp.*); (3) a 1967 Third Circuit case in which the court of appeals held that the creditor's lien on equipment had been properly perfected and thus, as the trustee in bankruptcy apparently had conceded would be proper if the lien were valid, allowed post-petition fees in favor of the apparently oversecured creditor, *who was to receive payment of its claim, including post-petition fees, out of proceeds of sale of the collateral*, *In re Ferro Contracting Co.*; (4) a 1938 Second Circuit case allowing attorneys' fees to be included in the lien of an oversecured chattel mortgage holder, *Mesard v. Ullmann* (*In re American Motor Prods.*); and (5) a similar district court case, *In re Schafer's Bakeries*. *See East Side Investors*, 702 F.2d 214, 215 (11th Cir. 1983); *Continental Vending Mach. Corp.*, 543 F.2d 986, 994–96 (2d Cir. 1976); *Ferro Contracting Co.*, 380 F.2d 116, 119–120 (3d Cir. 1967); *Am. Motor Prods.*, 98 F.2d 774, 775 (2d Cir. 1938); *Schafer's Bakeries*, 155 F. Supp. 902, 907 (E.D. Mich. 1957). Travelers also cited *LeLaurin v. Frost Nat'l Bank of San Antonio*, which did not hold that post-petition fees were allowable on unsecured claims, though it shows that one bankruptcy judge did allow such fees. 391 F.2d 687 (5th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968); *see supra* note 172.

practice of allowing such fees, any concession of this kind would have been qualified, in a way that this concession apparently was not.[243]

CONCLUSION

Although the Supreme Court in *Travelers* abrogated the Fobian rule, it left open for consideration all other bases for refusing to allow post-petition fees on unsecured claims. The plain meaning of sections 502(b), 506(a), and 506(b) sets up a system for dealing with claims that precludes allowance of post-petition fees on unsecured claims. This result is not inconsistent with pre-Code practice as it would have been known to Congress at the time the Code was enacted, nor does this result create a conflict with provisions of the Code dealing with contingent claims that would require us to reconsider the result. It also does not cause section 502(b)(2) to be superfluous, though the opposite result—allowing such fees—would render section 506(b) either absurd or largely superfluous.

The confusion with regard to this issue results from a misunderstanding of section 506(b). That misunderstanding has led at least three circuits astray, as they have assigned a function to section 506(b) rather than attending to its text.

Additional exploration remains to be done with respect to several issues, all of which will be addressed in later articles. One issue is whether the allowance of post-petition fees on unsecured claims where the debtor is solvent—as courts routinely have permitted—is supportable on grounds that are consistent with the plain meaning of sections 502(b), 506(a), and 506(b). If not, the courts will need to return to enforcing the Code as written.

A further issue deals with what it means under the Code to describe a claim as contingent. Though the specific sections of the Code dealing with post-petition fees preclude allowance of post-petition fees under section 502(b)—whether or not they otherwise would be considered contingent claims—the conclusions reached in this article would be confirmed if such claims for fees would fail to qualify as "contingent claims" within the meaning of that phrase under the general provisions of the Code.

Another issue deals with the relation between post-petition "collateral legal expenses" and section 506(b). It seems likely that section 506(b) simply does not deal with such expenses, which therefore may be allowed without regard to whether the creditor is oversecured (or secured at all). This conclusion is particularly important for creditors, like Travelers, who seek indemnity, and further work must be done to confirm it.

Finally, there is the question whether the Code preempts state law bases for award of attorneys' fees against debtors in nondischargeability actions. If not,

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[243] The district court in *United Merchants* reversed the bankruptcy court's allowance of fees (and in turn was reversed by the Second Circuit). The district court noted that "[a]s Judge Babitt [the bankruptcy judge] and the claimants concede, not a single decision has been found allowing an unsecured creditor to assert such a claim." *United Merchs.*, 10 B.R. 312, 315 n.3 (S.D.N.Y. 1981), *rev'd*, 674 F.2d 134 (2d Cir. 1982).

debtors may be coerced into reaffirming debts that would have been found to be dischargeable, had the debtors dared to litigate the question. Congress sought to avoid that result, but the standards for preemption are strict, and the answer to the question is, at this point, in urgent need of clarification.