

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: October 15, 2009 Decided: November 5, 2009)

Docket No. 09-0691-bk

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D. CLARK OGLE, Liquidating Trustee of
the Agway Liquidating Trust,
Appellant,

- v.-

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Appellee.

- - - - -x

Before: JACOBS, Chief Judge, FEINBERG and
 KATZMANN, Circuit Judges.

The United States District Court for the Northern
District of New York (Sharpe, J.), affirming a judgment of
the United States Bankruptcy Court for the Northern District
of New York (Gerling, C.J.), ordered the Agway Liquidating
Trust to pay post-petition attorneys' fees on a claim that
stemmed from a pre-petition indemnity agreement. The
liquidating trustee, D. Clark Ogle, appeals, arguing that
the federal Bankruptcy Code ("Code") bars unsecured claims

1 for post-petition attorneys' fees.

2 In United Merchants & Manufacturers, Inc. v. Equitable
3 Life Assurance Society of the United States, 674 F.2d 134
4 (2d Cir. 1982), this Court held, under the Bankruptcy Act
5 then current, that such claims are allowable. In Travelers
6 Casualty & Surety Co. of America v. Pacific Gas & Electric
7 Co., 549 U.S. 443 (2007), the Supreme Court rejected a Ninth
8 Circuit rule disallowing such claims if the fees were
9 incurred litigating issues of bankruptcy law, but reserved
10 decision on the precise question presented on this appeal:
11 whether such claims are allowable categorically. We
12 conclude that the holding of United Merchants has not been
13 impaired by Travelers or by statutory revisions.

14 For the reasons that follow, we affirm the judgment of
15 the district court.

16 JEFFREY A. DOVE, JAMES C.
17 THOMAN, Menter, Rudin &
18 Trivelpiece, P.C., Syracuse, New
19 York, for Appellant.

20
21 GLENN M. FJERMEDAL, Lacy Katzen
22 LLP, Rochester, New York;
23 FILIBERTO AGUSTI, MARK MORAN,
24 JOSHUA R. TAYLOR, Steptoe &
25 Johnson LLP, Washington, D.C.,
26 for Appellee.

1 DENNIS JACOBS, Chief Judge:

2
3 The federal Bankruptcy Code ("Code"), 11 U.S.C. §§ 101
4 et seq., does not explicitly state whether an unsecured
5 creditor can collect *post-petition* attorneys' fees based on
6 a *pre-petition* indemnity agreement. In United Merchants &
7 Manufacturers, Inc. v. Equitable Life Assurance Society of
8 the United States, 674 F.2d 134 (2d Cir. 1982), this Court
9 held, under the Bankruptcy Act then current, that such
10 claims are allowable. In Travelers Casualty & Surety Co. of
11 America v. Pacific Gas & Electric Co., 549 U.S. 443 (2007),
12 the Supreme Court rejected a Ninth Circuit rule disallowing
13 such claims if the fees were incurred litigating issues of
14 bankruptcy law, but reserved decision on the precise
15 question presented on this appeal: whether such claims are
16 allowable categorically. We conclude that the holding of
17 United Merchants has not been impaired by Travelers or by
18 statutory revisions.

19 Fidelity & Deposit Company of Maryland ("Fidelity")
20 entered into several agreements ("the Agreements") with
21 Agway, Inc. which required Agway to indemnify Fidelity for
22 attorneys' fees that it might incur to enforce the
23 Agreements against Agway. After Agway filed for bankruptcy

1 under Chapter 11, Fidelity duly made payments to Agway's
2 creditors, unsuccessfully demanded indemnity under the
3 Agreements, and incurred attorneys' fees in litigation to
4 collect from Agway. Only those attorneys' fees are at issue
5 on this appeal. The liquidating trustee of the Agway
6 Liquidating Trust ("the Trust"), D. Clark Ogle ("Ogle"),
7 concedes that Fidelity has a right to the fees under state
8 contract law, but refuses to pay on the ground that the Code
9 bars such recovery.

10 The United States Bankruptcy Court for the Northern
11 District of New York (Gerling, C.J.) held that Fidelity can
12 collect \$884,506.28 in post-petition attorneys' fees. The
13 United States District Court for the Northern District of
14 New York (Sharpe, J.) affirmed. Ogle appeals that decision.
15 We affirm, concluding that the Code does not prohibit an
16 unsecured creditor from collecting post-petition attorneys'
17 fees pursuant to an otherwise enforceable pre-petition
18 contract of indemnity.

19
20 **I**

21 Pursuant to the Agreements, Fidelity provided surety
22 bonds ("Bonds") to Agway's insurers, and Agway in turn

1 agreed to indemnify Fidelity for any payments that it made
2 under the Bonds as well as legal fees incurred to enforce
3 the Agreements. On October 1, 2002, Agway filed a voluntary
4 Chapter 11 bankruptcy petition. Up until then, Agway had
5 not defaulted on any payment obligation to its insurers;
6 Fidelity's claim in bankruptcy therefore asserted no more
7 than a contingent right to payment under the Agreements.

8 When Agway thereafter defaulted on payments to its
9 insurers, the insurers in turn sought payment from Fidelity,
10 and Fidelity tendered payment consistent with its
11 obligations under the Bonds. Fidelity incurred additional
12 costs, including legal fees, enforcing its indemnity rights
13 against Agway in prolonged litigation. On July 18, 2008,
14 the Bankruptcy Court concluded (as relevant here) that Agway
15 was liable for Fidelity's post-petition attorneys' fees.

16 The parties thereafter settled all of the issues
17 between them except the order requiring payment of post-
18 petition attorneys' fees. Ogle appealed that part of the
19 bankruptcy court's order to the district court pursuant to
20 28 U.S.C. § 158(a), and the district court affirmed the
21 bankruptcy court's order. Ogle now appeals to this Court.

22 The sole question on appeal is one of law: Under the

1 Bankruptcy Code, is an unsecured creditor entitled to
2 recover post-petition attorneys' fees that were authorized
3 by a pre-petition contract but were contingent on post-
4 petition events?

5 Where, as here, a district court affirms a bankruptcy
6 court's decision, we independently review the decision of
7 the bankruptcy court. Adelphia Bus. Solutions, Inc. v.
8 Abnos, 482 F.3d 602, 607 (2d Cir. 2007). Our review of
9 legal conclusions is de novo. Id.

10
11 **II**

12 Courts are closely divided on the question presented.
13 One line of cases holds that an unsecured claim for post-
14 petition attorneys' fees asserted on the basis of a pre-
15 petition contract is allowable. See, e.g., In re SNTL
16 Corp., 571 F.3d 826, 839-45 (9th Cir. 2009) ("SNTL"); Martin
17 v. Bank of Germantown, 761 F.2d 1163, 1168 (6th Cir. 1985).
18 Another line of cases holds that such a claim is disallowed.
19 See, e.g., Adams v. Zimmerman, 73 F.3d 1164, 1177 (1st Cir.
20 1996); Waterman v. Ditto, 248 B.R. 567, 573 (B.A.P. 8th Cir.
21 2000).

22 This Court allowed such claims in a case that was

1 decided under the former Bankruptcy Act, but that commented
2 on section 506(b) of the Code. United Merchs. & Mfrs., Inc.
3 v. Equitable Life Assurance Soc'y of the U.S., 674 F.2d 134,
4 137-39 (2d Cir. 1982). This opinion considers whether
5 United Merchants survives statutory revisions and the
6 Supreme Court's decision in Travelers Casualty & Surety Co.
7 of America v. Pacific Gas & Electric Co., 549 U.S. 443
8 (2007). We join the Ninth Circuit's recent decision in SNTL
9 and hold that the Bankruptcy Code does not bar an unsecured
10 claim for post-petition attorneys' fees authorized by a pre-
11 petition contract valid under state law.

13 III

14 Two Code provisions bear upon the disputed question:
15 section 502(b) and section 506(b). Travelers addresses the
16 first, and United Merchants the second.

17 A

18 Section 502(b) of the Code provides (with inapplicable
19 exceptions) that a "court, after notice and a hearing, shall
20 determine the *amount* of [a] claim in lawful currency of the
21 United States *as of the date of the filing of the petition*,
22 and shall allow such claim in such amount." 11 U.S.C.

1 § 502(b) (emphases added). A claim, in turn, is a “right to
2 payment, whether or not such right is reduced to judgment,
3 liquidated, *unliquidated*, fixed, *contingent*, matured,
4 *unmatured*, disputed, undisputed, legal, equitable, secured,
5 or *unsecured*.” 11 U.S.C. § 101(5)(A) (emphases added). A
6 “right to payment . . . usually refer[s] to a right to
7 payment recognized under state law.” Travelers, 549 U.S. at
8 451 (internal quotation marks and citation omitted).

9 A “contingent” claim under the Code refers “to
10 obligations that will become due upon the happening of a
11 future event that was within the actual or presumed
12 contemplation of the parties at the time the original
13 relationship between the parties was created.” In re
14 Manville Forest Prods. Corp., 209 F.3d 125, 128-29 (2d Cir.
15 2000) (internal quotation marks omitted). “A claim will be
16 deemed to have arisen pre-petition if the relationship
17 between the debtor and the creditor contained all of the
18 elements necessary to give rise to a legal obligation--a
19 right to payment--under the relevant non-bankruptcy law.”
20 Id. at 129 (internal quotation marks omitted); see also SNTL
21 571 F.3d at 843-44. “Under contract law, a right to payment
22 based on a written indemnification contract arises at the

1 time the indemnification agreement is executed.” Manville,
2 209 F.3d at 129.

3 Manville therefore makes clear that Fidelity possessed
4 a contingent right to post-petition attorneys’ fees, and
5 that its right arose pre-petition. However, the dollar
6 amount of Fidelity’s contingent right was not a sum certain
7 on the day the bankruptcy petition was filed. We read
8 Travelers to mean that this does not matter.

9 The Supreme Court framed the Travelers issue as
10 follows: “We are asked to consider whether federal
11 bankruptcy law precludes an unsecured creditor from
12 recovering attorney’s fees authorized by a prepetition
13 contract and incurred in postpetition litigation.” 549 U.S.
14 at 445. True, the facts in Travelers were such that the
15 post-petition costs related solely to litigating issues of
16 bankruptcy law (which Ogle contends is a decisive limiting
17 principle); but the Court’s analysis and rationale would
18 seem equally applicable to post-petition costs arising out
19 of pre-petition contracts more generally. Furthermore, the
20 way the issue is framed at the outset, see id. (as quoted
21 above), defines the scope of the opinion broadly.

22 This is important because, under Travelers, section

1 502(b) interposes no bar to an unsecured creditor's ability
2 to recover post-petition attorneys' fees. Travelers starts
3 from the premise that "an otherwise enforceable contract
4 allocating attorney's fees (i.e., one that is enforceable
5 under substantive, nonbankruptcy law) is allowable in
6 bankruptcy except where the Bankruptcy Code provides
7 otherwise." Id. at 448. The Court went on to explain that,
8 because--as in the present case--none of the section 502(b)
9 exceptions (enumerated (2)-(9)) applied, Travelers's claim
10 for post-petition fees "must be allowed under § 502(b)
11 unless it is unenforceable within the meaning of
12 § 502(b)(1)." Id. at 449-50.

13 Section 502(b)(1) in turn bars any claim that "is
14 unenforceable against the debtor and property of the debtor,
15 under any agreement or applicable law for a reason other
16 than because such claim is contingent or unmatured." 11
17 U.S.C. § 502(b)(1). Travelers construed this wording to
18 mean that "any defense to a claim that is available outside
19 of the bankruptcy context is also available in bankruptcy."
20 549 U.S. at 450. Unless a claim is unenforceable under
21 state law or one of the section 502(b)(2)-(9) exceptions
22 applies, courts must "presume" that the claim "will be

1 allowed in bankruptcy unless [it is] expressly disallowed.”
2 Id. at 452.

3 All of the fees at issue in Travelers were incurred
4 post-petition; so the amount was necessarily unknown when
5 the bankruptcy petition was filed. It follows that if an
6 unsecured claim for post-petition fees was for that reason
7 unrecoverable, the Travelers Court could have disposed of
8 the claim on that simple, available ground alone.
9 Travelers, therefore, proceeds along lines that, reasonably
10 extended, would suggest (notwithstanding the Court’s express
11 disclaimer) that section 502(b)’s requirement--that the
12 court “shall determine the amount of such claim . . . as of
13 the date of the filing of the petition”--does not bar
14 recovery of post-petition attorneys’ fees.

15 In the present appeal, as in Travelers: The underlying
16 contract is valid as a matter of state substantive law; none
17 of the section 502(b)(2)-(9) exceptions apply; and the Code
18 is silent as to the particular question presented--in
19 Travelers, whether the Code allows “unsecured claims for
20 contractual attorney’s fees incurred while litigating issues
21 of bankruptcy law,” 549 U.S. at 453; and here, whether the
22 Code allows unsecured claims for “fees incurred while

1 litigating issues of" contract law more generally.

2 Accordingly, we hold that an unsecured claim for post-
3 petition fees, authorized by a valid pre-petition contract,
4 is allowable under section 502(b) and is deemed to have
5 arisen pre-petition. Accord SNTL, 571 F.3d at 844 ("[W]e
6 reject the position . . . that section 502(b) precludes such
7 fees.").

8

9

B

10 "[C]laims enforceable under applicable state law will
11 be allowed in bankruptcy unless they are expressly
12 disallowed." Travelers, 549 U.S. at 452. A fair question
13 is raised by Ogle as to whether section 506(b) of the Code
14 amounts to an express disallowance of Fidelity's claim by
15 negative inference or otherwise. Section 506(b) provides in
16 relevant part that "interest on [a] claim, *and any*
17 *reasonable fees, costs, or charges* provided for under the
18 agreement or State statute under which such claim arose" can
19 be recovered if the creditor is *oversecured*. 11 U.S.C.
20 § 506(b) (emphasis added). So what does section 506(b) say
21 or imply about a similar claim that is *unsecured*?

22 In United Merchants, we observed: "Neither [section

1 506(b)] nor its legislative history sheds any light on the
2 status of an unsecured creditor's contractual claims for
3 attorney's fees." 674 F.2d at 138. United Merchants is
4 therefore dispositive if it survives Travelers. We conclude
5 that it does.

6 As Travelers makes clear, the question is whether the
7 Code *disallows* post-petition attorneys' fees, and does so
8 expressly. It was therefore decisive in Travelers that "the
9 Code says *nothing* about unsecured claims for contractual
10 attorney's fees incurred while litigating issues of
11 bankruptcy law." 459 U.S. at 453 (emphasis in original).
12 And while Travelers declined to address section 506(b)
13 (because the parties had not raised the issue below), see
14 id. at 454-56, it is decisive here that the Code says
15 nothing about such fees incurred litigating things *other*
16 than issues of bankruptcy law. The teaching of Travelers is
17 therefore fully consonant with our decision in United
18 Merchants.

19 Accordingly, we hold that section 506(b) does not
20 implicate unsecured claims for post-petition attorneys'
21 fees, and it therefore interposes no bar to recovery.

1 IV

2 Ogle adduces three additional reasons for construing
3 the Code to disallow unsecured claims for post-petition
4 attorneys' fees.

5 [1] Ogle relies on wording in United Savings
6 Association of Texas v. Timbers of Inwood Forest Associates,
7 Ltd., 484 U.S. 365 (1988), which explained that section
8 506(b) allows an oversecured creditor to receive post-
9 petition interest only out of the "security cushion," but
10 that an undersecured creditor--who lacks any such cushion--
11 "falls within *the general rule disallowing postpetition*
12 *interest.*" Id. at 372-73 (emphasis added). From the
13 italicized phrase Ogle would deduce a general rule favoring
14 his position. However, the wording references section
15 502(b) (2) of the Code, which expressly disallows a claim for
16 interest that is unmatured. See id.; see also 11 U.S.C.
17 § 502(b) (2). In this way, section 506(b) creates a limited
18 exception--for oversecured creditors--from the general rule
19 in section 502(b) (2) that disallows a claim for unmatured
20 interest. Timbers, 484 U.S. at 372-73. But while section
21 502(b) (2) bars claims for unmatured interest, it does not
22 similarly bar (or even reference) claims for post-petition

1 attorneys' fees. See SNTL, 571 F.3d at 844-45.

2 [2] Ogle argues that an unsecured claim for post-
3 petition attorneys' fees is barred by section 502(e)(2),
4 which provides that a claim for "reimbursement or
5 contribution . . . that becomes fixed after the commencement
6 of the case . . . shall be allowed . . . the same as if such
7 claim had become fixed before the date of the filing of the
8 petition." 11 U.S.C. § 502(e)(2). Ogle's argument relies
9 on expressio unius: Because section 502(e)(2) provides an
10 exception to section 502(b) for reimbursement and
11 contribution, it thereby forecloses an exception for post-
12 petition attorneys' fees. However, Travelers requires us to
13 "presume that claims enforceable under applicable state law
14 will be allowed in bankruptcy unless they are expressly
15 disallowed." 549 U.S. at 452. We cannot, then, as Ogle
16 wishes, draw from section 502(e)(2) an inference by silence
17 or omission.

18 [3] Ogle argues from policy that allowing an unsecured
19 creditor to collect post-petition attorneys' fees based on a
20 pre-petition contract would unfairly disadvantage other
21 creditors (such as tort claimants and trade creditors) whose
22 distributions would be reduced pro tanto. In United

1 Merchants, however, we rejected the idea “that the policy of
2 equitable distribution” defeats “an unsecured creditor’s
3 otherwise valid contractual claim for collection costs
4”:

5 When equally sophisticated parties negotiate a
6 loan agreement that provides for recovery of
7 collection costs upon default, courts should
8 presume, absent a clear showing to the contrary,
9 that the creditor gave value, in the form of a
10 contract term favorable to the debtor or
11 otherwise, in exchange for the collection costs
12 provision. Such a creditor should recover more in
13 the division of the debtor’s estate because it
14 gave more to the debtor at the time it made the
15 loan. Rather than providing an undeserved bonus
16 for one creditor at the expense of others,
17 allowing a claim under a collection costs
18 provision merely effectuates the bargained-for
19 terms of the loan contract.

20
21 674 F.2d at 137. Although United Merchants was construing
22 the predecessor to the current Bankruptcy Code, see id. at
23 136 n.1, its analysis is equally applicable to the Code
24 today.

25

26

CONCLUSION

27 For the foregoing reasons, we affirm the judgment of
28 the district court.