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Unsecured Claim for Post-Petition Contractual Attorneys' Fees? File It!

Section 506(b) of the Bankruptcy Code provides for the allowance of post-petition contractual attorneys' fees for oversecured creditors, but the Code is silent about the allowance of these claims for unsecured creditors. As a result, "there has never been a nationwide consensus on the allowability of bankruptcy claims for contractual post-petition fees."¹ A consensus — or at least a trend — seems to be forming, with *SummitBridge Nat'l Invs. III LLC v. Faison*² being the latest circuit court opinion allowing post-petition attorneys' fees provided for in a contract. The Fourth Circuit's reliance on the U.S. Supreme Court's *Travelers*³ opinion and sound reasoning strongly supports the allowance of such claims.

Creditors receive the benefit of their bargain when their claims for contractual attorneys' fees are honored, regardless of when they were incurred, but allowance of these claims could also lead to greatly diluted unsecured creditor pools in cases with significant attorneys' fee claims (e.g., in the indenture-trustee context).⁴ Regardless of the policy implications, *SummitBridge* serves as a reminder of the importance of attorneys' fee provisions in contracts as a potential additional means of recovery for unsecured and undersecured creditors.

This article provides an overview of common arguments against the allowance of unsecured claims for post-petition attorneys' fees, discusses the impact of the Supreme Court's *Travelers* decision on the reasoning of courts addressing these claims, and gives an overview of the Fourth Circuit's decision in *SummitBridge* and a preview of a case on appeal to the Third Circuit.

Sections 502 and 506

The two provisions of the Bankruptcy Code most relevant to the determination of the allowability of post-petition contractual attorneys' fees are §§ 502 ("allowance of claims or interests") and 506 ("determination of secured status").

Section 502(a) provides that a claim is deemed allowed absent an objection, while § 506(b) provides

that "the court, after notice and a hearing, 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" unless one of the nine enumerated exceptions applies. Section 506(b) provides:

To the extent that an allowed secured claim is secured by property the value of which ... is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

Arguments Against Allowance of Contractual Attorneys' Fees

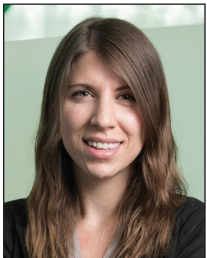
A pre-*Travelers* bankruptcy court decision in 2005 from within the Third Circuit, *Global Indus. Techs. Servs. v. Tanglewood Invs. Inc. (In re Global Indus. Techs.)*,⁵ summarized the rationale used by the "majority of courts" holding that "unsecured creditors may not include post-petition attorneys' fees in their claims from a bankruptcy estate."⁶ Below are some of the points noted in the decision.

Since § 506(b) expressly provides for the allowance of post-petition attorneys' fees for oversecured creditors, and neither § 506(b) nor any other Bankruptcy Code provision provides for the allowance of such fees for unsecured creditors, "unsecured creditors have no clear entitlement to post-petition attorneys' fees."⁷ "*Expressio unius est exclusio alterius* (the expression of one is the exclusion of the alternatives)"⁸ means that Congress must have intended to disallow such claims to unsecured creditors.

In *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc.*,⁹ the Supreme Court found that only oversecured creditors were entitled to post-petition interest on their claims. "Because § 506(b) expressly provides for the allowance of both post-petition interest and fees, the majority of courts addressing this issue have applied this reasoning to restrict the allowance of post-petition fees to oversecured creditors only."¹⁰



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¹ *Wilmington Tr. Co. v. Tribune Media Co. (In re Tribune Media Co.)*, No. 1:15-cv-01116-RGA, 2018 U.S. Dist. LEXIS 199137, at *2, n.1 (D. Del. Nov. 26, 2018).

² 915 F.3d 288 (4th Cir. 2019).

³ *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas and Elec. Co.*, 549 U.S. 443 (2007).

⁴ The indenture trustee's claim for post-petition attorneys' fees and costs in *In re Tribune Media Co.* was more than \$30 million, which was disallowed by the bankruptcy court before being reversed on appeal to the district court. See *In re Tribune Media Co.*, No. 08-13141 (KJC), 2015 Bankr. LEXIS 3973 (Bankr. D. Del. Nov. 19, 2015).

⁵ 327 B.R. 230 (Bankr. W.D. Pa. 2005).

⁶ *Id.* at 239.

⁷ *Id.* at 239-40.

⁸ *Id.* at 239.

⁹ 484 U.S. 365 (1988).

¹⁰ *In re Global Indus. Techs.* at 240.

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Section 502(b) requires a court to calculate the amount of a claim as of the petition date. “It is axiomatic that, as of the petition date, post-petition attorneys’ fees have not been incurred. Thus, unsecured prepetition claims cannot include post-petition attorneys’ fees.”¹¹

The final reason is claim dilution: “[I]t is inequitable to allow certain unsecured creditors to recover post-petition attorneys’ fees at the expense of similarly situated claimants. To allow one group of unsecured creditors to recover more than their pre-petition debt unfairly discriminates against others because it reduces the pool of assets available to all unsecured creditors *pro rata*.”¹² Disallowance by negative inference has greatly reduced traction following *Travelers*.

Travelers and the Presumption of Enforceability of State Law Claims

The inquiry presented to the Supreme Court in *Travelers* was “whether federal bankruptcy law precludes an unsecured creditor from recovering attorneys’ fees authorized by a pre-petition contract and incurred in post-petition litigation.”¹³ The Court unanimously rejected the Ninth Circuit’s judicially created rule disallowing claims against a bankruptcy estate for attorneys’ fees incurred by creditors litigating bankruptcy issues. The Court reiterated its presumption that “claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed,” and held that the debtor had not overcome the presumption, noting that none of the exceptions to claim allowance in § 502(b) were implicated.¹⁴

The Court declined to address the debtor’s argument — not made in the lower courts — that § 506(b), which expressly provides that a secured claim of an oversecured creditor is allowed a claim for reasonable fees and costs provided for under the agreement, “categorically disallows unsecured claims for contractual attorney’s fees.”¹⁵

Post-*Travelers*, some courts continue to follow the *In re Global Indus.* line of cases disallowing post-petition attorneys’ fees, even when they are expressly provided for in the underlying contract.¹⁶ Cases like *SummitBridge* rely on *Travelers*’s seemingly simple logic to allow these claims: If the claim is enforceable under state law and the Bankruptcy Code does not expressly disallow the claim, it is valid.

Fourth Circuit Allows Unsecured Claim for Post-Petition Contractual Attorneys’ Fees

In *SummitBridge*, the Fourth Circuit Court of Appeals was squarely presented the issue of whether the Bankruptcy Code bars a creditor from asserting an unsecured claim for

attorneys’ fees if those fees are incurred post-petition but based on a pre-petition contract.¹⁷ SummitBridge National Investments III LLC was the assignee of three promissory notes from the debtor, Ollie Faison. The notes were secured by farmland and provided that if they were placed with an attorney for collection, Faison would pay all costs of collection, including reasonable attorneys’ fees.¹⁸

There was sufficient collateral to cover most of the indebtedness secured by the notes, but SummitBridge was undersecured and filed an unsecured claim for post-petition attorneys’ fees that it had incurred. Faison objected to the claim on the grounds that the Bankruptcy Code does not allow creditors like SummitBridge to assert unsecured claims for post-petition attorneys’ fees. Both the bankruptcy and district courts disallowed the claim.¹⁹

The Fourth Circuit noted the split of authority on the issue before turning to *Travelers* as having provided “important guidance” and having “applied a presumption of broader significance,”²⁰ namely, the presumption that “claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.”²¹ Armed with this presumption, the Court analyzed the claim under §§ 502(b) and 506(b) in order to determine whether either section expressly disallows claims for post-petition attorneys’ fees based on a valid pre-petition contract.

Starting with § 502(b), the Court reasoned that this section does not bar SummitBridge from recovering post-petition attorneys’ fees if two conditions are met: (1) SummitBridge must have had a “claim” under § 101(5)(a) of the Bankruptcy Code for those fees as of the petition date; and (2) the claim must not fall within an enumerated exception.²²

The Court first held that SummitBridge had a claim for fees as of the petition date in light of the Code’s broad definition of a “claim,” which expressly includes rights to payment that are contingent. “What matters is that the *right* to those fees arose pre-petition, when Faison signed the promissory notes in question.”²³ The Court also found nothing in § 502(b) that expressly disallows claims for post-petition attorneys’ fees.²⁴

The Court then turned to § 506(b) and invoked the *Travelers* claim of validity presumption to reject Faison’s negative inference/*expressio unius est exclusio alterius* argument that by expressly allowing creditors with oversecured claims to add attorneys’ fees to their claims, Congress must have intended to disallow such claims to unsecured creditors. Section 506(b) does not expressly disallow these claims, and “[a] section that is completely silent with regard to the allowance/disallowance issue at hand cannot rebut the *Travelers* presumption.”²⁵

The Court buttressed its conclusion on § 506(b) by noting that § 506 has nothing to do with the allowance or dis-

11 *Id.*

12 *Id.*

13 *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas and Elec. Co.*, 549 U.S. 443, 445 (2007).

14 *Id.* at 452-53.

15 *Id.* at 454-55.

16 See, e.g., *In re Old Colony LLC*, 476 B.R. 1, 31-32 (Bankr. D. Mass. 2012) (“[W]here the bankruptcy estate is unable to pay all other creditors in full, post-petition attorneys’ fees are not allowable as part of an unsecured claim even where provided for in the underlying contract.”) (citing cases).

17 *SummitBridge Nat’l Invs. III LLC v. Faison*, 915 F.3d 288, 289 (4th Cir. 2019).

18 *Id.*

19 *Id.* at 290.

20 *Id.* at 291.

21 *Id.* (quoting *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas and Elec. Co.*, 549 U.S. 443, 452 (2007)).

22 *SummitBridge Nat’l Invs. III LLC*, 915 F.3d at 292.

23 *Id.* (emphasis in original).

24 *Id.* at 293.

25 *Id.* at 294 (internal quotation and citation omitted).

allowance of claims, which is left to § 502: “Section 502, in other words, answers the threshold question of whether a claim should be allowed or disallowed, while § 506 deals with the entirely different, more narrow question of whether certain types of claims should be considered secured or unsecured.”²⁶

Finally, the Fourth Circuit rejected Faison’s policy argument that it would be unfair to allow SummitBridge’s post-petition attorneys’ fees claim because allowance would reduce the pool of assets available to wholly unsecured creditors that have yet to recover any principal, let alone fees. The court held that the argument had no basis in the text of the Bankruptcy Code, that the result was not necessarily inequitable, and that it is Congress’s province to determine property rights in the assets of a bankrupt’s estate.²⁷

Is the Third Circuit Next to Weigh In?

A pre-*SummitBridge* district court opinion in late 2018 is in accord with *SummitBridge*’s reasoning, having reversed the bankruptcy court and allowed more than \$30 million in unsecured post-petition fees incurred by an indenture trustee.²⁸ The bankruptcy court agreed with *Global Indus.* and its four reasons for disallowing the claim, “especially the conclusion that the plain language of § 502(b) and § 506(b), when read together, indicate that

post-petition interest, attorneys’ fees and costs are recoverable only by oversecured creditors.”²⁹

The brief district court opinion reversing the bankruptcy court turned on *Travelers*’ presumption that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed by the Bankruptcy Code.³⁰ The district court cited cases from the First, Second, Seventh, Ninth and Eleventh Circuit Courts of Appeals that have allowed contractual attorneys’ fees accruing post-petition and held:

I cannot conclude that Section 506(b) “expressly” disallows the claims at issue here. Thus, I agree with the position adopted by every court of appeals faced with this question; Section 506(b) does not limit the allowability of unsecured claims for contractual post-petition attorneys’ fees under Section 502.³¹

The debtor has appealed the district court’s decision to the Third Circuit.

Conclusion

SummitBridge is the latest decision in a growing post-*Travelers* trend holding that unsecured claims for post-petition contractual attorneys’ fees are not expressly disallowed by the Bankruptcy Code. The case reinforces the importance of attorneys’ fees clauses in contracts and should cause practitioners to account for these claims when seeking recoveries for their creditor clients. **abi**

²⁶ *Id.* (internal quotation and citation omitted).

²⁷ *Id.* at 295-96.

²⁸ *Wilmington Tr. Co. v. Tribune Media Co. (In re Tribune Media Co.)*, No. 1:15-cv-01116-RGA, 2018 U.S. Dist. LEXIS 199137 (D. Del. Nov. 26, 2018).

²⁹ *In re Tribune Media Co.*, No. 08-13141 (KJC), 2015 Bankr. LEXIS 3973, at *11.

³⁰ *Wilmington Tr. Co.*, 2018 U.S. Dist. LEXIS 199137, at *2, n.1.

³¹ *Id.* at *3-*4.

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