

Second Circuit holds post-petition attorneys' fees based on prepetition indemnity agreement allowable as unsecured claims: *Ogle v. Fidelity & Deposit Company of Maryland*

In a ruling issued on November 5, 2009, *Ogle v. Fidelity & Deposit Co. of Md.*, No. 09-0691-bk, 2009 WL 3645651 (2d Cir. Nov. 5, 2009) (“**Ogle**”), the U.S. Court of Appeals for the Second Circuit held that the Bankruptcy Code does not prohibit an unsecured creditor from claiming attorneys’ fees that accrue after the bankruptcy filing pursuant to an otherwise enforceable prepetition indemnity agreement. The Second Circuit thereby resolved a question that the U.S. Supreme Court had expressly left open in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*¹ (“**Travelers**”).

I. **Ogle v. Fidelity & Deposit Co. of Md.**

In *Ogle*, Fidelity & Deposit Company of Maryland asserted a claim against the Debtor Agway Inc. for attorneys’ fees that Fidelity incurred in litigation to collect payment from Agway under certain agreements. Under these agreements entered into before Agway’s bankruptcy, Fidelity provided surety bonds to Agway’s insurers, and Agway agreed to indemnify Fidelity for any payments that it made under the bonds as well as legal fees incurred to enforce the agreements. After filing for Chapter 11, Agway defaulted on payments to its insurers. Consistent with its obligations under the surety bonds, Fidelity paid the insurers. However, Fidelity incurred legal fees enforcing its indemnity rights against Agway. The bankruptcy court held that Fidelity’s claim for outstanding attorneys’ fees incurred post-petition was allowable as a prepetition unsecured claim. The district court affirmed the bankruptcy court decision, and Agway’s liquidating trustee, Ogle, appealed to the Second Circuit.

The Second Circuit framed the issue on appeal as follows: under the Bankruptcy Code, is an unsecured creditor entitled to recover post-petition attorneys’ fees that were authorized by a prepetition contract but were contingent on post-petition events? Agreeing with the Ninth Circuit’s recent decision in *In re SNTL Corp.*,² the Second Circuit held that the Bankruptcy Code does not bar a prepetition unsecured claim for post-petition attorneys’ fees provided for in a prepetition contract that is valid under state law.

¹ 549 U.S. 443 (2007).

² 571 F.3d 826 (9th Cir. 2009).

A. Section 502(b) of the Bankruptcy Code Does Not Bar Recovery of Post-Petition Attorneys' Fees

The Second Circuit in Ogle first found that under the Supreme Court's decision in Travelers, section 502(b) of the Bankruptcy Code creates no bar to an unsecured creditor's ability to recover post-petition attorneys' fees. In Travelers the Supreme Court rejected the so-called Fobian rule, which precluded recovery of attorneys' fees incurred in connection with litigating issues peculiar to bankruptcy law. The Supreme Court, however, did not reach the broader question of whether unsecured claims for contractual attorneys' fees are categorically allowable under the Bankruptcy Code. Nevertheless, the Second Circuit found that the reasoning in Travelers was applicable to the question before the court.

Specifically, the Second Circuit read Travelers to stand for the broad proposition that a claim must be allowed under section 502(b) of the Bankruptcy Code unless it is either unenforceable under state law (other than because it is contingent or unmatured) (in which case the claim is expressly disallowed under section 502(b)(1)) or one of the section 502(b)(2) - (9) bases for disallowance expressly applies. Here, the underlying contract was valid as a matter of state substantive law and none of the section 502(b)(2) - (9) exceptions applied. Nor did the fact that the attorneys' fees were contingent and unknown at the time of the bankruptcy petition and were incurred only thereafter run afoul of 502(b)'s specific requirement that the court shall determine the amount of a claim, and allow such claim, as of the date of the filing of the petition. In this respect, the Second Circuit relied on the fact that a right to payment based on a written indemnification contract arises at the time the indemnification agreement is executed. Therefore, Fidelity's contingent right to attorneys' fees incurred post-petition arose prepetition. For these reasons, the Second Circuit concluded that Fidelity's unsecured claim for attorneys' fees incurred post-petition was not barred by section 502(b).

B. Section 506(b) of the Bankruptcy Code Also Is No Bar to Recover Post-Petition Attorneys' Fees

The Second Circuit also rejected the argument that section 506(b) of the Bankruptcy Code, pursuant to which reasonable fees provided by an agreement can be recovered if the creditor is oversecured, amounts to an express disallowance of Fidelity's claim by negative inference or otherwise. The Second Circuit had previously observed in United Merchants & Mfrs., Inc. v. Equitable Life Assurance Soc'y of the U.S.³ that neither section 506(b) nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorneys' fees. The Supreme Court in Travelers expressly declined to address this issue because it was not briefed at the trial court level below. Further, since nothing in Travelers overruled United Merchants, the Second Circuit held that section 506(b) does not implicate

³ 674 F.2d 134 (2d Cir. 1982).

unsecured claims for post-petition attorneys' fees, and it therefore interposes no bar to recovery.

II. Implications of Ogle v. Fidelity & Deposit Co. of Md.

The Second Circuit's decision in Ogle provides a clear and definitive statement, at least in the Second Circuit, as to an unsecured creditor's rights to recover attorneys' fees that accrue post-petition under a prepetition contractual indemnity. It further provides support for the broader proposition that unsecured creditors may be entitled to other post-petition costs and expenses that are expressly provided for under prepetition contracts, including potentially prepayment costs and no-call premiums in loan agreements. Whether such fees would be ultimately recoverable, however, would depend, among other things, on whether they are re-characterized as interest, in which case they would not be recoverable pursuant to section 502(b)(2)'s express disallowance of unmatured interest.

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Bankruptcy and Restructuring in the "Practices" section of our website (<http://www.clearygottlieb.com>) if you have any questions.

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