

Travelers Casualty and Surety v. Pacific Gas and Electric: Supreme Court Overturns Long-Standing Rule That Disallowed Claims for Postpetition Attorneys' Fees for Bankruptcy Services

In a recent opinion, *Travelers Casualty and Surety Co. of America v. Pacific Gas and Electric Co.*, 2007 U.S. Lexis 3566 (2007), the Supreme Court overruled a long-standing Ninth Circuit decision, *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991), which held that claims for attorneys' fees arising under contractual provisions or state law could not be awarded when they arose from litigating issues "peculiar to federal bankruptcy law."

Travelers concerned a claim against the chapter 11 debtor by an insurer for, among other things, attorneys' fees that the insurer was entitled to recover under the terms of the applicable surety bond. The Bankruptcy Court disallowed the request for attorneys' fees under the *Fobian* rule since they were for services peculiar to bankruptcy law, and the District Court and Ninth Circuit Court of Appeals affirmed. In a strongly worded unanimous opinion, the Supreme Court rejected the argument that contract-based attorneys' fees could not be awarded in connection with litigating federal bankruptcy issues.

The Court found that "the *Fobian* rule finds no support in the Bankruptcy Code, either in § 502 or elsewhere," and that "the absence of textual support is fatal" to the rule. The opinion noted that, while the general rule is that a prevailing litigant is not entitled to attorneys' fees from the adverse party, this rule can be overcome by an enforceable contract which grants attorneys' fees. It stated the general presumption that claims enforceable under applicable state law (such as a contractual claim for attorneys' fees), will be allowed in bankruptcy unless expressly disallowed by bankruptcy law. The Court then held that the debtor failed to overcome this presumption. Thus, finding no support for the *Fobian* holding, the Court overruled it, and remanded to the Bankruptcy Appellate Panel to reconsider *Travelers*' claim for attorneys' fees.

Although the holding of *Travelers* is narrowly confined to the allowance of claims for attorneys' fees arising out of the litigation of federal bankruptcy issues, the decision is an important recognition of the principle that the validity and amount of claims in bankruptcy are generally determined by applicable state law unless there is an expressed provision in the Bankruptcy Code to the contrary. Creditors who have a contractual or state law right to recover attorneys' fees, and who have incurred such fees for litigating bankruptcy issues postpetition, would be well advised to include them as part of their claims against the debtor's estate. Moreover, lenders should consider adding provisions to loan agreements that specifically provide for payment of attorneys' fees for services unique to bankruptcy law.

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