IN THE

Supreme Court of the United States

D. CLARK OGLE, LIQUIDATING TRUSTEE
OF THE AGWAY LIQUIDATING TRUST,

Petitioner,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Agway, Inc. and Respondent entered into a contract that included a provision requiring Agway, Inc. to reimburse Respondent for its attorneys' fees incurred in connection with the enforcement of its rights under that contract.

After Agway, Inc. filed for protection under Chapter 11 of the Bankruptcy Code, Respondent incurred attorneys' fees in excess of $800,000 and sought to include those fees as part of its pre-petition unsecured claim.

Petitioner, as the trustee of the Agway Liquidating Trust established under Agway, Inc.'s confirmed Chapter 11 Plan of Liquidation, objected to so much of the claim as represented attorneys' fees incurred after the Chapter 11 petition date.

In allowing those post-petition fees as part of Respondent's unsecured pre-petition claim, the Second Circuit Court of Appeals found that the Court's decision in *Travelers v. Pacific Gas & Electric* indicated that this Court would allow such a claim and that the *Travelers* decision did not warrant a departure from the Second Circuit's decision in *United Merchants*.

The question presented is:

Whether the Court should grant certiorari to determine whether a general unsecured creditor in a bankruptcy case should be permitted to include post-petition attorneys' fees as part of its pre-petition claim.

The question presented, if answered by the Court, would resolve a conflict among the Circuits (and multiple lower courts) and would also resolve an important and recurring question of federal law that the Court declined to answer in *Travelers v. Pacific Gas & Electric.*

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is D. Clark Ogle, the trustee appointed to administer the Agway Liquidating Trust established under the confirmed Chapter 11 Liquidating Plan of Agway, Inc. Agway, Inc. was an agricultural cooperative owned by approximately 69,000 farmer-members. No entity owned 10% or more of Agway, Inc.'s stock.

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OPINIONS BELOW

The Memorandum-Decision and Order of the United States Bankruptcy Court for the Northern District of New York may be found at:

> *In re Agway, Inc., 2008 Bankr. LEXIS 3597 (Bankr. N.D.N.Y. July 18, 2008).*

The Memorandum-Decision and Order of the United States District Court for the Northern District of New York, on appeal from the United States Bankruptcy Court for the Northern District of New York, may be found at:

> *Ogle v. Fid. & Deposit Co., 2009 U.S. Dist. LEXIS 1595 (N.D.N.Y Jan. 12, 2009).*

The Opinion of the Second Circuit Court of Appeals (the "Decision" or "Ogle"), on appeal from the United States District Court for the Northern District of New York, may be found at:

> *Ogle v. Fid. & Deposit Co., 586 F.3d 143 (2d Cir. 2009).*

The opinions of the Second Circuit Court of Appeals, United States District Court for the Northern District of New York, and the United States Bankruptcy Court for the Northern District of New York are also attached at Petition Appendices A, B and C, respectively.

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals entered its judgment on November 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

11 U.S.C. §§ 101(5), 501, 502 and 506 are relevant to the petition, and are reproduced in Petitioner's Appendix, at Pet. App. D.

STATEMENT OF THE CASE

Agway's Bankruptcy Case and F&D's Claim

On October 1, 2002 (the "Petition Date"), Agway and several of its subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. For many years prior to the Petition Date, F&D had provided surety bonds to collateralize Agway, Inc.'s ("Agway") obligations under a series of insurance policies issued by third party insurers. The bonds were required by the insurers as a condition to the issuance of "large deductible" insurance policies issued to Agway. Under the large deductible policies, Agway was liable for the first $1 million of liability for each claim, with the respective insurance company indemnifying Agway for liability in excess of the $1 million deductible. If Agway were unable or unwilling to pay the "first" $1 million in liability, the insurance company would have the security of an F&D bond to satisfy Agway's abrogated obligation. F&D issued the bonds on Agway's behalf on an unsecured basis. The agreement between F&D and

Agway pursuant to which the bonds were issued (the "Program Agreement") required Agway to reimburse F&D for all amounts paid by F&D on Agway's behalf, as well as for all costs and expenses, including attorneys' fees, incurred by F&D in enforcing its rights under the Program Agreement.

As of the Petition Date, Agway was not in default of any of its obligations to its insurance companies or with respect to its obligations to F&D under the Program Agreement. After the Petition Date, however, Agway ceased making payments on account of certain insured claims, causing the insurance companies to make payments on behalf of Agway and then to seek reimbursement from F&D under the bonds. In addition to making payments under the bonds, F&D incurred attorneys' fees in excess of $800,000 during the administration of Agway's bankruptcy case.

F&D filed a series of proofs of claim during Agway's case, asserting claims for the amounts paid under the bonds, plus post-petition interest and post-petition attorneys' fees. An amendment to the proof of claim dropped the portion of the claim seeking post-petition interest, but continued to assert a claim for post-petition attorneys' fees.

Agway's Chapter 11 Liquidation Plan was confirmed by the bankruptcy court on April 28, 2004. Pursuant to the Plan, D. Clark Ogle ("Ogle") was appointed as the trustee of the Agway Liquidating Trust which was established to liquidate Agway's remaining assets, resolve outstanding claims and distribute the asset proceeds among the holders of allowed unsecured

claims. To date Ogle has made distributions equal to 71% of allowed unsecured claims. He anticipates that distributions equal to approximately another 4% will be made to holders of allowed unsecured claims. Agway is insolvent, however, such that there is no possibility that unsecured creditors will be paid in full.

Ogle filed an objection to F&D's proof of claim, including but not limited to the portion of the claim representing F&D's post-petition attorneys' fees. Ogle and F&D resolved the objection to the portion of the claim representing amounts paid by F&D on its bonds but did not resolve the objection to the attorneys' fees. Ogle did not dispute the amount of the attorneys' fees F&D sought to recover, and acknowledges that the fees would be recoverable were Agway not in bankruptcy. The sole basis for the objection to the attorneys' fees component of the F&D claim is Ogle's assertion that the Bankruptcy Code prohibits unsecured creditors from including post-petition attorneys' fees as part of their general unsecured claim.

In the decisions below, the Second Circuit Court of Appeals affirmed the district court, which had affirmed the bankruptcy court, and held that F&D is entitled to have its post-petition attorneys' fees claim included in its allowed general unsecured claim.

In affirming the lower court decisions, the Second Circuit held that "*Travelers* . . . reasonably extended, would suggest (notwithstanding the Court's express disclaimer) that section 502(b)'s requirement that the court "shall determine the amount of such claim . . . as of the date of the filing of the petition" — does not bar

recovery of post-petition attorneys' fees." *D. Clark Ogle v. Fidelity & Deposit Company of Maryland*, 586 F.3d 143, 147 (2nd Cir. 2009); Pet. App. at 10a.

REASONS FOR GRANTING THE PETITION

As the Second Circuit recognized in its decision:

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

Ogle at 145-6; Pet. App. at 6a.

A decision from this Court (and absent Congressional action, only a decision from this Court) will resolve the split among the Circuits and remedy the intolerable disparate treatment that claims for post-petition attorneys' fees currently receive in courts across the country.

A. The Split Is Fully Developed

The Decision reinforces a well developed split among the Circuits concerning whether a claim for post-petition attorneys' fees is allowed to general unsecured creditors and is at odds with the Court's holding in *Randolph v. Scruggs*, 190 U.S. 533 (1903).

The Second Circuit's decision in *Ogle* is consistent with the decisions of the Ninth Circuit in *SNTL Corp.* and the Sixth Circuit in *Martin Bank* (both courts allowed unsecured creditors to include post-petition attorneys' fees as part of their pre-petition claim), but is at odds with the holdings of the First Circuit in *Adams*[1] and the Eighth Circuit Bankruptcy Appellate Panel in *Waterman.*

The split is fully developed, with the majority of courts that address the question having analyzed essentially the same points in reaching their decisions. In describing the split of authority, the Ninth Circuit Bankruptcy Appellate Panel observed in its *SNTL Corp.* decision (issued after this Court's *Travelers* decision):

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1. Although *Adams* is correctly cited by the Second Circuit for the proposition that the First Circuit would disallow an unsecured creditor's claim for post-petition attorneys' fees, *Adams* actually involved a claim by an unsecured creditor seeking post-insolvency attorneys' fees in a bank liquidation under Title 12 of the United States Code. In discussing the analogy between a claim made under Title 12 with a claim under Title 11, the First Circuit did clearly state that claims by unsecured creditors in bankruptcy cases for ". . . post-petition attorneys' fees are generally not allowed. . . ." *Adams* at 1177.

> While the holdings may diverge, these cases analyze the four primary arguments in favor of and against the allowance of such claims: whether section 506(b) operates to disallow such claims; whether section 502(b) disallows such claims because they were not fixed "as of the date of the filing of the petition;" whether the Supreme Court's decision in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc's., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed. 2d 740 (1988), precludes allowance of such claims; and whether public policy favors disallowance of such claims.

In re SNTL Corp., 380 B.R. 204, 218 (B.A.P. 9th Cir. 2007).[2]

Moreover, these very points were extensively argued before this Court during the oral argument of *Travelers*, although the arguments and issues were ultimately not dispositive in that case.

The decision is also at odds with the Court's holding in *Randolph v. Scruggs*, 190 U.S. 533, 23 S.Ct. 710, 47 L.Ed. 1165 (1903) (an issue also discussed, albeit briefly, during the *Travelers* argument.)

In *Randolph v. Scruggs*, the Court was asked to determine whether to allow attorneys' fees incurred in connection with the preparation of an assignment for the benefit of creditors prior to the filing of an

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2. The Ninth Circuit adopted the BAP's opinion as its own and attached the BAP decision as an appendix to its decision. *See, SNTL* Corp., 571 F.3d at 829.

involuntary bankruptcy case, as well as fees incurred in opposing the involuntary bankruptcy case commenced after the assignment had been effected.

The Court allowed the claim for pre-petition attorneys' fees as an unsecured claim, but denied the allowance of an unsecured claim for post-petition attorneys' fees. The post-petition attorneys' fees were not rejected because they were contingent as of the date of the adjudication of the bankruptcy (the bankruptcy act in force at the time disallowed claims that were not due and absolutely owing as of the petition date), but because the applicant had not demonstrated any benefit to the estate from the services rendered. *Id.* at 539-40.

Not only is there a split (as described in footnote 1, either actual or in principle) among the Circuits, none of the decisions consider the impact of *Randolph v. Scruggs* which disallowed post-petition attorneys' fees absent a demonstrated benefit to the bankruptcy estate.

B. The Decision Concerns An Important Federal Issue That Should Be Uniformly Interpreted

The Decision adopts one of the two conflicting positions on an important Federal statute that should be, but is not interpreted uniformly in bankruptcy courts across the country. Uniformity may only be provided by a decision from the Court or clarification from Congress.

Whether an unsecured creditor may include post-petition attorneys' fees as part of its pre-petition claim is an issue that bankruptcy courts are faced with every day and one that has generated multiple diverging

decisions. *See*, Brubaker, *Allowance of Attorney's Fees to an Unsecured Creditor (Part II): Wrestling with the Issue Undecided by the Supreme Court*, Bankruptcy Law Letter Vol. 27, No. 8 (August 2007), fns. 25 and 26 (collecting 16 cases disallowing and 12 cases allowing such fees). Under the current state of the law, bankruptcy courts in the Second, Sixth and Ninth Circuits are required to allow the post-petition attorneys' fees, while courts in First and Eighth Circuit should disallow the claim. Courts in the Western District of Kentucky, the Northern District of Georgia, the Eastern District of Tennessee, the Western District of Arkansas, the Northern District of Texas and the Western District of Wisconsin have allowed a claim for such attorneys' fees (*see*, Brubaker, cases listed at fn. 26), while courts in the Western District of Pennsylvania, the District of Colorado, the Western District of Virginia, the Northern District of Texas, the District of Delaware, Western District of Texas, the District of Maryland, the Southern District of Florida, the Northern District of Ohio, the Eastern District of Michigan, the Southern District of Texas, the Middle District of Florida, the Northern District of Georgia and the District of Kansas have all disallowed such a claim for post-petition attorneys' fees. *See*, Brubaker, cases listed at fn. 25.

Until it is resolved, the split among the Circuits will create situations that are antithetical to the establishment of ". . . uniform Laws on the Subject of Bankruptcies throughout the United States." U.S. Const., Article I, § 8. cl. 3. The varied interpretations to the question will lead to debtors with venue options seeking to file their cases in a district where such attorneys' fees are not allowed, Chapter 13

debtors who file in districts where post-petition attorneys' fees are allowed will bear the additional financial burden of such attorneys' fees, creditors' claims will be allowed in differing amounts based solely on the venue in which a debtor's case is filed, and unsecured creditors' claims in districts that allow such attorneys' fees will be impaired by the amount of such allowed attorneys' fees.

The issue has also spawned a number of law review and similar articles. Not surprisingly, the authors of those articles also diverge as to whether the Court will (and should) allow an unsecured creditor's claim for post-petition attorneys' fees. *See*, Taylor & 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 (Spring 2007) (predicting that the Court would disallow such a claim); Roe, *The Aftermath of Travelers v. PG&E, Attorneys' Fees Recovery in Bankruptcy*, American Bar Association Tort Trial & Insurance Practice Section, Fidelity & Surety Law Committee Newsletter, Fall 2007 (suggesting that *Travelers* indicates that the Court would allow such a claim); Scarberry, *Interpreting Bankruptcy Code Sections 502 & 506: Post-Petition Attorneys' Fees In A Post-Travelers World*, 15 American Bankr. L. R. 611 (2007) (arguing that the clear language of Sections 502 and 506 does not permit the allowance of post-petition attorneys' fees to unsecured creditors).

C. The Decision Below Was Decided Incorrectly And Renders Other Provisions Of The Bankruptcy Code Superfluous.

Petitioner respectfully submits that in addition to incorrectly deciding the four prongs typically analyzed by courts (see discussion of *SNTL Corp.* above), the *Ogle* decision renders several provisions of the Bankruptcy Code superfluous and thus in conflict with this Court's ". . . deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990), *citing*, *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988).

By adopting such an expansive meaning of "contingent claim" to allow post-petition attorneys' fees under Section 502, the Second Circuit (and all other courts that come to the same conclusion) have effectively rendered Sections 502(e)(2), (g), (h) and (i), as well as Section 506(b) superfluous.

The *Ogle* decision held that creditors with a pre-petition contract including an attorneys' fee provision hold a contingent claim for post-petition attorneys' fees on the date of the petition that is not disallowed by any sub-part of Section 502. If in fact any post-petition event relating to a pre-petition contract or event is simply considered to be a contingent claim as of the petition date that is allowable when the contingency later occurs, then there is simply no purpose served by Sections 502(e)(2) (providing for the allowance of indemnity claims as of the petition date notwithstanding that such claim became fixed post-petition), 502(g) (providing that a

claim arising from the post-petition rejection of an executory contract or unexpired lease shall be allowed as of the petition date), 502(h) (providing that a claim arising from the post-petition recovery of property arising out of an avoidable pre-petition transaction shall be allowed as of the petition date), and 502(i) (providing that certain tax liabilities determined post petition but relating to pre-petition tax periods, shall be allowed as of the petition date).

Under the construct established in the *Ogle*, the post-petition claims specifically allowed as of the petition date pursuant to Sections 502(e)(2), (g), (h) and (i) would already be allowed within the definition of "contingent claim". Those specifically enumerated exceptions to the mandate of Section 502(b) to determine a claim "as of the date of the filing of the petition" would be rendered entirely superfluous.

The expansive definition of "contingent claim" adopted in *Ogle* also renders Section 506(b) superfluous insofar as it deals with the allowance of attorneys' fees to an oversecured creditor.

As *Ogle* allows an unsecured creditor's claim for post-petition attorneys' under Section 502(b), then a secured creditor's allowed claim must also include post-petition attorneys' fees (Section 502 makes no distinction between secured or unsecured claims.)

As the secured creditor's allowed Section 502 claim includes post-petition attorneys' fees, under Section 506(a)(1), the claim will be a secured claim to the extent of the value of the collateral. "An allowed claim of a

creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . ." 11 U.S.C. § 506(a). If the allowed claim (including attorneys' fees) is already secured to the extent of the value of the collateral, then Section 506(b), to the extent that addresses attorneys' fees, is superfluous:

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

Only if Section 502 is read to fix the amount of claims as of the date of the filing of the petition, except where specifically excepted, and thus excluding the allowance of post-petition attorneys' fees, do Sections 502(b), (e)(2), (g), (h) and (i), and Sections 506(a) and (b) work in harmony. When Section 502 is read to allow post-petition attorneys' fees, the referenced sections become redundant and illogical.

> 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" view.

Scarberry, *Interpreting Bankruptcy Code Sections 502 & 506: Post-Petition Attorneys' Fees In A Post-Travelers World* at 651.

D. Alternatively, The Court Should Grant Summary Reversal

Because the decision below is plainly in error, the Court may find it appropriate to consider summary reversal. Accordingly, pursuant to Supreme Court Rule 16.1, Petitioner respectfully moves for summary reversal of the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant the petition for writ of certiorari. Alternatively, Petitioner requests summary reversal.

Respectfully submitted,

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