

# An Unsecured Creditor's Right To Recover Attorneys' Fees: Highlighting the Section 502/Section 506 Dispute

N. THEODORE ZINK, JR. AND ANDREW ROSENBLATT

*This article examines whether an unsecured creditor, through enforcement of prepetition contractual rights, may recover, as part of its unsecured claim, attorneys' fees incurred during a bankruptcy case in enforcing its rights under the Bankruptcy Code.*

Prior to the United States Supreme Court's recent decision in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*,<sup>1</sup> the prevailing view, based on the leading Ninth Circuit case *In re Fobian*,<sup>2</sup> was that attorneys' fees incurred by an unsecured creditor in litigating federal bankruptcy law issues could not be recovered.<sup>3</sup> The Supreme Court in *Travelers Casualty*, however, rejected the *Fobian* rule, holding that there is no provision in Title 11 of the United States Code (the "Bankruptcy Code")<sup>4</sup> disallowing contract-based, unsecured claims for attorneys' fees based solely on the fact that the fees were incurred litigating bankruptcy law issues.<sup>5</sup> The Supreme Court supported its decision based on its reading of Section 502(b) of the Bankruptcy

---

N. Theodore Zink, Jr. is a partner in the bankruptcy practice at Chadbourne & Parke LLP in New York. Andrew Rosenblatt is an associate in the same practice. The authors can be reached at [tzink@chadbourne.com](mailto:tzink@chadbourne.com) and [arosenblatt@chadbourne.com](mailto:arosenblatt@chadbourne.com), respectively.

Code, which governs the allowance of claims. That section provides that a claim shall be allowed except to the extent that it falls within one or more of nine enumerated exceptions. The Supreme Court held that the fee claim in question did not implicate any of the statutory exceptions in Section 502(b) and, therefore, was not subject to automatic disallowance.

Although the *Travelers Casualty* decision signifies the demise of *Fobian*, the issue of whether contractual attorneys' fees are recoverable was not definitively resolved by the Supreme Court. The appellee in *Travelers Casualty* argued that regardless of *Fobian*, Section 506(b) of the Bankruptcy Code, which governs the scope of an allowed secured claim, implicitly disallows unsecured claims for contractual attorneys' fees. Section 506(b) allows, as part of a creditor's *secured* claim, reasonable attorneys' fees and costs incurred during the postpetition period. Specifically, Section 506 (b) provides as follows:

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.<sup>6</sup>

Unfortunately, the Supreme Court refused to address the appellee's Section 506(b) argument because the appellee had failed to raise timely the issue at the trial court level.<sup>7</sup>

As described in the following sections, numerous courts have considered the issue of whether unsecured creditors can recover postpetition attorneys' fees — although most of the cases involve a solvent debtor or fees related to the enforcement of state law or contractual rights, as opposed to bankruptcy rights. Nevertheless, the courts considering this issue have differed in their interpretations of Sections 502(b) and 506(b) of the Bankruptcy Code, resulting in a split in authority as to whether an unsecured creditor's postpetition fee claim is recoverable under the Bankruptcy Code. These cases, and the Section 502/Section 506 dispute adjudicated therein, will undoubtedly become more relevant in light of the Supreme Court's rejection of *Fobian*.<sup>8</sup>

## THE SO-CALLED "MAJORITY VIEW"

Even though Section 506 ostensibly only addresses the determination of a secured claim, numerous courts have relied on that section as a basis for denying postpetition fees to unsecured creditors.<sup>9</sup> Those courts generally rely on the maxim of statutory construction known as *expressio unius est exclusio alterius* (which translates to mean "the expression of one thing is the exclusion of another") in order to find that because Congress expressly allowed attorneys' fees for secured claims, it thereby disallowed these same fees for unsecured claims. For example, the court in *In re Sakowitz*<sup>10</sup> noted that:

Congress provided for attorney's fees only for the secured portion of such a claim. Congress must be presumed to have understood what it was doing. It could easily have provided for attorney fees for the unsecured portion of the claim as well as the secured portion. That it did not do so this Court feels is determinative of the issue ....<sup>11</sup>

In *In re Hedged-Investment Assocs., Inc.*<sup>12</sup> the court reasoned that "if attorneys' fees were allowable on the unsecured portion of a debt, there would be no need for subsection [506 (b)] at all."<sup>13</sup>

Several courts adopting this so-called "majority view" have also relied on the United States Supreme Court decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD.*<sup>14</sup> as a basis for denying unsecured creditors' fee claims under Section 506(b). In *Timbers*, the Supreme Court addressed the issue of whether an undersecured creditor, as adequate protection under Section 362(d)(1) of the Bankruptcy Code, was entitled to interest on its collateral for the delay caused by the automatic stay in foreclosing on collateral. The Supreme Court held that an undersecured creditor was not entitled to such interest. In support of its position, the Supreme Court reasoned that because Section 506(b) "permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest."<sup>15</sup>

Grafting onto *Timbers*, several courts have reasoned that because

Section 506(b) refers to interest in the same manner as it does fees and expenses, the Supreme Court's analysis in *Timbers* as to postpetition interest should be broadly applied to claims for postpetition fees.<sup>16</sup> For example, in the oft cited case *In re Woodmere Investors Limited Partnership*, the Bankruptcy Court for the Southern District of New York adopted the *Timbers* analysis in denying a creditor's unsecured claim for fees. The bankruptcy court expressly noted that "[i]f no 'security cushion' exists to allow postpetition interest, none exists for the allowance of attorneys' fees and costs."<sup>17</sup>

Several courts have also supported the majority view based on the fact that Section 502(b) provides that the court shall determine claim amounts "as of the date of the filing of the petition."<sup>18</sup> Those courts, adopting a literal interpretation of Section 502(b), analyze a proof of claim "as it existed at the time of the filing of the case."<sup>19</sup> Accordingly, those courts have held that attorneys' fees incurred after the petition date should not be allowed to unsecured or undersecured creditors.<sup>20</sup>

Finally, the majority view relies upon the policy argument that payment of postpetition attorneys' fees to only those unsecured creditors with a contractual or statutory right to fees would be inequitable to other unsecured creditors and may consume the estate.<sup>21</sup> As the court in *In re Sakowitz* explained:

[A] primary purpose of the Bankruptcy [Code] is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands ... this principle should bar enforcement of any contractual provision which would permit one creditor - and not others - to charge the estate with legal expenses associated with a proceeding before the Bankruptcy Court.<sup>22</sup>

To this point, courts have noted that it is typically larger and more sophisticated creditors that include clauses requiring payment of their attorneys' fees in their contracts. Smaller and less sophisticated creditors may have insufficient bargaining leverage to obtain such a promise, while involuntary creditors, such as tort claimants, have no ability to obtain this benefit at all.<sup>23</sup>

In support of this policy argument, the court in *In re Pride* noted that bankruptcy “routinely” alters creditors’ rights, “and this is simply a situation where the policy of ratable distribution and equitable treatment of the varying interests in bankruptcy should override any asserted rights by unsecured creditors to recover attorney’s fees.”<sup>24</sup>

### THE CASES AGAINST APPLICATION OF SECTION 506(B)

Despite *Timbers* and its progeny, a plain reading of Section 506(b) reveals that the statute does not expressly prohibit the allowance of an unsecured creditor’s claim for postpetition fees. In fact, unlike a claim for postpetition interest, which is expressly disallowed under Section 502(b)(2), nowhere in the Bankruptcy Code, including in Section 502(b), is there a provision disallowing an unsecured creditor’s claim for postpetition fees. Based primarily on this “plain language” rationale, a line of cases has developed which has refused to impute Section 506(b) or the *Timbers* holding to unsecured postpetition fee claims.<sup>25</sup>

The seminal case to address the Section 502/Section 506 conflict is the Second Circuit case *United Merchants*. *United Merchants* was decided prior to *Timbers* and was decided under the old Bankruptcy Act. Nevertheless, the court analyzed whether, under Bankruptcy Code Section 506(b), an unsecured creditor is prohibited from recovering fees and expenses incurred postpetition in protecting its interests in the bankruptcy case.<sup>26</sup>

In *United Merchants*, the debtor argued that Section 506(b) was enacted to codify pre-Code law that only fully secured creditors could assert contract claims for postpetition fees. The Second Circuit agreed that Section 506(b) was meant to codify pre-Code law, but only to the extent that “an *oversecured* creditor can assert, *as part of its secured claim*, its right to interest and costs arising under its credit agreement.”<sup>27</sup> The Second Circuit went on to note that “neither the statute nor its legislative history sheds any light on the status of an unsecured creditor’s contractual claims for attorneys’ fees.”<sup>28</sup> In short, the Second Circuit refused to read into Section 506(b) limitations not supported by the plain language of the statute.<sup>29</sup>

The cases adopting *United Merchants*<sup>30</sup> have generally concluded that Sections 502 and 506 are directed at two entirely different situations. Whereas Section 506(b) dictates the circumstances in which attorneys' fees can be recovered as part of a *secured* claim, Section 502(b) requires a second and independent inquiry as to whether the fee claim may be allowed as an *unsecured* claim. Accordingly, even if a claim is not allowed as a secured claim under Section 506(b), the court is still required to look to Section 502(b) to determine if the claim is allowable as an unsecured claim. To do otherwise would create a judicially mandated exception to Section 502 where one does not exist.

For example, in *In re Tricca*, the court held that the *Woodmere* line of cases "read § 506(b) too broadly [as] Section 506(b) is not a provision which concerns itself with claim allowance. Section 506(b) addresses only the question of what is part of an allowed secured claim."<sup>31</sup> In *In re Byrd*, the court further noted that "there is no general rule disallowing postpetition attorneys' fees set forth in § 502(b)" and thus there is no rationale for disallowing postpetition fee and expense claims based solely on *Timbers*.<sup>32</sup>

*Woodmere* aside, numerous courts have continued to follow *United Merchants* and have not found that *Timbers* eroded that decision.<sup>33</sup> One of the more recent and most instructive cases on the fee claim allowance issue is *In re New Power*, a bankruptcy case from the Northern District of Georgia. The *New Power* court engaged in a comprehensive analysis of practically all of the prior decisions addressing this issue before concluding that Section 506(b) does not prohibit the allowance of unsecured postpetition fees.<sup>34</sup> In reaching this conclusion, *New Power* rejected the argument that the *Timbers* holding should be imputed to postpetition fee claims. To the contrary, as the *New Power* court surmised that the Supreme Court would conclude that Section 506(b) does not dispose of the question because, unlike postpetition interest, "there is no exception within § 502(b) which would prevent the collection of attorneys' fees by a creditor who has a valid nonbankruptcy right to do so."<sup>35</sup> Thus, the court held that "[n]either § 506(b) nor the *Timbers* decision bar unsecured creditors from asserting a contractual or statutory [postpetition] claim for attorneys' fees as an unsecured claim."<sup>36</sup>

*New Power* also rejected the argument that postpetition fees should be

disallowed because Section 502(b) provides that the court shall “determine the amount of [a] claim as of the date of the filing of the petition.”<sup>37</sup> In rejecting this argument, the *New Power* court provided the following analysis:

Pursuant to § 502, when a proof of claim is filed, the claim will be deemed allowed unless a party in interest objects. In the face of an objection, the bankruptcy court must allow the claim unless one of nine specific exceptions applies...the fact that a claim is contingent or unmatured is not grounds to disallow a claim unless that claim is for unmatured interest. The Court finds nothing within § 502 that would require the disallowance of an unmatured claim for attorneys' fees.

Although § 502 directs the bankruptcy court to ‘determine the amount of such claim as of the date of the filing of the petition’ and allow the claim in such amount, § 502(c) provides that the court shall estimate for purposes of allowance of claims ‘any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.’ When a creditor’s right to payment for fees exists prepetition, the right to payment constitutes a ‘claim,’ within the meaning of § 101(5)(A), albeit an unliquidated, unmatured claim that may be estimated for purposes of allowance, if necessary, pursuant to § 502(c). So long as the right to collect the fees existed pre-petition, the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable pre-petition claim for the fees. Therefore, the Court does not agree with the reasoning of the majority decisions that § 502(b)’s requirement that the amount of the claim be determined as of the filing of the petition bars a claim for postpetition fees.<sup>38</sup>

## **DEBUNKING THE MAJORITY VIEW: A STATUTORY INTERPRETATION ANALYSIS**

Although the *Woodmere/Timbers* line of cases is considered the “majority view,” many recent and, in our view, better reasoned decisions

have followed *United Merchants*.<sup>39</sup> As described below, the reasoning employed by the *United Merchants* line of cases better comports with basic tenets of statutory interpretation.

It is well established that interpretation of the Bankruptcy Code is governed by the “plain meaning rule.”<sup>40</sup> As stated by the United States Supreme Court, “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”<sup>41</sup>

As noted above, Section 506(b) merely dictates the circumstances in which attorneys’ fees can be recovered as part of a *secured claim*, but does not expressly preclude the allowance of such claims by an unsecured creditor.<sup>42</sup> The majority line of cases goes beyond the plain meaning of Section 506(b) by applying the *maxim expressio unius est exclusio alterius*. However, their reliance on this maxim is questionable, because it can just as easily be used to support the allowance of unsecured claims for postpetition attorneys’ fees when the maxim is applied to Section 502(b). Section 502(b) lists nine categories of claims to be disallowed. Nowhere in Section 502(b) is there any mention of the disallowance of an unmatured claim for fees. Applying the maxim of *expressio unius est exclusio alterius* would suggest that Congress knowingly chose not to include unsecured fee claims in the list of exceptions and, thus, claims for fees are not to be disallowed. In short, this maxim does little to help resolve this issue, as it easily supports both positions.

The majority view also conflicts with the rule of construction that “when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”<sup>43</sup> It is well established that a court should, if reasonably possible, interpret a statute in a way that will give force and effect to each of its provisions and not render some of them meaningless or superfluous.<sup>44</sup>

The interpretation urged by the majority line of cases renders portions of the Bankruptcy Code superfluous. If Section 506(b) is to be construed to disallow unsecured claims for interest and fees, then it would render Section 502(b)(2) superfluous because it would have been unnecessary

for Congress to have included postpetition interest within the nine exceptions in Section 502(b). The fact that Congress felt it necessary to specifically prohibit unsecured claims for postpetition interest in Section 502(b)(2) makes it clear that Section 506(b) does not apply to unsecured claims. If Section 506(b) does not apply to bar unsecured claims for postpetition interest, then it certainly does not apply to bar unsecured claims for postpetition fees.

Unlike the majority view, the reasoning in *United Merchants* allows Sections 502 and 506 to be reconciled so that neither is rendered superfluous. Allowing unsecured claims for fees under Section 502 does not diminish the role that Section 506(b) plays with regard to the secured portion of postpetition fees.

In sum, Section 506(b) answers the question of whether a secured creditor can recover attorneys' fees from the collateral securing the principal debt. It does not answer the question of whether an unsecured creditor has an allowable claim for attorneys' fees, recoverable as an unsecured debt. Section 502 provides the answer to that question. The majority view requires one to assume that Congress intended to disallow claims for postpetition attorneys' fees, but chose to do so by an oblique reference in Section 506(b), instead of directly amending Section 502. This reasoning is difficult to support as a matter of statutory interpretation.

## PRACTICAL CONSIDERATIONS

Until now, whether because of *Fobian* or the fact that recoveries to unsecured creditors are often small, there have been very few instances where unsecured creditors have sought recovery of their postpetition bankruptcy-related fees from an insolvent debtor. However, with the demise of *Fobian*, we expect many more unsecured creditors to seek fees related to enforcement of their bankruptcy rights.

Although we believe that, from a legal standpoint, bankruptcy-related fees that are permitted by contract should be allowed under the current bankruptcy regime, we express no view as to whether this outcome is beneficial to the bankruptcy process. One can reasonably surmise that permitting contractual postpetition fee claims could lead to administrative

problems and hinder a debtor's reorganization efforts. For example, permitting unsecured creditors to recover postpetition fees could result in, among other things: (i) overlawyering by unsecured creditors, (ii) increased administrative costs incurred by debtors and creditors' committees to monitor and, if necessary, challenge unsecured fee claims, and (iii) increased administrative burden on debtors, creditors' committees, and bankruptcy courts.

Interestingly, most of the courts that have adopted *United Merchants* and the minority view have done so without addressing the policy arguments advanced by the majority view. The reason likely stems from the fact that most of the cases adopting *United Merchants* involve solvent debtors or relate to fees sought in enforcing state law or contract rights, as opposed to bankruptcy rights. Therefore, issues such as increased administrative costs and equal treatment of similarly situated creditors have not been particularly relevant. With *Travelers Casualty* opening the door to more fee claims, however, we expect policy considerations to play a more critical role in future fee disputes.

## CONCLUSION

Based on the foregoing survey of the relevant cases, a slim majority of courts have concluded that unsecured creditors may not recover postpetition attorneys' fees under the Bankruptcy Code. The issue remains far from resolved though. With *Travelers Casualty* spelling the end of *Fobian*, there will undoubtedly be many more instances of unsecured creditors seeking fee claims based on enforcement of their bankruptcy rights. Although the authors believe that the reasoning advanced by the minority line of cases is more persuasive as a matter of law, there are many important policy considerations that may sway courts to adopt the majority view.

## NOTES

<sup>1</sup> *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199 (2007).

<sup>2</sup> *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991).

<sup>3</sup> It should be noted that, prior to *Travelers Casualty*, *Fobian* was the law in the Second Circuit, see *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000); *In re Child World*, 161 B.R. 349, 354 (Bankr. S.D. N.Y. 1993); *In re Best Products Co.*, 148 Bankr. 413, 414 (Bankr. S.D.N.Y. 1992), and the Third Circuit, see *Agassi v. Planet Hollywood Int'l, Inc.*, 269 B.R. 543, 552 (D. Del. 2001).

<sup>4</sup> 11 U.S.C. §§ 101-1532.

<sup>5</sup> *Travelers Casualty*, 127 S.Ct. at 1205.

<sup>6</sup> 11 U.S.C. § 506(b).

<sup>7</sup> *Travelers Casualty*, 127 S.Ct. at 1207-08.

<sup>8</sup> To be clear, the discussion set forth in this article applies only to those unsecured or undersecured creditors who are a party to a prepetition contract that obligates the debtor to pay, reimburse, or indemnify the creditor for its attorneys' fees. Also, references throughout this article to "unsecured postpetition fee claims" or "unsecured postpetition fees" cover claims for postpetition fees asserted by both general unsecured creditors, as well as secured creditors who are undersecured.

<sup>9</sup> See *Adams v. Zimmerman*, 73 F.3d 1164, 1177 (1st Cir., 1996); *In re Waterman*, 248 B.R. 567, 573 (BAP 8th Cir. 2000); *Finova Group, Inc. v. BNP Paribas (In re Finova Group, Inc.)*, 304 B.R. 630, 638 (D. Del. 2004); *In re Hedged-Investments Assocs., Inc.*, 293 B.R. 523 527 (D. Colo. 2003); *In re Miller*, 344 B.R. 769, 773 (Bankr. W.D. Va. 2006); *Global Indus. Technologies Services v. Tanglewood Invs., Inc. (In re Global Indus. Technologies, Inc.)*, 327 B.R. 230, 239-40 (Bankr. W.D. Pa. 2005); *In re 900 Corp.*, 327 B.R. 585, 600 (Bankr. N.D. Tex. 2005); *In re Marietta Farms, Inc.*, 2004 Bankr. LEXIS 1773, \*3-8 (Bank. D. Kan. 2004); *In re Kindred Healthcare, Inc.*, 2003 Bankr. LEXIS 969, \*11-13 (Bankr. D. Del. 2003); *In re Pride Cos., L.P.*, 285 B.R. 366, 372 (Bankr. N.D. Tex. 2002); *In re Loewen Group Int'l Inc.*, 274 B.R. 427, 444 (Bankr. D. Del. 2002); *In re El Paso Refinery L.P.*, 244 B.R. 613, 616 (Bankr. W.D. Tex. 2000); *In re Smith*, 206 B.R. 113, 115 (Bankr. D. Md. 1997); *In re Homestead Partners Ltd.*, 200 B.R. 274-276 (Bankr. N.D. Ga. 1996); *In re Southeast Banking Corp.*, 188 B.R. 452, 462 (Bankr. S.D. Fla. 1995), *rev'd on other grounds*, 156 F.3d 1114 (11th Cir. 1998); *In re Woodmere Investors Limited Partnership*, 178 B.R. 346, 356 (Bankr. S.D.N.Y. 1995); *In re Saunders*, 130 B.R. 208, 210 (Bankr. W.D. Va. 1991); *In re Alden*, 123 B.R. 563, 564 (Bankr. E.D. Mich. 1990); *In re Sakowitz*, 110 B.R. 268, 272 (Bankr. S.D. Tex. 1989).

- <sup>10</sup> *Sakowitz*, 110 B.R. at 275.
- <sup>11</sup> *Id.* at 277; *see also Pride Cos.*, 285 B.R. at 372 (same); *Loewen Group*, 274 B.R. at 444 n. 36 (“If post-petition fees and costs were generally recoverable by all creditors, then Congress would not have expressly provided for their recovery by oversecured creditors in § 506(b)”).
- <sup>12</sup> *Hedged-Investment*, 293 B.R. at 523.
- <sup>13</sup> *Id.* at 528; *see also Sakowitz*, 110 B.R. at 275.
- <sup>14</sup> *United Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD.*, 484 U.S. 365, 108 S.Ct. 626 (1988).
- <sup>15</sup> *Id.* at 372-73.
- <sup>16</sup> *See, e.g., Pride Cos.*, 285 B.R. at 373; *Woodmere Investors*, 178 B.R. at 346; *Loewen Group*, 274 B.R. at 427.
- <sup>17</sup> *Woodmere Investors*, 178 B.R. at 356.
- <sup>18</sup> 11 U.S.C. § 502(b).
- <sup>19</sup> *See Pride Cos.*, 285 B.R. at 373 (*quoting Sakowitz*, 110 B.R. at 271) (emphasis in original deleted).
- <sup>20</sup> *See, e.g., Global Indus. Technologies*, 327 B.R. at 240.
- <sup>21</sup> *See, e.g., Pride Cos.*, 285 B.R. at 373; *Loewen Group*, 274 B.R. at 444; *Marietta Farms*, 2004 Bankr. LEXIS 1773, at \*3-8.
- <sup>22</sup> *Sakowitz*, 110 B.R. at 271.
- <sup>23</sup> *See, e.g., Pride Cos.*, 285 B.R. at 374.
- <sup>24</sup> *Id.*
- <sup>25</sup> *See, e.g., In re Dow Corning Corp.*, 456 F.3d 668, 683 (6th Cir. 2006); *Sanson Investment Co. v. 268 Limited*, 789 F.2d 674 (9th Cir. 1986); *Martin v. Bank of Germantown*, 761 F.2d 1163 (6th Cir. 1985); *United Merchants and Manufacturers, Inc. v. The Equitable Life Assurance Society of the United States (In re United Merchants and Manufacturers, Inc.)*, 674 F.2d 134 (2d Cir. 1982); *Liberty Nat'l Bank & Trust Co. v. George*, 70 B.R. 312 (W.D. Ky. 1987); *Marine Midland Bank, N.A. v. Ladycliff College (In re Ladycliff College)*, 56 B.R. 765 (S.D.N.Y. 1985); *In re Fast*, 318 B.R. 183 (Bankr. Colo. 2004); *In re New Power Co.*, 313 B.R. 496 (Bankr. N.D. Ga. 2004); *In re Byrd*, 192 B.R. 917, 919 (Bankr. E.D. Tenn. 1996); *Homestead Partners Ltd. v. Condor Once Inc. (In re Homestead Partners Ltd.)*, 200 B.R. 274 (Bankr. N.D. Ga. 1996); *In re Tricca*, 196 B.R. 214, 220 (Bankr. D. Mass. 1996); *In re Holywell Corp.*, 68 B.R. 134, 136-37 (Bankr. S.D. Fla. 1986); *Tri-State Homes, Inc. v. Mears (In re Tri-State Homes, Inc.)*, 56 B.R. 24 (Bank. W.D. Wis. 1985); *In re Ely*, 28 B.R. 488 (Bankr. E.D. Tenn. 1983).

<sup>26</sup> In *United Merchants*, the debtor filed its petition on July 12, 1977, prior to the October 1, 1979 effective date of the Bankruptcy Code. Thus, *United Merchants* was decided under the Bankruptcy Act and not the Bankruptcy Code. However, the court analyzed Section 506(b) because the debtor had argued that Section 506(b) supported its contention that “only collection costs incident to recovery of secured claims are cognizable in bankruptcy.” *United Merchants*, 674 F.2d at 138. Even though *United Merchants* was a pre-Code case, we believe that the Second Circuit’s analysis of Section 506(b) was clearly indicative of how it would rule on the postpetition fee issue in future cases under the Bankruptcy Code. Indeed, when the Second Circuit rendered its decision, the Bankruptcy Code had already been in effect for four years and the court had sufficient time to contemplate the correct interpretation of Section 506(b). We are not alone in our belief, as at least one commentator has noted that, in rendering its ruling, the Second Circuit was cognizant of the implications associated with its interpretation of Section 506(b). See Ray Geoffroy, Notes and Comments, *Show Me the Money: The Debate Over Creditors’ Postpetition Attorneys’ Fees*, 14 Bankr.Dev.J. 425, 431 (1998).

<sup>27</sup> *United Merchants*, 674 F.2d at 138 (emphasis in original).

<sup>28</sup> *United Merchants*, 674 F.2d at 138.

<sup>29</sup> The bankruptcy court in *Woodmere* stated that it did not “feel compelled to follow the holding of *United Merchants*” based on the subsequent Supreme Court decision in *Timbers*. *Woodmere Investors*, 178 B.R. at 356.

<sup>30</sup> See endnote 25, *supra*.

<sup>31</sup> *Tricca*, 196 B.R. at 219; see also *In re Keaton*, 182 B.R. 203 (Bankr. E.D. Tenn. 1995) (“[S]ection 506(b) recognizes the secured creditor’s superior position with respect to other creditors. Nothing more was intended and should not be read into the section.”); *Sanson Investment*, 789 F.2d at 678 (Section 506(b) is properly understood only to “define the portion of the fees which shall be afforded secured status,” and not the total scope of unsecured claims).

<sup>32</sup> *Byrd*, 192 B.R. at 919 (internal quotations omitted).

<sup>33</sup> Some of the cases that have followed *United Merchants* after *Timbers* include: *Fast*, 318 B.R. at 183; *New Power*, 313 B.R. at 496; *Byrd*, 192 B.R. at 917; *Homestead Partners*, 200 B.R. at 274; *Tricca*, 196 B.R. at 214.

<sup>34</sup> *New Power*, 313 B.R. at 510.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* It should be noted that, in *New Power*, the debtor was solvent. Courts,

adopting the majority view, have distinguished and rejected *New Power* on this basis. See, e.g., *Marietta Farms*, 2004 Bankr. LEXIS 1773, at \*3-8.

<sup>37</sup> 11 U.S.C. § 502(b).

<sup>38</sup> *New Power*, 313 B.R. at 507-08 (citations omitted and emphasis added).

<sup>39</sup> See *In re Dow Corning Corp.*, 456 F.3d 668, 683 (6th Cir. 2006); *In re Fast*, 318 B.R. 183 (Bankr. Colo. 2004); *New Power*, 313 B.R. at 496.

<sup>40</sup> *B.N. Realty Assocs. v. Lichtenstein*, 238 B.R. 249, 254 (S.D.N.Y. 1999).

<sup>41</sup> *U.S. v. Ron Pair Enters., Inc.* 489 U.S. 235, 242, 109 S.Ct. 1026 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245 (1982)); *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023 (2004) (plain meaning of a bankruptcy statute should be enforced, unless enforcement would lead to an “absurd” result); see also *Stoltz v. Obuchowski (In re Stoltz)*, 315 F.3d 80, 89 (2nd Cir. 2002); *Schoonover Electric Co., Inc. v. Enron Corp. (In re Enron Corp.)*, 294 B.R. 232, 238 (Bankr. S.D.N.Y. 2003).

<sup>42</sup> See *United Merchants*, 674 F.2d at 138.

<sup>43</sup> *J.E.M. AG Supply, Inc. v. Pioneer HI-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S.Ct. 593 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474 (1974)); see also *In re Laymon*, 117 B.R. 856, (Bankr. W.D. Tex. 1990) (“A fundamental tenet of statutory construction is that ‘each part or section [of a statute] should be construed in connection with every other part of section so as to produce a harmonious whole.’”), *rev'd on other grounds*, 985 F.2d 72 (5th Cir. 1992).

<sup>44</sup> See *U.S. v. Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1969) (noting that “[t]here is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective”), *cert. dismissed*, 393 U.S. 1008 (1969); *Auburn Housing Authority v. Martinez*, 277 F.3d 138 (2d Cir. 2002) (same).