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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-1429, Travelers Casualty and Surety Company versus Pacific Gas and Electric Company.

Mr. Brunstad.

ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

ON BEHALF OF THE PETITIONER

MR. BRUNSTAD: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit's Fobian rule creates an unwarranted Federal common law rule that exists outside the structure of the Bankruptcy Code. The Bankruptcy Code has a distinct structure. For example, if a debtor has a right to an attorneys' fees valid under State law, after the petition date, the date the debtor files for bankruptcy, that right passes to the bankruptcy estate. If a creditor has a State law right to attorneys' fees, after the petition date, that right becomes a claim in bankruptcy.

The Ninth Circuit's Fobian rule intercepts those rights even before we get to what the Bankruptcy Code provides or does to them and basically says, if you're litigating Federal issues, you simply cannot have a right to attorneys' fees unless the Federal law

1 authorizes that right, in this case, contractual rights,
2 or alternatively rights available under State statute.

3 That, we submit, is an impermissible
4 creation of a Federal common law rule. There is no
5 basis for it under this Court's preemption precedents.
6 There's no conflict between Federal policy and State
7 policy which would justify the creation of the rule, and
8 accordingly, it is unwarranted.

9 JUSTICE KENNEDY: Can you tell me -- this is
10 just basic bankruptcy. I should know, but I looked it
11 up and couldn't find it. A standard promissory note
12 which provides for attorneys' fees, the holder of the
13 note is the creditor, the maker of the note is the
14 bankrupt -- the maker of the note goes bankrupt. The
15 holder of the note gets his attorney and says: File a
16 claim in bankruptcy. And the attorney sends him a bill.
17 Is the attorneys' fees, the attorney fee for filing the
18 bankruptcy claim, recoverable as part of the claim?

19 MR. BRUNSTAD: It depends, Justice Kennedy.
20 It depends on what their contractual right provides.
21 Here we have a contractual --

22 JUSTICE KENNEDY: It's the standard, it's
23 the standard attorneys' fee provision, all attorneys'
24 fees in connection with collection of this note and
25 enforcement of the terms of this note.

1 MR. BRUNSTAD: Then, yes, Justice Kennedy, I
2 would say it probably would be covered. It probably
3 would be covered and the analysis --

4 JUSTICE KENNEDY: Is there something where I
5 can look that up in Collier? Are there millions of
6 cases? I mean, this seems to me fairly rudimentary.

7 MR. BRUNSTAD: Yes, Justice Kennedy. In our
8 reply brief, we do cite to a Collier section, where we
9 talk about exactly that scenario and it is described.
10 And it basically works like this. A claim under the
11 Bankruptcy Code is defined under section 1015. The
12 claim includes any right to payment whether it's
13 contingent or fixed, matured, unmatured, et cetera. Any
14 right to payment, literally any right to payment, when
15 the debtor files for bankruptcy, that becomes a claim.
16 If the right --

17 JUSTICE KENNEDY: No, no. But in my case,
18 it's a post-petition action.

19 MR. BRUNSTAD: Yes, Justice Kennedy. The
20 key concept -- and this is explained clearly in Collier
21 -- is where does the right come from? If it arises out
22 of a pre-petition contract, then the right is
23 pre-petition in nature, even though the fees are
24 incurred post-petition. Think of a guarantee. Think of
25 if PG&E had guaranteed its parent's debt of a \$100

1 million, let's say.

2 JUSTICE STEVENS: Could you just back up
3 just for a second? Supposing at the time of the
4 bankruptcy that the services have not been performed.
5 It's post-petition conduct by the lawyer.

6 MR. BRUNSTAD: Right.

7 JUSTICE STEVENS: Now, in that case,
8 are you saying that routinely the lawyer recovers fees
9 in the bankruptcy case even if the debtor, the debtor
10 was insolvent? And we're assuming insolvency in the
11 hypothetical, although it may not fit this case.

12 MR. BRUNSTAD: Exactly, yes, Justice
13 Stevens. If in fact, though, the creditor bothers to
14 assert the claim for fees in the bankruptcy case. In
15 most cases, creditors don't, because it's not worth the
16 effort of asserting the claim for fees subsequently. In
17 cases such as this, where you have a solvent debtor who
18 can pay all claims in full, there's no reason why they
19 should be able to get out of their contractual
20 obligations in bankruptcy.

21 JUSTICE STEVENS: Well, why wouldn't it be
22 worth -- I know here. But why wouldn't it be worth the
23 effort, instead of getting \$90 on the note, to get 95?

24 MR. BRUNSTAD: Well, because there's a
25 transaction cost in actually filing the additional claim

1 setting forth the amount that you've incurred. In most
2 cases, Justice Stevens, creditors don't even hire
3 attorneys to pursue or file a claim in bankruptcy. In
4 most Chapter 7 cases, for example, they are no-asset
5 cases.

6 JUSTICE STEVENS: Are you telling me just
7 based on your experience that in Justice Kennedy's
8 hypothetical, normally, no fees are recovered?

9 MR. BRUNSTAD: Normally, there's no
10 distribution on unsecured claims in most bankruptcy
11 cases. So why bother?

12 JUSTICE STEVENS: But assuming in those
13 cases where there's some distribution, is it correct, as
14 I'm assuming your answer in Justice Kennedy's question,
15 that the normal practice is you don't bother because
16 there is not enough involved?

17 MR. BRUNSTAD: Typically, Justice Stevens,
18 that is correct. But in cases such as this, where the
19 attorneys' fees are substantial, the debtor is solvent,
20 and there are substantial --

21 JUSTICE KENNEDY: Just in the hypothetical,
22 I would think that in many cases, there's going to be
23 some payout for the promissory note, and the holder of
24 the note tells his attorneys: Make sure I get that
25 claim in bankruptcy. The attorney files a claim. And

1 every attorney that files a claim for a promissory note
2 which is entitled to a fee from the bankruptcy court for
3 filing in the bankruptcy court.

4 MR. BRUNSTAD: For the work done in
5 performing, filing the proof of claim, that's correct.
6 And even though, Justice Kennedy, the attorney's conduct
7 was after the debtor filed for bankruptcy, the right to
8 payment arises out of the pre-petition contract. Again,
9 think of the guarantee hypothetical. There you had the
10 --

11 JUSTICE STEVENS: The pre-petition contract,
12 but not out of pre-petition conduct.

13 MR. BRUNSTAD: That's correct, Justice
14 Stevens. But just think about the pre-petition tort
15 claim, where there has been exposure to asbestos
16 products pre-petition, but the injury arises
17 post-petition. It's still a pre-petition claim.

18 JUSTICE SOUTER: Okay, but you're one step
19 away from that here, because here there hasn't been any,
20 in effect, any exposure. Here there isn't any certain
21 default on the note. So far as we know, here, there may
22 never be any default on the workers comp obligation. So
23 that your contingency is a much more remote contingency.
24 Why should that, why should this case fall into the same
25 category as the promissory note?

1 MR. BRUNSTAD: Justice Souter, it's
2 different in this sense. This is an indemnity, all-loss
3 indemnity provision. The surety is not supposed to
4 incur any loss, any cost whatsoever, for supplying these
5 surety bonds to PG&E.

6 JUSTICE SOUTER: And so far as we know, it
7 won't.

8 MR. BRUNSTAD: But it has, because when PG&E
9 filed for bankruptcy --

10 JUSTICE SOUTER: Well, it has, but that
11 depends on a totally circular argument. The minute it
12 filed for bankruptcy, although there had been no default
13 on the comp obligation, your client started incurring
14 attorneys' fees, and it was not incurring attorneys'
15 fees based on any default by the, by the debtor.

16 MR. BRUNSTAD: Justice Souter, you can
17 visualize bankruptcy itself as being a default. When
18 the debtor files for bankruptcy, you must come to the
19 bankruptcy court to present your rights --

20 JUSTICE SOUTER: You can call bankruptcy a
21 default, but that's not what I mean, and you know that's
22 not what I mean. I'm talking about a default on the
23 workers comp obligation.

24 MR. BRUNSTAD: Yes, Justice.

25 JUSTICE SOUTER: There has been no default

1 on the workers comp obligation, and because they intend
2 to keep on running this business, there is reason to
3 suppose that there will not be.

4 MR. BRUNSTAD: Well, by analogy, Justice
5 Souter, in the LTV case, the same posture at the
6 beginning of the case. We don't know what's going to
7 happen in the future. You must file your claim at the
8 beginning of the case. In LTV --

9 JUSTICE SOUTER: Yes, and maybe you don't
10 have a claim at the beginning of the case. I mean,
11 that's what we're getting at. We can understand the
12 claim when the note -- when you've got a promissory note
13 and you're out of money. The claim is inevitable. In
14 this case, there is no inevitable claim.

15 MR. BRUNSTAD: But that's precisely the
16 point of why claim is defined so broadly to include
17 contingent claims.

18 JUSTICE SOUTER: But if it is defined as
19 broadly as this, we're in a situation exactly like this.
20 There has been no default on the obligation, and prior
21 to getting to this Court, \$167,000 has been racked up in
22 legal fees that accomplishes absolutely nothing.

23 MR. BRUNSTAD: Absolutely false, Justice
24 Souter. In bankruptcy, if you do not present your
25 rights, if the rights of the workers themselves are not

1 properly treated, they are lost. Under section 1141,
2 they are extinguished.

3 JUSTICE SOUTER: Okay, in this case,
4 \$167,000 has been spent to come to the conclusion, as I
5 understand it. That if the time comes to assert a right
6 of indemnification, you can assert a right of
7 indemnification and we can oppose it. If we are going
8 to construe the bankruptcy law to provide a result like
9 this, then maybe there is something wrong in the, in the
10 construction of the bankruptcy law.

11 MR. BRUNSTAD: No, Justice Souter, because
12 if you look at what section 1141 of the Bankruptcy Code
13 does, it provides that a plan of reorganization binds
14 all parties. If you're not provided for adequately in
15 the plan under section 1141(d), your rights are
16 extinguished forever. You must come to the bankruptcy
17 court; you must be sure that the rights are properly
18 characterized. Excuse me.

19 JUSTICE GINSBURG: But that's not what this
20 bankruptcy court thought about the claim. This
21 bankruptcy court said some rather critical things.

22 MR. BRUNSTAD: Yes, Justice Ginsburg, but I
23 think we need to distinguish two different things.
24 There was the work that was performed in preserving the
25 rights of the injured employees, to make sure they were

1 properly classified, that their rights were rendered
2 unimpaired. If that hadn't been in the plan, then their
3 rights would have been extinguished under section 1141.

4 Then there was the claim that the surety
5 provides for having to have done all of that work.

6 JUSTICE GINSBURG: And I don't -- there was
7 never a time that the plan said we are not going to pay
8 our workers' compensation.

9 MR. BRUNSTAD: The problem, Justice
10 Ginsburg, is that the plan said nothing at all. And
11 when the plan says nothing at all, the default rule in
12 bankruptcy is that those rights are extinguished; they
13 are discharged under section 1141(d). It must be in the
14 plan in order for it to be valid after confirmation of
15 the plan. We had to assure that those rights were
16 properly treated in the plan, because they weren't,
17 they would have been discharged under the general --
18 general discharge provision.

19 That is why one must come to the bankruptcy
20 court, one must file a proof of claim, one must enforce
21 your rights in bankruptcy; if you don't, you lose them.
22 That's why the surety here stepped forward, said it has
23 subrogation rights; the workers have rights. And the
24 bankruptcy court agreed with Travelers. It directed the
25 debtor to put that language in the plan. Travelers --

1 JUSTICE GINSBURG: I thought there was a
2 section of the code that preserved subrogation rights.

3 MR. BRUNSTAD: That's section 509, Justice
4 Ginsburg.

5 JUSTICE GINSBURG: Yes.

6 MR. BRUNSTAD: But that's not what I was
7 speaking of just momentarily. The rights of the injured
8 employees, the workers, when they filed for -- when PG&E
9 filed for bankruptcy, the injured workers had claims.
10 They were going to receive periodic benefit payments off
11 into the future. If PG&E had not properly provided for
12 those claims in the bankruptcy case in their plan, those
13 claims would have been extinguished. As a result,
14 though, Travelers would not have been off the hook on
15 its surety bond, Travelers would have had to have
16 stepped forward and make the payments if PG&E did not.

17 But if Travelers hadn't come to the
18 bankruptcy court and said, these are our rights, these
19 need to be preserved, its recourse against PG&E would
20 have extinguished as well. If one does not come to the
21 bankruptcy court and assert one's rights, one loses
22 them. And of course, creditors when they do have to
23 assert their rights, incur attorneys' fees for doing so.
24 And here we had a pre-petition contract that said,
25 whatever loss we incur, including attorneys' fees, we

1 have a right to recover, a right to payment. That
2 becomes the claim.

3 JUSTICE SOUTER: Let's assume, let's assume
4 that one of the recipients of comp payments had come
5 forward and said: I object to the plan, I have a claim
6 for comp payments and I object to the plan because it
7 doesn't provide for them. And the -- the court said,
8 you're, you're right. The plan is going to include
9 provision for comp payments and it had been so amended,
10 and it was then -- the plan was then amended.

11 Would you, under those circumstances, have
12 had any -- would Travelers, under those circumstances,
13 have had any reason to assert a claim?

14 MR. BRUNSTAD: We would not have done that
15 work. No, Justice Souter, because the injured worker
16 him or herself would have done it.

17 JUSTICE SOUTER: No, I know it. But would
18 you have had any other claim that you would have
19 asserted, had that been done?

20 MR. BRUNSTAD: Well, with respect to the,
21 the treatment of the workers under the plan, no. With
22 respect to --

23 JUSTICE SOUTER: With respect to any
24 interest of Travelers?

25 MR. BRUNSTAD: Yes, Justice Souter.

1 JUSTICE SOUTER: If that had been done,
2 would Travelers have asserted a claim?

3 MR. BRUNSTAD: Yes, Justice Souter.

4 JUSTICE SOUTER: What?

5 MR. BRUNSTAD: We would have said, in our
6 proof of claim, as we did: If we must make payment in
7 the future, we are entitled to two things. One, we are
8 entitled to reimbursement from PG&E for any amount that
9 we must spend in the future whenever that might occur.
10 Two, if we have to pay any of the employees, we are
11 subrogated. We stand in the shoes of the employees and
12 may assert those rights.

13 The subrogation right would have been fully
14 protected, though, Justice Souter, because of the
15 treatment of the workers in the plan rendering them
16 unimpaired. We would have been left simply -- with
17 simply saying we have these reimbursement rights which
18 we would have in case we have to make payment.

19 Now, in the LTV case, which we cite in our
20 papers, at the beginning of the LTV case, the surety who
21 has had \$40 million in surety bonds was in a position,
22 very much the same as in this case, when PG&E filed.
23 PG&E got an order authorizing it to continue to pay but
24 not requiring it to pay. That can only be done in the
25 plan of reorganization. LTV started paying the workers'

1 comp benefits, but then defaulted and stopped, long
2 after the bankruptcy case had commenced, but far short
3 of when it concluded. The surety had to step up to the
4 plate and make the payments.

5 If the surety had not filed a proof of claim
6 at the beginning of the case, the surety would have lost
7 its recourse against the debtor, LTV, even though it
8 subsequently, far later, had to make payments.

9 JUSTICE GINSBURG: Correct me if I'm
10 wrong --

11 MR. BRUNSTAD: That's how bankruptcy works.

12 JUSTICE GINSBURG: In -- in this case, I
13 thought that a contingency claim for indemnification
14 is not allowed, but if it becomes fixed at some time,
15 then the claim can be made and is not lost.

16 MR. BRUNSTAD: No, Justice Ginsburg. There
17 is a bar date set in the beginning of Chapter 11 cases.
18 You must file your claim by the bar date or you'll be
19 forever barred, even if your liability becomes fixed
20 later.

21 JUSTICE GINSBURG: I'm talking about
22 502(e)(1).

23 MR. BRUNSTAD: Yes, Justice Ginsburg, if
24 your reimbursement claim is contingent, it will be
25 disallowed, subject to reconsideration under section

1 502(j). And that's what the parties stipulated to in
2 this case in our stipulation. We filed our proof of
3 claim, then PG&E objected to our proof of claim, but
4 Justice Ginsburg, PG&E did a lot more than just object
5 to our contingent reimbursement rights. They
6 mischaracterized our subrogation rights as claims; they
7 sought to disallow our subrogation claims; and they
8 sought to subordinate our claims. Plus in addition,
9 they sought to disallow the claims of the injured
10 workers.

11 So we had to respond to the litigation that
12 was commenced. We had to defend our rights, and we were
13 successful. The workers' claims ultimately were left
14 unimpaired in the bankruptcy as they should have been.
15 PG&E was fully responsible for paying the workers'
16 claims.

17 JUSTICE GINSBURG: In any case, this has
18 nothing to do with the, Fobian, so-called Fobian issue,
19 whether the Ninth Circuit drew the right line.

20 MR. BRUNSTAD: Correct, Justice Ginsburg.
21 The Fobian rule, we submit, is an impermissible creation
22 of Federal common law. It's not justified by any
23 concept of preemption; there is no conflict with
24 bankruptcy policy --

25 JUSTICE KENNEDY: Are they --

1 JUSTICE BREYER: Question --

2 JUSTICE KENNEDY: Let me just ask you about
3 the Fobian, and I know Justice Breyer has a question.

4 Let's assume that you're correct in that the
5 fees are allowable. Can the bankruptcy court make the
6 determination of the reasonableness of the fees?

7 MR. BRUNSTAD: It depends, Justice Kennedy.
8 If State law, if it's an unsecured claim under section
9 501(b)(1) --

10 JUSTICE KENNEDY: In this case.

11 MR. BRUNSTAD: In this case, that would be a
12 determination under State law. Every State, Your Honor,
13 has a reasonableness requirement.

14 JUSTICE KENNEDY: So -- so if the bankruptcy
15 judge isn't sure of what the amount is, he looks to
16 State law to determine the amount?

17 MR. BRUNSTAD: Yes, Justice Kennedy. Under
18 section 501(b)(1) --

19 JUSTICE KENNEDY: But the bankruptcy judge
20 does determine reasonableness?

21 MR. BRUNSTAD: If State law provides for it,
22 and all States do. The Bankruptcy Code adopts the
23 State reasonableness standard for unsecured claims under
24 section 502(b)(1). Yes, Justice Breyer?

25 JUSTICE BREYER: I'm sort of back where

1 Justice Kennedy started on this. Forget -- I'd like to
2 forget your case, because your case seems to me to be a
3 case where parties argue reasonably about whether the
4 contract itself covers this kind of fee. And maybe it
5 doesn't, if it's very unreasonable, et cetera.

6 But let's take a very straightforward case.
7 It's an obvious contract to collect a debt, or maybe a
8 mortgage, and in the debt or the mortgage agreement, it
9 says, attorneys' fees will be paid for collection.
10 Clearly covers bankruptcy, too, by its language.

11 And now there must be many instances or
12 some, anyway, where the security is inadequate.

13 MR. BRUNSTAD: The security --

14 JUSTICE BREYER: And there must be other
15 instances in which there wasn't any security. And if I
16 read Collier as you pointed to, that seems to say, in
17 such cases, very simple, the creditor has the status of
18 an unsecured creditor in respect to those attorneys'
19 fees.

20 BRUNSTAD: And in --

21 JUSTICE BREYER: Overage in the secured
22 case, and the whole claim in the unsecured case. So get
23 in the queue and you can collect your pro-rata share.

24 MR. BRUNSTAD: Absolutely, Justice Breyer.

25 JUSTICE BREYER: My question is, I have 19

1 professors and the other side coming to tell me that
2 that's never happened. They can't even find an
3 instance. So it isn't as if, it isn't as if you haven't
4 found an instance, it is that they are prepared to say
5 it never happened. And then there may be one exception
6 or two or something like that.

7 And I can't, that -- I'm now totally
8 puzzled. Because if it's so clear as you say, and I
9 follow your logic, and I followed Collier, why? After
10 all, there are bankrupt people who do have some assets.
11 Explain it.

12 MR. BRUNSTAD: Justice Breyer it happens all
13 the time. In our brief, we cite to many, many cases in
14 which attorneys' fees are allowed as unsecured claims.
15 It's actually been happening for over 100 years, it
16 happened under the Bankruptcy Act of 1898.

17 JUSTICE KENNEDY: No, no. But -- but we are
18 talking about attorneys' fees for services performed in
19 the bankruptcy proceeding?

20 MR. BRUNSTAD: Correct, Your Honor.

21 JUSTICE KENNEDY: The cost of filing the
22 claim, the cost of talking to the bankruptcy judge, et
23 cetera.

24 MR. BRUNSTAD: Correct, Your Honor. And in
25 a key case we cite is the Second Circuit's decision,

1 United Manufacturers and Merchants, where they didn't
2 even hire an attorney until after the bankruptcy case
3 was filed. The attorney performed services, filing a
4 proof of claim, protecting the equitable rights, and the
5 Second Circuit clearly held that those attorneys' fees
6 were properly part of the unsecured claim, but it
7 couldn't be any clearer. And the Second Circuit --

8 JUSTICE BREYER: But what I don't --

9 JUSTICE STEVENS: There is a body of law on
10 the other side of that issue, too, isn't there?

11 MR. BRUNSTAD: There is, Justice Stevens,
12 but those are lower court decisions. Every court of
13 appeals --

14 JUSTICE STEVENS: Yes. Absolutely. The
15 Second Circuit is a lower court.

16 MR. BRUNSTAD: Well, compared to this Court,
17 certainly, Justice Stevens.

18 JUSTICE STEVENS: That's exactly right.
19 There are no cases from this Court speaking to this
20 precise issue, are there? On which there is a
21 disagreement among the lower courts?

22 MR. BRUNSTAD: Justice Stevens, I think it's
23 important to say that the alternative rule that PG&E
24 asked for is one that every court of appeals to have
25 addressed has rejected. What they are saying is that, oh,

1 you can't get your attorneys' fees based on a
2 construction of the Bankruptcy Code. No court of
3 appeals has accepted it. There are some lower
4 bankruptcy court decisions that have accepted it, but
5 that is routinely overturned on appeal.

6 The issue of whether you get your attorneys'
7 fees as part of an unsecured claim, Cohen versus De La
8 Cruz, in that case this Court had to construe whether
9 the term debt, which means under the Bankruptcy Code the
10 same thing as a claim, is defined as liability on a
11 claim. There the Court -- this Court concluded that that
12 debt included attorneys' fees, the treble damages, the
13 whole nine yards.

14 JUSTICE BREYER: You would have thought that
15 the one group of people who ought to know this
16 thoroughly, or at least have a view are the bankruptcy
17 bar.

18 MR. BRUNSTAD: Well --

19 JUSTICE BREYER: And, and yet there are no
20 briefs from them; there are no -- there is no article
21 that I could find in Bankruptcy Journal.

22 CHIEF JUSTICE ROBERTS: Well, there may be
23 no briefs from them because it isn't the question on
24 which we granted cert, is it?

25 MR. BRUNSTAD: Chief Justice Roberts, that's

1 correct. And our view is that the Court should deal
2 only with the Fobian rule. And the alternative argument
3 which Respondent presents was never argued below, was
4 not decided below, was not presented in the opposition
5 to certiorari. It's been rejected by every single court
6 of appeals --

7 JUSTICE GINSBURG: But it would be proper to
8 remand for the Ninth Circuit to consider those other
9 arguments?

10 MR. BRUNSTAD: Yes, Justice Ginsburg. And
11 that's exactly what this Court should do. It should
12 remand their statutory interpretation argument to the
13 court of appeals to consider, for the lower courts to
14 consider. This Court deserves more than just a 20-page
15 reply brief in response to 80 pages of briefing by the
16 other side on an issue that was never raised below, not
17 presented in the opposition to certiorari.

18 Remand would be the proper thing to do with
19 respect to their claim. I do believe that is true,
20 Justice Ginsburg.

21 JUSTICE GINSBURG: On both their statutory
22 interpretation and the contract?

23 MR. BRUNSTAD: The contract, reasonableness,
24 all of those issues. The circuit split, which we
25 presented to the Court, and which I understand

1 certiorari was -- well, I'm guessing -- certiorari was
2 granted on, it deals with the Fobian rule. As this
3 common law rule, this sort of construct, that if you're
4 litigating Federal law issues, well, as a matter of
5 general Federal common law, you can't get the attorneys'
6 fees unless it's authorized by Federal law.

7 And our brief was entirely devoted to that.
8 You can't justify that rule in our view under preemption
9 principles; there's no conflict; there is no Congress
10 preempting the field in any way; you can't justify this
11 under Atherton as a, as a -- something that's necessary
12 because of a conflict with Federal policy.

13 And also the Fobian rule is inappropriately
14 categorical, in violation of what we submit are these
15 Court's principles in the Nolan case, in the CF and I
16 case. In those cases, the Court said: It's not for the
17 courts to create these claims processing rules in
18 bankruptcy. But that exactly is what the Ninth Circuit
19 did here.

20 If there are no further questions I'd like
21 to reserve the balance of my time for rebuttal.

22 JUSTICE STEVENS: One quick question, if I
23 may. Would one of the issues open on remand be the
24 construction of the contract? Is there an issue of
25 State law as to whether Travelers pays for these

1 particular services?

2 MR. BRUNSTAD: Yes, Justice Stevens. That
3 would be appropriate on remand. I reserve the balance
4 of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. BRUNSTAD: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Rosenkranz.

8 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

9 ON BEHALF OF THE RESPONDENT

10 MR. ROSENKRANZ: Mr. Chief Justice, and may
11 it please the Court:

12 Let me begin at the threshold, on whether
13 this Court should consider the statutory construction
14 argument that we've presented. The issue of statutory
15 --

16 JUSTICE GINSBURG: And can we be, take one
17 step before that and tell us if you are conceding that
18 the Fobian rule has no basis in the statute and is
19 wrong?

20 MR. ROSENKRANZ: Your Honor, the Fobian rule
21 reaches the correct conclusion in this case, but Your
22 Honor is correct. The problem with the Fobian rule is
23 that it doesn't go far enough in presenting -- in
24 preventing creditors from requiring other creditors to
25 pay for their attorneys' fees.

1 JUSTICE KENNEDY: Well, if you say it
2 doesn't go far enough then I infer from that you say
3 that it's valid as far as it goes?

4 MR. ROSENKRANZ: It is valid as far as it
5 covers this case but not on the rationale of the Ninth
6 Circuit. In other words, the Ninth Circuit did begin in
7 the wrong place, which was not to read the statute,
8 section 502, which is why that is a rational predicate
9 to the issue that Travelers is presenting here.

10 CHIEF JUSTICE ROBERTS: I'm not sure I
11 agree, counsel, that the Fobian rule is both narrower
12 and broader than the question you try to present. For
13 example it applies to the claims of a secured creditor
14 for attorneys fees on a secured claim as well.

15 MR. ROSENKRANZ: No, Your Honor --

16 CHIEF JUSTICE ROBERTS: Why -- it doesn't?

17 MR. ROSENKRANZ: No, Mr. Chief Justice. No
18 court has ever held that the Fobian rule applies to
19 oversecured creditors. Everyone acknowledges that
20 section 506(b) applies to oversecured creditors so.

21 CHIEF JUSTICE ROBERTS: So if you're an
22 oversecured creditor with a claim for attorneys' fees
23 arising under solely issues of matters of Federal
24 bankruptcy law, the Fobian rule doesn't prevent that?

25 MR. ROSENKRANZ: No, Your Honor. Everyone

1 is absolutely clear that Fobian to the extent that it
2 applies --

3 CHIEF JUSTICE ROBERTS: Well, not everyone.
4 I'm not clear on it.

5 MR. ROSENKRANZ: I'm sorry, Your Honor. All
6 the bankruptcy practitioners and courts are clear that
7 to the extent that Fobian applies, it applies only to
8 unsecured creditors. But again this is a rational
9 predicate to this Court's analysis of Fobian. How do we
10 know?

11 CHIEF JUSTICE ROBERTS: If it is a rational
12 predicate, we might have expected to hear about it in
13 the opposition to certiorari.

14 MR. ROSENKRANZ: Yes, Your Honor. I
15 apologize for focusing only on the issue that Travelers
16 was focusing on, which was whether this was, whether the
17 Fobian rule was itself a cert-worthy question. But it
18 is a rational predicate because, as you can see from
19 Travelers' brief, Travelers says no fewer than a dozen
20 times, including in two point headings: Read the code;
21 read the code. It will tell you that unsecured
22 creditors have an allowable claim for post-petition
23 attorneys' fees, and only if you begin by reading the
24 code can you figure out whether the Fobian common law
25 overlay is correct or not. So when we say, Your Honors,

1 yes, let's read the code, that's not an ambush and that
2 is not smuggling in.

3 CHIEF JUSTICE ROBERTS: No, it's an ambush
4 and it is smuggling in the sense we don't have a court
5 of appeals decision one way or the other on that
6 question, do we?

7 MR. ROSENKRANZ: Your Honor, we do have
8 court of appeals decisions on this precise question, not
9 in this case because the court of appeals had Fobian and
10 the rule that underlay Fobian for 20 years. But there
11 are three courts of appeals --

12 JUSTICE KENNEDY: Justice Ginsburg has a
13 question I'm very interested in. Do you defend the
14 Fobian rule?

15 MR. ROSENKRANZ: We do not, Your Honor. The
16 Fobian rule is wrong at least, especially as to the
17 distinction that it draws between State law and Federal
18 litigation. There's only one answer to the question --

19 JUSTICE STEVENS: Well, why then isn't the
20 proper disposition of this case to send it back to the
21 Ninth Circuit to consider all these other arguments?

22 MR. ROSENKRANZ: Well, Your Honor, because
23 this issue has been fully ventilated among the lower
24 courts.

25 JUSTICE GINSBURG: Yes, but we are not a

1 court of first view and you know that very well. We are
2 a court of review. So no matter how well it's been
3 aired, we wait to see what the lower courts have said on
4 a question. We don't take it in the first instance.

5 MR. ROSENKRANZ: Yes, I understand that,
6 Your Honor. It would have been futile to argue this
7 before the Ninth Circuit. The Ninth Circuit would have
8 said that --

9 JUSTICE GINSBURG: I understand that because
10 they have the Fobian rule.

11 MR. ROSENKRANZ: Yes. No, but, Your Honor,
12 let me just add two additional reasons why this Court
13 should consider it now. The first is this has been
14 fully ventilated in the lower courts. There is not a
15 single argument in the briefs on either side on which
16 there is not a lower court opinion going one way or
17 another on every argument.

18 Secondly, there is an enormous amount of
19 affirmative harm that can come from this Court simply
20 saying, let us conclude that the Ninth Circuit was wrong
21 in disallowing these claims on the logic that the Ninth
22 Circuit followed, but we will reserve for a later day an
23 open question of law on what section 502(b) and 506(b)
24 means. And the harm comes from the fact that
25 overwhelmingly the lower courts in the last 10 years

1 have concluded that 502(b) and 506(b) mean that
2 unsecured creditors do not have these claims.

3 If this Court declares that it is now an
4 open question --

5 JUSTICE STEVENS: Let me ask you a question
6 about that. Your argument depends -- you analogize --
7 you would agree, I think, that if this was an
8 oversecured, secured creditor they'd be entitled to
9 fees?

10 MR. ROSENKRANZ: Your Honor, we would
11 dispute the contractual interpretation, but yes, Your
12 Honor.

13 JUSTICE STEVENS: But assuming, assuming the
14 contract provides that.

15 MR. ROSENKRANZ: Yes, Your Honor.

16 JUSTICE STEVENS: And if that's true
17 -- and the reason for that I suppose is that doesn't
18 impair the rights of the general creditors at all.

19 MR. ROSENKRANZ: That's one logic of the --

20 JUSTICE STEVENS: If that's so, why isn't
21 their argument that, well, your client is solvent, the
22 complete answer to your position?

23 MR. SHORR: Well, Your Honor, because
24 Congress didn't say that. Congress gave only one answer
25 to the question whether unsecured creditors get their

1 attorneys' fees allowed, that is post-petition
2 attorneys' fees allowed. It's either yes or no. There
3 is no on-off switch for solvent or insolvent creditors
4 within the code, which is why Travelers never argued
5 that as a, an objection to the plan of confirmation.

6 JUSTICE STEVENS: They argue it in their
7 reply brief here.

8 MR. ROSENKRANZ: Yes, Your Honor, and that
9 is absolutely incorrect. If you look at the case that
10 they cite, that case relies on a provision of the code,
11 which is section 726. And section 726 is only about
12 post-petition interest for solvent debtors, not
13 post-petition attorneys' fees.

14 JUSTICE BREYER: Well, how do you avoid --
15 what about their statement from Collier?

16 MR. ROSENKRANZ: Your Honor, the statement
17 that Travelers quotes from Collier is about a
18 proposition that we don't dispute, which is whether it
19 is a pre-petition claim. But Collier --

20 JUSTICE BREYER: No. No. It said -- a
21 pre-petition claim, if a creditor incurs the attorneys'
22 fees post-petition, they incur it post-petition,
23 afterwards they file, after the petition they file a
24 claim with the bankruptcy court, in exercising or
25 protecting a pre-petition claim that included a right to

1 recover attorneys' fees. And they say that's what we
2 had, we had a contract that gave us this right to
3 attorneys' fees. The fees will be pre-petition in
4 nature, constituting a contingent pre-petition
5 obligation that became fixed post-petition when the fees
6 were incurred. All right. Now, what is your response
7 to that?

8 MR. ROSENKRANZ: Your Honor, my response is
9 I urge you, Justice Breyer, to look back at Collier,
10 because that is absolutely accurate and it doesn't apply
11 to this case.

12 JUSTICE BREYER: Because?

13 MR. ROSENKRANZ: Because, Your Honor, that
14 is a statement about whether it is a pre-petition claim,
15 not about whether the claim is allowable or not, which
16 is what we are arguing about.

17 JUSTICE BREYER: Then you explain that to
18 me?

19 MR. ROSENKRANZ: Yes, Your Honor. Step one
20 is, is it a claim. No one disputes that this is a
21 claim. It is a right to payment. Step two, is this an
22 allowable claim? The answer under the code is
23 absolutely not, because the code says there is only one
24 class of creditors that gets their attorneys' fees
25 claims allowed and that is oversecured creditors and so

1 --

2 JUSTICE KENNEDY: Well, that's because 506
3 had to do that in order to tell the bankruptcy courts
4 how to deal with secured claims.

5 MR. ROSENKRANZ: No, Your Honor.

6 JUSTICE KENNEDY: That doesn't -- and then
7 you have the negative inference or the exclusio unius
8 argument, whatever, which I think is misplaced in this
9 context.

10 MR. ROSENKRANZ: Your Honor, Congress put
11 506(b) in the code for one purpose and one purpose only,
12 and that was to allow claims that are not elsewhere
13 allowed, because if it doesn't do that 506(b) serves no
14 purpose at all. 506(b) says nothing at all about
15 whether the claim is secured.

16 JUSTICE GINSBURG: Why doesn't it serve the
17 purpose of saying that the fees will be covered by the
18 security? They'll not just be claims for fees that
19 would stand together with the unsecured creditors, but
20 that the oversecured -- the security will cover the
21 interest, will cover the attorneys' fees, and that's the
22 function of 506 whatever --

23 MR. ROSENKRANZ: Your Honor, the answer is
24 506(b) does not say anything about whether the allowed
25 claim is secured or not. It is completely silent about

1 that. Now, if we accept, as we explain in our brief in
2 much more detail, if we accept Travelers' argument that
3 it was an allowed claim in the first instance and it is
4 therefore furthermore an allowed secured claim, 506(a)
5 tells you what to do with that. 506(a) tells us that an
6 allowed claim to a secured creditor is a secured claim.
7 It still leaves section 506(b) with nothing left to do.

8 Now, let me just back up and underscore:
9 Any creditor would love to get the other creditors to
10 pay its attorneys' fees. Tort claimants would love it,
11 trade creditors would love it, local tax collectors
12 would love it. But Congress said only one category of
13 claimants get to claim their post-petition attorneys'
14 fees.

15 JUSTICE BREYER: Of course, that is exactly
16 what's puzzling me. But why haven't they gone out and
17 gotten it? So why -- what you're pointing to so far is
18 that Congress has said a particular class of people get
19 the attorneys' fees out of the security insofar as the
20 security will support it. It doesn't say a word about
21 what happens to the attorneys' fees after the security
22 is exhausted, nor about anybody else's attorneys' fees,
23 where so provided by contract. Collier says they can
24 get it.

25 MR. ROSENKRANZ: Your Honor, Congress

1 said --

2 JUSTICE BREYER: Same puzzlement.

3 MR. ROSENKRANZ: Your Honor, Congress has
4 said no such thing. What Congress says is that an
5 allowed claim is allowed as of the date of the filing of
6 the petition. That is when you value the claim and you
7 value the claim as of the date of the filing of the
8 petition. At that point, it is worth zero because no
9 post-petition attorneys' fees have been incurred. And
10 the fact of the matter is it may well have never
11 occurred to the drafters of the code when --

12 JUSTICE BREYER: Suppose I sell you a house
13 and I make a promise that I'll fix any leaks in the
14 bathroom. And lo and behold, before there's a leak
15 the -- I'm bankrupt. And while I'm bankrupt it floods,
16 the bathroom. No claim?

17 MR. ROSENKRANZ: Your Honor, that is a
18 claim. It is a --

19 JUSTICE BREYER: It is a contingent claim.
20 And they're saying this is the same.

21 MR. ROSENKRANZ: I'm saying -- they are
22 saying this is a contingent claim. If -- and it is a
23 very strange sort of a contingency. It is Travelers
24 saying, we have a claim, it is a contingent claim; the
25 contingency is whether tomorrow morning we're going to

1 pick up the phone and called Weil Gotshal to monitor the
2 bankruptcy proceeding.

3 But let's assume it is a contingent claim.
4 It is still a disallowed claim and Congress provided
5 numerous statutory indications that it was. I already
6 mentioned 506(b) but there are more. Congress said that
7 attorneys' fees are available only, quote, "to the
8 extent that a claim is oversecured." Now that would be
9 a very --

10 CHIEF JUSTICE ROBERTS: No. It's quite
11 unlike the situation, for example in Timbers, where you
12 had in 502 a disallowance of post-petition interest.
13 There is not in 502 a disallowance of attorneys' fees.

14 MR. ROSENKRANZ: Well, Your Honor, I was
15 just going to get there. Timbers underscores this
16 proposition. Timbers focused on the structure of 506
17 and it began with and it underscored, the only words
18 that it underscored were, "to the extent that." But let
19 me turn to that.

20 JUSTICE KENNEDY: Well, Timbers cited, as
21 the Chief Justice indicates, the interest section in
22 506. That's all it's about. I don't -- I think Timbers
23 is misleading on this point.

24 MR. ROSENKRANZ: Your Honor, Timbers has the
25 structural argument that focuses on what the purpose of

1 506(b) is. But there are more indications. It would be
2 odd for Congress, for example, to draft this provision
3 506(b) that purports to put post-petition attorneys'
4 fees on the same footing as post-petition interest if it
5 intended to put them on different footings. It's an
6 observation this Court made in *Ron Pair*. Moreover,
7 Congress was not oblivious to the existence of
8 attorneys' fees post petition. There are 15 occasions
9 in the code where Congress focuses on attorneys' fees and
10 if Congress had intended attorneys' fees to be available
11 to this enormous class of unsecured creditors, one would
12 think that it would not have hidden that in the
13 definition of "claim" --

14 JUSTICE BREYER: Well, are those 15 places
15 -- do they involve attorneys' fees as administrative
16 expenses? Do any of them involve attorneys' fees simply
17 as an unsecured claim for attorneys' fees?

18 MR. ROSENKRANZ: Your Honor, as to
19 creditors, four of them apply to attorneys' fees as
20 administrative expenses. It's a very important point
21 because the code says and it adopts this age-old rule
22 that if you are going to take money away from some
23 unsecured creditors and give it to attorneys it better
24 be because you're expanding the pot for all of the other
25 creditors.

1 JUSTICE BREYER: What's the answer to my
2 question? Is the answer that 11 of them say you can
3 collect attorneys' fees, but only as an unsecured claim
4 against creditors?

5 MR. ROSENKRANZ: Your Honor, for the, for
6 creditors there are only six that apply. Four of them
7 are the administrative.

8 JUSTICE BREYER: All right, so six.

9 MR. ROSENKRANZ: Yes.

10 JUSTICE BREYER: So six are administrative,
11 and then the remaining two say that the creditor can
12 collect it as an unsecured debt?

13 MR. ROSENKRANZ: Yes, Your Honor.

14 JUSTICE BREYER: Which are those two?

15 MR. ROSENKRANZ: Well, one of them does.

16 JUSTICE BREYER: Which is that?

17 MR. ROSENKRANZ: That is the provision that
18 Travelers cites -- and I apologize it's not in any of
19 the appendices -- 502(b)(4). And 502(b)(4) underscores
20 our point. 502(b)(4) says, and I'm quoting directly
21 from the code: "A claim is allowed to the" -- "is
22 disallowed to the extent that," and then "(4) if such
23 claim is for services of an insider or attorney and such
24 claim exceeds the reasonable value of such services."
25 That is focused on pre-petition activities of the

1 lawyers on behalf of the debtor.

2 JUSTICE BREYER: That seems to cut the other
3 way because it says it's disallowed insofar as it's
4 unreasonable of course, and therefore it would be
5 allowed insofar as it's reasonable.

6 MR. ROSENKRANZ: Well, yes. Pre-petition
7 claims for services provided by an attorney before for
8 the petition.

9 JUSTICE KENNEDY: No, attorney for the
10 debtor.

11 MR. ROSENKRANZ: An attorney for the debtor
12 and, Your Honor, the code is clear and it's noteworthy.

13 JUSTICE BREYER: Yes, but I mean you don't
14 have exactly what I was driving towards. I was quite
15 interested that you said there are 11 other provisions
16 that we could look at for support, and I wouldn't think
17 it was support if those consider -- concern
18 administrative expenses, which nobody's asking for here,
19 they just want an unsecured claim, or if they concern
20 some other --

21 MR. ROSENKRANZ: Fair enough Your Honor.

22 JUSTICE BREYER: -- irrelevant thing.

23 MR. ROSENKRANZ: Fair enough, Your Honor.

24 My point is that Congress knew about attorneys' fees and
25 if it wanted this huge class of unsecured creditors to

1 collect their attorneys' fees for post-petition
2 activities, it wouldn't have hidden that in a general
3 definition of "claim" or in the general statement of
4 allowability.

5 CHIEF JUSTICE ROBERTS: Counsel, your
6 brother in his reply brief says that no court of appeals
7 has endorsed your theory, and I -- earlier you told me
8 one had. Which one in particular?

9 MR. ROSENKRANZ: Your Honor, the First
10 Circuit -- there are three courts of appeals that have
11 addressed the question, all in dictum but in very
12 extensive dictum. So the First Circuit comes out our
13 way in Adams versus Zimmerman. The Second Circuit comes
14 out also in dictum on Travelers' side in United
15 Merchants. And then the Sixth Circuit splits the baby
16 in half, or reads the code all the way up to our
17 position as we do, and then takes a detour in another
18 direction.

19 CHIEF JUSTICE ROBERTS: So you really want
20 us to reach out and decide a question that's not
21 presented when there has been no holding of the court of
22 appeals one way or the other on the issue?

23 MR. ROSENKRANZ: Your Honor, we didn't come
24 here asking this Court to address this question.
25 Travelers put it front and center. They conceded --

1 CHIEF JUSTICE ROBERTS: If you thought the
2 Fobian rule was wrong, you could have said that.

3 MR. ROSENKRANZ: Well, Your Honor, it would
4 have made no sense for us to argue that Fobian was wrong
5 when we were trying to defend the judgment below. But I
6 concede, Your Honor, this Court has discretion to decide
7 whether it's going to address what we believe is an
8 absolute factual predicate, and what Travelers seems --
9 I'm sorry, legal predicate -- and what Travelers seems
10 to believe is a legal predicate, which is why we're
11 saying to the Court this case, this issue has been
12 ventilating for 20 years, and a lot of mischief can be
13 --

14 JUSTICE BREYER: How -- can we decide? But
15 I'm wondering about, maybe you don't want to answer
16 this, but I mean, if we were to say Fobian is wrong,
17 everybody will agree with us. But we should have to say
18 why it's wrong. And if we say the reason that it's
19 wrong is because you can't collect attorneys' fees at
20 all, you'll be delighted. And if we say the reason it's
21 wrong is because you can collect attorneys' fees
22 regardless, they'll be delighted. And our only other
23 alternative is to not say why it's wrong or -- I mean,
24 that's the problem.

25 MR. ROSENKRANZ: That's exactly --

1 CHIEF JUSTICE ROBERTS: There's an added
2 complication. There's another case on which the Ninth
3 Circuit's based its decision in your case, DeRoche.
4 Your proposed solution here doesn't address the issue in
5 DeRoche because there it's the debtor that's seeking
6 attorneys' fees.

7 MR. ROSENKRANZ: Absolutely, Your Honor.

8 CHIEF JUSTICE ROBERTS: So we still have to
9 decide the Fobian issue. And your failure to defend it
10 here means that we're going to have to decide in on that
11 inadequate record. If you had mentioned that in an
12 opposition to certiorari, perhaps we would have granted
13 cert in the DeRoche case and had an argument about the
14 rule that we have to decide.

15 MR. ROSENKRANZ: Your Honor, I appreciate
16 that, and I apologize for not having raised it in the
17 cert petition, cert opposition, we were simply focused
18 on why it is that this little sliver of the Fobian rule
19 was not worth this Court's attention. But I understand
20 that this Court needs to look forward and try and figure
21 out what exactly the issues are that are presented. I
22 only add that the statutory question that is presented
23 in DeRoche and in this case are as Your Honor has
24 pointed out, mirror images of each other.

25 So whatever this Court decides as to the

1 statutory construction question on 502(b), this Court
2 can say it's not resolving Fobian because this is a
3 predicate question. And this Court can say there may
4 well be circumstances in which a creditor can say, you
5 know what, for State law litigation we have this common
6 law right, and we reserve for a later day the question
7 of whether there is an exception to the statutory rule
8 that we are articulating.

9 Now I want to underscore that Congress had
10 very important reasons that are built into the code for
11 coming out this way and disallowing unsecured creditors
12 attorneys' fees. Bear in mind that these sorts of fee
13 shifting provisions are absolutely ubiquitous. They are
14 in every credit card contract. They are in every bank
15 loan. They are in virtually any written contract, and
16 when a contract doesn't provide for it, quite often
17 State law statutes do. Allowing all of these unsecured
18 creditors to pay their lawyers out of the hides of all
19 of the other unsecured creditors --

20 JUSTICE STEVENS: Yes, but that's not the
21 facts of this case. Isn't that correct?

22 MR. ROSENKRANZ: Well, Your Honor --

23 JUSTICE STEVENS: This will not have any
24 adverse, if I understand the facts, any adverse impact
25 whatsoever on any unsecured creditor.

1 MR. ROSENKRANZ: Your Honor, on the facts of
2 this case if the rule had been otherwise, we don't know
3 whether PG&E would have been solvent at all. But we are
4 arguing about a rule that is not one rule for Travelers
5 and one rule for everyone else. We are arguing about a
6 rule for the vast majority of cases.

7 JUSTICE STEVENS: No, but just looking at
8 this case itself, if there is plenty of money there to
9 pay a State law obligation, why shouldn't just ordinary
10 rules of contract law apply?

11 MR. ROSENKRANZ: Well, Your Honor, the
12 answer is, Congress dealt with this issue and decided
13 that no one gets to get in line and get their attorneys'
14 fees, regardless of whether they're solvent or not.
15 It's a --

16 JUSTICE GINSBURG: You're raising a
17 provision that says just that, it's the absence of a
18 provision for attorneys' fees that you're relying on.

19 MR. ROSENKRANZ: Well, no, Your Honor.
20 We've been talking about why the only natural way to
21 read the code is to disallow attorneys' fees, and I'm
22 explaining that if attorneys' fees are generally
23 disallowed to everyone, there's no exception to that
24 rule in the code that says ah, yes, but if there's an
25 insolvent -- if there's a solvent debtor, the rule is

1 otherwise.

2 JUSTICE GINSBURG: Where is the provision
3 that generally disallows attorneys' fees?

4 MR. ROSENKRANZ: I'm sorry. What I'm saying
5 is 502(b) when you read "as of the time of the filing of
6 the petition," it says -- that means, that must mean
7 that it doesn't apply to post-petition attorneys' fees,
8 especially when you look at 502(b) through the lens, as
9 this Court did in Timbers, of the rest of the code.
10 506(b), all of these other attorneys' fees --

11 JUSTICE KENNEDY: Well, on that point you
12 disagree with the Collier citation at page 9 of the
13 reply brief then?

14 MR. ROSENKRANZ: Yes, Your Honor, I disagree
15 with Collier, but I don't think Collier comes out one
16 way or another on this particular question. That was
17 the same question that was asked earlier about whether
18 it's a claim, whether it's a pre-petition claim.

19 JUSTICE KENNEDY: Well, it says if the
20 creditor incurs the attorneys' fees post petition in
21 connection with protecting a pre-petition claim --

22 MR. ROSENKRANZ: Yes, Your Honor.

23 JUSTICE KENNEDY: -- the fees will be
24 pre-petition.

25 MR. ROSENKRANZ: That was the same --

1 JUSTICE KENNEDY: So you disagree with that?

2 MR. ROSENKRANZ: I don't disagree with that,
3 Your Honor. I was referring to another provision of
4 Collier, not the one that's cited in the reply brief.
5 That is a correct statement but it has no application
6 here because we are not arguing about whether it's a
7 pre-petition obligation. Of course it's a pre-petition
8 obligation. Just like pre-petition interest -- excuse
9 me -- post-petition interest is a pre-petition
10 obligation we are arguing that the code cancels that
11 obligation because there are very important reasons,
12 such as equality among all unsecured creditors, the --

13 JUSTICE BREYER: You're saying this
14 particular set of pre-petition obligations. Collier, I
15 think in context must be saying, you get paid the money.
16 I mean, he goes on in the next sentence and says by the
17 way, despite my last sentence, you don't get the money?

18 MR. ROSENKRANZ: No, Your Honor. What
19 Collier is talking about is a completely different
20 question. He doesn't answer that question one way or
21 another in Collier.

22 JUSTICE BREYER: Oh, in other words what he
23 implies, if I read the whole page I'll see, although he
24 just said what we quoted, the whole page means, by the
25 way, I'm not telling you if you get the money or not?

1 MR. ROSENKRANZ: This was a completely
2 different discussion on a --

3 JUSTICE BREYER: Alright, I'll --

4 MR. ROSENKRANZ: -- completely different
5 section referring to setoffs.

6 JUSTICE BREYER: I think your 506(b)
7 argument, I see your point, I see your point, is there
8 -- I mean, and you'd have to say well, 506(b) simply
9 repeats 506(a), as sometimes provisions do, and then it
10 becomes somewhat superfluous, somewhat not. I got that
11 point. I also have your point about, well, there are
12 other references. Now, is there any other point in the
13 code?

14 MR. ROSENKRANZ: Yes, Your Honor. There is
15 one other point and that is, 502(c) tells the court what
16 it is supposed to do with contingent claims. It is
17 supposed to either liquidate them or estimate them.
18 These are -- this is a very strange sort of contingency,
19 as I mentioned earlier.

20 JUSTICE SCALIA: That's not in the
21 materials, 502(c)?

22 MR. ROSENKRANZ: 502(c) is, Your Honor.
23 It's on the very back of the cert petition appendix on
24 page, I believe 28. And so it says either estimate or
25 liquidate, but always as of the date of the filing of

1 the petition. Now as of the date of the filing of the
2 petition it would be impossible to estimate without a
3 crystal ball.

4 JUSTICE BREYER: How do they do it with my
5 leaky bathroom?

6 MR. ROSENKRANZ: Your Honor, what you do is
7 -- that is a classic contingency. What you do is to
8 estimate the likelihood that the bathroom will in fact
9 leak and the cost of those expenses, and you put
10 something into the, into the bankruptcy estate for that
11 purpose. That would be something that Congress would
12 never have wanted to do with thousands and thousands of
13 unsecured creditors.

14 JUSTICE KENNEDY: I -- I am concerned about
15 your point that there are all kinds of attorneys' fees
16 contracts out there and if everybody can get fees for
17 filing the claim post-petition act, we have a huge
18 amount of claims to pay.

19 Travelers would tell us, though, that a
20 surety is different, that they somehow stand in the
21 shoes of PG&E or something.

22 MR. ROSENKRANZ: Your Honor, I don't
23 understand why a surety is different from any other
24 contract. All contractual creditors will want their
25 fees. The reason that they haven't been applying for

1 them is that the overwhelming majority of bankruptcy
2 courts will tell you no, you can't have them, because
3 the overwhelming majority of cases have been saying
4 exactly what I'm saying to you. 502(b) does not allow
5 them, and we can tell that by looking at 506(b).

6 And there are other reasons that Congress
7 would not have wanted to do that. It would have
8 burdened the administration of the state -- of the
9 estate. The court would be spending more time
10 administering claims about fees and what does this
11 contract mean, and fees upon fees upon fees, than it
12 would be spending administering the basic bankruptcy
13 estate.

14 JUSTICE SOUTER: Well, of course the
15 argument here is that this is something different from
16 the general abuse that you're describing, because the
17 plan didn't make any provision here for, for paying the
18 workers comp obligation at all. What is your response
19 to that?

20 MR. ROSENKRANZ: Your Honor, my response is
21 that is absolutely wrong. The first draft of the plan
22 which you can see on page 28 of the appendix says
23 explicitly, and I quote, "all workers compensation
24 programs are treated as executory contract." Treated as
25 executory contracts and deemed assumed by the debtor,

1 and that means that the workers got the most favorable
2 treatment that they could have gotten. These are not
3 just unsecured claims.

4 CHIEF JUSTICE ROBERTS: Your friend says
5 it's more favorable to say the claims are unimpaired.

6 MR. ROSENKRANZ: Your Honor, that's what
7 they argued. The bankruptcy court explicitly held
8 otherwise and the Ninth Circuit agreed with the
9 bankruptcy court. The bankruptcy court said, none of
10 your interventions were reasonably necessary to reach --
11 excuse me -- to advance your interests. Therefore, you
12 are absolutely wrong when you argue to us that you are
13 on the State law side of the Fobian rule.

14 Now if you ask me, Your Honor, where in the
15 bankruptcy court decision does it say that, I would
16 refer the Court to page 24a of the -- of the cert
17 petition appendix, where you see asterisks for a missing
18 paragraph right in the middle of the opinion. That, and
19 just to orient the Court, we're looking at the first
20 paragraph that says first of all. Then there's a --
21 there is an asterisk eliminating a paragraph. Look at
22 page 140a, 141 of the joint appendix where the missing
23 paragraph that Travelers eliminated is filled in, and
24 there the court summarizes a 15-page colloquy with
25 Travelers about why it is completely wrong in claiming

1 that its steps were reasonably necessary.

2 And on page 141, just to orient the Court
3 again, you see that it begins, second paragraph, first
4 of all. That's the same paragraph. The next paragraph
5 refers to Mr. Brunstad's arguments. It says, "I just
6 simply don't buy it. I don't think you can sort of say,
7 you know, we thought there was a thief hiding under the
8 bed so we had to clear out under the bed. I don't think
9 there was a risk there." And that was the gist of 15
10 pages proceeding the joint appendix, where the court
11 methodically demolishes each of the arguments Travelers
12 presents here.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Brunstad, you have eight minutes remaining.

16 REBUTTAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

17 ON BEHALF OF THE PETITIONER

18 MR. BRUNSTAD: Justice Breyer, in our brief
19 on pages 25 and 26, we cite to a number of cases where
20 the courts allowed attorneys' fees as an unsecured
21 claim, both for pre-petition work done and also
22 post-petition work done where the contractual right was
23 pre-petitioned. We also cite a bunch of cases around
24 page 44 -- 43 and 44 of our brief, including an article
25 in the middle of page 44, quote: "In cases decided

1 under the Bankruptcy Act, the higher courts consistently
2 held that attorneys' fees were allowable even as
3 unsecured claims in bankruptcy." Close quote. I've
4 been a bankruptcy lawyer for over 20 years. I've been
5 teaching bankruptcy law for 17 years. It is absolutely
6 not true that courts routinely disallow claims for
7 attorneys' fees as part of unsecured claims. It's the
8 opposite is true; it's routine that they are allowed in
9 practical reality however they are not presented because
10 creditors don't bother to present them because
11 distributions are generally so low in bankruptcy.

12 On the point about the plan completely
13 protected the rights of the injured workers, nothing
14 could be farther from the truth. The provision that
15 counsel cites in the plan refers to exec, as executory
16 contracts, workers' compensation benefit programs.
17 Those are the contractual relationships between PG&E and
18 its administrators, not the claims of the workers
19 themselves. Tellingly, PG&E never argued in the
20 bankruptcy court that the claims of the workers were
21 fine under the plan. In fact, they said, we will do
22 what Travelers wants after the bankruptcy court directed
23 -- and it's in the transcript -- that that was the
24 appropriate thing to do.

25 In fact, what Travelers insisted is

1 required by section 1123 of the Bankruptcy Code, claims
2 such as the workers must be classified, their treatment
3 must be specified. If they are not they are eliminated.

4 The reference to executory contracts
5 clearly doesn't apply. As we explain in our reply
6 brief, the workers' claims were not executory contracts
7 under applicable law. That section does not apply.

8 Of course, I think, Chief Justice
9 Roberts, there is a lot more that we would like to say
10 about their alternative arguments than we were able to
11 put in our 20-page reply brief. The issue that they
12 raised has not been fully ventilated in the lower
13 courts. In fact, there are many more things we would
14 say about it on remand.

15 I also think it's important to point out,
16 Justice Stevens, they are a solvent debtor, and under
17 the concept of absolute priority, shareholders are not
18 allowed to recover anything unless creditors are paid in
19 full. What they are trying to do is they're trying to
20 get rid of their contractual obligations in bankruptcy
21 for the benefit of their shareholders. There's no
22 implication between creditors, creditors' recoveries in
23 this case one versus the other.

24 In the Dow Corning case which we cite in
25 our reply brief the Sixth Circuit expressly held where

1 you have a solvent debtor you have to pay all of the
2 attorneys' fees. That is an additional argument we
3 would develop on remand.

4 But all of their arguments about section
5 506 and their interpretation of 502 simply don't matter,
6 because as a solvent debtor they're not entitled to take
7 advantage of that theory even if it were valid. And we
8 contend that it isn't valid. The court of appeals have
9 resoundingly rejected it. The Second Circuit rejected
10 it in United Merchants and Manufacturers. The Sixth
11 Circuit rejected it in Dow Corning. The Eleventh
12 Circuit rejected it en banc in the Wellsville case. All
13 of them considered the 506 argument that they're making
14 and rejected it, and properly so.

15 Counsel cites to section 502(b)(4).
16 That's an important section because that demonstrates
17 that Congress understood that attorneys' fees would be
18 allowable as an unsecured claim under section 502. And
19 in section 502(b)(4) it provided the only exception, the
20 only one where attorneys' fees would not be allowable as
21 an unsecured claim. It provided expressly attorneys'
22 fees would not be allowable for the attorney for the
23 debtor to the extent the claim for the fees exceeded the
24 reasonable value of the services performed. Why is that
25 provision there? Because Congress saw there was a

1 problem. There was a problem of debtors sending money
2 to their attorneys. Congress understood that to be a
3 problem and it remedied it.

4 Congress did not think there was a
5 problem with respect to this historic practice of going
6 on over 100 years of attorneys' fees being allowed as
7 unsecured claims, and so in section 502 it allows them.
8 Respondent's argument about section 506(b) renders
9 section 502(b)(4) superfluous. If attorneys' fees were
10 never allowable as part of an unsecured claim except for
11 how 506(b) allows it, then there would not be a need for
12 section 502(b)(4). In addition, Respondent overstates
13 the office of section 506. 506, as this Court explained
14 in *Ron Pair*, provides -- essentially tells us what
15 secured creditors get out of their collateral and in what
16 order -- the pre-petition amount and then, if there's any
17 value left, the value of the collateral. After you pay
18 the pre-petition amount of the claim, you can add
19 attorneys' fees and you can add, post-petition you can
20 add interest. Their interpretation of section 506(b)
21 would render section 502(b)(2) superfluous. Under their
22 theory, only oversecured creditors get post-petition
23 interest, get interest.

24 JUSTICE KENNEDY: If you prevail, why can't
25 every attorney who represents a creditor who has a

1 credit card -- a promissory note providing for
2 attorneys' fees file something in bankruptcy and get
3 attorneys' fees for the filing of the claim?

4 MR. BRUNSTAD: That already happens, Justice
5 Kennedy. In all the circuits that recognize that
6 attorneys' fees are allowed as unsecured claims, that
7 already happens. And that has not caused any disaster or
8 any problem. It's been a practice for 100 years. If
9 Congress had wished to change the practice, it would
10 have when it codified the Bankruptcy Code in 1979. The
11 fact that it hasn't perceived it to be a problem
12 demonstrates that Congress wanted to leave the practice
13 unchanged.

14 Now, what happens, though, again, Justice
15 Kennedy, is that creditors don't bother to file claims
16 for those amounts. And where it matters is in cases
17 where it should matter, like in this case, in the PG&E
18 case, where a solvent debtor is simply trying to get out
19 of its contractual relationships. And under principles
20 of absolute priority they are not allowed to do that for
21 the benefit of shareholders where creditors are not
22 being paid in full. And I think it's important to
23 underscore again, Justice Kennedy.

24 JUSTICE STEVENS: It's interesting. You're
25 of course a teacher too. The amicus brief by a bunch of

1 professors have a different view of the history than
2 you're describing.

3 MR. BRUNSTAD: Justice Stevens, what I take,
4 what I take from their analysis is a hostility towards
5 attorneys' fees being allowed in bankruptcy. And
6 perhaps maybe as a matter of policy, if we were to start
7 from scratch, well, maybe we shouldn't allow attorneys'
8 fees to be allowed in bankruptcy. Maybe we shouldn't
9 allow tort claims to be allowed in bankruptcy. Maybe we
10 shouldn't allow certain kinds of environmental claims to
11 be allowed in bankruptcy. They don't like the rule,
12 apparently, but their analysis of the history is wrong.

13 And we cite innumerable cases and law review
14 articles that demonstrate that the practice is as we say
15 that it is. And policy reasons are no grounds to sort
16 of create these Federal common law rules or these
17 categorical rules of preclusions.

18 JUSTICE STEVENS: Would you say a word about
19 Justice Holmes' opinion in the Scruggs case.

20 MR. BRUNSTAD: Yes, Justice Stevens. The
21 Randolph case was decided in 1903 and the law changed
22 dramatically since then. For example, in 1903
23 contingent claims were not provable under the Bankruptcy
24 Act. That changed in 1938 when contingent claims became
25 provable under the Bankruptcy Act.

1 Randolph & Randolph versus Scruggs involved
2 the claim of a custodian, a custodian, an assignee, who
3 took control of all the debtor's assets before the
4 bankruptcy filing. Now under section 503(b)(3)(E), the
5 Randolph versus Scruggs analysis as it pertains to the
6 claims of the assignee, those are now treated as an
7 administrative expense under section 503 dealing with
8 administrative expenses.

9 In Randolph, it's interesting, the fees --
10 Justice Kennedy, the fees incurred in preparing the
11 assignment were allowed as an unsecured claim in the
12 bankruptcy case. Justice Holmes for the Court said they
13 are allowed. So in fact Randolph I think refutes their
14 analysis rather than supports it.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 The case is submitted.

17 (Whereupon, at 12:01 p.m., the case in the
18 above-entitled matter was submitted.)

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