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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 Collier, where we talk about  
9 exactly that scenario and it is described. And it  
10 basically works like this. A claim under the Bankruptcy  
11 Code is defined under Section 1015. The claim includes  
12 any right to payment whether it's contingent or fixed,  
13 matured, unmatured, et cetera. Any right to payment,  
14 literally any right to payment, when the debtor files  
15 for bankruptcy, that becomes a claim. If the right --

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

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

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

5 MR. BRUNSTAD: Right.

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

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

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

23 MR. BRUNSTAD: Well, because there's a  
24 transaction cost in actually filing the additional claim  
25 setting forth the amount that you've incurred. In most

1 cases, Justice Stevens, creditors don't even hire  
2 attorneys to pursue or file a claim in bankruptcy. In  
3 most Chapter 7 cases, for example, they are no-asset  
4 cases.

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

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

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

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

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

1 which is entitled to a fee from the bankruptcy court for  
2 filing in the bankruptcy court.

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

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

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

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

25 MR. BRUNSTAD: Justice Souter, it's



1 different in this sense. This is an indemnity, all-loss  
2 indemnity provision. The surety is not supposed to  
3 incur any loss, any cost whatsoever, for supplying these  
4 surety bonds to PG&E.

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

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

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

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

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

23 MR. BRUNSTAD: Yes, sir.

24 JUSTICE SOUTER: There has been no default  
25 on the workers comp obligation, and because they intend

1 to keep on running this business, there is reason to  
2 suppose that there will not be.

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

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

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

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

22 MR. BRUNSTAD: Absolutely false, Justice  
23 Souter. In bankruptcy, if you do not present your  
24 rights, if the rights of the workers themselves are not  
25 properly treated, they are lost. Under Section 1141,

1 they are extinguished.

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

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

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

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

1 unimpaired. If that hadn't been in the plan, then their  
2 rights would have been extinguished under Section 1141.

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

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

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

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

25 JUSTICE GINSBURG: I thought there was a

1 section of the code that preserved subrogation rights.

2 MR. BRUNSTAD: That's Section 509, Justice  
3 Ginsburg.

4 JUSTICE GINSBURG: Yes.

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

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

1 becomes the claim.

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

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

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

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

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

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

24 MR. BRUNSTAD: Yes, Justice Souter.

25 JUSTICE SOUTER: If that had been done,

1 would Travelers have asserted a claim?

2 MR. BRUNSTAD: Yes, Justice Souter.

3 JUSTICE SOUTER: What?

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

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

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

1 after the bankruptcy case had commenced, but far short  
2 of when it concluded. The surety had to step up to the  
3 plate and make the payments.

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

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

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

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

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

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

22 MR. BRUNSTAD: Yes, Justice Ginsburg, if  
23 your reimbursement claim is contingent, it will be  
24 disallowed, subject to reconsideration under Section  
25 502(j). And that's what the parties stipulated to in



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

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

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

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

24 JUSTICE KENNEDY: Are they --

25 JUSTICE BREYER: Question --

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

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

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

9 JUSTICE KENNEDY: In this case.

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

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

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

18 JUSTICE KENNEDY: But the bankruptcy court  
19 does determine reasonableness.

20 MS. MAHONEY: If State law provides for it,  
21 and all States do. The bankruptcy court adopts the  
22 State reasonableness standard for unsecured claims under  
23 Section 502(b)(1). Yes, Justice Breyer?

24 JUSTICE BREYER: I'm sort of back where  
25 Justice Kennedy started on this. Forget -- I'd like to

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

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

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

12 MR. BRUNSTAD: The security --

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

19 BRUNSTAD: And in --

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

23 MR. BRUNSTAD: Absolutely, Justice Breyer.

24 JUSTICE BREYER: My question is, I have 19  
25 professors on the other side coming to tell me that

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

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

11 MR. BRUNSTAD: Justice Breyer it happens all  
12 the time. In our brief, we cite to many, many cases in  
13 which attorneys' fees are allowed as unsecured claims.  
14 It's actually been happening for over 100 years, it  
15 happened in the Bankruptcy Act of 1998.

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

19 MR. BRUNSTAD: Correct, Your Honor.

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

23 MR. BRUNSTAD: Correct, Your Honor. And in  
24 a key case we cited, the Second Circuit's decision,  
25 United Manufacturers and Merchants, where they didn't

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

7 JUSTICE STEVENS: But what I don't -- there  
8 is a body of law on the other side of that issue, too,  
9 isn't there?

10 MR. BRUNSTAD: There is, Justice Stevens,  
11 but those are lower court decisions.

12 JUSTICE STEVENS: Yes. Absolutely. The  
13 Second Circuit is a lower court.

14 MR. BRUNSTAD: Well, compared to this Court,  
15 certainly, Justice Stevens.

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

20 MR. BRUNSTAD: Justice Stevens, I think it's  
21 important to say that the alternative rule that PG&E  
22 asked for is one that every court of appeals to have  
23 addressed has rejected. What they are saying is, oh,  
24 you can't get your attorneys' fees based on a  
25 construction of the Bankruptcy Code. No court of

1 appeals has accepted it. There are some lower  
2 bankruptcy court decisions that have accepted it, but  
3 that is routinely overturned on appeal.

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

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

16           MR. BRUNSTAD: Well --

17           JUSTICE BREYER: And, and yet there are no  
18 briefs from them; there are not -- there is no article  
19 that I could find in Bankruptcy Journal.

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

23           MR. BRUNSTAD: Chief Justice Roberts, that's  
24 correct. And our view is that the Court should deal  
25 only with the Fobian rule. And the alternative argument

1 which Respondent presented was never argued below, was  
2 not decided below, was not presented in the opposition  
3 to certiorari. It's been rejected by every single court  
4 of appeals --

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

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

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

19 JUSTICE GINSBURG: On both their statutory  
20 interpretation and the contract?

21 MR. BRUNSTAD: The contract, reasonableness,  
22 all of those issues. The circuit split, which we  
23 presented to the Court, and which I understand  
24 certiorari was -- well, I'm guessing -- certiorari was  
25 granted on, it deals with the Fobian rule. As this

1 common law rule, this sort of construct, that if you're  
2 litigating Federal law issues, well, as a matter of  
3 general Federal common law, you can't get the attorneys'  
4 fees unless it's authorized by Federal law.

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

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

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

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

25           MR. BRUNSTAD: Yes, Justice Stevens. That



1 would be appropriate on remand. I reserve the balance  
2 of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

4 MR. BRUNSTAD: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Rosenkranz.

6 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

7 ON BEHALF OF THE RESPONDENT

8 MR. ROSENKRANZ: Mr. Chief Justice, and may  
9 it please the Court:

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

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

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

24 JUSTICE KENNEDY: Well, if you say it  
25 doesn't go far enough then I infer from that you say

1 that it's valid as far as it goes?

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

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

13 MR. ROSENKRANZ: No, Your Honor --

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

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

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

23 MR. ROSENKRANZ: No, Your Honor. Everyone  
24 is absolutely clear that Fobian to the extent that it  
25 applies --

1 CHIEF JUSTICE ROBERTS: Well, not everyone.  
2 I'm not clear on it.

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

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

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

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

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

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

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

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

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

23 JUSTICE GINSBURG: Yes, but we are not a  
24 court of first view and you know that very well. We are  
25 a court of review. So no matter how well it's been

1 aired, we wait to see what the lower courts have said on  
2 a question. We don't take it in the first instance.

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

7 JUSTICE GINSBURG: I understand that because  
8 they have the Fobian rule.

9 MR. ROSENKRANZ: Yes. Now, but, Your Honor,  
10 let me just add two additional reasons why this Court  
11 should consider it now. The first is this has been  
12 fully ventilated in the lower courts. There is not a  
13 single argument in the briefs on either side on which  
14 there is not a lower court opinion going one way or  
15 another on every argument.

16 Secondly, there is an enormous amount of  
17 affirmative harm that can come from this Court simply  
18 saying, let us conclude that the Ninth Circuit was wrong  
19 in disallowing these claims on the logic that the Ninth  
20 Circuit followed, but we will reserve for a later day an  
21 open question of law on what Section 502(b) and 506(b)  
22 means. And the harm comes from the fact that  
23 overwhelmingly the lower courts in the last 10 years  
24 have concluded that 502(b) and 506(b) mean that  
25 unsecured creditors do not have these claims.

1           If this Court declares that it is now an  
2 open question --

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

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

11          JUSTICE STEVENS: But assuming, assuming the  
12 contract provides that.

13          MR. ROSENKRANZ: Yes, Your Honor.

14          CHIEF JUSTICE ROBERTS: And if that's true  
15 -- and the reason for that I suppose is that doesn't  
16 impair the rights of the general creditors at all.

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

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

21          MR. SHORR: Well, Your Honor, because  
22 Congress didn't say that. Congress gave only one answer  
23 to the question whether unsecured creditors get their  
24 attorneys' fees allowed, that is post-petition  
25 attorneys' fees allowed. It's either yes or no. There

1 is no on-off switch for solvent or insolvent creditors  
2 within the code, which is why Travelers never argued  
3 that as a, an objection to the plan of confirmation.

4 JUSTICE STEVENS: They argue it in their  
5 reply brief here.

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

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

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

18 JUSTICE BREYER: No. No. It said -- a  
19 pre-petition claim, if a creditor incurs the attorneys'  
20 fees post-petition, they incur it post-petition,  
21 afterwards they file, after the petition they file a  
22 claim with the bankruptcy court, in exercising or  
23 protecting a pre-petition claim that included a right to  
24 recover attorneys' fees. And they say that's what we  
25 have, we had a contract that gave us this right to

1 attorneys' fees. The fees will be pre-petitioned in  
2 nature, constituting a contingent pre-petition  
3 obligation that became fixed post-petition when the fees  
4 were incurred. All right. Now, what is your response  
5 to that?

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

10 JUSTICE BREYER: Because?

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

15 JUSTICE BREYER: Then you explain that to  
16 me?

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

25 JUSTICE BREYER: Well, that's because 506



1 had to do that in order to tell the bankruptcy courts  
2 how to deal with secured claims.

3 MR. ROSENKRANZ: No, Your Honor.

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

8 MR. ROSENKRANZ: Your Honor, Congress put  
9 506(b) in the code for one purpose and one purpose only,  
10 and that was to allow claims that are not elsewhere  
11 allowed, because if it doesn't do that 506(b) serves no  
12 purpose at all. 506(b) says nothing at all about  
13 whether the claim is secured.

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

21 MR. ROSENKRANZ: Your Honor, the answer is  
22 506(b) does not say anything about whether the allowed  
23 claim is secured or not. It is completely silent about  
24 that. Now, if we accept, as we explain in our brief in  
25 much more detail, if we accept Travelers' argument that

1 it was an allowed claim in the first instance and it is  
2 therefore furthermore an allowed security claim, 506(a)  
3 tells you what to do with that. 506(a) tells us that an  
4 allowed claim to a secured creditor is a secured claim.  
5 It still leaves Section 506(b) with nothing left to do.

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

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

23 MR. ROSENKRANZ: Your Honor, Congress said  
24 --

25 JUSTICE BREYER: Same puzzlement.

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

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

15 MR. ROSENKRANZ: Your Honor, that is a  
16 claim. It is a --

17 JUSTICE BREYER: It is a contingent claim.  
18 And you're saying this is the same.

19 MR. ROSENKRANZ: I'm saying -- they are  
20 saying this is a contingent claim. If -- and it is a  
21 very strange sort of a contingency. It is Travelers  
22 saying, we have a claim, it is a contingent claim; the  
23 contingency is whether tomorrow morning we're going to  
24 pick up the phone and called Weil Gotshal to monitor the  
25 bankruptcy proceeding.

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

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

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

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

22           MR. ROSENKRANZ: Your Honor, *Timbers* has the  
23    structural argument that focuses on what the purpose of  
24    506(b) is. But there are more indications. It would be  
25    odd for Congress, for example, to draft this provision

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

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

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

24 JUSTICE BREYER: What's the answer to my  
25 question? Is the answer that 11 of them say you can

1 collect attorneys' fees, but only as an unsecured claim  
2 against creditors.

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

6 JUSTICE BREYER: All right, so six.

7 MR. ROSENKRANZ: Yes.

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

11 MR. ROSENKRANZ: Yes, Your Honor.

12 JUSTICE BREYER: Which are those two?

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

14 JUSTICE BREYER: Which is that?

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

25 JUSTICE BREYER: That seems to cut the other

1 way because it says it's disallowed insofar as it's  
2 unreasonable of course, and therefore it would be  
3 allowed insofar as it's reasonable.

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

7 JUSTICE KENNEDY: No, attorney for the  
8 debtor.

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

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

19 MR. ROSENKRANZ: Fair enough Your Honor.

20 JUSTICE BREYER: -- irrelevant thing.

21 MR. ROSENKRANZ: Fair enough, Your Honor.  
22 My point is that Congress knew about attorneys' fees and  
23 if it wanted this huge class of unsecured creditors to  
24 collect their attorneys' fees for post-petition  
25 activities, it wouldn't have hidden that in a general

1 definition of claim or in the general statement of  
2 allowability.

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

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

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

21 MR. ROSENKRANZ: Your Honor, we didn't come  
22 here asking this Court to address this question.

23 Travelers put it front and center. They conceded --

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



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

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

23           MR. ROSENKRANZ: That's exactly --

24           CHIEF JUSTICE ROBERTS: That's an added  
25 complication. There's another case on which the Ninth

1 Circuit's based its decision in your case, DeRoche.  
2 Your proposed solution here doesn't address the issue in  
3 DeRoche because there it's the debtor that's seeking  
4 attorneys' fees.

5 MR. ROSENKRANZ: Absolutely, Your Honor.

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

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

23 So whatever this Court decides as to the  
24 statutory construction question on 502(b), this Court  
25 can say it's not resolving Fobian because this is a

1 predicate question. And this Court can say there may  
2 well be circumstances in which a creditor can say, you  
3 know what, for State law litigation we have this common  
4 law right, and we reserve for a later day the question  
5 of whether there is an exception to the statutory rule  
6 that we are articulating.

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

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

20           MR. ROSENKRANZ: Well, Your Honor --

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

24           MR. ROSENKRANZ: Your Honor, on the facts of  
25 this case if the rule had been otherwise, we don't know

1 whether PG&E would have been solvent at all. But we are  
2 arguing about a rule that is not one rule for Travelers  
3 and one rule for everyone else. We are arguing about a  
4 rule for the vast majority of cases.

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

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

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

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

25 JUSTICE GINSBURG: Where is the provision

1 that generally disallows attorneys' fees?

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

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

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

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

20 MR. ROSENKRANZ: Yes, Your Honor.

21 JUSTICE KENNEDY: -- the fees will be  
22 pre-petition.

23 MR. ROSENKRANZ: That was the same --

24 JUSTICE KENNEDY: So you disagree with that?

25 MR. ROSENKRANZ: I don't disagree with that,

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

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

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

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

24 MR. ROSENKRANZ: This was a completely  
25 different discussion on a --

1 JUSTICE BREYER: Sorry, I'll --

2 MR. ROSENKRANZ: -- completely different  
3 section referring to setoffs.

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

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

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

20 MR. ROSENKRANZ: 502(c) is, Your Honor.  
21 It's on the very back of the cert petition appendix on  
22 page, I believe 28. And so it says either estimate or  
23 liquidate, but always as of the date of the filing of  
24 the petition. Now as of the date of the filing of the  
25 petition it would be impossible to estimate without a

1 crystal ball.

2 JUSTICE BREYER: How do they do it with my  
3 leaky bathroom?

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

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

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

20 MR. ROSENKRANZ: Your Honor, I don't  
21 understand why a surety is different from any other  
22 contract. All contractual creditors will want their  
23 fees. The reason that they haven't been applying for  
24 them is that the overwhelming majority of bankruptcy  
25 courts will tell you no, you can't have them, because



1 the overwhelming majority of cases have been saying  
2 exactly what I'm saying to you. 502(b) does not allow  
3 them, and we can tell that by looking at 506(b).

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

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

18 MR. ROSENKRANZ: Your Honor, my response is  
19 that is absolutely wrong. The first draft of the plan  
20 which you can see on page 28 of the appendix says  
21 explicitly, and I quote, "all workers compensation  
22 programs are treated as executory contract." Treated as  
23 executory contracts and deemed assumed by the debtor,  
24 and that means that the workers got the most favorable  
25 treatment that they could have gotten. These are not

1 just unsecured claims.

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

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

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

25 And on page 141, just to orient the Court

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

11 Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Brunstad, you have eight minutes remaining.

14 REBUTTAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

15 ON BEHALF OF THE PETITIONER

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

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

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

23 In fact, what Travelers insisted is  
24 required by Section 1123 of the Bankruptcy Code, claims  
25 such as the workers' must be classified, their treatment

1 must be specified. If they are not they are eliminated.

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

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

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

22 In the Dow Corning case which we cite in  
23 our reply brief the Sixth Circuit expressly held where  
24 you have a solvent debtor you have to pay all of the  
25 attorneys' fees. That is an additional argument we

1 would develop on remand.

2 But all of their arguments about Section  
3 506 and their interpretation of 502 simply don't matter,  
4 because as a solvent debtor they're not entitled to take  
5 advantage of that theory even if it were valid. And we  
6 contend that it isn't valid. The court of appeals have  
7 resoundingly rejected it. The Second Circuit rejected  
8 it in United Merchants and Manufacturers. The Sixth  
9 Circuit rejected it in Dow Corning. The Eleventh  
10 Circuit it en banc in the Wellsville case. All of them  
11 considered the 506 argument that they're making and  
12 rejected it, and properly so.

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

1 problem and it remedied it.

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

22 JUSTICE KENNEDY: If you prevail, why can't  
23 every attorney who represents a creditor who has a  
24 credit card or a promissory note providing for  
25 attorneys' fees file something in bankruptcy and get

1 attorneys' fees for the filing of the claim?

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

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

22 JUSTICE STEVENS: It's interesting. You're  
23 of course a teacher too. The amicus brief by a bunch of  
24 professors has a different view of the history than  
25 you're describing.



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

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

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

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

24 Randolph & Randolph versus Scruggs involved  
25 the claim of a custodian, a custodian, an assignee, who

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 The case is submitted.

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

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