UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

AGWAY, INC.

Debtor

CASE NO. 02-65872 through 02-65877
Chapter 11
Jointly Administered

IN RE:

AGWAY GENERAL AGENCY, INC.

Debtor

IN RE:

BRUBAKER AGRONOMIC CONSULTING SERVICE LLC

Debtor

IN RE:

COUNTRY BEST ADAMS, LLC

Debtor

IN RE:

COUNTRY BEST-DEBERRY LLC

Debtor

IN RE:

FEED COMMODITIES INTERNATIONAL LLC

Debtor

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed by D. Clark Ogle, Liquidating Trustee ("LT") of the jointly administered debtors identified above ("Debtors") on August 26, 2004 (LT"s Motion"). The LT's Motion seeks to fix Claim No. 4792, filed by Fidelity and Deposit Company of Maryland ("F&D"), in the amount of $8,194,381.06 and to expunge what the LT argues are duplicate claims. The LT's Motion was originally scheduled to be heard on September 28, 2004, but has been adjourned many times over a period of three years on consent of the parties (*See* Dkt. Nos. 5583, 5708, 5777, 5825, 5986, 6009, 6122, 6208, 6330, 6389, 6434, 6548, 6639, 6738, 6797,

6842, and 6958.) On September 20, 2007, F&D filed its response to the LT's Motion, as well as a cross-motion to compel distribution to it as an unsecured creditor on the "liquidated" portion of its claims in the amount of $8,194,381.06.

Both the LT's Motion and F&D's Cross-motion were heard at the Court's regular motion term on September 25, 2007, in Utica, New York. On October 16, 2007, the LT filed his response to F&D's Cross-motion. On October 19, 2007, F&D filed a reply to the LT's response and on October 22, 2007, the LT filed a supplemental reply to F&D's reply. Both the LT's Motion and F&D's Cross-motion were adjourned to October 23, 2007. Following oral argument, the Court reserved decision on both motions and allowed the parties an opportunity to file memoranda of law.[1] The matter was submitted for decision on December 3, 2007.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), and (b)(2)(B) and (O).

FACTS

On October 1, 2002, the above-captioned Debtors filed voluntary petitions pursuant to

[1] At the hearing on October 23, 2007, there was some discussion of what F&D asserts is an alternative theory of recovery, namely that it holds an exoneration claim. The parties agreed to reserve F&D's right to assert an exoneration claim in the event that it is unsuccessful with its claim for reimbursement. Accordingly, the Court indicated that it would "leave exoneration off the table" for purposes of the briefing schedule.

chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1532 ("Code"). On April 28, 2004, the Court confirmed the Debtors' Second Amended Joint Plan of Liquidation ("the Plan") and appointed D. Clark Ogle as the Liquidating Trustee.

In the course of its prepetition operations, Agway, Inc. entered into a number of casualty insurance policies with various insurance carriers, including the Travelers Indemnity Company, the National Union Fire Insurance Company, the Reliance Insurance Company and the Pacific Employer's Insurance Company. In connection with those policies, Agway provided surety bonds ("Bonds") issued by "F&D" pursuant to agreements of indemnity whereby Agway, Inc. was to reimburse F&D for all amounts paid by F&D under the Bonds issued to each carrier as security for the payment of deductibles and premiums.[2] According to the LT, the face amount of the outstanding Bonds issued by F&D is approximately $23.9 million. In addition, allegedly there are letters of credit with a value of approximately $25.7 million. *See* LT's Motion at ¶ 10.

On March 6, 2003, the Court signed an Order establishing May 30, 2003, as the final date for filing proofs of claim against the Debtors. F&D filed a proof of claim on May 29, 2003, in each of the Debtors' cases in the amount of $27,650,330.50. Amended proofs of claim were filed on February 20, 2004, in the amount of $27,650,330.50, of which $2,775,441 was stated as being fixed.

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[2] According to the LT, F&D asserts that Telmark and the "Agway Energy entities" are also liable under the Agreements of Indemnity. On January 29, 2003, F&D commenced an action against those entities in the U.S. District Court for the District of Maryland, which action was subsequently transferred to the U.S. District Court for the Northern District of New York (Civil Action No. 5:2003-CV-0604) ("Telmark litigation"). On November 18, 2005, Chief U.S. District Judge Norman A. Mordue signed an order indicating that "at this time . . . there is no current reason to maintain this action on the open docket for statistical purposes" but that "any party may reopen the action by advising the Court in writing that the above entitled action should no longer be stayed." F&D asserts that the LT has conceded that "the proceedings in [the bankruptcy case] cannot close until the Telmark litigation has been completed or settled." *See* F&D's Supplemental Brief, filed December 3, 2007 (Dkt. No. 7068) at 11.

Second amended proofs of claim were filed on June 17, 2004, increasing the amount of the fixed portion to $4,369,775.84.[3]

According to the LT, as of the date of the LT's Motion, F&D has disbursed approximately $3,875,831.01, for which it asserts F&D is entitled to a subrogation claim in that amount pursuant to Code § 509(a). *See* LT's Motion at ¶ 18. On August 25, 2005, Third Amended Proofs of Claim were filed in the amount of $19,652,900. Fourth Amended Proofs of Claim were filed on September 14, 2005, in the amount of $20,730,784.67. Fifth Amended Proofs of Claim were filed on August 31, 2006, in the amount of $22,038.075.66. The Sixth Amended Proofs of Claim, filed on July 11, 2007, lists an increased amount in its fixed and liquidated claim in the amount of $8,194,381.06. The Sixth Amended Proof of Claim filed in Agway, Inc., Case No. 02-65872, also asserts fees and expenses of $635,922.85, interest totaling $1,656,290.57[4] and loss and expense reserves in the amount of $13,917,506. The total amount listed in the Sixth Amended Proof of Claim in Agway, Inc.'s case (Claim No. 4792) is $22,396.220.60.[5] Ultimately, the LT requests that the Court expunge

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[3] A second amended proof of claim was not filed in the case of Feed Commodities International, LLC ("FCI").

[4] At the hearing on October 23, 2007, LT's counsel represented to the Court that F&D had agreed that it was not entitled to interest and that that particular component of their proof of claim was "off the table."

[5] Since the hearing on October 23, 2007, F&D has filed further amendments in the Debtors' cases. In Agway, Inc.'s case, for example, on November 15, 2007, it filed a Seventh Amended Proof of Claim (Claim No. 4798) in the amount of $19,390,786.33, including $8,614,555.17 in monies actually disbursed to the various insurance carriers, $10,035,605.73 in loss and expense reserves and $740,625.43 in legal fees and costs. Its Eighth Amended Proof of Claim (Claim No. 4804), filed on December 18, 2007, is in the amount of $19,399,665.12, including $8,623,433.96 in monies actually disbursed to the various insurance carriers, $10,035,605.73 in loss and expense reserves, and $740,625.43 in legal fees and costs. Its Ninth Amended Proof of Claim was filed on May 8, 2008, (Claim No. 4811) also in the amount of $19,399.665.12, including $8,652,847.68 in monies actually disbursed to the various insurance carriers (an increase of $458,466.62 since the Sixth Amended Proof of Claim was filed), $10,035,605.73 in loss and expense reserves and $884,506.28 in legal

all claims filed by F&D, except Claim No. 4792 (the Sixth Amended Proof of Claim) and allow it in the amount of $8,194,381.06, identified by F&D as "costs" and representing the amounts actually disbursed by F&D under the Bonds to the various insurance carriers as of July 11, 2007.

ARGUMENTS

The LT argues that the Court should allow F&D's claim in the amount of $8,194,381.06 as being fixed and liquidated and disallow the balance of its contingent claim. It is the LT's position that Code §§ 502(e)(1) and (e)(2) allow resolution of a claim at a fixed point in time and then distribution may be made on any allowed claim. According to the LT, Code § 502(j) is the proper procedure to later revisit a claim to the extent that it was previously disallowed.

It is F&D's position that the Court has discretion to allow its fixed and liquidated claim pursuant to Code § 502(e)(2) and simply defer disallowing the balance of its contingent claim. According to F&D, this approach would alleviate the need for it to file a series of motions pursuant to Code § 502(j) seeking reconsideration of the disallowance of its contingent claim once actual disbursements under the Bonds have been made and the claim(s) becomes fixed and liquidated. F&D argues that "it will make sense to rule on the motion when it would be meaningful: either at the end of the case or after the LT obtains releases of the Bonds from the insurance carriers." F&D's Supplemental Brief, dated December 3, 2007 (Dkt. No. 7068), at 6.

Additionally, the LT objects to F&D's claim for attorneys' fees and costs/expenses in the

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fees and costs (an increase of $248,583.43 since the Sixth Amended Proof of Claim was filed). There is no dispute that while proofs of claim have been filed in a number of the Debtors' cases, F&D is only entitled to one recovery, whether it be from Agway, Inc. or some other related entity.

amount of $635,922.85, as set forth in F&D's Sixth Amended Proof of Claim, arguing that Code § 506(b) allows only oversecured creditors to recover reasonable attorneys' fees and costs. F&D relies on the recent United States Supreme Court decision in *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007), as well as *United Merchs. & Mfrs., Inc. v. Equitable Life Assurance Soc'y of the U.S. (In re United Merchs. & Mfrs., Inc.)*, 674 F.2d 134, 137-38 (2d Cir. 1982) and *In re Qmect, Inc.*, 368 B.R. 882 (Bankr. N.D. Calif. 2007), in arguing that it is entitled to recover postpetition attorneys' fees and costs, as authorized under its contract with Agway, as part of its unsecured claim.[6]

DISCUSSION

The Court's analysis must begin with the basic premise that a claim is broadly defined under the Bankruptcy Code. *See Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 91 (2d Cir. 1997). Pursuant to Code § 101(5), a claim includes a right to payment "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent*, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A) (emphasis added). Payment of the claim by the bankruptcy estate is dependent on whether or not the claim is allowed.

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[6] The Supreme Court declined to reach the issue of whether Travelers, as an unsecured creditor, could recover postpetition attorneys' fees. It held that "an otherwise enforceable contract allocating attorney's fees . . . is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Travelers Cas.*, 127 S.Ct. at 1204. The Supreme Court ultimately vacated the judgment of the U.S. Court of Appeals for the Ninth Circuit and remanded the case for further proceedings consistent with its opinion. On May 8, 2008, the U.S. Court of Appeals for the Ninth Circuit remanded the case to the district court with instructions to remand it to the bankruptcy court for further proceedings. *See Travelers Cas.*, 525 F.3d 885 (9th Cir. May 8, 2008).

A claim is "deemed allowed" unless a party in interest objects. 11 U.S.C. § 502(a). If there is an objection, as is the case herein, the Court, after notice and a hearing, "shall determine the amount of such claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount . . ." subject to certain exceptions identified in the statute. 11 U.S.C. § 502(b).

Code § 502(e)(1)(B)

Code § 502(e)(1)(B) is one such exception and provides that "the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that . . . such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . . 11 U.S.C. § 502(e)(1)(B).

The LT points out that under the terms of the Plan there is to be no payment or distribution on a disputed claim until it is an "allowed claim." *See* Article 8.01 of the Plan. With its Cross-motion, F&D requests that the Court allow its claim to the extent that it is currently "liquidated," thereby entitling it to a distribution at this time. As noted above, the LT takes no issue with F&D receiving payment of $8,194,381.06, as set forth in its Sixth Amended Proof of Claim, as an allowed claim. However, it is the LT's position that the balance of F&D's claim, to the extent that it is currently contingent, should be disallowed.

The Court has reviewed the case law cited by both parties. None of the cases provide the remedy that F&D is proposing, namely, having the Court defer disallowance of the balance of F&D's claim until the end of the case. Code § 502(e)(1)(B) directs that the Court "shall disallow" any claim for reimbursement or contribution to the extent that such claim is contingent at the time of allowance or disallowance. As pointed out by U.S. District Judge, Loretta A. Preska of the

United States District Court for the Southern District of New York, in *Aetna Cas. and Sur. Co. v. Georgia Tubing Co.*, Case No. 93 Civ. 3659, 1995 WL 429018 (S.D.N.Y. July 20, 1995), *aff'd* 93 F.3d 56 (2d Cir. 1996), both U.S. Bankruptcy Judge Francis J. Conrad and U.S. Bankruptcy Judge Burton R. Lifland disallowed the proofs of claim filed by Aetna in related reorganization proceedings and indicated that Aetna's remedy in both cases was to move for reconsideration pursuant to Code § 502(j). *Id.* at *1 and *5 n.3; *see also In re Worldcom, Inc. Sec. Litig.*, 293 B.R. 308, 323 (S.D.N.Y. 2003) (noting that "[w]here a contingent claim is disallowed, it may be reconsidered when the contingency is 'resolved'"); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 56 (Bankr. D.Del. 2001).

Thus, F&D has a remedy pursuant to Code § 502(j) to have its claim(s) reconsidered once the claim(s) has become fixed and liquidated. The Court is at a loss to understand the advantage to F&D in having the Court defer indefinitely its ruling on the disallowance of F&D's claim(s). It has suggested that this will result in its having to make several motions in the future pursuant to Code § 502(j). However, if it were willing to wait for the Court to delay ruling on the disallowance of its claim(s) to some date in the future, then it should have no problem delaying any requests for reconsideration of the disallowance of its claim(s) pursuant to Code § 502(j) as well. It appears to be a distinction without a difference as far as the treatment of its claim(s) is concerned.

However, in light of the fact that it has now been several months since the LT's Motion was heard and F&D has filed three additional amended proofs of claim within that time frame, the Court will consider any objections the LT has to F&D's Ninth Amended Proof of Claim, consistent with this Decision, before allowing F&D's claim for the amounts actually disbursed by it under the Bonds through May 8, 2008.

Allowance of F&D's Claim for Attorneys' Fees

At the hearing on October 23, 2007, the LT made an argument that the addition of a claim for attorneys' fees and costs incurred in "attempting to enforce the Indemnity Agreement" by F&D, beginning with its First Amended Proof of Claim (Claim No. 4568), filed on February 20, 2004, in the amount of $391,018, represents a new claim and not an "amendment." However, as one court has noted, "as a general rule, amendments intended merely to increase the amount of a claim grounded in the same right to payment are not considered 'new' claims under the Code." *See In re Hemingway Transport, Inc.*, 954 F.2d 1, 10 (1st Cir. 1992). In this case, F&D's claim or right to payment includes not only the monies it has disbursed under the Bonds, but also any attorneys' fees and costs, under the terms of the indemnity agreements entered into with the Debtors. Thus, the Court does not construe the addition of attorneys' fees and costs to be a "new" claim but rather an amended claim.

The Supreme Court in *Travelers Casualty* limited its discussion to "whether the Bankruptcy Code disallows contract-based claims for attorneys' fees, based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law." *Travelers Cas.*, 127 S.Ct. at 1204. It pointed out that "it remains true that an otherwise enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Id.*. In the matter under consideration, this Court is asked to address whether the Bankruptcy Code "provides otherwise" such that F&D's claim for attorneys' fees, incurred postpetition, should be disallowed because of its status as an unsecured creditor.

This issue was recently addressed by the court in *In re SNTL Corp.*, 380 B.R. 204 (9th Cir. BAP 2007) in which the Bankruptcy Appellate Panel for the Ninth Circuit discussed the split in decisions both pre- and post-*Travelers*. For example, the United States Court of Appeals for the Second Circuit in *United Merchants*, 674 F.2d at 139, in what *SNTL Corp.* refers to as one of the minority line of cases, allowed unsecured creditors to claim "collection costs," including reasonable attorney's fees, incurred postpetition based on a prepetition contract.[7] As pointed out by *SNTL Corp.*, the split has continued post-*Travelers*. *Compare Qmect, Inc.*, 368 B.R. 882 (allowing contract-based attorney's fees incurred postpetition in its prepetition claim) to *In re Electric Mach. Enters., Inc.*, 371 B.R. 549 (Bankr. M.D. Fla. 2007) (disallowing unsecured creditor's postpetition attorneys' fees). Ultimately, the court in *SNTL Corp.* agreed with the reasoning of the court in *Qmect* and concluded that "claims for postpetition attorneys' fees cannot be disallowed simply because the claim of the creditor is unsecured." *SNTL Corp.*, 380 B.R. at 223.[8]

The LT's makes several arguments in his objection to F&D's claim for attorneys' fees. The

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[7] This Court, of course, is bound by the decisions of the U.S. Court of Appeals for the Second Circuit unless there is a basis for distinguishing those cases. Admittedly, *United Merchants* was decided under the Bankruptcy Act without consideration of Code § 506(b). In view of the Court's conclusions herein, it need not decide whether this distinction has merit for purposes of the issue before this Court.

[8] The debate has found itself presented not only in the case law but also in several law review articles: Mark S. Scarberry, *Interpreting Bankruptcy Code Sections 502 and 506: Post-Petition Attorney's Fees in a Post-Travelers World*, 15 AM. BANKR. INST. L. REV. 611 (Winter 2007); Jennifer M. Taylor and Christopher J. Mertens, *Travelers and the Implications on the Allowability of Unsecured Creditors' Claims for Post-petition Attorneys' Fees against the Bankruptcy Estate*, 81 AM. BANKR. L.J. 123 (Spring 2007); N. Theodore Zink, Jr. and Andrew Rosenblatt, *An Unsecured Creditor's Right to Recover Attorneys' Fees: Highlighting the Section 502/Section 506 Dispute*, J. OF BANKR. L. 2007.06-2 (June 2007); *see also* Ray Geoffroy, *Show Me the Money: The Debate over Creditors' Postpetition Attorneys' Fees*, 14 BANKR. DEV. J. 425 (1998) and Liore Z. Alroy and J. Michael Mayerfeld, *Contracted-for Post-Petition Attorneys' Fees and Collection Costs: United Merchants Revisited*, 1992 COLUM. BUS. L. REV. 309 (1992).

first, of course, is based on the language in Code § 506(b) and the maxim of statutory construction known as *expressio unius est exclusio alterius*.[9] It is the LT's position that because Congress expressly allowed attorneys' fees, as well as interest, only for holders of oversecured claims, to the extent of the value of the property securing the claims pursuant to Code § 506(b), it necessarily follows that attorneys' fees for holders of unsecured claims should not be allowed since there is no comparable provision authorizing unsecured creditors to collect their attorneys' fees from a debtor's estate. Yet, Code § 506(b) is not concerned with the question of claim *allowance*. It is concerned with the "[d]etermination of secured status" and what may be included in a secured claim. *See SNTL Corp.*, 380 B.R. at 220.

It is Code § 502(b), not Code § 506(b), that governs the allowance and disallowance of claims. *Id.*, citing *In re Rodriguez*, 375 B.R. 535, 545 (9th Cir. BAP 2007). The LT, as well as many courts in the "majority," make the argument that disallowance of claims by unsecured creditors such as F&D for attorneys' fees incurred postpetition is mandated based on the Supreme Court's twenty year old decision in *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988). In that case, the Supreme Court held that an undersecured creditor could not receive postpetition interest on the unsecured portion of its debt. *Id.* at 380. The court's holding comports with Code § 502(b)(2), which expressly excepts from allowance a claim for unmatured interest. This exception is, of course, subject to the specific statutory provision of Code § 506(b), which includes a claim for unmatured interest if provided by contract or agreement as long as the creditor

[9] Translated "the expression of one thing is the exclusion of another."

is oversecured, and then only to the extent of the value of the security.[10] Code § 502(b) does not contain a similar prohibition against the allowance of attorneys' fees. *See SNTL Corp.*, 380 B.R. at 220, citing *Qmect, Inc.*, 368 B.R. at 885; *In re New Power Co.*, 313 B.R. 496, 509-10 (Bankr. N.D.Ga. 2004); *but see In re Woodmere Investors Ltd. P'ship*, 178 B.R. 346, 355-56 (Bankr. S.D.N.Y. 1995) (distinguishing *United Merchants* and concluding that the rationale of *Timbers* was applicable to the disallowance of a claim for attorney's fees and costs).

In fact, the Supreme Court in *Travelers Casualty*, without considering the effect of Code § 506(b), indicated that "'claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed' under Code § 502(b)." *In re Smith*, Case No. 06-60768, 2008 WL 185784, at *6 (Bankr. W.D.Mo. Jan. 19, 2008), quoting *Travelers Cas.*, 127 S.Ct. at 1206. Accordingly, the Court concludes that the analysis in *Timbers* and its discussion of Code § 506(b) with respect to an allowance of postpetition interest is not persuasive on the issue of attorneys' fees and costs under the circumstances now before this Court as more fully discussed below.

A third argument that needs to be considered is when F&D's claim for attorneys' fees arose. Code § 502(b) requires that the Court "determine the amount of such claim . . . as of the date of the filing of the petition." 11 U.S.C. § 502(b). Yet, as of the petition date the fees for which F&D now seeks to recover were contingent to the extent that the indemnity agreements provided for them. Nevertheless, under its contract with the Debtors, it had a right to payment or a "claim" as of the

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[10] Code § 506(b) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to provide for "reasonable fees, costs, or charges provided for under the agreement *or State statute* under which such claim arose." The new language has no application to the matter herein. In addition, the new language has application only to cases filed after October 17, 2005.

prepetition date, despite the fact that it may have been unliquidated, unmatured and contingent. As pointed out by the court in *SNTL Corp.*,

> "if the creditor incurs the attorneys' fees postpetition in connection with exercising or protecting a prepetition claim that included a right to recover attorneys' fees, the fees will be prepetition in nature, constituting a contingent prepetition obligation that became fixed postpetition when the fees were incurred."

See SNTL Corp., 380 B.R. at 221, quoting 5 *Collier on Bankruptcy* § 4553.03[1][i] (15th ed. updated 2007); *see also New Power*, 313 B.R. at 508 (indicating that "[s]o long as the right to collect the fees existed prepetition, the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable pre-petition claim for the fees"); *see also Qmect, Inc.*, 368 B.R. at 884 (indicating that the fact that the claim was contingent as of the petition date is not a basis for disallowance of the claim); *Insurance Co. of North America v. Sullivan*, 333 B.R. 55, 62 (D.Md. 2005) (embracing proposition that "a prepetition indemnity agreement covering attorney's fees creates a contingent right to those attorney's fees for litigation occurring postpetition [in fulfilling surety obligations]").

The Court believes that the contingent nature of F&D's claim, including its claim for attorneys' fees and costs, distinguishes it from other cases in analyzing whether such a claim should be allowed despite F&D's status as an unsecured creditor. As discussed above, the fact that the fees were incurred postpetition does not negate the fact that F&D's claim is contingent and deemed to have arisen prepetition based on its agreements with the Debtors. In the view of the Court, the only issue is the whether the fees and costs are enforceable under applicable state law and whether they are reasonable.

The LT also makes the argument that disallowance of F&D's claim for attorneys' fees promotes equality of distribution among other unsecured creditors whose claims are based on

contracts that have no provision for an award of attorneys' fees or claims such as those are based on torts and not contracts. However, the U.S. Court of Appeals for the Second Circuit in *United Merchants* took exception to this position, stating that the court "cannot agree that the policy of equitable distribution renders an unsecured creditor's otherwise valid contractual claim for collection costs unenforceable in bankruptcy." *United Merchants*, 674 F.2d at 137.

Courts have also expressed concerns that if unsecured creditors were permitted to recover their attorneys' fees pursuant to their prepetition contract, there would be nothing to prevent "individual creditors from utilizing scorched-earth litigation tactics or absorbing an inequitable amount of estate assets." *Elec. Mach.*, 371 B.R. at 551-53. Such policy concerns are more appropriately addressed by Congress, rather than the courts. *See SNTL Corp.*, 380 B.R. at 222. As pointed out by the Court in *SNTL Corp.*, some of these concerns have been addressed by Congress by requiring that compensation for attorneys that is to be paid from the estate be reasonable. *See id.*, n.20 (listing Code §§ 303(i)(1)(B), 329(b), 330(a), 502(b)(4), and 503(b)(4) which refer to "reasonable compensation" and the "reasonable value of services").

The Court concludes that the Bankruptcy Code does not prohibit the allowance of F&D's claim for attorneys' fees and costs, to the extent that it is a prepetition contingent claim which was fixed postpetition and provided that the fees and costs are reasonable and enforceable under substantive nonbankruptcy law. Accordingly, the Court deems it appropriate to allow the LT an opportunity to review said fees and costs in F&D's Ninth Amended Proofs of Claim and to file any objections it may have before the Court rules on the allowance of said fees and costs, as well as F&D's fixed and liquidated claim for reimbursement.

Based on the foregoing, it is hereby

ORDERED that the LT's Motion is granted insofar as the Court will allow the claim of F&D to the extent that it is fixed and liquidated and represents the amounts actually disbursed under the Bonds to the various insurance carriers, as of May 8, 2008, when the Ninth Amended Proof of Claim was filed, subject to the LT's objection as set forth below; it is further

ORDERED that the LT shall have thirty (30) days from the date of this Order to file a motion objecting to the fixed and liquidated portion of the Ninth Amended Proof of Claim in the amount of $8,652,847.68; it is further

ORDERED that in the event that the LT files no objection to the fixed and liquidated portion of the Ninth Amended Proof of Claim in the amount of $8,652,847.68 within said 30 days, that the LT make a distribution on said "liquidated" portion of F&D's claim in accordance with Debtors' Second Amended Joint Plan of Liquidation confirmed by the Court, dated April 28, 2004; it is further

ORDERED that the LT shall have thirty (30) days from the date of this Order to file a motion on notice and hearing, objecting to F&D's claim for attorneys' fees and costs, as set forth in its Ninth Amended Proof of Claim in the amount of $884,506.28, solely on the basis of their reasonableness and the extent to which they were contingent on October 1, 2002 and enforceable under the terms of the indemnity agreements, for the Court's consideration before allowing said claim; it is finally

ORDERED that the balance of F&D's prepetition claim, as reflected in its Ninth Amended Proof of Claim, to the extent it remains contingent, is disallowed, subject to being reconsidered pursuant to Code § 502(j), on motion filed by F&D not earlier than six (6) months from the date of this Order, and thereafter at intervals of not less than six (6) months, unless otherwise ordered by

this Court for good cause.

Dated at Utica, New York
this 18th day of July 2008

/s/ Hon. Stephen D. Gerling
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge