No. 08-

IN THE

Supreme Court of the United States

ZURICH AMERICAN INSURANCE COMPANY,
Petitioner,

v.

LEXINGTON COAL COMPANY, LLC,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In order to encourage lenders, vendors, and other creditors to do business with companies in bankruptcy, facilitating reorganization and the preservation of businesses, the Bankruptcy Code provides that administrative expenses—claims to payment that arise during a bankruptcy case, including the "actual, necessary costs and expenses of preserving the [bankruptcy] estate," 11 U.S.C. §503(b)(1)(A)—are entitled to priority over the claims of other creditors, *see id.* §507(a). The questions presented are:

1. Whether the Sixth Circuit erred in holding that administrative-expense priority does not extend to *all* payments due under a contract entered or assumed by the debtor during a bankruptcy case—a holding in direct conflict with decisions of the First, Second, and Fourth Circuits.

2. Whether the Sixth Circuit erred in holding that a creditor's claim against a bankruptcy estate arises only when the creditor's right to payment accrues under state law, in agreement with the Third Circuit but in conflict with the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits.

PARTIES TO THE PROCEEDINGS

Petitioner is Zurich American Insurance Company, the appellant below. Respondent is Lexington Coal Company, LLC, the appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Zurich American Insurance Company is a wholly-owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation. Zurich Holding Company of America, Inc. is a 99.8711% owned subsidiary of Zurich Insurance Company, a Swiss corporation. Zurich Insurance Company is directly and indirectly owned by Zurich Financial Services, a Swiss corporation. Zurich Financial Services is the only publicly traded parent company, with a listing on the Swiss stock exchange, and a further trading of American Depositary Shares.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Zurich American Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 536 F.3d 683 (6th Cir. 2008). App. 1a-2a. Its order denying rehearing is unreported. App. 69a-70a. The opinion of the United States District Court for the Eastern District of Kentucky is reported at 371 B.R. 210 (E.D. Ky. 2007). App. 3a-58a. The opinion of the United States Bankruptcy

Court for the Eastern District of Kentucky is reported at 343 B.R. 839 (Bankr. E.D. Ky. 2006). App. 59a-68a.

JURISDICTION

The Court of Appeals entered its judgment on August 13, 2008, and denied rehearing on January 8, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The version of §101(5) of the Bankruptcy Code, 11 U.S.C. §101(5), applicable to this case provides in relevant part:

> "Claim" means—
>
> > (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[.]

The version of §503(b) of the Bankruptcy Code, 11 U.S.C. §503(b), applicable to this case provides in relevant part:

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> > (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]

The version of §507(a) of the Bankruptcy Code, 11 U.S.C. §507(a), applicable to this case provides in relevant part:

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.[1]

STATEMENT

1. Bankruptcy has dual goals: to grant a debtor a fresh start, including where appropriate the opportunity to reorganize and thus preserve its business, and to apportion the debtor's property equitably among its creditors, in accordance with the statutory priorities established by the Bankruptcy Code. *See, e.g., Central Va. Comm. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006). To achieve those goals, the Bankruptcy Code provides that when a debtor commences a bankruptcy case, all of its property, with certain narrow exceptions, becomes part of the bankruptcy estate. 11 U.S.C. §541. The debtor's creditors may then assert claims against the estate. *See id.* §§501-503. When an eligible debtor sat-

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[1] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") amended each of these provisions. BAPCPA amended §101(5) by inserting the words "The term" before the word "claim." Pub. L. No. 109-8, §1201(2). It amended §503(b)(1)(A) to clarify that certain back-pay awards are entitled to administrative-expense priority. *Id.* §329. And it amended §507(a) to provide that certain domestic-support obligations have first priority, above administrative expenses. *Id.* §212. None of those amendments applies in cases, like this one, commenced prior to the enactment of BAPCPA. *Id.* §1501. Nor is any of these amendments material to any issue in this case. For clarity, this petition hereafter refers only to the version of the Bankruptcy Code applicable to this case.

isfies the requirements of the Code, it may obtain a discharge of the existing claims against it. *See id.* §727 (Chapter 7 cases); *id.* §1141(d) (Chapter 11 cases).

The Bankruptcy Code contains an exceedingly broad definition of the "claims" that may be asserted (and potentially discharged) in bankruptcy: a "claim" includes any "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). As Congress explained when the Code was enacted, "[b]y this broadest possible definition," the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; *see also Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990); *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991).

This case involves a special type of claim against the bankruptcy estate: an administrative-expense claim. Administrative expenses are obligations incurred by the debtor or bankruptcy trustee during the bankruptcy case. They include, for example: loans, leases, supply agreements, or other contracts enabling the debtor to continue its business while it is attempting to reorganize; wages paid by the business while in bankruptcy; and tort or environmental liabilities incurred through the debtor's operations while it is in bankruptcy. *See generally Reading Co.* v. *Brown*, 391 U.S. 471 (1968). As defined by the Bankruptcy Code, administrative expenses include all "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. §503(b)(1)(A).

The Bankruptcy Code provides that administrative expenses receive priority over the claims of other creditors. 11 U.S.C. §507(a). Priority status is important to a creditor's recovery because the claims against a bankruptcy estate typically far outstrip the value of the debtor's assets. Creditors with high-priority claims may be paid in full, whereas those lower in the hierarchy will likely recover only pennies on the dollar, or nothing at all. Congress chose to grant administrative-expense claims priority to "provide an incentive for creditors and others to continue or commence doing business with an insolvent entity." 4 *Collier on Bankruptcy* ¶503.06[2] (15th rev. ed. 2008). Lenders, suppliers, and others considering dealing with a debtor will understandably be wary that credit they extend might not be repaid. This concern is allayed if, in the event "the debtor fails to rehabilitate itself and winds up in liquidation, they can move to the front of the distributive line, ahead of the debtor's pre-bankruptcy creditors." *In re Klein Sleep Prods., Inc.*, 78 F.3d 18, 20 (2d Cir. 1996). Without that assurance, a debtor would be unlikely to obtain credit except on the most onerous terms, and its prospects of continuing its business and emerging from bankruptcy would be severely limited.

2. Petitioner Zurich American Insurance Company ("Zurich") provided workers' compensation, automobile, and general liability insurance to a coal-mining company, Horizon Natural Resources, and its affiliates (collectively, "Horizon"), beginning in 1998. Workers' compensation insurance was essential to Horizon's business. Indeed, it was required by state law. App. 11a n.5; Ky. Rev. Stat. Ann. §342.340.

There are two principal varieties of workers' compensation insurance policies: "guaranteed-cost" policies, in which the insurer assumes all the risk of the

workers' compensation claims, and "loss-sensitive" policies, including deductible policies, in which the insured assumes a portion of the risk associated with each claim. Because the insured bears part of the risk, deductible policies generally have significantly lower premiums than guaranteed-cost policies, and a significantly lower overall cost even when the deductibles are taken into account. App. 8a-9a. In addition, the deductibles structure spreads out the insured's payments, providing a cash-flow advantage particularly helpful to debtors in bankruptcy.

The insurance policies Horizon purchased from Zurich were deductible policies, under which Zurich agreed to pay the full amount of the claims against Horizon up front, and then bill Horizon for the deductible. Thus, Horizon had two payment obligations under the policies: first, to pay premiums, and second, to reimburse Zurich for the deductibles Zurich advanced. Zurich, in turn, was obligated to pay workers' compensation claims asserted against Horizon arising from accidents or other occurrences during the period of insurance coverage, even if the resulting injuries did not manifest themselves for months or years after coverage ended. Because coal-mining is particularly likely to result in injuries, such as black-lung disease, that become manifest only after a long latency period, such future workers' compensation claims are a virtual certainty. As the district court recognized, the "practical realit[y]" is that "these deductible obligations will inevitably arise, and in large number," "reach[ing] well into the millions of dollars range." App. 28a n.17.

3. In November 2002, Horizon filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. Zurich continued providing insurance coverage to Horizon while Horizon attempted to reorganize. In

September 2003, Horizon assumed the Zurich policies, with bankruptcy-court approval, pursuant to 11 U.S.C. §365. App. 13a-14a.[2] In June 2004, Zurich and Horizon negotiated a series of short-term extensions taking the policies through the end of September 2004. App. 15a.

Horizon's reorganization efforts were unsuccessful, and it decided to liquidate. In August 2004, it auctioned part of its business as a going concern and sold the rest of its assets to other buyers, including respondent Lexington Coal Company ("Lexington"). The bankruptcy court approved the sale and confirmed Horizon's plan of liquidation, and on September 30, 2004, Horizon closed the sale of its assets. Under the order confirming Horizon's plan, Horizon was deemed dissolved as of that date. Horizon's insurance coverage with Zurich had also expired by that date. App. 15a.

Zurich then filed an administrative-expense claim against the estate (within the period for doing so established by the plan). Zurich sought to collect the amount of the deductibles it would have to advance in the fu-

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[2] Section 365 permits a trustee or debtor-in-possession to assume or reject an "executory contract ... of the debtor," subject to the court's approval. If the debtor chooses to assume a contract, it "continue[s] to receive the benefits of [the contract], while also continuing to perform its obligations under" the contract. *N.C.P. Mktg. Group, Inc.* v. *BG Star Prods., Inc.*, No. 08-463, 2008 WL 4522334, at *1 (U.S. Oct. 6, 2008) (Kennedy, J., respecting the denial of certiorari). In that event, expenses incurred under the assumed contract are treated as administrative expenses, just as if the contract were entered into during the bankruptcy. *See, e.g., NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 531-532 (1984). If the debtor rejects the contract, it walks away from its obligations under the contract, and the counterparty receives a claim for damages against the estate. *See id.* at 531.

ture on claims covered by Horizon's now-expired insurance policies. Because the deductibles would be paid on workers' compensation claims that had not yet been made, Zurich's claim required estimation. The evidence Zurich presented as a basis for that estimation was an actuarial calculus called an "ultimate loss projection." Insurance companies prepare such actuarial reports for "the basic purpose of estimating future obligations in connection with insurance coverage." App. 18a. Zurich's net administrative-expense claim, based on its ultimate loss projection and subtracting payments and the value of collateral Zurich had received from Horizon, was approximately $14.5 million. App. 20a-21a.

Lexington objected to Zurich's claim, and the bankruptcy court held that the deductibles were not administrative expenses. It observed that the Sixth Circuit applies a two-part test to determine whether a claim represents the "actual, necessary costs and expenses of preserving the estate" under §503(b)(1)(A): first, the debt must have "arisen from a post-petition transaction with the debtor," and second, it must have "directly and substantially benefi[t]ed the estate." App. 63a. The court asserted that "[e]xpenses incurred post-confirmation are not entitled to administrative expense priority treatment," and that payments Horizon owed under the insurance policies thus "must actually be paid prior to confirmation in order to qualify as an administrative expense." App. 64a-65a.

4. The district court affirmed. In doing so, the court recognized that "it is undisputed that Zurich will be rightfully 'owed' any deductible obligations advanced under the Zurich Policies ... when they 'arise.' " App. 23a-24a. It also recognized that the insurance coverage Zurich provided was essential to Horizon's reorganization efforts:

> There can be no question that ... the insurance coverage provided by the Zurich Policies was critical to the Debtors' operations. Without the insurance provided by Zurich, the Debtors would have been unable to operate their business as a going concern both prior to and during the pendency of the bankruptcy.

App. 10a-11a.

The district court nevertheless held that the deductibles Horizon owed under the insurance policies were not administrative expenses and that Zurich was not entitled to receive payment for the deductibles from the bankruptcy estate. Instead, the court concluded that Zurich could recover the deductibles only from any dissolved entity that might remain after the bankruptcy. That is, while Zurich would remain liable for future claims against Horizon, it would never be repaid for the substantial deductibles that Horizon had promised to pay in return for the insurance it purchased.

In so holding, the district court examined both the language of §503(b)(1)(A) and the "benefit to the estate" test on which the bankruptcy court had relied. The court first held that Zurich's claim for deductibles was not an "actual" cost of preserving the estate because Horizon's state-law obligation to reimburse Zurich for the deductibles would not accrue until after the bankruptcy—after injured workers had made claims and Zurich had paid those claims. App. 27a-28a ("Zurich is only contractually obligated to pay the deductibles, and subsequently seek reimbursement, once the [workers' compensation] claims actually 'arise.' ").

The court next concluded that the deductibles were not "necessary" costs of preserving the estate because

Horizon would not become obligated to pay them until after it had dissolved. "The moment Zurich is contractually permitted to seek reimbursement from the Debtors for the advanced deductibles, the estate will have already dissolved and the Debtors will cease to exist. Consequently, payment of the claimed expenses will in no way act to preserve an estate when there is no estate to preserve." App. 29a.

For similar reasons, the district court concluded that Zurich's claim did not meet the "benefit to the estate" test. App. 30a-34a. It reasoned that because the insurance contract did not require the reimbursement of deductibles until after Zurich had advanced them, Horizon's "deductible obligations d[id] not even exist" until after Horizon's dissolution and thus the payment of the deductibles would not provide a direct and substantial benefit to the estate. App. 33a-34a. The court acknowledged Zurich's argument that its claim for deductibles arose *during* the bankruptcy because Horizon assumed the insurance policies, and the accidents or other occurrences giving rise to the workers' compensation claims necessarily took place, before the bankruptcy ended. But the court dismissed that argument, reasoning that it "does not alter the dispositive adjudication that the payment of the claimed expenses when they truly arise"—in the court's view, only after the bankruptcy's conclusion—"would not act to either preserve [or] benefit the estate." App. 40a. Because Zurich's claim for deductibles would not arise until after the bankruptcy, the court reasoned, it could not be an

administrative-expense claim that could be asserted in the bankruptcy.[3]

5. The Sixth Circuit affirmed in a published, *per curiam* opinion that adopted the district court's reasoning. App. 2a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with two lines of cases from other courts of appeals and with this Court's decision in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968). *First*, the court's conclusion that a debtor's obligation to pay a creditor under a contract assumed during the bankruptcy does not benefit the estate—and is not an administrative expense—if the payment is not yet due at the time of confirmation conflicts with decisions of the First, Second, and Fourth Circuits, and rests on a premise rejected in *Reading*. *Second*, the court's conclusion that Zurich's claim did not arise until its right to payment accrued as a matter of state contract law exacerbated one of the most significant and deeply entrenched splits of authority in bankruptcy law: the well-established three-way division of authority regarding how to determine when a bankruptcy claim arises. Both questions are recurring, significant to debtors' ability to reorganize, and likely to be even

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[3] The district court refused to rest its decision on two of the grounds the bankruptcy court relied on. First, it rejected the bankruptcy court's conclusion that Zurich's claim was untimely, holding that Zurich had filed its claim before the bar date and nothing more was required. App. 51a-53a. Second, although the district court suggested that estimation might not be appropriate for an administrative-expense claim, it chose not to make that suggestion part of its holding. App. 44a-47a (discussing estimation in section entitled "Other (Non-Dispositive) Considerations").

more important in the near future, as the nation's economic crisis brings a wave of new bankruptcies.

I. THE SIXTH CIRCUIT'S HOLDING THAT FUTURE OBLIGATIONS UNDER A CONTRACT ASSUMED DURING BANKRUPTCY ARE NOT ADMINISTRATIVE EXPENSES CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND IS IN TENSION WITH THIS COURT'S PRECEDENT

A. The Sixth Circuit's Holding Conflicts With The Decisions Of Other Courts Of Appeals

The Sixth Circuit, adopting the district court's reasoning, held that Horizon's obligation to pay deductibles under the Zurich policies it assumed during its bankruptcy so that it could continue operating its business was not an "actual, necessary cost[] and expense[] of preserving the estate" under §503(b)(1)(A). The court reasoned that payment of the deductibles could not "preserve [the] estate" because Horizon would not become obligated to pay them until after the bankruptcy case had ended. App. 27a. Similarly, applying the "benefit to the estate" test that various courts have employed to determine whether a claim is entitled to administrative-expense priority, the court reasoned that "the payment of the deductibles, when and if they should arise ... does not provide a direct and substantial benefit to, nor act to preserve, a bankruptcy estate where there is no longer an estate to benefit." App. 33a.

That reasoning suffers from a fundamental flaw: it asks whether *payment of the deductibles* would preserve or benefit the estate, rather than asking whether the *insurance* Horizon received in return for agreeing to pay premiums and deductibles preserved or benefited the estate. The purpose of granting priority to administrative expenses is to induce providers of es-

sential funds, goods, and services—such as insurance—to continue doing business with a debtor. The Sixth Circuit accordingly erred by concluding that "the benefit [to the estate] should be measured" only when the payment would become due, App. 32a, rather than during the bankruptcy case, when Horizon was enabled to continue its business by the insurance Zurich provided.

Three other federal courts of appeals have addressed this precise question and reached the opposite conclusion. *See In re Hemingway Transp., Inc.*, 993 F.2d 915 (1st Cir. 1993); *In re Klein Sleep Prods., Inc.*, 78 F.3d 18 (2d Cir. 1996); *In re Merry-Go-Round Enters., Inc.*, 180 F.3d 149 (4th Cir. 1999). In concluding that claims arising from contracts and other obligations that entail future payments are entitled to administrative priority, those courts have properly focused on the benefit to the estate at the time the debtor entered into or assumed a contract, or incurred a liability, that obligated it to make future payments. They hold that if the consideration the estate received in return for its contractual obligations benefited the estate or was otherwise necessary to its preservation, then *all* the obligations the debtor undertook—including future payment obligations—are entitled to administrative-expense priority. Under the rule adopted by these courts of appeals, Zurich would have been entitled to payment of its claim for deductibles as an administrative expense.

The First Circuit reached this result in *Hemingway*, a case concerning liability for future environmental clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9657 ("CERCLA"). The debtor in that case, Hemingway, operated a trucking facility contaminated by leaking drums of hazardous substances. After Hemingway filed a Chapter 11 bankruptcy peti-

tion, a land developer, Juniper, purchased the facility for $1.6 million. *See* 993 F.2d at 919-920. The EPA ordered Juniper to remove the drums, and Juniper filed a claim against the Hemingway estate, seeking to recover its past and future clean-up costs as administrative expenses. *See id.* at 920.[4] The First Circuit held that Juniper's claim for future clean-up costs was entitled to administrative priority under §503(b)(1)(A), provided that it survived a provision of the Bankruptcy Code—immaterial to this case—that restricts a claimant's ability to recover on debts on which it is jointly liable with the debtor. *See id.* at 934, 936.[5] Thus, if Juniper was not jointly liable with the debtor for the clean-up costs under CERCLA, the First Circuit held, its "claim for past *and future* [clean-up] costs should be

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[4] Both the current owner of a contaminated facility and the entity that owned the facility at the time of hazardous waste disposal are potentially responsible parties under CERCLA. *See generally* 42 U.S.C. §9607(a). The EPA had designated both Juniper and Hemingway as potentially responsible parties. *See* 993 F.2d at 920 & n.2.

[5] Specifically, the Code requires disallowance of "any claim for ... contribution of an entity that is liable with the debtor on ... the claim of a creditor, to the extent that ... such claim for ... contribution is contingent as of the time of allowance or disallowance." 11 U.S.C. §502(e)(1)(B). Because the EPA had not yet ordered clean-up beyond its initial demand, Juniper's claim for future clean-up costs was "contingent" on such a future order from the EPA. 993 F.2d at 923. Thus, Juniper's claim would be barred by §502(e)(1)(B) if it were a claim for "contribution" on a debt on which Juniper and Hemingway were jointly liable to the EPA. If, on the other hand, Juniper could avoid liability under CERCLA—for example, by establishing that it was an "innocent landowner" who purchased the facility without notice that it was contaminated—Juniper would not be "liable with the debtor" and its claim for future clean-up costs would not be barred by §502(e)(1)(B).

estimated and allowed as administrative expenses entitled to priority." *Id.* at 934 (emphasis added).

In reaching that conclusion, the First Circuit began with the "benefit to the estate" test as first set out in *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976). Under that test, a claim is an "actual, necessary cost[] and expense[] of preserving the estate" under §503(b)(1)(A) if (1) the right to payment "arose from a postpetition [as opposed to pre-bankruptcy] transaction with the debtor," and (2) "the consideration supporting the right to payment was beneficial to the estate of the debtor." *Hemingway*, 993 F.2d at 929 (internal quotation marks omitted). Like Lexington here, the trustee in Hemingway argued that Juniper's future clean-up costs under CERCLA were not administrative expenses because Juniper's payment of those costs would not benefit the estate. *See id.* at 929-930. The First Circuit rejected that argument. In direct contradiction to the Sixth Circuit's reasoning below, the First Circuit held that, in determining whether Juniper's claim was an administrative expense, the relevant inquiry was not whether the *payment* of clean-up costs would benefit the estate, but whether the *consideration* Juniper had provided, and from which its claim ultimately arose—there, the $1.6 million purchase price Juniper had paid for the facility—benefited the estate. "Obviously," the court observed, "this substantial infusion of cash benefited the chapter 11 rehabilitation effort. Thus, the $1.6 million in purchase monies constituted the requisite baseline 'consideration' for Juniper's right to contribution; and [clean-up] costs subsequently incurred by Juniper a mere maturation of that right, immaterial for *Mammoth Mart* purposes." *Id.* at 930.

Zurich would have prevailed under this analysis. The workers' compensation and other insurance cover-

age it provided to Horizon during the bankruptcy unquestionably benefited the estate—as the court itself acknowledged. App. 10a-11a ("There can be no question that ... the insurance coverage provided by the Zurich Policies was critical to the Debtors' operations. Without [it], the Debtors would have been unable to operate their business as a going concern both prior to and during the pendency of the bankruptcy."). As in *Hemingway*, the expenses for which Zurich seeks payment in the bankruptcy—reimbursement of the deductibles it will have to advance under the insurance agreements—are a "mere maturation of [its] right" to be paid in return for the valuable consideration it provided to the debtor's estate. 993 F.2d at 930. The decision below squarely conflicts with *Hemingway*.[6]

The Second and Fourth Circuits have also allowed the recovery of future payment obligations as administrative expenses, likewise reasoning that the proper focus of the "benefit" analysis is the consideration the debtor received in return for entering into the contract giving rise to the future payment obligations. In the Fourth Circuit's decision in *Merry-Go-Round*, the debtor entered into a ten-year lease for retail store

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[6] Not only did the First Circuit hold that Juniper's claim for future clean-up costs could be allowed as an administrative expense, it recognized that the forward-looking nature of the claim meant that Juniper's clean-up costs would have to be estimated. *See* 993 F.2d at 934 & n.25 ("Juniper's claim for ... future [clean-up] costs should be estimated and allowed as administrative expenses entitled to priority."). Thus, had the Sixth Circuit squarely held, rather than endorsing the district court's "non-dispositive" suggestion, that estimation is unavailable for an administrative expense claim under §503(b)(1)(A), App. 44a-47a, it would have created a circuit split on that issue too.

space during its Chapter 11 bankruptcy case. *See* 180 F.3d at 152. Merry-Go-Round's reorganization efforts failed, and the case was converted to Chapter 7. The Chapter 7 trustee subsequently rejected the lease and returned the premises to the landlord, giving rise to a contractual claim for the future rent for the remainder of the lease. *See id.* at 152-154. The landlord filed a claim seeking administrative-expense treatment for the future rent due under the lease. The trustee opposed allowance of the claim on grounds similar to those advanced by Lexington here, arguing that it did not represent an "actual, necessary cost and expense of preserving the estate" under §503(b)(1)(A) because once the leased premises were vacated, the estate no longer made any actual use of them and the lease was no longer necessary to the estate. *See id.* at 156-157.

The Fourth Circuit rejected those arguments and held "as a matter of law" that the landlord's claim for future rent was an administrative expense. 180 F.3d at 155. It reasoned—in direct contradiction to the Sixth Circuit here—that the future rent was an "actual" expense of preserving the estate because it arose out of a transaction between the debtor and the landlord during the bankruptcy. *Id.* at 157. Moreover, the future rent was a "necessary" expense of preserving the estate because, before conversion to Chapter 7, the lease clearly was beneficial to the debtor, permitting it to continue operating its business. *Id.* The court explained that because landlords would refuse to enter leases with tenants in bankruptcy without some assurance that the rent obligations would be paid in full, "the future rent ... was an actual and necessary expense [of] preserving the estate" and thus entitled to administrative priority. *Id.* at 158.

The Second Circuit has similarly held that future rent owed under a lease assumed and then rejected during a bankruptcy case must be treated as an administrative expense. In *Klein Sleep*, the debtor assumed a long-term retail lease so that it could continue to operate its business while it tried to reorganize. After its attempt to reorganize failed, the case was converted to Chapter 7. The newly-appointed Chapter 7 trustee rejected the lease and returned the premises to the landlord, triggering the lease's provision for payment of future rent as damages. *See* 78 F.3d at 20-21. The landlord sought administrative-expense treatment for its claim for future rent. Both the bankruptcy and district courts reasoned, like the Sixth Circuit here, that the future rent was not an administrative expense because its payment would confer no benefit on the estate. *See id.* at 22.

The Second Circuit reversed, holding that "a trustee or debtor-in-possession's assumption of an unexpired lease transforms *all* liability under the lease ... into administrative expenses." 78 F.3d at 22 (emphasis in original). The court explained that the lower courts' analysis relied on "an unduly narrow view of the benefit conferred on an estate when a [debtor] assumes an unexpired lease." *Id.* at 24. When the debtor assumed the lease, the court held, it obtained the rights to present and future possession of the premises, which "had a present value at the time of assumption. Acquisition of those rights clearly constituted a benefit to the estate even if, later, the benefit turned to dust." *Id.* at 26. A contrary holding, the court noted, "would mean that any post-bankruptcy contract, entered into for the benefit of a bankrupt's estate, would cease to be entitled to priority the moment the deal turned sour." *Id.* Such a result would contravene the purpose of the ad-

ministrative-expense provisions: to encourage suppliers of essential credit, goods, and services to undertake the risk of dealing with a company in bankruptcy.[7]

The reasoning and result of the Sixth Circuit in this case squarely contradict the Fourth Circuit's decision in *Merry-Go-Round* and the Second Circuit's decision in *Klein Sleep*. Under the Fourth Circuit's reasoning in *Merry-Go-Round*, Zurich's claim for future deductibles was "actual" within the meaning of §503(b)(1)(A) because it stemmed from a transaction with the bankruptcy estate, and it was "necessary" because it was an obligation Horizon undertook in return for the provision of insurance it needed to operate its business. *See* 180 F.3d at 157. And, as the Second Circuit explained in *Klein Sleep*, asking whether the payment of future obligations under a contract benefits the estate—as the Sixth Circuit did here—takes "an unduly narrow view of the benefit conferred on an estate" when a debtor enters into or assumes a contract for necessary goods or services during a bankruptcy. 78 F.3d at 24. As in *Klein Sleep*, "[a]cquisition of th[e] rights [to insurance] clearly constituted a benefit to the estate even if, later,

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[7] *See also In re Frontier Props., Inc.*, 979 F.2d 1358, 1367 (9th Cir. 1992) (when a debtor assumes and then rejects an executory contract post-petition, "all of the liabilities flowing from that rejection are entitled to priority as administrative expenses of the estate"). Following *Klein Sleep* and *Frontier*, BAPCPA amended §503 by adding paragraph (b)(7), which caps the amount of rent entitled to administrative-expense treatment for a nonresidential real-property lease assumed, then rejected, under §365. Pub. L. No. 109-8, §445. The imposition of the cap, however, did not change the holding of those cases relevant here: that such future rent payments are administrative expenses.

the benefit turned to dust" because Horizon's reorganization effort failed. *Id.* at 26.

The Sixth Circuit's failure to recognize these principles, and its clear departure from the governing legal rule in the First, Second, and Fourth Circuits, warrants this Court's review.

B. The Sixth Circuit's Decision Relies On A Premise Rejected By This Court's Precedent

The Sixth Circuit's decision also misapprehends basic principles articulated by this Court in the leading case construing the administrative-expense provision. In *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), this Court construed the predecessor to §503(b)(1)(A) under the Bankruptcy Act of 1898, which similarly granted administrative priority to "the actual and necessary costs and expenses of preserving the estate." *Id.* at 475. The Court was faced with the question whether a tort claim against the debtor arising during a bankruptcy met that definition; the claimants were building owners whose properties had been damaged by a fire caused by the negligence of the bankrupt's receiver. *See id.* at 473. The Court held that those claims did meet the definition, reasoning that " 'actual and necessary costs' should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible." *Id.* at 483. Accordingly, because the tort claim was the result of the debtor's operation of its business during the bankruptcy, it was entitled to administrative priority.

Reading thus expressly rejected one of the key premises underlying the Sixth Circuit's decision: the notion that a *payment* must benefit the estate to be entitled to administrative priority. Instead, the proper inquiry is whether the debt was incurred through the

operation of the debtor's business, as a result of its efforts to continue the business as a going concern (either for reorganization or sale to the highest bidder). That is unquestionably true here: the insurance coverage Zurich provided permitted the debtor to continue operating as it sought to reorganize, to the benefit of the estate and its creditors. *See, e.g.*, App. 10a-11a (without the Zurich policies, Horizon "would have been unable to operate ... as a going concern ... during the pendency of the bankruptcy"). Indeed, *Reading* specifically noted that "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained." 391 U.S. at 483. Had the Sixth Circuit properly applied the legal principles underlying *Reading*, it would have recognized that the insurance provided by Zurich benefited the estate, and that the obligations owed under the insurance contract thus were "actual, necessary costs and expenses of preserving the estate."

II. THE SIXTH CIRCUIT'S DECISION EXACERBATES THE ENTRENCHED SPLIT OF AUTHORITY REGARDING WHEN A CLAIM AGAINST A BANKRUPTCY ESTATE ARISES

The Sixth Circuit's decision rested in significant part on the conclusion that Zurich's claim for reimbursement for deductibles under its policies would not "arise" until Horizon's obligation to pay the deductibles accrued as a matter of state contract law. The district court acknowledged that Zurich was entitled to reimbursement of the deductibles under the insurance policies. App. 23a-24a ("[I]t is undisputed that Zurich will be rightfully 'owed' any deductible obligations advanced under the Zurich Policies (pursuant to the Deductible Agreements) when they 'arise[.]' "). It emphasized, however, that the insurance contract did not re-

quire Horizon to pay Zurich for the deductibles until Zurich first paid the claims against Horizon, and concluded that such "expenses that arise and are incurred post-confirmation should [not] relate back to the underlying contractual arrangement during the bankruptcy." App. 33a. Indeed, the court held that "the deductible obligations do not even exist until [workers' compensation] claims arise whereby Zurich must advance payment." App. 33a-34a.

Accordingly, the court rejected Zurich's argument that because its claim stemmed from events during the bankruptcy—Horizon's decision to assume the insurance policies, as well as the occurrences that would later give rise to injuries and workers' compensation claims—it was entitled to an administrative-expense claim against the estate. App. 33a-34a.[8] Rather, finding that Zurich's claim did not yet exist and thus could not be asserted as an administrative-expense claim in the bankruptcy, the court relegated Zurich to whatever recovery it might be able to obtain "as a creditor of the dissolved estate"—that is, none. App. 24a.

In so holding, the Sixth Circuit took sides in an entrenched three-way circuit split regarding one of the most important and fundamental questions in bankruptcy law: when does a bankruptcy claim arise? The

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[8] Even if some of the deductibles related to accidents or occurrences that took place during the period of insurance coverage prior to bankruptcy, Horizon's assumption of the insurance policies in bankruptcy rendered all obligations under those policies administrative expenses arising during the bankruptcy case. *See* 4 *Collier on Bankruptcy* ¶503.06[6][b] ("[A]ssumption of [a] contract ... turn[s] a prepetition liability into a postpetition liability," "entitled to administrative expense priority.").

answer to that question plays a crucial role in a claimant's recovery. If a claim arises before the filing of the bankruptcy petition, it receives no special priority, unless it falls into one of the narrow categories set out in §507. If such a pre-bankruptcy claim is unsecured, it will likely receive only cents on the dollar, if it is paid at all. If, on the other hand, a claim arises after the filing of the bankruptcy petition and during the bankruptcy, it will generally be an administrative expense entitled to priority over the claims of pre-bankruptcy creditors. Such administrative-expense claimants will typically receive a far higher proportion of the amount they are owed. Finally, if a claim does not arise until after the bankruptcy case is concluded, it is not entitled to payment in the bankruptcy at all (nor is it discharged in bankruptcy). In that case, if the debtor succeeds in reorganizing, the claim may be asserted against the reorganized entity. In the common event that the debtor liquidates—as occurred here—the claimant will almost certainly recover nothing: "its right to recover exists in theory but is not enforceable in practice." *Reading*, 391 U.S. at 478.

The courts of appeals have adopted at least three different approaches to determining when a bankruptcy claim arises. The Sixth Circuit's approach—concluding that a "claim" for bankruptcy purposes arises when the creditor's right to payment accrues under state law—had previously been adopted by the Third Circuit. *See In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984). But six other circuits have rejected the *Frenville* approach, instead adopting analyses falling into two broad categories: the Fourth and Tenth Circuits have adopted the so-called "conduct test," under which a bankruptcy claim arises when the conduct giving rise to the claim occurs, and the Second, Fifth,

Ninth, and Eleventh Circuits have adopted either the "relationship" test, under which a claim arises when the debtor's conduct giving rise to the claim has occurred and the debtor and creditor have formed a relationship, or a variant known as the "fair contemplation" test, which adds the nuance that the claim must be within the "fair contemplation" of the parties before it can be asserted (or discharged) in the bankruptcy.

Frenville itself turned on whether the claim at issue arose before or after the filing of the bankruptcy petition. *See* 744 F.2d at 333. An accounting firm that the debtors had engaged as an auditor was sued by a group of banks for negligently preparing the debtors' financial statements. *See id.* The accounting firm wished to obtain indemnification or contribution from the debtors via a third-party complaint, which was permissible under the automatic-stay provision, 11 U.S.C. §362(a)(1), only if the firm's claim arose before the filing of the bankruptcy petition. *See* 744 F.2d at 334. The court acknowledged that "the debtor[s'] acts which form the basis of [the] suit"—preparation of the financial statements—"occurred pre-petition," but nevertheless, looking to New York law, held that the accounting firm's claim for contribution or indemnification from the debtor arose only post-petition, once it had been sued by the banks. *Id.* at 334, 337 ("[T]he threshold question of when a right to payment arises ... 'is to be determined by reference to state law.' " (citation omitted)). The *Frenville* decision has been widely criticized, but the Third Circuit has repeatedly announced its intention to adhere to it. *See, e.g., Jones* v. *Chemetron Corp.*, 212 F.3d 199, 206 (3d Cir. 2000) ("We are cognizant of

the criticism the *Frenville* decision has engendered, but it remains the law of this circuit." (footnote omitted)).[9]

Other than the Sixth Circuit, every court of appeals to consider the issue has rejected *Frenville*'s focus on the time at which a right to payment accrues under state law, noting the breadth of the definition of "claim" under the Bankruptcy Code and the undesirable consequences that may follow from an overly restrictive reading of that definition. The Fourth Circuit and Tenth Circuit have adopted the so-called "conduct" test, under which a claim arises when the conduct giv-

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[9] Confirming the entrenched nature of the split, the Sixth Circuit had previously endorsed the Third Circuit's *Frenville* line of authority in *CPT Holdings, Inc.* v. *Industrial & Allied Employees Union Pension Plan*, 162 F.3d 405 (6th Cir. 1998). *CPT* held that a pension plan's claim against a debtor employer for withdrawal liability under ERISA arose only when the plan acquired a cause of action under ERISA after the bankruptcy, splitting with other cases that had held that a contingent bankruptcy claim for withdrawal liability existed prior to the accrual of an ERISA cause of action. *See id.* at 408-409. The Sixth Circuit reasoned that "[i]t is not enough ... to look at the broad definition of 'claim' in the Bankruptcy Code." *Id.* at 409. Rather, "[t]he relevant non-bankruptcy law must be examined" to determine when a "right to payment" arises. *Id.* In so holding, the Sixth Circuit chose to follow the Third Circuit's decision in *In re Remington Rand Corp.*, 836 F.2d 825 (3d Cir. 1988), which itself relied on *Frenville* to hold that "the existence of a valid claim" under bankruptcy law depends on whether a right to payment exists under the non-bankruptcy law that governs the claim. *See id.* at 830. Although, prior to *CPT* and this case, the Sixth Circuit had stated that "the proper standard for determining [a] claim's administrative priority looks to when the acts giving rise to a liability took place, not when they accrued," *In re Sunarhauserman, Inc.*, 126 F.3d 811, 818 (6th Cir. 1997), that case did not discuss the split of authority or the *Frenville* reasoning later adopted by *CPT* and applied by the court in this case.

ing rise to the claim occurred. The Fourth Circuit first adopted that analysis in the bankruptcy of A.H. Robins, the manufacturer of the Dalkon Shield intrauterine device. *See Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir. 1988) (expressly rejecting the reasoning of *Frenville* and concluding that a claimant who had a Dalkon Shield inserted before the bankruptcy petition had a "claim" for purposes of the automatic-stay provisions even if injury would not manifest itself until post-petition), *aff'g* 63 B.R. 986 (Bankr. E.D. Va. 1986) (holding that a "claim" arises at the "time when the acts giving rise to the alleged liability were performed"). The Fourth Circuit has subsequently applied that analysis in other contexts. *See Butler* v. *Nationsbank, N.A.*, 58 F.3d 1022 (4th Cir. 1995). *Butler* concerned a bank's claim to recover on a fraudulently endorsed check. The debtor had deposited the check before filing his bankruptcy petition. The court held that it was that underlying act—and not the bank's post-petition awareness of the forgery and efforts to recover the funds—that gave rise to the claim. *See id.* at 1029 (expressly refusing to follow *Frenville*, and concluding that the bank "had a claim as soon as [the debtor] deposited the fraudulently endorsed check," even though recovery "was contingent upon the receipt of notice of the forgery").

The Tenth Circuit has similarly held that a malpractice claim arises on the date the underlying conduct occurred, not on the date a cause of action accrued under state law. *See In re Parker*, 313 F.3d 1267, 1269 (10th Cir. 2002) (describing "conduct theory" as "more in tune with the plain language and the policy underlying the Bankruptcy Code"). The Tenth Circuit likewise expressly rejected the *Frenville* approach, approvingly citing the Fourth Circuit's observation that " 'the legis-

lative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy.' " *Parker*, 313 F.3d at 1269 (quoting *A.H. Robins*, 839 F.2d at 202).

Four other courts of appeals have likewise rejected *Frenville*, but have adopted analyses under which a claim arises either when a "relationship" is formed between the debtor and the claimant or when the claim can be said to be within the "fair contemplation" of the parties prior to the bankruptcy. In *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), the Second Circuit considered the extent to which future clean-up costs that might be expended by the EPA under CERCLA based on the debtor's release of hazardous waste prior to bankruptcy constituted "claims" dischargeable in the bankruptcy. The court reviewed both the approach under which a "claim" exists only once a state-law right to payment has accrued, and the approach under which a "claim" exists as soon as the pre-bankruptcy conduct on which it was based occurred, and adopted a middle ground, holding that at a minimum the debtor and creditor must have a "relationship," such as the relationship between a regulated entity and regulator, at the time of filing the petition. *See id.* at 1001-1005. Applying that test, the court found that the EPA had a claim in the bankruptcy for all future clean-up costs arising from the debtor's pre-bankruptcy discharge of hazardous waste. *See id.* at 1005.

The Fifth Circuit applied a similar "relationship" test in *Lemelle* v. *Universal Manufacturing Corp.*, 18 F.3d 1268 (5th Cir. 1994). The plaintiff in that case sought to go forward with a wrongful-death claim against the manufacturer of an allegedly defective mobile home that had burned down. The defendant ar-

gued that the plaintiff's claim had been discharged in its bankruptcy, which occurred after it manufactured and distributed the mobile home but before the fire. The Fifth Circuit noted the three conflicting lines of authority, *see id.* at 1275-1276, and concluded that the absence of any "pre-petition contact, privity, or other relationship" between the manufacturer and the plaintiff precluded a finding that her claim arose prior to discharge, *id.* at 1277.

In *In re Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995), the Eleventh Circuit addressed the question whether Piper, an aircraft manufacturer, could discharge in its bankruptcy all claims that might be asserted in the future by any person arising out of aircraft manufactured or distributed by Piper before bankruptcy. The court acknowledged the three-way split on the issue, and declined to adopt either the *Frenville* "state law claim theory," *id.* at 1576 n.2, or the Fourth Circuit's "conduct" test, *id.* at 1576-1577, which might have supported the broad relief sought by the debtor. Rather, it held that "[t]he debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant ... and [the debtor's] prepetition conduct." *Id.* at 1577.

Finally, in another environmental clean-up case, the Ninth Circuit adopted a more restrictive variant of the "relationship" test often called the "fair contemplation" test, holding that "all future ... cost[s] based on pre-petition conduct that can be fairly contemplated by the parties at the time of [the] bankruptcy" are "claims" under the Bankruptcy Code. *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993) (internal quotation marks omitted). The court reviewed and rejected both the broad "conduct" test and "*Frenville*'s 'right of payment'

theory," noting that the latter "is widely criticized outside the Third Circuit, at least in part because it would appear to excise 'contingent' and 'unmatured' claims from §101(5)(A)'s list." *Id.* at 929-930 (citation omitted).

Under any of the conduct, relationship, or fair contemplation tests, Zurich would have had a claim for deductibles that arose during Horizon's bankruptcy, when Horizon assumed the insurance policies that obligated it to pay those deductibles. By the conclusion of the bankruptcy, the contract had been assumed; the period of insurance coverage had expired; and Horizon unquestionably understood that it was liable for the deductibles associated with workers' compensation claims that would be asserted in the future arising out of that period of coverage. That Zurich's claim was dependent on future workers' compensation claims being asserted and paid makes no difference. Under the plain language of §101(5) of the Bankruptcy Code, as interpreted by a majority of circuits, it was nonetheless a "claim" in the bankruptcy.

By holding, to the contrary, that Zurich had no claim that could be asserted in the bankruptcy case because its contractual right to payment had not yet accrued, the Sixth Circuit aligned itself with the Third Circuit and against the six courts of appeals that have rejected the Third Circuit's approach. It thus exacerbated one of the most significant splits of authority in bankruptcy law, on an issue of central importance to the effective and uniform administration of the bankruptcy laws. That issue unquestionably merits this Court's review.

III. THE DECISION BELOW WAS INCORRECT AND THREATENS DEBTORS' ABILITY TO REORGANIZE

The decision below marks a radical departure from the settled understanding of §503(b)(1)(A), under which a claimant who entered into a contract with a debtor during the bankruptcy case (or whose pre-bankruptcy contract the debtor assumed) is entitled to administrative priority for *all* payments due to it under that contract. *See, e.g.*, *Bildisco*, 465 U.S. at 531 ("If the debtor-in-possession elects ... to assume [an] executory contract ... it assumes the contract *cum onere*, and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate" (citations omitted)); 2 *Collier on Bankruptcy* ¶365.09[5] (when a pre-bankruptcy contract is assumed and then rejected, "[o]ne might argue that if the estate gets no benefit from the breach, there is no basis for administrative priority.... The better approach, however, is to recognize that the estate receives the benefit of the assumed contract ... and takes that contract *cum onere*. Therefore, any damages flowing from the breach of a previously assumed contract should be considered first priority administrative expenses.").

Horizon unquestionably benefited from the insurance coverage Zurich provided it during the bankruptcy. App. 10a-11a ("There can be no question that ... the insurance coverage provided by the Zurich Policies was critical to [Horizon's] operations. Without the insurance provided by Zurich, [Horizon] would have been unable to operate [its] business as a going concern ... during the pendency of the bankruptcy."); App. 11a n.5 (because state law required Horizon to carry workers' compensation coverage, "the insurance policies themselves necessarily constituted a significant benefit

to the estate in that the coverage allowed [Horizon's] business to operate"). The insurance contracts it entered with Zurich obligated Horizon to reimburse Zurich for the advanced deductibles. And a debtor's obligations under a contract necessary to operate its business are *ipso facto* actual, necessary costs of preserving the estate.

The Sixth Circuit's contrary decision is an unduly narrow interpretation of the Bankruptcy Code's administrative-expense provisions. If left uncorrected, it will significantly impair financially distressed companies' ability to reorganize. Reorganization depends critically on the willingness of lenders, suppliers, landlords, insurers, and other parties to provide the debtor with needed credit, goods, and services during the bankruptcy, so that it can preserve and potentially rehabilitate its business. Such parties will have good reason to be wary of providing credit to an entity in bankruptcy, whose ability to pay is necessarily in doubt. The Bankruptcy Code therefore grants administrative-expense claims priority over claims of other creditors, assuring such parties that if they do business with a company in bankruptcy, they will be paid amounts due to them in full. The Sixth Circuit's decision undermines that assurance, imposing on parties contracting with debtors the risk that, if the debtor's reorganization efforts fail, they will be left unpaid. Such uncertainty will seriously threaten debtors' ability to obtain the goods and services they need to reorganize.

This risk is particularly acute for debtors that require any type of liability insurance. Insurers will be unwilling to offer debtors the type of insurance policies they are most likely to afford—policies requiring the payment of deductibles. *Cf. In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 994 (2d Cir. 1996) (noting that no in-

surance company was willing to offer guaranteed-cost workers' compensation coverage to financially distressed airline). As this Court explained in *Reading*, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained," 391 U.S. at 483, and insurance is necessary to every debtor's business. Without affordable insurance, many Chapter 11 debtors will have no opportunity to attempt reorganization, and will be forced to liquidate.

Indeed, even debtors' ability to liquidate in the fashion most beneficial to their creditors will be impaired. Deprived of the opportunity to operate their businesses as going concerns while seeking the highest bidder for those businesses, debtors may be forced instead to sell their assets at "fire sale" prices, dramatically reducing the value of the estate and the distributions to creditors.[10]

The Sixth Circuit's narrow construction of the Bankruptcy Code's expansive definition of "claim" likewise presents an issue of the greatest significance

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[10] The Sixth Circuit's construction of the administrative-expense provisions is also likely to have serious repercussions for states that permit employers to self-insure their workers' compensation obligations. Under these programs, the employer pays benefits directly to employees. *See, e.g.*, Mich. Admin. Code, R. 408.43c(1). Many states have established state guaranty funds, from which an injured employee can collect if insolvency prevents the employer from paying the claim. *See, e.g.*, Mich. Comp. Laws Serv. §§418.501(1), 418.537(1). The Sixth Circuit's decision raises the prospect that state funds that pay the workers' compensation claims of insolvent employers will not be able to recover those payments from the employers' estates, and that the shortfall will devolve on either the state or the injured employees.

to the administration of bankruptcies. The division of authority on that most basic of questions seriously impairs the uniformity that bankruptcy law requires. A claimant like Zurich, who in the great majority of circuits would be an administrative claimant entitled to priority over the claims of other creditors, in the Third Circuit or Sixth Circuit has no claim in the bankruptcy case at all. Likewise, a claimant who holds a contingent claim under the relationship test prior to bankruptcy, but whose right to payment accrues under state law only during the bankruptcy, in the majority of circuits would be a pre-bankruptcy creditor entitled only to share *pro rata* with other like creditors, but in the Third Circuit or Sixth Circuit would be entitled to administrative priority. That outcome upends the goals of the administrative priority provisions: to encourage dealings with entities during their bankruptcy cases. It also has profound implications for any bankruptcy—most obviously, those involving tort and environmental liabilities—in which there are likely to be claimants harmed by the debtor's pre-bankruptcy conduct, but whose injury becomes manifest only later.

The prompt resolution of the questions presented is particularly critical now, when the global economic crisis has left many of the nation's leading industrial companies on the verge of bankruptcy. Many economic forecasters predict a substantial surge in corporate bankruptcy filings, extending well into 2010.[11] The live-

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[11] *See, e.g.*, Siew, *US Company Bankruptcies May Top 100 Next Year*, Reuters (July 31, 2008) (bankruptcies of public companies with more than $100 million in assets "may soar to more than 100 in 2009"), *available at* www.reuters.com; Bain & Company, *Bankruptcies of Large U.S. Companies To Extend Into 2010* (Dec. 1, 2008) (similar projection for 2010), *available at* www.bain.com.

lihoods of many workers, as well as the success of those who do business with these troubled companies, will turn on whether their attempts to reorganize succeed. The Sixth Circuit's decision is a substantial impediment to those efforts. It warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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