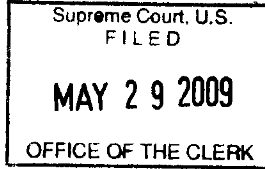

No. 08-1254

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

OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Bankruptcy Code allows a limited priority of payment to certain claims accruing during the administration of a bankruptcy case, generally referred to as administrative expense claims. 11 U.S.C. §§ 503(b)(1)(A) and 507(a). Priority treatment requires proof that claims are "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). This case involves a program of insurance that is unique to the petitioner/insurer and the debtors/insureds. The insurance contracts obligated the petitioner to administer workers' compensation claims, and pay claims if required, before the debtors had any obligation to reimburse the insurer for the deductible portion of the insurance policies. The narrow question presented by this case is whether the petitioner may, contrary to the terms of the insurance contracts, force the immediate payment of an estimate of deductibles that might or might not arise after the termination of the debtors' bankruptcy estates as an administrative expense.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Lexington Coal Company, LLC, a Delaware limited liability company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of Lexington Coal Company, LLC.

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STATEMENT

Under the Bankruptcy Code certain claims that accrue during the administration of a bankruptcy case, generally referred to as administrative expense claims, are given priority treatment pursuant to 11 U.S.C. §§ 503(b)(1)(A) and 507(a). Priority treatment requires proof that claims are "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The "rare" and "very narrow" issue presented in this case involves an administrative expense claim dispute between petitioner and claimant, Zurich American Insurance Company, and respondent, Lexington Coal Company, LLC. Respondent has the right to object to and resolve all administrative expense claims in the bankruptcy proceeding of the debtors, Horizon Natural Resources Company and subsidiaries ("Debtors"). At issue is whether an estimate of unknown and unpaid deductibles that will arise only after termination of Debtors' bankruptcy estates are "actual" and "necessary" to the preservation of the Debtors' bankruptcy estates.

The "bankruptcy estate" is a creature of statute that comes into existence upon the commencement of the bankruptcy case. *See* 11 U.S.C. § 541(a). Debtors filed their petitions on November 13 and 14, 2002. Consummation of Debtors' Plans[1] and

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[1] In its Petition for a Writ of Certiorari, petitioner only refers to a "plan" confirmed in the underlying bankruptcy cases. Debtors actually confirmed two plans (jointly, the "Plans"): (i) Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code and (ii) Third Amended Joint Plan of

dissolution of Debtors' bankruptcy estates occurred on September 30, 2004 (the "Effective Date"). App. 2a, ¶ 83.[2] Therefore, Debtors' estates existed and were administered from November 13 or 14, 2002, to September 30, 2004 (referred to herein as the "administration period").

1. It is undisputed that Debtors owed and paid petitioner all premium and deductible obligations due under insurance contracts assumed as part of a program of insurance during the administration period. Pet. App. 23a-24a. The parties dispute, however, whether petitioner may unilaterally amend the insurance contracts to accelerate the obligation of the Debtors to pay deductibles for future workers' compensation claims that had not yet accrued at the time of confirmation through a request to treat an estimate of such amounts as an administrative priority expense. These estimated claims were neither made (by the covered worker) nor paid (by petitioner) at the time of termination of the administration period.

Petitioner provided the insurance coverage to Debtors through the issuance of numerous annual insurance policies from 1998 to approximately the

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Liquidation Under Chapter 11 of the Bankruptcy Code. The Plans set out specific rights and obligations of interested parties, including respondent, but did not provide for any post-confirmation payment to petitioner.

[2] Relevant Excerpts from the Agreed Stipulated Facts and List of Exhibits of Zurich American Insurance Company and Lexington Coal Company, LLC [Doc. 7180] is attached as Appendix A for ease of reference (the "Stipulated Facts").

Effective Date. Petitioner referred to the relationship as a "Program" to reflect the nature of the obligations of the parties, which were in addition to, and went beyond, the purchase of insurance coverage. The majority of the insurance policies under the Program related to workers' compensation coverage. App. 4a, ¶ 138. "Under the Zurich Program, the insureds were not obligated to pay the deductible in full upon the occurrence of the claim. Instead, Zurich would advance money to pay losses and expenses, and the insureds would not pay until billed." *See* R. 9, Motion to Stay, at 3, App. 62.

This type of insurance policy, known as a deductible policy, exposes the insurer to the risk that the insured will become insolvent and have no ability to pay the deductibles, even though the insurer will remain obligated to pay covered workers in full. The insurer typically negotiates for collateral to protect against that risk. The insurer and insured may negotiate over the amount and nature of the collateral and competing insurance companies may offer the insured different terms concerning both rates and collateral. Pet. App. 10a-11a.

In keeping with industry practice for deductible policies, petitioner obtained substantial collateral from Debtors to cover the exposure it now seeks to address through an administrative expense priority claim. This collateral includes cash exceeding $23 million and almost $14 million in surety bonds. Pet. App. 20a and 21a, n. 13. When the insurance policies were up for renewal after Debtors filed for bankruptcy, Debtors negotiated with Petitioner and other insurance companies. Pet. App. 11a. Petitioner's rates were the most favorable and the

amount of collateral was negotiated by petitioner and Debtors. Pet. App. 11a-12a.

2. On the deadline for filing administrative claims under Debtors' confirmed Plans, petitioner filed a request for priority treatment of an estimate of its maximum post-confirmation exposure under the Program (referred to by petitioner as the "Ultimate Loss Projection") pursuant to 11 U.S.C. §§ 503(b)(1)(A) and 507(a) (the "Priority Request"). Petitioner only filed this administrative expense claim to protect itself in the event Debtors' collateral failed. Pet. App. 48a.

The Priority Request initially sought almost $44 million, but petitioner was forced to reduce its demand significantly based on numerous errors. The Ultimate Loss Projection mistakenly included over $3 million for general liability and automobile insurance policies that petitioner was not obligated to pay.[3] App. 3a, ¶ 101-02. Petitioner also had not allowed credits for at least $9.5 million of deductible payments previously received by petitioner and third party administrators. App. 3a, ¶ 122. Further, the Ultimate Loss Projection failed to reflect over $23 million in cash collateral held by petitioner. App. 4a, ¶ 135. Notwithstanding that the original Priority Request was inflated by $35.5 million, leaving a

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[3] General liability and automobile policies do not have separate deductible agreements and only provide for billing after petitioner expends funds under the policies (e.g., legal fees, costs, injured party payments). App. 3a, ¶ 101-02. Petitioner is not obligated to pay amounts below the deductibles to claimants, so petitioner admitted it should not have sought a claim for such amounts. *Id.*

difference of $8.5 million, petitioner still seeks $14.6 million from Debtors' estates. Pet. 8; *see also* App. 3a-4a, ¶ 134.[4]

Even this amount is just petitioner's guess based on estimates at one point in time. The Ultimate Loss Projection will never show actual amounts due because it is a moving target that fluctuates up or down as the claims arising under one or more of the insurance policies are paid, settled or rejected. *See* App. 4a-5a, ¶ 173. "[T]he ultimate loss projections are actuarial analyses of the projected ultimate cost made on a regular periodic basis which employ information provided by the insured and updated loss information." *Id.*

The amount of petitioner's claim depends not only on estimates about future claims that may or may not arise, but also on assumptions about the value of certain collateral. As the District Court repeatedly observed, this case arises only because of the "failure" of certain collateral that petitioner agreed to accept. *See, e.g.*, Pet. App. 35a n.20, 48a. The District Court recognized that the amount of the Priority Request and the projected current deficiency on which it rests, "would have been substantially reduced" if the bonds secured by petitioner as collateral retained their value. Pet. App. 21a.

[4] Petitioner's Priority Request, if granted, would come at least in part from funds that are otherwise set aside to perform various reclamation obligations of Debtors. Pet. App. 24a. As the District Court noted, "the [priority] pool would fail in large measure to cover both Zurich's claim and the 'intended' reclamation costs." Pet. App. 24a. n.14.

Further, the District Court noted that, at least at the time of the District Court opinion, there remained a dispute about the value of the collateral. Pet. App. 50a-51a n.28.

Petitioner admits that it never called a default under the insurance contracts. App. 2a, ¶ 78. The record confirms that Debtors complied with their contractual obligations, paying substantially all amounts billed under the insurance policies during the administration period. *See, e.g.,* App. 1a-2a, ¶¶ 51, 69. Further, the Priority Request did not allege Debtors failed to comply with their contractual obligations under the Program.

3. Several parties in petitioner's position participated in the plan confirmation process and negotiated post-confirmation payments through incorporation of terms into the Plans.[5] Petitioner, however, affirmatively chose *not* to participate in the plan process. *See* Pet. App. 52a (the District Court indicated petitioner's failure to participate was potentially to its detriment); Pet. App. 68a (the Bankruptcy Court believed petitioner should have participated in the plan confirmation process).

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[5] *See, e.g.*, Reorganization Plan, as amended by the applicable Confirmation Order, §§ 2.1(d) ($1.8 million to second tier lienholders for legal fees/costs); 2.3 ($1 million to Deutsche Bank for possible suits on indemnified actions); 4.5(b) ($750,000 to third tier lienholders for legal fees/costs); and 6.5 ($40,000 to the third tier indenture trustee to offset costs to distribute recoveries to the claimants). (R. 2, Third Amended Joint Reorganization Plan, App. pp. 333, 334, 339 and 342; Confirmation Order, App. pp. 464-465 and 455-457.)

Therefore, the Plans did not provide an alternate mechanism to that specified in the insurance contracts for payment of the obligations arising in the future.

4. The Bankruptcy Court, the District Court, and Sixth Circuit have all rejected petitioner's efforts to use the judicial process to do something its insurance contracts prohibit — accelerating payment by granting administrative priority treatment to an estimate of the possible deductibles. The Bankruptcy Court concluded that the future deductible payments were "[e]xpenses incurred post-confirmation" and thus were not entitled to priority treatment. Pet. App. 64a. The court reasoned that only those payments due pursuant to the insurance contracts during the administration period were "actual, necessary costs and expenses of preserving the estate" under § 503(b)(1)(A). Pet App. 63a, 65a.

In a "comprehensive and well-reasoned opinion," the District Court affirmed the Bankruptcy Court's decision to deny petitioner's administrative expense claim. Pet App. 2a. Addressing only the "rare" issue before it, and emphasizing the lack of authority on point, the District Court examined both the limiting language of § 503(b)(1)(A), which classifies only those "actual, necessary costs and expenses of preserving the estate" as administrative claims, and the commonly applied "benefit to the estate" test. The District Court held: "[T]he Priority Request fails as a simple matter of statutory interpretation on both fronts: the claimed expenses are not 'actual' (i.e., not yet realized) and the payment thereof, when the obligations are realized, cannot act to preserve an estate that no longer exists." Pet. App. 27a.

The District Court understood that the expenses petitioner is attempting to classify as administrative expenses will only arise post-confirmation, if ever. Moreover, the District Court acknowledged that petitioner's purported future losses were not actual or necessary expenses because the costs did not exist when the Priority Request was made — and may never exist. The District Court recognized that petitioner would never know what the costs are, nor have the contractual right to invoice Debtors, until the claims are made by the covered workers and paid by petitioner. Pet. App. 27a. The District Court provided: "The moment Zurich is contractually permitted to seek reimbursement from Debtors for the advanced deductibles, the estate will have already dissolved and 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." Pet. App. 29a.

Once Debtors' bankruptcy estates ceased to exist, they could not incur further expenses. "In this unique context," the District Court observed, "courts, although few in number, have consistently held that expenses arising post-confirmation fail to satisfy the requirements for administrative priority under § 503 for the simple, yet inescapable reality that there is no estate to preserve or benefit." Pet. App. 40a. Paying obligations before their contractual due date makes little sense and provides no benefit to a bankruptcy estate. Thus, the District Court affirmed the Bankruptcy Court's decision to deny petitioner's Priority Request.

In a two-paragraph opinion that praised the District Court's thorough analysis, without adding

"anything of substance" to it, Pet. App. 2a, the Sixth Circuit affirmed the lower court's decision.

REASONS FOR DENYING THE PETITION

The case described in the petition bears little resemblance to the case actually litigated and decided by the courts below. While the petition describes a path-marking and conflict-creating decision of the Sixth Circuit, in reality, the Sixth Circuit issued just a two-paragraph summary affirmance of a decision of the District Court. Rather than wading into any circuit splits, the District Court repeatedly observed it was deciding a very narrow issue that both parties conceded was one of first impression. The District Court focused on the unusual nature of the contractually-agreed deductible reimbursement obligation, and addressed only the distinct circumstances that created the narrow issue presented by this case: whether the reimbursement obligation of an insured-debtor that does not arise by the negotiated terms of the contract until after the covered workers make, and the insurer pays, the allowed claims in the future is entitled to administrative priority treatment. The District Court's careful resolution of this narrow issue implicates no circuit split and hardly threatens the ability of entities in bankruptcy to obtain insurance.

Petitioner does not even try to suggest that any other circuit has addressed the specific issue here, let alone come to a different conclusion. Once it is clear that the District Court addressed only a narrow and unique issue, the cases petitioner cites easily distinguish themselves. For example, cases

involving the treatment of CERCLA liability or post-petition, but pre-confirmation, lease defaults shed little light on, and certainly do not control, the proper treatment of a contractual obligation to reimburse the deductible portion of claim payments. This is particularly true where the claims have been neither made nor paid, and no contractual repayment obligation exists at the time of the request for priority treatment. Likewise, the District Court's handling of this unusual contractual arrangement does not implicate any well-entrenched three-way split concerning broader issues of when claims arise. In fact, petitioner's argument acknowledges that the only Sixth Circuit case cited by the District Court actually rejects the analysis of the Third Circuit case petitioner finds offensive and identifies as the root of the circuit split.

The District Court's decision also does not threaten the broader policies of bankruptcy law or the ability of entities in bankruptcy to obtain insurance. The petition ignores the essential fact that petitioner attempted to protect against loss by securing collateral for the deductible obligations. Petitioner also glosses over the District Court's repeated observations that this case arises only because of the failure of some of that collateral.

These two facts are critical and contradict petitioner's assertion that existing law gave it a clear right to treat the unusual contract reimbursement obligations as administrative expenses. If the law were as clear as petitioner now paints it, petitioner would have little need for collateral. The ability of insurers to insist on such collateral likewise demonstrates that the decision below does not signal

the end of deductible policies for entities in bankruptcy. The decision simply means that insurers must abide by contract terms and ensure that the collateral they demand is, in fact, valuable. Finally, the fact that this case arises only because of the failure of the collateral underscores the unique nature of this controversy and explains the absence of other precedential opinions addressing the proper treatment of deductible obligations.

I. THE DISTRICT COURT'S DECISION DOES NOT CREATE A CIRCUIT SPLIT ON THE TREATMENT OF POST-CONFIRMATION CONTRACT OBLIGATIONS OR CREATE TENSION WITH *READING.*

In the first of several attempts by petitioner to transform the District Court's decision into a conflict-creating precedent, petitioner claims that the opinion conflicts with decisions from the First, Second and Fourth Circuits over the relation back of obligations arising from post-petition contracts. *See Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915 (1st Cir. 1993); *Devan v. Simon DeBartolo Group, L.P. (In re Merry-Go-Round Enters., Inc.)*, 180 F.3d 149 (4th Cir. 1999); *Nostas Assocs. v. Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18 (2d Cir. 1996). Petitioner also asserts that the Sixth Circuit's summary affirmance is in "tension" with this Court's decision in *Reading Co. v. Brown*, 391 U.S. 471 (1968).

At the outset, it bears emphasis that the District Court repeatedly emphasized the unique factual setting of this case, the narrowness of the issue decided and the complete absence of precedent. For

example, the District Court referred to the facts and issue variously as "very narrow," at Pet. App. 24a, involving "unique circumstances," at 33a, a "special case," at 33a, a "rare issue," at 34a, a "unique context," at 40a, and "narrow circumstances," at 48a. The District Court then, in a section entitled "Case of First Impression," noted that "the parties readily acknowledged during oral argument, ... an unfortunate lack of precedent capable of shedding light on the rare issue at hand," at 40a. The District Court went on to lament "the void of controlling authority," at 35a, and the "lack of precedential guidance," at 38a. Petitioner nonetheless attempts to create a circuit split out of this raw material.

None of the decisions petitioner cites deals with the type of unique contractual obligations and terms at issue here. Two of these cases, *Merry-Go-Round* and *Klein Sleep*, consider assumptions of leases that expressly provide for accelerated rental payments due immediately upon early termination. The third, *Hemingway*, considers post-confirmation obligations in connection with environmental provisions under CERCLA. Whatever the proper treatment of such obligations, these cases say nothing about the treatment of the unusual reimbursement obligations in the insurance contract here, which will not even arise until claims are made and paid long after the end of the administration period.

Similarly, *Reading*, which holds that a tort claim arising during the administration period is an actual, necessary expense of preserving the estate, has nothing to do with the unique type of contractual obligations at issue in this case. Neither a purported circuit split nor tension with *Reading* was created by

the Sixth Circuit's short, summary decision adopting the reasoning of the District Court's thorough analysis of the "very narrow" issue presented here.

1.a. In *Hemingway*, Juniper Development Group ("Juniper") sought indemnification for its current and future response costs under CERCLA pursuant to a post-petition asset purchase agreement. The *Hemingway* court's decision mined the "increasingly crowded 'intersection' between the discordant legislative approaches embodied in CERCLA and the bankruptcy code." 993 F.2d at 921. Fortunately, such an endeavor is neither necessary nor relevant here. Even the most cursory review of the *Hemingway* opinion demonstrates that the complex issues addressed there look nothing like the issue here. This case has nothing to do with CERCLA liability, which itself involves complex questions related to apportioning cleanup costs, nor does this case implicate § 502(e)(1)(B) of the Bankruptcy Code, which disallows the claims of a codebtor that is jointly liable with the debtor on a creditor's claim. Contrary to petitioner's claim in a footnote (Pet. 14 n.5), the court in *Hemingway* focused most of its analysis on the impact of § 502(e)(1) and the discord between the legislative goals of bankruptcy and environmental laws. *See Hemingway*, 993 F.2d at 921.

The only possible relevance of *Hemingway* is the First Circuit's agreement with the District Court here that "contingent" costs are not eligible for administrative expense priority:

> [W]e agree that . . . priority is unavailing to Juniper insofar as its

> right to contribution for future response costs remains "contingent" at the time the bankruptcy court considers Juniper's claim for allowance against the debtor estate. Only "actual" administrative expenses, not contingent expenses, are entitled to priority payment under Bankruptcy Code § 503(b)(1)(A).

993 F.2d at 930. Just like petitioner's Priority Request, Juniper's right to a future contribution claim would be disallowed unless it became "fixed and actual." *Id.*

The vastly different facts and contexts do not allow an easy comparison of *Hemingway* to the current proceeding. A careful reading of *Hemingway* reveals that it sheds no light on the unusual contractual obligations at issue here.[6] The District Court here recognized the grant of administrative priority treatment would improperly accelerate a contractual payment obligation and effectively rewrite the underlying insurance contracts; the claim dispute in *Hemingway* did neither. The *Hemingway* decision is simply not in conflict with the decision here.

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[6] Also, *Hemingway* was a case converted to Chapter 7 and did not involve application of a plan of reorganization. Here, petitioner is constrained by the final terms of the confirmed Plans that do not provide a means of payment.

b. The other two cases petitioner identifies as part of the alleged circuit split, *Merry-Go-Round* and *Klein Sleep*, are inapposite. *Merry-Go-Round* involved a post-conversion breach of an assumed lease by a Chapter 7 trustee. In *Klein Sleep*, the Chapter 11 debtor failed to confirm a plan and then breached an assumed lease. Because the lease defaults occurred during the administration of the bankruptcy cases, the non-debtor party was allowed to enforce its contract remedies. One of the remedies under the leases was acceleration of amounts due. *See Merry-Go-Round*, 180 F.3d at 152; *Klein Sleep*, 78 F.3d at 20-21.

The holdings in *Klein Sleep* and *Merry-Go-Round* merely reflect a consensus among courts regarding the treatment of a very specialized and easily identifiable type of claim: a damage claim for future rent arising from an assumed lease that was breached during the administration of the debtor's estate.[7] In these cases, the courts gave effect to existing contractual terms that permitted immediate acceleration of rental payments due upon breach of a

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[7] Recent Congressional legislation — the addition of § 503(b)(7) to the Bankruptcy Code — confirms this consensus, but also reflects the concerns that are raised when significant future obligations are contractually accelerated and given priority treatment. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1103. Section 503(b)(7) recognizes that such future rent claims are administrative expenses, but explicitly limits the priority amount of these claims to two years post-rejection rent or actual turnover of the premises. 11 U.S.C. § 503(b)(7).

lease assumed during the administration of the bankruptcy estate. By recognizing that these contract damages were entitled to administrative expense priority, the courts did little more than enforce contractual terms freely bargained for between the landlord and the debtor/lessee, in contemplation of the lessee's default.

The reasoning of *Merry-Go-Round* and *Klein Sleep* does not apply to these facts. Here, Debtors successfully confirmed Chapter 11 plans and emerged from bankruptcy without any breach of the underlying insurance policies. Further, the existence of a default is not asserted in the Priority Request, nor is it relevant to the calculation of the Ultimate Loss Projection.

Petitioner's arguments also make no practical sense. If petitioner's position succeeds, any party that has a post-petition contract may seek actuarially accelerated "damages" solely because the contract was assumed or executed by a debtor in possession during the administration of the bankruptcy case. Far from enforcing the contract terms as in *Merry-Go-Round* and *Klein Sleep*, allowing petitioner to require immediate payment in the form of an administrative expense claim for possible future insurance obligations would accelerate the mutually agreed upon payment dates and breach the insurance contracts.

2. Petitioner also suggests that the decision below is in tension with *Reading Co. v. Brown*, 391 U.S. 471 (1968). In *Reading*, this Court determined that an accrued tort claim — fire-loss damages arising from the receiver's negligent use and control

of the debtor's building post-petition — was an actual and necessary cost of operating the debtor's business, even though paying the claim provided no benefit to the debtor's bankruptcy estate. The Court reasoned 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." *Reading*, 391 U.S. at 483.

Nothing in *Reading's* treatment of the accrual of tort claims remotely implicates the very different circumstances at issue here. There, the particular loss, the claims arising out of that loss, and the obligations incurred by the debtor all arose during the administration period of the estate. *Id.* at 473-74. Here, in the context of a contractual obligation, the opposite is true. Debtors are under no legal obligation to pay any deductible until the claim is made long after the end of the administration period.

The District Court recognized that *Reading* dealt with analytically distinct issues. The District Court characterized the *Reading* line of cases as a "refined benefit to the estate approach, which was developed largely in response to the common problem of characterizing damages from legal judgments . . . ." Pet. App. 30a (footnote omitted). The District Court found that approach of limited utility because the underlying dispute here involves interpretation of contracts, and not legal judgments. Pet. App. 31a. The *Reading* test is appropriate for a select group of difficult to classify claims: torts, penalties for injunction violations, penalties related to environmental remediation costs and fines for violating a federal or state statute. *See Caradon*

Doors and Windows, Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.), 447 F.3d 461, 464 (6th Cir. 1995) (providing a discussion of the types of claims that are supported by a *Reading* analysis).

The nature of the Priority Request here is starkly different. The Priority Request is not based on a tort, breach of contract or other wrongful action by Debtors. To the contrary, petitioner has never alleged wrongful conduct by Debtors.[8] Instead, this case turns on the proper treatment of unusual contractual obligations that the insurer required and the insureds accepted. Moreover, it is the non-debtor party, petitioner, that is attempting to avoid the explicit terms of the underlying agreements. There is simply no tension between *Reading* and the decision below.

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[8] The Court in *Reading* did acknowledge that ordinary insurance premiums are entitled to administrative priority treatment. "It is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained . . . ." *Reading*, 391 U.S. at 483. Here there is no dispute regarding premium expenses incurred during the administration period. Only the unusual future reimbursement obligations are in dispute. That reality underscores the lack of tension between the decision below and *Reading*, and demonstrates that the decision below addresses unique and unusual obligations far outside the contemplation of the *Reading* Court.

II. THE DECISION BELOW ADDRESSES AN UNUSUAL CONTRACT REIMBURSEMENT PROVISION AND DOES NOT IMPLICATE ANY CIRCUIT SPLIT CONCERNING WHEN A CLAIM ARISES.

Overlooking the parties' ready acknowledgment that there was "an unfortunate lack of precedent capable of shedding light on the rare issue at hand," Pet. App. 34a, and the District Court's repeated observation that this case presented a unique and narrow issue, petitioner now argues that the decision below weighs in on a long-standing three-way split of authority involving how courts determine whether a party has a claim under § 101(5) of the Bankruptcy Code. *See, e.g., Epstein v. Official Committee of Unsecured Creditors of the Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995) ("We . . . adopt what we call the 'Piper test' in determining *the scope of the term claim under § 101(5)* . . . .") (emphasis added); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 199 (4th Cir. 1988) ("While the parties agree that the term claim is broadly defined under the Bankruptcy Code, they disagree over whether [plaintiff's] suit falls within that definition.").

This case only addresses the distinct issue of whether an administrative expense is allowed and has nothing whatsoever to do with whether petitioner has a claim within the meaning of § 101(5). The District Court acknowledged from the outset that the issue presented here was not "whether [the prospective deductible obligations] are in fact 'legal' obligations," but whether those obligations "should receive administrative expense

treatment . . . above that afforded to most creditors." Pet. App. 23a-24a. There is no need to decide whether the prospective deductible obligations are *claims* within the meaning of § 101(5)(a); the disagreement only concerns whether these estimated future payments are entitled to *administrative priority treatment.*[9]

Petitioner attempts to conflate the timing issue in determining when a claim arises and the timing issue concerning administrative expenses accruing after the bankruptcy estates terminate. But the relevant statutory provisions involve different requirements and distinct bankruptcy policies. Conflating the issues may produce some confusion, but it does not create an actual split of authority.

1. Petitioner's argument fails to account for the fact that very different guiding principles govern the respective issues concerning: (1) when claims arise for the purpose of determining what is and is not a bankruptcy claim, generally, and (2) when claims

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[9] The Brief submitted in support of petitioner on behalf of the *Amici Curiae* States, appears to acknowledge as much. *Amici Curiae* States' Brief 13 n.6. *Amici* then assert that even if the decision below addresses only the accrual of an administrative expenses, it nevertheless merits this Court's review. *Id.* at 16-20. *Amici's* sky-is-falling argument with respect to future calamities that may result from the application of this exceedingly narrow issue is out-of-step with the reality that this is a case of first impression for *any* court. Accordingly, the District Court's decision should only affect the very narrow and heretofore undiscovered class of cases involving specific payment terms in insurance contracts. Any possible impact on those cases is avoided if insurers secure adequate collateral and stay involved in any bankruptcy proceeding.

arise for the purpose of determining what is and is not an "administrative expense."

a. As *Amici Curiae* States demonstrate, the purported circuit split described in the petition has emerged as courts have grappled with the purposefully broad language of § 101(5)'s definition of a claim, which extends to contingent and potentially unrealized claims of liability. *Amici Curiae* States' Brief 10-11. Section 101(5) defines a "claim" under the Bankruptcy Code to mean 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). Courts have consistently recognized that both the broad text of the statute and also the legislative history indicate that "Congress intended the term 'claim' to be given broad interpretation so that 'all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case.'" *Lemelle v. Universal Manufacturing Corp.*, 18 F.3d 1268, 1275 (5th Cir. 1994) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6266); *United States v. LTV Corp.* (*In re Chateaugay Corp.*), 944 F.2d 997, 1003 (2d Cir. 1991) ("Congress unquestionably expected this definition to have wide scope.").

The broad language employed by the statute is not unlimited. As the Second Circuit explained when it rejected the broad conduct test, "[d]efining claims to include any ultimate right to payment arising from prepetition conduct by the debtor comports with the theoretical model of assuring that

all assets of the debtor are available to those seeking recovery for prepetition conduct. But such an interpretation of 'claim' yields questionable results." *Chateaugay*, 944 F.2d at 1003. Accordingly, the circuit split invoked by petitioner here reflects the courts' attempts to avoid the "questionable results" that might otherwise derive from the broad and seemingly unlimited definition of a "claim." That difficult task has nothing to do with issues here, which are answered simply by reviewing the specific terms of the insurance contracts.

b. The broad definition of a "claim" within the meaning of the Bankruptcy Code contrasts starkly with the narrow definition of administrative expenses entitled to priority under § 503(b)(1)(A). Administrative expenses include only "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). Whereas the definition of a "claim" is unquestionably broad, the definition of an administrative expense is unquestionably narrow, as the cases that petitioner cites involving administrative expense claims readily acknowledge. *See Merry-Go-Round*, 180 F.3d at 157 ("Since there is a general presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed among creditors, § 503 [providing for priority claims], must be narrowly construed."); *Klein Sleep*, 78 F.3d at 23 (affirming "stated policy that priorities in bankruptcy should be narrowly construed and sparingly granted"); *see also Otte v. United States*, 419 U.S. 43, 53 (1974) (holding that there is an overriding concern to keep administrative expenses at a minimum).

The text of § 503(b)(1)(A), in contrast to the text of § 101(5), does not recognize "contingent" administrative expenses; administrative priority claims must be "actual" and "necessary." *Accord Hemingway*, 993 F.2d at 930 ("Only 'actual' administrative expenses, not contingent expenses, are entitled to priority payment under Bankruptcy Code § 503(b)(1)(A)."). Accordingly, the decisions involving the definition of a claim under § 101(5) are not only inapposite, they reflect bankruptcy policies that produce conflicting presumptions. The interest that supports a broad encompassing conception of prepetition claims cannot be conflated with the impulse toward narrowly construing post-petition administrative expenses.

2. The distinct question of when a claim arises under § 101(5) has nothing to do with the narrow, rare and unique issue the District Court actually resolved. This is underscored by the fact that the only case that even implicates this split that was actually relied upon by the District Court was *Pension Benefit Guaranty Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811 (6th Cir. 1997). *Sunarhauserman* is a Sixth Circuit decision that, as acknowledged by petitioner, falls on the side of this presumed split that is more favorable to petitioner's position. Pet. App. 30a; Pet. 25 n.9 (acknowledging that *Sunarhauserman* 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"). Thus, the idea that the decision below is a product of a Sixth Circuit decision that joins the Third Circuit on the minority

side of a three-way split does not square with the actual decision of the District Court.

More fundamentally, the issue that divided the circuits has nothing to do with the issue actually resolved by the District Court. *Sunarhauserman* is the only case among those identified by petitioner in this purported three-way split that even addresses accrual of claims with respect to determining an administrative expense claim as opposed to determining whether a claim accrued pre- or post-petition. The cases petitioner cites are for the purposes of determining (1) whether the claim was discharged in bankruptcy, *e.g.*, *Watson v. Parker (In re Parker)*, 313 F.3d 1267 (10th Cir. 2002); *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan*, 162 F.3d 405 (6th Cir. 1998); *Butler v. Nationsbank, N.A.*, 58 F.3d 1022 (4th Cir. 1995); *Lemelle v. Universal Manufacturing Corp.*, 18 F.3d 1268 (5th Cir. 1994); *In re Chateaugay*, 944 F.2d 997 (2d Cir. 1991); or (2) whether the claim was subject to the automatic stay provision of § 362(a)(1), *Grady v. A.H. Robins Company, Inc.*, 839 F.2d 198 (4th Cir. 1988).

One case was careful to note that decisions on the threshold issue of how to define a claim do not impact or resolve issues related to the status of an administrative claim. *See Grady*, 839 F.2d at 199 (adopting the conduct test applied by the district court and emphasizing the narrowness of the district court's holding and noting that it "did not decide whether or not . . . claim would constitute an administrative expense"). Another court separately addressed and considered the status of an administrative expense claim that related solely to

actual, fixed costs, after resolving issues related to contingent, unrealized costs. *See Chateaugay*, 944 F.2d at 1009-10 (authorizing recovery of actual clean-up costs under CERCLA that accrued and were expended during the administration period).

Moreover, these cases apply the generalized discussion of when a claim accrues for purposes of the definition of a claim in § 101(5) to either tort or regulatory contexts — and not under circumstances where the parties have defined their contractual responsibilities in the form of the distinct reimbursement obligations at issue here. *See, e.g., Watson v. Parker (In re Parker)*, 313 F.3d 1267 (10th Cir. 2002) (legal malpractice); *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan*, 162 F.3d 405 (6th Cir. 1998) (statutory withdrawal liability); *In re Sunarhauserman, Inc.*, 126 F.3d 811 (6th Cir. 1997) (unpaid post-petition minimum funding contributions); *Butler v. Nationsbank, N.A.*, 58 F.3d 1022 (4th Cir. 1995) (fraudulent conveyance); *Lemelle v. Universal Manufacturing Corp.*, 18 F.3d 1268 (5th Cir. 1994) (wrongful death); *In re Chateaugay*, 944 F.2d 997 (2d Cir. 1991) (statutory environmental claims); *Grady v. A.H. Robins Company, Inc.*, 839 F.2d 198 (4th Cir. 1988) (mass tort litigation); *Kilbarr Corp. v. Gen. Servs. Admin. (In re Remington Rand Corp.)*, 836 F.2d 825 (3d Cir. 1988) (federal Contract Claims Act); *Jones v. Chemetron Corp.*, 212 F.3d 199 (3d Cir. 2000) (mass tort litigation); *In re Piper Aircraft Corp.*, 162 B.R. 619 (Bankr. S.D. Fla. 1994) (personal injury/wrongful death); *Avellino & Bienes v. M. Frenville Co., Inc. (In re Frenville Co., Inc.)*, 744 F.2d

332 (3d Cir. 1984) (common law indemnification and contribution claims for tort liability).

Although petitioner and *amici* seize on this purportedly long-standing split among the circuit courts in order to elevate the importance of the decision below, this case does not implicate the question that divides the circuits. This case only addresses a unique, contract-specific issue that the District Court and parties below correctly treated as one of first impression.

III. NO COMPELLING POLICY ARGUMENTS UNDERLIE THIS CONTRACT DISPUTE.

Petitioner's policy arguments are an attempt to deflect the analysis from the specific terms of the underlying contracts and petitioner's own mistakes. *See* Pet. 30-34. As the District Court correctly recognized, this matter involves case specific contract terms and a mistake by petitioner involving collateral, not some broader threat to the availability of insurance for entities in bankruptcy. Bankruptcy laws are structured to induce creditors to work with bankrupt entities, but they also seek fair and consistent treatment of similarly situated creditors. *Compare Reading*, 391 U.S. at 477 (An "important" statutory objective of chapter 11 is "fairness to all persons having claims against an insolvent.") *with Otte*, 419 U.S. at 53 ("There is, of course, an overriding concern in the Act with keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors."). These goals sometimes clash, but *not* in this case.

Petitioner attempted to assert priority status for the future contract payments to overcome the impact of the anticipated failure of some of its underlying collateral.[10] As indicated in the Statement, Debtors provided almost $14 million in surety bonds as part of a collateral pool that also included substantial amounts of cash. The sum of the bonds approximately equals the total amount of the Priority Request. Although petitioner has made a claim under these bonds, collection of a portion of the proceeds is in dispute. Pet. App. 21a, n. 13. Also, the issuer of the surety bonds is in receivership in the state of New York. *Id.*

The District Court correctly recognized that the failure of this collateral is the raison d'être of this dispute. *See* Pet. App. 35a, n. 20. The very fact that petitioner demanded extensive collateral approximately equal to its exposure undermines petitioner's assertion that this type of future contract obligation is routinely given administrative priority treatment and the suggestion that the decision below threatens the availability of deductible policies for entities in bankruptcy. *Id.* It was clear to the District Court that this controversy is the result of "failed collateral, which Zurich incidentally required to offset some of the risk attendant to deductible policies, especially those entered into with companies in bankruptcy, despite an alleged custom in bankruptcy that priority status

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[10] Petitioner has admitted that the claim was filed as a protective measure in the event of the ultimate failure of any of the collateral. App. 2a-3a, ¶ 94.

is routinely awarded for insurers in Zurich's shoes." *Id.*

The District Court also recognized that the case-specific failure of collateral undermined any argument that this decision had broad repercussions. Whereas "[t]he value that insurance coverage provides to debtors-in-possession during bankruptcy cannot be overstated[,] . . . the precedential repercussions felt by denying Zurich's claim under these narrow circumstances will not produce the dire picture that Zurich now paints." Pet. App. 48a. Petitioner is "an incredibly sophisticated, for-profit insurance corporation that was fully aware of the risks associated with insuring a financially-troubled business" such as the operations of Debtors. Pet. App. 50a. Other insurance companies bargained with Debtors to provide insurance, and petitioner earned the business by underbidding its competition. Pet. App. 11a-12a. "Proverbially speaking, Zurich made its bed and the other parties in interest — including [respondent] and the public by way of reclamation — should not be forced to sleep in it." Pet. App. 48a. The courts below appropriately balanced the competing policy and business interests to arrive at an equitable resolution of an unfortunate — and rare — outcome resulting from "arm's length and contentiously negotiated" insurance contracts. Pet. App. 51a. This case does not signal the end of the

availability of insurance — including deductible policies — for other financially troubled insureds.[11]

IV. THE UNIQUE ISSUE BEFORE THE LOWER COURTS WAS CORRECTLY DECIDED.

The District Court's analysis of the "very narrow" and "unique" issue presented here not only fails to create a circuit split or threaten any public policy calamity, *it was also correct.* Petitioner's Priority Request for their unusual contractual obligations that will not even arise until future claims are made

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[11] The *Amici Curiae* States indicate they "are concerned with enforcing state laws that assure that injured employees who are covered by their employer's workers' compensation insurance . . . actually receive their workers compensation benefits," and are also concerned about whether employees of companies that are self-insured will retain their coverage if the companies enter bankruptcy. *Amici Curiae* States' Brief 1, 2. Those concerns, while obviously legitimate, have nothing to do with the decision below. Debtors' employees here will receive their workers' compensation payments. In fact, the reason petitioner seeks priority treatment is because petitioner is statutorily and contractually obligated to make payments to Debtors' employees whether or not future deductibles are reimbursed. The problem of coverage for self-insured employers is a real one, but not one that has anything to do with the treatment of the specific contractual reimbursement provision at issue here. Moreover, for the reasons addressed above, the District Court's decision does not threaten the availability of insurance coverage — with or without deductible reimbursement provisions — to entities near or in bankruptcy, it only requires insurers to scrutinize the value of collateral. Simply put, petitioner's real problems, failure of a portion of the collateral and inattention to the bankruptcy plan process, will not impact employees of Chrysler, GM or any insured, self-insured or illegally uninsured company.

and paid may only receive priority treatment if petitioner bears its burden of showing that they are "actual" and "necessary" to preserve Debtors' estates. 11 U.S.C. § 503(b)(1)(A). That is precisely what petitioner failed to prove.

1. The District Court held: "It is in this regard that the Priority Request fails as a simple matter of statutory interpretation on both fronts: the claimed expenses are not 'actual' (*i.e.*, not yet realized) and the payment thereof, when the obligations are realized, cannot act to preserve an estate that no longer exists." Pet. App. 27a. The lower courts understood that the obligations that petitioner is attempting to classify as administrative expenses will only arise post-confirmation, if ever.

a. Estimated costs based on an Ultimate Loss Projection are not actual or necessary expenses because the costs did not exist when the Priority Request was made — and may never exist. The District Court recognized petitioner would never know what the costs are, nor have the contractual right to invoice Debtors, until the charges are incurred and paid by petitioner. Pet. App. 27a. "The bottom line remains that Zurich is not contractually obligated to pay any of the deductible obligations in question until claims are filed, which will necessarily occur post-confirmation." Pet. App. 29a. When petitioner is finally permitted under the insurance contracts "to seek reimbursement from Debtors for the advanced deductibles, the estate will have already dissolved and Debtors will cease to exist." *Id.* Thus, "payment of the claimed expenses will in

no way act to preserve an estate when there is no estate to preserve."[12] *Id.*

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[12] *Amicus* National Union, but not petitioner (despite working long and hard to find a circuit split lurking in a district court decision addressing an issue of first impression), attacks the District Court's determination that the administration of the estates terminated upon confirmation of Debtors' Plans. According to National Union, this view conflicts with holdings in the Second and Eighth Circuits and the Bankruptcy Code. National Union Brief 18-21. There is no conflict.

Section 1141 of the Code addresses the effects of plan confirmation on a debtor's bankruptcy estate and the estate's assets. *See* 11 U.S.C. § 1141. The general rule under § 1141 of the Bankruptcy Code is that the bankruptcy estate is no longer required upon the confirmation of the debtor's chapter 11 plan. *Venn v. Kinjite Motors, Inc. (In re WMR Enters., Inc.)*, 163 B.R. 887, 889 (Bankr. N.D. Fla. 1994). The bankruptcy court and plan proponents may modify the general rule by including provisions in the plan or confirmation order that specifically address what happens to the estate or unadministered estate assets. *In re Chisolm*, 156 B.R. 336 (Bankr. M.D. Fla. 1993), *aff'd without rehearing* 157 B.R. 710; *see also In re Cumberland Farms, Inc.*, 162 B.R. 62 (Bankr. D. Mass. 1993). The Debtors' Plans did not alter the default rule of § 1141, so Debtors' bankruptcy estates were no longer required upon confirmation and sale of the Debtors' assets. In fact, the provisions of the Confirmation Orders contemplated termination of Debtors' estates. *See* Reorganization Order L. 2. (z) and Liquidation Order L. 2. (aa) (on the Effective Dates of the Plans, "Debtors shall be deemed dissolved").

National Union points to § 554(d) of the Bankruptcy Code to support its argument that the estate survives plan confirmation. Section 554(d), however, deals with abandonment of property of the estate, and here there is no abandoned or unadministered assets, so § 554(d) is inapposite.

The cases National Union cites deal with special situations that are not remotely implicated here and do not detract from

Once Debtors' bankruptcy estates ceased to exist, they could not incur further expenses. "In this unique context, courts, although few in number, have consistently held that expenses arising post-confirmation fail to satisfy the requirements for administrative priority under § 503 for the simple, yet inescapable reality that there is no estate to preserve or benefit." Pet. App. 40a.

This is not just a matter of known expenses that are not yet payable. Here, the obligation to reimburse the deductibles will not even arise by contract until covered claims are made and paid, long after the administration period has ended. Claims incurred post-confirmation are simply ordinary creditor claims against the post-confirmation debtor. *See In re Frank Meador Buick, Inc.*, 65 B.R. 200, 203 (W.D. Va. 1986). Thus, the estimated future obligations described in the Priority Request are not actual or necessary under Section 503(b)(1)(A).

Petitioner concedes, as it must, that it can only estimate the deductibles it might pay because the actual obligation to reimburse deductibles will not arise until the future. Still, petitioner insists the insured must advance the money to cover the

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the general rule. *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F3d 116 (2d Cir. 2008) (involving a chapter 7 debtor who concealed various prepetition interests and claims in his insurance business by failing to schedule or otherwise disclose them to the trustee); *Security Bank v. Neiman*, 1 F.3d 687 (8th Cir. 1993) (involving a chapter 7 case converted from chapter 13 and raising distinct issues related to preconversion administrative expense claims).

deductibles now. This directly conflicts with the terms of the insurance contracts and is nothing more than a breach of those agreements.

b. Courts should not allow a party to ignore the negotiated obligations in the insurance policies. The concept that a debtor must comply with the terms of its contracts is a fundamental principle of bankruptcy law that is without dispute. *See, e.g., Stewart Title Guaranty Company v. Old Republic National Title Insurance Company,* 83 F.3d 735, 741 (5th Cir. 1996) ("It is well established that as a general proposition an executory contract must be assumed or rejected in its entirety."); *City of Covington v. Covington Landing Ltd. P'ship (In re Covington Landing Ltd. P'ship),* 71 F.3d 1221, 1226 (6th Cir. 1995) (a debtor must assume all benefits and burdens of a contract); *In re Nitec Paper Corp.,* 43 B.R. 492, 498 (S.D. N.Y. 1984) ("A contract assumed in bankruptcy is accompanied by all its provisions, and conditions. It may not be assumed in part and rejected in part."); *In re Camptown, Ltd.,* 96 B.R. 352, 355 (Bankr. M.D. Fla. 1989) ("It is well established that as a general proposition an executory contract must be assumed or rejected in its entirety.").

The corollary, that the non-debtor party should also comply with its contractual obligations, is likewise unassailable. Moreover, enforcement of a contract between a debtor and non-debtor is simply a matter of state contract law. *See Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."); *see also American Inv. Fin. v.*

United States, 476 F.3d 810, 813 (10th Cir. 2006) (citing *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960)) ("Federal law creates no property right, but does attach federally defined consequences to rights created under state law."); *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998) ("In developing federal common law rules of contract interpretation, we take direction from both state law and general contract law principles."). Petitioner has failed to present any legal authority that would allow a contract party — debtor or non-debtor — to judicially amend a contract or actuarially accelerate contract payments when the agreement prohibits this result.

2. The District Court's opinion also represents a straightforward and correct application of the benefit to the estate test. Many circuits apply the same benefit to the estate test without conflict, but no court of appeals has addressed this kind of contractual reimbursement obligation and afforded it administrative priority. If another court of appeals ever addresses a case of failed collateral, the result will depend on the terms of the insurance policies, the collateral, the diligence of the carrier and many other fact specific issues. Under these facts, including the specific terms of the arms-length insurance contracts, the decision should always be the same because payments due by contract at some point in the future will not likely benefit an existing bankruptcy estate. But in all events, no such case has arisen.

Petitioner and its *amici* seek to lump the entire insurance program together and argue that the insurance represents a "benefit" to the estate. Pet.

12. But that ignores the character of the reimbursement obligation. Debtors paid all that they were obligated to pay by contract for the benefit of the insurance coverage, including premiums and deductibles, during the administration period. *See* Statement. The only question here is the treatment of aspects of the overall insurance program that may only be performed post-confirmation.

The District Court characterized petitioner's argument as follows: "Zurich asserts that the accrual of the claims should essentially relate back to the underlying insurance coverage as part and parcel of the relevant insurance policies, which include *the premium obligations that were assigned administrative priority and satisfied accordingly.*" Pet. App. 28a (emphasis added); *see also* Pet. 12-13. But petitioner's argument mischaracterizes the benefit question these facts present. The "benefit" issue addressed is whether Debtors' estates benefit from the upfront payment of obligations that only arise by contract outside the administration period. They do not. A bankruptcy estate does not benefit from paying obligations it has no contractual duty to pay and which have, in fact, not yet arisen (and may never arise). Making such payments out of time makes no economic, legal or practical sense.

Further, in addition to insurance coverage under the Program, petitioner agreed to handle various matters of administration and claims management that occur after termination of the insurance coverage. More importantly, petitioner contractually obligated itself to *advance* money for deductibles *before* Debtors have any obligation to pay. Until petitioner fulfills its bargained-for, administrative

obligations and advances the deductibles, the full benefit of the deductible insurance contracts is not received. Allowing the Priority Request, thus requiring payment from Debtors before Petitioner makes any disbursements, would completely reverse this contractual arrangement. These obligations are not performed by petitioner, nor are the corresponding benefits received by Debtors, until *after* the end of the administration period. "Even assuming arguendo that the expenses arose (or *will arise* in Zurich's case) from a transaction with the bankruptcy estate," the District Court reasoned, "accelerated reimbursement via administrative priority status will not act to provide a direct and substantial benefit to the estate where the claimed expenses will not become legal obligations until unknown points in the future, if ever." Pet. App. 32a (emphasis in original).

As is plain from the text of § 503, administrative expenses do not include "contingent" or "unmatured" claims. The decisions below correctly held that the unique type of obligations at issue here were not "actual" expenses that were "necessary" to preserve the bankruptcy estate.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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