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

BRIEF OF *AMICUS CURIAE* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit erred in holding that administrative-expense priority does not extend to *all* payments due under a contract entered into or assumed by the debtor during a bankruptcy case, in contravention of this court's holding in *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968) (stating that the cost of insurance is properly an administrative expense) and the decisions of other Courts of Appeals.

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INTEREST OF THE AMICUS

Amicus curiae National Union Fire Insurance Company of Pittsburgh, PA ("National Union") respectfully submits this brief in support of Petitioner Zurich American Insurance Company ("Zurich"). Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief.[1]

The issue in this case is whether a chapter 11 debtor is obligated to pay as an "administrative expense" the full cost of its workers' compensation insurance that it purchases on extended payment terms during its chapter 11 case, or whether the debtor may eliminate any outstanding payment obligation simply by confirming its chapter 11 plan before final payment is liquidated and due.

As an issuer of workers' compensation insurance, *amicus curiae* National Union is greatly affected by the decision in this case. National Union submits this brief in support of Zurich's petition for a writ of certiorari because the Sixth

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. To the extent not previously filed, copies of the letters of the parties consenting to the filing of this brief are lodged herewith.

Circuit's decision effectively holds, in conflict with both Supreme Court precedent and decisions of other courts of appeals, that when a debtor in bankruptcy purchases workers' compensation insurance, the debtor need not pay for that insurance in full as an expense of administration. *Compare Reading Co. v. Brown*, 391 U.S. 471, 483 (1968) (stating that insurance purchased in bankruptcy "is an administrative expense payable in full . . . before dividends to general creditors" because otherwise necessary insurance "could not be obtained") *with* Pet. App. 1a, 3a.

Zurich provided economical workers' compensation and other insurance to Horizon Natural Resources Company and its affiliates (collectively, "Horizon") both before and after Horizon commenced its bankruptcy case. The insurance policies provided by Zurich were deductible policies, structured so that Zurich agreed to pay the full amount of the claims against Horizon up front and then bill Horizon for the deductible. Accordingly, under the policies, Horizon's payment obligations included (1) payment of premiums and (2) reimbursement of Zurich over time for the deductibles Zurich advanced. A workers' compensation insurer such as Zurich has a duty to pay workers' claims long after the policy period expires – indeed, long after the bankrupt debtor's bankruptcy plan is confirmed – as workers continue to need medical care or compensation for injuries sustained during the

policy period. Under this structure, rather than pay a single, large, fixed, up-front premium for the insurance, Horizon agreed to pay a small up-front premium and to reimburse Zurich for these "deductibles" as the payments were made far into the future.

The holding of the decision below, refusing to accord administrative expense priority to Horizon's reimbursement obligation for post-confirmation payments, effectively whipsaws Zurich, leaving it obligated to pay millions of dollars in claims while effectively denying reimbursement. Moreover, left in place, the decision will have far reaching consequences. A debtor in bankruptcy in the Sixth Circuit need only pay amounts that the insurer bills up until the time of confirmation of its plan, and not sums due thereafter. As a result, no insurer in the Sixth Circuit will be willing to provide insurance without demanding up-front payment or expensive forms of collateral to secure the debtor's obligations. Like Zurich, National Union is an insurance carrier that writes workers' compensation insurance, and thus, the question presented is of vital significance to it.

Consistent with Supreme Court Rule 37.1, the purpose of this brief is to bring to the Court's attention matters that are not addressed in the parties' briefs. This brief addresses the interpretation and application of section 503(b)(1)(A) from a distinct perspective, emphasizing how the Sixth Circuit's decision conflicts with settled

precedent and how the decision, if uncorrected, will frustrate Congress' intent to enable businesses to operate in bankruptcy. National Union respectfully submits that, in deciding the instant controversy, the Court would benefit from consideration of the matters addressed herein.

STATEMENT

This matter arises out of the chapter 11 bankruptcy case of Horizon.[2] In chapter 11 cases such as this one, a debtor may generally continue its business after commencing its bankruptcy case as a "debtor in possession" of property of the bankruptcy estate. 11 U.S.C. §§ 1101(1), 1107, 1108 (authorizing operation of business). Certain debts that the debtor incurs while operating in bankruptcy are classified as "administrative expenses," entitled to priority over other obligations. *Id.* §§ 503(b), 507(a)(2). Administrative expenses include the "actual, necessary costs and expenses of preserving the estate." *Id.* §§ 503(b)(1)(A), 507(a)(2). The priority granted administrative expenses "encourage[s] third parties to provide [businesses attempting to reorganize in bankruptcy] with necessary goods and servic-

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[2] When Horizon's effort to reorganize was not successful, it decided to liquidate, and 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"). Pet. for Writ of Certiorari at 7.

es" in order to maximize the value of the estate for the benefit of creditors. *United Trucking Serv., Inc. v. Trailer Rental Co. (In re United Trucking Serv., Inc.)*, 851 F.2d 159, 161 (6th Cir. 1988).

Between 1998 and 2004, Zurich provided workers' compensation, general liability, and business automobile insurance to Horizon. Horizon filed for bankruptcy protection under chapter 11 of the Bankruptcy Code in November 2002. While Horizon attempted to reorganize, Zurich continued to provide insurance coverage to Horizon. Horizon could not legally operate in bankruptcy without workers' compensation insurance. *See* Ky. Rev. Stat. § 342.340; *see also* 28 U.S.C. § 959. As the district court recognized, "There can be no question that . . . the insurance coverage provided by the Zurich Policies was critical to the Debtors' operations," "both prior to and during the pendency of the bankruptcy." Pet. App. 10a-11a. Thus, the insurance coverage was "necessary," § 503(b)(1)(A), to the bankruptcy estate's operation of Horizon's business.

The Debtors' payment for this indispensable insurance was deliberately extended over time and designed to reimburse Zurich's actual payouts under the policies – all to reduce the burden on Horizon's cash flow and the overall cost of insurance. Under these sorts of "loss-sensitive" policies, including deductible policies, instead of Zurich charging a single, up-front premium to cover all risk and expense under the

policies, the parties agreed Zurich would pay claims and then be reimbursed by Horizon after payments were made. Pet. App. 8a ("On a deductible policy, the insured agrees to retain some of the risk of claims within the deductible layer. . . . In this instance, Zurich would advance the money to pay the losses and expenses and the Debtors would then reimburse Zurich when billed for the deductible costs under the policy.").

Under this payment structure, payments and reimbursements extend far into the future, long after plan confirmation. *Id.* at 9a ("although a claim may occur during a policy coverage period . . . costs may be incurred in connection with the prior coverage at some juncture after the coverage has expired; payments on some types of claims may extend over many years."). This can occur because, "[f]or example, a worker may suffer a compensable injury on December 1, 2002, but receive compensation payments and medical reimbursements over many years" because the condition "abate[s] but flares up in future years," or "the injury might be latent and manifest itself years later." *Id.* at 9a-10a. As the district court explained, "[b]ecause the later expenses stem from the original injury during the coverage period, the expenses will still fall under the domain of Zurich. And when dealing on such a large scale, these deductible expenses will reach well into the millions of dollars range." *Id.* at 28a n.17.

Such deductible policies are used in the vast majority of bankruptcy cases because non-deductible policies would impose "prohibitive costs" on debtors. *Id.* at 35a n.21. The difference in cost is staggering: Zurich estimated that Horizon would have paid $50 million as an up-front premium for one year as opposed to the $10 million premium for the actual policy. *Id.* Because of this enormous cost differential, "[n]either party suggests that guaranteed cost policies (i.e. non-deductible policies) . . . are . . . utilized to any meaningful degree by debtors in bankruptcy." *Id.* In addition to slicing the initial premium by 80%, the deductible structure also lessens the total cost of the insurance. *Id.* at 8a-9a ("because the Debtors purchased deductible policies, their agreed-upon premiums were reduced as a result of absorbing some of the risk to the insurer," and "[t]hese policies are generally less expensive than policies with no deductibles . . . even after considering the insured's exposure to deductibles.").

This arrangement is routinely used in bankruptcy to conserve cash while the debtor gets on its feet. The decision below makes this arrangement far more difficult and costly by effectively denying reimbursement of post-confirmation deductibles. As a result, debtors in bankruptcy will have to resort to other types of payment arrangements, either by paying the full cost of their insurance up-front or by providing

expensive cash-equivalent collateral to secure their obligations.

Although Horizon sold its assets to third parties, its obligations remained, including its deductible obligation to Zurich to pay its share of workers' compensation benefits that Zurich would continue to pay into the future. Zurich thus filed an application to allow Horizon's obligation as an administrative expense. Because an injured employee may be entitled to workers' compensation benefits for the duration of his or her disability for many years into the future, it is not possible to liquidate Horizon's reimbursement obligation with exact certainty prior to the actual, final cessation of benefits. However, using actuarial tables, it is possible to estimate the projected loss (the "Ultimate Loss Projection"), and either pay that amount to Zurich or, alternatively, establish a reserve to cover it, with payments made periodically from the reserve.

Zurich sought an administrative claim in the amount of $14,593,567.79 based on its Ultimate Loss Projection. The district court recognized that "there can be no question that Zurich will be forced to 'advance' a substantial portion, if not all, of the deductible obligations in question." Pet. App. 27a. Zurich's payments will "inevitably occur to some significant degree and unquestionably stem from insurance coverage during bankruptcy." *Id.* at 29a.

The district court's decision nevertheless denied recovery of this sum as an administrative expense because, in the court's view, an estimated expense could not be "actual" or "necessary," and "the payment thereof, when the obligations are realized, cannot act to preserve an estate that no longer exists," *id.* at 27a, i.e., when the claims are filed post-confirmation, *id.* at 28a-29a. On appeal, the Sixth Circuit affirmed, declining to "add anything of substance" to the district court's opinion. *Id.* at 2a.

SUMMARY OF ARGUMENT

Although Horizon obtained the full benefit of the insurance Zurich provided during the course of its bankruptcy case, it has sought to avoid paying the full price for that insurance as an administrative expense. The court of appeals concluded that only amounts liquidated by the time of confirmation of a plan qualify as administrative expenses. Moreover, it concluded that Zurich's request for reimbursement from Horizon for the cost of benefits Zurich paid post-confirmation on account of injuries sustained in the policy period cannot satisfy the section 503(b)(1) requirement that the cost "preserve the estate" because the estate ceased to exist at confirmation. These conclusions are unsound.

First, the decision below conflicts with extensive precedent from various courts of appeals by holding that the deductibles are not administrative expenses because *payment of the deduc-*

tibles would not benefit the bankruptcy estate. Instead, the court below should have asked whether the *insurance* benefited the estate, which the insurance obviously did. Various courts of appeals have properly applied the "benefit to the estate" test, focusing on whether the estate got something (*i.e.,* consideration – here, insurance) in exchange for its obligation to pay. In focusing on whether paying for the insurance would benefit the estate rather than whether the insurance benefited the estate, the decision below created a circuit split ripe for resolution by this Court.

Second, the decision below conflicts with Supreme Court precedent. In *Reading Co. v. Brown*, the Court rejected a narrow reading of the statutory term "actual and necessary costs," and interpreted the term as including "costs ordinarily incident to operation of a business, and not [] limited to costs without which rehabilitation would be impossible." 391 U.S. 471, 483 (1968). Workers' compensation insurance falls easily within the ambit of that description. Moreover, *Reading* stated that it was "obvious that proper insurance premiums must be given priority, else insurance could not be obtained." *Id.* *Reading* and its progeny eschewed narrow, formulaic readings of the "benefit to the estate" test, treating it properly as a means to an end of furthering the statutory purpose of reorganization. The decision below conflicts irreconcilably with that approach.

Third, the decision below creates a circuit split with two other courts of appeals in holding that the estate ceases to exist when the plan is confirmed. The Code does not provide that confirmation of a chapter 11 plan terminates the bankruptcy estate. Confirmation simply transfers property dealt with under the plan from the bankruptcy estate to the debtor or some other entity as specified in the plan. For confirmation of a plan to take place, the debtor must pay all administrative expenses in full, so it cannot also be true that confirmation excuses full payment. Indeed, the estate continues to exist and to hold, for example, unadministered assets, 11 U.S.C. § 554(d), even after the case is closed.

Fourth, the decision below conflicts with precedent from a sister court of appeals in suggesting that administrative expenses must be liquidated prior to confirmation in order to be paid. The Code provides expressly that a claim properly includes amounts that are "unliquidated." 11 U.S.C. § 101(5). The fact that Horizon was obligated to pay its deductible obligations over time, and that the precise amount of the payments were subject to change, does not make the obligations any less "actual" – it simply makes them "unliquidated."

Finally, left to stand, the decision below will have grave consequences. Debtors in bankruptcy may avoid paying for necessary insurance they purchase during the course of their cases. Insurers will therefore demand up-front pay-

ment or expensive collateral to secure the debtors' obligations. This will place workers' compensation insurance beyond the reach of many debtors, and because workers' compensation is required, those debtors will not be able to reorganize, in direct contravention of the policy of rehabilitation undergirding chapter 11 and section 503(b).

ARGUMENT

A. The Decision Below Conflicts with Extensive Precedent from Various Courts of Appeals by Holding that the Estate Does Not Benefit from the Payment of Amounts Due After Confirmation of Its Plan.

In bankruptcy cases, section 507 of the Bankruptcy Code governs the order in which claims are paid and affords the second highest priority to administrative expenses. 11 U.S.C. § 507(a)(2). Section 503(b)(1)(A) defines "administrative expenses" as "the actual, necessary costs and expenses of preserving the estate." *Id.* § 503(b)(1)(A). In order to qualify for administrative expense priority, courts have held that a claim must (1) "ar[i]se from a transaction with the bankruptcy estate" and (2) "directly and substantially benefit[] the estate." *Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 816 (6th Cir. 1997).

As Zurich demonstrates in its Petition, the decision below erroneously holds that the deduc-

tibles are not administrative expenses because, assertedly, *payment of the deductibles* would not benefit the bankruptcy estate. The proper legal question is whether the *insurance* benefited the estate. Pet. for Writ of Certiorari at 12. As the district court itself pointed out, it obviously did. Pet. App. 10a-11a. National Union writes separately to point out that the decision below conflicts with precedent from this Court and other courts of appeals.

The "benefit to the estate" test does not require that the *payment* of an administrative expense must benefit the estate. Rather, it requires that the debtor's obligation to pay the expense arise from a transaction that benefited the estate. Expenses satisfy the traditional definition of "administrative expenses" so long as they arose from transactions that occurred between the creditor and the estate after the petition for bankruptcy was filed.

The test is whether the estate got something (*i.e., consideration* – here, insurance) in exchange for its obligation to pay. *Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007) ("[A]n expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession, and only to the extent that the *consideration supporting the claimant's right to payment* was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (emphasis supplied)

(citation and internal quotation marks omitted); *CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229, 237 (4th Cir. 2005) ("[C]ourts agree that an administrative expense has two defining characteristics," including "the *consideration supporting the right to payment* provides some benefit to the estate.") (emphasis supplied); *Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1531 (10th Cir. 1988) (describing consideration as "crucial" to the right to administrative expense priority); *In re Jartran, Inc.*, 732 F.2d 584 (7th Cir. 1984); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 955 (1st Cir. 1976) ("the case law teaches that a creditor's right to payment will be afforded [administrative expense] priority only to the extent that the *consideration* supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (emphasis supplied).

Aside from being settled law, this only makes sense. An estate never gets a benefit from the payment of a debt. It gets a benefit from what it received in exchange for its obligation to pay. In focusing on whether *paying* for the insurance would benefit the estate rather than whether the *insurance* benefited the estate, the decision below created a circuit split warranting certiorari review.

B. The Decision Below Conflicts with Supreme Court Precedent.

In *Reading Co. v. Brown*, the Supreme Court considered whether a tort obligation incurred during the course of a bankruptcy proceeding qualified as an administrative expense. 391 U.S. 471 (1968). The Court began by looking to the purposes of section 64(a) (precursor to section 503(b)), chapter 11, and the Bankruptcy Act as a whole. *Id.* at 476. Objecting to Reading's claim, the bankruptcy trustee argued for a narrow reading of "necessary," such that priority "should be given only to those expenditures without which the insolvent business could not be carried on." *Id.* at 477. The Court refused to read the statutory term narrowly, *id.*, concluding that the tort obligation did qualify as an administrative expense, *id.* at 485.

Turning to insurance, the Supreme Court stated that "the court below recognized that the cost of insurance against tort claims arising during an arrangement is an administrative expense payable in full under § 64a(1) before dividends to general creditors." *Id.* at 483. "It is of course obvious," held the Court, "that proper insurance premiums must be given priority, else insurance could not be obtained." *Id.* The Court rejected a narrow reading of "actual and necessary costs," stating 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 im-

possible." *Id.* Workers' compensation insurance falls within this analysis, and the decision below, reaching the opposite conclusion, conflicts irreconcilably with *Reading*.

The *Reading* rule reaches to fact patterns beyond the tort context, *Texas Comptroller of Public Accounts v. Megafoods Stores, Inc. (In re Megafoods Stores, Inc.)*, 163 F.3d 1063, 1071 (9th Cir. 1998), including "situation[s] in which a bankruptcy estate may engage in activities regulated by state law while [attempting to avoid] the costs associated with that regulation," *Mass. Div. of Employment & Training v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.)*, 291 F.3d 111, 126 (1st Cir. 2002), or where "damage to the plaintiffs was caused by the postpetition operation of the estate's business." *Megafoods*, 163 F.3d at 1072 (holding that statutory interest was administrative expense) (citation & internal quotation marks omitted); *see also, e.g., In re H.L.S. Energy Co.*, 151 F.3d 434, 436 (5th Cir. 1998) (holding that costs incurred by the state in satisfaction of estate's post-petition environmental obligations were entitled to administrative expense priority); *Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 21 (1st Cir. 1997) ("This was a post-petition claim incurred during the operation of [the debtor's] business while it was operating under Chapter 11. We think it would be fundamentally unfair to allow [the debtor] to flout Florida's environmental protection laws and escape paying a

penalty for such behavior."); *Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997); *Al Copeland Enters., Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233, 240 (5th Cir. 1993) (holding that statutory award of interest constituted an administrative expense); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992) ("We find that a policy of ensuring compliance by trustees with state law is sufficient justification to place civil penalties assessed for postpetition mining operations in the category of 'some cases' in which 'costs ordinarily incident to operation of a business' are accorded administrative-expense priority.") (citation omitted); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 955 (1st Cir. 1976) ("When the debtor-in-possession . . . accepts services from a third party without paying for them, the debtor-in-possession itself caused legally cognizable injury, and the resulting claims for compensation are entitled to first priority.").

In this case, the relevant administrative expense involves the cost of insurance that applicable state law requires a debtor to have in order to operate. As noted in the cases cited above, the full cost of complying with applicable regulatory requirements is properly an administrative expense.

Consistent with *Reading*, the courts cited above have eschewed narrow, rigid, or formulaic

readings of the "benefit to the estate" test, noting that it is merely a means to an end of furthering the statutory purpose of facilitating reorganization and preserving the value of an estate. *E.g., H.L.S. Energy*, 151 F.3d at 437 ("The 'benefit' requirement has no independent basis in the Code . . . but is merely a way of testing whether a particular expense was truly 'necessary' to the estate."); *Mammoth Mart*, 536 F.2d at 954 (holding the application of the administrative expense priority "to Chapter [11] arrangements is primarily a means of implementing the statutory objective of facilitating the rehabilitation of insolvent businesses.").

In marked contrast, the decision below embraces an overly narrow reading of the "benefit to the estate" test, conflicting irreconcilably with *Reading* and other cases that have followed it.

C. The Decision Below Conflicts with Two Courts of Appeals and the Bankruptcy Code's Plain Text in Holding that the Estate Ceases to Exist When the Plan is Confirmed.

The decision below held that the expenses did not preserve the bankruptcy estate as the Code requires or meet the "benefit to the estate" test for administrative expenses because "[t]he moment Zurich is contractually permitted to seek reimbursement from the Debtors for the advanced deductibles, the estate will have al-

ready dissolved and the Debtors will cease to exist," so "payment of the claimed expenses will in no way act to preserve an estate when there is no estate to preserve." Pet. App. 29a; *see also id.* at 33a ("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 when there is no longer an estate to benefit.").

However, this holding that the estate ceases to exist upon confirmation, such that there is "no longer an estate," conflicts with the Code, the decisions of two courts of appeals, and the leading bankruptcy law treatise. The Code does *not* provide that confirmation of a chapter 11 plan terminates the bankruptcy estate. Section 541 of the Code provides for the creation of a bankruptcy estate. 11 U.S.C. § 541. Notably, section 541 contains no provision terminating the estate at any given point in time. Rather, confirmation merely transfers property dealt with under the plan from the bankruptcy estate to the debtor or some other entity as specified in the plan. *Id.* § 1141(b). The debtor's *estate* is not discharged from its obligations. *Id.* § 1141(d)(3). Indeed, for confirmation of a plan to take place, the debtor must pay all administration expenses in full. *Id.* § 1129(a)(9)(A). Therefore, if a claim would otherwise be an administrative expense, *it cannot also be true that confirmation excuses full payment.*

Indeed, termination of the estate is inconsistent with the Code's plain text. Assets not administered in the bankruptcy proceedings remain "property of the estate." 11 U.S.C. § 554(d) ("property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate."). The estate continues to exist and to hold such un-administered assets even after the case is closed. This provision prevents a certain type of fraud – where the debtor fails to disclose an asset and then claims, after the conclusion of the bankruptcy proceeding, that the asset devolved back to the debtor out of the estate.

Thus, in *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116 (2d Cir. 2008), the debtor failed to disclose his interest in a corporation and a contract involving the corporation. The Second Circuit, reiterating that "undisclosed assets automatically remain property of the estate after the case is closed," *id.* at 122, held that the corporation, the contract, and a cause of action arising on the contract remained property of the bankruptcy estate even though the bankruptcy case had closed. *Id.* at 123; *see Sec. Bank v. Neiman*, 1 F.3d 687, 690 (8th Cir. 1993) ("The estate can continue to exist as a legal entity after confirmation even if it holds no property."); *In re Auto West, Inc.*, 43 B.R. 761, 764 (D. Utah 1984) ("all property of the estate that is not expressly abandoned or administered remains property of the estate."); *In re Dick*, Nos. 05-10881, 06-5286,

2007 WL 490948, at *1 (Bankr. D. Kan. Feb. 9, 2007) ("the overwhelming weight of case law precedent hold[s] that undisclosed assets in a bankruptcy estate remain assets of the estate. . . . '[A]n undisclosed asset of the Debtor . . . always remains property of the bankruptcy estate.'") (quoting *In re Thompson*, 344 B.R. 461, 464 (Bankr. W.D. Va. 2004)). As the Collier treatise puts it: "Even after the case is closed, the estate continues to retain its interest in unscheduled property." 5 COLLIER ON BANKRUPTCY ¶ 554.03 (Alan N. Resnick & Henry J. Sommer eds., 15th rev. ed. 2001).

Accordingly, the pivotal premise of the decision below – that the estate ceased to exist upon confirmation – conflicts with the Code, the COLLIER treatise, and the holdings of the Second and Eighth Circuits. Certiorari review is warranted.

D. The Decision Below Conflicts with Another Court of Appeals in Suggesting that Administrative Expenses Cannot Be Estimated.

As noted, the deductibles owed Zurich must be estimated because the claims have not been paid in full yet. *See supra* at 6, 8. Though terming the issue "non-dispositive," Pet. App. 44a, the district court's opinion, adopted by the Sixth Circuit, suggests that administrative expenses cannot be estimated because estimation is not expressly authorized by the Bankruptcy Code; therefore, the deductibles might not quali-

fy as administrative expenses. *Id.* at 44a-47a. The consequence of such a holding would be that any estimated administrative expense – contractual, environmental, or tort – must be disallowed. This cannot be, and is not, the law. Indeed, a sister court of appeals has explicitly approved estimation of administrative expenses. *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 934 (1st Cir. 1993).

Moreover, the Bankruptcy Code provides expressly that a claim properly includes amounts that are "unliquidated." 11 U.S.C. § 101(5). The term "actual" in section 503(b) does not mean that the amount of the liability has to be "liquidated" at any particular point to qualify as an administrative expense. The term "actual" means simply that the liability has to have been incurred by the debtor during the course of its bankruptcy case. In this matter, Horizon incurred the obligation to pay the full amount of its insurance when it signed up for it in 2001, including all deductible obligations. The fact Horizon was obligated to pay its deductible obligations over time, and that the precise amount of the payments were subject to change, does not make the obligations any less "actual." It simply makes them "unliquidated."

Further, the Code expressly authorizes debtors in chapter 11 to incur debts payable on credit over time. *Id.* §§ 363-64. It would make no sense to conclude that, having authorized debtors in bankruptcy to obtain goods and ser-

vices on credit, Congress secretly intended to deny payment to those same creditors who were not yet paid at the time the debtor confirmed its plan because their claims were not yet due or liquidated. The notion that an "actual" claim does not include an "unliquidated" claim is at war with the governing statutory scheme. Thus, to the extent that the decision below held that administrative expenses cannot be estimated, it created a circuit split with the First Circuit, *see Hemingway*, 993 F.2d at 934, and conflicts with the Code itself.

E. If Not Corrected, the Decision Below Will Have Grave Consequences for Reorganizations, Harming Debtors and Unfairly Denying Payment to Insurance and Other Service Providers.

As Zurich's petition demonstrates, the decision below, if not corrected, will have grave consequences for reorganizations. Absent reversal, it will permit debtors in bankruptcy to avoid paying for necessary insurance they purchase during the course of their cases. As a result, no insurer will be willing to provide insurance without demanding up-front payment or expensive forms of collateral to secure the debtors' obligations. Many debtors will thus not be able to obtain workers' compensation insurance, and because such insurance is required, they will not be able to reorganize, thwarting Congress's intent. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513,

527 (1984) ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

CONCLUSION

For the foregoing reasons, Zurich's petition for a writ of certiorari should be granted.

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