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

BRIEF FOR THE STATES OF MICHIGAN, ALASKA, ARIZONA, HAWAII, INDIANA, MARYLAND, MASSACHUSETTS, MISSOURI, NEVADA, NEW MEXICO, TENNESSEE, UTAH, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Bankruptcy Code provides that administrative expenses—claims to payment of expenses that arise during a bankruptcy case, including the "actual, necessary costs and expenses of preserving the [bankruptcy] estate," 11 U.S.C. §503(b)(1)(A)—are entitled to priority over the claims of other unsecured creditors, *see id.* §507(a). That priority recognizes both the need to convince parties to do business with the debtor during the case, and the possibility that the debtor's operations may adversely impact other parties and give them a right to be fully compensated. In light of those twin purposes, the questions presented are:

1. Whether the Sixth Circuit erred in holding that administrative-expense priority extends only to payments made prior to confirmation, even if later payments arise directly out of interactions with the debtor during the case – a holding that conflicts with the law of three other Circuits.

2. Whether the Sixth Circuit erred in holding that a claim against a bankruptcy estate for an administrative expense arose only when an enforceable right to payment accrued under nonbankruptcy law post-confirmation, even though the transaction giving rise to the right to payment occurred prior to confirmation – a result in conflict with the law of six other Circuits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (continued)

Statutes

Other Authorities

INTERESTS OF THE AMICI CURIAE

The *Amici Curiae* States file this brief in support of petitioner to underscore the need for clarity with respect to the important questions presented herein and to urge that the Court resolve these issues in a way that provides appropriate protection for the interests of creditors and the debtor alike.

The Bankruptcy Code utilizes a broad definition of "claims" (of which administrative expenses are a subset) as a way of resolving in one time and place as much as possible of the universe of obligations facing the debtor.

The courts have, in the main, constructed a test for determining when a claim arises that honors that intent, while recognizing the constitutional limits that must exist on the scope of a "claim." The decision below unduly narrows the definition of a claim in ways that affect not only the allowance of administrative expense claims but all claims generally. In doing so, it introduces unnecessary confusion into an area that requires careful attention to competing interests.

The significance of the decision in dispute to *Amici Curiae* States is difficult to overstate. The nation's economic crisis and the continuing stress on all aspects of the automotive industry have paved the way for a surge of new bankruptcies involving large employers. Chrysler, LLC, with 38,500 hourly and salaried U.S. workers is one such employer. The *Amici Curiae* States are concerned with enforcing state laws that assure that injured employees who are covered by their employer's workers' compensation insurance, such as that provided by the Petitioner, actually receive their workers compensation benefits.

They are equally concerned with protecting employees injured at work while an employer is in bankruptcy proceedings regardless of whether that employer is illegally uninsured or has secured workers' compensation coverage through an insurance carrier, State-provided coverage, or by being self-insured. Further, they are also deeply concerned about analogous issues that arise with respect to environmental remediation costs that arise from the debtors' actions during a bankruptcy case but continue to accrue after a case terminates. In all of these scenarios, the Sixth Circuit's holding would result in downgrading the priority of the claim – or, indeed, denying allowance of the claim altogether, based merely on the happenstance of whether payment for such obligations comes due during or after the bankruptcy case.[1] For all of those reasons, the *Amici Curiae* States have a deep interest in the outcome of this case.

INTRODUCTION

The bankruptcy system created by title 11 of the United States Code[2] pursues several goals simultaneously. It grants individual debtors a "fresh start" by relieving them of debts through the discharge and exemption processes. It assists businesses to reorganize, thereby providing greater value to creditors and continued employment for workers. Finally, it seeks to divide the debtor's assets fairly among competing groups of creditors in accordance

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[1] There are other fact patterns where the Sixth Circuit's analysis could prove harmful, but these are the most obvious and illustrate the problems with that analysis.

[2] All section references hereafter, unless otherwise stated, are to title 11 of the United States Code, commonly referred to as the Bankruptcy Code.

with Congress' priorities—priorities that were chosen based on many criteria, including the importance of the particular debt (i.e., domestic support obligations, employee wages and benefits, and taxes) and the timing of the debt.

In particular, the Bankruptcy Code gives special priority to debts arising after the petition date that are based on dealings with the debtor in possession. These debts, which are treated in Sections 503 and 507 of the Bankruptcy Code, are referred to as administrative expenses. Such expenses are given the first priority for payment in corporate bankruptcies for very pragmatic reasons – namely, that goods, services, and credit provided during the bankruptcy are necessary to "preserve the estate," so it can be maximized for the benefit of the creditors. The drafters of the Code understood that providers of such necessities would refuse to deal with entities in bankruptcy absent such protection and provided that priority to allow the reorganization to succeed.

In addition, while, in general, administrative expenses are commonly described as those that "benefit" the estate, this Court has also held that they must include those costs that are "ordinarily incident to operation of a business." *Reading Co. v. Brown,* 391 U.S. 471, 483 (1968). In that case, this Court held that administrative status must be accorded to the claims of a neighboring business that was damaged by a fire that began on the debtor's premises. This Court rejected the debtor's argument that it need not pay those costs in full because they did not "benefit" the estate, holding that that argument took too narrow a view of how and when the "benefit" should be assessed. Rather, this Court held, if a debtor and its general creditor body choose to continue the operation of the

company in order to preserve and potentially expand the estate assets, they must accept the corollary obligation to pay for the costs imposed on others by those operations. *Id.* at 478. The benefit to the estate arises when the decision is made to continue to operate the business; the debtor and other creditors cannot use hindsight to impose the negative consequences of such operations on those who have "had an insolvent business thrust upon it by operation of law." *Ibid.*

The *Amici Curiae* States believe it is critical to strike a proper balance in reviewing administrative expense claims. The standard for granting such status must be reasonably strict so that they do not swallow up all of the assets of the estate to the detriment of those with pre-petition claims. At the same time, though, they must not be denied if properly owed. Debtors must be able to guarantee that they can offer full payment of such expenses to those with whom they need to do business in order to continue in operation. Creditors and other parties that engage in transactions with the debtor, or are injured by its operations, have a right to receive the full payments to which they are entitled. Creditors will not do business with debtors if they are forced to provide involuntary subsidies to them; nor should other parties who have losses "thrust upon [them]" by the debtor's actions be denied compensation for those losses.

The ramifications of the Sixth Circuit's holding apply not only in the specific context here – denial of priority status for deductibles incurred under workers' compensation policies assumed during the case – but in several other contexts as well that are of concern to the *Amici Curiae* States. The court's conclusion that costs arising out of post-petition transactions with the debtor have administrative status only if the payment

obligations come due prior to termination of the case would deny such status to future medical costs and wage loss for employees of self-insured debtors who are injured during the case but whose medical expenses continue after the bankruptcy. Similarly, when environmental obligations arise from a debtor's actions during the bankruptcy, the remedial costs to clean up the contamination should be given administrative priority even if some of those costs will not need to be paid until after the bankruptcy's conclusion. Such ongoing payments are often necessary to fully remedy the damage done to the environment by the debtor's conduct, since the clean-up often cannot be completed within the limited time period of a bankruptcy case. Under the Sixth Circuit's rationale such future costs—though stemming from the debtor's operations during bankruptcy—would receive no priority. Indeed, as discussed further below, under that analysis, such costs would likely not even be an allowable claim at all.

The rule adopted by the Sixth Circuit is also problematic because it leaves the priority of these claims within the debtor's sole control. Thus, under the Sixth Circuit's reasoning, the obligations owed in the *Reading* case could have been treated as nonadministrative, if the debtor had merely liquidated after destroying its neighbor's property, so that the remedial costs were not being spent during the reorganization case. A rule that allows such manipulation of costs arising out of the debtor's operations does not further the equitable considerations underlying the Code's priority provisions.

Similarly, the court's holding that the debtor's future duty to pay deductibles is not a claim in

bankruptcy because it would not be recognized under nonbankruptcy law until after the debtor was liquidated raises enormous concerns for any party doing business with or regulating the debtor during the bankruptcy case. Such a rule would mean that any party interacting with the debtor during the case must assume that it will not be paid for expenses that arise from transactions during the bankruptcy, but that do not come due until after confirmation. To protect themselves, such parties will need to take steps to deal with those costs such as demanding full payment up front, seeking security, or refusing to deal with the debtor at all – responses that will harm the debtor, rather than assist in its reorganization.

Finally, the Sixth Circuit's apparent adoption of the view that there must be a presently litigable cause of action under nonbankruptcy law before a claim exists deepens the long-standing and substantial conflict on that issue among the Circuits, as detailed in the Petitioner's brief, pp. 21-29.

As the nation's economic crisis brings a surge of new bankruptcies, time is of the essence. The *Amici Curiae* States submit that the issues raised by the Sixth Circuit's holdings in the decision below go to the most fundamental questions under the Bankruptcy Code – how to decide when a claim exists in order to determine its allowability and priority. Leaving these issues unresolved serves no one's interests. Because the resolution of these issues directly affects the interests of the *Amici Curiae* States, their citizens, and employees working within their borders, they respectfully urge this Court to grant certiorari.

ARGUMENT

The Sixth Circuit's Holding That Future Obligations Arising Out Of Conduct During The Bankruptcy Case Are Not Administrative Expenses Conflicts With Other Circuits And Harms Debtors and Creditors Alike.

The facts of this matter are simple – the debtor operated for an extended period of time after filing its bankruptcy petition. In order to do so legally, it was required to maintain workers' compensation insurance for its employees. It could have bought a "guaranteed cost" policy with no deductible. The premiums for that policy would undoubtedly have been an administrative expense, but choosing that option was not desirable because such policies are extremely expensive. Instead, it agreed, with bankruptcy court approval, to "assume" its existing policy.[3] That policy required it to pay an up-front premium to the insurer (i.e., the Petitioner here) and then to pay a deductible amount on each claim after the insurer had first paid the full amount to the worker. The total cost of the premiums and the deductibles was still less than the cost of premiums for a guaranteed-cost policy, so choosing this option provided added funds to the estate for other creditors. While the debtor was operating in Chapter 11, there was no question that it was obligated to reimburse the insurer for deductibles the insurer had already paid on account of workers' compensation claims and that the reimbursement obligation was an administrative expense – and such payments were

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[3] Assumption of a contract takes place under Section 365(a) of the Bankruptcy Code. If approved by the court, an assumed contract is treated as if it were entered into anew postpetition and costs incurred thereunder enjoy administrative-expense priority. *NLRB v. Bildisco and Bildisco,* 465 U.S. 513, 531-32 (1984).

indeed made by the debtor. Had the debtor successfully reorganized – as was its intention when it filed – it would have been obligated to continue to pay the deductibles for claims that arose from events during the policy period after the petition date, but that were filed and paid after the confirmation date.

This case arose because the debtor could *not* reorganize, and instead (as often occurs) was forced to liquidate. The insurer could document with reasonable certainty that it would have future obligations for a significant number of additional claims arising under the policies assumed during the bankruptcy that would result in deductibles being owed (in the approximate amount of some $14 million).[4] When the insurer sought to have a claim for that amount treated as an administrative expense and paid (or reserved for) in the distribution of the debtor's estate, the Sixth Circuit held that the insurer had no administrative-expense claim because the debtor's obligation to reimburse the insurer for those deductibles did not arise until post confirmation.

It took that position for two reasons, both of which the *Amici Curiae* States disagree, and with respect to which there is considerable divergence in the Circuit Courts. First, it held that an

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[4] While there might be some dispute about the amount and certainty of the claim, those disputes are no different than those that might arise with respect to a similar prepetition claim. The definition of a "claim" under Section 101(5) includes "contingent," "disputed," and "unliquidated" claims, so there is nothing unusual about the fact that the bankruptcy court might be required to value a claim where there was still a degree of uncertainty about the precise amount that would be owed. There is no reason why making such determinations would be any more difficult for postpetition claims than prepetition claims.

"administrative expense" could only result from a transaction that benefited the estate and, once the estate terminated on the debtor's liquidation, then, *ipso facto*, nothing that happened could benefit that estate. Second, it held that there was no claim at the time of confirmation because no right to payment could accrue until the time the right to reimbursement came due under nonbankruptcy law; i.e., after confirmation and after distribution of the estate.

There is serious doubt as to the merits of the Sixth Circuit's position on both of those issues. Of more significance for the purpose of this filing is that the positions in the decision below put the Sixth Circuit in conflict with several other Circuits, as discussed in the Petitioner's brief. That conflict arises in large part from disagreement over fundamental questions about when a "claim" in bankruptcy arises – questions this Court has never directly addressed and that have divided the lower courts ever since the Bankruptcy Code was passed in 1978. This case presents this Court with a chance to address and resolve those important issues and provide much-needed guidance to the lower courts.

A. Limiting "claims" to rights to payment that have already accrued under State law is overly narrow.

The Bankruptcy Code defines "claims" in an exceedingly broad manner; i.e., a "claim" means any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). The intent was that "all legal obligations of the debtor, no matter how remote or

contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266. The problem that has arisen upon closer analysis is that such a broad definition raises serious constitutional questions if applied to discharge claims that may still be contingent or where an injury may have not yet manifested itself. As a result, it is quite possible for a "claim" to exist under the literal terms of this definition, but for the potential claimant to have no idea of its existence, so that the party lacks adequate notice and ability to be heard in the bankruptcy. *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2nd Cir. 1991) (using example of debtor who has built 10,000 bridges, one of which may fail and kill 10 people, to illustrate problems with identifying whether "claims" could be said to currently exist and who would hold those claims.)

The courts have struggled with where to draw the line to determine when a claim "arises" where it is not yet a fully realized cause of action under nonbankruptcy law at the time the bankruptcy is filed, but the debtor has taken the actions that give rise to its liability. The most obvious example of this problem is the situation where the debtor manufactured and sold products prepetition, some of which were defective and could cause injuries. While a person owning such a product could be said to have a bankruptcy "claim" based on the contingency that the product might eventually cause harm, it would be unlikely that the person would have a state law claim under those circumstances. Similarly, the debtor may have exposed workers to a dangerous substance such as asbestos, but the person has not yet manifested disease. And, in the environmental context, the debtor may have allowed toxic substances to escape into the

environment, but the damage may not yet be known to environmental authorities or the damage may initially be limited before contamination has begun to spread. In each of those cases, the courts have discussed how to determine when the facts of the debtor's conduct have coalesced into a "claim" that must be handled within the bankruptcy process.

See, e.g. Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corporation, 58 F.3d 1573, 1577 (11th Cir. 1995) ("debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct") (planes with design defect); *Grady v. A.H. Robins Co., Inc.,* 839 F.2d 198, 202-03 (4th Cir. 1988) (claim can exist even though it "depends upon a future uncertain event, that event being the manifestation of injury from use of the Dalkon Shield. We do not believe that there must be a right to the immediate payment of money . . . when the acts constituting the tort or breach of warranty have occurred prior to the filing of the petition; . . . Congress has created a contingent right to payment."); *In the Matter of Crystal Oil Co.,* 158 F.3d 291 (5th Cir. 1998) ("regulatory environmental claim will be held to arise when 'a potential . . . claimant can tie the bankruptcy debtor to a known release of a hazardous substance," citing *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 786 (7th Cir.1992)) As Petitioner's brief explains (pp. 23-29), in addressing such questions, courts have adopted a variety of tests that consider the extent of the debtor's conduct, the current injury, if any, suffered by the potential claimant, the relationship between the debtor and the potential claimants, and the claimants' knowledge about the

possibility that they have suffered harm and need to file a claim. As described in *Chateaugay*, balancing these competing concerns requires line-drawing. But what is clear is that, in light of the breadth of the Bankruptcy Code's definition of claim, and its express inclusion of "contingent" and "unmatured" claims, few courts—indeed, only the Third Circuit and the Sixth Circuit here—have suggested that the existence of a currently enforceable state law cause of action is the dispositive factor for when a claim arises.

The Sixth Circuit's decision appears to be based on that narrow view of a claim – that there must be a present, fully ripened cause of action at the relevant moment (i.e, prepetition or preconfirmation). In doing so, it has placed itself at odds with numerous other Circuits. If that is indeed to be the rule within the Sixth Circuit, it will treat many issues differently from other Circuits and will create a distinctly nonuniform definition of which obligations will be treated within the bankruptcy process. In doing so, it dramatically constricts the "claims" that can be dealt with in bankruptcy and leaves many potential obligations outside the purview of the bankruptcy case. That result would conflict with Congress' intent to have bankruptcy proceedings reach as broadly as legally possible to resolve the debtor's legal obligations.

While the *Amici Curiae* States agree that the definition of a claim cannot be applied in a manner that would violate claimants' due process rights, the text of the Bankruptcy Code makes clear that the overly narrow definition adopted by the Third and Sixth Circuits is not appropriate or what Congress

intended.[5] The decision as to when facts have become sufficiently ripe and known to the claimant so as to have a claim arise is an issue that is at the heart of every bankruptcy case. That issue deserves to be heard and resolved by this Court and the decision below provides a suitable opportunity for the Court to address those issues.[6]

B. The Sixth Circuit's constricted reading of the administrative priority provision conflicts with the law of other Circuits and harms the interests of the *Amici Curiae* States.

As described in Petitioner's brief, the Sixth Circuit also erred, and departed from the governing law in other Circuits, by concluding that when a debtor purchases insurance (or any other necessity) to enable it to continue its business, payments that come due after the bankruptcy's conclusion are not entitled to administrative-expense priority.

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[5] Indeed, where there were doubts as to whether bankruptcy courts could constitutionally bring the rights of those exposed to asbestos but without manifested illnesses into the case, Congress created a specific mechanism – Section 524(g) – that addressed those due process issues and kept those claims in the case.

[6] It is possible that the Sixth Circuit intended to apply its narrow definition of a claim only to the subset of claims that are administrative expenses. If so, then the *Amici Curiae* States believe that certiorari should be granted, as further discussed below, to bring the law in the Sixth Circuit into accord with the treatment of similar administrative expenses in the other Circuits. There is no basis under the Bankruptcy Code to apply different standards to different types of claims and no indication that other Circuits agree that the criteria for determining when a claim is sufficiently concrete to have "arisen" should differ based on whether the events occurred before or after the petition was filed.

As discussed above, the debtor here purchased workers' compensation insurance in order to continue its business while pursuing reorganization. Accordingly, all of the debtor's obligations under the insurance policies, including its obligation to reimburse the insurer for deductibles paid in the future under those policies, are properly viewed as administrative expenses. Those rights all arose out of a single contractual transaction that created the parties' benefits and obligations when it was entered into during the case.

The situation here is no different than the analysis of the treatment of claims arising from breaches of prepetition contracts. The cases almost universally find that such breaches are allowed only as *prepetition* claims, even though the actual breach and loss occurred postpetition. *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.),* 126 F.3d 811, 818 (6th Cir.1997); *U.S. Through Agr. Stabilization and Conservation Service v. Gerth,* 991 F.2d 1428 (8th Cir. 1993) ("dependency on a postpetition event does not prevent a debt from arising prepetition"); *Matter of United Sciences of America, Inc.,* 893 F.2d 720, 724 (5th Cir. 1990) (claim was prepetition when item was charged to bank's account prior to bankruptcy filing although payment not made until postpetition); *In re Riodizio, Inc.,* 204 B.R. 417, 424, n.6 (Bankr. S.D.N.Y. 1997); *In re Chateaugay Corp.*, 87 B.R. 779, 796 (S.D.N.Y.1988). The same principle is embodied in the executory contract provisions of Section 365. That section provides that breaches of executory contracts that occur postpetition are to be deemed to have occurred prior to the petition date, thus automatically turning the breaches into prepetition unsecured claims.

In short, the standard rule is that breaches of a contract are treated as foreseeable, "contingent" or "unmatured" claims as of the date the contract was entered into. There is no reasonable basis for using a different standard to evaluate the accrual of claims with respect to *postpetition* contracts, merely because it would allow creditors to assert administrative status for their costs.

The Sixth Circuit's contrary holding thwarts the purpose of the administrative-priority provision: to ensure that parties who deal with the debtor during its bankruptcy receive the assurance that they will be paid before other creditors that is necessary to induce them to do business with the debtor. That common sense position has been adopted by at least three other Circuits with which the Sixth Circuit's holding conflicts as discussed in Petitioner's Brief, pp. 12-20.

The Sixth Circuit sought to explain its view by holding that the post-confirmation payment could not "benefit" the estate when it occurred after the estate no longer existed. But that merely begs the question of when the claim arises and, thus, when the requisite "benefit" should be analyzed. The prepetition contract cases show that the claim is normally treated as arising with entry into the contract. And, as *Reading* teaches, "benefit" flows from the debtor's ability to continue operating during the bankruptcy case. Accordingly, if the debtor enters into or assumes an insurance policy during the bankruptcy so that it can continue operating, then that is the date relevant to assessment of whether the transaction benefited the estate—not the date the payment for the insurance comes due. The insurer's claim for reimbursement of deductibles is substantively no different than a claim for premiums paid in installments—both are merely

the price paid by the debtor for the insurance coverage it needed to operate its business. And, as this Court has stated, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained." *Reading*, 391 U.S. at 483. The fact that certain premiums for insurance necessary to operate a debtor's business might come due after the debtor's liquidation should not change that analysis—and the same is true with respect to the deductible reimbursement obligations at issue here.

As with the definition of a claim, clarity in the treatment of administrative expenses is also of substantial concern to the *Amici Curiae* States. In this case, workers' compensation expenses were handled by way of an insurance contract. Many large companies, though, such as Chrysler and General Motors, are self-insured for such expenses. As a result, if an employee is injured or becomes ill from causes arising out of their work, those costs become a direct charge on the debtor that must be paid if the entity is to continue its self-insured status. Self-insured status, in turn, benefits other creditors in the case in that the payments made on employee claims are typically less than even the deductible policies used by the employer here. Moreover, maintaining employee morale and protecting the employer from the possibility of tort suits by employees (the bargain struck by workers' compensation laws) clearly benefits the estate. *See Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651, 662-64 (2006) where this Court held that workers' compensation plans were more in the nature of an employer benefit, rather than falling under the definition of "employee benefit plan" as set out in Section 507(a)(5).

Workers compensation claims are well-known for their long coattails. Often times, employee injuries or work-related illnesses can result in medical costs and wage loss for an extended period of time – a period that may last beyond the conclusion of the bankruptcy proceedings. Notably, there is no statute of limitations for bringing a workers' compensation claim. Under the Sixth Circuit's analysis, not only would such future payments not be administrative expenses, they would not even be allowable claims in the bankruptcy forum at all. Such a result would be deeply troubling to the *Amici Curiae* States with respect to the impact on their citizens and especially workers with work-related illnesses and injuries. Moreover, to the extent that they have sought to protect these workers by providing a guaranty fund to cover unpaid costs, the amounts owed with respect to a large self-insured employer, such as Chrysler, could quickly swamp the reserves in such a fund. The result would be to force other employers to pay much higher assessments (putting them under added financial strain), to place the burden on the taxpayers of the *Amici Curiae* States, or to leave the injured worker without any relief.

Further, the Sixth Circuit's decision directly conflicts with the intent of 28 U.S.C. § 959(b), which provides that a debtor in possession "shall manage and operate the property in his possession . . . according to the requirements of valid laws of the State in which such property is situated." For example, Chrysler, LLC is a self-insured employer in Michigan. If, during the bankruptcy proceedings, Chrysler stops paying its statutory workers' compensation obligations, Michigan can seek an order to enjoin Chrysler's business activities until it resumes paying its self-insured obligations or it makes alternative arrangements for workers' compensation coverage to return to

compliance—almost certainly at a much higher cost. Thus, it is critical that debtors in the ordinary course of business continue to process and pay workers' compensation claims in the states where they continue to engage in some level of business activity during bankruptcy proceedings. To do otherwise, may lead to a shut down of the debtors business operations under § 959(b), which—from the view points of debtors, creditors, employees, and even citizens thinking of buying a product made by a self-insured debtor in bankruptcy—could have a detrimental effect on the bankruptcy estate. Having once incurred those claims and processed them, a debtor should not then be allowed to artificially bifurcate the costs accruing from that claim and accept responsibility for paying only those amounts that come due prior to the termination of the case. Accordingly, the *Amici Curiae* States have a vested interest on behalf of their citizens, employers, and employees to urge this Court to grant certiorari.

Similar issues can arise in the context of environmental cleanup obligations that arise out of the debtor's operations. It is often the case that cleanup will need to continue after the termination of the bankruptcy process. In some cases, the cleanup will benefit the estate by salvaging a contaminated property and turning it into a usable asset. In other cases, the debtor may be obligated to carry out the cleanup, pursuant to 28 U.S.C. § 959(b) (which requires that a "debtor in possession . . . shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated") and in accordance with the principles announced in *Reading Co.* Under that case, the debtor is obligated to pay the costs "ordinarily incident" to its operations as administrative expenses. As *Reading* showed, the

ability to continue doing business preserves the estate, and thus justifies administrative-expense treatment of the necessary costs arising out of the debtor's business while in bankruptcy – including the costs the debtor is lawfully obligated to incur to comply with Section 959(b).

Reading made clear that the "preservation" analysis has to be made using a global, prospective perspective, rather than the legalistic parsing that the Sixth Circuit used to bifurcate a unified transaction here. The *Amici Curiae* States believe that the same analysis applies so that, where a cleanup during the case is given administrative status, future costs to complete that cleanup must similarly be treated as administrative expenses. The Sixth Circuit's decision casts doubt on the resolution of all of these issues and will allow debtors to use bankruptcy to unfairly escape obligations that have accrued under the Bankruptcy Code pre-confirmation.

When a party assumes an executory contract like the insurance policies in this case, it must take it *cum onere*, accepting the good and the bad parts of the contract alike, including the obligation to pay *all* of the costs of the benefits it received. *NLRB v. Bildisco and Bildisco,* 465 U.S. 513, 531-32 (1984). Similarly, when the debtor and its creditors allow a company to operate in bankruptcy, they must accept that doing so has both the potential for higher recoveries *and* the risk of loss. The approach taken by the Sixth Circuit forces entities that deal with the debtor during the case to shoulder an unacceptable risk. The result is that they will be far less likely to be willing to do business with entities in bankruptcy. That, in turn, makes it less likely that debtors will be able to reorganize successfully for the benefit of all their creditors.

In short, it is critical for those determining how and whether to deal with a debtor in possession to know if their claims will be entitled to administrative status and whether that right will change based on when the payments thereon are due. For those reasons, and because of the split in the Circuits, the *Amici Curiae* States respectfully submit that this Court should grant certiorari to answer these questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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