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No. 10-711

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.,

Respondent.

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

MOTION OF ZURICH AMERICAN INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE

KAREN LEE TURNER
ECKERT, SEAMANS,
CHERIN & MELLOTT, LLC
2 Liberty Place
50 South 16th Street
Philadelphia, PA 19102
(215) 851-8400

CRAIG GOLDBLATT
Counsel of Record
DANIELLE SPINELLI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W
Washington, D.C. 20006
(202) 663-6000

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MOTION OF ZURICH AMERICAN INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the rules of this Court, Zurich American Insurance Company ("Zurich") respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for a writ of certiorari. Pursuant to Rule 37.2(a), amicus notified counsel of record for all parties ten days before this brief's due date of its intention to file the brief and requested their consent to the filing. Petitioner has consented, and petitioner's letter of consent has been submitted to the Clerk of the Court. Respondent has not yet responded to Zurich's request.

This case presents a question of substantial importance to the administration of the Bankruptcy Code, and of great practical import to insurers and debtors alike: whether all costs incurred by a debtor to obtain insurance during its reorganization, including deductibles that may not become due until after plan confirmation, are administrative expenses entitled to priority payment in bankruptcy.

The Bankruptcy Code provides that "the actual, necessary costs and expenses of preserving the estate"—including the expenses necessary to keep the debtor's business in operation while it attempts to reorganize—are known as "administrative expenses" and granted priority over most pre-bankruptcy claims. 11 U.S.C. § 503(b)(1)(A); *id.* § 507(a)(2). Such treatment is necessary in order to encourage insurers and providers of other essential goods and services to do business with entities in bankruptcy and for those entities to have any realistic chance of reorganizing.

This Court has made clear that the cost of insurance necessary for a debtor to operate during bankruptcy is a quintessential administrative expense. *See Reading Co.* v. *Brown*, 391 U.S. 471, 483 (1968). Yet, in the decision below, the Sixth Circuit held that an insurer that provides a debtor with insurance the debtor needs to operate during bankruptcy is *not* entitled to administrative priority for the entire cost of the insurance. Specifically, it addressed the common situation in which an insurer provides a debtor with workers' compensation insurance under which the insurer pays claims as they arise and the debtor thereafter pays the insurer a deductible for each claim. The workers' compensation insurance was required by state law for the debtor to continue its business, and the deductibles were a very substantial part of the payment the debtor agreed to make for the insurance coverage. The Sixth Circuit nonetheless held that the insurer could not obtain administrative priority for deductibles that came due after the debtor confirmed its plan of reorganization.

In so holding, the Sixth Circuit followed its prior decision in *Zurich American Insurance Co.* v. *Lexington Coal Co. (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008) (per curiam). As in *HNRC*, the court reasoned, in essence, that because the deductibles would not be liquidated until after plan confirmation, they were not "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); *see HNRC*, 536 F.3d at 683-684. While the panel held that it was bound by *HNRC*, two of the three members of the panel urged the Sixth Circuit to decide the issue en banc, recognizing that *HNRC*'s reasoning is flawed, conflicts with the decisions of other courts, and poses substantial practical obstacles to debtors who need insurance to reorganize. Pet. App. 13a-18a.

As an insurer that issues workers' compensation and other insurance policies to companies that may find themselves in bankruptcy, Zurich has a strong interest in having this Court resolve the important and recurring issue presented by the petition. As a result of the Sixth Circuit's decision in *HNRC*, now reaffirmed by the decision below, Zurich has been required to revise its business practices with regard to issuing insurance to companies that are in bankruptcy or likely to enter bankruptcy. If this Court were to grant the petition and reverse the decision below, adopting a rule under which unliquidated deductibles are properly treated as administrative expenses—as Zurich believes the Bankruptcy Code requires—insurers will again be able to make such necessary insurance available to debtors on affordable terms, thus benefiting insurers and debtors alike, and furthering the Bankruptcy Code's purpose of encouraging reorganization.

Accordingly, Zurich respectfully requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted.

KAREN LEE TURNER
ECKERT, SEAMANS,
CHERIN & MELLOTT, LLC
2 Liberty Place
50 South 16th Street
Philadelphia, PA 19102
(215) 851-8400

CRAIG GOLDBLATT
Counsel of Record
DANIELLE SPINELLI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

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CORPORATE DISCLOSURE STATEMENT

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

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BRIEF OF ZURICH AMERICAN INSURANCE COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus curiae Zurich American Insurance Company ("Zurich") respectfully submits this brief in support of the petition for a writ of certiorari.[1]

[1] Pursuant to Rule 37.2(a), Zurich notified counsel of record for all parties ten days before this brief's due date of its intention to file the brief. Petitioner has consented to the filing of the brief and a letter of consent has been submitted to the Clerk of the Court. Respondent has not yet responded to Zurich's request. Pursuant to Rule 37.2(b), therefore, Zurich has prepared and submits with this brief a motion for leave to file the brief. No counsel for a party authored this brief in whole or in part, and no person, other than

INTEREST OF AMICUS CURIAE

The Bankruptcy Code provides, and this Court has long recognized, that those who do business with a debtor in bankruptcy are generally entitled to be paid before the debtor's pre-bankruptcy creditors. *See generally Reading Co.* v. *Brown*, 391 U.S. 471 (1968). Specifically, "the actual, necessary costs and expenses of preserving the estate"—including the expenses necessary to keep the debtor's business in operation while it attempts to reorganize—are known as "administrative expenses" and granted priority over most pre-bankruptcy claims. 11 U.S.C. § 503(b)(1)(A); *id.* § 507(a)(2). Congress chose to grant administrative expenses priority "to provide an incentive for creditors to continue doing business with the debtor and an incentive for others to engage in business transactions with the debtor." 4 *Collier on Bankruptcy* ¶ 503.06[2] (16th ed. 2010). Absent such priority treatment, a debtor would be unlikely to obtain credit except on the most onerous terms, and its prospects of continuing its business and successfully reorganizing would be severely limited.

As this Court has made clear, the cost of insurance necessary for a debtor to operate during bankruptcy is a quintessential administrative expense. *See Reading*, 391 U.S. at 483. Yet, in the decision below, the Sixth Circuit held that an insurer that provides a debtor with insurance the debtor needs to operate during bankruptcy is *not* entitled to administrative priority for the entire cost of the insurance. Specifically, it addressed the common situation in which an insurer provides a debtor with workers' compensation insurance under which the in-

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amicus and its counsel, made any monetary contribution to the preparation or submission of this brief.

surer pays claims as they arise and the debtor thereafter pays the insurer a deductible for each claim. The workers' compensation insurance was required by state law for the debtor to continue its business, and the deductibles were a very substantial part of the payment the debtor agreed to make for the insurance coverage. The Sixth Circuit nonetheless held that the insurer could not obtain administrative priority for deductibles that came due after the debtor confirmed its plan of reorganization—even though the deductibles were exclusively for claims that arose prior to confirmation of the plan.

In so holding, the Sixth Circuit followed its prior decision in *Zurich American Insurance Co.* v. *Lexington Coal Co.* (*In re HNRC Dissolution Co.*), 536 F.3d 683 (6th Cir. 2008) (per curiam). As in *HNRC*, the court reasoned, in essence, that because the deductibles would not be liquidated until after plan confirmation, they were not "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); *see HNRC*, 536 F.3d at 683-684.

As an insurer that issues workers' compensation and other insurance policies to companies that may find themselves in bankruptcy, Zurich has a strong interest in having this Court resolve the important and recurring issue presented by the petition. As a result of the Sixth Circuit's decision in *HNRC*, now reaffirmed by the decision below, Zurich has been required to revise its business practices with regard to issuing insurance to companies that are in bankruptcy or likely to enter bankruptcy. If this Court were to grant the petition and reverse the decision below, adopting a rule under which unliquidated deductibles are properly treated as administrative expenses—as Zurich believes the Bankruptcy Code requires—insurers will again be able to make such necessary insurance available to debtors on affordable terms, thus benefiting insurers and debtors alike, and furthering the Bankruptcy Code's purpose of encouraging reorganization.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S OVERLY NARROW INTERPRETATION OF ADMINISTRATIVE EXPENSES CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND WRONGLY DECIDES AN ISSUE OF SUBSTANTIAL IMPORTANCE TO DEBTORS AND INSURERS

This Court should grant certiorari to resolve the confusion created by the Sixth Circuit regarding a question of exceptional and wide-ranging significance: the definition of "administrative expense" in bankruptcy. Administrative expenses are obligations incurred by the debtor or bankruptcy trustee during the bankruptcy case. They include, for example, loans, leases, supply agreements, or other contracts enabling the debtor to continue its business while it is attempting to reorganize; wages paid by the business while in bankruptcy; and tort or environmental liabilities incurred through the debtor's operations while it is in bankruptcy. *See generally Reading Co.* v. *Brown*, 391 U.S. 471 (1968). As defined by the Bankruptcy Code, administrative expenses include all "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A).

The Bankruptcy Code provides that administrative expenses receive priority over the claims of other creditors. 11 U.S.C. § 507(a). Priority status is important to a creditor's recovery because the claims against a bankruptcy estate typically far outstrip the value of the debtor's assets. Creditors with high-priority claims may be paid in full, whereas those lower in the hierarchy will likely recover only pennies on the dollar, or nothing at all. As noted above, Congress chose to grant administrative-expense claims priority "to provide an incentive for creditors to continue doing business with the debtor and an incentive for others to engage in business transactions with the debtor." 4 *Collier on Bankruptcy* ¶ 503.06[2] (16th ed. 2010). Lenders, suppliers, and others considering dealing with a debtor will be understandably wary that credit they extend might not be repaid. This concern is allayed if, in the event "the debtor fails to rehabilitate itself and winds up in liquidation, they can move to the front of the distributive line, ahead of the debtor's pre-bankruptcy creditors." *Nostas Assocs.* v. *Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 20 (2d Cir. 1996). Without that assurance, a debtor's ability to obtain credit—or, as in this case, affordable insurance with a deductible arrangement—and thus to reorganize and emerge from bankruptcy as a going concern would be severely compromised.

The decision below, together with the Sixth Circuit's prior decision in *HNRC*, marks a radical departure from the otherwise settled understanding of § 503(b)(1)(A), under which a creditor who provides services to a debtor during the bankruptcy case is entitled to administrative priority for *all* payments due to it in return for those services.

There can be no question that the insurers' claims for deductibles in this case and in *HNRC* arose from a transaction with the bankruptcy estate and directly and substantially benefited the estate. Indeed, the debtors were required by state law to carry workers' compensation insurance in order to operate their businesses during the bankruptcy case. *See Zurich Am. Co.* v. *Lexington Coal Co. (In re HNRC Dissolution Co.)*, 371 B.R. 210, 217 (E.D. Ky. 2007) ("[T]he insurance coverage provided by the Zurich Policies was critical to [Horizon's] operations. Without the insurance provided by Zurich, [Horizon] would have been unable to operate [its] business as a going concern ... during the pendency of the bankruptcy."); Pet. App. 7a ("The parties agree that the provision of insurance benefitted the estate[.]"). The insurance contracts the debtors entered into obligated them to reimburse their insurers for the deductibles the insurers advanced. And a debtor's obligations under a contract necessary to operate its business are *ipso facto* actual, necessary costs of preserving the estate.

Nonetheless, the Sixth Circuit below held that the debtor's obligation to pay deductibles was not an "actual, necessary cost[] and expense[] of preserving the estate" under § 503(b)(1)(A). The court reasoned that the deductibles were not "actual" expenses of preserving the estate because the debtor would not become obligated to pay them until after the bankruptcy case had ended and because their amount could not be ascertained with certainty until that time. Pet App. 10a. Similarly, the Sixth Circuit reasoned in *HNRC* (adopting the reasoning of the district court) that "the payment of the deductibles, when and if they should arise ... does not provide a direct and substantial benefit to, nor act to preserve, a bankruptcy estate where there is no longer an estate to benefit." 371 B.R. at 228.

That reasoning suffers from a fundamental flaw: It asks whether *payment of the deductibles* would preserve or benefit the estate, rather than asking whether the *insurance* the debtor received in return for agreeing to pay premiums and deductibles (in addition to the cash-flow benefit of the deductible arrangement itself) preserved or benefited the estate. As the concurring judge on the Sixth Circuit panel explained, "[F]ramed this way, there can be just one answer—a *cost* incurred by a business (let alone a bankrupt one) by definition provides no benefits and, arguably, does not become actual or necessary until the debtor receives the bill, which may not occur until after plan confirmation." Pet. App. 13a-14a. That mode of analysis cannot be reconciled with this Court's controlling decisions or with common sense. Rather, "[o]nly by analyzing the cost's purpose—assessing the *services* provided in exchange—can courts determine whether the expense meets § 503(b)'s requirements." *Id.* at 14a.

In *Reading*, this Court construed the predecessor to § 503(b)(1)(A) under the Bankruptcy Act of 1898, which similarly granted administrative priority to "the actual and necessary costs and expenses of preserving the estate," to include tort claims against a debtor arising during its bankruptcy. 391 U.S. at 475. 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." *Id.* at 483. Accordingly, because the tort claim was the result of the debtor's operation of its business during the bankruptcy, the claim was entitled to administrative priority.

Reading thus expressly rejected one of the key premises underlying the Sixth Circuit's analysis: the notion that a *payment* must benefit the estate to be entitled to administrative priority. Instead, the proper inquiry is whether the debt was incurred through the operation of the debtor's business, as a result of its efforts to continue the business as a going concern (either for reorganization or sale to the highest bidder). That is unquestionably true here: The insurance coverage provided permitted the debtors to continue operating as they sought to reorganize, to the benefit of the estates and their creditors—even if the reorganization attempt ultimately failed. And the rule recognized in *Reading* makes sense. The payment of a debt never benefits the estate; the benefit that the estate receives is the goods or services that it obtains in exchange for its obligation to pay for them.

In contrast to the Sixth Circuit, other courts of appeals have recognized that a claim for payment need not mature or be liquidated prior to plan confirmation to be an administrative expense, as long as the payment is in return for a benefit conferred on the bankruptcy estate. *See, e.g., Devan* v. *Simon DeBartolo Group, L.P. (In re Merry-Go-Round Enters., Inc.)*, 180 F.3d 149, 157-158 (4th Cir. 1999) (future rent owed by the debtor under a lease entered into during bankruptcy was an administrative expense even though it did not become due until after failure of the reorganization); *Klein Sleep Prods.*, 78 F.3d at 22-26 (same; explaining that "assumption of an unexpired lease transforms *all* liability under the lease ... into administrative expenses" and that a contrary holding "would mean that any post-bankruptcy contract, entered into for the benefit of a bankrupt's estate, would cease to be entitled to priority the moment the deal turned sour," contravening the purpose of the administrative-expense provisions); *Juniper Dev. Group* v. *Kahn (In re Hemingway Transp. Inc.)*, 993 F.2d 915, 934 (1st Cir. 1993) (if creditor held a valid claim for clean-up costs under CERCLA, "past and future [clean-up] costs should be estimated and allowed as administrative expenses entitled to priority" (footnote omitted)); *Carter-Wallace, Inc.* v. *Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 874 (2d Cir. 1971) (unliquidated patent infringement claim arising from the debtor's post-petition activity was entitled to administrative priority). Equally fundamentally, as the concurrence below recognized and the petition for certiorari explains, other courts of appeals are in accord in focusing on what the estate *obtains*—be it goods, services, or simply the ability to operate the debtor's business—not what the estate *pays*, in determining whether a claim is an "actual, necessary cost of preserving the estate" entitled to administrative priority. Pet. 22-24; Pet. App. 13a-16a.

The contrary rule applied in the Sixth Circuit is an unduly narrow interpretation of the Bankruptcy Code's administrative-expense provisions. If left uncorrected, it will significantly impair financially distressed companies' ability to reorganize. Reorganization depends critically on the willingness of lenders, suppliers, landlords, insurers, and other parties to provide the debtor with needed credit, goods, and services during the bankruptcy. Unless these parties are willing to extend credit or provide goods and services to the debtor on a post-petition basis, debtors will be unable to preserve or rehabilitate their businesses. The administrative-expense provisions of the Code assure such parties that if they do business with a company in bankruptcy, they will be paid amounts due to them in full. The Sixth Circuit's reasoning undermines that assurance, imposing on parties contracting with debtors the risk that, if the debtor's reorganization efforts fail, they will be left unpaid. Such uncertainty will seriously threaten debtors' ability to obtain the goods and services they need to reorganize.

This risk is particularly acute for debtors that require insurance covering claims likely to arise while they attempt to reorganize. Insurers will be unwilling to offer debtors the type of insurance policies they are most likely to be able to afford—policies requiring the payment of deductibles, which reduce premiums and offer a substantial cash-flow benefit to cash-strapped debtors. *Cf. Eastern Air Lines* v. *Insurance Co. of State of Penn. (In re Ionosphere Clubs, Inc.)*, 85 F.3d 992, 994 (2d Cir. 1996) (noting that no insurance company was willing to offer guaranteed-cost workers' compensation coverage to financially distressed airline). As this Court explained in

Reading, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained," 391 U.S. at 483, and insurance is necessary to every debtor's business. Without affordable insurance, many Chapter 11 debtors will have no opportunity to attempt reorganization and will be forced to liquidate.

II. THE SIXTH CIRCUIT'S DECISION SPLITS WITH OTHER CIRCUITS ON THE IMPORTANT AND RECURRING QUESTION OF THE MEANING OF "CLAIM" IN BANKRUPTCY

The Sixth Circuit's reasoning in *HNRC*, adopted by the decision below, rested in significant part on the court's conclusion that the insurer's claim for reimbursement for deductibles under its policies would not "arise" until the debtor's obligation to pay the deductibles accrued as a matter of state contract law. The court reasoned that the "deductible obligations do not even exist" until the workers' compensation claims are presented. *HNRC*, 371 B.R. at 228. The underlying premise of this reasoning—that a "claim" "does not even exist" for purposes of bankruptcy law until a state-law right to payment has ripened—cannot be squared with either the language of the Bankruptcy Code or the reasoning of every other court of appeals to address the issue.

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

The Bankruptcy Code defines a "claim" as 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)(A). As Congress explained when the Code was enacted, "[b]y this broadest possible definition," the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

Notwithstanding the Bankruptcy Code's very broad definition of a "claim," for many years the courts of appeals were sharply divided on the question whether a "claim" exists, as a matter of bankruptcy law, at a time when the acts giving rise to liability have occurred, but when the claimant has not yet suffered the type of injury that would entitle it to sue under non-bankruptcy law.

In *Avellino & Bienes* v. *M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), the Third Circuit employed the same analysis as the Sixth Circuit below, holding that a "claim" under the Bankruptcy Code does not arise until the right to payment accrues as a matter of non-bankruptcy law. In *Frenville*, a group of banks sued an accounting firm that the debtors had engaged as an auditor for negligently preparing the debtors' financial statements. *See id.* at 333. The accounting firm wished to obtain indemnification or contribution from the debtors via a third-party complaint, which was permissible under the automatic-stay provision, 11 U.S.C. § 362(a)(1), only if the firm's claim arose before the filing of the bankruptcy petition. *See* 744 F.2d at 333-334. The court acknowledged that "the debtor[s'] acts which form the basis of [the] suit"—preparation of the financial statements—"occurred pre-petition," but nevertheless, looking to New York law, held that the accounting firm's claim for contribution or indemnification from the debtor arose only post-petition, once it had been sued by the banks. *Id.* at 334, 337 ("[T]he threshold question of when a right to payment arises ... 'is to be determined by reference to state law.'").

Every other court of appeals to consider this issue has rejected *Frenville*, noting the breadth of the definition of "claim" under the Bankruptcy Code and the undesirable consequences that follow from an overly restrictive reading of that definition. *See United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997 (2d Cir. 1991) (EPA had a contingent "claim" in bankruptcy for all future clean-up costs arising from the debtor's pre-bankruptcy discharge of hazardous waste); *Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir. 1988) (expressly rejecting the reasoning of *Frenville* and concluding that a claimant who had a Dalkon Shield inserted before the bankruptcy petition had a "claim" for purposes of the automatic-stay provisions even if injury would not manifest itself until post-petition), *aff'g In re A.H. Robins Co.*, 63 B.R. 986, 993 (Bankr. E.D. Va. 1986) (holding that a claim arises at the "time when the acts giving rise to the alleged liability were performed" (internal quotation marks omitted)); *Butler* v. *NationsBank, N.A.*, 58 F.3d 1022, 1029 (4th Cir. 1995) (expressly refusing to follow *Frenville*, and concluding that a bank "had a claim as soon as [the debtor] deposited the fraudulently endorsed check," even though recovery "was contingent upon the receipt of notice of the forgery"); *California Dep't of Health Servs.* v. *Jensen (In re Jensen)*, 995 F.2d 925, 930 (9th Cir. 1993) ("all future ... cost[s] based on pre-petition conduct that can be fairly contemplated by the parties at the time of [the] bankruptcy" are "claims" under the Bankruptcy Code (internal quotation marks omitted)); *Watson* v. *Parker (In re Parker)*, 313 F.3d 1267, 1269-1270 (10th Cir. 2002) (holding that a malpractice claim arises on the date the underlying conduct occurred, not on the date a cause of action accrued under state law); *Epstein* v. *Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1577 (11th Cir. 1995) ("The debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant ... and [the debtor's] prepetition conduct.").

Significantly, the en banc Third Circuit recently rejected the reasoning of *Frenville* (and implicitly that of the Sixth Circuit), holding that, in the tort context, a "claim" arises under bankruptcy law when the claimant is exposed to a product or conduct that later causes injury. The en banc court observed that "there seems to be something approaching a consensus among the courts ... that "a 'claim' arises when an individual is exposed prepetition to a product or other conduct giving rise to an injury which underlies a 'right to payment' under the

Bankruptcy Code." *Jeld-Wen, Inc.* v. *Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010) (en banc). *Grossman's* recognized that the "accrual test in *Frenville*," like the reasoning of the Sixth Circuit, "does not account for the fact that a 'claim' can exist under the Code before a right to payment exists under state law." *Id.* at 121. And it concluded that *Frenville* "imposes too narrow an interpretation of a 'claim' under the Bankruptcy Code. Accordingly, the *Frenville* accrual test should be and now is overruled." *Id.*

As the Third Circuit noted in *Grossman's*, the courts are "approaching a consensus" on this issue of bankruptcy law. 607 F.3d at 125. And that consensus is directly contrary to the holding of the Sixth Circuit below that an insurer cannot have a "claim" before its right to payment would accrue under non-bankruptcy law. In reasoning that closely tracks *Frenville*'s rejected "accrual" test, the Sixth Circuit concluded that "until [an insurer] has made a payment" on a claim and thus is permitted to "seek[] reimbursement from the insured" under non-bankruptcy law, its claim is not "actual" and therefore is not entitled to administrative expense priority. Pet. App. 10a.

The Third Circuit correctly recognized that this reasoning was out of step with the emerging consensus among the courts of appeals, observing that its *Frenville* decision was "one of the most criticized and least followed precedents under the current Bankruptcy Code." *Grossman's*, 607 F.3d at 120 (internal quotation marks omitted). The Third Circuit therefore went en banc to reconsider *Frenville* and bring its precedent into line with the overwhelming majority view. But the Sixth Circuit, notwithstanding the strong suggestion by two of the three members of the panel that the court rehear this case en banc (Pet. App. 13a-18a), has declined to do so.

Accordingly, only this Court can bring uniformity to the courts of appeals' treatment of this fundamental question of bankruptcy law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

KAREN LEE TURNER
ECKERT, SEAMANS,
CHERIN & MELLOTT, LLC
2 Liberty Place
50 South 16th Street
Philadelphia, PA 19102
(215) 851-8400

CRAIG GOLDBLATT
Counsel of Record
DANIELLE SPINELLI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W
Washington, D.C. 20006
(202) 663-6000

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