No. 11-

IN THE

Supreme Court of the United States

CONTINENTAL INSURANCE COMPANY,
Petitioner,

v.

THORPE INSULATION COMPANY, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID C. CHRISTIAN II
SEYFARTH SHAW LLP
131 South Dearborn St.
Chicago, IL 60603

TODD C. JACOBS
GRIPPO & ELDEN LLC
111 South Wacker Dr.
Chicago, IL 60606

SETH P. WAXMAN
Counsel of Record
CRAIG GOLDBLATT
DANIELLE SPINELLI
SHIVAPRASAD NAGARAJ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

The question presented, as articulated by the Ninth Circuit in the decision below, is:

> "[W]hether Congress 'intended to make an exception to the [Federal] Arbitration Act' for claims arising in bankruptcy proceedings" in view of "an inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code."

App. 15a-16a (quoting *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987)).

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the case caption, the parties in the court of appeals included the Official Committee of Unsecured Creditors of Thorpe Insulation Company and Charles B. Renfrew.

CORPORATE DISCLOSURE STATEMENT

Continental Insurance Company is 100% owned by the Continental Casualty Company. The Continental Casualty Company, in turn, is owned entirely by the Continental Corporation. CNA Financial Corporation, a publicly traded corporation, owns all of the stock of the Continental Corporation. Loews Corporation, which is also publicly traded, owns the majority of the stock of CNA Financial Corporation. No other corporation owns 10% or more of the stock of CNA Financial Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Continental Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 671 F.3d 1011 and appears at App. 1a-29a. The district court's opinions are unpublished and appear at App. 31a-33a and 73a-84a. The bankruptcy court's opinions denying Continental's motions to compel arbitration are unpublished and appear at 35a-57a and 85a-100a. The bankruptcy court's opinions disallowing Continental's claim

are unpublished and appear at App. 59a-71a and 101a-118a.

JURISDICTION

The Ninth Circuit entered its judgment on January 30, 2012. App. 29a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act provides:

> A written provision in … a contract … to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2.

INTRODUCTION

This case presents a question of major importance that is the subject of a significant and long-standing division of authority among the courts of appeals: whether, and under what circumstances, a bankruptcy court may refuse to enforce a pre-bankruptcy agreement to arbitrate a creditor's claim against the debtor.

In the decision below, the Ninth Circuit held that a bankruptcy court may refuse to enforce such an arbitration agreement if the dispute "raise[s] questions … that 'should be resolved by a bankruptcy judge and not an arbitrator'" or if arbitration would offend the bankruptcy policy of "[c]entralization of disputes concerning a debtor's legal obligations." App. 19a, 20a. In effect, the Ninth Circuit gave bankruptcy courts broad discretion to ignore the FAA whenever they believe arbitra-

tion of a creditor's claim would infringe their putative authority.

The Ninth Circuit's decision deepened a well-established split among the courts of appeals. Twenty-five years ago, this Court held that even when federal statutory rights are at stake, the FAA mandates enforcement of valid arbitration agreements unless it is "overridden by a contrary congressional command" evident from text, legislative history, or an "inherent conflict" with the federal statute at issue. *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226, 227 (1987). Since *McMahon*, this Court has considered whether many different federal statutes pose an "inherent conflict" with the FAA. It has never found such a conflict.

This Court "has yet to weigh in on the enforceability of arbitration clauses in bankruptcy," however. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 Am. Bankr. Inst. L. Rev. 503, 517 (2009). Without this Court's guidance, "federal courts at the circuit and lower levels have struggled … for more than 20 years" to apply *McMahon*'s teaching in the bankruptcy context. Culhane, *Limiting Litigation over Arbitration in Bankruptcy*, 17 Am. Bankr. Inst. L. Rev. 493, 493 (2009). As a result, "a significant circuit split," reflecting "a great deal of confusion and disparity," has emerged. Kirgis, *supra*, at 517.

Specifically, the Ninth Circuit has now joined the Second and Fourth Circuits in holding that bankruptcy courts have broad discretion to refuse to enforce arbitration agreements whenever they conclude that arbitration of a creditor's claim against a debtor would offend a vaguely delineated policy of "centralization."

App. 20a; *see In re United States Lines, Inc.*, 197 F.3d 631, 639-641 (2d Cir. 1999); *In re White Mountain Mining Co.*, 403 F.3d 164, 168-170 (4th Cir. 2005). The Third and Fifth Circuits, by contrast, have concluded that bankruptcy courts may refuse to enforce arbitration clauses only in proceedings to vindicate rights created by the Bankruptcy Code itself—rights that often exist to protect creditors as a group. *See In re Mintze*, 434 F.3d 222, 228-232 (3d Cir. 2006); *In re National Gypsum Co.*, 118 F.3d 1056, 1067-1069 (5th Cir. 1997).

The Second, Fourth, and Ninth Circuits' reasoning embodies "exactly the judicial approach to arbitration that [this] Court has repeatedly repudiated for the last three decades." Kirgis, *supra*, at 540. This Court has made it unmistakably clear that a court may not refuse to enforce an arbitration agreement out of fear that "arbitrators will not follow the law," and that "arbitral tribunals are readily capable of handling the … complexities of [federal statutory] claims." *McMahon*, 482 U.S. at 232. And the courts of appeals' focus on arbitration's supposed conflict with a bankruptcy policy of "centralization" cannot be squared with this Court's admonition that courts must enforce arbitration agreements "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 217 (1985).

In short, the old-fashioned hostility to arbitration that this Court has rejected again and again in many other contexts retains a firm foothold in bankruptcy. Nothing about the Bankruptcy Code—neither its text nor the policy it embodies—justifies such a legal regime. To the contrary, bankruptcy law rests on the fundamental premise that non-bankruptcy rights and obligations, including contractual rights and obliga-

tions, are respected unless the Bankruptcy Code explicitly overrides them. *See, e.g.*, *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537-546 (1994). And, absent an express contrary provision, claims by creditors against a debtor are resolved according to the non-bankruptcy law under which they arise. *See* 11 U.S.C. §502; *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979). Likewise, no bankruptcy rule or policy requires that a state-law contract claim against the debtor be decided by the bankruptcy court when, outside of bankruptcy, it would have been arbitrated.

The question presented here is perhaps the most significant unresolved question regarding the enforceability of arbitration agreements. It has exceedingly broad application. "Virtually any contractual relationship can become the subject of a dispute in bankruptcy, and because almost any contract can include an arbitration clause, the variety of cases in which arbitration and bankruptcy can collide is nearly limitless." Kirgis, *supra*, at 514. And the approach adopted by the Second, Fourth, and Ninth Circuits is "so vague and malleable that [it] give[s] courts license to do almost anything they want." *Id.* at 520. The inability to predict whether arbitration clauses will be enforced in bankruptcy thus casts a shadow over arbitration clauses in general, impairing the certainty and expeditious resolution of disputes that are the FAA's objects. The division of authority among the courts of appeals over this important question, and the wrongheaded approach many courts have taken, demand this Court's review.

STATEMENT

1. Respondent Thorpe Insulation Company is a former distributor and installer of asbestos-containing products. Thorpe's insurers, including petitioner Con-

tinental Insurance Company, have collectively paid more than $180 million to defend and indemnify Thorpe against the resulting tort claims. App. 2a.[1] Thorpe and many of its insurers, again including Continental, are signatories to the 1985 Wellington Agreement, "an omnibus insurance coverage and claims handling agreement between asbestos producers and their insurers." *Id.* The Wellington Agreement requires arbitration of all coverage disputes. *Id.*

By 1998, Thorpe had exhausted the limits of the applicable liability coverage under Continental's policies and had begun to access its excess liability coverage. Thorpe then argued for the first time that it was entitled to additional coverage under its primary policies with Continental. Continental initiated an arbitration proceeding before former United States District Court Judge Abraham Sofaer, whom the parties had chosen to resolve all coverage disputes. Judge Sofaer rejected Thorpe's contentions and concluded that Thorpe was not entitled to any further coverage from Continental. App. 2a-3a.

While Thorpe's appeal of Judge Sofaer's decision was pending, Continental and Thorpe entered into a 2003 settlement agreement (the "Agreement") resolving Thorpe's claims. CAER4161-4180. Thorpe agreed to release Continental from "any and all claims, actions, causes of action, rights, liabilities, obligations and demands … arising out of, related to, or in any way connected with … the Policies." CAER4168.

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[1] Continental's predecessor-in-interest Harbor Insurance Company issued primary comprehensive general liability policies to Thorpe between 1971 and 1979. Court of Appeals Excerpts of Record (CAER) 4143.

The parties also agreed to two warranties. The Establishment Warranty precluded the parties from "voluntarily assist[ing]" any third party "in the establishment of any claim, cause of action, action, or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released." CAER4173. The Establishment Warranty was intended, among other things, to preclude Thorpe from assisting asbestos claimants in bringing so-called "direct actions" against Continental, in an attempt to evade the release Thorpe had provided. The Assignment Warranty forbade either party from assigning to a third party "any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein." CAER4172-4173. Again, the Assignment Warranty was designed to preclude evasion of the broad release Thorpe had given. Finally, the Agreement included an arbitration clause, giving Judge Sofaer "continuing jurisdiction … to enforce this Agreement and its terms." CAER4170.

Following the Agreement with Continental, Thorpe began negotiating settlements with its other insurers and meeting with counsel for the asbestos claimants. There has been no discovery into those discussions, but it appears that they focused, at least in part, on a potential bankruptcy filing by Thorpe. Thorpe apparently hoped to make use of §524(g) of the Bankruptcy Code, a provision designed for debtors with substantial asbestos liability and the ability to continue as a going concern if that liability is resolved. Section 524(g) provides that if a qualifying debtor sets up a trust, funded with certain assets, for the benefit of asbestos claimants, the debtor can obtain an injunction barring present and future asbestos claims against it and channeling such claims to the

trust. 11 U.S.C. §524(g); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234-235 & n.45 (3d Cir. 2004).

Thorpe's negotiations toward resolution of the claims against it, including any discussion of a potential §524(g) bankruptcy, did not by themselves violate the Agreement. As courts have noted, however, because a §524(g) plan requires the consent of 75% of the class of asbestos claimants before it can be confirmed, debtors must work closely with claimants' counsel to craft a plan claimants will approve. *See In re Congoleum Corp.*, 426 F.3d 675, 680 (3d Cir. 2005). That situation can lead to conflicts of interest, frequently to the detriment of debtors' insurers. *See, e.g., id.* at 689-692.

In 2007, Continental learned that, in the course of its negotiations, Thorpe had breached the Agreement. Specifically, Thorpe breached the Establishment Warranty by—among other things—working with asbestos claimants to assist them in bringing direct actions against Continental. In return, claimants' counsel agreed to help find financing for Thorpe, to allow Thorpe's owners to retain their equity in the company, and to "stand[] down" against Thorpe in the tort system. CAER1562. In mid-2007, shortly after counsel for Thorpe and the claimants met, the claimants filed direct actions against Continental for the first time. *See* CAER1559-1565.[2]

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[2] Thorpe also violated the Establishment and Assignment Warranties by acquiring other insurers' contribution claims against Continental through settlement agreements, some of which indicated that the contribution claims would be assigned to a §524(g) trust so that the trust could assert them against Continental. App. 4a-6a; CAER5497; *see also, e.g.*, CAER3684.

2. After learning of Thorpe's actions, Continental initiated arbitration proceedings against Thorpe for breach of the Agreement. CAER4198-4208. Judge Sofaer set a hearing for October 16, 2007. The day before the hearing, however, Thorpe filed for chapter 11 protection, halting the arbitration proceedings pursuant to the Bankruptcy Code's automatic stay. App. 6a; 11 U.S.C. §362.

Soon after Thorpe's bankruptcy filing, Continental moved for relief from the automatic stay to continue the arbitration proceeding. CAER5458-5464. The bankruptcy court denied the motion because Continental had not yet filed a proof of claim. CAER5452. Because the court indicated it would not resolve the motion until Continental did so, CAER5452, in February 2008 Continental filed a proof of claim for its damages stemming from Thorpe's breach of the Agreement and moved to compel arbitration. CAER5953-5962. In March 2008, the bankruptcy court denied Continental's motion again, this time because Thorpe had not yet objected to the claim. CAER5021, 5053.

In May 2008, Thorpe and the asbestos claimants filed a proposed §524(g) plan. Nearly four months later—and nearly seven months after Continental had filed its proof of claim—Thorpe filed its objection to Continental's claim. CAER4389-4413. Continental filed an amended proof of claim, CAER4142-4158, and renewed its motion to compel arbitration, CAER3983.[3]

[3] While Continental's original proof of claim related only to Thorpe's pre-bankruptcy conduct, its amended proof of claim pointed out that Thorpe's breach continued after the bankruptcy, noting, for example, that the §524(g) plan did in fact assign other

After a hearing, the bankruptcy court denied Continental's motion to compel arbitration and disallowed Continental's claim. App. 85a-118a. Continental's claim against Thorpe was a state-law breach-of-contract action arising from a pre-bankruptcy agreement, and the bankruptcy court acknowledged during the hearing that "the conduct of which [Continental] complain[s] … commenced prepetition." CAER249-250. The court reasoned, however, that because the breaches arguably occurred during Thorpe's negotiations over the terms of its plan, the matter was "within the exclusive jurisdiction of the Bankruptcy Court." CAER250.[4] "As a matter of fundamental bankruptcy policy," the court opined, "only a Bankruptcy Court should decide whether the manner in which someone has administered a bankruptcy estate gives rise to a claim for damages." CAER250. On the merits, the bankruptcy court disallowed Continental's claim, concluding that it was preempted by the Bankruptcy Code. App. 101a-118a.

The district court largely affirmed the bankruptcy court's decision, but remanded for reconsideration of the question whether Thorpe's pre-petition attempts to encourage asbestos claimants to file lawsuits directly against Continental violated the Agreement.

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insurers' contribution claims against Continental to the trust. CAER4152.

[4] The bankruptcy court was in error on that point. *See* 28 U.S.C. §1334(b) (giving the district courts "original *but not exclusive* jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Code]") (emphasis added); *id.* §157(a) (providing that district courts may refer such proceedings to the bankruptcy courts for that district).

App. 73a-84a.[5] On remand, the bankruptcy court again refused to refer that claim to arbitration and disallowed it. As before, the bankruptcy court concluded that the claim should not be arbitrated because (1) "centralization of disputes [is] especially critical in Chapter 11 cases" and (2) "adjudication of the [remanded claim] involves a determination as to whether or not Thorpe's preparation for and exercise of its federal rights to file a bankruptcy petition, to file a Section 524(g) plan …, and to discuss the foregoing matters with its asbestos creditors, could constitute a violation of a prepetition contract." App. 53a-54a. The court explained during the hearing on remand that "I can't let this go to arbitration because it's too fraught with peril that … a non-bankruptcy forum would end up adjudicating things that [it] really ha[s] no business adjudicating, lest [it] run into a violation of bankruptcy policy." CAER142. The district court affirmed. App. 31a-33a.

3. On appeal, the Ninth Circuit affirmed. The court acknowledged that arbitration clauses should ordinarily be "'rigorously enforce[d].'" App. 15a (quoting *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987)). Purporting to follow *McMahon*, the court framed the question before it as "whether Congress 'intended to make an exception to the Arbitration Act' for claims arising in bankruptcy proceedings, 'an intention discernible from the text, history, or purposes of the [Bankruptcy Code].'" *Id.* (quoting

[5] The scope of the remanded claim was disputed. The lower courts and the Ninth Circuit, however, concluded that the remand was limited to the specific direct actions brought against Continental in 2007, and faulted Continental for its "unwillingness to separate the direct actions from Thorpe's efforts to negotiate a plan and prepare for bankruptcy." App. 12a.

McMahon, 480 U.S. at 227). Admitting that "[n]either the text nor the legislative history of the Bankruptcy Code reflects a congressional intent to preclude arbitration in the bankruptcy setting," the court proceeded to "ask … whether there is an inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code." App. 15a-16a. The court noted that "[t]his issue is one of first impression in our circuit." App. 16a.

In its analysis of that issue, the Ninth Circuit first adopted the reasoning of other courts of appeals that have distinguished between "core" and "non-core" proceedings in deciding whether to enforce arbitration agreements in bankruptcy. App. 16a.[6] The court endorsed the generally accepted view that "[i]n non-core proceedings, the bankruptcy court generally does not have discretion to deny enforcement of a valid prepetition arbitration agreement." *Id.* But it purported to "join [its] sister circuits" in holding that bankruptcy courts have discretion to refuse to enforce arbitration of a core proceeding when "arbitration would conflict

[6] As this Court recently explained, "core" proceedings are proceedings that either arise under the Bankruptcy Code or can arise only in a bankruptcy case. "Non-core" proceedings are proceedings that neither arise under the Code nor are peculiar to bankruptcy, but are related to the bankruptcy because their resolution could affect the bankruptcy estate. *See* 28 U.S.C. §1334(b); *id.* §157(b); *Stern* v. *Marshall*, 131 S. Ct. 2594, 2603-2605 (2011). The distinction is intended to reflect the Article III limits on bankruptcy courts' powers. Bankruptcy courts thus may both hear and decide proceedings properly designated as "core" proceedings, but may only hear—and not decide, absent the parties' consent—"non-core" matters, as to which the district court must enter final judgment. 28 U.S.C. §157(b); *Stern*, 131 S. Ct. at 2604-2605.

with the underlying purposes of the Bankruptcy Code." *Id.* at 15a-16a.[7]

After determining that resolution of Continental's contested claim was a core proceeding under 28 U.S.C. §157(b)(2)(B) (providing that "allowance or disallowance of claims against the estate" is a core proceeding), the Ninth Circuit held that arbitration of Continental's claim would "conflict with the purposes and policies" of the Bankruptcy Code and, accordingly, that "the bankruptcy court had discretion not to enforce the arbitration clause." App. 22a.

The Ninth Circuit invoked two justifications for that holding. *First*, it concluded that the question whether a debtor has breached a pre-bankruptcy contract in the course of negotiations toward a chapter 11 plan was a question that only a bankruptcy court was competent to decide. Characterizing Continental's claim as one "based on a debtor's efforts to seek for itself and third parties the protections of §524(g)," the court reasoned: "Because Congress intended that the bankruptcy court oversee all aspects of a §524(g) reorganization, only the bankruptcy court should decide whether the debtor's conduct in the bankruptcy"—and its conduct during pre-bankruptcy negotiations—"gives rise to a claim for breach of contract." App. 19a-20a. Based on that analysis, the Ninth Circuit baldly asserted that "[a]rbitration in this case would conflict with congressional intent." *Id.* at 20a.

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[7] As discussed further below, *see infra* Part I.B, the Ninth Circuit's claim that it was "join[ing] [its] sister circuits" obfuscated the existence of a "significant circuit split," Kirgis, *supra*, at 517, as to *when* arbitration can "conflict with the underlying purposes of the Bankruptcy Code."

Second, "[e]ven apart from § 524(g)," the Ninth Circuit concluded that the bankruptcy court had discretion to refuse to enforce the parties' arbitration agreement based solely on the purported bankruptcy policy of "centralization." App. 20a. It reasoned that "[t]he purposes of the Bankruptcy Code include '[c]entralization of disputes concerning a debtor's legal obligations,'" and that "[a]rbitration of a creditor's claim against a debtor, even if conducted expeditiously, prevents the coordinated resolution of debtor-creditor rights and can delay the confirmation of a plan of reorganization." *Id.* The court pointed to no evidence that arbitration of Continental's claim would have caused such delay in *this* case, but instead posited a hypothetical situation in which multiple arbitrations took a long time to resolve, causing the bankruptcy court to "lose control over the timing of the reorganization." App. 20a-21a. The Ninth Circuit acknowledged that, under this Court's precedent, "judicial economy and centralization of disputes are not sufficient bases for nonenforcement of an otherwise applicable arbitration clause." App. 20a n.9 (citing *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)). But it concluded that this longstanding principle "does not hold in the bankruptcy context." *Id.*[8]

[8] The Ninth Circuit went on to uphold the bankruptcy court's disallowance of Continental's claim, reasoning that the Assignment and Establishment Warranties "were not enforceable" because they were "purported prepetition waivers of the protections of the Bankruptcy Code, which need not here be permitted." App. 26a. Although the Agreement "does not specifically mention bankruptcy," the court believed that enforcing it could "thwart[]" Thorpe's ability to reorganize under §524(g). App. 27a, 28a. It reasoned, in effect, that §524(g) impliedly preempted the provisions of the Agreement.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision deepens the division of authority among the courts of appeals on the question whether, and when, arbitration agreements are enforceable in bankruptcy. Although courts are generally in accord that agreements to arbitrate "non-core" matters should be enforced, a significant circuit split has developed as to when bankruptcy courts may refuse to enforce agreements to arbitrate "core" matters, such as a creditor's claim against the debtor for breach of a pre-bankruptcy contract. The Third and Fifth Circuits have held that such discretion is limited to causes of action created by the Bankruptcy Code. But the Second, Fourth, and now the Ninth Circuits have held that bankruptcy courts have broad discretion to override agreements to arbitrate whenever the bankruptcy policy of "centralization" is implicated—that is, in every claim by a creditor against a debtor.

The position adopted by the latter group of circuits cannot be squared with this Court's repeated admonition that arbitration agreements must be enforced absent a manifest congressional intent to preclude them. Neither the Bankruptcy Code's text nor bankruptcy policy hints at any such intent. To the contrary, bankruptcy is built on a foundation of non-bankruptcy contract, property, and tort law, and it does not alter non-bankruptcy rights and entitlements except where necessary to serve a specific bankruptcy purpose. The Ninth Circuit fundamentally misapprehended both arbitration and bankruptcy, and in doing so exacerbated the persistent confusion over the question presented here. That important question can be put to rest only by this Court's intervention.

I. THERE IS A SIGNIFICANT AND WELL-DEVELOPED SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS REGARDING THE ENFORCEABILITY OF ARBITRATION CLAUSES IN BANKRUPTCY

1. The disarray among the circuits must be understood against the backdrop of the Federal Arbitration Act and this Court's decisions interpreting it.

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The FAA "overrule[d] the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985). It established a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), placing them "on the same footing as other contracts," *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). And it made "unmistakably clear" that arbitration should be "speedy and not subject to delay and obstruction in the courts," *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967), and that agreements to arbitrate must be "rigorously enforce[d]," *Dean Witter*, 470 U.S. at 221.

The FAA "leaves no place for the exercise of discretion" by a court presented with a valid arbitration clause. *Dean Witter*, 470 U.S. at 218. Rather, it "mandates that [a] court[] *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* (emphasis in original). That is true regardless of the subject matter of the dispute. This Court has repeatedly held that federal "statutory claims may be the subject of an arbitration

agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26; *see also, e.g.*, *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2011); *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 89 (2000). The Act "provide[s] no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). To the contrary, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. "'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory [rights] in the arbitral forum, the statute will continue to serve … its … function.'" *Gilmer*, 500 U.S. at 28.

A court may set aside an otherwise valid arbitration clause only when "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987); *see also, e.g.*, *Mitsubishi*, 473 U.S. at 627. Congressional intent "to limit or prohibit waiver of a judicial forum for a particular claim … 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 226-227; *see also, e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). The party opposing arbitration bears the burden of demonstrating that Congress intended to oust the FAA. *McMahon*, 482 U.S. at 226-227.

That burden is a heavy one—particularly in the absence of any textual provision barring arbitration. "Congress is fully equipped 'to identify any category of claims as to which agreements to arbitrate will be held

unenforceable.'" *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009). An "inherent conflict" between the FAA and another statute must thus be truly "irreconcilable" before a court can nullify an arbitration clause. *McMahon*, 482 U.S. at 239; *see also, e.g.*, *Greenwood*, 132 S. Ct. at 672-673. And the question "must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24; *see also, e.g.*, *Randolph*, 531 U.S. at 89; *Gilmer*, 500 U.S. at 26. Any "doubts" concerning arbitrability "should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24, 25.

Many times over the last three decades, this Court has addressed the question whether a particular federal statute poses an "inherent conflict" with the FAA. It has never found such a conflict. *See, e.g.*, *Mitsubishi*, 473 U.S. 614 (Sherman Act); *McMahon*, 482 U.S. 220 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Rodriguez de Quijas*, 490 U.S. 477 (Securities Act of 1933); *Gilmer*, 500 U.S. 20 (Age Discrimination in Employment Act as applied to individually bargained employment agreements); *14 Penn Plaza*, 556 U.S. 247 (ADEA as applied to collectively bargained employment agreements); *Greenwood*, 132 S. Ct. 665 (Credit Repair Organizations Act). In doing so, this Court has considered and rejected many arguments that arbitration would vitiate a particular federal statutory scheme—including contentions that arbitration would result in piecemeal litigation, that arbitrators were incapable of adjudicating statutory rights or complex cases, and that issues implicating important public policies should remain in the hands of judges. These "attacks on arbitration … are far out of step with [this Court's] current strong en-

dorsement of [arbitration]." *Gilmer*, 500 U.S. at 30 (quotation marks omitted).

2. Despite this Court's extensive FAA jurisprudence, it "has yet to weigh in on the enforceability of arbitration clauses in bankruptcy." Kirgis, *supra*, at 517. Since this Court's decision in *McMahon* 25 years ago, the lower courts have struggled to apply its principles in bankruptcy. As one scholar has put it, the "numerous approaches and analyses adopted by the various federal courts of appeals" have led to substantial "uncertainty and confusion … with respect to the interplay between arbitration and bankruptcy and whether an arbitration clause should be enforced in a particular proceeding in a bankruptcy case." Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 183, 185 (2007). The result has been a "morass" of conflicting and inconsistent decisions, culminating in "a significant circuit split." Kirgis, *supra*, at 517.

As the Ninth Circuit noted, the courts of appeals have generally concurred that agreements to arbitrate "non-core" proceedings that are merely "related to" a bankruptcy case, such as contract suits by the debtor against a third party, must be enforced. App. 16a; *see also* Kirgis, *supra*, at 517. But "[a] split has emerged among the Circuits as to when a bankruptcy court has discretion to refuse to enforce an arbitration agreement covering a core claim," including contract and tort claims by creditors seeking a share of the debtor's estate. *Id.* at 518; *see supra* n.6 (discussing distinction between "core" and "non-core" proceedings).

a. The Third and Fifth Circuits have taken the narrower view of bankruptcy courts' discretion regarding arbitration agreements, holding "that a bankruptcy

court has discretion to refuse to enforce an arbitration clause *if the proceedings are based on Bankruptcy Code provisions* and arbitration would inherently conflict with the purposes of the Code." Kirgis, *supra*, at 519 (emphasis added).

The Third Circuit has thus held that, even in a core proceeding, a bankruptcy court must enforce a valid agreement to arbitrate unless the claim was "created by" the Bankruptcy Code. In *In re Mintze*, for example, a lender filed a proof of claim against the debtor; the debtor then sought to rescind the loan agreement pursuant to the Truth in Lending Act; and the lender moved to compel arbitration pursuant to the agreement. 434 F.3d 222, 225-226 (3d Cir. 2006). The bankruptcy court refused to compel arbitration, concluding that the matter was "core" and would affect administration of the bankruptcy estate. *Id.* at 227. The Third Circuit reversed, "hold[ing] that the Bankruptcy Court lacked the authority and discretion to deny enforcement of the arbitration provision." *Id.* at 226.

The Third Circuit noted that "to override the FAA's mandate for enforcement of arbitration, the *McMahon* standard requires congressional intent 'to preclude a waiver of judicial remedies for the *statutory rights* at issue.'" *Mintze*, 434 F.3d at 231 (quoting *McMahon*, 482 U.S. at 227; emphasis in original). Accordingly, the court reasoned that an arbitration clause's enforceability in bankruptcy turns on whether the claim at issue is one "that the Bankruptcy Code created for the benefit of the creditors of the estate." *Id.* at 230. Because the debtor had "failed to raise any statutory claims that were created by the Bankruptcy Code," there was no "inherent conflict between arbitration of [the] federal and state consumer protection is-

sues and the underlying purposes of the Bankruptcy Code." *Id.* at 231-232.

The Third Circuit had previously explained that "given the recent Supreme Court cases concerning the Arbitration Act, we can no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over that Act." *Hays & Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989). The "message" the Third Circuit drew from this Court's decisions "is that we must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and that we should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code." *Id.* *Hays* thus held that claims by the trustee against the debtor's broker under state and federal securities law, contract and tort law, and RICO had to be arbitrated. Because the claims were based on the debtor's pre-bankruptcy rights, and not the Bankruptcy Code itself, the court could "perceive … no adverse effect of sufficient magnitude to relieve a … court of its mandatory duty under the Arbitration Act." *Id.*[9] By contrast, *Hays* held that the bankruptcy court could refuse to compel arbitration of fraudulent conveyance claims because "[t]hey are creditor claims" that the Bankruptcy Code itself "authorizes the trustee to assert." 885 F.2d at 1155; *see* 11 U.S.C. §544.

The Fifth Circuit has employed a similar approach, explaining that a bankruptcy court may refuse to en-

[9] Although the claims arbitrated in *Hays* were non-core, the Third Circuit made clear in *Mintze* that the standard articulated in *Hays* applies equally to core proceedings. *See* 434 F.3d at 231.

force an arbitration clause only when "the proceeding derives exclusively from the provisions of the Bankruptcy Code." *In re National Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997); *see also In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002) (bankruptcy court had discretion to deny arbitration of fraudulent conveyance action arising under the Bankruptcy Code). When a proceeding is "derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code." *National Gypsum*, 118 F.3d at 1069, 1070 (concluding that debtor's action to enforce the discharge injunction, which "raised no issues under [a pre-bankruptcy contract] and was restricted entirely to the adjudication of federal bankruptcy issues," need not be arbitrated). But when an action does not derive exclusively from the Bankruptcy Code, an arbitration clause must be enforced.

b. By contrast, the Second, Fourth, and now Ninth Circuits have taken a much broader view of a bankruptcy court's veto power over arbitration agreements. *See* Kirgis, *supra*, at 520. Rather than asking whether the proceeding arises under the Bankruptcy Code, these courts apply a nebulous standard focused on the purported bankruptcy policy of "centralization" to determine whether arbitration will pose an "inherent conflict" with the Bankruptcy Code.

The Second Circuit's influential decision in *In re United States Lines, Inc.*, 197 F.3d 631 (2d Cir. 1999), exemplifies this approach. The debtors' successor-in-interest filed a declaratory judgment action against the debtors' insurers, seeking a determination that insurance policies would cover asbestos-related claims against the debtors. The action was a pure contract-

law claim by the debtors' successor against a third party arising under a pre-bankruptcy agreement and raising questions of state contract and insurance law.[10] The insurers sought to enforce their agreement to arbitrate disputes arising out of the policies, but the bankruptcy court refused.

The Second Circuit affirmed, opining that "[i]n the bankruptcy setting, congressional intent to permit a bankruptcy court to enjoin arbitration is sufficiently clear to override … arbitration agreements." *U.S. Lines*, 197 F.3d at 639. It noted that "one of the core purposes of bankruptcy … is to 'allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate.'" *Id.* at 640. And it stated that, while arbitration clauses should not necessarily be annulled in all core proceedings, "[w]here the bankruptcy court has properly considered the conflicting policies …, we acknowledge its exercise of discretion and show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding." *Id.* at 641. Reasoning that the insurance coverage proceedings were "integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets," the Second Circuit concluded that the

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[10] Although the dispute was thus a classic matter of private right, the Second Circuit concluded that it was "core," on the basis that the insurance coverage was an important asset of the debtor's estate. *U.S. Lines*, 197 F.3d at 638. That reasoning cannot survive this Court's decision in *Stern* v. *Marshall*, 131 S. Ct. 2594, 2612-2615 (2011). Nonetheless, the *U.S. Lines* decision exemplifies the analysis of the courts of appeals that have granted bankruptcy courts broad discretion to refuse arbitration of core matters. And the decision remains influential, as evidenced by the Ninth Circuit's reliance on it below. *See* App. 16a, 21a.

bankruptcy court had not abused its discretion in refusing to enforce the parties' arbitration agreement. *Id.*

As one commentator has observed, "*In re United States Lines* represents exactly the judicial approach to arbitration that the Supreme Court has repeatedly repudiated for the last three decades." Kirgis, *supra*, at 540. The Second Circuit deferred to a bankruptcy court's refusal to enforce an agreement to arbitrate a contract dispute because the outcome of the dispute—that is, whether the debtor would obtain money from its insurers—was important to the bankruptcy. But the "routine contract" claim in *U.S. Lines* is "the kind[] of claim[] that [this] Court has said over and over [is] conducive to arbitral resolution." *Id.* at 541. Outside bankruptcy, there is no doubt that it would have been arbitrable, and nothing in the Bankruptcy Code suggests that the result should differ simply because the outcome of the dispute would have affected the size of the bankruptcy estate.

In *In re White Mountain Mining Co.*, 403 F.3d 164 (4th Cir. 2005), the Fourth Circuit followed *U.S. Lines* to similar effect. There, the debtor's two owners disputed whether one owner's pre-bankruptcy payment to the debtor should be characterized as debt or equity. The parties had agreed to arbitrate all disputes arising out of the transaction. Purporting to apply the *McMahon* standard, the Fourth Circuit "reach[ed] the same conclusion as did the Second Circuit: 'In the bankruptcy setting, congressional intent … to enjoin arbitration is sufficiently clear to override … arbitration agreements.'" *Id.* at 168 (quoting *U.S. Lines*, 197 F.3d at 639). The court reasoned that "Congress intended to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts," and that "[a]rbitration is inconsistent with centralized decision-

making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge." *Id.* at 169. And it held that the bankruptcy court was not "clearly erroneous" in concluding that expedited resolution of the issue was necessary to a successful reorganization and that arbitration was therefore "inconsistent with the purpose of the bankruptcy laws." *Id.* at 170.

In the decision below, the Ninth Circuit relied on *U.S. Lines* and *White Mountain* and employed the same reasoning. App. 1a-29a. The court did not ask, as the Third and Fifth Circuits would, whether Continental's claim arose under the Bankruptcy Code. Instead, it relied entirely on a vaguely outlined "conflict" between arbitration and bankruptcy policy. The Ninth Circuit opined that only a bankruptcy court—not an arbitrator—could be trusted to decide the question whether conduct during negotiations over a plan of reorganization violated a pre-bankruptcy contract. App. 20a. Like the Second and Fourth Circuits, it also reasoned that arbitration conflicted with the policy of "'[c]entralization of disputes concerning a debtor's legal obligations,'" because arbitration "prevents the coordinated resolution of debtor-creditor rights and can delay the confirmation of a plan of reorganization." App. 20a (quoting *White Mountain*, 403 F.3d at 170). While acknowledging that this Court has rejected such concerns as a basis for refusing to enforce arbitration agreements, the Ninth Circuit stated that this Court's reasoning "does not hold in the bankruptcy context." App. 20a n.9.

II. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS

The Ninth Circuit seriously erred in concluding that the principles this Court has articulated "do[] not hold in the bankruptcy context." App. 20a n.9. Nothing in bankruptcy law justifies that conclusion.

1. Under *McMahon*, a court may decline to enforce an arbitration agreement only when "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," which will be "'deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." 482 U.S. at 227. Courts are in agreement that nothing in the Bankruptcy Code's text or legislative history suggests that Congress intended to preclude arbitration. *See, e.g.*, App. 15a. But a number of courts, like the Ninth Circuit below, have found an "inherent conflict" between the FAA and bankruptcy.

At the outset, that holding disregards this Court's admonition that "[w]hen [Congress] has restricted the use of arbitration …, it has done so with … clarity." *Greenwood*, 132 S. Ct. at 672 (collecting federal statutes that expressly make arbitration agreements unenforceable). *Greenwood* therefore held that because the Credit Repair Organizations Act "is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

The enforceability of arbitration clauses in bankruptcy has been a contested issue at least since *McMahon* was decided in 1987. Congress undertook a major revamping of the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of

2005, and had it wanted to preclude arbitration of claims in bankruptcy, could easily have done so then. That Congress did not do so by itself weighs strongly against any conclusion that there is an "inherent conflict" between arbitration and bankruptcy.

2. Moreover, the justifications courts employ for refusing to enforce agreements to arbitrate creditors' claims against a debtor are precisely the same justifications this Court has repeatedly held insufficient to override the FAA's clear mandate. Neither of the two reasons the Ninth Circuit invoked for its holding can be squared with this Court's precedent.

a. The Ninth Circuit first reasoned that because Continental alleged that Thorpe had breached the Agreement during its negotiations with plaintiffs' lawyers over a §524(g) plan, "adjudication of Continental's claim in any forum other than a bankruptcy court would conflict with 'fundamental bankruptcy policy." App. 19a. Specifically, "[a] claim based on a debtor's efforts to seek … the protections of §524(g) implicates and tests the efficacy of the provision's underlying policies," and "only the bankruptcy court should decide" whether that conduct breaches a contract. App. 19a-20a.

This reasoning amounts to nothing more than the very suspicion of arbitration and fears about arbitrators' competence that this Court has rejected time and again. As early as 1985, the Court observed that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-627. "[A]rbitral tribunals are readily capable of handling the factual and legal com-

plexities of [federal statutory] claims, notwithstanding the absence of judicial instruction and supervision," and "there is no reason to assume … that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232; *see also Gilmer*, 500 U.S. at 27 (finding no inconsistency between furthering "important social policies" underlying ADEA and enforcing agreements to arbitrate ADEA claims).

Nothing about Continental's claim differentiates it from the many other claims this Court has found arbitrable. Continental's claim alleges a breach of its pre-bankruptcy Agreement with Thorpe. The claim did not arise under §524(g) or any provision of the Bankruptcy Code. It is of no moment whether Thorpe's breaches of the Agreement occurred during negotiations over its plan. Although the bankruptcy court decides whether to confirm a plan of reorganization, it does not follow that only a bankruptcy court can decide whether a debtor's actions during the negotiation of a plan constitute a breach of contract under non-bankruptcy law. Indeed, Thorpe's own plan of reorganization proves the point: It contains language intended to preserve insurers' ability to argue in subsequent coverage proceedings that the terms of the plan breach the insurance policies. CAER860-861; *see also generally In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004). At the very least, arbitration of such claims poses no "irreconcilable" conflict with bankruptcy law.

And although Thorpe raised as a defense the notion that §524(g) impliedly preempted the Agreement's provisions, there is no reason to believe that Congress intended that only bankruptcy courts could rule on such defenses. To the contrary, if the parties to a dispute have agreed to arbitration, the entire dispute must be referred to arbitration, including affirmative defenses.

See, e.g., *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 451-452 (2003); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). This Court has held that arbitrators are competent to address all sorts of federal statutory issues, and the question whether the Bankruptcy Code preempts a particular contract claim is no different.

b. The Ninth Circuit also held, independently of any consideration of §524(g), that the bankruptcy policy of "centralization" of claims against the debtor trumps the FAA. App. 20a. Again, this Court has already rejected virtually identical reasoning, explaining that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20 (emphasis in original). Indeed, the Ninth Circuit recognized that "judicial economy and centralization of disputes are not sufficient bases for nonenforcement of an otherwise applicable arbitration clause." App. 20a n.9 (citing *Moses H. Cone*, 460 U.S. at 20). Yet the court concluded that this Court's admonition "does not hold in the bankruptcy context." *Id.*

There is simply no basis for such an exception, at least in the case of a breach-of-contract claim against the debtor. To be sure, bankruptcy differs from other judicial proceedings because it is in part *in rem*: The district court sitting in bankruptcy has exclusive jurisdiction over the property constituting the bankruptcy estate, which will be distributed *pro rata* to creditors. 28 U.S.C. §1334(a), (e); *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 369-370 (2006). In that sense, bankruptcy does indeed "centralize" resolution of the debtor's—or, rather, the estate's—rights and obligations. The broad umbrella of bankruptcy, however, covers a wide range of *in personam* disputes, including contract or tort

claims by the debtor against third parties; creditors' contract, tort, or other claims against the debtor; and claims brought by the trustee on behalf of all the creditors as a group, such as a preference or fraudulent conveyance suit. Bankruptcy courts do not have exclusive jurisdiction over any of those proceedings. *See* 28 U.S.C. §1334(b); *supra* n.4.

And, as discussed above, courts have generally agreed that "non-core" proceedings, such as the debtor's breach-of-contract claim against a third party in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), or the debtor's tort-law counterclaim against a creditor in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), should be referred to arbitration in accordance with a valid arbitration clause, notwithstanding any policy of "centralization." The result should be no different for a creditor's claim against the debtor. Such claims are "core" not because they arise under the Bankruptcy Code—to the contrary, claims against the debtor almost invariably arise under state or other non-bankruptcy law—but because the bankruptcy court must allow or disallow them in order to determine each creditor's *pro rata* share of the estate. *See* 11 U.S.C. §502; 28 U.S.C. §157(b)(2)(B). And the distinction between core and non-core claims creates an odd asymmetry: The debtor may enforce an arbitration clause in a dispute with its contractual counterparty, but the counterparty cannot invoke the same arbitration clause if it raises a claim against the debtor.

Nothing in bankruptcy law or policy requires that absurd result. Bankruptcy is not a separate, arcane realm into which non-bankruptcy fora cannot intrude. To the contrary, it is built on a foundation of non-bankruptcy law. "Creditors' entitlements in bankruptcy arise in the first instance from the underlying

substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. The 'basic federal rule' in bankruptcy is that [non-bankruptcy] law governs the substance of claims." *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000); *see also Butner* v. *United States*, 440 U.S. 48, 54-55 (1979); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161 (1946). The claims-allowance process follows that rule, allowing or disallowing claims pursuant to the non-bankruptcy law under which they arise, subject only to specific, express exceptions. *See Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Electric Co.*, 549 U.S. 443, 450-451 (2007).

As Judge Easterbrook recently and aptly put it:

> Bankruptcy is a means of administering claims that are defined by tort, contract, and other generally applicable bodies of law. … [U]nless the Code makes … an alteration the job of the bankruptcy court is to gather all of the debtor's assets, as state law defines those assets, and distribute them according to the creditors' rights under state law.

Peterson v. *McGladrey & Pullen, LLP*, 2012 WL 1088274, at *3 (7th Cir. Apr. 3, 2012).

Nor is there any rule or policy that claims against the debtor be decided by the bankruptcy court. Indeed, the Code expressly contemplates that certain claims against the debtor will be decided outside the bankruptcy court. *See* 11 U.S.C. §362(d) (requiring bankruptcy courts to grant relief from the automatic stay so that a creditor can pursue its claim against the debtor outside bankruptcy court in a variety of circumstances, including where creditor's rights are not adequately protected); 28 U.S.C. § 157(b)(5) (requiring "personal

injury tort and wrongful death claims" to be heard in the district court); *id.* § 1334(c) (providing that bankruptcy courts *must* abstain from hearing certain non-core bankruptcy proceedings and *may* abstain from hearing any proceeding in the interest of justice or comity).

In short, state and other federal courts can, and routinely do, adjudicate claims by creditors against a debtor in bankruptcy. The bankruptcy court's role in such circumstances is to allow the claim if the creditor follows proper procedures and to ensure a fair distribution to the creditor consistent with the valuation of its claim by the other forum. There is no reason whatsoever that the same process cannot apply when the parties have agreed that a claim will be resolved through arbitration.

There is thus no threat to bankruptcy policy involved in arbitrating creditors' claims. Although the valuation of a particular creditor's claim can affect the recovery of other creditors by increasing or decreasing the total value of claims to be satisfied out of the estate, that is equally true of suits by the debtor against a third party that might bring additional funds into the estate—and all agree that such suits are arbitrable. *See Mintze*, 434 F.3d at 231 (rejecting the argument that because adjudication of a debtor's claims will affect distributions to creditors, the claims could not be arbitrated). It is the *distribution* of the estate—not the resolution and valuation of claims by and against it—that requires "centralization."

3. Finally, the Ninth Circuit compounded its errors by applying an abuse-of-discretion standard to the bankruptcy court's decision not to enforce the parties' arbitration agreement. App. 14a; *see also*, *e.g.*,

U.S. Lines, 197 F.3d at 641. That standard of review has no support in the FAA itself or in this Court's precedent. To the contrary, *McMahon* presents an either/or standard: Either the FAA must be fully enforced, or another statute categorically "preclude[s] a waiver of judicial remedies for the statutory rights at issue." 482 U.S. at 227. *McMahon* cannot be understood to grant courts the power to enforce or refuse to enforce arbitration agreements at their "discretion."

Nor did the Ninth Circuit provide any clear or manageable standards for determining when a bankruptcy court may properly exercise its supposed "discretion." Rather, its analysis is "so vague and malleable that [it will] give courts license to do almost anything they want." *Kirgis*, *supra*, at 520. Contracting parties are thus left without any certainty as to whether their arbitration clauses will be enforced in bankruptcy. Such a regime substantially undermines the FAA's basic mandate.

III. The Question Presented Has Obvious Importance, And This Case Is An Ideal Vehicle For Addressing It

After nearly 25 years of effort, courts have failed to agree on a workable standard for determining when an arbitration clause may be overridden in bankruptcy. A cloud thus hangs over every arbitration clause in the nation: Any party to an arbitration agreement may, if its counterparty files for bankruptcy, face a significant risk that the arbitration clause will be nullified by a bankruptcy judge.

The scale of this problem is substantial and growing. Arbitration agreements have proliferated in recent decades. They are commonplace in every corner of business, and parties have come to expect that such

agreements will be honored. At the same time, bankruptcies have been on the uptick in the aftermath of the financial crisis. Bankruptcy and arbitration are thus on a collision course. A clear, nationwide standard regarding the arbitrability of claims in bankruptcy is essential, so that parties can maintain confidence in their arbitration agreements. Indeed, the question presented may be the most important arbitration-related issue that this Court has left unresolved.

And the time is ripe to resolve it. This case presents an unusual opportunity for this Court to decide the issue. Few complex commercial bankruptcy cases reach this Court due to the economic pressures to resolve cases consensually. Accordingly, the Court may not be presented with this issue in the near future, even though it will continue to arise in bankruptcy courts.

Nor is there any need for further percolation in the lower courts. The courts of appeals have had 25 years to ponder the issue and have succeeded only in sinking ever deeper into a morass of confusion. The Ninth Circuit's decision squarely raises the question presented. And its reasoning is typical of the misguided approach taken by some circuits, in which arbitration is viewed as antithetical to the purposes of bankruptcy because of a perceived need for "centralization" and as an inappropriate forum for deciding issues of federal law. The Court has repudiated such hostility to arbitration in many contexts. It should grant review of this case and make clear that bankruptcy is no different.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID C. CHRISTIAN II
SEYFARTH SHAW LLP
131 South Dearborn St.
Chicago, IL 60603

TODD C. JACOBS
GRIPPO & ELDEN LLC
111 South Wacker Dr.
Chicago, IL 60606

SETH P. WAXMAN
Counsel of Record
CRAIG GOLDBLATT
DANIELLE SPINELLI
SHIVAPRASAD NAGARAJ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

APRIL 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-55744

IN THE MATTER OF THORPE INSULATION CO.,
Debtor.

CONTINENTAL INSURANCE COMPANY, AS SUCCESSOR IN INTEREST TO CERTAIN POLICIES ISSUED BY HARBOR INSURANCE COMPANY, *Appellant*,

v.

THORPE INSULATION COMPANY, *Appellee*,

and

OFFICIAL CREDITORS' COMMITTEE OF THORPE INSULATION COMPANY AND PACIFIC INSULATION COMPANY,
Movant,

FUTURE CLAIMS REPRESENTATIVE, *Real-party-in-interest.*

Argued: August 30, 2011
Decided: January 30, 2012

[671 F.3d 1011]

* * *

[1014] Before: MARY M. SCHROEDER and RONALD M. GOULD, Circuit Judges, and RICHARD SEEBORG, District Judge.*

OPINION

GOULD, Circuit Judge:

This appeal involves Continental Insurance Company's ("Continental") pursuit of a breach of contract claim against Thorpe Insulation Company ("Thorpe") in Thorpe's Chapter 11 bankruptcy proceeding. The district court affirmed the bankruptcy court's orders denying Continental's motion to compel arbitration and disallowing its claim. We now affirm.

I

A

Thorpe distributed and installed asbestos-containing products from 1948 to 1972. About 12,000 claims for asbestos-related injuries or deaths have been brought against Thorpe. Thorpe's insurers, including Continental, have paid more than $180 million defending and indemnifying Thorpe for these claims. In 1985, Continental and Thorpe entered into the Wellington Agreement, an omnibus insurance coverage and claims handling agreement between asbestos producers and their insurers. The Wellington Agreement provides for binding arbitration of coverage disputes.

In 1998, Continental told Thorpe that Thorpe had exhausted its coverage under Continental's insurance

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* The Honorable Richard Seeborg, United States District Judge for the Northern District of California, sitting by designation.

policies and ceased indemnifying Thorpe. Thorpe then sought, for the first time, "non-products" coverage under Continental's policies, asserting that such "non-products" coverage was not subject to the policies' liability limits. Continental disputed Thorpe's coverage claim and initiated arbitration under the Wellington Agreement. The arbitrator rejected Thorpe's claim and found that Thorpe had no remaining coverage rights under Continental's policies. Thorpe appealed, and the parties agreed to settle.

The parties executed an integrated Settlement Agreement and Release ("Settlement Agreement") in April of 2003. Whether there has been a breach of this agreement and whether that should be determined by an arbitrator or by the bankruptcy court are the issues presented by this litigation.

The Settlement Agreement provides for mutual releases, and states in relevant part:

> [Thorpe] fully releases and forever discharges [Continental] … of and from any and all claims, actions, causes of action, rights, liabilities, obligations and demands of every kind and nature, **[1015]** known and unknown, suspected or unsuspected, past, present, and future, arising out of, related to, or in any way connected with, in whole or in part, any claim of any kind under the Policies or relating to the [arbitration] ….

The Settlement Agreement also contains two warranties that are central to this case. First, the "Assignment Warranty" provides:

> The parties to this Agreement each represent and warrant that they have not and will not in any manner assign, transfer, convey or sell, or

> purport to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein, and that they are the only persons or entities entitled to recover for damages under such claims, causes of action, actions, and rights.

Second, the "Establishment Warranty" provides:

> The parties to this Agreement each further represent and warrant that they will not in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action, or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Thorpe and Continental agreed to arbitrate disputes regarding the Settlement Agreement and its terms.

The Settlement Agreement released only Thorpe's claims against Continental. It does not refer to the direct action rights of individual asbestos claimants[1] or to the contribution, indemnity, or subrogation rights of other insurers. As such, direct action claims and other insurers' claims against Continental were not released under the terms of the Settlement Agreement.

After the 2003 Settlement Agreement, as Thorpe's coverage under other insurers' policies neared its limits, coverage actions commenced in California state

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[1] California law permits a tort claimant to bring a direct action against an insurer to recover on a judgment against the insured. *See* Cal. Ins. Code § 11580(b)(2).

court. Thorpe and the insurers began settlement discussions that contemplated Thorpe's filing for bankruptcy. Thorpe's goal was to confirm a plan of reorganization pursuant to section 524(g) of the Bankruptcy Code.

Section 524(g) is unique to the asbestos context. It provides a mechanism for consolidating asbestos-related assets and liabilities of a debtor into a single trust for the benefit of present and future asbestos claimants. *See* H.R. Rep. 103-835, at 46-48 (1994). Section 524(g) authorizes the bankruptcy court to enter a "channeling injunction"—channeling claims to the trust—to prevent claimants from suing the debtor. 4 Collier on Bankruptcy ¶ 524.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011). The injunction may also bar actions against third parties, such as insurers, that are based on asbestos-related claims against the debtor, if the third parties contribute to the trust in amounts that are commensurate with their likely liability. *Id.* One requirement for a § 524(g) injunction is that, "as part of the process of seeking approval of the plan of reorganization," a class of claimants be established and vote, by at least 75 percent of those voting, to approve the plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

In preparation for the bankruptcy and to achieve settlement in the state court actions, Thorpe negotiated with insurers other than Continental. Certain insurers agreed to fund the § 524(g) trust in consideration **[1016]** of Thorpe's filing for bankruptcy and seeking a § 524(g) injunction that would protect the insurers against asbestos-related claims arising out of policies issued to Thorpe. These insurers (the "Settling Insurers") agreed to assign their contribution, indemnity, and subrogation rights against Thorpe's other insurers, includ-

ing Continental, to Thorpe and the trust to be established under § 524(g). Before filing for bankruptcy, Thorpe also collaborated with asbestos claimants to begin structuring a § 524(g) plan, as § 524(g) requires 75 percent of such claimants to consent to the plan as one requirement for it to be confirmed.

Continental contends that the above actions violated the Assignment Warranty and the Establishment Warranty of the 2003 Settlement Agreement. Continental also alleges that Thorpe encouraged and assisted the filing of three direct action lawsuits against Continental in September of 2007, in violation of the Establishment Warranty. Continental tried to arbitrate its claim that Thorpe's actions breached the Settlement Agreement. In a letter requesting arbitration, Continental made clear its concern over "a bankruptcy filing and/or any actions related thereto."[2] The arbitrator scheduled a hearing for October 16, 2007.

B

On October 15, 2007, Thorpe filed for Chapter 11 bankruptcy. This stayed arbitration pursuant to 11

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[2] The letter asked that arbitration proceed "as expeditiously as possible," because "a bankruptcy filing and/or any actions related thereto pertinent to the … policies may irreparably harm Continental['s] rights under the Settlement Agreement." Continental stated that it had reason to believe "that Thorpe is now preparing for bankruptcy and that, in doing so, Thorpe may be endeavoring to acquire, assert, or assign alleged rights against Continental … that were released in the Settlement Agreement, for example contribution rights acquired from other carriers in settlements," and "that Thorpe may be negotiating a bankruptcy with its adversaries, the asbestos claimants and their lawyers, and to the exclusion of its insurers." The letter also complained that "Thorpe [had] not been forthright about its bankruptcy plans."

U.S.C. § 362. Continental filed a proof of claim in the bankruptcy court on February 11, 2008. Thorpe objected to the claim. Continental filed an amended proof of claim and moved to compel arbitration. The amended claim alleged the following to be violations of the Settlement Agreement: (1) Thorpe's prepetition acquisition of the Settling Insurers' contribution, indemnity, and subrogation rights against Continental;[3] (2) Thorpe's post-petition assignment of such rights to the trust created pursuant to the § 524(g) plan; (3) Thorpe's prepetition encouragement of direct action claims against Continental; and (4) "Thorpe's cooperation and participation as a 'Plan Proponent' in drafting, proposing, and seeking confirmation of a Plan designed to assist asbestos claimants in bringing direct action claims against … Continental."

The bankruptcy court set a hearing on the motion to compel arbitration and the claim objection for October 16, 2008; it told the parties that it would decide the motion to compel arbitration first and that it would then resolve legal but not factual issues relating to the claim objection. Continental did not conduct any discovery before the October 16 hearing.[4]

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[3] Continental alleges that Thorpe's post-petition acquisition of one Settling Insurer's rights also violates the Settlement Agreement.

[4] Continental wanted to wait to conduct discovery until after a decision on its motion to compel arbitration. Understanding this, the bankruptcy court said to Continental:

> I'm not going to prohibit you from doing discovery, I'm not going to require you to do discovery…. If there are factual issues [after the legal issues are resolved], … I can't resolve those without an evidentiary hearing [that]

[1017] At the October 16 hearing, the bankruptcy court denied Continental's motion to compel arbitration and disallowed its claim. The bankruptcy court held that the allowance or disallowance of Continental's claim was a core matter under 28 U.S.C. § 157(b)(2).[5] But the core nature of the proceeding "[didn't] answer the [arbitration] question." The bankruptcy court recognized the "strong federal policy in favor of … arbitration," but stated that in core matters, it had "discretion in an appropriate case not to send it to arbitration." Quoting from a prior tentative ruling, the bankruptcy court explained why in its view this case was such an appropriate case, and exercised its discretion to deny Continental's motion to compel arbitration:

> Although the conduct of which [Continental] complain[s] may have commenced prepetition, the acts of which [Continental] complain[s], if true, are inextricably intertwined with the manner in which [Thorpe is] attempting to structure, orchestrate, and obtain approvals for what is likely to be a complex plan of reorganization. Resolution of these claims would require the trier of fact to adjudicate whether in conducting and administering these Chapter 11 cases and negotiating with the various constituencies involved in the case con-

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> I'm not going to do at that point. So that means if you wanted to wait to do your discovery until after your hearing on your motion to arbitrate, you can because you'll have some more time after that.

[5] Section 157(b)(2) provides a nonexhaustive list of core proceedings that includes "allowance or disallowance of claims against the estate." *See* 28 U.S.C. § 157(b)(2)(B).

> cerning the prospect of a consensual plan of reorganization, [Thorpe] has somehow run afoul of contractual provisions contained in a prepetition settlement agreement with [Continental]. Such matters are within the exclusive jurisdiction of the Bankruptcy Court. As a matter of fundamental bankruptcy policy, only a Bankruptcy Court should decide whether the manner in which someone has administered a bankruptcy estate gives rise to a claim for damages. Non-bankruptcy courts cannot be the arbiters of such issues…. Moreover, the arguments that [Continental] wish[es] to advance are inextricably intertwined with the issues that the Court will have to address in connection with confirmation of the proposed plan ….
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> ….
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> … The very terms of the plan themselves are among the alleged breaches of the settlement agreement.[6]

After denying Continental's motion to compel arbitration, the bankruptcy court turned to Continental's claim and Thorpe's claim objection. It sustained Thorpe's claim objection and disallowed Continental's claim as a matter of law.

First, as to Thorpe's alleged breaches of the Assignment Warranty, the bankruptcy court held that the plain language of the Settlement Agreement precludes Thorpe from assigning claims to third parties, but does

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[6] *Cf.* 28 U.S.C. § 157(b)(2)(A), (L) ("Core proceedings include … matters concerning the administration of the estate; … confirmation of plans.").

not preclude acquiring claims from third parties, so Thorpe's mere acquisition of the Settling Insurers' contribution, indemnity, and subrogation rights against Continental did not breach the Assignment Warranty.[7]

[1018] The bankruptcy court also rejected as a matter of law Continental's argument that Thorpe's assignment of the Settling Insurers' rights to the § 524(g) trust breached the Assignment Warranty. The bankruptcy court reasoned that because Thorpe could not have released third parties' claims in the Settlement Agreement, the Settling Insurers' contribution, indemnity, and subrogation claims did not "vaporiz[e]" once assigned to Thorpe. And because those claims, as assets, "ought to go in the trust," the bankruptcy court held that even if the Assignment Warranty by its terms precluded Thorpe from then assigning them to the trust, the provision would not be enforceable under Bankruptcy Code sections 524(g), 541(c)(1), and 1123(a)(5)(B).

The bankruptcy court next addressed Thorpe's alleged breaches of the Establishment Warranty. It concluded that, even assuming Continental's broad reading of the warranty, a breach of contract claim based on Thorpe's actions to assist asbestos claimants in bringing claims against Continental—as part of its efforts to confirm a reorganization plan and create a § 524(g) trust—could not succeed as a matter of bankruptcy law. The bankruptcy court reasoned along these lines: Given that "agreements in which a Debtor contracts away prepetition rights that it would otherwise have

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[7] The bankruptcy court found explicitly that "no amount of extrinsic evidence" could "change a prohibition on transferring out to a prohibition on receiving."

had in the context of a bankruptcy case are not generally enforceable," the conduct alleged to be a breach in this case, "the formulation and structuring, negotiation, [and] attempt to arrive at the very kind of plan structure that [§] 524(g) is about," could not be "a breach of an enforceable contract." Continental appealed to the district court.

The district court affirmed the bankruptcy court's order denying Continental's motion to compel arbitration and affirmed the order disallowing Continental's claim in large part. But the district court reversed the bankruptcy court's disallowance order as to Continental's allegations concerning Thorpe's prepetition encouragement of direct actions against Continental.

The district court agreed that resolution of Continental's claim was a core proceeding. It also agreed that the bankruptcy court had discretion to deny Continental's motion to compel arbitration, "at least to the extent that arbitration of the claim would conflict with the purposes of the Bankruptcy Code," and held that the bankruptcy court's findings "support the conclusion that arbitration of the claims would conflict with the underlying purposes of the Bankruptcy Code." The district court upheld the bankruptcy court's findings and conclusions regarding the Assignment Warranty, as well as its finding that Thorpe's bankruptcy-related actions alleged to breach the Establishment Warranty were "part-and-parcel of its attempt to establish a trust … and to avail itself … of the protections of 11 U.S.C. § 524(g)." However, the district court held that the bankruptcy court's findings did not support disallowance of Continental's claim to the extent that it alleged Thorpe's prepetition encouragement of direct action claims against Continental, and remanded this issue to the bankruptcy court. The district court stated that its

opinion regarding the core nature of Continental's claims against the bankruptcy estate "applie[d] with equal force to [the remanded] claims" and "expresse[d] no opinion on whether the bankruptcy court should refer these claims to arbitration."

On remand, Thorpe moved for summary judgment on the remanded portions of its objection to Continental's claim, and Continental moved to compel arbitration of the remanded "encouragement claims." Continental requested discovery, but the bankruptcy court neither gave Continental an **[1019]** opportunity to conduct discovery nor held an evidentiary hearing before ruling on the motions.

At a May 28, 2009 hearing, Continental refused to argue the remanded issue—Thorpe's alleged prepetition encouragement of three direct actions—as a "standalone claim" unrelated to Thorpe's larger goal of filing for bankruptcy and confirming a § 524(g) plan. In light of Continental's unwillingness to separate the direct actions from Thorpe's efforts to negotiate a plan and prepare for bankruptcy, the bankruptcy court concluded that its previous analysis of Thorpe's postpetition conduct, that "contracts for prepetition waivers of bankruptcy-related rights [are] unenforceable," applied with equal force to Thorpe's prepetition conduct. The bankruptcy court granted Thorpe's post-remand motion for summary judgment, sustained Thorpe's claim objection, and disallowed Continental's claim in its entirety.

The bankruptcy court also denied Continental's renewed motion to compel arbitration. It concluded that it had discretion not to enforce the arbitration clause in the Settlement Agreement for two reasons. First, the case required centralization, because resolution of Con-

tinental's claim had to be coordinated with the plan confirmation process and because Continental's claim and its objection to the plan confirmation overlapped factually.[8] Second, the remaining claims, as asserted by Continental on remand, still involved Thorpe's exercise of its rights in bankruptcy and should be decided by a bankruptcy judge.

The bankruptcy court indicated that if Continental's claim "really could be separated out and be a standalone claim," then arbitration might be appropriate. But, from Continental's comments at the hearing and its moving papers, the bankruptcy court found that "[t]his one little piece cannot be extracted and treated as something different from" Thorpe's actions in the bankruptcy. The bankruptcy court stated that Continental's post-remand claim was "inextricably intertwined with something I really need to adjudicate," and so, it reasoned, "I can't let this go to arbitration because it's too fraught with peril that … a nonbankruptcy forum would end up adjudicating things that [it] really ha[s] no business adjudicating, lest [it] run into a violation of bankruptcy policy." Continental again appealed to the district court.

The district court affirmed the bankruptcy court's orders denying Continental's motion to compel arbitration and disallowing its claim, concluding that "Continental repeatedly refused to limit the scope of its claim to matters that were within the scope of the remand and would not require the arbitrator to decide impor-

[8] Continental's challenge to Thorpe's § 524(g) plan is the subject of a related appeal in this court, Nos. 10-56543 & 10-56622.

tant matters of bankruptcy policy involving § 524(g)." Continental then appealed to this court.

II

We have jurisdiction under 28 U.S.C. § 158(d) and 9 U.S.C. § 16(a)(1)(B). *See Mintze v. Am. Gen. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 227 (3d Cir. 2006). "We review de novo a district court's decision on appeal from a bankruptcy court." *Decker v. Tramiel (In re JTS Corp.)*, 617 F.3d 1102, 1109 (9th Cir. 2010). We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Id.* Whether a bankruptcy court has discretion to deny a **[1020]** motion to compel arbitration is a question of law that we review de novo. *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 494 (5th Cir. 2002). If we conclude that the bankruptcy court had discretion, we review its exercise of discretion only for abuse of discretion. *Id.* We review the denial of discovery requests for abuse of discretion. *See Johnson v. Neilson (In re Slatkin)*, 525 F.3d 805, 810 (9th Cir. 2008). We review de novo a bankruptcy court's disallowance of a claim as a matter of law. *See id.*

III

Continental contends that its claim should be arbitrated pursuant to the arbitration clause in the Settlement Agreement. It argues first, that its claim is non-core, and second, that even if its claim is core, it should be arbitrated because arbitration would not inherently conflict with the Bankruptcy Code. We disagree.

A

The Federal Arbitration Act, 9 U.S.C. § 1 et seq., establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury*

Constr. Corp., 460 U.S. 1, 24 (1983). The Act provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and that a court must stay a proceeding if it is satisfied that an issue in the proceeding is arbitrable under such an agreement. 9 U.S.C. §§ 2-3. A court's duty to "rigorously enforce" arbitration agreements does not diminish "when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal quotation marks omitted).

"Like any statutory directive," however, "the Arbitration Act's mandate may be overridden by a contrary congressional command." *Id.* at 227. "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* (alteration, citation, and internal quotation marks omitted).

We must decide whether Congress "intended to make an exception to the Arbitration Act" for claims arising in bankruptcy proceedings, "an intention discernible from the text, history, or purposes of the [Bankruptcy Code]." *See id.* Neither the text nor the legislative history of the Bankruptcy Code reflects a congressional intent to preclude arbitration in the bankruptcy setting. *See Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796 (11th Cir. 2007); *In re Mintze*, 434 F.3d at 231; *Mor-Ben Ins. Mkts. Corp. v. Trident Gen. Ins. Co. (In re Mor-Ben Ins. Mkts. Corp.)*, 73 B.R. 644, 648 (B.A.P. 9th Cir. 1987). We ask, then, whether there is an inherent conflict between arbitra-

tion and the underlying purposes of the Bankruptcy Code. *See McMahon*, 482 U.S. at 227.

This issue is one of first impression in our circuit. Several of our sister circuits that have addressed the issue have considered, as a threshold matter, a distinction between core and non-core proceedings. *See In re Elec. Mach. Enters.*, 479 F.3d at 796; *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines)*, 197 F.3d 631, 640 (2d Cir. 1999); **[1021]** *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1066-69 (5th Cir. 1997). In non-core proceedings, the bankruptcy court generally does not have discretion to deny enforcement of a valid prepetition arbitration agreement. *In re Elec. Mach. Enters.*, 479 F.3d at 796; *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 166 (2d Cir. 2000); 2 Martin Domke, Domke on Commercial Arbitration § 52:6 (3d ed. 2011); *see also MCI Telecomms. Corp. v. Gurga (In re Gurga)*, 176 B.R. 196, 199-200 (B.A.P. 9th Cir. 1994). In core proceedings, by contrast, the bankruptcy court, at least when it sees a conflict with bankruptcy law, has discretion to deny enforcement of an arbitration agreement. *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.)*, 403 F.3d 164, 169 (4th Cir. 2005); *In re U.S. Lines*, 197 F.3d at 640; *In re Nat'l Gypsum*, 118 F.3d at 1067-68; Domke, *supra*, § 52:7. The rationale for the core/non-core distinction, as explained by the Second Circuit, is that non-core proceedings "are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration," whereas core proceedings "implicate more pressing bankruptcy concerns." *In re U.S. Lines*, 197 F.3d at 640.

However, "not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." *In re Nat'l Gypsum*, 118 F.3d at 1067. We agree that the core/non-core distinction, though relevant, is not alone dispositive. We join our sister circuits in holding that, even in a core proceeding, the *McMahon* standard must be met—that is, a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code. *See McMahon*, 482 U.S. at 227; *In re Elec. Mach. Enters.*, 479 F.3d at 796 (Eleventh Circuit); *In re Mintze*, 434 F.3d at 231 (Third Circuit); *In re White Mountain Mining*, 403 F.3d at 169-70 (Fourth Circuit); *In re U.S. Lines*, 197 F.3d at 640 (Second Circuit); *In re Nat'l Gypsum*, 118 F.3d at 1069-70 (Fifth Circuit).

B

Here, we agree with the bankruptcy court and the district court that the resolution of Continental's claim was a core proceeding. Continental argues that its "state law breach of contract claim" is non-core because "it is based on state law and arose outside of and independent of Thorpe's bankruptcy." Yet regardless of how Continental characterizes its claim, Continental filed a proof of claim, and Thorpe objected to the claim, so under 28 U.S.C. § 157(b)(2)(B), the allowance or disallowance of that claim was a core proceeding. *See Durkin v. Benedor Corp. (In re G.I. Indus. Inc.)*, 204 F.3d 1276, 1279-80 (9th Cir. 2000) ("The filing of a proof of claim is the prototypical situation involving the 'allowance or disallowance of claims against the estate,' a core proceeding under 28 U.S.C. § 157(b)(2)."); 1 *Col-*

lier, *supra*, ¶ 3.02[3][a] ("An objection to a claim is classified as a core proceeding even though, in another context, the litigation in question might be related."). One can readily see that allowing a claim for Continental would affect what was available for all creditors to receive. Continental's claim disputed or affected assets in the § 524(g) trust (the Settling Insurers' contribution, indemnity, and subrogation rights) and the rights of other creditors (the asbestos claimants). Accordingly, resolution of that claim directly impacted the administration of the bankruptcy estate. **[1022]** *See* 28 U.S.C. § 157(b)(2)(A). On all these grounds we hold that the resolution of Continental's claim was a core matter in the bankruptcy.

C

We next address whether, in this core proceeding, the bankruptcy court had discretion to deny Continental's motion to compel arbitration.

As an initial matter, we note that Continental's claim is not, as Continental contends on appeal, "independent of Thorpe's bankruptcy." From Continental's initial letter requesting arbitration and its arguments throughout this litigation, it is clear that "[Thorpe's] bankruptcy filing and/or any actions related thereto" are related to Continental's claim. The amended proof of claim challenges Thorpe's acquisition of the Settling Insurers' contribution, indemnity, and subrogation rights against Continental, its assignment of those rights to the § 524(g) trust, and its efforts to negotiate, structure, and confirm a plan designed to assist asbestos claimants in bringing direct actions—all actions that Thorpe took to exercise its rights in bankruptcy.

Because Thorpe's alleged breaches of the Settlement Agreement were "inextricably intertwined" with its bankruptcy, the bankruptcy court determined that resolving Continental's claim required adjudication of "whether in conducting and administering these Chapter 11 cases and negotiating with the various constituencies involved in the case concerning the prospect of a consensual plan of reorganization, [Thorpe] has somehow run afoul of contractual provisions contained in a prepetition settlement agreement," and that "[a]s a matter of fundamental bankruptcy policy, only a Bankruptcy Court should decide whether the manner in which someone has administered a bankruptcy estate gives rise to a claim for damages." In other words, the nature of the allegations were such that adjudication of Continental's claim in any forum other than a bankruptcy court would conflict with "fundamental bankruptcy policy." As such, the bankruptcy court concluded that it had discretion not to send the claim to arbitration. The district court agreed, stating that Continental's claim raised questions "go[ing] to the heart of § 524(g) and the management of an asbestos-related bankruptcy estate," that "should be resolved by a bankruptcy judge and not an arbitrator."

We agree. The purpose of § 524(g) is to consolidate a debtor's asbestos-related assets and liabilities into a single trust for the benefit of asbestos claimants. *See* H.R. Rep. 103-835, at 46-48. Congress intended that the trust/injunction mechanism be "available for use by any asbestos company facing … overwhelming liability." *See id.* at 48. Congress tasked bankruptcy courts with ensuring that § 524(g)'s "high standards" are met and gave them authority to implement and supervise this unique procedure. *See id.* at 47. A claim based on a debtor's efforts to seek for itself and third parties the

protections of § 524(g) implicates and tests the efficacy of the provision's underlying policies. Because Congress intended that the bankruptcy court oversee all aspects of a § 524(g) reorganization, only the bankruptcy court should decide whether the debtor's conduct in the bankruptcy gives rise to a claim for breach of contract. Arbitration in this case would conflict with congressional intent.

Even apart from § 524(g), the purposes of the Bankruptcy Code include "[c]entralization of disputes concerning a debtor's legal obligations" and "protect[ing] creditors and reorganizing debtors from piecemeal litigation." *In re White Mountain Mining*, 403 F.3d at 170; **[1023]** *In re Nat'l Gypsum*, 118 F.3d at 1069.[9] Arbitration of a creditor's claim against a debtor, even if conducted expeditiously, prevents the coordinated resolution of debtor-creditor rights and can delay the confirmation of a plan of reorganization. An example may help to illuminate the problem: Suppose that (1) several creditors seek to arbitrate their prepetition claims; (2) each is a party to an agreement containing an arbitration clause; and (3) under the arbitral rules governing the arbitrations, while efficiency is fa-

[9] Continental argues that judicial economy and centralization of disputes are not sufficient bases for nonenforcement of an otherwise applicable arbitration clause. In general, this proposition is correct, *see Moses H. Cone*, 460 U.S. at 20, but it does not hold in the bankruptcy context. In rejecting essentially the same argument that Continental makes here, the Fifth Circuit stated, "[I]nsofar as efficiency concerns might present a genuine conflict between the Federal Arbitration Act and the [Bankruptcy] Code—for example where … severe delays would prejudice the rights of creditors or the ability of a debtor to reorganize—they may well represent legitimate considerations." *In re Nat'l Gypsum*, 118 F.3d at 1070 n.21.

vored there is no absolute time limit on the arbitration, with the pace of proceedings resting on decisions of arbitrators. In such a case separate arbitrations would so fracture the plan confirmation process that one could never say for sure when it could be brought to conclusion for the benefit of the debtor and all creditors. To a certainty, in such a case the bankruptcy court would lose control over the timing of the reorganization because it would not have control over the timing of the arbitrations. The general need in any bankruptcy proceeding for centralization is heightened in a § 524(g) proceeding involving multiple insurers and numerous asbestos claimants. *See In re U.S. Lines*, 197 F.3d at 641 ("[T]he bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor."). In the § 524(g) context, delay not only disrupts a debtor's efforts to reorganize, but also affects the rights of countless asbestos claimant creditors, for whose benefit in part § 524(g) was enacted. Pragmatic concerns such as these pose a serious conflict between arbitration, normally a benign and efficient form of dispute resolution, and the underlying purposes of the Bankruptcy Code, which are tailored to the needs of debtors and creditors. *See In re Nat'l Gypsum*, 118 F.3d at 1069-70 & n.21.

Continental's claim, including the remanded portion of it, is based on Continental's challenge to Thorpe's efforts to seek § 524(g) relief and confirm a § 524(g) plan. There was no error in the bankruptcy court concluding that such a claim must be resolved by a bankruptcy court, not an arbitrator.[10] Moreover, centralizing the

[10] The Supreme Court has admonished that "courts must examine a complaint with care to assess whether any individual claim

dispute in this case had heightened importance because the bankruptcy court found a need to expedite resolution of Continental's claim—to allow payments to Thorpe's **[1024]** creditors "as soon as possible"—and to coordinate resolution of the claim with the plan confirmation process. In accord with the courts below, we conclude that arbitration of the claim presented by Continental would conflict with the purposes and policies of § 524(g) and the Bankruptcy Code as a whole.[11] Accordingly, the bankruptcy court had discretion not to enforce the arbitration clause. And, for the reasons set forth above, we hold that the bankruptcy court did not

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must be arbitrated." *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (per curiam). If Continental on remand had presented a standalone claim relating solely to Thorpe's prepetition encouragement of direct actions, that claim likely should have been arbitrated, and we read the bankruptcy court decision to indicate that if the claim was limited and isolated to prepetition matters independent of the bankruptcy, then the bankruptcy court might have sent such a narrow claim to arbitration. But because Continental steadfastly declined to limit its post-remand claim, we agree with the bankruptcy court that sending the claim to arbitration risked the arbitrator "tread[ing] upon matters that were properly decided by the Bankruptcy Court" and potentially "run[ing] into a violation of bankruptcy policy."

[11] Citing *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1168 (9th Cir. 1990), Continental argues that any potential conflict between arbitration and the Bankruptcy Code could be avoided by first allowing the arbitrator to decide the merits of its claim, and then having the bankruptcy court decide how the claim, once established, should be administered in the bankruptcy. But Continental's claim, unlike the claim in Tuscon Estates, overlaps with the substantive provisions of the Bankruptcy Code, and would significantly interfere with the § 524(g) process. Continental's proposed solution would not avoid the conflict we identify.

abuse its discretion in denying Continental's motion to compel arbitration.

IV

Continental challenges the disallowance of its claim on procedural and substantive grounds. It contends that the bankruptcy court should not have summarily disallowed its claim without permitting it to conduct discovery. It argues further that the bankruptcy court's interpretation of the Settlement Agreement and its conclusion on prepetition waiver were erroneous. We address these arguments in turn.

A

A bankruptcy court abuses its discretion in denying discovery only if "the movant diligently pursued its previous discovery opportunities, and can demonstrate that allowing additional discovery would have precluded summary judgment." *See In re Slatkin*, 525 F.3d at 810 (quoting *Bank of Am., NT & SA v. PENG-WIN*, 175 F.3d 1109, 1118 (9th Cir. 1999)).

Continental complains that "discovery by it was completely and without exception foreclosed." Our review of the record leads us to a contrary conclusion. Before the October 16, 2008 hearing, Continental did not conduct any discovery, but not because the bankruptcy court forbade it from doing so. Though the bankruptcy court told Continental that it could "wait" to do its discovery until after the hearing on its motion to compel arbitration, the bankruptcy court said, in the same breath, that it would not "prohibit" Continental from doing discovery. Continental made its own strategic choice to forego discovery because it hoped to con-

duct its discovery in the arbitration.[12] Then, two days before the October 16 hearing, Continental filed an emergency motion seeking to conduct discovery and requesting that the bankruptcy court continue its decision on the merits of Thorpe's claim objection. The bankruptcy court denied the motion, stating, "At no time did this Court preclude Continental from engaging in discovery with respect to Thorpe's objection to the Claim…. Continental's tactical decision **[1025]** to defer discovery does not constitute good cause for continuing the hearing."[13]

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[12] The following statement, from a declaration filed on October 2, 2008 in support of Continental's opposition to Thorpe's claim objection, is pertinent: "[Continental] believe[s] that any discovery related to the proofs of claim and the objections should be conducted in the arbitration, not in this Court. Accordingly, [Continental] ha[s] not yet served any discovery…." The declaration then outlined the discovery that Continental thought relevant to the merits of its claim, but Continental did not thereafter serve discovery requests on Thorpe or third parties.

[13] Continental conceded this point at the post-remand hearing on its claim:

> THE COURT: … It's not true that discovery was not allowed in connection with this. If you go back [before the October 16, 2008 hearing], I said you don't need to do it now because if I'm going to decide … on a factual issue, I'll give you a further opportunity.
>
> But it isn't that it wasn't allowed. In fact, there was a point in time where … it was intentionally not going to be done by [Continental] here in this forum because you wanted very much to go back to arbitration. So it isn't that I precluded you from doing discovery, but I understand that I said I'd give you more time later [if there were issues of fact to be resolved].

Also, the bankruptcy court sustained Thorpe's claim objection and disallowed Continental's claim as a matter of law. It explicitly reasoned that "any evidence that Continental may have obtained in discovery would not change the outcome of the objection to the Claim." Though stated after the initial, October 16, 2008 hearing, this reasoning also applies to the claim and claim objection on remand, because Continental refused to present a standalone claim on Thorpe's prepetition encouragement of direct actions.[14] If the bankruptcy court was correct, that there were no issues of fact and that the claim was properly disallowed as a matter of law, then Continental would be hard pressed to "demonstrate that allowing additional discovery would have

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> MR. JACOBS [Counsel for Continental]: I actually agree with the Court. I stand corrected.

[14] After the case was remanded, the bankruptcy court did not permit Continental to conduct discovery, despite Continental's Rule 56(f) request. *See* Fed. R. Civ. P. 56(f); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) ("[T]he Supreme Court has restated [Rule 56(f)] as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986))). The bankruptcy court explained that it was not inclined to grant summary judgment on the basis of either Thorpe's legal arguments about the Settlement Agreement language or its factual argument that it had not encouraged the direct actions. The bankruptcy court said at first, "I would be inclined to continue this hearing and let there be discovery on the issue of what was actually said and was there actually any encouragement." Once it concluded that Continental's claim as presented was inseparable from Thorpe's exercise of its rights in bankruptcy, the bankruptcy court held that discovery was not necessary and granted summary judgment based on its reasoning before the prior appeal to the district court which yielded the partial remand.

precluded summary judgment." *See In re Slatkin*, 525 F.3d at 810.

Given Continental's decision not to conduct discovery before the October 16, 2008 hearing, its decision that it would not argue the remanded issue as a standalone claim, and the bankruptcy court's resolution of Continental's claim as a matter of law, we conclude that the bankruptcy court did not abuse its discretion by declining to give Continental further opportunity for discovery.

B

Continental next challenges the bankruptcy court's merits determination that Thorpe's actions in pursuing a § 524(g) reorganization did not create a claim for damages. Continental contends that Thorpe breached the Assignment Warranty by acquiring the Settling Insurers' claims and assigning them to the § 524(g) trust, and that it breached the Establishment Warranty by collaborating with asbestos claimants to structure and confirm a § 524(g) plan. But even if the **[1026]** covenants in the Settlement Agreement by their terms would have proscribed these actions, we conclude that, to the extent that they did, they were not enforceable, because they then would be purported prepetition waivers of the protections of the Bankruptcy Code, which need not here be permitted.

We have held that "[i]t is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002). "This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive." *Id.* In *Huang*, a prepetition settlement agreement provided that the debtor would not file for

bankruptcy and that a debt was not dischargeable in bankruptcy. Though the Settlement Agreement here does not specifically mention bankruptcy, other courts have said that prepetition waivers of bankruptcy benefits generally are unenforceable. *See, e.g.*, *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 651-52 & n.7 (B.A.P. 9th Cir. 1998) (collecting cases); *In re Pease*, 195 B.R. 431, 434-35 (Bankr. D. Neb. 1996) ("[A]ny attempt by a creditor in a private pre-bankruptcy agreement to opt out of the collective consequences of a debtor's future bankruptcy filing is generally unenforceable. The Bankruptcy Code preempts the private right to contract around its essential provisions.").

Similarly, specific provisions of the Bankruptcy Code invalidate prepetition anti-assignment clauses that would limit a debtor's rights to assign its interests in bankruptcy. Section 541(c)(1)(A) states that, when a Chapter 11 case starts, an interest of the debtor becomes property of the estate, "notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law … that restricts or conditions transfer of such interest by the debtor." Section 541(c)(1) thus overrides a contractual provision that "purports to limit or restrict the rights of a debtor to transfer or assign[] its interests in bankruptcy." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 219 n.27 (3d Cir. 2004). Section 1123(a)(5)(B) states that "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall … provide adequate means for the plan's implementation, such as … transfer of … property of the estate to one or more entities, whether organized before or after the confirmation of such plan." *Cf. In re Combustion Eng'g*, 391 F.3d at 219 n.27 ("The Bankruptcy Code expressly contemplates the in-

clusion of debtor insurance policies in the bankruptcy estate." (citing §§ 541(c)(1), 1123(a)(5))).

Thorpe sought to use § 524(g)'s trust/injunction mechanism. For its reorganization to succeed, asbestos-related assets and liabilities had to be consolidated in the § 524(g) trust. The inability to transfer valuable assets to the trust could have thwarted confirmation of the plan. Thorpe acquired the Settling Insurers' contribution, indemnity, and subrogation claims against Continental and assigned them to the trust pursuant to settlement agreements in which the Settling Insurers agreed to fund the trust. Thorpe did not acquire the claims to then assert them against Continental in its own right, nor did it assign the claims to an independent third party to gain benefit for itself. Thorpe transferred the Settling Insurers' claims to the trust to "provide adequate means for the plan's implementation," and the claims became assets of the trust for the benefit of asbestos claimants. *See* 11 U.S.C. §§ 524(g), 1123(a)(5)(B). The Bankruptcy Code gave Thorpe, as a Chapter 11 debtor, the right to acquire these assets and assign them to the § 524(g) **[1027]** trust, "notwithstanding any provision in a[] [prepetition] agreement." *See id.* § 541(c)(1)(A); *see also In re Huang*, 275 F.3d at 1175.[15]

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[15] We reject Continental's argument that the bankruptcy court erred in concluding, without considering extrinsic evidence, that the Assignment Warranty was not reasonably susceptible to the interpretation it urged. Even if the Assignment Warranty precluded not only assignment of claims but also acquisition of claims, which we doubt is correct, it would restrict Thorpe's ability to implement a § 524(g) plan and would be void as against congressional policy in the Bankruptcy Code.

To confirm the § 524(g) plan, Thorpe also needed the affirmative vote of 75 percent of asbestos claimants voting on the plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). If Thorpe did not negotiate with asbestos claimants and their representatives to set a plan that they would support, a successful reorganization would not have been possible. If, in negotiating the terms of the plan, Thorpe had to accommodate the asbestos claimants' interests in preserving direct action rights and maximizing the trust's insurance assets—interests potentially adverse to those of Continental—it is not liable to Continental for doing so. Thorpe could not contract away its right to avail itself of the protections of § 524(g). *See In re Huang*, 275 F.3d at 1175. The courts below correctly disallowed Continental's claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Nos.
CV 08-7862 DSF
CV 09-5587 DSF
CV 09-5602 DSF
CV 09-5660 DSF

IN RE THORPE INSULATION CO.

May 4, 2010

MEMORANDUM

Present: The Honorable DALE S. FISCHER, United States District Judge.

Debra Plato	Not Present
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Opinion AFFIRMING Orders of the Bankruptcy Court Denying Motion to Compel Arbitration and Disallowing Claim

Appellant Continental Insurance Company appeals the orders of the bankruptcy court denying its motion to compel arbitration and disallowing its claim against Debtor/Appellee Thorpe Insulation Company. While the underlying merits of Continental's arguments present complicated issues of bankruptcy law this appeal can be easily resolved given the law of the case and basic concepts of appellate court mandates.

The bankruptcy court originally disallowed Continental's claim in its entirety. The order was appealed to this court which affirmed the bankruptcy court in all respects except for the disallowance of certain prepetition claims related to Thorpe's alleged encouragement of direct actions against Continental by asbestos personal injury claimants.[1] On remand Continental essentially sought to reargue the entire disallowance of its claim. The bankruptcy court correctly found that Continental's arguments greatly exceeded the scope of the remand. When given an opportunity to narrow its arguments to the issues remanded by this Court, Continental declined to proceed solely on the remanded issues. The bankruptcy court then disallowed Continental's claims in their entirety.

The Court finds no error in the bankruptcy court's order disallowing the claim. The scope of the remand was limited and Continental declined to proceed on the

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[1] Continental's proof of claim only concerned two types of actions by Thorpe: (1) actions related to its use of 11 U.S.C. § 524(g). (App. Ex. 9, ¶¶ 19-21, 25, 34, 37) and (2) encouragement of certain pre-petition direct actions by asbestos tort claimants, (*id.*¶¶ 23-24, 33). The disallowance of the claim as to the first group of actions was affirmed in the Court's prior opinion. Only the second group of actions was remanded.

remanded issues as limited. Continental stresses that it is not presenting the same arguments as it did before, but this is not important. A remand is not a free ticket to complete reopening of the case. The remand was limited to certain issues that Continental apparently has no interest in pursuing on their own. Other issues were not open to being reargued in the bankruptcy court.[2]

The bankruptcy court also did not err in denying the request to send Continental's claim to arbitration. This Court previously held that matters involving Thorpe's use of § 524(g) in its reorganization plan are not subject to arbitration. Continental repeatedly refused to limit the scope of its claim to matters that were within the scope of the remand and would not require the arbitrator to decide important matters of bankruptcy policy involving § 524(g). In light of this, the bankruptcy court properly denied the motion to compel arbitration.

The order of the bankruptcy court is AFFIRMED. Costs are awarded to Appellee.

IT IS SO ORDERED.

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[2] Continental also suggests that this Court should reconsider its opinion in the previous appeal. While this Court *might* have more freedom to reconsider the law of the case than subsequent appellate panel does in normal appellate procedure a reconsideration of prior appeals and altering the prior law of the case should certainly be done sparingly. Continental basically believes that the Court got it wrong on the prior appeal. Needless to say, this is not a compelling reason to revisit the law of the case.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
JUL 21 2009
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY wesley DEPUTY CLERK

ORDER ON MOTION TO COMPEL ARBITRATION OF OBJECTIONS TO CONTINENTAL INSURANCE COMPANY'S AND FIREMAN'S FUND INSURANCE COMPANY PROOF OF CLAIM

Date: May 28, 2009
Time: 10:00 a.m.
Ctrm: 1475

The motion of Fireman's Fund Insurance Company ("**Fireman's Fund**") and Continental Insurance Company ("**Continental**" and, together with Fireman's Fund, the "**Insurers**") to compel arbitration of Thorpe's objections to the proofs of claim filed by the Insurers (the "**Motion**") came regularly on for hearing on May

28, 2009, at 10:00 a.m., in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the Motion, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing, and having entered findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT the Motion be denied.

####

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: July 21, 2009

APPENDIX D

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
JUL 21 2009
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY wesley DEPUTY CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MOTIONS TO COMPEL ARBITRATION OF OBJECTIONS TO CONTINENTAL INSURANCE COMPANY AND FIREMAN'S FUND INSURANCE COMPANY PROOFS OF CLAIM AND RELIEF FROM STAY RE ARBITRATION PROCEEDINGS

Date: May 28, 2009
Time: 10:00 a.m.
Ctrm: 1475

The motion of Fireman's Fund Insurance Company ("**Fireman's Fund**") and Continental Insurance Company ("**Continental**" and, together with Fireman's Fund, the "**Insurers**") to compel arbitration of Thorpe's

objections to the proofs of claim filed by the Insurers and to modify the automatic stay to permit those arbitration proceedings to proceed (the "**Motion**") came regularly on for hearing on May 28, 2009, at 10:00 a.m., in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the Motion, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Procedural Status of These Bankruptcy Cases

1. On October 15, 2007 (the "**Petition Date**"), Thorpe Insulation Company ("**Thorpe**") filed a voluntary petition under chapter 11 of the United States Bankruptcy Code with the Clerk of this Court. The bankruptcy case commenced by the filing of that petition is presently pending before this Court. Thorpe continues to act as the debtor in possession in its bankruptcy case.

2. On October 31, 2007, Pacific Insulation Company ("**Pacific**") filed a voluntary petition under chapter 11 of the United States Bankruptcy Code with the Clerk of this Court. The bankruptcy case commenced by the filing of that petition is presently pending before this Court and is being jointly administered with Thorpe's bankruptcy case.

3. On April 13, 2009, Thorpe filed its Third Amended Joint Plan of Reorganization of Thorpe Insu-

lation Company and Pacific Insulation Company in Thorpe's bankruptcy case (the "**Plan**").

4. So far as it is relevant to these proceedings, the Plan contemplates:

(a) The creation of a trust (the "**Trust**") pursuant to Bankruptcy Code section 524(g) to administer asbestos claims against Thorpe, to marshal Thorpe's insurance assets, and to make distributions on account of the claims submitted to the Trust;

(b) That the Trust will receive, among other things, contribution, indemnity and subrogation claims against the Insurers obtained from insurers (the "**Settling Insurers**") who will assign those claims to Thorpe and/or the Trust in connection with the resolution of the Settling Insurers' coverage disputes with Thorpe; and

(c) That any right of asbestos claimants to bring direct actions against the Insurers will be unaffected by the Plan or Thorpe's discharge, including by not providing the Insurers with the protection of an injunction precluding the assertion of such claims against the Insurers, except that: (a) any asbestos claimant that desires to bring a direct action against the Insurers, or either of them, must first obtain permission from the Trust to do so and (b) any direct action judgment that any asbestos claimant may obtain against either of the Insurers shall be reduced by the amount of any contribution, subrogation or indemnity claim that such Insurer may have against any of the Settling Insurers.

5. The Court has previously held hearings in connection with Thorpe's request that it confirm a plan of reorganization in these bankruptcy cases on January 8 and 9, 2009 and April 2, 2009. The Court scheduled a

fourth hearing on the Plan to take place on June 11, 2009 for the purpose of considering whether or not any of Thorpe's asbestos creditors desire to change their vote on Thorpe's plan of reorganization in light of the changes made to that plan by the Plan. Based upon the Court's tentative rulings to date, assuming that the required number and amount of Thorpe's asbestos creditors vote in favor of the Plan, it is probable that the Plan could be confirmed prior to the conclusion of the arbitration of the Remaining Claims (as hereinafter defined), assuming that confirmation of the Plan is not delayed by the additional plan discovery requested by the Insurers (see paragraph 26, below).

The Status of the Insurers' Claims

6. The Insurers' claims are based on Thorpe's alleged breach of two warranties in a settlement agreement among the Insurers and Thorpe entered into on or about April 17, 2003 (the "**Settlement Agreement**"), the "Establishment Warranty" and the "Assignment Warranty." The Establishment Warranty provides that Thorpe would not:

> in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Settlement Agreement, ¶ 24. The "Assignment Warranty" provides that Thorpe:

> will not in any manner assign, transfer, convey or sell … to any entity or person any cause of action, chose in action, or part thereof, arising

> out of or connected with the matters released herein …

Id.

7. On October 2, 2007, the Insurers initiated an arbitration proceeding before Abraham D. Sofaer claiming that Thorpe had breached the Settlement Agreement and invoking its arbitration provision ("the **Arbitration Proceeding**"). On October 12, 2009 [sic], Thorpe responded to the Insurers' arbitration demand. On October 15, 2007, before an initial meeting with the arbitrator could take place, Thorpe filed its chapter 11 petition, as result of which all proceedings in the Arbitration Proceeding were stayed pursuant to Bankruptcy Code section 362(a).

8. On February 6, 2008, each of the Insurers filed a proof of claim [Claim Nos. 28 (Fireman's Fund) and 30 (Continental)] in Thorpe's bankruptcy case.

9. On September 11, 2008, Thorpe filed objections to the Insurers' proofs of claim [Docket Nos. 1387 (Continental) and 1391 (Fireman's Fund)].

10. On September 22, 2008, the Insurers filed amended proofs of claim (together with their original claims, the "**Claims**"). The Insurers' amended proofs of claim did not materially alter the facts or theories of relief set forth in their original proof of claim. At Thorpe's request, the Court deemed Thorpe's objection to the original claims as an objection to the claims as amended.

11. On September 22, 2008, the Insurers filed motions requesting an order compelling Thorpe to arbitrate its objections to the Claims and an order modifying the automatic stay to permit the Insurers to con-

clude the Arbitration Proceeding (Docket Nos. 1421 and 1420).

12. On December 16, 2008, this Court entered its *Findings of Fact and Conclusions of Law re Objection to Fireman's Fund Insurance Company Proof of Claim* (Docket No. 1796) and *Findings of Fact and Conclusions of Law re Objection to Continental Insurance Company Proof of Claim* (Docket No. 1794) (together, the "**Initial Findings**").

13. On December 16, 2008, this Court entered its *Order Sustaining Objection to Fireman's Fund Insurance Company Proof of Claim* (Docket No. 1795) and *Order Sustaining Objection to Continental Insurance Company Proof of Claim* (Docket No 1799) (together, the "**Claim Orders**").

14. On December 16, 2008, this Court entered its *Findings of Fact and Conclusions of Law re Motion to Compel Arbitration* (Docket No. 1798) and *Order Denying Motion to Compel Arbitration re Objections to Continental Insurance Company and Fireman's Fund Insurance Company Proofs of Claim* (Docket No. 1797) (the "**Arbitration Order**).

15. On December 16, 2008, this Court entered its *Findings of Fact and Conclusions of Law re Motion for Relief from the Automatic Stay re Arbitration of Objections to Continental Insurance Company and Fireman's Fund Insurance Company Proofs of Claim* (Docket No. 1793) and *Order Denying Motion for Relief from Automatic Stay Action: Action in Non-Bankruptcy Forum* (Docket No. 1800) (the "**Stay Order**").

16. The Insurers timely appealed from the Claims Orders, the Arbitration Order and the Stay Order to

the United States District Court for the Central District of California (the "**District Court**").

17. On April 7, 2009, the District Court entered its *Opinion AFFIRMING IN PART and REVERSING IN PART Orders of the Bankruptcy Court* (the "**Remand Order**"). The Remand Order affirmed the Claim Orders, the Arbitration Order and the Stay Order in their entirety, other than with respect to the portion of the Claim Orders disallowing that portion of the Claims based upon Thorpe's alleged breach of the Establishment Warranty on account of Thorpe's alleged prepetition encouragement of direct actions against the Insurers (the "**Remaining Claims**"), and remanded the Remaining Claims to this Court for further findings with respect to the Remaining Claims. The Remand Order specifically affirmed this Court's determination that the contested matters relating to the Claims, including the Remaining Claims, constituted "core" proceedings as defined by 28 U.S.C. § 157(b)(2)(B), but expressed no opinion as to whether or not Thorpe should be compelled to arbitrate the Remaining Claims or as to the merits of the Remaining Claims.

18. There is a fundamental inconsistency in the Insurers' articulation of the Remaining Claims. Prior to the entry of the Claim Orders, this Court understood the Remaining Claims to assert that Thorpe had breached the Establishment Warranty by encouraging the Brayton Purcell law firm to file three direct action claims against the Insurers on or about September 25, 2007 (the "**Brayton Purcell Direct Actions**"). Neither of the Insurers has responded to the complaints in the Brayton Purcell Direct Actions. The Brayton Purcell Direct Actions have been stayed since the Petition Date (20 days after the date that the Brayton Purcell Direct Actions were filed) by reason of the automatic

stay imposed by Bankruptcy Code section 362(a). Moreover, if the Plan is confirmed and the Section 524(g) injunction contemplated therein goes into effect, the Brayton Purcell Direct Actions will continue to be stayed unless, as with all other direct action claims, the Trust permits those actions to proceed.

19. The Remand Order reflects that the District Court understood the Remaining Claims in precisely the same manner as this Court.

> Because the orders below do not, on their face, support the bankruptcy courts disallowance of the claims regarding prepetition encouragement of direct claims against [the Insurers] by asbestos claimants, this portion of the bankruptcy court's orders is reversed and the matter remanded for further findings.

Remand Order at p. 6.

20. On remand, however, the Insurers have asserted that Thorpe's prepetition breach of the Establishment Warranty included not only the encouragement of the filing of the Brayton Purcell Direct Actions, but also prepetition discussions with representatives of Thorpe's asbestos creditors regarding potential plans of reorganization, in the event that Thorpe determined to file a chapter 11 petition. Those discussions did not have any effect upon the Insurers, apart from the eventual filing of the chapter 11 petition that began this case and the Plan presently being considered by this Court assuming, without deciding, that those discussions, which took place in the years 2003 through 2005, were somehow related to Thorpe's bankruptcy filing in October, 2007 and the filing of the Plan.

21. In addition, on remand, the Insurers have contended that Thorpe's liability for the Remaining Claims could total many millions of dollars, despite the fact that the only damages that the Insurers could have suffered by reason of the filing of the Brayton Purcell Direct Actions are nominal attorneys fees that the Insurers may have incurred in the 20 days that those direct actions were pending prior to the Petition Date.

22. Based upon:

(a) The Insurers' assertion that the Remaining Claims are based upon Thorpe's prepetition discussions with representatives of Thorpe's asbestos creditors regarding the possibility of Thorpe filing a bankruptcy petition (which would only be relevant to the Remaining Claims if the filing of Thorpe's petition and the Plan, as opposed to solely the filing of the Brayton Purcell Direct Actions, were contended to be a breach of the Establishment Warranty); and

(b) The fact that the Insurers assert that their damages from Thorpe's breach of the Establishment Warranty may amount to many millions of dollars (which could only be true if the Insurers were asserting that any liability that they might have for post-confirmation direct action claims asserted in compliance with the Plan resulted from Thorpe's breach of the Establishment Warranty, as opposed to the nominal damages that the Insurers may have suffered from the filing of the Brayton Purcell Direct Actions on the eve of the filing of Thorpe's bankruptcy petition, assuming the filing of the Brayton Purcell Direct Actions to be actionable), the Court concludes that the Insurers intend to assert a claim based upon the assertion that Thorpe's filing of its chapter 11 petition and proposing of the Plan violated the Establishment Warranty.

23. On April 17, 2009 Thorpe filed motions for summary judgment on its objections to the Remaining Claims. Those motions were scheduled to be heard by this Court at the same time as the Motion.

The Need to Coordinate Adjudication of the Remaining Claims with the Plan Process

24. The Insurers have been vociferous in their objections to the Plan, as originally filed and as subsequently amended, and have attempted to delay the plan process at every opportunity. For example, notwithstanding the fact that the only issues on which the Insurers had standing to challenge the confirmation of the Plan were issues of law determinable from the face of the Plan and feasibility as to the Trust's ability to pay the Claims, if and to the extent the Claims were allowed, the Insurers served the following discovery requests in relation to the plan confirmation hearing:

(a) Subpoena duces tecum to Bayshore Partners, LLC;

(b) Subpoena duces tecum to Alan Brayton, Esq.;

(c) Subpoena duces tecum to Bucknell Stehlik Sato & Stubner LLP;

(d) Subpoena duces tecum to Clark Trevithick, a Professional Law Corporation (counsel to Pacific);

(e) Certain Insurers' First Set of Interrogatories to the Official Committee of Unsecured Creditors in Connection with First Amended Plan of Reorganization (Continental only);

(f) Fireman's Fund's First Set of Interrogatories to Official Committee of Unsecured Creditors in connection with First Amended Joint Plan of Reorgani-

zation of Thorpe Insulation Company and Pacific Insulation Company (Fireman's Fund only);

(g) Certain Insurers' Requests to the Official Committee of Unsecured Creditors of Pacific for Production of Documents in Connection with Debtors' Joint Plan of Reorganization

(h) Subpoena duces tecum to Farwest Insulation Contracting;

(i) Certain Insurers' First Set of Interrogatories to Future Claims Representative Charles B. Renfrew in Connection with First Amended Plan of Reorganization (Continental only);

(j) Fireman's Fund's First Set of Interrogatories to FCR Charles B. Renfrew in Connection with First Amended Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company (Fireman's Fund only);

(k) Certain Insurers' Requests to Charles B. Renfrew, the Future Claims Representative, for Production of Documents in Connection with Debtors' Joint Plan of Reorganization;

(l) Subpoena duces tecum to First Regional Bank;

(m) Subpoena duces tecum to David Fults;

(n) Subpoena duces tecum to Debra Fults;

(o) Subpoena duces tecum to Eric Fults;

(p) Subpoena duces tecum to Linda Fults;

(q) Subpoena duces tecum to Robert Fults;

(r) Subpoena duces tecum to Stacie Fults;

(s) Subpoena duces tecum to Vicky Fults;

(t) Subpoena duces tecum to Higgins Marcus & Lovett, Inc.

(u) Subpoena duces tecum to Richard James Hilfer, Esq.

(v) Subpoena duces tecum to Inslee, Best, Doezie & Ryder, PS

(w) Subpoena duces tecum to Lasher Holzapfel Sperry & Ebberson PLLC

(x) Subpoena duces tecum to David McClain, Esq.

(y) Subpoena duces tecum to Mellon 1st Business Bank, N.A.

(z) Subpoena duces tecum to Morgan, Lewis & Bockius LLP (special insurance counsel to Thorpe);

(aa) Subpoena duces tecum to Pachulski Stang Ziehl & Jones LLP (counsel to Thorpe);

(bb) Certain Insurers' First Set of Interrogatories to Pacific Insulation Company in Connection with First Amended Plan of Reorganization (Continental only);

(cc) Fireman's Fund's First Set of Interrogatories to Pacific Insulation Company in Connection with First Amended Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company (Fireman's Fund only);

(dd) Certain Insurers' Requests to Pacific for Production of Documents in Connection with Debtors' Joint Plan of Reorganization;

(ee) Subpoena duces tecum to Pacific Funding Group, LLC;

(ff) Subpoena duces tecum to Peitzman, Weg & Kempinsky LLP;

(gg) Subpoena duces tecum to Sheppard Mullin Richter & Hampton LLP;

(hh) Subpoena duces tecum to Snyder Miller & Orton LLP;

(ii) Certain Insurers' First Set of Interrogatories to Thorpe Insulation Company in Connection with First Amended Plan of Reorganization (Continental only);

(jj) Fireman's Fund's First Set of Interrogatories to Thorpe Insulation Company in Connection with First Amended Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company (Fireman's Fund only); and

(kk) Certain Insurers' Requests to Thorpe for Production of Documents in Connection with Debtors' Joint Plan of Reorganization.

25. On December 4, 2008, this Court entered its *Order on Motion by Plan Proponents for Protective Order Forbidding Chicago Insurance Company and Fireman's Fund Insurance Company from Propounding Discovery Relating to, and Quashing Subpoenas Duces Tecum Served In Connection with Plan Confirmation* (Docket No. 1724) (the "**Protective Order**"). The Protective Order provided, *inter alia*, for the quashing of the subpoenas listed at paragraph 24(a)-(d), (h), (l) through (aa) and (ee) through (gg), above, upon the ground that such discovery was not reasonably calculated to obtain relevant information as to any issue presented by Thorpe's request that the then pending plan of reorganization be confirmed as to which the Insurers had standing.

26. On April 29, 2009, the Insurers filed *Continental's and Fireman's Fund's Notice of Motion and Motion for an Order Allowing Insurers to Proceed with Plan Discovery on Plan Confirmation Issues and to Continue Confirmation Hearing Pending Completion of Plan Discovery; Memorandum of Points and Authorities in Support Thereof* (Docket No. 2091). That motion argued, in substance, that as a result of the Remand Order and the continued proceedings relating to the Remaining Claims, the Insurers were now creditors of Thorpe's bankruptcy estate entitled to engage in discovery regarding number of issues related to the confirmation of the Plan and that the then scheduled June 11, 2009 hearing to consider confirmation of the Plan should be continued to allow them to engage in that discovery.

27. The Insurers' request to engage in discovery in connection with the pending plan confirmation proceedings threatens to disrupt and delay those proceedings. Thus, there is a need to expedite proceedings in relation to Thorpe's objection to the Remaining Claims (so as to allow payments to Thorpe's and Pacific's creditors as soon as possible) and to coordinate those proceedings with the proceedings in relation to Thorpe's request that the Plan be confirmed.

The Rights of Thorpe's Present and Future Asbestos Creditors

28. In the event that the Remaining Claims were allowed by a final order, the Plan provides that those claims would be paid in full in cash by the Trust. To the extent that those claims are paid, there will be fewer funds available to the Trust to pay the claims of Thorpe's existing and future asbestos creditors. Therefore, Thorpe's existing and future asbestos creditors are the

parties with an economic interest in the outcome of Thorpe's objection to the Remaining Claims. That economic interest is particularly significant in this case, where the Insurers have insisted that their claims could "potentially total many millions of dollars" (*Continental and Fireman's Fund's Notice of Motion and Motion for an Order Allowing Insurers to Proceed with Discovery on Plan Confirmation Issues and to Continue Hearing Pending Completion of Discovery; Memorandum of Points and Authorities in Support Thereof* (Docket No. 2091 at p.2, fn. 5) and the Remaining Claims challenge one of the fundamental provisions of the Plan (preserving the asbestos claimants' direct action rights).

29. None of Thorpe's existing or future asbestos creditors, whose economic interests are at stake in Thorpe's objection to the Claims, are parties to the Settlement Agreement containing the arbitration clause that the Insurers seek to enforce.

30. Bankruptcy Code sections 502(a) and 1109(b) guarantee the right of Thorpe's existing asbestos creditors and the future claims representative appointed by this Court (as representative of Thorpe's future asbestos creditors) to be heard with respect to Thorpe's objection to the Remaining Claims in the event that the objection is heard before this Court. There is no provision in the Settlement Agreement, or the rules under which the arbitration of that dispute would be conducted, that guarantees that those parties have a right to be heard in the arbitration proceeding that the Insurers wish compel.

Judicial Economy

31. The arbitrator identified in the Settlement Agreement, Abraham D. Sofaer, did not participate in

the negotiation of the Settlement Agreement and did not have an opportunity to consider the merits of the Remaining Claims in the Arbitration Proceeding. See paragraph 7, above.

32. This Court expended substantial resources considering the Claims prior to entering the Initial Findings and in preparation for the hearing on Thorpe's motion for summary judgment as to the Remaining Claims, scheduled to be heard at the same time as the Motion. In addition, this Court has had occasion to consider the Claims in the context of proceedings before the Court in relation to Thorpe's plan of reorganization.

33. The Insurers have stated that the Remaining Claims and their objections to the Plan involve common issues of fact. Therefore, the interests of judicial economy suggest that the same adjudicative body consider both Thorpe's objection to the Remaining Claims and the Plan.

34. Given the substantial resources that this Court has already devoted to consideration of the Remaining Claims, the fact that Mr Sofaer has not, as yet, expended substantial time in relation to the Remaining Claims and the fact that the Insurers have taken the position that the Remaining Claims and their objections to the Plan involve common issues of fact, the interests of judicial economy and conservation of the parties' resources militate in favor of this Court adjudicating the Remaining Claims rather than compelling Thorpe to arbitrate those claims.

35. To the extent that any of the Conclusions of Law set forth below constitute Findings of Fact, they are incorporated herein by this reference

CONCLUSIONS OF LAW

1. This Court has jurisdiction of Thorpe's objection to the Remaining Claims pursuant to the provisions of 28 U.S.C. § 1334(b).

2. Thorpe's objections to the Remaining Claims are core proceedings pursuant to the provisions of 28 U.S.C. § 157(b)(2)(B). Remand Order at pp. 3.

3. In this case, applying what the Remand Order notes as the "strictest standard enunciated by an appeals court" for determining whether or not this Court has discretion to refuse to enforce the arbitration clause in the Settlement Agreement, the Court concludes that it has such discretion for two reasons. First, "Because centralization of disputes was especially critical in Chapter 11 cases, and in order for reorganization to proceed as efficiently as possible, unimpeded by uncoordinated proceedings in other arenas to require arbitration would inherently conflict with the Bankruptcy Code." *Brown v. Mortgage Electric Registration Systems Inc. (In re Brown)*, 354 B.R 591, 596 (R.I. 2006) (internal quotes omitted). This is particularly apt in this case in light of the need to coordinate the timing of the resolution of the Remaining Claims and the plan confirmation process, the Insurers' statement that there are overlapping facts between the Remaining Claims and the plan confirmation process and the Insurers' previously demonstrated abuses of the discovery process. Second, adjudication of the Remaining Claims involves a determination as to whether or not Thorpe's preparation for and exercise of its federal rights to file a bankruptcy petition, to file a Section 524(g) plan of reorganization that marshals its insurance assets for the benefit of its asbestos creditors, including the provisions of that plan dealing with the as-

bestos creditors' direct action rights, and to discuss the foregoing matters with its asbestos creditors, could constitute a violation of a prepetition contract. As the District Court observed in relation to the Insurers' analogous contention that Thorpe's conduct in negotiating and proposing a plan of reorganization that transferred the Settling Insurers contribution and similar rights to the Trust violated the Assignment Warranty, "This important question of first impression goes to the heart of § 524(g) and the management of an asbestos-related bankruptcy case. The bankruptcy court was correct to conclude that it should be resolved by a bankruptcy judge, not an arbitrator." Remand Order at p. 5.

4. Having determined that this Court has discretion to decline to enforce the arbitration provision in the Settlement Agreement, the Court has determined to retain jurisdiction over the Remaining Claims rather than compelling Thorpe to arbitrate those claims for the following reasons:

(a) This Court, and not a private arbitrator, should determine whether or not the Establishment Warranty, as interpreted by the Insurers, is enforceable in light of the overriding policies of the Bankruptcy Code. As the District Court observed in the Remand Order in relation to the contribution and similar claims being transferred to the Trust under Thorpe's settlement agreements with the Settling Insurers, "The point of section 524(g) is to consolidate asbestos related assets and liabilities of the debtor into a single trust for the benefit of asbestos claimants." Remand Order at p. 4. This requires, among other things, that a section 524(g) plan contain provisions dealing with the asbestos creditors' direct action rights or the debtor's insurance assets could be depleted by asbestos

creditors who chose to ignore the trust mechanism and to proceed directly against, and possibly exhaust, the same insurance policies that were intended to be enforced by the Trust for the benefit of all of the debtor's asbestos creditors. Thus, as with their contentions regarding Thorpe's transference of the Settling Insurers' contribution claims to the Trust, "Appellants essentially [argue] that—by virtue of the settlement agreement—they should be able to take advantage of the section 524(g) trust through elimination of potential liability to [direct action claimants] without having to provide anything of value to the trust." *Id.* "The question presented [is] whether the § 524(g) scheme contemplates [protecting the Trust against the erosion of its insurance assets by including provisions in a section 524(g) plan dealing with the asbestos creditors' direct action claims] and, if so, whether a pre-petition contract could override that scheme. This important question of first impression goes to the heart of § 524(g) and the management of an asbestos bankruptcy estate. The bankruptcy court was correct to conclude that it should be resolved by a bankruptcy judge." *Id.* at p. 5.

(b) The Remaining Claims assert that Thorpe's conduct in filing its bankruptcy petition and proposing and confirming the Plan could give rise to a claim for damages based upon a prepetition settlement agreement among Thorpe and the Insurers. Whether or not acts taken on behalf of a chapter 11 bankruptcy estate, while that estate is under the exclusive jurisdiction of the bankruptcy court, were proper should be decided by the federal bankruptcy judge having jurisdiction of the chapter 11 case, not a private arbitrator.

(c) Thorpe's present and future asbestos claimants are the parties with the economic interest in the outcome of Thorpe's objection to the Remaining

Claims. The Bankruptcy Code guaranties that those parties will be able to participate fully in all proceedings relating to the adjudication of the Remaining Claims, if those proceedings are conducted by this Court. There are no similar guaranties were the objections to be resolved by a private arbitrator.

(d) This Court has already invested substantial resources in considering the merits of the Remaining Claims, both in connection with the prior proceedings conducted by this Court in relation to the Claims and in connection with proceedings relating to confirmation of the Plan. Because the arbitrator has not invested similar time and attention to this matter, the interests of judicial economy favor this Court retaining jurisdiction of this matter.

(e) The interests of judicial economy also favor this Court retaining jurisdiction of this matter to the extent that the Insurers' assertion that there are common questions of fact that will have to be determined in relation to the adjudication of the Remaining Claims and the confirmation of the Plan is correct. Only this Court can determine whether the Plan should be confirmed. Therefore, this Court's retaining jurisdiction over Thorpe's claim objection may avoid duplication of judicial effort and piecemeal litigation, as well as conserving the parties' resources by not requiring them to litigate the same facts in two different *fora*.

(f) Because the Insurers have now contended that they have a right to conduct discovery in relation to the plan confirmation proceedings before this Court based upon their status as holders of the disputed Remaining Claims, there is a need to coordinate the adjudication of the merits of the Remaining Claims with the

plan confirmation proceedings presently before this Court. Only this Court can do so.

5. As result of the foregoing, this Court has determined to exercise its discretion to deny the Insurers' motion to compel arbitration of Thorpe's objections to the Remaining Claims.

6. Because the Court has determined to deny the Insurers' motion to compel arbitration of the Remaining Claims, no cause exists to modify the automatic stay to allow the Arbitration Proceedings to proceed. As a result, the Court has determined to exercise its discretion to deny the Insurers' motion for relief from the automatic stay.

7. To the extent that any of the Findings of Fact set forth above constitute Conclusions of Law, they are incorporated herein by this reference.

####

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: July 21, 2009

APPENDIX E

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
JUL 21 2009
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY wesley DEPUTY CLERK

ORDER SUSTAINING OBJECTION TO CONTINENTAL INSURANCE COMPANY PROOF OF CLAIM (AFTER REMAND)

Date: May 28, 2009
Time: 10:00 a.m.
Ctrm: 1475

Thorpe's post-remand motion for summary judgment on its objection to the Proof of Claim filed by Continental Insurance Company ("**Continental**") in Thorpe's bankruptcy case (Claim No. 30) (the "**Motion**") came regularly on for hearing on May 28, 2009, at 10:00 a.m., in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of the foregoing hearing. The Court

having considered the papers filed in support of, and in opposition to, the Motion, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing, and having entered findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT:

1. The Motion be granted and Claim No. 30 be disallowed in its entirety;

2. The objections to the declarations of Alan R. Brayton and Charles J. Malaret be overruled; and

3. The Court reserves jurisdiction to consider whether, as the prevailing party, Thorpe is entitled to recover its costs and attorneys fees from Continental. Any motion for such costs and fees shall be filed not later than 60 days after entry of this order.

# # # #

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: July 21, 2009

APPENDIX F

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
JUL 21 2009
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY wesley DEPUTY CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE OBJECTION TO CONTINENTAL INSURANCE COMPANY'S PROOF OF CLAIM (AFTER REMAND)

[Lodged per Local Rule 7056-1(b)(2)(A)]

Date: May 28, 2009
Time: 10:00 a.m.
Ctrm: 1475

Thorpe Insulation Company's ("**Thorpe**") post-remand motion for summary judgment (the "**Motion**") on its objection to the Proof of Claim filed by Continental lnsurance Company ("**Continental**") in Thorpe's bankruptcy case (Claim No. 30) (the "**Objection**") came regularly on for hearing on May 28, 2009, at 10:00 a.m.

in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the Motion, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Procedural Status of These Bankruptcy Cases

1. On October 15, 2007 (the "**Petition Date**"), Thorpe Insulation Company ("**Thorpe**") filed a voluntary petition under chapter 11 of the United States Bankruptcy Code with the Clerk of this Court. The bankruptcy case commenced by the filing of that petition is presently pending before this Court. Thorpe continues to act as the debtor in possession in its bankruptcy case.

2. On October 31, 2007, Pacific Insulation Company ("**Pacific**") filed a voluntary petition under chapter 11 of the United States Bankruptcy Code with the Clerk of this Court. The bankruptcy case commenced by the filing of that petition is presently pending before this Court and is being jointly administered with Thorpe's bankruptcy case.

3. On April 13, 2009, Thorpe filed its Third Amended Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company in Thorpe's bankruptcy case (the "**Plan**").

4. So far as it is relevant to these proceedings the Plan contemplates:

(a) The creation of a trust (the "**Trust**") pursuant to Bankruptcy Code section 524(g) to administer asbestos claims against Thorpe, to marshal Thorpe's insurance assets, and to make distributions on account of such claims;

(b) That the Trust will receive, among other things, contribution, indemnity and subrogation claims against Continental obtained from insurers (the "**Settling Insurers**") who will assign those claims to Thorpe and/or the Trust in connection with the resolution of the Settling Insurers' coverage disputes with Thorpe; and

(c) That any right of asbestos claimants to bring direct actions against Continental will be unaffected by the Plan or Thorpe's discharge, including by not providing Continental with the protection of an injunction precluding the assertion of such claims against Continental, except that: (a) any asbestos claimant that desires to bring a direct action against Continental must first obtain permission from the Trust to do so and (b) any direct action judgment that any asbestos claimant may obtain against Continental shall be reduced by the amount of any contribution, subrogation or indemnity claim that Continental may have against any of the Settling Insurers.

Continental's Claim

5. Continental's claim is based on Thorpe's alleged breach of two warranties in a settlement agreement among Continental, Fireman's Fund Insurance Company and Thorpe entered into on or about April 17, 2003 (the "**Settlement Agreement**"), the "Establishment Warranty" and the "Assignment Warranty." The Establishment Warranty provides that Thorpe would not:

> in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Settlement Agreement, ¶ 24. The "Assignment Warranty" provides that Thorpe:

> will not in any manner assign, transfer, convey or sell … to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein …

Id.

6. On February 6, 2008, Continental filed a proof of claim (Claim No. 30) in Thorpe's bankruptcy case.

7. On September 11, 2008, Thorpe filed an objection to Continental's proof of claim (Docket No. 1387).

8. On September 22, 2008, Continental filed an amended proof of claim (together with its original claim, the "**Claim**"). Continental's amended proof of claim did not materially alter the facts or theories of relief set forth in its original proof of claim. At Thorpe's request, the Court deemed Thorpe's objection to Continental's original claim as an objection to the claim as amended.

9. On December 16, 2008, this Court entered its *Findings of Fact and Conclusions of Law re Objection to Continental Insurance Company Proof of Claim* (Docket No. 1794) and *Order Sustaining Objection to Continental Insurance Company Proof of Claim* (the "**Claim**") (Order Docket No. 1799).

10. Continental timely appealed from the Claim Order to the United States District Court for the Central District of California (the "**District Court**").

11. On April 7, 2009, the District Court entered its *Opinion AFFIRMING IN PART and REVERSING IN PART Orders of the Bankruptcy Court* (the "**Remand Order**"). The Remand Order affirmed the Claim Order in its entirety other than with respect to the portion of the Claim Order disallowing that portion of the Claim based upon Thorpe's alleged breach of the Establishment Warranty on account of Thorpe's alleged prepetition encouragement of direct actions against the Insurers (the "**Remaining Claim**"), and remanded the Remaining Claim to this Court for further findings with respect to the Remaining Claim.

12. There is a fundamental inconsistency in Continental's articulation of the Remaining Claim. Prior to the entry of the Claim Order, this Court understood the Remaining Claim to assert that Thorpe had breached the Establishment Warranty by encouraging the Brayton Purcell law firm to file three direct action claims against the Insurers on or about September 25, 2007 (the "**Brayton Purcell Direct Actions**"). Continental has not responded to the complaints in the Brayton Purcell Direct Actions. The Brayton Purcell Direct Actions have been stayed since the Petition Date (20 days after the date that the Brayton Purcell Direct Actions were filed) by reason of the automatic stay imposed by Bankruptcy Code section 362(a). Moreover, if the Plan is confirmed and the Section 524(g) injunction contemplated therein goes into effect, the Brayton Purcell Direct Actions will continue to be stayed unless, as with all other direct action claims, the Trust permits those actions to proceed.

13. The Remand Order reflects that the District Court understood the Remaining Claim in precisely the same manner as this Court.

> Because the orders below do not, on their face, support the bankruptcy court's disallowance of the claims regarding pre-petition encouragement of direct claims against [the Insurers] by asbestos claimants, this portion of the bankruptcy court's orders is reversed and the matter remanded for further findings.

Remand Order at p. 6.

14. On remand, however, Continental has asserted that Thorpe's prepetition breach of the Establishment Warranty included not only the encouragement of the filing of the Brayton Purcell Direct Actions, but also prepetition discussions with representatives of Thorpe's asbestos creditors regarding potential plans of reorganization, in the event that Thorpe determined to file a chapter 11 petition. Any damages resulting from those discussions, which took place in the years 2003 through 2005, depend upon the eventual filing of the chapter 11 petition that began this case and the Plan presently being considered by this Court assuming, without deciding, that those discussions were somehow related to Thorpe's bankruptcy filing in October, 2007.

15. In addition, on remand, Continental has contended that Thorpe's liability for the Remaining Claim could total many millions of dollars, despite the fact that the only damages that Continental could have suffered by reason of the filing of the Brayton Purcell Direct Actions are nominal attorneys fees that Continental may have incurred in the 20 days that those direct actions were pending prior to the Petition Date.

16. Based upon:

(a) Continental's assertion that the Remaining Claim is based upon Thorpe's prepetition discussions with representatives of Thorpe's asbestos creditors regarding the possibility of Thorpe filing a bankruptcy petition (which would only be relevant to the Remaining Claim if the filing of Thorpe's petition and the Plan, as opposed to solely the filing of the Brayton Purcell Direct Actions, were contended to be a breach of the Establishment Warranty); and

(b) The fact that Continental asserts that its damages from Thorpe's breach of the Establishment Warranty may amount to many millions of dollars (which could only be true if Continental was asserting that any liability that it might have for post-confirmation direct action claims asserted in compliance with the Plan resulted from Thorpe's breach of the Establishment Warranty, as opposed to the nominal damages that Continental may have suffered from the filing of the Brayton Purcell Direct Actions on the eve of the filing of Thorpe's bankruptcy petition, assuming the filing of those direct actions to be actionable),

the Court concludes that Continental intends to assert a claim based upon the assertion that Thorpe's prepetition conduct in preparing for and filing its chapter 11 petition, and proposing the Plan following the filing of Thorpe's chapter 11 petition, including Thorpe's discussions with Thorpe's asbestos creditors concerning those matters, violated the Establishment Warranty.

17. It is unclear from the face of the Claim and from the opposition to the Motion whether: (a) the Claim asserts a right to recover as a result of the Brayton Purcell Direct Actions independent of the claim premised upon Thorpe's discussions with representa-

tives of its asbestos creditors regarding the possibility of Thorpe filing a chapter 11 petition and the treatment of the asbestos creditors' direct action rights under a Section 524(g) plan or (b) those factual allegations are being made solely in relation to the claim concerning Thorpe's bankruptcy filing and the formulation of a Section 524(g) plan. During the course of the hearing of the Motion, the Court attempted to elicit Continental's position with regard to that ambiguity from Continental's counsel, who failed to provide a substantive response to that inquiry, even after being informed that, in the absence of a response, the Court would not consider Continental's assertion that Thorpe's alleged encouragement of the filing of the Brayton Purcell Direct Actions as stating a separate and distinct ground for relief.

18. In support of the Motion, Thorpe submitted two declarations, one by Charles J. Malaret, Thorpe's primary counsel, and one by Alan R. Brayton, the attorney who filed the Brayton Purcell Direct Actions, both of whom stated that Thorpe did not encourage the Brayton Purcell law firm to file any direct action claims against Thorpe. During the course of the hearing of the Motion, the Court stated that, if Continental contended that the filing of the Brayton Purcell Direct Actions constituted a ground for relief independent of Thorpe's formulating and proposing its Section 524(g) plan, the Court intended to conduct an evidentiary hearing on that claim. Despite that statement, Continental chose to submit to the Court's tentative ruling granting the Motion, which was premised upon the belief that resolution of the factual question of whether or not Mr. Malaret, or any other party on behalf of Thorpe, had encouraged or facilitated Mr. Brayton in bringing the Brayton Purcell Direct Actions was unnecessary be-

cause the only significance of the Brayton Purcell Direct Actions was as part of Thorpe's discussions and strategy related to the filing of its bankruptcy case and Section 524(g) plan.

19. To the extent that any of the Conclusions of Law set forth below constitute Findings of Fact, they are incorporated herein by this reference.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this proceeding pursuant to the provisions of 28 U.S.C § 1334(b).

2. This proceeding is a core proceeding pursuant to the provisions of 28 U.S.C. § 157(b)(2)(B).

3. The only ground for relief asserted in the Remaining claim is premised upon Thorpe's activities related to Thorpe's decision to seek protection under chapter 11 of the Bankruptcy Code and to formulate, propose and confirm a plan of reorganization as permitted by Bankruptcy Code section 524(g). To the extent that the Remaining Claim could be read as stating a separate and distinct claim premised solely upon the filing of the Brayton Purcell Direct Actions, Continental has waived that ground for relief by failing to state that it was seeking relief upon that ground in response to the Court's inquiries at the hearing of the Motion, by submitting on the Court's tentative ruling, which assumed that no such independent claim was being asserted, and by failing to accept the Court's offer to conduct an evidentiary hearing with respect to such claim.

4. Congress created Bankruptcy Code section 524(g) to provide a mechanism for dealing with mass tort asbestos litigation and insurance disputes related thereto. Among other things, Section 524(g) contemplates that plans of reorganization utilizing that section

will consolidate debtors' insurance assets in a trust for the benefit of existing and future asbestos claimants. The ability of a debtor in an asbestos case to marshal its insurance assets for the benefit of all of its asbestos creditors would be severely compromised if the debtor were precluded from proposing a plan of reorganization that dealt with potential direct action claims against its insurers. In light of the provisions of Bankruptcy Code sections 524(g)(2)(ii)(IV)(bb) (which requires that a plan that seeks to implement Bankruptcy Code section 524(g) obtain the approval of at least 75% of those voting on the plan), and 129(a)(8)(a) and 1126(c) (which together require that an impaired class accept a plan by a vote of two-thirds in amount and one-half in number of those voting on the plan), the right of a debtor in an asbestos case to propose a plan of reorganization would be severely compromised if it were precluded from negotiating a plan of reorganization with its creditors, without regard to whether or not those negotiations occurred before or after the date that such debtor filed its chapter 11 petition. As a result of the foregoing, the Court concludes that the ability of a debtor in an asbestos case to deal with direct action claims against its insurers in a chapter 11 plan of reorganization, and to negotiate that plan with its asbestos creditors (whether before or after the filing of its bankruptcy petition) cannot be contracted away by the debtor in a prepetition contract. Thus, even were the Court to accept Continental's interpretation of the Settlement Agreement (as to which the Court makes no findings of fact or conclusions of law) and that the facts alleged in the Claim were accurate (as to which the Court makes no findings of fact or conclusions of law), Thorpe's objection to the Claim should be sustained and the Claim disallowed.

5. Continental's objection to the declaration of Alan R. Brayton is overruled as the basis of said objection is not a proper ground to object to a declaration.

6. Continental's objection to the declaration of Charles J. Malaret is overruled as the basis of said objection is not a proper ground to object to a declaration.

7. To the extent that any of the Findings of Fact set forth above constitute Conclusions of Law, they are incorporated herein by this reference.

# # # #

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: July 21, 2009

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.
CV 08-7862 DSF

IN RE THORPE INSULATION CO.

April 7, 2009

CIVIL MINUTES—GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge.

Debra Plato	Not Present
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Opinion AFFIRMING IN PART and REVERSING IN PART Orders of the Bankruptcy Court

Before the Court is an appeal from the bankruptcy court of two orders disallowing claims filed against the bankruptcy estate by Appellants Continental Insurance Company and Fireman's Fund Insurance Company. For the reasons given below, the orders of the bank-

ruptcy court are affirmed in most aspects. The Court reverses the bankruptcy court's order as it relates to the alleged pre-petition encouragement of direct actions by asbestos claimants against Appellants and remands the matter for further findings.

I. BACKGROUND

In 2003, Appellants entered into a fully integrated Settlement Agreement with Appellee Debtor Thorpe Insulation Company ("Thorpe") resolving an arbitration between the parties regarding a prior agreement. The Settlement Agreement provided in relevant part:

> Thorpe expressly acknowledges and agrees that Continental's … agreements herein constitute a full and complete accord and satisfaction of any and all obligations they have or may have for any claim of any kind under the Policies, whether described above or otherwise. Thorpe Insulation Company fully releases and forever discharges [Continental] … from any and all claims, actions, causes of actions, rights, liabilities, obligations and demands of every kind and nature, known and unknown, suspected or unsuspected past, present and future, arising out of, or related to, or in any way connected with, in whole or in part, any claim of any kind under the Policies or relating to the [arbitration] ….

(App. Ex. 8A, ("Settlement Agreement") ¶ 9.)

> The parties to this Agreement each represent and warrant that they have not and will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any entity or person any cause of action, chose

> in action, or part thereof, arising out of or connected with the matters released herein, and that they are the only persons or entities entitled to recover for damages under such claims, causes of action, actions and rights.

Settlement Agreement ¶ 24 ("Assignment Warranty").

> The parties to this Agreement each further represent and warrant that they will not in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Id. ("Establishment Warranty").

The contract also provided that disputes regarding the Settlement Agreement would be referred to arbitration. Settlement Agreement ¶ 14.

On October 15, 2007, Thorpe filed for Chapter 11 bankruptcy protection. During and immediately prior to the bankruptcy, Thorpe sought to acquire certain claims against Appellants, including contribution, indemnity, and subrogation claims held by other insurance companies and direct action claims held by individuals who may have been injured by asbestos-containing products sold or installed by Thorpe. Appellants also allege that Thorpe assisted certain asbestos claimants in asserting direct actions against Appellants pre-petition in violation of the Settlement Agreement.

Pre-petition, Appellants moved to arbitrate Thorpe's actions as a breach of the Settlement Agreement. After Thorpe filed its bankruptcy petition, the arbitration was stayed. The bankruptcy court denied several attempts to lift the stay. Eventually, Appellants filed

proofs of claim in the bankruptcy court and moved to have the merits of the underlying contract dispute decided through arbitration. The bankruptcy court denied the motion to arbitrate and disallowed the claims. It found that the allowance and disallowance of claims was a core proceeding and exercised its discretion to adjudicate the claims rather than send them to arbitration. In deciding the merits of the claims, the bankruptcy court rejected the need for extrinsic evidence in interpreting the contract because the Settlement Agreement was not reasonably susceptible to the interpretations urged by Appellants. It further held that the Settlement Agreement could not block Thorpe from assisting certain parties in interest from asserting claims against Appellants because that would result in an unenforceable pre-petition waiver of the protections of 11 U.S.C. § 524(g), which contemplates the consolidation of insurance-related claims in a trust for the benefit of present and future asbestos injury claimants.

II. DISCUSSION

A. Thorpe's Acquisition of Claims from Settling Insurers and Transfer of Those Claims to the Proposed § 524(g) Trust

1. Arbitration

Allowance or disallowance of claims in bankruptcy is a core proceeding. 28 U.S.C. 157(b)(2)(B). While *In re Tucson Estates*, 912 F.3d 1162, 1168 (9th Cir. 1990) suggests that a bankruptcy court does not have jurisdiction over the underlying dispute that generates the claim,[1] *Tucson Estates* did not involve a filed proof of

[1] "The [bankruptcy] court first considered the case to be about allowance and disallowance of claims. This finding again

claim. Even, if it had, it would be contradicted by other later cases and commentators. *See In re G.I. Industries, Inc.*, 204 F.3d 1276, 1280 (9th Cir. 2000) ("By filing the proof of claim, Benedor voluntarily subjected the agreement [underlying the claim] to the bankruptcy court's jurisdiction as well, because the agreement is an integral component of the bankruptcy court's consideration of Benedor's claim."); *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 353 (9th Cir. 1996) ("As the bankruptcy court noted, if Benedor filed a proof of claim, the bankruptcy court would have core jurisdiction over the claim under 28 U.S.C. 157(b)(2)(B), allowance or disallowance of claims."); 1 *Collier on Bankruptcy*, 3.02(3)[a] (15th ed. rev. 2008) ("An objection to a claim is a core proceeding even though, in another context, the litigation in question might be related. Thus, if A files a proof of claim in the debtor's case and the debtor objects to the claim on state law grounds … , the resolution of the controversy is generally a core matter that can be heard and determined by the bankruptcy judge.").[2] As the resolution of the Settlement Agreement-related claim was a core proceeding, the bankruptcy court had discretion whether to adjudicate the claim or to refer it to arbitration, at least to the extent

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confuses the tasks of determining whether the homeowners have a claim, and determining what to do with it in the bankruptcy if they do. *Id.* (internal citation omitted).

[2] This conclusion is bolstered by the exception to core jurisdiction for "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims." *See* 28 U.S.C. § 157(a)(2)(B). If the bankruptcy court does not have jurisdiction to adjudicate state law claims under its core jurisdiction, there would be no apparent reason to exclude personal injury and wrongful death claims specifically.

that arbitration of the claim would conflict with the purposes of the Bankruptcy Code. *See In re Elec. Mach. Enter., Inc.*, 479 F.3d 791, 796 (11th Cir. 2007); *In re Mintze*, 434 F.3d 222, 231-32 (3d Cir. 2006).[3]

The bankruptcy court's findings support the conclusion that arbitration of the claims would conflict with the underlying purposes of the Bankruptcy Code. (*See* Findings of Fact and Conclusions of Law re Motion to Compel Arbitration, Conclusions of Law ¶ 4.[4]) The point of § 524(g) is to consolidate asbestos related assets and liabilities of the debtor into a single trust for the benefit of asbestos claimants. *See* H.R. Rep. 103-835, at 40-41 (1994). This unique procedure occurs within the context of close supervision by the bankruptcy court and eventual approval or disapproval by the district court.

Appellants raised difficult questions that went to the heart of the management of the bankruptcy estate. Appellants essentially argued to the bankruptcy court that—by virtue of the Settlement Agreement—they should be able to take advantage of the § 524(g) trust through elimination of potential liability to other insurers without having to provide anything of value to the trust. It is important to note that Appellants were not

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[3] There is no Ninth Circuit precedent on this issue. The Court applies the Third and Eleventh Circuit standard, without deciding its appropriateness, because it is the strictest standard enunciated by an appeals court.

[4] Due to the unusual procedure followed by the Appellants in this case, formal findings were not available when the Appendix was filed. The bankruptcy court's Findings of Fact and Conclusions of Law appear in two separate "Amended Notice[s] of Lodgment."

seeking a release of Thorpe's own claims, but, rather, secondary claims of other insurers. These secondary claims of other insurers essentially had to be acquired by Thorpe and then the trust. Otherwise, under the 524(g) framework the claims would disappear—"vaporize" in the words of the bankruptcy court—due to the elimination of the other insurers' primary liability granted by the § 524(g) injunction. The question presented was whether the § 524(g) scheme contemplates a transfer of derivative contribution claims to the trust along with primary liability claims, and, if so, whether a pre-petition contract could override that scheme. This important question of first impression goes to the heart of § 524(g) and the management of an asbestos-related bankruptcy estate. The bankruptcy court was correct to conclude that it should be resolved by a bankruptcy judge and not an arbitrator.

2. Disallowance of Claims

Appellants also have not established that the bankruptcy court erred in its treatment of the merits of the claims. Appellants argue that the bankruptcy court should have allowed them to submit extrinsic evidence before it determined that the language of the Settlement Agreement was unambiguous and not susceptible to the interpretation that the Appellants urged. *See Pacific Gas & Elec. Co. v. G.W Thomas Drayage & Rigging Co., Inc.*, 69 Cal. 2d 33, 37-40 (1968). *Pacific Gas* generally requires a court to examine offered extrinsic evidence to determine whether seemingly unambiguous language is susceptible to an interpretation outside of its plain meaning. *See Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 569-70 (9th Cir. 1988); *Wolf v. Superior Ct.*, 114 Cal. App. 4th 1343 1350-51 (2004). However, the reasoning of *Pacific Gas* is limited to the interpretation of words—it is not an

opportunity to add or remove provisions in an integrated contract. *See Pacific Gas*, 69 Cal. 2d at 39; *Appling v. State Farm Mut. Auto Ins. Co.*, 340 F.3d 769, 777-78 (9th Cir. 2003).

No extrinsic evidence was presented to the bankruptcy court and there is no hint of what kind of extrinsic evidence could have been provided that would be relevant to support Appellants' interpretation of the words of the Settlement Agreement. Given that Appellants were parties to the Settlement Agreement, they would presumably know what kind of extrinsic evidence they would expect to present. In fact, one would presume that Appellants' employees or counsel would have personal knowledge of at least some relevant extrinsic evidence. Despite this, Appellants have not identified—either to this Court or the bankruptcy court—the nature and substance of the extrinsic evidence that they would like to present that is relevant to their proposed interpretation of the terms in the Settlement Agreement.[5] It is also unclear what words

[5] Appellants submitted a declaration to the Bankruptcy Court outlining the discovery they wished to take. (*See* App. Ex. 11 Declaration of Leslie A. Davis).) The only mention of extrinsic evidence relevant to interpretation of the Settlement Agreement is a statement that the possible existence of extrinsic evidence is a factual issue that "must be explored through discovery before the merits of the proofs of claim are addressed. (*Id.* at 2 (¶ 6(a)).) There is no indication that any relevant extrinsic evidence was known to exist.

Appellants argue that they would have provided extrinsic evidence if they had been allowed discovery. However, they do not dispute that they had an opportunity to engage in discovery before the bankruptcy court's hearing, but chose not to do so. Appellants now claim that they did not want to engage in discovery in the bankruptcy court for fear of a finding that they consented to

Appellants seek to define that would change the result reached by the bankruptcy court. Appellants would like the Assignment Warranty to be read to prevent Thorpe from acquiring claims related to the claims released in the Settlement Agreement, but that would add terms to the contract rather than define any existing term—as the terms of the contract only prevent Thorpe from transferring its claims to others. Therefore, no discovery was warranted for these aspects of the Settlement Agreement.[6] As discussed below, the Establishment Warranty could be read to prevent Thorpe from acquiring claims, and the bankruptcy court indicated that it would have granted discovery on this issue except that it rejected Appellants' Establishment Warranty arguments based on preemption

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litigate rather than arbitrate, but they do not point to any evidence in the record—nor has the Court found any—that they made this concern known before the bankruptcy court. Instead, they merely noted their preference for discovery through the arbitration proceeding and rejected the Creditors' Committee's attempt to facilitate discovery through the bankruptcy proceeding. (*See* App. Ex. 7 at 432-33.) Given these facts—and the above-mentioned lack of proffer as to what Appellants think that they might find—the bankruptcy court's refusal to stay its proceedings to allow discovery was not an abuse of discretion. *See In re Slatkin*, 525 F.3d 805 810-11 (9th Cir. 2008) ("We will only find an abuse of discretion if the movant diligently pursued its previous discovery opportunities, and can demonstrate that allowing additional discovery would have precluded summary judgment.")

[6] Given the resolution of the issues by the bankruptcy court, the argument over whether Appellants were told that they would have discovery is irrelevant. No amount of discovery would allow Appellants to add provisions to the Settlement Agreement as they seek to do. *See Pacific Gas*, 69 Cal. 2d at 39; *Appling*, 340 F.3d at 777-78.

and pre-petition waiver grounds, not on state law contract interpretation grounds.[7]

As the bankruptcy court found, the Assignment Warranty, on its face, does not appear to prevent later acquisition of the claims of third parties, only the transfer of claims from Thorpe to third parties. (*See* Findings of Fact and Conclusions of Law re Objection to Fireman's Fund Claim ("Claim Objection Findings") Conclusions of Law ¶ 4(a); Settlement Agreement ¶ 24.) Whether Thorpe's actions to acquire claims against Appellants and to assist third parties in asserting claims against Appellants violate the Establishment Warranty, is a closer question. However, the bankruptcy court did not err in finding that Thorpe's actions are part-and-parcel of its attempt to establish a trust to pay asbestos claims and to avail itself and certain third parties of the protections of 11 U.S.C. § 524(g). (*See* Claim Objection Findings Conclusions of Law ¶¶ 4(d), 8.) Appellants' view of the Settlement Agreement would result in a de facto waiver of certain § 524(g) protections or, at the very least, a substantial hindrance to the effective use of § 524(g). This is further supported by a reasonable assumption that the parties could have contemplated at the time of the Settlement Agreement—2003—that Thorpe—a company with large asbestos liabilities—might file for bankruptcy protection and attempt to protect itself and certain third parties with a § 524(g) injunction.

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[7] Extrinsic evidence could be relevant to interpret the general release provision in the Settlement Agreement (¶ 9). However, the general release does not appear to create an independent claim against Thorpe, but rather a defense if the controverted claims were asserted against Appellants by Thorpe or the trust.

Section 524(g) would not function properly if Appellants' view of the Settlement Agreement were followed. Appellants' reading of the Settlement Agreement would require Thorpe essentially to destroy valuable contribution rights *held pre-petition by the other settling insurers and not Thorpe* in order to effectuate a § 524(g) injunction. For § 524(g) to function properly in this context, the Thorpe asbestos liability of the settling insurers is shifted to the asbestos trust and along with that liability comes the corresponding contribution claim assets. Appellants' argument that § 524(g) does not have to work this way—that the contribution claims can merely be discarded—is self-serving, to say the least, and misses the further point that any destruction of valuable assets can act as a barrier to the successful confirmation of a reorganization plan.

B. Thorpe's Alleged Encouragement of Direct Actions Against Appellants Pre-Petition

The bankruptcy court's orders and analysis do not, on their face, apply with equal force to the claims regarding pre-petition encouragement of direct claims against Appellants by asbestos claimants. The record suggests that this aspect of Appellants' claims was overlooked in the context of the more complicated claims about Thorpe's conduct in structuring its plan and proposed § 524(g) trust. Because the orders below do not, on their face, support the bankruptcy court's disallowance of the claims regarding pre-petition encouragement of direct claims against Appellants by asbestos claimants, this portion of the bankruptcy court's

orders is reversed and the matter remanded for further findings.[8]

III. CONCLUSION

The orders of the bankruptcy court are AFFIRMED IN PART and REVERSED and REMANDED IN PART consistent with this opinion.

[8] In the interest of saving judicial resources below, the Court's opinion regarding the core nature of claims for payment against the estate applies with equal force to these claims. The Court expresses no opinion on whether the bankruptcy court should refer these claims to arbitration.

APPENDIX H

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
DEC 16 2008
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY milano DEPUTY CLERK

ORDER DENYING MOTION TO COMPEL ARBITRATION RE OBJECTIONS TO CONTINENTAL INSURANCE COMPANY AND FIREMAN'S FUND INSURANCE COMPANY PROOFS OF CLAIM

Date: October 16, 2008
Time: 10:00 a.m.
Ctrm: 1475

The motion of Continental Insurance Company ("**Continental**") and Fireman's Fund Insurance Company ("**Fireman's Fund**" and, together with Continental, the "**Insurers**") to compel arbitration of Thorpe's objection to the proofs of claim filed by the Insurers (the "**Motion**") came regularly on for hearing on Octo-

ber 16, 2008, at 10:00 a.m. in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the Motion, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing, and having entered its written findings of fact and conclusions of law,

IT IS ORDERED THAT the motion be and hereby is denied with prejudice.

####

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: December 16, 2008

APPENDIX I

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
DEC 16 2008
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY milano DEPUTY CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MOTION TO COMPEL ARBITRATION RE OBJECTIONS TO CONTINENTAL INSURANCE COMPANY AND FIREMAN'S FUND INSURANCE COMPANY PROOFS OF CLAIM

Date: October 16, 2008
Time: 10:00 a.m.
Ctrm: 1475

The motion of Fireman's Fund Insurance Company ("**Fireman's Fund**") and Continental Insurance Company ("**Continental**" and together with Fireman's Fund, the "**Insurers**") to compel arbitration of Thorpe's objections to the proofs of claim filed by the Insurers (the "**Motion**") came regularly on for hearing on Octo-

ber 16, 2008, at 10:00 a.m., in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the foregoing motion, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Procedural Status of These Bankruptcy Cases and Thorpe's Claim Objection

1. Thorpe Insulation Company ("**Thorpe**") filed a voluntary petition under chapter 11 of the United States Bankruptcy Code with the Clerk of this Court on October 15, 2007 (the "**Petition Date**"). The bankruptcy case commenced by the filing of that petition is presently pending before this Court. Thorpe continues to act as the debtor in possession in its bankruptcy case.

2. On May 28, 2008, Thorpe filed its Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company in Thorpe's bankruptcy case.

3. On July 24, 2008, Thorpe filed its First Amended Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company in Thorpe's bankruptcy case (the "**Plan**").

4. The confirmation hearing on the Plan is presently scheduled to commence on January 8, 2009.

5. So far as it is relevant to these proceedings, the Plan contemplates:

(a) The creation of a trust (the "**Trust**") pursuant to Bankruptcy Code section 524(g) to administer asbestos claims against Thorpe and to make distributions on account of such claims;

(b) That the Trust will receive, among other things, contribution, indemnity and subrogation claims against the Insurers obtained from insurers who will assign those claims to Thorpe and/or the Trust in connection with the resolution of their coverage disputes with Thorpe; and

(c) That any right of asbestos claimants to bring direct actions against the Insurers will be unaffected by the Plan or Thorpe's discharge; the Plan does not provide the Insurers with the protection of an injunction precluding the assertion of such claims against the Insurers.

6. The Insurers filed their original proofs of claim on February 6, 2008 (the "**Original Claims**").

7. Thorpe filed its objections to the Original Claims on September 11, 2008

8. The Insurers filed amended proofs of claim on September 22, 2008 (together with the Insurers' original proofs of claim, the "**Claims**"). The Insurers' amended proofs of claim did not materially alter the facts or theories of relief set forth in their original proof of claim. At Thorpe's request, the Court considered Thorpe's objection to the Original Claims as objections to the claims as amended.

9. The Insurers filed their motion to compel arbitration of the Claims on September 22, 2008. The hearings on Thorpe's objections to the Claims and the Insurers' motion to compel arbitration of the Claims were both set for hearing on October 16, 2008 at 10:00 a.m.

The Wellington Agreement and Arbitration

10. On or about June 19, 1985, Thorpe and the Insurers entered into an "Agreement Concerning Asbestos Related Claims" (the "**Wellington Agreement**") that prescribed certain procedures pursuant to which the Insurers would administer asbestos related claims tendered to them by Thorpe as a result of liability insurance policies that Harbor Insurance Company ("**Harbor**"), a predecessor of Continental, and Fireman's Fund had issued to Thorpe. The Wellington Agreement contained a provision requiring, with certain exceptions not relevant to these proceedings, that any disputes regarding the parties' rights and obligations under the Wellington Agreement be arbitrated.

11. On May 25, 1999, the Insurers initiated an arbitration proceeding against Thorpe under the Wellington Agreement for the purpose of resolving certain disputes that had arisen regarding the coverages afforded to Thorpe under certain insurance policies that had been issued to Thorpe by Harbor and Fireman's Fund, as modified by the Wellington Agreement.

12. On or about October 28, 2002, the arbitrator in that proceeding, Abraham D. Sofaer, issued written Findings of Fact and Conclusions of Law with respect to the matters that had been the subject of the arbitration. Thereafter, Thorpe appealed from the arbitrator's decision.

The Settlement Agreement

13. On April 17, 2003, Thorpe and the Insurers entered into a Settlement Agreement (the "**Settlement Agreement**") in order to resolve the disputes that had been the subject of the arbitration initiated by the In-

surers and the parties' rights to costs and fees incurred in connection with that arbitration.

14. The Settlement Agreement provided for a release of Thorpe's claims against the Insurers as follows:

> Thorpe releases Insurers [Continental and Fireman's Fund Insurance Company ("**Fireman's Fund**")] from any claims for coverage of any kind under or related to the Policies, including but not limited to, those under the Wellington Agreement, the Harbor Policies, the Fireman's Fund Policies, and the [Comprehensive Claims Handling Agreement], and releases Insurers from any kind of contractual liability or extra contractual liability, including but not limited to, any alleged in the Complaints [relating to Thorpe's insurance rights] and under the [arbitration].

Settlement Agreement at ¶ 5.

> Thorpe expressly acknowledges and agrees that Continental's … agreements herein constitute a full and complete accord and satisfaction of any and all obligations they have or may have for any claim of any kind under the Policies, whether described above or otherwise. Thorpe Insulation Company fully releases and forever discharges [Continental] … from any and all claims, actions, causes of actions, rights, liabilities, obligations and demands of every kind and nature, known and unknown, suspected or unsuspected past, present and future, arising out of, or related to, or in any way connected with, in whole or in part, any claim of any kind under the Policies or relating to the [arbitration] …

Settlement Agreement at ¶ 9.

15. The Settlement Agreement contains two warranties by the parties, the "**Assignment Warranty**" and the "**Establishment Warranty**." The Assignment Warranty provides that:

> The parties to this Agreement each represent and warrant that they have not and will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein, and that they are the only persons or entities entitled to recover for damages under such claims, causes of action, actions and rights.

Settlement Agreement at ¶ 24. The Establishment Warranty provides that:

> The parties to this Agreement each further represent and warrant that they will not in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Id.

16. The Settlement Agreement further provided that:

> Thorpe and the Insurers agree to the continuing jurisdiction of Trial Judge Abraham D. Sofaer to enforce this Agreement and its terms.

Settlement Agreement at ¶ 14.

The Insurers' Proof of Claim

17. The Claims allege that Thorpe breached the Assignment Warranty by entering into settlement agreements with other insurers pursuant to which the settling insurers assigned their contribution, indemnity and subrogation rights against the Insurers to Thorpe and to the Trust and (b) assigning or otherwise transferring to the Trust all contribution, indemnity and subrogation rights against the Insurers acquired from any settling insurers. Each of those settlement agreements was approved by this Court.

18. The Claims allege that Thorpe breached the Establishment Warranty in four respects:

(a) By entering into settlement agreements with other insurers pursuant to which the settling insurers assign their contribution, indemnity and subrogation rights against the Insurers to Thorpe and to the Trust;

(b) By assigning or otherwise transferring to the Trust all contribution, indemnity and subrogation rights against the Insurers acquired from any settling insurers;

(c) By encouraging, facilitating and assisting certain asbestos claimants in bringing direct actions against the Insurers prior to the Petition Date; and

(d) By including provisions in the Plan that encourage, facilitate, and assist asbestos claimants in bringing direct actions against the Insurers following the confirmation of the Plan, including a provision that exempts the Insurers from the provisions of an injunction that protects certain other insurers from the assertion of direct action claims without the consent of the Trust.

19. In addition, the Claim asserts that Thorpe breached the Settlement Agreement by collaborating with representatives of the holders of asbestos claims to:

(a) obtain contribution, indemnity and subrogation rights from settling insurers and vesting those rights in the Trust, and

(b) facilitate the asbestos claimants' alleged direct action rights against the Insurers in the Plan.

20. This Court neither instructed nor required the Insurers to file the Claims.

21. The Claims state that:

> This proof of claim is being filed so that the merits of [the Insurer's] claims can be arbitrated before Judge Sofaer as the parties agreed and the law requires.

During the course of the hearing on Thorpe's objection to the Claims, the Insurers confirmed that, notwithstanding the foregoing language in the Claims, the Claims had been filed for the purpose of seeking a distribution from Thorpe's bankruptcy estate.

22. Among other issues, Thorpe's objections to the Claims raise the following issues:

(a) Assuming that the Assignment Warranty could be construed to preclude Thorpe from assigning the settling insurers' contribution, indemnity and contribution rights to the Trust, whether such prohibition would be enforceable as a result of Bankruptcy Code sections 541(c)(1) and 1123(a)(5)(B); and

(b) Assuming that either the Assignment Warranty or the Establishment Warranty could be construed to preclude Thorpe from collaborating with rep-

resentatives of asbestos claimants to obtain contribution, indemnity and subrogation rights against Continental from settling insurers and to preserve the asbestos claimants' alleged direct action rights, whether the Settlement Agreement, to that extent, would be unenforceable as violative of Bankruptcy Code section 524(g), the public policies underlying that statute and a chapter 11 debtor's obligation to consult with its creditors in relation to any proposed plan of reorganization in its bankruptcy case.

23. As evidenced by the Insurers' objections to the Plan, many of the alleged breaches of the Settlement Agreement upon which the Claims are based are inextricably intertwined with Thorpe's conduct in negotiating and confirming the Plan. As a result, in order for this Court to properly supervise the administration of these bankruptcy estates and the reorganization and plan confirmation processes over which it has exclusive jurisdiction, this Court must retain jurisdiction over Thorpe's objections to the Claims and resolve them.

Motion to Stay

24. In addition to seeking to compel Thorpe to arbitrate the merits of its objection to the Claims, the Motion sought an order staying proceedings before this Court in relation to Thorpe's objections to the Claims pending appeal from the order denying the Motion.

25. For the reasons set forth herein, the Court has concluded that Thorpe should not be required to arbitrate the merits of its objections to the Claims and does not believe that the Insurers are likely to succeed in any appeal from this Court's order denying the Motion.

26. The Insurers have not identified any irreparable injury that they would suffer were this Court to rule upon Thorpe's objections to the Claims.

27. Staying proceedings in relation to Thorpe's objections to the Claims would unduly delay the administration of Thorpe's bankruptcy case in that:

(a) Resolution of the Claims is important to assessing whether or not this Court will confirm the Plan in that:

(i) The Court would be reluctant to confirm a plan of reorganization that might give rise to substantial claims against the estate, such as those alleged by the Insurers in this case; and

(ii) Whether or not the Claims are valid claims might impact upon the Court's assessment of the feasibility of the Plan; and

(b) Resolution of the Claims is a condition precedent to the confirmation of the Plan pursuant to the terms of the Plan.

Such delay would substantially prejudice the creditors of Thorpe's estate by delaying any distribution to those creditors on account of their claims and by increasing the administrative costs of Thorpe's bankruptcy case by prolonging that case.

28. None of the parties to the objections to the Claims will be required to expend substantial resources in litigating the claims before this Court in that, for the reasons set forth in this Court's "Findings of Fact and Conclusions of Law re Continental Insurance Company Proof of Claim" and "Findings of Fact and Conclusions of Law re Fireman's Fund Insurance Company Proof of Claim" entered concurrently with these findings, the

Court has determined that the Claims should be disallowed.

29. Staying Thorpe's objections to the Claims while the Insurers appealed would not be in the public interest in that:

(a) The public has an interest in promoting successful reorganizations and delaying the administration of Thorpe's and Pacific Insulation Company's bankruptcy cases while the Insurers prosecuted their appeals would jeopardize that interest;

(b) As noted above, staying proceedings in relation to Thorpe's objections to the Claims might delay confirmation of the Plan, placing an unnecessary burden upon this Court by requiring this Court to unduly extend its administration of Thorpe's and Pacific Insulation Company's bankruptcy cases; and

(c) The public has an interest in expediting distributions from Thorpe's bankruptcy estate to the holders of claims against Thorpe, which interest would be frustrated were a stay imposed.

Incorporation of Conclusions of Law

30. To the extent that any of the Conclusions of Law set forth below constitute Findings of Fact, they are incorporated herein by this reference.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of Thorpe's objection to the Claims pursuant to the provisions of 28 U.S.C. 1334(b).

2. Thorpe's objections to the Claims are core proceedings pursuant to the provisions of 28 U.S.C. 157(b)(2)(B). Any purported reservation of rights to this Court's exercise of its core jurisdiction in the

Claims does not, and cannot, affect this Court's core jurisdiction over Thorpe's objection to the Claims.

3. Because Thorpe's objections to the Claims are core proceedings, this Court has discretion to retain jurisdiction over those objections, rather than compelling the parties to arbitrate the merits of Thorpe's objections to the Claims.

4. This Court has determined to exercise its discretion to retain jurisdiction over Thorpe's objections to the Claims for the following reasons:

(a) The Claims raise the issue of whether, as a matter of federal bankruptcy law, a provision in a prepetition contract may prevent a bankrupt from transferring rights that it has obtained from third parties against a non-debtor entity to a trust established for the benefit of the bankrupt's creditors under the terms of a plan of reorganization. This is an issue that should be decided by a federal bankruptcy judge, not a private arbitrator.

(b) The Claims raise the issue of whether, as a matter of federal bankruptcy law, a provision in a prepetition contract may prevent a chapter 11 debtor from consulting with its creditors regarding the terms and conditions of a plan of reorganization that the chapter 11 debtor may propose in its bankruptcy case. This is an issue that should be decided by a federal bankruptcy judge, not a private arbitrator.

(c) The Claims assert that Thorpe's conduct following the Petition Date violated the terms of the Settlement Agreement. Whether or not acts taken on behalf of a chapter 11 bankruptcy estate, while that estate is under the exclusive jurisdiction of the bankruptcy court, were proper should be decided by the

federal bankruptcy judge having jurisdiction of the chapter 11 case, not a private arbitrator.

(d) Resolution of the Claims is inextricably intertwined with the confirmation of the Plan in at least two respects: (a) there are overlapping factual and legal issues and (b) the outcome of Thorpe's objection to the Claims may affect the confirmability of the Plan. To the extent that Thorpe's objections to the Claims raise factual or legal issues that bear on the confirmability of the Plan, those issues ought to be decided by a federal bankruptcy judge to whom Congress has granted exclusive jurisdiction over the confirmation of chapter 11 plans. To the extent that Thorpe's objections to the Claims are not otherwise inextricably intertwined with the process of confirming the Plan, considerations of sound judicial administration and conservation of the parties' resources favor this Court's retention of jurisdiction over Thorpe's objections to the Claims.

5. As a result of the foregoing, the Insurers' motion to compel arbitration of Thorpe's objections to the Claims should be denied.

6. For the reasons set forth above, the Insurers are not likely to prevail on any appeal that they may elect to file regarding their motion to compel arbitration, the Insurers will not suffer any irreparable injury in the absence of a stay, Thorpe's estate would suffer substantial hardship were a stay imposed and the public interest favors permitting Thorpe to proceed on its objections to the Claims. As a result, the Insurers' motion to stay Thorpe's objections to the Claims pending appeal should be denied.

7. To the extent that any of the Findings of Fact set forth above constitute Conclusions of Law, they are incorporated herein by this reference.

# # # #

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: December 16, 2008

APPENDIX J

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamps: FILED & ENTERED
DEC 16 2008
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY milano DEPUTY CLERK

CHANGES MADE BY COURT

ORDER SUSTAINING OBJECTION TO CONTINENTAL INSURANCE COMPANY PROOF OF CLAIM

Date: October 16, 2008
Time: 10:00 a.m.
Ctrm: 1475

Thorpe's objection to the Proof of Claim filed by Continental Insurance Company in Thorpe's bankruptcy case (Claim No. 30) (the "**Objection**") came regularly on for hearing on October 16, 2008, at 10:00 a.m., in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as

noted in the record of the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the Objection, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing, and having entered findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT:

1. The Objection be sustained and Claim No. 30 be disallowed in its entirety;

2. Continental's oral motion at the hearing of the Objection to stay the effectiveness of this order pending an appeal of this order be denied; and

3. Continental's oral motion at the hearing of the Objection to stay proceedings relating to the confirmation of the pending plan of reorganization in this bankruptcy case pending appeal of this order be denied.

4. The Court reserves jurisdiction to consider whether, as the prevailing party, Thorpe is entitled to recover its costs and attorneys fees from Continental. Any motion for such fees and costs shall be filed not later than 60 days after entry of this order.

# # #

s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: December 16, 2008

APPENDIX K

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 07-19271-BB
Chapter 11
(Jointly Administered with Case No. LA 07-20016-BB)

IN RE THORPE INSULATION CO., Debtor.

Stamp: FILED & ENTERED
DEC 16 2008
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY milano DEPUTY CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE OBJECTION TO CONTINENTAL INSURANCE COMPANY PROOF OF CLAIM

Date: October 16, 2008
Time: 10:00 a.m.
Ctrm: 1475

Thorpe Insulation Company's ("**Thorpe**") objection to the Proof of Claim filed by Continental Insurance Company ("**Continental**") in Thorpe's bankruptcy case (Claim No. 30) (the "**Objection**") came regularly on for hearing on October 16, 2008, at 10:00 a.m. in Courtroom 1475 of the above-entitled court, the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding. Appearances of counsel were as noted in the record of

the foregoing hearing. The Court having considered the papers filed in support of, and in opposition to, the Objection, the matters of which judicial notice was requested, and the argument of counsel during the course of the foregoing hearing hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Procedural Status of These Bankruptcy Cases and Thorpe's Claim Objection

1. Thorpe filed a voluntary petition under chapter 11 of the United States Bankruptcy Code with the Clerk of this Court on October 15, 2007 (the "**Petition Date**"). The bankruptcy case commenced by the filing of that petition is presently pending before this Court. Thorpe continues to act as the debtor in possession in its bankruptcy case.

2. On May 28, 2008, Thorpe filed its Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company in Thorpe's bankruptcy case.

3. On July 24, 2008, Thorpe filed its First Amended Joint Plan of Reorganization of Thorpe Insulation Company and Pacific Insulation Company in Thorpe's bankruptcy case (the "**Plan**").

4. The confirmation hearing on the Plan is presently scheduled to commence on January 8, 2009.

5. So far as it is relevant to these proceedings, the Plan contemplates:

(a) The creation of a trust (the "**Trust**") pursuant to Bankruptcy Code section 524(g) to administer asbestos claims against Thorpe and to make distributions on account of such claims;

(b) That the Trust will receive, among other things, contribution, indemnity and subrogation claims against Continental obtained from insurers who will assign those claims to Thorpe and/or the Trust in connection with the resolution of their coverage disputes with Thorpe; and

(c) That any right of asbestos claimants to bring direct actions against Continental will be unaffected by the Plan or Thorpe's discharge, including by not providing Continental with the protection of an injunction precluding the assertion of such claims against Continental.

6. Continental filed its original proof of claim on February 6, 2008 (the "**Original Claim**").

7. Thorpe filed its objections to the Original Claim on September 11, 2008.

8. Continental filed an amended proof of claim on September 22, 2008 (together with Continental's original proof of claim, the "**Claim**"). Continental's amended proof of claim did not materially alter the facts or theories of relief set forth in its original proof of claim. At Thorpe's request, the Court considered Thorpe's objection to the Original Claim as objections to the claim as amended.

9. These findings of fact and conclusions of law reflect the Court's findings of fact and conclusions of law with respect to some, but not all, of the arguments made in Thorpe's objections to the Claim. To the extent that there were arguments made in the objections that are not disposed of in these findings of fact and conclusions of law, the Court considered such arguments as being unnecessary to its decision on the objec-

tions and did not reach a conclusion as to the merits of those arguments.

10. On October 14, 2008, Continental filed an emergency motion for the purpose of seeking discovery with respect to Thorpe's claim objection. At no time prior to the hearing on Thorpe's objection to the Claim was Continental precluded from initiating discovery in relation to the objection to the Claim. At no time prior to the hearing did Continental serve any discovery requests upon Thorpe, or seek to obtain discovery from third parties, in relation to Thorpe's objection to the Claim.

The Wellington Agreement and Arbitration

11. On or about June 19, 1985, Thorpe and Continental entered into an "Agreement Concerning Asbestos Related Claims" (the "**Wellington Agreement**") that prescribed certain procedures pursuant to which Continental would administer asbestos related claims tendered to it by Thorpe as a result of liability insurance policies that Harbor Insurance Company ("**Harbor**"), a predecessor of Continental, had issued to Thorpe. The Wellington Agreement contained a provision requiring, with certain exceptions not relevant to these proceedings, that any disputes regarding the parties' rights and obligations under the Wellington Agreement be arbitrated.

12. On May 25, 1999, Continental and Fireman's Fund Insurance Company ("**Fireman's Fund**" and, together, with Continental, the "**Insurers**") initiated an arbitration proceeding against Thorpe under the Wellington Agreement for the purpose of resolving certain disputes that had arisen regarding the coverages afforded to Thorpe under certain insurance policies that had been issued to Thorpe by the Insurers or, in the

case of Continental, their predecessors, as modified by the Wellington Agreement.

13. On or about October 28, 2002, the arbitrator in that proceeding issued written Findings of Fact and Conclusions of Law with respect to the matters that had been the subject of the arbitration. Thereafter, Thorpe appealed from the arbitrator's decision.

The Settlement Agreement

14. On April 17, 2003, Thorpe and the Insurers entered into a Settlement Agreement (the "**Settlement Agreement**") in order to resolve the disputes that had been the subject of the arbitration initiated by the Insurers and the parties' rights to costs and fees incurred in connection with that arbitration

15. The Settlement Agreement provided for a release of Thorpe's claims against Continental as follows:

> Thorpe releases Insurers [Continental and Fireman's Fund Insurance Company ("**Fireman's Fund**")] from any claims for coverage of any kind under or related to the Policies, including, but not limited to, those under the Wellington Agreement, the Harbor Policies, the Fireman's Fund Policies, and the [Comprehensive Claims Handling Agreement], and releases Insurers from any kind of contractual liability or extra contractual liability, including but not limited to, any alleged in the Complaints [relating to Thorpe's insurance rights] and under the [arbitration].

Settlement Agreement at ¶ 5.

> Thorpe expressly acknowledges and agrees that Continental's … agreements herein constitute a full and complete accord and satisfaction

> of any and all obligations they have or may have for any claim of any kind under the Policies, whether described above or otherwise. Thorpe Insulation Company fully releases and forever discharges [Continental] … from any and all claims, actions, causes of actions, rights liabilities, obligations and demands of every kind and nature, known and unknown, suspected or unsuspected past, present and future, arising out of, or related to, or in any way connected with, in whole or in part, any claim of any kind under the Policies or relating to the [arbitration] …

Settlement Agreement at ¶ 9.

16. The Settlement Agreement contains two warranties by the parties, the "**Assignment Warranty**" and the "**Establishment Warranty**." The Assignment Warranty provides that:

> The parties to this Agreement each represent and warrant that they have not and will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein, and that they are the only persons or entities entitled to recover for damages under such claims, causes of action, actions and rights.

Settlement Agreement at ¶ 24. The Establishment Warranty provides that:

> The parties to this Agreement each further represent and warrant that they will not in any way voluntarily assist any other person or en-

> tity in the establishment of any claim, cause of action, action or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Id.

17. The Settlement Agreement further provided that:

> This Agreement is restricted and limited to the matters addressed herein…

Settlement Agreement at ¶ 12.

> This Agreement is an integrated Agreement and contains the entire Agreement regarding the matters herein between the signatories hereto ..

Settlement Agreement at ¶ 28.

> Thorpe, [Continental] and Fireman's Fund agree that this Agreement is being entered into to resolve their disputes over various coverage issues …

Settlement Agreement at ¶ 35.

18. The Settlement Agreement does not refer to either the direct action rights of parties whose claims might be covered by the insurance policies referred to in the Settlement Agreement, or the contribution, indemnity or subrogation rights of other insurers against Continental. At the time that Thorpe entered into the Settlement Agreement, it did not hold any rights in any of the contribution, indemnity or subrogation claims assigned to it by any of its other insurers or any direct action rights held by any parties with asbestos claims against Thorpe.

Continental's Proof of Claim

19. In sum, the Claim alleges that Thorpe breached the Assignment Warranty by entering into settlement agreements with other insurers pursuant to which the settling insurers assigned their contribution, indemnity and subrogation rights against Continental to Thorpe and to the Trust.

20. In sum, the Claim alleges that Thorpe breached the Establishment Warranty in four respects:

(a) By entering into settlement agreements with other insurers pursuant to which the settling insurers assign their contribution, indemnity and subrogation rights against Continental to Thorpe and to the Trust;

(b) By assigning or otherwise transferring to the Trust all contribution, indemnity and subrogation rights against Insurers acquired from any settling insurers;

(c) By encouraging, facilitating and assisting certain asbestos claimants in bringing direct actions against Continental prior to the Petition Date; and

(d) By including provisions in the Plan that encourage, facilitate and assist asbestos claimants in bringing direct actions against Continental following the confirmation of the Plan.

21. In addition, the Claim asserts that Thorpe breached the Settlement Agreement by collaborating with representatives of the holders of asbestos claims to:

(a) obtain contribution, indemnity and subrogation rights from settling insurers and vesting those rights in the Trust, and

(b) facilitate the asbestos claimants' alleged direct action rights against Continental in the Plan.

22. This Court neither instructed nor required Continental to file the Claim.

23. The Claim states that:

> This proof of claim is being filed so that the merits of Continental's claims can be arbitrated before Judge Sofaer as the parties agreed and the law requires.

During the hearing on Thorpe's objection to the Claim, Continental confirmed that, notwithstanding the foregoing language in the Claim, the Claim had been filed for the purpose of seeking a distribution from Thorpe's bankruptcy estate.

Stay Pending Appeal

24. During the course of the hearing on Thorpe's objection to the Claim, Continental requested that any order sustaining the objection be stayed pending appeal.

25. There was no evidence offered at the hearing regarding the merits of Continental's request for a stay pending appeal other than the arguments presented in relation to the merits of Thorpe's objection to the Claim. Based upon the evidence and argument presented regarding the merits of Thorpe's objection to the claim, the Court has concluded that Continental is not likely to prevail on any appeal from this Court's order sustaining Thorpe's objection to the Claim.

Stay of Confirmation Proceedings

26. During the hearing on Thorpe's objection to the Claim, Continental requested that this Court stay the proceedings relating to Thorpe's request that this

Court confirm the Plan, pending the conclusion of an appeal from this Court's order sustaining Thorpe's objection to the Claim.

27. No evidence was offered in support of that request.

Incorporation of Conclusions of Law

28. To the extent that any of the Conclusions of Law set forth below constitute Findings of Fact, they are incorporated herein by this reference

CONCLUSIONS OF LAW

Disallowance of the Claim

1. This Court has jurisdiction of this proceeding pursuant to the provisions of 28 U.S.C. § 1334(b).

2. This proceeding is a core proceeding pursuant to the provisions of 28 U.S.C. § 157(b)(2)(B). Any purported reservation of rights to this Court's exercise of its core jurisdiction in the Claim does not, and cannot, affect this Court's core jurisdiction over Thorpe's objection to the Claim.

3. The releases provided for in the Settlement Agreement could not have released claims then held by parties who were not parties to the Settlement Agreement, such as Thorpe's insurers other than Continental and Fireman's Fund and parties holding asbestos claims against Thorpe. The releases provided for in the Settlement Agreement also could not release claims that Thorpe later acquired from third parties, such as the contribution, indemnity and subrogation claims that Thorpe and the Trust are to receive pursuant to Thorpe's settlement agreements with certain insurers, because a release cannot apply to a claim that is not in existence at the time of the release, as opposed to a claim

that is in existence but is not known to the party granting the release. *FASA v. Playmates Toys, Inc.*, 892 F.Supp. 1061 (N.D. Ill. 1995) (applying California law). Such a release would be against public policy because it would immunize a party from the consequences of its future conduct.

4. The purported breaches of the Settlement Agreement asserted in the Claim arising from Thorpe's obtaining an assignment of contribution, indemnity and subrogation claims from settling insurers on its own behalf and on behalf of the Trust do not violate the terms of the Assignment Warranty for the following reasons:

(a) The Assignment Warranty precludes Thorpe from assigning claims to third parties, not obtaining an assignment of claims from third parties. Therefore, it cannot be a breach of the Assignment Warranty for Thorpe to obtain contribution, indemnity or subrogation claims from settling insurers on its own behalf or on behalf of the Trust.

(b) The Assignment Warranty only applies to claims "arising out of or connected with the matters released herein." The "matters released" in the Settlement Agreement were Thorpe's rights as of the date of the Settlement Agreement under the Harbor Insurance policies referred to in the Settlement Agreement, not contribution, indemnity or subrogation claims held by Thorpe's other insurers.

(c) The Plan does not improperly encourage, facilitate or assist claimants in bringing direct action claims against Continental. Rather, the Plan merely preserves whatever direct action rights claimants may have had against Continental prior to the filing of Thorpe's bankruptcy petition and thus prevents Conti-

nental from obtaining an unwarranted advantage from Thorpe's bankruptcy filing in contravention of Bankruptcy Code section 524(e).

(d) Even if the Assignment Warranty purported to preclude Thorpe from assigning the settling insurers' contribution, indemnity and contribution rights to the Trust, such prohibition would not be enforceable as a result of Bankruptcy Code sections 524(g), 541(c)(1) and 1123(a)(5)(B).

5. The purported breaches of the Settlement Agreement asserted in the Claim arising from Thorpe's obtaining an assignment of contribution, indemnity and subrogation claims from settling insurers on its own behalf and on behalf of the Trust do not violate the terms of the Establishment Warranty in that they do not arise out of, result from or in any way relate to the "matters released." The "matters released" in the Settlement Agreement were Thorpe's rights as of the date of the Settlement Agreement under the Harbor Insurance policies referred to in the Settlement Agreement, not contribution, indemnity or subrogation rights held by Thorpe's other insurers, which Thorpe could not affect by settling with Continental. *Employers Insurance Company of Wausau v. The Travelers Indemnity Company*, 141 Cal. App. 4th 398 (2006).

6. The purported breaches of the Settlement Agreement asserted in the Claim relating to Thorpe's alleged prepetition encouraging, facilitating, and assisting certain asbestos claimants in relation to direct actions against Continental do not violate the Establishment Warranty as the claimants' direct action rights, if any, do not arise out of, result from or in any way relate to the "matters released." The "matters released" in the Settlement Agreement were Thorpe's rights as of

the date of the Settlement Agreement under the Harbor Insurance policies referred to in the Settlement Agreement, not the direct action rights, if any, of Thorpe's asbestos claimants, which Thorpe could not affect by settling with Continental. *Shapiro v. Republic Indemnity Company of America*, 52 Cal. 2d 437 (1959).

7. Thorpe's collaboration with representatives of asbestos claimants to obtain contribution, indemnity and subrogation claims against Continental from settling insurers, to preserve the asbestos claimants' direct action claims, if any, and to formulate and confirm the Plan does not violate Settlement Agreement, because for the reasons noted above, neither the Establishment Warranty nor the Assignment Warranty pertain to the contribution, indemnity and subrogation claims of settling insurers or to the asbestos claimants' direct action claims, if any..

8. Even were the Settlement Agreement were construed to preclude Thorpe from collaborating with representatives of asbestos claimants to obtain contribution, indemnity and subrogation claims against Continental from settling insurers and to preserve the asbestos claimants' direct action claims, if any, the Settlement Agreement would, to that extent, be unenforceable. Congress created Bankruptcy Code section 524(g) to provide a mechanism for dealing with mass tort asbestos litigation and insurance disputes related thereto. Among other things, Section 524(g) contemplates that plans of reorganization proposed utilizing that section will consolidate debtors' insurance assets in a trust for the benefit of existing and future asbestos claimants. The ability of a debtor in an asbestos case to transfer such assets to a Section 524(g) trust, and to negotiate such a plan of reorganization with its creditor constituencies, including representatives of the asbes-

tos claimants who are the beneficiaries of the trust contemplated by Section 524(g), cannot be contracted away by the debtor in a prepetition contract.

9. To the extent that Continental might seek to present parol evidence to assist the Court in construing the Settlement Agreement in a manner contrary to that set forth at paragraphs 4 through 7, above, the Settlement Agreement is not reasonably susceptible of such an interpretation. As a result, any such evidence would not be admissible and there is no need for this Court to conduct an evidentiary hearing to provisionally admit such evidence and then to strike such evidence. *BMW of North America, Inc. v. New Motor Vehicle Bd.*, 162 Cal. App. 3d 980, 990 (1985).

10. For the foregoing reasons, Thorpe's objection to the Claim overcomes any presumptive validity of the Claim and that objection should be sustained and the Claim disallowed.

Denial of Motion to Continue

11. Continental's motion to continue the hearing on Thorpe's claim objection is premised upon the arguments that Thorpe raised new factual material in its reply in support of its objection to the Claim and the Committee raised new legal arguments in its joinder to Thorpe's objection. Neither of those arguments is persuasive in that, to the extent that either Thorpe's reply or the Committee's joinder raised new arguments, or presented new evidence in support of the objection, the Court did not rely upon such new arguments or evidence in determining to sustain the objection and disallow the Claim.

12. Continental's motion to continue also argues that a continuance of the hearing was warranted be-

cause of the "necessity to first determine the arbitration issue" before engaging in discovery. At no time did this Court preclude Continental from engaging in discovery with respect to Thorpe's objection to the Claim. As a result, there was no reason why Continental could not have proceeded to conduct whatever discovery it felt to be necessary to respond to Thorpe's objection to the Claim and Continental's tactical decision to defer discovery does not constitute good cause for continuing the hearing on Thorpe's objection to the Claim.

13. Finally, because the Court is deciding Thorpe's objection to the Claim as a matter of law, any evidence that Continental may have obtained in discovery would not change the outcome of the objection to its Claim.

14. For the foregoing reasons, Continental's motion to continue the hearing of Thorpe's objection to the Claim should be denied.

Denial of Requests for Stay

15. Continental's request for a stay of this Court's order disallowing the Claim pending appeal should be denied in that:

(a) For the reasons stated above, Continental is not likely to prevail in its appeal from the order disallowing the Claim;

(b) Staying the effectiveness of the order disallowing the Claim would be prejudicial to Thorpe's estate because the acts alleged to constitute breaches of the Settlement Agreement are inextricably intertwined with the process of proposing and confirming the Plan; and

(c) There was no evidence presented to the Court in support of the request that the Court stay the order disallowing the Claim.

16. Continental's request that this Court stay the proceedings relating to the confirmation of the Plan pending appeal from this Court's order sustaining Thorpe's objection to the Claim should be denied in that:

(a) Continental failed to present any evidence to the Court supporting such request; and

(b) Based upon the evidentiary record in connection with certain insurers' prior motion to stay the proceedings in this bankruptcy case (Docket No. 1080) issuance of a stay is likely to cause irreparable harm to Thorpe's bankruptcy estate and creditors and would not be in the public interest.

17. To the extent that any of the Findings of Fact set forth above constitute Conclusions of Law, they are incorporated herein by this reference.

# # # #

/s/ Sheri Bluebond
UNITED STATES BANKRUPTCY JUDGE

DATED: December 16, 2008