No. 12-___

IN THE
Supreme Court of the United States

PFIZER INC.,
Petitioner,
v.

LAW OFFICES OF PETER G. ANGELOS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Congress enacted § 524(g) of the Bankruptcy Code to provide a comprehensive framework for resolving asbestos-related claims in chapter 11 cases. Section 524(g) authorizes courts to channel asbestos-related claims into a trust that is funded by the debtor and specified third parties, such as the debtor's corporate parent, who in turn receive an injunction that protects them from the asbestos-related claims. Section 524(g) is intended to foster global finality for the debtor and for third parties for whom contributions are made to the trust, thereby maximizing the assets available to pay present and future asbestos claimants. Approximately $40 billion has been allocated to or earmarked for these trusts nationwide, and they have become a principal vehicle for managing asbestos-related mass tort liability.

In the underlying chapter 11 case, the bankruptcy court preliminarily enjoined asbestos claimants who, when they could not pursue their claims against the debtor, Quigley Co. Inc., attempted to do so against its corporate parent, Pfizer Inc. These claims arise out of Quigley's manufacture and sale of allegedly defective asbestos-containing products and seek to hold Pfizer liable as an "apparent manufacturer" of Quigley's products. After being acquired by Pfizer, Quigley affixed Pfizer's name and logo to various documents as a statement of corporate affiliation. It is undisputed that Quigley would not have done so but for Pfizer's ownership of Quigley.

The bankruptcy court's injunction tracks the language of § 524(g) and enjoins claims against Pfizer "alleging that Pfizer is directly or indirectly

liable for the conduct of … Quigley to the extent such alleged liability of Pfizer arises by reason of … Pfizer's ownership of … Quigley." Reversing the bankruptcy court, the district court and the Second Circuit held that the injunctive language does not reach the claims at issue. The Second Circuit concluded that the statutory phrase "arises by reason of" in § 524(g)(4)(A)(ii) invokes only a legal standard rather than a factual inquiry and, thus, enjoins claims against a third party only where the third party's relationship to the debtor – such as ownership – is a legal element of the claim, and does not enjoin claims where, as here, that relationship is an undisputed factual predicate of the claim.

The question presented is thus:

Whether the Second Circuit erred by failing to apply as written a federal statute, 11 U.S.C. § 524(g)(4)(A)(ii), by limiting its scope in a manner that is contrary to its plain terms and that frustrates the congressional purposes of the statute.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Second Circuit were Pfizer Inc.; Quigley Company, Inc.; The Law Offices of Peter G. Angelos, P.C.; Hissey Kientz L.L.P.; and Hissey, Kientz & Herron P.L.L.C.[1]

Petitioner Pfizer Inc. is a publicly traded company with no parent companies. No publicly traded corporation owns ten percent or more of the stock of Pfizer Inc.

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[1] While Hissey Kientz L.L.P. and Hissey, Kientz & Herron P.L.L.C. initially appeared as intervenors in the district court and the Second Circuit, the Second Circuit treated them as *amici* and struck them from the caption of the case. (*See* 9a n.2.) The Appendix is cited herein as "__a."

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Pfizer Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 676 F.3d 45. (1a-35a.) The opinion of the district court is published at 449 B.R. 196. (36a-60a.) The opinion of the bankruptcy court is unpublished and is available at 2008 WL 2097016. (61a-78a.)

STATEMENT OF JURISDICTION

The opinion of the court of appeals was entered on April 10, 2012. (1a.) A petition for rehearing and rehearing en banc was denied on June 12, 2012. (97a-98a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the U.S. Constitution provides: "The Congress shall have Power … To establish … uniform Laws on the subject of Bankruptcies throughout the United States."

Section 105(a) of the Bankruptcy Code provides, in relevant part, that bankruptcy courts "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Section 362(a) of the Bankruptcy Code provides, in relevant part:

> [A] petition filed under section 301, 302, or 303 of this title … operates as a stay, applicable to all entities, of –
>
> …
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate ….

Section 524(g)(4)(A)(ii) of the Bankruptcy Code provides:

> [A]n injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of –
>
> (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> (II) the third party's involvement in the

> management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
>
> (III) the third party's provision of insurance to the debtor or a related party; or
>
> (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to –
>
> (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
>
> (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

The complete text of 11 U.S.C. § 524(g) is set forth in the Appendix. (99a-106a.)

STATEMENT OF THE CASE

This case presents issues of vital importance to the resolution of asbestos-related bankruptcies and affects the viability of existing and future trusts envisioned by Congress as the mechanism for resolving millions of asbestos-related claims with finality. Some $40 billion has already been committed to such trusts. The issues presented concern the scope of asbestos-channeling injunctions under 11 U.S.C. § 524(g), which directly impacts the funding, disposition, and finality of nearly every asbestos-related chapter 11 case nationwide. A panel of the court of appeals – in conflict with decisions of this Court and other courts of appeals – narrowly interpreted the statutory term "arises by reason of" in § 524(g) by categorically eliminating facts from the analysis and by adding the modifier "legally" so as to limit its reach to claims that "legally" arise by reason of the relationship at issue. The court of appeals applied an erroneous and idiosyncratically narrow construction of the statutory term, which controls the scope of injunctions entered under § 524(g), imperiling the principal statutory scheme extant to resolve the "elephantine mass of asbestos cases" that "defies customary judicial administration." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). This case presents a fundamental and pure question of law for this Court's review.

1. The underlying facts are uncontested. Prior to the early 1970s, Quigley manufactured and sold Insulag, an asbestos-containing product. After Pfizer acquired Quigley in 1968, Quigley affixed Pfizer's name and logo on certain Quigley marketing materials and other documents. (63a, 71a-72a, 75a.)

Other than adding Pfizer's name and logo, Quigley used identical promotional materials before and after Pfizer's acquisition. (72a, 75a.) Quigley would not have placed Pfizer's name and logo on anything "absent Pfizer's ownership interest in Quigley." (29a-30a.) Indeed, it is undisputed that Quigley would not have used Pfizer's name and logo "but for" Pfizer's ownership of Quigley. (71a-72a, 75a.) "Under the facts presented, the joinder of the Quigley and Pfizer names and logos is a statement of corporate affiliation." (75a.) Pfizer had no role in making or selling Insulag. Pfizer simply owned Quigley as a subsidiary.

"After the hazardous effects of asbestos became widely known, more than 160,000 plaintiffs filed asbestos-related suits against Quigley," about 109,200 of which also named Pfizer. (2a, 63a.) To satisfy defense costs, settlements, and judgments associated with these suits, Quigley and Pfizer have used shared liability insurance. Quigley and Pfizer each has the right to draw upon the insurance proceeds "on a first billed, first paid basis," regardless of amounts previously paid. (3a, 16a-17a, 90a.) Pfizer "has a now-existent legal right" to draw upon the shared insurance. (17a-18a.)

2. To stay the litigation and thereby preserve the remaining value of its shared insurance, Quigley filed a chapter 11 case in the U.S. Bankruptcy Court for the Southern District of New York and also filed an adversary proceeding to enjoin asbestos-related claims brought against Pfizer. The shared insurance polices are the principal asset of Quigley's bankruptcy estate, and preserving their value is essential for Quigley's reorganization. (89a-90a.)

The district court had original jurisdiction over the chapter 11 case, pursuant to 28 U.S.C. § 1334(a), and over the related adversary proceeding, pursuant to 28 U.S.C. § 1334(b). The district court by standing order referred the chapter 11 case and adversary proceeding to the bankruptcy court, pursuant to 28 U.S.C. § 157(a), and the bankruptcy court exercised jurisdiction, pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A)-(B), (O).

a. The bankruptcy court entered a preliminary injunction to enjoin "any and all pending or future Asbestos Related Claims against Pfizer during the pendency of Quigley's chapter 11 case." (93a.) The bankruptcy court determined that absent injunctive relief, the "plaintiffs will continue to prosecute their claims against Pfizer, which will deplete the Shared Insurance Policies" and "cause immediate and irreparable injury to Quigley's estate and impair Quigley's ability to … successfully reorganize under chapter 11." (90a.) The bankruptcy court found that injunctive relief was "in the best interests of Quigley, its estate, creditors and parties in interest." (*Id.*)

The bankruptcy court subsequently amended its preliminary injunction so as not to "bar claims against Pfizer based on Pfizer products that had nothing to do with Quigley" and instead to "provide[] Pfizer with the same protection it would receive under 11 U.S.C. § 524(g) if Quigley confirms its proposed plan." (62a-64a.) The amended preliminary injunction ("API") thus tracks the language of § 524(g) and enjoins, *inter alia*, claims against Pfizer (i) for the conduct of Quigley (ii) to the extent such alleged liability "arises by reason of" Pfizer's ownership of Quigley:

> ORDERED, that pursuant to sections 105(a) and 362(a) of the Bankruptcy Code, during the pendency of Quigley's chapter 11 case, all parties, including, without limitation, the defendants in this action … and counsel, are hereby stayed, restrained and enjoined from commencing or continuing *any legal action against Pfizer alleging that Pfizer is directly or indirectly liable for the conduct of, claims against, or demands on Quigley to the extent such alleged liability of Pfizer arises by reason of —*
>
> (I) *Pfizer's ownership of a financial interest in Quigley* ….

(81a (emphasis added).)

b. Pfizer moved to enforce the API against claims asserted by Respondent, The Law Office of Peter G. Angelos ("Angelos"). Those claims seek to hold Pfizer vicariously and derivatively liable as an "apparent manufacturer," based upon the Restatement (Second) of Torts § 400 (1965) as uniquely construed by Pennsylvania law (the "§ 400 Claims"). (69a-71a.) The bankruptcy court made findings of fact, applied the plain terms of the API, and ordered Angelos to cease prosecuting its § 400 Claims against Pfizer.

The bankruptcy court found that the § 400 Claims "arise from Quigley's conduct" in manufacturing and selling an allegedly defective product and in affixing Pfizer's name and logo to certain documents and, thus, fit the terms of the API. (71a.) These claims all arise from the same alleged injuries from the same sales of the same Quigley asbestos-containing

product, Insulag, that Quigley – not Pfizer – manufactured and sold. (*Id.*) The asbestos claimants allege that Quigley, as the manufacturer and seller, breached its duty to adequately warn of the dangers of asbestos, and that this product defect caused their injuries. If Pfizer has any liability, it is because Quigley's product was defective, not because Insulag documents contained Pfizer's name and logo. (*Id.*)

The bankruptcy court further found that the § 400 Claims "'arise[] by reason of'" Pfizer's ownership of Quigley and, thus, fit the terms of the API. (75a.) As a matter of undisputed fact, Quigley would not have used Pfizer's name or logo "but for" Pfizer's ownership of Quigley. (72a, 75a.) After Pfizer acquired Quigley, Quigley added Pfizer's name and logo to existing Quigley documents, but nothing else changed. (75a.) "Under the facts presented, the joinder of the Quigley and Pfizer names and logos is a statement of corporate affiliation." (*Id.*)

From these facts, as well as Pennsylvania law that defines the nature of the § 400 Claims as vicarious and derivative, the bankruptcy court determined that to the extent Angelos seeks to hold Pfizer liable as an "apparent manufacturer," that alleged liability "'arises by reason of'" Pfizer's ownership of Quigley, thereby meeting the plain terms of the API. (71a-75a.)

The bankruptcy court rejected as illogical Angelos's view that the API does not enjoin the § 400 Claims – which do not involve any tortious conduct by Pfizer – but that the API would enjoin claims involving wrongful conduct by the defendant, such as liability theories of successor-in-interest, alter ego,

piercing the corporate veil, and domination and control. (73a-74a.) The bankruptcy court reasoned that the § 400 Claims were akin to *respondeat superior* claims, which Angelos acknowledged would be enjoined under § 524(g). (73a-75a.)

3. On appeal by Angelos, the U.S. District Court for the Southern District of New York reversed. Angelos did not appeal any factual findings, and the district court took no issue with them. (112a-13a, 123a, 128a.) The district court agreed with the bankruptcy court's conclusion that the § 400 Claims are for the conduct of Quigley, not Pfizer, but departed from the bankruptcy court when addressing whether liability for the § 400 Claims "'arise by reason of'" Pfizer's ownership of Quigley. (49a-51a.) Rather than apply the plain terms of the API as written, the district court "read 'arise by reason of' to require a reference to state law" (122a), and thus added the word "legally" to the text of the API, stating that the § 400 Claims "do not *legally* arise by reason of Pfizer's ownership of Quigley." (57a (emphasis added).) In construing the scope of the API, the district court engaged in a strict "legal analysis, rather than [a]n inquiry into the factual circumstances that led to liability." (51a.)

4. On appeal by Pfizer, the Second Circuit followed the same analytical path as the district court and affirmed. As an initial matter, the court of appeals recognized that the "central purpose" of a bankruptcy court's exercise of jurisdiction over actions against certain third parties is to protect the assets of the bankruptcy estate. (25a.) Thus, "'a bankruptcy court ... has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of

the bankruptcy estate.'" (23a (citation omitted; omission in original).) Because the claims against Pfizer would threaten the *res* of Quigley's estate by "drawing down" insurance that Quigley and Pfizer share, the Second Circuit properly found that the bankruptcy court had jurisdiction to enjoin the claims. (26a.)

Despite its broad recognition of jurisdiction, the Second Circuit held that the § 400 Claims were not enjoined by the terms of the API. To interpret the scope of the API, the court of appeals held that it must interpret the language of § 524(g), which the API tracks. (26a-27a.) Instead of applying the statutory term "arises by reason of" as written, and despite acknowledging that "Section 524(g) does not explicitly indicate whether the phrase 'by reason of' refers to legal or factual causation, or some combination of the two," the court of appeals eliminated factual causation from the phrase "by reason of" and substituted instead what the court calls "legal" causation. (30a.) By that, the court means "that the relationship" at issue under § 524(g)(4)(A)(ii) "must be a legal cause of or a legally relevant factor to the third party's alleged liability." (*Id.*)

In so holding, the Second Circuit constrained the reach of a 524(g) injunction for any third party identified in § 524(g)(4)(A)(ii), including owners, managers, insurers, financers, and others:

> We conclude that the phrase "by reason of," as employed in 11 U.S.C. § 524(g)(4)(A)(ii), requires that the alleged liability of a third party for the conduct of or claims against the debtor

> arises, in the circumstances, as a *legal consequence* of one of the four relationships between the debtor and the third party enumerated in subsections (I) through (IV).

(34a-35a (emphasis added); *see also* 30a.) Though it is undisputed that Quigley would not have used Pfizer's name and logo "but for" Pfizer's ownership of Quigley, the Second Circuit concluded that the § 400 Claims do not "arise by reason of" Pfizer's ownership of Quigley because ownership is not a legal element of the § 400 Claims. (34a-35a.)

REASONS FOR GRANTING THE PETITION

Asbestos liability is the largest and longest running mass tort in the United States. It has wreaked havoc on the court system, generating an "elephantine mass of asbestos cases" that "defies customary judicial administration." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 & n.1 (1999). Despite calls by this Court and the United States Judicial Conference Ad Hoc Committee on Asbestos Legislation to enact a national dispute resolution scheme for asbestos-related liability, Congress has failed to do so. *Id.*; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997). Absent such a solution, the Bankruptcy Code – and § 524(g) in particular – has become "the only national statutory scheme extant to resolve asbestos litigation through a quasi-administrative process." *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 362 (3d Cir. 2012). Yet the court of appeals below so narrowly construed § 524(g) as to undermine its operation.

Millions of asbestos-related claims have been channeled into 524(g) trusts, and some $40 billion has been committed by debtors, corporate parents, insurers, and others to 524(g) trusts to resolve those claims with finality. "For almost two decades, Chapter 11 bankruptcies have employed … § 524(g) to resolve massive asbestos liability," making § 524(g) "[t]he primary bankruptcy innovation for addressing [asbestos] mass tort liability." *Id.* at 357, 359. That statute is crucial to achieving "predictability," "regularity," and "a global resolution and discharge of current and future liability, while claimants' interests are protected." *Id.* at 359. Third party contributions commonly constitute the "'cornerstone'"

of such trusts. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 141 (2009); *In re Thorpe Insulation Co.*, 677 F.3d 869, 891 (9th Cir. 2012).

This Court has cited § 524(g) on only two occasions and has expressly reserved for future consideration how broad a 524(g) injunction may be. *See Travelers*, 557 U.S. at 155; *Ortiz*, 527 U.S. at 860 n.34. This case is an ideal vehicle for this Court to provide much needed guidance on that crucial federal question, which is a pure question of law that lies at the core of every asbestos-related chapter 11 bankruptcy.

The court of appeals construed the API narrowly and removed the facts from the analysis – an approach that directly conflicts with this Court's decision in *Travelers*, 557 U.S. 137, where this Court broadly construed injunctive language that was strikingly similar to the language at issue here. The court of appeals' erroneous construction of the statutory term "by reason of" in § 524(g) also conflicts with decisions of this Court and other courts of appeal that have broadly construed the same statutory term in several contexts.

The court of appeals' decision, if allowed to stand, frustrates Congress's intent in enacting § 524(g) and discourages corporate parents and other third parties from contributing funds necessary to make 524(g) trusts an effective vehicle for compensating asbestos claimants. Certiorari is urgently needed to resolve the sharply divergent view taken by the court of appeals on a vitally important federal question and to restore uniformity in construing a pivotal term in a federal statute.

I. THE SECOND CIRCUIT'S DEPARTURE FROM THE PLAIN TERMS OF § 524(g) AND EXCLUSION OF THE FACTS FROM THE ANALYSIS CONFLICT WITH THIS COURT'S PRECEDENT

A. The Second Circuit's Decision Conflicts With *Travelers Indemnity Co. v. Bailey*

The Second Circuit's narrow construction of the injunctive language directly conflicts with this Court's decision in *Travelers*, 557 U.S. 137. The injunctive language at issue in *Travelers* hews closely to the language at issue here – no doubt because the injunction in *Travelers* was the "model[]" for Congress in "codify[ing]" the injunctive language in § 524(g)(4)(A)(ii). *In re Johns-Manville Corp.* (*Manville III*), 517 F.3d 52, 57 n.9, 61 & n.18, 68 (2d Cir. 2008)*, rev'd sub nom. Travelers*, 557 U.S. 137.

This Court's broad construction of the injunctive language in *Travelers* is directly applicable here. Yet despite robust briefing and argument of that holding, the court of appeals never discussed it in its opinion. Nor did the court of appeals discuss its own broad construction of the same injunction in *Manville III*, 517 F.3d at 67-68, or on remand in *In re Johns-Manville Corp.* (*Manville IV*), 600 F.3d 135, 146, 157 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 644 (2010).

Manville III, although "primarily" focused on "a question of jurisdiction," directly addressed the scope of the bankruptcy court's injunction. 517 F.3d at 55, 60-61, 63, 67-68. The Second Circuit had "little doubt" that "in a literal sense" the claims at issue were enjoined by the plain terms of the injunction – a conclusion that the court held was supported by the bankruptcy court's factual findings. *Id.* at 67.

Though this Court reversed the Second Circuit's jurisdictional holding, it noted its "agreement" that the claims were "enjoined … by the language of the" injunction. *Travelers*, 557 U.S. at 148.

In so holding, this Court construed injunctive language that closely tracks the statutory phrase "arises by reason of" at issue here – *i.e.*, "based upon, arising out of or relating to" – and recognized that "[i]n a statute, 'the phrase "in relation to" is expansive,' and so is its reach here." *Id.* (citation and alteration omitted). This Court held that the injunctive language was not susceptible to a "narrow construction and clearly reaches factual assertions," "the terms of the injunction bar the actions," and the "factual findings drive the point home." *Id.* at 140, 148-49. So, too, here. Nothing in *Travelers* supports the court of appeals' novel interpretation, which departs from the plain terms of the injunction. "Where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Id.* at 150.

On remand from *Travelers*, the Second Circuit acknowledged that the "'plain terms'" of the injunction "'unambiguously'" barred the actions. *Manville IV*, 600 F.3d at 146 (citation omitted). Indeed, "the factual extent of Travelers' relationship with Manville … ultimately served as the lynchpin" for the analysis. *Id.* at 157. Yet in the decision below, the court of appeals failed to apply the plain terms of the injunction and categorically eliminated all factual inquiry from the analysis, thereby disregarding the factual circumstances giving rise to the § 400 Claims. (*See* 29a-30a, 34a-35a.)

The court of appeals' decision below directly

conflicts with its construction of the injunctive terms in *Manville III* and *Manville IV* as well as with this Court's construction in *Travelers*. Certiorari is warranted to resolve these divergent views.

B. The Question Presented Raises Issues This Court Granted Certiorari To Decide But Left Open in *Travelers Indemnity Co. v. Bailey*

Certiorari is particularly appropriate to resolve an issue this Court has previously left open. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 220 (2003); *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161-62 (1999); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 (1991). That is precisely the case here.

In 2008, this Court granted certiorari in *Travelers* to decide issues that closely match those presented here: whether the Second Circuit erred by "failing to apply as written a federal statute (11 U.S.C. §§ 524(g) and (h)) by limiting the scope of relief in a manner that is contrary to the express terms and purposes of that statute" and by "failing to respect important principles of finality and repose, and the express provisions of § 524(g)." *Travelers Indem. Co. v. Bailey*, No. 08-295, Order at 1 (U.S. Dec. 12, 2008). Yet "owing to the posture" of the litigation, the Court did "not address the scope of an injunction authorized by that section," *i.e.*, § 524(g)(4)(A)(ii). *Travelers*, 557 U.S. at 155.

That issue is squarely presented here, with the court of appeals ruling on a purely legal question concerning the scope of the injunctive language of § 524(g)(4)(A)(ii). This matter presents a

particularly suitable vehicle for the issuance of a writ of certiorari to settle vitally important and recurring questions concerning the scope of § 524(g).

II. THE SECOND CIRCUIT'S HOLDING THAT "ARISES BY REASON OF" IN § 524(g) IS NARROW AND EXCLUDES "BUT FOR" CAUSATION CONFLICTS WITH PRECEDENT FROM THIS COURT AND MANY COURTS OF APPEALS

Congress broadly defined the scope of § 524(g) by using expansive statutory phrases, such as "directly or indirectly liable" and "arises by reason of." These terms are not superfluous. Yet instead of applying the plain terms of the statute, the Second Circuit fashioned a narrow interpretation that finds no support in the language or purposes of the statute and creates a profound split with decisions of this Court and other courts of appeals. Certiorari is urgently needed to resolve the sharp conflict created by the decision below on an important and recurring federal question of statutory construction.

A. "Arises by Reason of" Is a Broad Statutory Term

The plain meaning of "arises by reason of" is broad and easily encompasses the § 400 Claims. "'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-76 (2009) (citation omitted). The Second Circuit failed to consider the ordinary meaning of "by reason of" and instead narrowly confined that term to mean the "*legal* consequence of." (30a (emphasis in original).)

This constrained construction ignores the plain language of § 524(g) and directly conflicts with "the breadth with which many courts have interpreted language such as 'by reason of.'" *United States v. Lowe*, 29 F.3d 1005, 1010-11 (5th Cir. 1994); *see Barry v. Barry*, 28 F.3d 848, 851 (8th Cir. 1994). The phrase "by reason of" is a "broad," "expansive[]," "supple," and "flexible" term that "is able to cover a myriad of potential factual scenarios that cannot be anticipated *ex ante* by the legislature." *Heffernan v. Pac. Dunlop GNB Corp.*, 965 F.2d 369, 375 (7th Cir. 1992). Yet the Second Circuit confined the reach of "by reason of" only to claims where liability is a "*legal* consequence of" the third party's relationship with the debtor – a narrow and inflexible standard that disregards the factual circumstances giving rise to the claims. (30a (emphasis in original); *see also* 34a-35a.) The Second Circuit refused to give the plain words of the statute their ordinary meaning.

Ignoring the plain meaning of "by reason of," and despite acknowledging that "Section 524(g) does not explicitly indicate whether the phrase 'by reason of' refers to legal or factual causation, or some combination of the two," the court of appeals categorically eliminated factual causation from the phrase "by reason of" and substituted instead what the court calls "legal" causation. (30a.)[2] By that, the court means "that the relationship" at issue under § 524(g)(4)(A)(ii) – whether ownership, management,

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[2] "Legal cause" is usually synonymous with "proximate cause," which limits the scope of liability for cause-in-fact. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263, § 42, at 273 (5th ed. 1984).

insurance, or financing – "must be a legal cause of or a legally relevant factor to the third party's alleged liability." (30a.) In so holding, the Second Circuit concluded that "by reason of" does *not* invoke "but for" causation. (29a-30a.) The court of appeals' approach squarely conflicts with precedent by this Court and the courts of appeals construing the same statutory term in a variety of contexts.

B. The Second Circuit's Decision Conflicts With Rulings from this Court and Many Courts of Appeals

1. The court of appeals' decision below intolerably conflicts with this Court's repeated holdings that Congress's use of the phrase "by reason of" entails "but for" causation – *i.e.*, cause-in-fact. This Court has held that "the phrase, 'by reason of,' requires at least a showing of 'but for' causation." *Gross*, 557 U.S. at 176 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653-54 (2008)). Indeed, under "a simple literal interpretation," the phrase "by reason of" can be satisfied "simply on [a] showing" of "but for" causation. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68 (1992) (citation and internal quotation marks omitted).[3]

The court of appeals' decision below also conflicts with other courts of appeals that have held that the phrase "by reason of" invokes "but for" causation. *UMG Recordings, Inc. v. Shelter Capital Partners*

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[3] In *Holmes*, based on the particular legislative history of § 1964(c) of the RICO Act, the Court determined that in that instance "by reason of" requires not only "but for" cause, but "proximate cause as well." 503 U.S. at 267-68.

LLC, 667 F.3d 1022, 1033 n.7 (9th Cir. 2011) (citing cases). The Eighth Circuit has held that the "language 'by reason of …' is unambiguous and sets forth a simple cause-in-fact or 'but-for' causation test." *Spirtas Co. v. Ins. Co. of Pa.*, 555 F.3d 647, 652 (8th Cir. 2009). The Third Circuit has similarly noted that the phrase "by reason of" "clearly establishes … but for causation." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 301 n.4 (3d Cir. 2007). The First Circuit has held that the "unambiguous" phrase "by reason of" "means 'because of,' and thus necessitates an analysis at least approximating a 'but-for' causation test." *Pac. Ins. Co. v. Eaton Vance Mgmt.*, 369 F.3d 584, 589 (1st Cir. 2004) (citation omitted). The Second Circuit has also held that the phrase "'by reason of' boils down to a but-for causation test." *Robinson Knife Mfg. Co. v. Commissioner*, 600 F.3d 121, 131-32 (2d Cir. 2010); *see also Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 39-40 (2d Cir. 2012).

For instance, in *UMG Recordings*, the Ninth Circuit construed a provision in the federal Digital Millennium Copyright Act ("DMCA"), the scope of which turned in part on the statutory term "by reason of." 667 F.3d at 1031. The court held that "by reason of" is "broad[] causal language" that readily encompassed the particular facts at issue. *Id.* The Ninth Circuit relied upon other courts of appeals that have concluded "'by reason of' should be read to require … 'but for' … causation." *Id.* at 1033 & n.7.

The Second Circuit recently followed the Ninth Circuit's broad construction of "by reason of" in another DMCA case, *Viacom*, 676 F.3d at 39-40. Contrary to its decision below, the Second Circuit in

Viacom construed "by reason of" using principles of "but for" causation and held that the particular facts came within the statutory provision. *Id.* at 30, 40 (citations omitted).

The Second Circuit's divergent construction of the identical statutory term "by reason of" – as invoking "but for" causation in *Robinson Knife* and *Viacom*, while eliminating "but for" causation in this matter – exemplifies the conflict created by the decision below. This Court has granted certiorari to resolve conflicting constructions of identical or similar language in analogous statutes. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002); *Gutierrez v. Ada*, 528 U.S. 250, 254 (2000).

2. The Second Circuit's decision further creates untenable conflicts with decisions of this Court on construing statutes generally and the Bankruptcy Code in particular. Rather than apply the plain terms of § 524(g), the court of appeals effectively rewrote the statute by inserting terms that improperly narrow the scope of a 524(g) injunction. The court stated that "to fit within the parameters of ... § 524(g), the liability sought to be imposed must arise as a *legal* consequence of one of the four enumerated relationships" in § 524(g)(4)(A)(ii). (30a (emphasis in original); *accord* 34a-35a.) Yet when enacting § 524, Congress knew how to use such restrictive language as "legal consequences." Indeed, Congress used the virtually identical phrase "the legal effect and consequences of" three times in other provisions of § 524 – *i.e.*, §§ 524(c)(3)(C), (d)(1)(B), and (k)(5)(A) – but not in § 524(g)(4)(A)(ii).

A fundamental principle of statutory construction is that when Congress uses particular language in

one section of a statute but omits it in another, its actions are purposeful and intentional. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Russello v. United States*, 464 U.S. 16, 23 (1983). This Court has consistently employed a strict plain meaning rule for cases involving the Bankruptcy Code. *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). "When Congress want[s] to restrict the application of a particular provision of the [Bankruptcy] Code," it does so in the plain text of the provision. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 n.5 (1989). Congress did not enact the restriction that the Second Circuit inserted into § 524(g)(4)(A)(ii), in violation of this Court's decisions and "longstanding" "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004).

By inserting the narrowing modifier "legally" into the phrase "arises by reason of" (30a, 34a-35a), the court of appeals significantly attenuated the entire analysis and improperly cabined the permissible reach of § 524(g) of the Bankruptcy Code, into which "an absent word" cannot be read. *Lamie*, 540 U.S. at 538. By rewriting this provision and imposing its limitation, the court of appeals decided that the § 400 Claims cannot be enjoined under § 524(g). The Second Circuit's addition of the word "legally" and its narrow interpretation of the injunctive language teamed up to drive the facts out of the analysis. Rather than narrowing § 524(g) to eliminate cause-in-fact, courts must adhere to the statute's plain meaning.

C. The Second Circuit's Reasoning Is Erroneous

In disregarding the plain meaning of "arises by reason of" in § 524(g), the court of appeals supported its erroneously narrow interpretation of § 524(g)(4)(A)(ii) by devising a wholly inapt hypothetical drawn from a different provision of the statute.

The court of appeals first made the qualified, "background" observation that "each of these four relationships [in § 524(g)(4)(A)(ii)] is of a sort that could, *legally*, have given rise to *actual* liability in appropriate circumstances prior to § 524(g)'s enactment." (30a (emphasis in original).) It is unclear what this observation demonstrates since all "actual liability" is, by definition, "legal liability." Indeed, application of § 400 of the Restatement (Second) of Torts (1965) could *legally* have given rise to *actual* liability on the part of a corporate parent due to the conduct of its subsidiary prior to Congress's enactment of § 524(g) in 1994. *See, e.g., Forry v. Gulf Oil Corp.*, 237 A.2d 593, 599 (Pa. 1968); *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134, 139-40 (Pa. Super. Ct. 1987). In any event, the court noted that "[t]his circumstance does not conclusively establish that § 524(g)(4)(A)(ii)'s channeling authority is limited to situations in which the third party's relationship with the debtor is legally relevant to its purported liability, so that a bankruptcy court is not authorized to bar litigation when the relationship is merely a 'but for' cause of the alleged liability." (32a.)

To "render[] definite" its narrow construction of § 524(g)(4)(A)(ii)'s channeling authority, the court of

appeals then looked to the "by reason of" language in a different subsection, § 524(g)(3)(A)(ii). (33a.) Under this provision, once a debtor's 524(g) plan has become final, "'[n]o entity that'" later becomes a successor to any of the debtor's assets "'shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a … successor.'" (*Id.* (quoting 11 U.S.C. § 524(g)(3)(A)(ii).) To test and criticize the reach of what it viewed as potentially limitless "but for" causation, the court of appeals posed a hypothetical: a company succeeds to the assets of a bankrupt estate, hires employees to administer those assets, engages in age discrimination in the hiring process, and then seeks to use § 524(g) to avoid liability in a discrimination suit. (*Id.*)

Dispositive factual and logical distinctions between the hypothetical and the claims at issue here render the hypothetical of no assistance in construing the scope of § 524(g)(4)(A)(ii). In the hypothetical, the successor's subsequent conduct – not the debtor's pre-bankruptcy conduct – forms the basis of the age discrimination claims and the successor's potential liability. That is, an "age discrimination claim would not be levied 'by reason of' the company's acquisition of these assets, but 'by reason of' the alleged discrimination itself." (33a-34a.) Such claims bear no substantive nexus to the company having succeeded to the assets of the debtor's estate.

In stark contrast to the hypothetical successor's post-bankruptcy discriminatory acts, Pfizer's alleged "apparent manufacturer" liability arises by reason of Quigley's pre-bankruptcy conduct in making and

selling Insulag. Quigley – the debtor – designed, manufactured, and sold Insulag. The presence of Pfizer's logo injured no one, and contrary to the court of appeals' suggestion, Pfizer's alleged "liability as an 'apparent manufacturer' under § 400" does not "hinge[] on the presence of Pfizer's name and logo on Quigley's products." (30a.) The product defect – without which there can be no § 400 liability under Pennsylvania law – that allegedly caused injury to the asbestos claimants was the lack of an adequate warning on Quigley's product. The claims thus seek to impose on Pfizer liability for the same alleged injuries from the same sales of the same allegedly defective products that Quigley – not Pfizer – manufactured, marketed, and sold.

Contrary to the court of appeals' suggestion, Quigley's use of Pfizer's logo did not have "an accidental nexus" to Pfizer's ownership of Quigley. (34a.) It was inextricably intertwined with it. Also contrary to the court's suggestion, Pfizer did not argue for the adoption of a "but for" causation standard – let alone a potentially limitless or "accidental" one with no substantive nexus to the claim – when construing "by reason of." (*See* 29a-30a, 33a-34a.) Rather, Pfizer repeated the bankruptcy court's undisputed factual finding that Quigley would not have used Pfizer's name and logo "but for" Pfizer's ownership of Quigley. (71a-72a, 75a.) Pfizer's ownership of Quigley was not a mere superficial and remote "but for" cause of Quigley's use of Pfizer's name and logo. It was the singular reason that Quigley used Pfizer's name. The bankruptcy court found that "[u]nder the facts presented, the joinder of the Quigley and Pfizer names and logos is a statement of corporate

affiliation." (75a.) This entire situation is in no sense comparable to the court of appeals' hypothetical, which posited liability arising from conduct unrelated or "accidental" to the entity's receipt of the debtor's assets and substantively unrelated to the debtor's pre-bankruptcy conduct.

Moreover, in attempting to buttress its "legal" as opposed to "factual" causation construction of § 524(g), the Second Circuit illustrates the weaknesses of its constrained construction. In searching for the type of liability that might fit its narrow construct, the court cites "an aiding and abetting theory, as when one party induces another to commit a tort." (31a-32a.) Yet aiding and abetting liability does not "arise[] … as a legal consequence of one of the four relationships" in the statute (34a-35a), but it is highly dependent upon the facts of the relationship. Indeed, "when one party induces" a stranger "to commit a tort," he will be liable if the stranger does so, even though these strangers have no other "relationship." (*See id.*); Restatement (Second) of Torts § 876(b) & cmt. *d*, illus. 4, 7 (1979). Further, in citing "an aiding and abetting theory" in inducing the commission of a tort, the court qualifies its example by making it dependent on the "given particular facts" (31a-32a), all of which exposes the incoherence of its categorical exclusion of cause-in-fact under § 524(g).

So, too, the court's "piercing the corporate veil" example (31a) – which, as the case it cites makes clear, requires that "the control is utilized to perpetrate a fraud or other wrong," *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1052-53 (2d Cir. 1997) – would protect the malfeasant corporate

parent. But perversely the court's construct would not protect an innocuous parent, such as Pfizer, under the "apparent manufacturer" theory under Pennsylvania law at issue in this matter.

The court of appeals' decision erodes the broad protections that § 524(g) was enacted to provide, undercuts the certainty needed for third parties to contribute substantial assets to a 524(g) trust, and imperils the optimal resolution of asbestos-related chapter 11 cases. Certiorari is needed to provide guidance on the vitally important federal question as to the scope of the injunctive provision of § 524(g).

III. THE QUESTION PRESENTED RAISES FEDERAL ISSUES OF GREAT IMPORTANCE IN ASBESTOS-RELATED CHAPTER 11 CASES

The federal issues raised in this matter transcend Quigley's chapter 11 case because the Second Circuit went beyond ruling solely on the scope of the API and anchored its analysis to § 524(g), which the API tracks and which affects nearly every asbestos-related chapter 11 case. The ruling below thus affects the application and scope of not only the 524(g) injunction proposed in Quigley's plan of reorganization, but also the scope of 524(g) asbestos-channeling injunctions and the assets available to satisfy claims in other asbestos-related bankruptcies.

The scope of the injunctive provision of § 524(g) is a legal issue that frequently arises in asbestos-related chapter 11 cases. *See, e.g.*, *Thorpe Insulation*, 677 F.3d at 877-78, 886-87, 891. Indeed, the Second Circuit's "narrow[]" and "strict interpretation" below has already been invoked in an asbestos-related bankruptcy case in another Circuit. *In re W.R. Grace*

& Co., __ B.R. __, 2012 WL 2130981, at *30 & n.58 (D. Del. June 11, 2012). The federal issues raised by the question presented are thus recurring ones that require urgent guidance from this Court, "the matter being of considerable practical importance in the administration of the Bankruptcy Act." *City of N.Y. v. Saper*, 336 U.S. 328, 329 (1949).

The Constitution empowers Congress to "establish … uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. This provision requires that bankruptcy laws operate uniformly, *Ry. Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193-94 (1819), which amplifies the importance of the federal question presented.

The Second Circuit constrained the reach of a 524(g) injunction for any third party identified in § 524(g)(4)(A)(ii), including owners, managers, insurers, financers, and others:

> We conclude that the phrase "by reason of," as employed in 11 U.S.C. § 524(g)(4)(A)(ii), requires that the alleged liability of a third party for the conduct of or claims against the debtor arises, in the circumstances, as a legal consequence of one of the four relationships between the debtor and the third party enumerated in subsections (I) through (IV).

(34a-35a; *see also* 30a.) Such a narrow construction affects the reach of the 524(g) asbestos-channeling injunctions that are associated with not only future

but also existing asbestos trusts nationwide. At least "fifty-six asbestos personal-injury trusts" have been created, "with several more in process," *Federal-Mogul*, 684 F.3d at 360, and some $40 billion has been allocated to or earmarked for post-*Manville* asbestos trusts. Lloyd Dixon et al., RAND Corp., *Asbestos Bankruptcy Trusts* 28 tbl.4.1 (2010).

"Congress believed" that the § 524(g) framework "served the 'fundamental' purposes of bankruptcy." *Federal-Mogul*, 684 F.3d at 378-79. Yet those uniform nationwide purposes are frustrated by the Second Circuit's decision, which unduly limits the reach of a 524(g) injunction. Where asbestos-channeling injunctions track the language of § 524(g), the scope of the claims enjoined can, by definition, only reach those covered by § 524(g). For example, many 524(g) plans apply injunctive language that tracks § 524(g) or provides that the scope of the injunction shall be that permitted by § 524(g). *See, e.g.*, *In re Durabla Mfg. Co.*, No. 09-14415(MFW), Dkt. [889] at ECF 27 (Bankr. D. Del. June 27, 2012) (confirming plan (Dkt. [856] at ECF 59) ("'Protected Party' means … the Settling Asbestos Insurance Companies, to the fullest extent, but only to the extent, provided by Bankruptcy Code § 524(g) in respect of any claim that arises by reason of one of the activities enumerated in § 524(g)(4)(A)(ii)")); *In re Congoleum Corp.*, No. 3:09-cv-4371-JAP, Dkt. [664] at ECF 44 (D.N.J. June 7, 2010) (extending "the Asbestos Channeling Injunction to third parties ... consistent with § 524(g)(4)(A)(ii)"); *In re N. Am. Refractories Co.*, No. 2:07-mc-318-GLL, Dkt. [1] at 4 n.3 (W.D. Pa. Dec. 18, 2007) ("NARCO Protected Parties will receive the protections of the NARCO Channeling Injunction only to the extent permitted

by Section 524(g), including 524(g)(4)(A)(ii)").

The court of appeals' narrowing of the reach of § 524(g) is likely to upset the reasonable reliance, predictability, and settled expectations that existed when third parties transferred billions of dollars into 524(g) trusts, whose scope has, in retrospect, now been limited by the decision below. Such third party contributions often constitute the "'cornerstone'" of 524(g)-based reorganizations. *See Travelers*, 577 U.S. at 141; *Thorpe Insulation*, 677 F.3d at 891.

If the scope of a 524(g) asbestos channeling injunction is narrowed or uncertain, it would have a chilling effect on future settlements and interfere with the ability of bankruptcy courts and parties-in-interest to foster efficient and consensual global resolutions in complex asbestos-related chapter 11 cases. The billions of dollars that have already been transferred into 524(g) trusts would likely never have been transferred if protected third parties knew that their bargained-for global finality would later be eroded by a judicial construction that limits the scope of a 524(g) injunction. The repose in numerous asbestos litigations that were thought to be resolved under § 524(g) – at the cost of billions of dollars of third party contributions to 524(g) trusts – is now at risk. The decision below, if permitted to stand, has the potential to revive previously resolved asbestos-related claims, with unmanageable and catastrophic consequences for the courts and contributing third parties alike. This Court's review is warranted to prevent those avoidable harms and to effectuate Congress's legislative goals in § 524(g).

The decision below also has the untoward effect of creating enormous uncertainty by allowing claimants

to try to plead around § 524(g). Addressing the enumerated relationships in § 524(g)(4)(A)(ii), the Second Circuit concluded (in derogation of the undisputed facts) that the claims at issue "do not attempt to fix on Pfizer liability 'arising by reason of' Pfizer's 'ownership of a financial interest in' Quigley" (35a), and thus it is not necessary to "address whether the suits seek to hold Pfizer directly or indirectly liable for the conduct of Quigley." (29a n.17.) Under this decision, to try to circumvent the reach of an asbestos-channeling injunction under § 524(g), a claimant could plead that the alleged liability of the non-debtor third party does not "arise[] … as a legal consequence of one of the four enumerated relationships." (34a-35a.)

This Court's review is required to provide guidance on important federal issues that frequently recur in asbestos-related bankruptcies.

IV. THE SECOND CIRCUIT'S NARROW CONSTRUCTION UNDERMINES CONGRESS'S INTENT IN ENACTING § 524(g), CREATING STATUTORY QUESTIONS THAT ONLY THIS COURT CAN RESOLVE

In enacting § 524(g), Congress sought to harmonize the interests of the debtor, certain third parties, and asbestos claimants. *Federal-Mogul*, 684 F.3d at 357-59, 362, 378-80. The "supplemental injunctions" established in § 524(g), Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113-17, are available to certain third parties, such as a debtor's parent, that – subject to the rigorous procedural safeguards of § 524(g) – contribute substantial financial assets to the 524(g) trust for the benefit of present and future asbestos

claimants. The supplemental injunctions provided by § 524(g) expanded the scope of relief available under the Bankruptcy Code to meet a growing onslaught of asbestos claims and the ensuing financial troubles of asbestos defendants.

"[T]he § 524(g) injunction aims to 'control the future litigation of all asbestos-related claims against the parties it protects.'" *Thorpe Insulation*, 677 F.3d at 877 (quoting 4 Collier on Bankruptcy ¶ 524.07[3] (16th ed. 2009)). Thus, by design, § 524(g) is intended to be broad in scope and "contemplates wide-reaching," *Pace v. AIG, Inc.*, 2010 WL 1325657, at *6 (N.D. Ill. Mar. 30, 2010), and "sweeping channeling injunctions." *Thorpe Insulation*, 677 F.3d at 887. It allows courts to craft "a broad channeling injunction that offers protection to a broad group of parties in interest" with "the inclusive protection of parents." Susan Power Johnston & Katherine Porter, *Extension of Section 524(g) of the Bankruptcy Code to Nondebtor Parents, Affiliates, & Transaction Parties*, 59 Bus. Law. 503, 512, 518 (2004). The legislative history of § 524(g) reveals that this provision was intended to protect certain third parties, such as corporate parents, from asbestos-related claims involving the debtor's products.

> To those companies willing to submit to the stringent requirements in this section designed to ensure that the interests of asbestos claimants are protected, the bankruptcy courts' injunctive power will protect those debtors and certain third parties … from future asbestos product litigation of the type which forced them into

> bankruptcy in the first place.

140 Cong. Rec. 8,021 (1994) (statement of Sen. Graham).

Section 524(g) is thus intended to be "a powerful tool for resolving any situation in which present and future liabilities are widespread, liability is impossible to determine fully at the time of the bankruptcy, and … affiliates of the debtor face lawsuits based on the debtor's alleged liability." Johnston & Porter, *supra* at 515. Where, as here, there are well over a hundred thousand asbestos personal injury claims pending against the debtor and its parent in many states, § 524(g) is "the only guaranteed method for containing asbestos liability for corporate parents and buyers," *id.* at 514, and ultimately maximizing the resources available to pay the claims of those persons allegedly injured by the debtor's asbestos-containing products.

To obtain the protection of a channeling injunction, a contribution must be made to the trust by or on behalf of the third party for the benefit of all claimants. *See* 11 U.S.C. § 524(g)(4)(B)(ii). As the legislative history demonstrates, § 524(g) is "about growing the pie available" to pay asbestos-related claims, 140 Cong. Rec. 8,021 (statement of Sen. Brown); *accord id*. at 8,022 (statement of Sen. Heflin), and facilitating the receipt of the "maximum value" for those claims. *Id.* at 28,358 (statement of Sen. Heflin). "By providing a trust to pay claims and an injunction channeling the present and future asbestos claims to that trust, the debtor and third parties … will be encouraged to participate in a system that will maximize the assets available to pay

asbestos claims." *Id.* at 8,021 (statement of Sen. Graham); *see id.* at 27,699 (statement of Rep. Fish).

Though the Second Circuit recognized that § 524(g) was enacted "to provide an incentive for parent or affiliated companies … to contribute to the trust" (28a), to be appropriately incentivized to cause substantial resources to be contributed to fund a 524(g) trust, a third party contributor needs certainty that future asbestos claims against it are enjoined. As with the debtor, "the very speculation that a claimant may be allowed to sue the company hurts its ability to maximize the trust's assets to pay claims." 140 Cong. Rec. 8,022 (statement of Sen. Heflin).

The Second Circuit's decision undermines that needed certainty and undercuts Congress's intent in enacting § 524(g). If financially sound non-debtor parents are not protected from tort liability based on the debtor's conduct and the parent's ownership of the debtor, then non-debtor parents will be reluctant to have funds committed to the trust, thus decreasing the assets available to satisfy claims for asbestos-related injuries and thwarting a major goal of § 524(g). The court of appeals' narrowing of § 524(g) also affects whether third parties who previously contributed substantial assets to 524(g) trusts get to keep the benefit of their bargain.

Moreover, by allowing the § 400 Claims to proceed, the ruling below exposes the Quigley bankruptcy estate to depletion because Pfizer has the right to draw on the Quigley-Pfizer shared liability insurance to satisfy any settlements, judgments, or defense costs for asbestos-related claims. (17a-18a, 90a.) The Quigley-Pfizer shared

insurance is property of the Quigley estate, and Quigley commenced the underlying chapter 11 case to preserve the insurance and to use it to fund a 524(g) trust. (63a, 90a.) As the bankruptcy court recognized, unless the claims against Pfizer are enjoined, claimants will continue to sue Pfizer until the Quigley-Pfizer shared insurance is exhausted. (90a.)

Exposing Pfizer to continued prosecution of claims concerning Quigley's asbestos-containing products undermines the balance created by Congress, which seeks to maximize the assets available to compensate asbestos claimants in chapter 11 cases by encouraging third parties to contribute assets to a 524(g) trust in exchange for a broad channeling injunction.

Without affording § 524(g) its intended breadth with respect to claims against third parties, claimants will frustrate orderly bankruptcy reorganizations, dissuade companies that are affiliated with a debtor from contributing their assets to a 524(g) trust, and inject needless uncertainty into asbestos-related restructurings. Each of these serious adverse effects exacerbates the multiple errors made by the Second Circuit and warrants certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted and this Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit (April 10, 2012)

United States Court of Appeals,
Second Circuit.
In re QUIGLEY COMPANY, INC.

Pfizer Inc., Appellant,
Quigley Company, Inc., Debtor–Appellant,
v.
Law Offices of Peter G. Angelos, Appellee.

Nos. 11–2635, 11–2767
Argued: Sept. 28, 2011
Decided: April 10, 2012

Before: WALKER, STRAUB, and LIVINGSTON, Circuit Judges.

LIVINGSTON, Circuit Judge:

This case requires us to address the scope of federal bankruptcy jurisdiction over suits against non-debtor third parties, as well as the scope of a stay issued pursuant to 11 U.S.C. § 524(g)(4). In reaching these questions, we are also called upon to clarify our own jurisdiction to hear appeals from decisions of district courts reviewing bankruptcy court orders.

Appellant Pfizer Inc. ("Pfizer") and Debtor–Appellant Quigley Co., Inc. ("Quigley") (collectively "Appellants") appeal from a judgment entered May 23, 2011 in the United States District Court for the Southern District of New York (Holwell, *J.*) reversing the Clarifying Order of the bankruptcy court

(Bernstein, *C.J.*) and holding that Appellee Law Offices of Peter G. Angelos ("Angelos") may bring suit against Pfizer for claims based on "apparent manufacturer" liability under Pennsylvania law. We determine that we have jurisdiction to hear the appeal; that the bankruptcy court had jurisdiction to issue the Clarifying Order; and that the Clarifying Order does not bar Angelos from bringing the suits in question against Pfizer. Accordingly, we affirm the district court.

BACKGROUND

Quigley was involved in the manufacture of "refractories," which are "materials that retain their strength at high temperatures." *In re Quigley Co., Inc.,* 449 B.R. 196, 198 (S.D.N.Y.2011) ("District Court Opinion"). In the decades from the 1930's through the 1970's, some Quigley products, including a product known as "Insulag," which was primarily used as an insulator in high heat environments, contained asbestos. *Id.* Pfizer acquired Quigley in 1968, the latter becoming Pfizer's wholly-owned subsidiary. *Id.* Post-acquisition, various marketing materials for Quigley products, including Insulag, "began to include the Pfizer name, logo, and trademark." *Id.* After the hazardous effects of asbestos became widely known, more than 160,000 plaintiffs filed asbestos-related suits against Quigley. *Id.* at 199. Many of these suits also named Pfizer as a defendant. *Id.* Quigley filed for Chapter 11 bankruptcy in 2004. *Id.*

Important to the instant litigation are a number of insurance policies that Quigley and Pfizer share ("Insurance Policies") as well as "the funds contained in a certain insurance trust under which Quigley and

Pfizer are joint beneficiaries" ("Insurance Trust"). Original Preliminary Injunction ("OPI") at 3. As found by the bankruptcy court, Pfizer and Quigley have used and may continue to use the policies and the trust "to satisfy settlements, judgments and defense costs related to ... Asbestos Related Claims." *Id.* The Insurance Policies and Insurance Trust cover claims against Pfizer or Quigley "on a first billed, first paid basis, irrespective of amounts previously billed by or paid to Pfizer or Quigley." *Id.* Quigley contemplates that "the remaining limits under the Shared Insurance Policies and the amounts contained in the Insurance Trust ... will be used to fund [its] pre-negotiated plan of reorganization." *Id.*

In 2004, the bankruptcy court granted Quigley's motion for a preliminary injunction (the OPI), pursuant to 11 U.S.C. §§ 105(a) and 362(a), enjoining "all parties ... from taking any action in any and all pending or future Asbestos Related Claims against Pfizer during the pendency of Quigley's chapter 11 case." *Id.* at 5–6. The goal of the OPI was to prevent "depletion of the Shared Insurance Policies and the Insurance Trust assets," which would "cause immediate and irreparable injury to Quigley's estate and impair Quigley's ability to implement its pre-negotiated chapter 11 plan and successfully reorganize under chapter 11." *Id.* at 4. The OPI allowed a party asserting that "it holds an Asbestos Related Claim solely against Pfizer based on a product having no relation to Quigley" to obtain relief from the injunction by demonstrating to the bankruptcy court's satisfaction that such claim truly arose from a product having no relation to Quigley and also that the Insurance Policies and Insurance

Trust "could not be utilized to satisfy any portion of the defense costs, settlements or judgments" related to the claim and would not be "diminished or impaired by [its] prosecution." *Id.* at 6.

In 2007, the bankruptcy court modified the preliminary injunction "to parallel the more limited ... injunction" contemplated by Quigley's proposed reorganization plan. *In re Quigley Co., Inc.,* Bankruptcy No. 04–15739 (SMB), 2008 WL 2097016, at *2 (Bankr. S.D.N.Y.May 15, 2008) ("Clarifying Order" or "CO"). As set out in the bankruptcy court's order, the Amended Preliminary Injunction ("API") tracked the language of § 524(g)(4)(A)(ii) of the Bankruptcy Code. Section 524(g) authorizes bankruptcy courts in asbestos-related bankruptcies to enter, in connection with confirmation of a reorganization plan, an injunction channeling certain classes of claims to a trust set up in accordance with the plan. The trust makes payments to both present and future claimants, thereby helping to ensure that legitimate claimants against the bankruptcy estate who develop symptoms of asbestos-related disease years after the estate's assets would otherwise have been depleted are able to recover. The API here, employing § 524(g)(4)(A)(ii)'s language, provided as follows:

> [P]ursuant to sections 105(a) and 362(a) of the Bankruptcy Code, during the pendency of Quigley's chapter 11 case, all parties ... are hereby stayed, restrained and enjoined from commencing or continuing any legal action against Pfizer alleging that Pfizer is directly or indirectly liable for the conduct of, claims against, or demands on Quigley to the extent

> such alleged liability of Pfizer arises by reason of—
>
> (I) Pfizer's ownership of a financial interest in Quigley, a past or present affiliate of Quigley, or a predecessor in interest of Quigley;
>
> (II) Pfizer's involvement in the management of Quigley or a predecessor in interest of Quigley; or service as an officer, director or employee of Quigley or a related party;
>
> (III) Pfizer's provision of insurance to Quigley or a related party;
>
> (IV) Pfizer's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of Quigley or a related party, including but not limited to—
>
> > (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
> >
> > (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

API at 2–3. The order further provided that "nothing contained in this order shall prohibit any party in interest from seeking relief from the automatic stay of section 362(a) of the Bankruptcy Code or the terms of this order by filing an appropriate motion with the Court." *Id.* at 6.

Beginning in 1999, Angelos brought multiple suits (the "Angelos suits") in Pennsylvania against

Pfizer on behalf of plaintiffs alleging they were injured by exposure to asbestos. CO at *2. At least some of these suits sought to hold Pfizer liable in connection with products containing asbestos and manufactured by Quigley under an "apparent manufacturer" theory of liability as set out in Restatement (Second) of Torts § 400. *Id.* The Angelos suits alleged that Pfizer's logo appeared on Quigley's advertising and the packages of Quigley's asbestos containing products. *Id.* at *5. Under § 400, "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." *Forry v. Gulf Oil Corp.,* 428 Pa. 334, 237 A.2d 593, 599 (1968) (quoting Restatement (Second) of Torts § 400 (1965)) (internal quotation marks omitted). Angelos moved for partial summary judgment against Pfizer on the issue of liability in many of these suits, and in response Pfizer moved in the bankruptcy court to enforce the API against Angelos. CO at *2–3. Angelos argued that the liability it sought to impose on Pfizer was based on Pfizer's own conduct in permitting its label to be affixed to Quigley products containing asbestos and to Quigley advertising, and therefore its suits were not barred by the API. *Id.* at *3.

In its Clarifying Order, the bankruptcy court began by noting that all the actions upon which Pfizer's liability is predicated in the Angelos suits were actually undertaken by Quigley, and that consequently the relevant inquiry for determining whether the API enjoins continuance of these suits is whether "Pfizer's liability 'arises by reason of' its ownership or management of Quigley," as the API, mirroring § 524(g)(4)(A)(ii), provides. *Id.* at *5. It

then observed that the phrase "arises by reason of" is ambiguous. On the one hand, the liability Angelos seeks to impose on Pfizer "arises by reason of the use of its name and logo by Quigley," not its ownership or management of Quigley. *Id.* (internal quotation marks omitted). On the other hand, "[b]ut for Pfizer's ownership and/or management of Quigley, its name and logo would never have been used" on Quigley products. *Id.*

The bankruptcy court concluded that the API does cover § 400 liability. It reasoned that the API plainly enjoins claims premised on successor and alter ego liability, and that both of these types of liability will often involve conduct by the third-party defendant that is more wrongful than "[t]he use of the Pfizer name and logo." *Id.* at *6. The bankruptcy court also noted the similarity between *respondeat superior* liability and liability imposed under § 400, since it concluded that both forms of liability are considered "derivative" under Pennsylvania law. *Id.* Suits alleging *respondeat superior* liability are clearly covered by the API so, the bankruptcy court reasoned, § 400 suits should be as well. *Id.*[1] The bankruptcy court determined that the API reaches the Angelos suits, and therefore it

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[1] Additionally, the bankruptcy court discussed our then-recent decision in *In re Johns–Manville Corp.,* 517 F.3d 52 (2d Cir.2008) (hereinafter "*Manville III*," to adhere to the numbering scheme employed by previous decisions discussing the long *Manville* line of cases), *rev'd sub nom. Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009), which it read to require that, to be enjoined under 11 U.S.C. § 524(g), a claim against a third party must be derivative. CO at *7.

directed Angelos and the plaintiffs in these suits to cease prosecution of them. *Id.* at *8.

Angelos appealed the CO to the United States District Court for the Southern District of New York. The district court did not quarrel with the bankruptcy court's determination that the conduct for which Angelos seeks to impose liability on Pfizer was Quigley's. District Court Opinion at 203–04. However, the district court disagreed with the bankruptcy court that the fact that Quigley would not have marked its products with Pfizer's name and logo but for Pfizer's ownership of Quigley leads to the conclusion that the API covers the Angelos suits. Instead, the district court viewed the relevant inquiry as whether the liability Angelos seeks to impose on Pfizer arises, *as a legal matter*, from its ownership of Quigley. *Id.* at 204–05. The district court found support for this position in our decision in *Manville III*, which it read as requiring, in cases interpreting the scope of an 11 U.S.C. § 524(g) injunction, "a legal analysis ... under state law to determine whether [a defendant] had 'an independent legal duty in dealing with the plaintiffs, notwithstanding the factual background in which [that] duty arose.'" *Id.* at 205 (quoting *Manville III*, 517 F.3d at 63). The district court explained that §400 imposes an independent duty on those putting themselves out as the apparent manufacturer of a product made by another not to hold themselves out as sponsors of defective products. *See id.* at 207. Because Angelos "seeks to bring separate direct actions against Pfizer ... because Pfizer breached an independent legal duty not to employ its name and logo in the marketing of a defective product," the Angelos suits, in the district court's view, fell outside

the scope of the API. *Id.* Accordingly, the district court reversed the bankruptcy court, permitting the Angelos suits to go forward in Pennsylvania state courts. *Id.* at 209.

The district court entered judgment for Angelos on May 23, 2011. Quigley moved for reconsideration, and the district court denied the motion.[2] This appeal followed.

DISCUSSION

This Court's Jurisdiction

The parties do not dispute our jurisdiction to hear this appeal. Nevertheless, "[w]e have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Coll. Standard Magazine v. Student Ass'n of State Univ. of N.Y. at Albany*, 610 F.3d 33, 35 (2d Cir. 2010) (per curiam) (internal quotation marks omitted). We have made clear in the past that 28 U.S.C. § 158(d) "is the exclusive source of court of appeals jurisdiction over orders of district courts

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[2] After entry of final judgment but before the decision on the motion to reconsider, Hissey Kientz L.L.P. and Hissey, Kientz & Herron P.L.L.C. (collectively "Hissey") gave notice of their intention to intervene, and moved to intervene on June 24, the same day the district court issued its decision denying Quigley's motion to reconsider. The district court granted the motion to intervene on June 27. On appeal, Appellants challenge the district court's grant of the motion to intervene, arguing that Hissey does not have standing. Because Hissey conceded at oral argument that its purposes in seeking to intervene would be vindicated if we were to treat it as an *amicus curiae*, we do so, and do not reach the standing question. The Clerk of Court is directed to amend the caption accordingly.

reviewing bankruptcy court rulings." *In re Lomas Fin. Corp.*, 932 F.2d 147, 150 (2d Cir.1991). Section 158(d)(1) provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" of United States district courts and bankruptcy appellate panels reviewing decisions of bankruptcy courts. *See* 28 U.S.C. § 158(a)–(b), (d).[3] But a district court's order can be final for purposes of appealability only if the order of the bankruptcy court below was also final. *See In re Fugazy Express, Inc.*, 982 F.2d 769, 775 (2d Cir. 1992) ("The district court's own decision of an appeal from the bankruptcy court is not a final decision for purposes of appeal to the court of appeals unless the order of the bankruptcy court was final."). Therefore, we may exercise jurisdiction over this appeal only if the order of the bankruptcy court was final.

"The standards for determining finality in bankruptcy differ from those applicable to ordinary civil litigation." *In re Sonnax Indus., Inc.,* 907 F.2d 1280, 1283 (2d Cir.1990). This difference is due to the "fact that a bankruptcy proceeding is umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant and that often involve decisions that will be unreviewable if appellate jurisdiction exists only at the conclusion of the bankruptcy proceeding." *Id.* Accordingly, we regard as final "orders that finally

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[3] Section 158(d) also provides for jurisdiction for courts of appeals to hear appeals on the basis of certification. *See* 28 U.S.C. § 158(d)(2). Because the instant appeal has not been certified, this provision is not relevant here.

dispose of discrete disputes within the larger case." *Id.* (emphasis omitted) (internal quotation marks omitted). Bankruptcy court orders lifting an automatic stay are final for purposes of appealability. *See, e.g.*, *In re Chateaugay Corp.,* 880 F.2d 1509, 1511 (2d Cir.1989). So are orders denying relief from an automatic stay, *see, e.g., In re Pegasus Agency, Inc.,* 101 F.3d 882, 885 (2d Cir.1996), so long as the bankruptcy court has not indicated that it contemplates further proceedings on the question of relief from the stay, *see Lomas*, 932 F.2d at 151; *In re Enron Corp.*, 316 B.R. 767, 770 (S.D.N.Y.2004).

Here, the Clarifying Order that is the subject of this appeal did not grant or deny relief from a stay; rather, it clarified that a stay applied to a particular party. But in *Lomas*, we stated that whether a bankruptcy court order "involve[s] an appeal from a denial of a motion to lift the automatic stay ... [or] involves an appeal from an order holding ... that the automatic stay applies to the action" is not "a distinction of consequence to the finality issue." *Lomas*, 932 F.2d at 151 n. 2. Furthermore, we have no reason to believe that the bankruptcy court contemplates additional proceedings as to the applicability of the stay to the Angelos suits. The bankruptcy court's resolution of the dispute between Angelos and the Appellants as to whether the stay applies to the Angelos suits is the equivalent of a decision from that court on a motion seeking relief from a stay. Accordingly, we agree with the district court's well-reasoned conclusion that the bankruptcy court's CO was final, *see In re Quigley*, No. M–47 (RJH), 2010 WL 356653 (S.D.N.Y. Jan. 27, 2010), and we thus have jurisdiction to hear this appeal.

The Bankruptcy Court's Jurisdiction to Issue the Clarifying Order

While the parties do not dispute our jurisdiction to hear this appeal, they do dispute the bankruptcy court's jurisdiction to enjoin the Angelos suits from going forward. *Amicus* Hissey suggests that the Supreme Court's recent opinion in *Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011), supports the view that the bankruptcy court's exercise of jurisdiction contravened Article III of the Constitution. Angelos argues that jurisdiction is lacking under the Bankruptcy Code. We disagree with both positions.

a. *Article III and the Bankruptcy Court's Jurisdiction*

Stern involved a dispute between the estates of Vickie Lynn Marshall (popularly known as Anna Nicole Smith and herein referred to as "Vickie"), the wife of the late J. Howard Marshall, and Pierce Marshall ("Pierce"), J. Howard Marshall's son. *Id.* at 2601. After the death of her husband, Vickie filed for bankruptcy in federal court. Pierce filed a proof of claim in that proceeding, charging that Vickie had defamed him in connection with a suit she had previously filed alleging that her husband intended to provide for her through a trust, and that Pierce had tortiously interfered with that gift. Upon Pierce's filing of a proof of claim in the bankruptcy proceeding, Vickie responded with a counterclaim for the alleged tortious interference. The bankruptcy court issued a final judgment in favor of Vickie on her counterclaim, *see id.* at 2601, and Pierce then challenged the bankruptcy court's jurisdiction to do so.

The Supreme Court held that the bankruptcy court's entry of final judgment on Vickie's counterclaim violated Article III of the Constitution.[4] *Id.* at 2608. "Article III," the Court reasoned, "could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* at 2609. The Court concluded that the entry of final judgment on Vickie's counterclaim "involve[d] the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derive[d] from nor depend[ed] upon any agency regulatory regime." *Id.* at 2615 (emphasis omitted). Accordingly, the counterclaim had to be decided by an Article III court.

Whatever *Stern's* precise contours (a matter we need not reach) we conclude that *Stern* has no application to the present case. The Supreme Court in *Stern* indicated that its holding was a narrow one. *See id.* at 2620 ("We conclude today that Congress, in one isolated respect, exceeded [Article III's] limitation in the Bankruptcy Act of 1984."); *see also In re Salander O'Reilly Galleries*, 453 B.R. 106, 115 (Bankr.S.D.N.Y.2011) ("*Stern* is replete with

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[4] Article III commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The Article further provides for the judges of these courts to hold their offices during good behavior, without diminution of salary. *Id.*

language emphasizing that the ruling should be limited to the unique circumstances of that case."). Its facts, moreover, are far removed from the instant situation. The CO and the API at issue here concern the stay of litigation during the pendency of Quigley's bankruptcy, rather than the entry of final judgment on a common law claim. Enjoining litigation to protect bankruptcy estates during the pendency of bankruptcy proceedings, unlike the entry of the final tort judgment at issue in *Stern*, has historically been the province of the bankruptcy courts. *See generally, e.g., In re Prudence Bonds Corp.*, 122 F.2d 258 (2d Cir. 1941) (discussing stays of litigation imposed by a bankruptcy court). Accordingly, the bankruptcy court was well within constitutional bounds when it exercised jurisdiction to enjoin the Angelos suits.

b. *Statutory Jurisdiction*

Statutory jurisdiction is a separate matter. 28 U.S.C. § 1334 provides for original jurisdiction in the district courts for "all cases under title 11" and "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 157(a), in turn, provides that district courts may refer all cases or proceedings over which they have jurisdiction under 28 U.S.C. § 1334(a) or (b) to the bankruptcy courts. The parties do not dispute that, if the district court had bankruptcy jurisdiction because the Angelos suits "aris[e] under title 11, or aris[e] in or [are] related to" the Quigley bankruptcy, the bankruptcy court's exercise of jurisdiction was

proper.[5]

Bankruptcy jurisdiction is appropriate over "third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Manville III*, 517 F.3d at 66; *see also In re Cuyahoga Equip. Corp.,* 980 F.2d 110, 114 (2d Cir.1992) ("The test for determining whether litigation has a significant connection with a pending bankruptcy [sufficient to confer bankruptcy jurisdiction] is whether its outcome might have any conceivable effect on the bankrupt estate." (internal quotation marks omitted)).[6] The application of this test to the claims at issue would at first glance

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[5] In the OPI, the bankruptcy court found that the proceeding before it was a "core proceeding" within the terms of 28 U.S.C. § 157(b)(2), thus enabling it to issue orders rather than merely to make proposed findings of fact and conclusions of law, *see* 28 U.S.C. § 157(b)(1), (c)(1). Angelos does not question this conclusion before us, or even cite 28 U.S.C. § 157 in its brief, and has thereby waived any objection to the bankruptcy court's determination. *See, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Although Hissey's brief alludes to 28 U.S.C. § 157, "an issue raised only by an *amicus curiae* is normally not considered on appeal"; we see no reason to depart from this general rule here. *Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 436 n. 5 (2d Cir. 2002).

[6] We have also expressed the test for bankruptcy jurisdiction as an inquiry whether the third-party action has "a significant connection" with the bankruptcy case in question. *In re Turner*, 724 F.2d 338, 341 (2d Cir.1983) (Friendly, J.) (internal quotation marks omitted). Any possible difference between these two standards is immaterial for our purposes, as the exercise of bankruptcy jurisdiction was proper if the Angelos suits satisfy either test. *See Cuyahoga*, 980 F.2d at 114.

appear straightforward. The Insurance Policies and Insurance Trust are the joint property of Pfizer and Quigley's estate. *See In re Johns–Manville Corp.*, 600 F.3d 135, 152 (2d Cir. 2010) (per curiam) ("*Manville IV* ") ("[T]he insurance policies that Travelers issued to Manville are the estate's most valuable asset."); *MacArthur Co. v. Johns–Manville Corp.*, 837 F.2d 89, 92 (2d Cir.1988) (agreeing with the "[n]umerous courts [that] have determined that a debtor's insurance policies are property of the estate"). If the Angelos suits succeed—or even if they merely require Pfizer to incur defense costs in litigating against them—the record is uncontradicted that Pfizer may submit a claim to be paid out of insurance that is this joint property. Therefore, these suits could directly affect Quigley's bankruptcy estate, and bankruptcy jurisdiction under 28 U.S.C. § 1334 is appropriate. *See Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.,* 639 F.3d 572, 579 (2d Cir.2011) ("If [the plaintiffs are] successful in their claims against [the defendant], the funds they recover will benefit the ... bankruptcy estates. It is not difficult to conclude that the 'conceivable effect' test is satisfied." (citation omitted)).

Angelos objects that the impact of the Angelos suits on Quigley's bankruptcy estate is too attenuated to confer bankruptcy jurisdiction. We disagree. The bankruptcy court found in 2004, and Angelos does not contest, that the Insurance Policies and Insurance Trust "may be utilized by Pfizer and Quigley to satisfy settlements, judgments or defense costs related to Asbestos Related Claims against either of them, on a first billed, first paid basis,

irrespective of amounts previously billed by or paid to Pfizer or Quigley."[7] OPI at 10. The potential impact of the Angelos suits on the bankruptcy estate is thus nothing but direct: at Pfizer's election, any judgments, settlements, or litigation expenses arising out of the Angelos suits will be paid by Quigley's estate. This case is thus different from *Pacor, Inc. v. Higgins,* 743 F.2d 984 (3d Cir. 1984), *overruled on other grounds by Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995), on which Angelos relies. In *Pacor*, where the third party had only a *potential* common law right of indemnification against the debtor, "any judgment received by the plaintiff ... could not itself [have] result[ed] in even a contingent claim against [the debtor], since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification." *Id.* at 995.[8] Here, Pfizer need not rely on a separate action for indemnification; rather, it has a now-existent legal right to utilize the assets of the Insurance Policies

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[7] This case thus differs from *In re Combustion Engineering, Inc.,* 391 F.3d 190 (3d Cir.2004). There, the bankruptcy court made insufficient findings of fact as to whether two third parties and the debtor were insured under the same program (and also as to the program's terms and operations) for the Third Circuit to conclude that claims against the third parties would in fact have an adverse effect on the debtor's estate. *See id.* at 232–33 & nn. 42–43.

[8] *See also In re W.R. Grace & Co.,* 591 F.3d 164, 173 (3d Cir.2009) ("[I]n order for a bankruptcy court to have related-to jurisdiction to enjoin a lawsuit, that lawsuit must 'affect the bankruptcy [ ] without the intervention of yet another lawsuit.'" (alteration in original) (quoting *In re Federal– Mogul Global, Inc.,* 300 F.3d 368, 382 (3d Cir. 2002))).

and Insurance Trust to satisfy judgments or settlements or pay defense costs. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001–02 (4th Cir.1986) (indicating that proceedings against third parties "who may be entitled to indemnification under [an insurance] policy [owned by the debtor] or who qualify as additional insureds under the policy" are covered by the automatic stay); *see also In re Brentano's*, 27 B.R. 90, 92 (Bankr.S.D.N.Y.1983) (exercising jurisdiction where an indemnification agreement between the debtor and a third party arranged that any judgment against the third party would automatically result in liability for the debtor), *cited in Pacor*, 743 F.2d at 995.[9]

Angelos also objects that, under this Court's decision in *Manville III*, the bankruptcy court did not have jurisdiction to enjoin the Angelos suits because they allege violations of an independent legal duty owed by Pfizer to the plaintiffs, rather than claims that are "derivative" under Pennsylvania state law. Again, we disagree. Because Angelos's mistake as to the nature of the jurisdictional inquiry under 28 U.S.C. § 1334(a) and (b) stems from a misunderstanding of our case law's treatment of derivative liability in the context of bankruptcy jurisdiction, however, we discuss our

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[9] We are unconvinced by Angelos's argument that the Angelos suits would not impact Quigley's estate because Pfizer would have to make a claim against the Insurance Policies or the Insurance Trust before any effect on Quigley's estate would occur. The parties entitled to contractual indemnity in *A.H. Robins* and *In re Brentano's* could presumably also have declined to insist on their contractual rights.

previous cases addressing this subject in some detail.

Our first case to address the role of derivative liability in the context of bankruptcy jurisdiction was *MacArthur Co. v. Johns–Manville Corp.,* 837 F.2d 89, part of the long saga of litigation arising from the bankruptcy of the Johns–Manville Corporation ("Manville"), a major national asbestos concern. In *MacArthur*, we addressed the question whether the bankruptcy court had jurisdiction to enjoin claims against Manville's insurers by an asbestos distributor (MacArthur) when the distributor claimed to be coinsured with Manville under "vendor endorsements" contained in the Manville policies. *Id.* at 91–93. We concluded that it did. *Id.* at 93. After determining that the insurance policies in question constituted property of the estate, we turned to MacArthur's argument that "because its own rights are separate from Manville's, its claims under the vendor endorsements are too remote from the Chapter 11 proceeding to permit the Bankruptcy Court to exercise jurisdiction." *Id.* at 92. We noted that "[t]he vendor endorsements cover only those liabilities resulting from the vendor's status as a distributor of Manville's products," that "[t]he endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of the underlying policies," and that "MacArthur's rights as an insured vendor are completely derivative of Manville's rights as the primary insured." *Id.* at 92. We reasoned that "[s]uch derivative rights are no different ... from those of the asbestos victims who have already been barred from asserting direct

actions against the insurers," *id.* (citing *In re Davis,* 730 F.2d 176 (5th Cir.1984) (per curiam)),[10] and consequently found the bankruptcy court's exercise of jurisdiction proper.

MacArthur does not hold that third-party suits that affect the *res* of the bankrupt estate but that are nonetheless not derivative, in some sense, of the debtor's rights and liabilities fall outside federal bankruptcy jurisdiction. (Indeed, language to this effect would have been dicta, as *MacArthur* found jurisdiction proper. *Id.* at 93.) The primary thrust of the opinion in *MacArthur* focuses on the fact that the suits in question would impact the *res* of the bankruptcy estate. *See id.* at 91–92. We viewed the similarity of MacArthur's claims to direct actions against an insurer (over which the Fifth Circuit in *Davis* had already approved bankruptcy jurisdiction) as relevant to whether MacArthur's claims affected the bankruptcy estate, not as an independent requirement for the exercise of jurisdiction. *See id.* at 92–93 ("[MacArthur] seek[s] to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct. [MacArthur's] claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets."). The

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[10] A "direct action" in the insurance context is a suit, statutorily authorized in some states, in which "[t]he injured party steps into the shoes of the tortfeasor and can assert any right of the tortfeasor-insured against the insurance company." *Continental Ins. Co. v. Atlantic Cas. Ins. Co.*, 603 F.3d 169, 179 (2d Cir.2010) (quoting *Lang v. Hanover Ins. Co.,* 3 N.Y.3d 350, 787 N.Y.S.2d 211, 820 N.E.2d 855, 858 (2004)) (internal quotation mark omitted).

fact that MacArthur's rights under the vendor endorsements were derivative of Manville's—as opposed to non-derivative rights under separate insurance policies—indicated in that case that any proceeds Manville's insurers might owe MacArthur would come from Manville's insurance policies.

Our next case to consider the role of derivative liability in the context of bankruptcy jurisdiction was *Manville III*. In that case, plaintiffs sought to bring suits against Travelers, Manville's primary insurer for a period of years. *Manville III*, 517 F.3d at 57. The plaintiffs in many of these suits did not claim against Manville's insurance policies,[11] but rather sought to hold Travelers liable for what they saw as its independent tortious conduct. *See id.* at 57–58. For instance, some of these plaintiffs alleged that they "declined to file personal injury suits against Manville because Travelers ... suppressed information about asbestos hazards and intentionally propagated an allegedly-fraudulent 'state of the art' defense to frustrate claimants' rights." *Id.* at 57. Travelers argued that the suits were enjoined pursuant to two orders issued by the bankruptcy court in 1986.[12] *Id.* at 58.

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[11] The suits were thus not traditional "direct actions." *See Manville III*, 517 F.3d at 55 n. 4.

[12] The Supreme Court reversed this Court's decision in *Manville III* on the ground that given "the finality of the Bankruptcy Court's [1986] orders following the conclusion of direct review," res judicata barred the plaintiffs' challenge, two decades later, to the bankruptcy court's jurisdiction to enter the orders in 1986. *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 129 S.Ct. 2195, 2198, 174 L.Ed.2d 99 (2009). In *Manville IV*, we clarified that the

We held that bankruptcy jurisdiction did not exist to enjoin the suits in question. We began by distinguishing *MacArthur* and the Fifth Circuit's decision in *Davis*, noting that the plaintiffs' "claims seek damages from Travelers that are *unrelated* to the policy proceeds, quite unlike the claims in *MacArthur* and *Davis* where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies." *Id.* at 63. We also noted that, unlike the claims in *MacArthur*, the claims at issue were not premised on Manville's conduct. *Id.* We faulted the courts below for failing to examine whether the suits in question sought to impose liability on Travelers on the basis of its "independent legal duty in its dealing with [the] plaintiffs," *id.,* noting that such an examination would have revealed that, while some of the claims were "premised on a statute that provides a direct action against an insurer when the insured is insolvent," the "vast majority" were claims which sought "to recover directly from [the] debtor's insurer for the insurer's own independent wrongdoing," "ma[d]e no claim against an asset of the estate," and whose litigation "[did not] affect the estate." *Id.* at 64–65. Accordingly, we concluded that the bankruptcy court had no jurisdiction "to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to Manville's

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Supreme Court "did not contradict the conclusion of [*Manville III's*] jurisdictional inquiry," 600 F.3d at 152, and we reaffirmed the jurisdictional analysis, *id.* at 148.

insurance policy proceeds and the *res* of the Manville estate." *Id.* at 68.

Manville III did not work a change in our jurisprudence. After *Manville III*, as before it, "a bankruptcy court ... has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Manville III,* 517 F.3d at 66; *accord Cuyahoga*, 980 F.2d at 114. As in *MacArthur*, the salience of *Manville III's* inquiry as to whether Travelers' liability was derivative of the debtor's rights and liabilities was that, in the facts and circumstances of *Manville III*, cases alleging derivative liability would affect the *res* of the bankruptcy estate, whereas cases alleging non-derivative liability would not. Compare *Manville III*, 517 F.3d at 64 ("[T]he claims involving Louisiana law are premised on a statute that provides a direct action against an insurer when the insured is insolvent. The recovery is against the policy...."), *with id.* at 65 ("Here ... Plaintiffs seek to recover directly from a debtor's insurer for the insurer's own independent wrongdoing.... They raise no claim against Manville's insurance coverage."). The *Manville III* panel thus quite properly used the derivative/ non-derivative inquiry as a means to assess whether the suits at issue would affect the bankruptcy estate. It did not impose a requirement that an action must both directly affect the estate *and* be derivative of the debtor's rights and liabilities for bankruptcy jurisdiction over the action to exist.

Our more recent decision in *Manville IV* made more explicit the fact that in *Manville III* derivative liability was discussed not as an independent jurisdictional requirement but as a factor

demonstrating, in the circumstances of that litigation, that the suits in question would have an effect on the bankruptcy *res*. We described our holding in *Manville III* as indicating "that the bankruptcy court's *in rem* jurisdiction was insufficient to allow it to enjoin ... [a]ctions based on state-law theories that [sought] to impose liability on Travelers as a separate entity rather than on the policies that it issued to Manville." *Manville IV*, 600 F.3d at 152. That is to say, *Manville III* drew a distinction between suits alleging non-derivative liability on the one hand, and suits affecting the *res* on the other. By identifying the suits in question as non-derivative, the *Manville III* panel determined that they would not affect the bankruptcy estate.

It thus appears from our case law that, while we have treated whether a suit seeks to impose derivative liability as a helpful way to assess whether it has the potential to affect the bankruptcy *res*, the touchstone for bankruptcy jurisdiction remains "whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *Cuyahoga*, 980 F.2d at 114. This test has been almost universally adopted by our sister circuits, *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 6, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) (collecting cases) [13] which in some instances have found bankruptcy jurisdiction to exist over non-derivative

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[13] The Supreme Court, while noting the widespread approval of the "conceivable effect" test among the circuits, has not reached the question of whether to adopt this formulation as its own. *See Celotex*, 514 U.S. at 308 n. 6, 115 S.Ct. 1493.

claims against third parties.[14] *See In re Stonebridge Techs., Inc.*, 430 F.3d 260, 263–64, 267 (5th Cir. 2005) (per curiam) (finding bankruptcy jurisdiction over a negligent misrepresentation suit against a third party where the alleged misrepresentation was undertaken by defendant, not debtor); *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th. Cir.1987) (finding bankruptcy jurisdiction over counterclaim for breach of contract where liability sought to be imposed arose from contracting party's alleged breach, not debtor's). We see no reason to question these decisions. One of the central purposes—perhaps *the* central purpose—of extending bankruptcy jurisdiction to actions against certain third parties, as well as suits against debtors themselves, is to "protect[ ] the assets of the estate" so as to ensure a fair distribution of those assets at a later point in time. *In re Zarnel*, 619 F.3d 156, 171 (2d Cir.2010). But whether the direct result of a suit against a third party will be the removal of assets from the bankruptcy estate is separate from the question whether the third party's alleged liability is derivative of the debtor's (although in certain suits, as our case law indicates, the two questions may become intertwined). A suit against a third party alleging liability not derivative of the debtor's conduct but that nevertheless poses the specter of direct impact on the *res* of the bankrupt estate may just as surely impair the bankruptcy court's ability

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[14] By contrast, we are aware of no sister circuit cases finding a *lack* of bankruptcy subject matter jurisdiction where the third-party action in question could affect the bankrupt estate but was not derivative of the rights and obligations of the debtor.

to make a fair distribution of the bankrupt's assets as a third-party suit alleging derivative liability.[14][sic] Accordingly, we conclude that, where litigation of the Angelos suits against Pfizer would almost certainly result in the drawing down of insurance policies that are part of the bankruptcy estate of Quigley, the exercise of bankruptcy jurisdiction to enjoin these suits was appropriate.

The Scope of the API

Having concluded both that we have jurisdiction to hear this appeal and that the bankruptcy court had jurisdiction to enjoin the Angelos suits, we next address whether the Angelos suits fall within the scope of the API and were, for that reason, actually enjoined. As both parties acknowledge, we typically accord a bankruptcy court's interpretation of its own order "customary appellate deference." *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999). Angelos urges, however, and the district court agreed, that such deference does not apply here since the language of the API tracks the statutory language of 11 U.S.C. § 524(g)(4)(A)(ii). We recognize that, in the agency context, the Supreme Court has held that judicial deference to an agency's interpretation of its own regulations is inappropriate when those regulations "do[ ] little more than restate the terms of [a] statute," because "the existence of a parroting regulation does not change the fact that the question

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[14] In neither circumstance, of course, is it necessarily the case that an injunction staying litigation during the course of bankruptcy proceedings is appropriate. A bankruptcy court's *jurisdiction* to enjoin an action does not *require* it to exercise that jurisdiction to enjoin a suit in a particular instance.

here is not the meaning of the regulation but the meaning of the statute." *Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). However, we need not decide whether to apply this principle here, as the bankruptcy court clearly stated in its CO that "[t]he Amended Injunction provides the same protection as a channeling injunction under § 524(g)." CO at *3. Thus, the bankruptcy court itself believed that it was interpreting the statute when it interpreted the API, and the meaning of the statute is dispositive as to the meaning of the API. We review the bankruptcy court's statutory interpretation, like all legal conclusions, *de novo*. *See In re Casse*, 198 F.3d at 332.[15]

As already noted, § 524(g) was enacted to address the unique problem posed by asbestos-related bankruptcies. Because symptoms of asbestos-related illness may not manifest until decades after exposure, potential claimants against an asbestos manufacturer's bankruptcy estate may not know of their claims until years after the estate has been depleted by other claimants whose symptoms became apparent earlier. Section 524(g) addresses this difficulty by authorizing a bankruptcy court to enter, along with confirmation of a reorganization plan, an injunction "channeling" certain classes of claims to a trust set up in accordance with the

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[15] We recognize that the API was not entered under the bankruptcy court's authority conferred in 11 U.S.C. § 524(g), but rather pursuant to 11 U.S.C. §§ 105(a) and 362(a). API at 2. However, Angelos does not contest the bankruptcy court's authority under these provisions to issue the API. Accordingly, we examine only whether the API's terms encompass the Angelos suits.

reorganization plan, which trust will then make payments to both present and future claimants. *See* 11 U.S.C. § 524(g)(1)–(2).[16]

To give bankruptcy courts power to channel all appropriate claims to the trust—and to provide an incentive for parent or affiliated companies of an entity undergoing asbestos-related bankruptcy to contribute to the trust—§ 524(g) contains a provision allowing the bankruptcy court to enter an injunction barring certain actions brought against non-debtor third parties. Section 524(g)(4)(A)(ii) provides as follows:

> [A]n injunction [under 11 U.S.C. § 524(g)] may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—
>
> (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

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[16] The requirements for a § 524(g) plan and trust are extensive but are relevant here only as described below.

> (III) the third party's provision of insurance to the debtor or a related party; or
>
> (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—
>
> (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
>
> (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

An injunction under the statute may thus properly bar an action against a third party only when that party is alleged to be liable "for the conduct of, claims against, or demands on" the debtor and to the extent that such liability arises "by reason of" one of the four relationships between the third party and the debtor enumerated in subsections (I) through (IV).[17]

The parties' principal disagreement focuses on the meaning of the phrase "by reason of." Stated simply, Pfizer argues that liability arises "by reason of" any of the four enumerated relationships when that relationship is a "but for," factual cause of the liability in question. Here, because Quigley, as a factual matter, would not have applied the Pfizer name and logo to its asbestos-containing products

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[17] Given our conclusion that the Angelos suits do not "arise by reason of" the enumerated grounds, we need not address whether the suits seek to hold Pfizer directly or indirectly liable for the conduct of Quigley.

absent Pfizer's ownership interest in Quigley, Pfizer contends that its liability arises "by reason of" that ownership interest and that the Angelos suits were properly enjoined. Angelos, on the other hand, argues that, to fit within the parameters of 11 U.S.C. § 524(g), the liability sought to be imposed must arise as a *legal* consequence of one of the four enumerated relationships (or, stated differently, that the relationship, in light of the debtor's conduct or the claims asserted against it, must be a legal cause of or a legally relevant factor to the third party's alleged liability). The API is inapplicable to the Angelos suits, according to Angelos, because Pfizer's liability as an "apparent manufacturer" under § 400 hinges on the presence of Pfizer's name and logo on Quigley's products, while the fact of Pfizer's ownership of Quigley is legally irrelevant.

We agree with Angelos. Section 524(g) does not explicitly indicate whether the phrase "by reason of" refers to legal or factual causation, or some combination of the two. We conclude, however, that several factors favor the interpretation proffered by the appellee.

In the first place, the statute lists four relationships between a third party and a debtor that, when resulting in alleged liability on the third party's part for the conduct of or claims against the debtor, may render an injunction appropriate. As a matter of background legal principle, we deem it significant that each of these four relationships is of a sort that could, *legally*, have given rise to *actual* liability in appropriate circumstances prior to § 524(g)'s enactment. For instance, 11 U.S.C. § 524(g)(4)(A)(ii)(I) provides a bankruptcy court with

the power to enjoin an action that arises "by reason of" the third party's "ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor." This subsection thus authorizes a bankruptcy court to bar actions seeking to impose liability on a third party in circumstances in which a plaintiff might have alleged that the third party was responsible for claims against the debtor on a "piercing the corporate veil" theory.[18] *See, e.g.*, *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1052 (2d Cir.1997) (noting that, under New York law, a plaintiff seeking to pierce the corporate veil "must prove [among other things] that ... the owner has exercised such control that the corporation has become a mere instrumentality of the owner") (brackets omitted). Similarly, § 524(g)(4)(A)(ii)(III) permits a bankruptcy court to enjoin a suit alleging liability "by reason of ... the third party's provision of insurance to the debtor or a related party," thus referring to statutory "direct action" liability, as discussed above. Section 524(g)(4)(A)(ii)(IV) provides that litigation may be enjoined where plaintiffs contend that a third party is liable for claims against the debtor "by reason of" the third party's "involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party." Here, too, such liability could arise,

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[18] A third party's "involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party," as provided in § 524(g)(4)(A)(ii)(II), could also give rise to liability on this basis.

inter alia and given particular facts, on an aiding and abetting theory, as when one party induces another to commit a tort, *see, e.g.,* Restatement (Second) of Torts § 876(b) (1979), or on a successor liability theory, when a transaction results in the merger or consolidation of the two firms but "the purchaser is a mere continuation of the seller," or where "the transaction was entered into fraudulently for the purpose of escaping liability," *Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Publ'g Corp.*, 635 F.3d 48, 52 (2d Cir.2011) (per curiam) (internal quotation marks omitted).

Each of the four relationships enumerated in subsections (I) through (IV), then, is a relationship between one party and another that, in appropriate circumstances, has commonly given rise to the liability of the one party for the conduct of or claims or demands against the other, long before § 524(g) came into being. This circumstance does not conclusively establish that § 524(g)(4)(A)(ii)'s channeling authority is limited to situations in which the third party's relationship with the debtor is legally relevant to its purported liability, so that a bankruptcy court is not authorized to bar litigation when the relationship is merely a "but for" cause of the alleged liability. The background legal context against which § 524(g)(4)(A)(ii) was enacted, however, suggests strongly that it was this sort of liability that Congress had in mind in enacting the provision. Were Pfizer's view of the matter correct, we would find it surprising that each enumerated relationship in § 524(g)(4)(A)(ii) just happens to correspond to a previously-recognized relationship that may, in appropriate circumstances, give rise to the legal liability of one party for the conduct of or

claims against another.

Even brief consideration of another part of § 524(g) in which the "by reason of" language is employed renders definite our conclusion in favor of Angelos's construction. *See United States v. Cunningham*, 292 F.3d 115, 118 (2d Cir.2002) ("[S]imilar language contained within the same section of a statute must be accorded a consistent meaning."). Section 524(g)(3)(A)(ii) provides as follows:

> No entity that pursuant to [a] plan [under § 524(g)] or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor.

Consider this provision's application to a case in which a company first succeeds to significant assets of a bankrupt asbestos concern pursuant to, and after confirmation of, a § 524(g) reorganization plan and thereafter hires new employees to administer these assets, engaging in age discrimination in the hiring process. On Pfizer's reading of the phrase "by reason of," such a company could plead 11 U.S.C. § 524(g) as a barrier to liability, since its discrimination would not have occurred, as a factual matter, but for the company's succession to the assets of the bankrupt estate. Angelos's construction of "by reason of," in contrast, would not foreclose liability on a discrimination suit, because even if the discrimination would not have taken place but for the company's acquisition of the bankrupt's assets, any subsequent age discrimination claim would not be levied "by reason of" the company's acquisition of

these assets, but "by reason of" the alleged discrimination itself.

We are confident that the Angelos reading of the statutory language at issue here is the correct one. Section 524(g) is designed to "facilitat[e] the reorganization and rehabilitation of the debtor as an economically viable entity," as well as "make[ ] it possible for future asbestos claimants to obtain substantially similar recoveries as current claimants." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir.2004). Needless to say, barring the prosecution of claims bearing only an accidental nexus to an asbestos bankruptcy is less than tangentially related to that objective. Indeed (although the question is not before us), we strongly suspect that the bankruptcy courts would not even have jurisdiction to enjoin the discrimination suit hypothesized above, since it would not have any effect whatsoever on the *res* of the bankruptcy estate. *See Cuyahoga*, 980 F.2d at 114 ("The test for determining whether litigation has a significant connection with a pending bankruptcy [sufficient to confer bankruptcy jurisdiction] is whether its outcome might have any conceivable effect on the bankrupt estate." (internal quotation marks omitted)). We are unpersuaded that Congress intended with its use of the phrase "by reason of" to produce the peculiar results and jurisdictional difficulties that Pfizer's construction of this phrase would bring about.

We conclude that the phrase "by reason of," as employed in 11 U.S.C. § 524(g)(4)(A)(ii), requires that the alleged liability of a third party for the conduct of or claims against the debtor arises, in the

circumstances, as a legal consequence of one of the four relationships between the debtor and the third party enumerated in subsections (I) through (IV). Pfizer does not argue that its ownership of Quigley is pertinent in any legal sense to the claims asserted in the Angelos suits. Indeed, as the district court very aptly noted, Pfizer's ownership interest in Quigley is "legally irrelevant" to the Angelos suits' § 400 claims. District Court Opinion at 204. Consequently, the API, modeled as it is on 11 U.S.C. § 524(g)(4)(A)(ii), does not enjoin the suits at issue.

Finally, although not necessary to its holding, *Manville III* briefly addressed 11 U.S.C. § 524(g)(4)(A)(ii)'s requirement that any injunctions imposed under § 524(g) may only bar actions against third parties "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor," suggesting that an injunction is available only in "situations where ... a third party has derivative liability for the claims against the debtor." 517 F.3d at 67–68 (quoting *Combustion Eng'g*, 391 F.3d at 234) (internal quotation marks omitted). Angelos argues that the suits at issue may not be enjoined pursuant to the API because § 400 liability is not derivative in nature as a matter of Pennsylvania law. As explained *supra* note 18, because we conclude that the Angelos suits do not attempt to fix on Pfizer liability "arising by reason of" Pfizer's "ownership of a financial interest in" Quigley, 11 U.S.C. § 524(g)(4)(A)(ii)(I), we do not reach this question.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

Memorandum Opinion and Order of the United States District Court for the Southern District of New York (May 17, 2011)

United States District Court,
S.D. New York.
In re QUIGLEY COMPANY, INC.

No. 10 Civ. 1573 (RJH).
May 17, 2011

MEMORANDUM OPINION AND ORDER

RICHARD J. HOLWELL, District Judge:

Appellant Law Offices of Peter A. Angelos appeals from an order of the United States Bankruptcy Court for the Southern District of New York ("the Bankruptcy Court") determining that certain state law claims it wished to bring were prohibited by the amended channeling injunction put in place in this case. Appellant brought claims against Pfizer, Inc. ("Pfizer"), the parent company of debtor Quigley Company, Inc. ("Quigley"), in state court. Pfizer filed a motion in the Bankruptcy Court arguing that these claims were subject to the amended injunction. On May 15, 2008, the Bankruptcy Court issued a memorandum order and opinion clarifying the amended injunction ("BR Opinion") that held that Appellant's suits fell within the injunction and directed Appellant to cease prosecuting them. Appellant appeals that decision, arguing that the Bankruptcy Court did not have subject matter jurisdiction to enjoin its actions and that its [sic] fell outside the scope of 11 U.S.C. § 524(g). For the

reasons stated below, the Bankruptcy Court's opinion is REVERSED.

BACKGROUND

Quigley was founded in 1916 and produced refractories (materials that retain their strength at high temperatures). (Def.'s Mem. 7.) From the 1930s through the early 1970s, some of those products, including an insulation called Insulag, contained asbestos. (*Id.*) In August 1968, Pfizer acquired Quigley, which became Pfizer's wholly owned subsidiary. (Pl.'s Mem. 3.) Following the acquisition, marketing materials for several of Quigley's products, including Insulag, began to include the Pfizer name, logo, and trademark. (*Id.*) For example, an advertisement for Insulag contains the Pfizer logo followed by the Quigley logo over the words, "Manufacturers of Refractories— Insulation— Paints." (RA 878.) The Pfizer name and/or logo also appeared on bags of Insulag. (Pl.'s Mem. 3–4.) Insulag was an insulation that could be used in high heat environments such as blast furnaces used in steel mills. (*Id.* 4.) Although it functioned well as an insulation, the asbestos it contained because dangerous when airborne because workers could inhale the fibers. (*Id.*) Once the fibers lodged in the lungs, they could cause fatal disease, including mesothelioma. (*Id.*) The Insulag packaging did not contain any warnings about the danger of asbestos. (*Id.*) To the contrary, Quigley marketing materials that also contained the Pfizer logo specifically marketed the product as safe, stating "Insulag ... is not injurious contains no mineral oil or fine slag particles which are irritants to the body." (*Id.*)

After the health effects of asbestos became known, many individuals began to file law suits against Quigley. By the time Quigley filed for Chapter 11 bankruptcy, it was defending over 160,000 asbestos-related law suits and claims. (BR Opinion 3.) Over 100,000 of these suits also named Pfizer as a defendant although it is difficult to tell which of the claims against Pfizer are based on its own products, certain of which contain asbestos, and which are based on Quigley's Insulag. (*Id.*) Quigley's principal asset is its interest in a joint insurance policy that it shares with Pfizer. (Def.'s Opp'n 7.)

When Quigley filed for bankruptcy in 2004, it petitioned the Bankruptcy Court for an injunction that would stop all asbestos-related lawsuits against itself and Pfizer. (*Id.*) The Bankruptcy Court (Beatty, J.) preliminarily enjoined all asbestos-related claims from proceeding against both companies (including those arising from Pfizer's own products) during the pendency of Quigley's bankruptcy proceeding. (*Id.*) In 2007, the Bankruptcy Court (Bernstein, J.) narrowed its earlier channeling injunction to permit certain direct actions against non-debtor Pfizer. The amended injunction afforded Pfizer with more limited protection against lawsuits, protection that tracks the language of 11 U.S.C. § 524(g)(A)(ii). (*Id.*) This provision is part of § 524(g), which enables bankruptcy courts to create asbestos litigation trusts that set aside money to pay out future asbestos claims. This statute also provides for injunctions of certain claims against certain non-debtors, including the parent companies of asbestos manufacturers such as Quigley. Tracking the statute, the Amended

Injunction enjoined:

> any action directed against Pfizer alleging that Pfizer is *directly or indirectly liable for the conduct of,* claims against, or demands on Quigley *to the extent* such alleged liability of Pfizer *arises by reason of*—
>
> (I) Pfizer's *ownership* of a financial interest in Quigley, a past or present affiliate of Quigley, or a predecessor in interest of Quigley;
>
> (II) Pfizer's involvement in the management of Quigley or a predecessor in interest of Quigley, or service as an officer, director or employee of Quigley or a related party;
>
> (III) Pfizer's provision of insurance to Quigley or a related party; or
>
> (IV) Pfizer's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of Quigley or a related party, including but not limited to—
>
> (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
>
> (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(*Id.* at 4 (emphasis added).)

Beginning in 1999, appellant commenced lawsuits in Pennsylvania on behalf of plaintiffs who had been exposed to asbestos-containing products sold by Quigley and Pfizer, including Insulag. (*Id.*) Appellant has named Pfizer as a defendant in Insulag-related claims under the theory that Pfizer, because it placed its logo on Insulag packaging and advertising, held itself out to consumers as a manufacturer of Insulag. (*Id.* at 5.) In doing so, appellant argues, Pfizer was an "apparent manufacturer" of Insulag and thus was liable pursuant to § 400 of the Second Restatement of Torts (*id.*), which the Pennsylvania courts have adopted as state law, *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593, 599 (1968). Section 400 of the Second Restatement of Torts provides: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Restatement (Second) of Torts § 400 (1965). In 2008, appellant moved for partial summary judgment in many of these actions, and Pfizer in response moved in the Bankruptcy Court to enforce the Amended Injunction. (BR Opinion 5.)

The Bankruptcy Court held that appellant's Pennsylvania suits fell within the Amended Injunction. (*Id.*) The Bankruptcy Court framed the § 524(g) analysis in terms of three questions, all of which must be answered in the affirmative for the claims to be enjoined: "(1) does Pfizer's Section 400 liability arise directly or indirectly from the 'conduct of, claims against, or demands on' Quigley; (2) will the Section 400 claims asserted by the Pennsylvania plaintiffs against Pfizer be paid under Quigley's plan; and (3) does Pfizer's liability 'arise by reason of' its

ownership or management of Quigley?" (BR Opinion 7–8.) It answered the first two questions quickly in the affirmative. (*Id.* at 9.) It found that found that [sic] under a § 400 theory, Pfizer would be held directly or indirectly liable for the actions of Quigley because Quigley, not Pfizer, had manufactured the defective product. It also found that these claims would be paid out under the Quigley plan because § 400 provides that an apparent manufacturer "is subject to the same liability as though he were its manufacturer." (*Id.*)

It then devoted the majority of its analysis to answering the third question. Noting that "at first glance," Pfizer's § 400 liability "arises by reason" of the placement of Pfizer's name and logo on the packaging of Insulag, the Bankruptcy Court concluded that the statutory text was vague because it could equally be said that Pfizer's § 400 liability arose by reason of its corporate affiliation with Quigley. (*Id.* at 10.) Finding that on the facts presented the use of the Pfizer name and logo were merely a "statement of corporate affiliation," the Bankruptcy Court concluded that Pfizer's § 400 liability arose from ownership of Quigley and fell within the ambit of § 524(g). (*Id.* at 12) Finally, it distinguished the Second Circuit's holding in *In re Johns–Manville,* 517 F.3d 52 (2d Cir.2008) (hereinafter " *Manville III* ")[1], wherein the court concluded that bankruptcy courts do not have subject matter jurisdiction to enjoin independents direct

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[1] The Court adopts the numeric used by the Second Circuit in *In re Johns–Manville,* 600 F.3d 135 (2d Cir. 2010) which is herein referred to as *Manville IV*.

claims against non-debtors *Id.,* 517 F.3d at 66, ("[A] bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate."). Here, the Bankruptcy Court found that the § 400 claims against Pfizer differed from the claims at issue in *Manville III* because they were not direct, nonderivative claims but were "vicarious and derivative" claims that could eventually affect the *res* of Quigley's bankruptcy estate. (*Id.* at 14.)

STANDARD OF REVIEW

"Pursuant to Bankruptcy Rule 8013, a District Court reviews a bankruptcy court's conclusions of law de novo and reviews findings of fact for clear error." *In re Cavalry Const., Inc.,* 428 B.R. 25, 29 (S.D.N.Y.2010); *see also In re Bayshore Wire Prods. Corp.,* 209 F.3d 100, 103 (2d Cir.2000) ("Like the District Court, we review the Bankruptcy Court's findings of fact for clear error, [and] its conclusions of law de novo...." (internal citations omitted)). Pfizer correctly points out that a bankruptcy court's interpretation of its own order, including the preliminary injunction at issue here, is typically given deference on appeal. *Deep v. Copyright Creditors,* 122 Fed.Appx. 530, 531 (2d Cir.2004); *Casse v. Key Bank Nat'l Ass'n,* 198 F.3d 327, 333 (2d. Cir.1999). Nonetheless, where, as here, the proper effect of an order hinges upon a question of statutory interpretation, this question is reviewed de novo. *See Casse,* 198 F.3d at 334; *see also Kern v. TXO Production Corp.,* 738 F.2d 968, 970 (8th Cir.1984) ("That is, when we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the

district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.").

DISCUSSION

I. The Origins of the § 524(g) Channeling Injunction

For years, courts and legislatures have struggled to craft just results for those who have been exposed to asbestos. Asbestos litigation poses unique challenges to bankruptcy courts because those who have been exposed to asbestos might not manifest symptoms of disease for forty years after exposure. *In re Johns–Manville Corp.,* 97 B.R. 174, 176 (Bankr.S.D.N.Y.1989) (" *Manville I* "). After the link between asbestos and respiratory disease became known, asbestos-producing companies became overwhelmed with lawsuits from disease-sufferers and often filed for bankruptcy. Bankruptcy courts were tasked with balancing the interests of those who were presently suffering from asbestos-related illness and those who might contract such illness in the future, but who had not yet manifested any symptoms of disease. *Id.*

The *Manville* bankruptcy court responded with an innovative solution: the asbestos litigation trust. Ronald Barliant et al., *From Free–Fall to Free–for–All: The Rise of Pre–Packaged Asbestos Bankruptcies,* 12 AM. BANKR. INST. L. REV. 441, 448 (2004). The court created an asbestos litigation trust funded by the debtor's assets and a portion of the reorganized company's future profits. This trust was to

compensate not only asbestos claimants whose symptoms had already manifested, but also future claimants without signs of illness. *Id.* This remedy was uniquely attractive for asbestos producers because it, unlike a traditional class action lawsuit, could bind future claimants. *Id.* at 444. It was also a departure from traditional bankruptcies, which resolve only those claims existing at the time the debtor files for bankruptcy. *Id.*

Congress blessed this approach by enacting § 524(g), which was modeled after the Manville bankruptcy trust. *Id.* at 446. Pursuant to § 524(g), debtor companies can fund an asbestos trust through Chapter 11 bankruptcy, and the courts will issue a channeling injunction that requires future claimants to direct their claims to the bankruptcy trust, rather than the debtor company. The payout to future claimants from these trusts tends to be small in comparison to the value of the claims, but at least future claimants receive something. *See* S. Todd Brown, *Section 524(g) without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox,* 2008 COLUM. BUS. L. REV. 841, 852 (2008). In some instances, the channeling injunctions may also cover certain types of claims against third parties related to the debtor, such as the debtor's insurer or corporate affiliates, both of whom are within the ring of fire created by asbestos litigation. This case concerns such a third-party injunction.

Section 524(g)(A)(ii) provides that a channeling injunction:

> may bar any action directed against a third party

who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be *directly or indirectly liable for the conduct of,* claims against, or demands on the debtor *to the extent* such alleged liability of such third party *arises by reason of*—

(I) the third party's *ownership* of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

§ 524(g)(A)(ii) (emphasis added).

As noted, the bankruptcy court issued a channeling injunction in this case that tracks the language of § 524(g)(4)(A)(ii).

Courts are to interpret the reach of the § 524(g) channeling injunction for third parties narrowly, in accordance with the Second Circuit's observation that "a nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." *Manville III,* 517 F.3d at 66 (quoting *In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 142 (2d Cir. 2005)).

II. Pennsylvania State Law

Appellant seeks to prosecute actions brought under §§ 400 and 402A of the Second Restatement of Torts, which the Pennsylvania courts have adopted as state law.[2] *Forry v. Gulf Oil Corp.,* 428 Pa. 334, 237 A.2d 593, 596–97, 599 (1968). Section 400 of the Second Restatement of Torts provides: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Restatement (Second) of

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[2] Although it appears that appellant did not explicitly argue in the Bankruptcy Court proceeding that it intended to rely upon § 402A in pursuing its claims against Pfizer, its intentions are implicit in its reliance on § 400. Section 400 subjects apparent manufacturers to the "same liability" as actual manufacturers. Appellant relies upon § 402A to explain what that "same liability" would be.

Torts § 400 (1965). The *Forry* court, in adopting § 400, approved the reasoning of the Second Restatement, specifically that: "(a) the name and the trademark of the sponsor, plus the reputation of the sponsor, constitute an assurance to the user of the quality of the product, and (b) reliance (by the user) upon a belief that (the sponsor) has required (the product) to be made properly for him." *Forry,* 237 A.2d at 599 (quoting Restatement (Second) of Torts § 400 cmt. d) (internal citations and quotations omitted).

This rule works in conjunction with Rule 402A. *Id.* § 402 cmt. a. Rule 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Id. § 402A. Further, "[a] seller must give such warnings and instructions as are required to inform the user or consumer of the possible risks and inherent limitations of his product. If the product is defective absent such warnings, and the defect is a proximate cause of the plaintiff's injury, the seller is strictly liable without proof of negligence." *Walton v.*

Avco Corp., 530 Pa. 568, 610 A.2d 454, 458–59 (1992) (quoting *Berkebile v. Brantly Helicopter Corp.,* 462 Pa. 83, 337 A.2d 893, 902–03 (1975)).

By the terms of § 400, a sponsor or apparent manufacturer is subject to the same type of liability as the actual manufacturer. In other words, where the manufacturer would be subject to strict liability pursuant to § 402A, a sponsor will be as well. *Brandimarti v. Caterpillar Tractor Co.,* 364 Pa. Super. 26, 527 A.2d 134, 139–40 (1987). In the most common § 400 case, retailers are held liable for private label products that are manufactured by another party. *E.g., Walton,* 610 A.2d at 459. However, Pennsylvania courts have also applied § 400 liability to a parent company such as Pfizer that neither sold, nor manufactured a product, but marked the product with its own name. *Brandimarti,* 527 A.2d at 139–40. ("Under such circumstances Caterpillar could expect others to purchase the product in reliance on the skill and reputation associated with the Caterpillar name ... and could be held strictly liable if the product bearing the Caterpillar name proved defective....").[3]

III. Application to the Instant Case

For a third-party action to be enjoinable under § 524(g), the action must have two characteristics: (1)

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[3] Whether appellant would ultimately prevail on its apparent manufacturer claims if freed from the present injunction is far beyond the purview of this Court and irrelevant to its analysis of the proper scope of an injunction under § 524(g). *Manville III,* 517 F.3d at 68.

the action must allege that Pfizer is "directly or indirectly liable" for the conduct of Quigley; and (2) the action must "arise by reason of" Pfizer's ownership of Quigley.

The Bankruptcy Court concluded that appellant's § 400 claims sought to hold Pfizer "directly or indirectly" liable for the conduct of Quigley. Determining whether this element has been satisfied is not without difficulty, especially in the context of strict products liability, where both manufacturers and sponsors are held liable regardless of whether they acted negligently. In one sense, these suits would hold Pfizer directly liable for its own conduct for endorsing a defective product. But the suits would also hold Pfizer indirectly liable for the conduct of Quigley in the sense that Quigley actually manufactured the defective product. The statute itself does not define the parameters of indirect liability. The Bankruptcy Court applied a "but for" standard, pointing out that in the absence of a defective product, Pfizer committed no tort by placing its name and logo on Insulag packaging. (*Id.* at 9.) In the absence of any relevant statutory history, such a reading is a reasonable interpretation of so broad a term as indirect liability.

The second element, that enjoinable suits "arise by reason of" Pfizer's ownership of Quigley, imposes a more demanding standar.[4] As noted, the Bankruptcy

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[4] The language of the statute makes clear that claims alleging that Pfizer, as parent, is "indirectly liable for the conduct of" its debtor-subsidiary are only subject to a channeling injunction "to the extent such liability arises by

Court acknowledged that "at first glance," Pfizer's alleged liability under § 400 arose out of its sponsorship of Insulag (*Id.* at 10). Nevertheless, the Bankruptcy Court concluded that the term "arise by reason of" was ambiguous. On the one hand, Pfizer would be held liable not because of its ownership of Quigley, but rather because it marked Insulag with its logo. On the other, use of the logo seemed to the Bankruptcy Court to be merely an expression of corporate affiliation; that is, that Pfizer only placed its logo on Insulag advertising and packaging because it owned Quigley. (*Id.* at 12.) The Bankruptcy Court noted this perceived ambiguity by resort to an analogy to the types of claims that both parties agreed arose by reason of ownership and could be enjoined through a § 524(g) channeling injunction: claims alleging alter ego, successor-in-interest, and *respondeat superior*. The Bankruptcy Court noted that as a general matter, a company would have to act fraudulently before it could be held liable under a theory of alter ego liability. It would be incongruous, the Bankruptcy Court noted, if companies would be shielded when they acted fraudulently, but could be held liable for the relatively innocent act of placing a logo on packaging, at least where the use of the parent's name and logo was merely "a statement of corporate affiliation." (*Id.* at 12.) In the court's view, "[i]f the corporate affiliation is the *sine qua non* of liability, the liability may be said to 'arise by reason of' the corporate relationship," a condition it held to be satisfied with respect to appellant's § 400 claims, thereby

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[cont'd from previous page]

reason of ... ownership." 11 U.S.C. § 524(g)(4)(A)(ii).

subjecting them to a channeling injunction.

Respectfully, the Court believes that the Bankruptcy Court's analysis misapprehends the nature of § 400 liability. Rather than being the *sine qua non* of liability, Pfizer's affiliation with Quigley was legally irrelevant to its sponsor liability. In adopting § 400 liability, Pennsylvania courts sought to vindicate the expectations of the consumer which do not turn on the intent of a product's sponsor or its affiliation with a manufacturer. *Forry,* 237 A.2d at 599. The labeling at issue here first listed the Pfizer logo, followed by the Quigley logo, with the words "Manufacturers of Refractories—Insulations—Paints" beneath. (*See e.g.* RA 1020.) This label does not contain any mention of a parent-subsidiary relationship and could even be read as saying that Pfizer is primarily responsible for producing the product because Pfizer's name is listed first on the label. A reasonable consumer could believe that "the name and the trademark of [Pfizer], plus the reputation of [Pfizer], constitute an assurance to the user of the quality of the product." *Forry,* 237 A.2d at 599. Thus it appears that appellant here has stated § 400 claims against Pfizer that are legally independent of any factual issue as to the nature of its affiliation with Quigley or the reason why its name appears on Insulag packaging.

Further, the Second Circuit's analysis in *Manville III* teaches that this sort of legal analysis, rather than on [sic] inquiry into the factual circumstances that led to liability, is how courts should determine whether claims are derivative, arising by reason of a third party's relationship to a debtor, or whether

they are independent of that relationship. Manville was at one time "the largest manufacturer of asbestos-containing products and the largest supplier of raw asbestos in the United States...." *Manville III*, 517 F.3d at 55–56 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 742 (Bankr.E.D.N.Y.1991)). Faced with a crushing number of products liability suits, Manville filed for Chapter 11 bankruptcy in 1982. *Id.* at 56. In response to the unique issues posed by asbestos litigation, the bankruptcy court oversaw what at the time was a new entity—an asbestos trust that would pay both present and future claimants. Travelers Insurance, Manville's "primary insurer from 1947 through 1976, paid nearly $80 million into the bankruptcy estate" that went to pay the claims against Manville that Travelers had insured. *Id.* at 57. Later, many of those who were exposed to Manville asbestos separately sued Travelers. *Id.* at 58. Plaintiffs alleged that Travelers had learned of the risks of asbestos because it paid claims to asbestos sufferers in its role of Manville's insurer, and had defaulted on an independent duty to disclose to insured's its knowledge of asbestos hazards in violation of state insurance law. The bankruptcy court held, and the district court agreed, that these claims were precluded by a channeling injunction issued by the bankruptcy court, *id.* at 62, which barred all suits against Manville's insurers "arising out of" Manville's liability insurance policies, and required potential plaintiffs to seek redress from the asbestos trust instead, *id.* at 57.

The Second Circuit held that bankruptcy court did not have jurisdiction to bar claims by asbestosis

suffers that proceeded directly against Travelers. Bankruptcy courts have broad equitable powers to release a company in bankruptcy from its debts and to reshape the company going forward. But the Second Circuit cautioned that courts should be hesitant to release third parties not in bankruptcy from claims against them because such third parties have not been subjected to the rigors of a bankruptcy proceeding. *Id.* at 66. The court also observed that the plaintiffs sought to recover not for the debtor Manville's conduct, but rather for Travelers' own alleged misconduct. *Id.* at 63. Further, the plaintiffs did not seek to recover insurance proceeds under Travelers' policies, which were the principle assets of the Manville estate. *Id.* Notably, the Second Circuit criticized the lower courts for viewing the inquiry as to whether these claims "arose out of" the Manville–Travelers relationship as essentially a factual one. *Id.* at 63. While in a literal sense the claims arose out of the insurance policies—but for the policies no claims would exist—a legal analysis was required under state law to determine whether Travelers had "an independent legal duty in dealing with the plaintiffs, notwithstanding the factual background in which they duty arose." *Id.* The court observed that § 524(g) channeling injunctions were similarly "limited to 'situations where a third party has derivative liability for the claims against the debtor.'" *Id.* at 68 (quoting *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004)). Ultimately, the court concluded that the district court lacked subject matter jurisdiction to enjoin the claims against Travelers because Travelers was alleged to owe a duty to plaintiffs independent of its obligations under the insurance policies. *Id.*

The Supreme Court reviewed this opinion in *Travelers Indem. Co. v. Bailey* and reversed on narrow procedural grounds. —— U.S. ——, 129 S. Ct. 2195, 174 L.Ed.2d 99 (2009). The *Bailey* Court explicitly stated that in reversing, it "[did] not resolve whether a bankruptcy court ... could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing." *Id.* at 2207. The Second Circuit confirmed its analysis in *Manville III* on remand. *Manville IV*, 600 F.3d at 158. It confirmed that courts did not have the subject matter jurisdiction in bankruptcy cases to enjoin nonderivative claims against third parties and that § 524(g) likewise limited the scope of a channeling injunction to derivative claims. *Id.* at 153. Applying the Circuit's holding in the *Manville* cases, this Court must determine whether as a matter of law, rather than merely as a matter of fact, Pfizer's liability is derivative of Quigley's. Put another way, does Pfizer's liability under state law arise out of its ownership of Quigley, or does liability arise out of its independent obligations as a sponsor of Insulag?

One way to answer this question is to propose the following hypothetical: Assuming that Pfizer had no corporate affiliation with Quigley could it be liable under § 400 if Insulag were marketed with Pfizer's logo on the packaging (say, as its disbritutor)? Since the answer is obviously yes, it would appear that Pfizer's liability arises out of its sponsorship of a defective product, not its corporate affiliation (or, in the hypothetical, its distribution agreement) with the manufacturer.

The Bankruptcy Court reached the opposite conclusion by employing a sort of commutative reasoning: § 400 liability is treated as a kind of vicarious liability under Pennsylvania law (BR Opinion at 8 (citing *Waters v. NMC–Wollard, Inc.,* 2007 WL 2668008, at *7 (E.D.Pa. Sept.5, 2007))), and vicarious liability claims are considered derivative under state law (*id.* citing *Mamalis v. Atlas Van Lines, Inc.,* 522 Pa. 214, 560 A.2d 1380, 1383 (1989)), so § 400 claims are derivative under *Manville III and IV* and properly enjoinable pursuant to § 524(g) (*id.* at 14). One difficulty within this analysis, however, is that the labels "derivative," and "vicarious" describe overlapping and amorphous concepts. The Second Circuit counseled in *Manville III* that courts should look beyond facile labels and examine the underlying nature of each claim.

These labels become especially confusing in the context of strict products liability claims. Appellant argues that Pfizer should be directly liable under § 400 which section imposes "the same liability as though he were [a] manufacturer" under § 402A. Pursuant to § 402A, liability attaches to a seller of a defective product "although the seller has exercised all possible care in the preparation and sale of his product." Restatement (Second) of Torts § 402A(2)(a). Two of the justifications for this rule are

> that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the

> maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id. cmt. c. In other words, all parties in the distribution chain are held strictly liable for selling a defective product not because they acted culpably, but rather because they defaulted on a duty to sell a safe product and are judged to be in a better position to bear the cost than the consumer. Section 400 liability reads another entity into the distribution chain: the company that did not manufacturer a product, but held itself out as a sponsor. Any participant in the distribution chain could be said to be held vicariously liable for the conduct of the original manufacturer. Yet in another sense, each of these participants had an independent responsibility to the consumer not to market or sell a defective product, and each can be held liable if it defaults on that responsibility.

Although the § 402A claims against Quigley are closely related to the § 400 claims against Pfizer, they are not the same. A claimant under each theory seeks redress for injury caused by a defective product. But the mere fact that claimants seek redress for the same ultimate harm does not mean that the one claim is derivative of the other, as that term is used in *Johns–Manville III and IV*. Pursuant to a § 400 theory, appellant in effect argues that claimants have been injured because they (or the actual purchaser) relied upon Pfizer's reputation in deciding to use a defective product. Appellant thus seeks to bring separate direct actions against Pfizer for the harm claimants suffered because Pfizer breached an

independent legal duty not to employ its name and logo in the marketing of a defective product. Because these claims do not legally arise by reason of Pfizer's ownership of Quigley, they are beyond the proper scope of a § 524 channeling injunction and beyond the jurisdiction of a bankruptcy court.

The Bankruptcy Court concluded that § 400 liability must be a type of claim that arises by reason of ownership because other claims based on ownership, such as piercing the corporate veil, are enjoinable but require that the parent company has acted fraudulently before liability will attach. It would make "no sense" the court reasoned to exclude a § 400 claim which "pales in comparison to the wrongful conduct" required to impose liability under an alter-ego theory. (BR Opinion at 12.) But this argument fails to take into account key differences between § 400 liability and forms of liability similar to piercing the corporate veil. The Pennsylvania Supreme Court has described the justification for piercing the corporate veil as follows:

> [The] legal fiction of a separate corporate entity was designed to serve convenience and justice, and will be disregarded whenever justice or public policy demand and when the rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless. We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate identity may properly be disregarded.

Ashley v. Ashley, 482 Pa. 228, 237, 393 A.2d 637

(1978) (internal citations omitted). In other words, "[w]here the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his." *Wicks v. Milzoco Builders, Inc.,* 503 Pa. 614, 621, 470 A.2d 86 (1983). It is natural, then, that a plaintiff who seeks to pierce the corporate veil would have to show some form of fraudulent behavior, whereas plaintiffs who allege § 400 liability should be required to make a different or even less burdensome showing. The crux of this analysis is not whether the predicate acts for one cause of action are better or worse, but rather whether those claims derive as a legal matter from Pfizer's ownership of Quigley.

A careful comparison of enjoinable claims like piercing the corporate veil and *respondeat superior* to § 400 liability reveals important differences between the types of claims. Were appellant seeking to pierce the corporate veil, it would argue that Quigley's actions were, in effect, Pfizer's actions. Were it seeking to hold Pfizer liable under a theory of respondeat superior, it would argue that Quigley's actions should be attributable to Pfizer because of the legal relationship between the two. Neither theory is a legal claim in itself, but rather a method of determining who should be responsible for an injury. Furthermore, in each of these hypotheticals, appellant would not be able to hold Pfizer liable unless it demonstrated a relationship between Pfizer and Quigley. Corporate affiliation is indeed the *sine qua non* of these forms of liability. But for a § 400 claim, it is legally irrelevant that Pfizer owned Quigley. Section 400 claims often involve two

companies that are not linked by any kind of corporate affiliation. Rather, one company might purchase a product from another company and label that product as its own. *See, e.g. Walton,* 530 Pa. 568, 610 A.2d 454. When one examines the nature of the legal claim, as opposed to merely the factual circumstances that gave rise to the claim, it becomes apparent that the claim itself does not arise from Pfizer's ownership of Quigley, and so § 524(g) does not authorize an injunction.

Pfizer, perhaps recognizing the weakness of its analysis, contends that an injunction is warranted because Quigley's *res* is exposed to claims by Pfizer for indemnification. The Bankruptcy Court appears to have credited this argument. (BR Opinion 14.) But Pfizer's ultimate ability to seek indemnification cannot alone confer subject matter jurisdiction. In the seminal case of *Pacor, Inc. v. Higgins*, the Third Circuit held that the bankruptcy court did not have jurisdiction to hear claims against a company that had distributed asbestos manufactured by Johns–Manville merely because the outcome of these claims could ultimately affect the *res* of the Johns–Manville estate. 743 F.2d 984, 995 (3d Cir. 1984). It reasoned that the suit was "[a]t best ... a mere precursor to the potential third party claim for indemnification by Pacor against Manville" and held that the proceeding itself would have to directly affect the *res* of the estate for jurisdiction to be appropriate. *Id. Pacor* is entirely on point. The § 400 claims that appellant wishes to prosecute are legally almost identical to the claims against asbestos distributors in *Pacor*.

Pfizer is on marginally firmer footing in arguing

that appellant's claims will directly affect the *res* because Pfizer and Quigley share an insurance policy to defend asbestos claims. In *In re Combustion Eng'g, Inc.,* two subsidiaries of the same parent had shared insurance, one of which was in bankruptcy, and the non-debtor subsidiary argued that the shared insurance acted as an indemnity agreement, conferring jurisdiction on the bankruptcy court. 391 F.3d 190, 232 (3d Cir.2004). The Third Circuit noted that "it is doubtful whether shared insurance would be sufficient grounds upon which to find related-to jurisdiction over independent claims against" the non-debtor subsidiaries, but ultimately found that it had insufficient facts to decide the issue and ruled on different grounds. *Id.* at 233. The Third Circuit did not decide the issue definitively, however, and it is possible that the fact a parent-subsidiary relationship exists would affect the Third Circuit's analysis. Nonetheless, even if the Court were to hold that these claims would directly affect the *res,* this fact would only have bearing on the subject matter jurisdiction analysis. It would not affect the Court's holding that the appellant's § 400 claims do not arise out of Pfizer's ownership of Quigley and, therefore, do not fall within the scope of § 524(g).

CONCLUSION

For the foregoing reasons, the ruling of the Bankruptcy Court is REVERSED. Appellant is free to pursue its § 400 claims in Pennsylvania state courts.

SO ORDERED.

Memorandum Opinion and Order Clarifying Amended Injunction of the United States Bankruptcy Court for the Southern District of New York (May 15, 2008)

United States Bankruptcy Court,
S.D. New York.

In re QUIGLEY COMPANY, INC., Debtor.

Quigley Company, Inc., Plaintiff,
v.
A.C. Coleman, The Other Parties Listed on Exhibit A to the Complaint, John Does 1–1000 and Jane Does 1–1000, Defendants.

Bankruptcy No. 04–15739(SMB).
Adversary No. 04–04262.
May 15, 2008.

MEMORANDUM OPINION AND ORDER CLARIFYING AMENDED INJUNCTION

STUART M. BERNSTEIN, Chief United States Bankruptcy Judge.

On the same day that Quigley Company, Inc. ("Quigley") filed this asbestos bankruptcy case, the Court entered a preliminary injunction (*Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362(a) and Federal Rule of Bankruptcy Procedure 7065,* dated December 17, 2004 ("Preliminary Injunction") (ECF Doc. # 122)), which enjoined asbestos-related litigation against Quigley's non-debtor parent, Pfizer Inc. ("Pfizer"). By the *Amended Injunction Pursuant*

to 11 U.S.C. §§ 105(a) and 362(a) and Federal Rule of Bankruptcy Procedure 7065, dated December 6, 2007 ("Amended Injunction")(ECF Doc. # 238), the Court narrowed the relief granted to Pfizer. The Amended Injunction provided Pfizer with the same protection it would receive under 11 U.S.C. 524(g) if Quigley confirms its proposed plan.

The Law Offices of Peter G. Angelos, P.C. (the "Angelos Firm") represent asbestos claimants that had sued Pfizer prior to the Quigley petition date. The Angelos Firm contends that certain of its claims asserted against Pfizer in Pennsylvania are based on the Restatement (Second) of Torts § 400 ("Section 400"). As discussed below, Section 400 imposes a manufacturer's liability on an entity that places its name on a product manufactured by another.

It is undisputed that the Preliminary Injunction barred the Section 400 claims. The Angelos Firm contends, however, that the Amended Injunction does not, and has taken steps to prosecute them. For the reasons that follow, the Court concludes that the Section 400 claims are also enjoined under the Amended Injunction.

BACKGROUND

A. The Bankruptcy Court Injunctions

The facts leading up to the issuance of the Preliminary Injunction are described in *Quigley Co. v. Coleman (In re Quigley Co.),* 361 B.R. 670 (Bankr. S.D.N.Y. 2007). I assume familiarity with that decision, and highlight the facts relevant to the instant motion. Pfizer is a well-known pharmaceutical company. In addition to its pharmaceutical business, Pfizer manufactured or sold products that contained asbestos, including

Kilnoise and Firex.

In 1968, Pfizer acquired Quigley. Quigley was engaged in the refractories business, and manufactured and sold products that contained asbestos, including Insulag. By the time Quigley filed this chapter 11 case on September 3, 2004, it was defending against over 160,000 asbestos-related lawsuits and claims. Pfizer had also been sued in many of the same actions. As of Quigley's petition date, approximately 109,200 claimants had asserted claims naming both Quigley and Pfizer, but it is impossible to tell whether the claims asserted against Pfizer are based on its own products or Quigley's. *In re Quigley Co.,* 377 B.R. 110, 113 (Bankr. S.D.N.Y. 2007).

On the petition date, Quigley commenced this adversary proceeding to obtain an injunction stopping the lawsuits against the non-debtor Pfizer. Pfizer and Quigley shared liability insurance coverage, and the goal was to stop the litigation while Quigley made its anticipated quick trip through bankruptcy and confirmed a plan. The Preliminary Injunction issued by Bankruptcy Judge Beatty "enjoined [all parties] from taking any action in any and all pending or future Asbestos Related Claims against Pfizer during the pendency of Quigley's chapter 11 case."

The case proceeded more slowly than anticipated, but Quigley eventually proposed a plan that included an injunction in favor of Pfizer that, after some modification, tracked the language of 11 U.S.C. § 524(g). The proposed plan injunction was narrower than the Preliminary Injunction, and did not bar claims against Pfizer based on Pfizer products that

had nothing to do with Quigley. Corresponding amendments were made to the Preliminary Injunction to parallel the more limited plan injunction. The resulting Amended Injunction restrained:

> any legal action against Pfizer alleging that Pfizer is directly or indirectly liable for the conduct of, claims against, or demands on Quigley to the extent such alleged liability of Pfizer arises by reason of—
>
> (I) Pfizer's ownership of a financial interest in Quigley, a past or present affiliate of Quigley, or a predecessor in interest of Quigley;
>
> (II) Pfizer's involvement in the management of Quigley or a predecessor in interest of Quigley; or service as an officer, director or employee of Quigley or a related party;
>
> (III) Pfizer's provision of insurance to Quigley or a related party;
>
> (IV) Pfizer's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of Quigley or a related party, including but not limited to—
>
> (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
>
> (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

B. The Pennsylvania Litigation

Beginning in 1999, the Angelos Firm commenced one or more lawsuits in Pennsylvania on behalf of

numerous plaintiffs against Pfizer and others. The complaints identified Pfizer as a manufacturer of various asbestos products, including "asbestos spray insulation." (*E.g., Memorandum in Opposition to Pfizer, Inc.'s Reply Brief on the Issue of the Permissible Scope of the Amended Injunction*, dated Apr. 9, 2008 (the "*Angelos Reply* "), at Ex. A., ¶ 12(l) (ECF Doc. # 259)). "Asbestos spray insulation" referred to Insulag. (*Id.* at p. 3.) In addition, after the Amended Injunction was entered, the Angelos Firm sought to add Pfizer as a defendant in other cases based on the plaintiffs' exposure to Insulag. (*Memorandum of Law of Pfizer Inc. in Support of Motion (I) To Enforce the Preliminary Injunction Order and (II) For Interim Relief to Enjoin the Insulag Actions Pending Ruling on the Motion*, dated Feb. 28, 2008 (" *Pfizer Memo* "), at Ex. C (ECF Doc. # 242.)) Finally, the Angelos Firm filed or intends to file additional complaints in Pennsylvania naming Pfizer as a defendant based upon exposure to Insulag. (*Id.*, at Ex. D, F.) In short, the Angelos Firm has sued Pfizer as a manufacturer of Insulag.

The Angelos Firm has now moved for partial summary judgment against Pfizer in many of these actions on the theory that Pfizer is liable as a manufacturer of Insulag under Section 400. (*Id.*, at Ex. H, I, M and N.) The proof attached to these motions indicates that the Pfizer and Quigley names and logos, including, in some cases, the reference to Quigley as a subsidiary of Pfizer, appeared on diaries, advertisements and literature, purchase orders, invoices, packaging and sales reports relating to the

manufacture or sale of Insulag.[1]

In response, Pfizer filed this motion to enforce the Amended Injunction. It maintains that it never manufactured Insulag—Quigley did—and the Pennsylvania actions seek to impose liability based upon its ownership or purported management of Quigley in violation of the Amended Injunction. Furthermore, Pfizer argues that it bargained for this relief under the plan, and is making a substantial contribution to get it. Allowing the Angelos Firm to prosecute these claims will undermine the foundation of the plan and the purpose of Pfizer's contribution, and prevent Quigley's successful reorganization.

Not surprisingly, the Angelos Firm disagrees. It contends that despite Pfizer's statements that it never manufactured or sold Insulag, Section 400 imposes a manufacturer's liability on Pfizer under Pennsylvania law. Furthermore, neither Bankruptcy Code § 524(g) nor the Amended Injunction can stop the prosecution of asbestos claims against Pfizer based upon allegations that it is directly responsible or liable for its own conduct. According to the Angelos Firm, "[t]he operative facts

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[1] In addition, the 1999 Notes to Pfizer's Consolidated Financial Statements stated that "[t]hrough the early 1970s, Pfizer Inc. (Minerals Division) and Quigley Company, Inc. ("Quigley"), a wholly owned subsidiary, sold a minimal amount of one construction product and several refractory products containing some asbestos." The statement does not, however, refer to Insulag by name. (*Memorandum Supporting Position That the Amended Injunction Does Not Extend to the Direct Pfizer Insulag Actions*, dated March 17, 2008 ("*Angelos Memo* "), at Ex. 3 (ECF Doc. # 250)).

giving rise to Pfizer's liability may be related to, but they do not derive from, Quigley's actions." (*Angelos Reply*, at p. 2.)

DISCUSSION

A. Section 524(g)

The Amended Injunction provides the same protection as a channeling injunction under § 524(g).[2] The channeling injunction may

> enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in

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[2] The reasons why Pfizer is making the plan contribution, or the importance of the contribution to the success of the reorganization, have no bearing on the Court's power to enjoin the Section 400 claims. *See Johns–Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns–Manville Corp.)*, 517 F.3d 52, 66 (2d Cir. 2008)("It was inappropriate for the bankruptcy court to enjoin claims brought against a third party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate."); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004) ("Although ABB Limited's contributions to the Asbestos PI Trust may depend on freeing Lummus and Basic of asbestos liability, and these contributions may inure to the benefit of certain Combustion Engineering asbestos claimants, these factors alone do not provide a sufficient basis for exercising subject matter jurisdiction. If that were true, a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions.").

> paragraph (2)(B)(i)….

11 U.S.C. § 524(g)(1)(B).

The injunction is not limited to the debtor. The court may extend it to protect third parties to the extent that the third party is allegedly liable based upon a past connection with the debtor relating to its ownership, management, provision of insurance, or participation in a transaction that changes the debtor's structure or relates to its financial condition. 4 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 524.07[1], at 524–49 (15th rev. ed. 2007). Section 524(g)(4)(A)(ii), on which the Amended Injunction was based, states:

> Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—
>
> (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to–

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction

In short, § 524(g) permits a court to enter a channeling injunction that restrains certain types of claims against a non-debtor that would be payable from the assets of the non-debtor. Section 524 sets several requirements before a channeling injunction can protect non-debtor parties. Three of these requirements, posed in the form of questions, are at issue in the present proceeding: (1) does Pfizer's Section 400 liability arise directly or indirectly from the "conduct of, claims against, or demands on" Quigley; (2) will the Section 400 claims asserted by the Pennsylvania plaintiffs against Pfizer be paid under Quigley's plan; and (3) does Pfizer's liability "arise by reason of" its ownership or management of Quigley? If the answer to each question is in the affirmative, the Section 400 claims are barred.

B. Section 400

Section 400 creates "apparent" manufacturer liability. It provides:

> One who puts out as his own product a chattel *manufactured by another* is subject to the same liability as though he were its manufacturer.

RESTATEMENT (SECOND) OF TORTS § 400 (1965)(emphasis added). Section 400 is based on the rationale that "one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark [and] ... there is an added emphasis that the user can rely upon the reputation of the person so identified." *Id.* at cmt. d. It was adopted as the law of Pennsylvania in *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 599 (Pa. 1968). Pennsylvania treats the liability as vicarious, *Waters v. NMC–Wollard, Inc.*, No. 06–0032, 2007 WL 2668008, at *7 (E.D. Pa. Sept. 5, 2007); *Forry,* 237 A.2d at 599; *Haverstock v. T.I. Raleigh (USA)*, 557 A.2d 1068, 1070 (Pa. Super. Ct. 1989); *accord Morris v. American Motors Corp.,* 459 A.2d 968, 973 (Vt. 1982), and a claim based on Section 400 is inconsistent with the theory that the defendant actually manufactured the product. *See Haverstock*, 557 A.2d at 1070. The Pennsylvania plaintiffs' Section 400 claim must, therefore, be viewed as contending that Quigley actually manufactured the Insulag that caused their injuries, and that Pfizer "apparently" manufactured the Insulag.[3]

I assume, solely for the purpose of analysis, that the Pennsylvania plaintiffs' evidence submitted in

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[3] Consequently, it is unnecessary at this juncture to decide if Pfizer was an actual manufacturer of Insulag under some other theory, and I decline Pfizer's invitation to resolve that question.

connection with their summary judgment motions establishes Section 400 liability against Pfizer. While the Angelos Firm views this as the end of the inquiry, it merely begins it. Section 524(g), and hence, the Amended Injunction, may nonetheless give the Court the power to enjoin the Section 400 claims. This requires consideration of the three questions already posed.

The first two answers are clearly in the affirmative. The Section 400 claims arise from Quigley's conduct. Quigley manufactured the Insulag that the Pennsylvania plaintiffs allege caused their injuries, and but for Quigley's allegedly tortuous conduct, no Section 400 liability could exist.[4] Pfizer did not commit an actionable tort simply by placing its name and logo, or allowing Quigley to place the Pfizer name and logo, on Quigley corporate documents, forms and packaging. In addition, because Quigley, as the actual manufacturer, is liable for the same injuries, the Pennsylvania plaintiffs can assert their claims against the Quigley trust established under the proposed plan.

The more difficult question is whether Pfizer's liability "arises by reason of" its ownership or management of Quigley. At first glance, Pfizer's Section 400 liability "arises by reason of" the use of its name and logo by Quigley. According to the partial summary judgment motions submitted to the Pennsylvania courts, the Pennsylvania plaintiffs

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[4] For this reason, the Angelos Firm's contention that the Section 400 claims "do not depend upon Quigley's conduct," (*Angelos Memo*, at p. 9), is wrong.

base their Section 400 claim on the appearance of the Pfizer corporate logo and name on certain documents that also included the Quigley logo and name, and related or referred to the manufacture or sale of Insulag. In addition, there was deposition testimony that the Pfizer logo appeared on Insulag packaging.

It is equally true, however, that Pfizer's Section 400 liability "arises by reason of" its corporate connection to Quigley. Quigley began manufacturing Insulag in the 1930s, thirty years before Pfizer acquired it. (*Declaration of Louis Kilian,* dated Feb. 28, 2008 (the "*Kilian Declaration* ") at ¶ 13.)[5] Before and after Pfizer's acquisition, Quigley used identical promotional materials, except that Quigley added the Pfizer logo after the acquisition. (*Id.*, at ¶ 16.) But for Pfizer's ownership and/or management of Quigley, its name and logo would never have been used, and the Angelos Firm conceded as much at oral argument. (Transcript of hearing, held Mar. 4, 2008 ("3/4 Tr.") at pp. 16–17 (ECF Doc. # 256.)) Although the actual and apparent manufacturers need not be corporate affiliates, when they are, it may be that the apparent manufacturer placed its logo (or allowed its logo to be placed) on the product because of the corporate relationship, *i.e.*, as a statement of corporate affiliation.[6] If the corporate affiliation is

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[5] The Kilian Declaration is annexed as Exhibit A to the Pfizer Memo.

[6] According to Mr. Kilian, Quigley unilaterally began using Pfizer's logo, and "Pfizer was not involved in that decision to place the Pfizer logo on the Quigley materials." (*Kilian Declaration,* at ¶ 16.) If correct, I assume that Pfizer acquiesced in its use. If Quigley used the Pfizer logo without Pfizer's consent, the Section 400 claim would fail on

the *sine qua non* of liability, the liability may be said to "arise by reason of" the corporate relationship.

The phrase "arises by reason of" is, therefore, ambiguous, and the meager legislative history does not provide any answers. The Angelos Firm's submissions ignore the phrase (except when quoting the statute), and instead, contend that third party protection is limited to derivative claims that arise from the debtor's conduct and the third party's connection to or affiliation with the debtor. (*Angelos Memo*, at p. 10.) Conversely, where the third party's liability is based on its own conduct, § 524(g) does not apply. (*Id*.)

The problem with this argument is that it creates a distinction that does not exist in the law. The Angelos Firm cites several examples of "corporate relationship" derivative claims that can be enjoined under § 524(g)—successor-in-interest, alter ego, piercing the corporate veil, domination and control[7] and *respondeat superior*. *(Id.)* Except for *respondeat superior*, each of the "relationship" claims often involves conduct by the defendant, usually wrongful, before liability will attach. For example, Pennsylvania imposes successor liability, *inter alia*, where the purchaser of assets continues the

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[cont'd from previous page]

that ground. Pfizer has not made this argument.

[7] The doctrines of "piercing the corporate veil" and "alter ego" liability are [sic] same. *See Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 851 (Bankr. S.D.N.Y. 1994). "Domination and control" is one basis to pierce the corporate veil. *Powers v. Lycoming Engines,* Civ. A. No. 06–2993, 2007 WL 2702705, at *5 (E.D. Pa. Sept. 12, 2007); *Botwinick v. Credit Exch., Inc.*, 213 A.2d 349, 354 (Pa. 1965).

predecessor's business, the transaction was fraudulent and designed to escape liability, or the transfer was made without adequate consideration. *Continental Ins. Co. v. Schneider, Inc.,* 873 A.2d 1286, 1291 (Pa. 2005); *Hill v. Trailmobile, Inc.*, 603 A.2d 602, 605 (Pa. Super. Ct. 1992). Moreover, although alter ego liability is deemed to be derivative, *see Bridgestone/Firestone, Inc. v. Carr's Tire Serv., Inc.*, Civ. A. No. 90–7106, 1992 WL 96303, at * 4 (E.D. Pa. Apr. 24, 1992); *Trans Pacific Ins. Co. v. Trans–Pacific Ins. Co.*, 136 F.R.D. 385, 389 (E.D. Pa. 1991), it will only be imposed where there is "undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud." *Lumax Industries, Inc. v. Aultman,* 669 A.2d 893, 895 (Pa. 1995)(internal quotation marks omitted); *accord College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 207 (Pa. 1976)("It has been held that the corporate veil is properly pierced whenever one in control of a corporation uses that control or corporate assets to further one's own personal interests.")(citing *Walkovszky v. Carlton,* 223 N.E.2d 6 (N.Y. 1966)).

The use of the Pfizer name and logo pales in comparison to the wrongful conduct often required to impose derivative liability under these doctrines. Yet the Angelos Firm's interpretation of § 524(g) would exclude Pfizer's Section 400 liability from the ambit of its protection, but include successor liability and veil piercing claims based on fraud. This makes no sense. Moreover, Section 400 liability has more in common with *respondeat superior* than with any other theory of liability. As already noted,

Pennsylvania considers Section 400 liability as vicarious, and vicarious liability is a form of derivative liability under Pennsylvania law. *See Mamalis v. Atlas Van Lines, Inc.,* 560 A.2d 1380, 1383 (Pa. 1989)(release of agent terminates "derivative claim" against the principal because "[a] claim of vicarious liability is inseparable from the claim against the agent."); *accord McDermott v. Biddle,* 647 A.2d 514, 528 (Pa. Super. Ct. 1994), *rev'd on other grounds*, 674 A.2d 665 (Pa. 1996).

The evidence presented on this motion shows that Quigley simply added the Pfizer logo to its existing documents and written materials after the Pfizer acquisition, but nothing else changed. Furthermore, the Angelos Firm acknowledged that the Pfizer name and logo would not have been used by Quigley but for the Pfizer affiliation. Under the facts presented, the joinder of the Quigley and Pfizer names and logos is a statement of corporate affiliation. Even if it is sufficient to trigger Section 400 liability under non-bankruptcy law, that liability nevertheless "arises by reason of" Pfizer's ownership or management of Quigley. Consequently, the Section 400 claim may be channeled into the Quigley trust.

The Second Circuit's recent decision in *Johns–Manville*, 517 F.3d 52, does not call for a different result. There, Manville confirmed its plan in 1986, prior to the enactment of § 524(g). Manville had reached a settlement with certain insurers, and the plan contained broad provisions that enjoined claims that "were based upon, arose out of, or related to Manville's liability insurance policies." *Id.* at 57.

Following confirmation, various groups of plaintiffs filed statutory and common law claims

against the settling insurers. These claims alleged, in substance, that the settling insurers had learned about the dangers of asbestos from Manville, but had failed to disclose the asbestos related information to the plaintiffs. *Id.* at 57–58. The matter was brought before the bankruptcy court, and through mediation, some of the parties reached a settlement. As part of the settlement, the bankruptcy court issued a Clarifying Order stating that the 1986 channeling injunction had barred the statutory and common law claims based on the suppression of information. *Id.* at 59. After the district court affirmed the settlement, the objecting parties appealed.

The question before the Second Circuit was whether the bankruptcy court had subject matter jurisdiction to enjoin the statutory and common law claims against the settling insurers. Reversing the lower courts, the Second Circuit ruled that it did not. The claims did not seek to collect on the basis of Manville's conduct. *Id.* at 63. In addition,

> Plaintiffs seek to recover directly from a debtor's insurer for the insurer's own independent wrongdoing. Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers.

Id. at 65 (internal reference omitted).

Although the Manville injunction pre-dated the

enactment of § 524(g), the Court also analyzed the issue under that provision.[8] Citing the Third Circuit's decision in *Combustion Engineering,* the Court concluded that a § 524(g) injunction was limited to derivative liability for claims against a debtor, and "was not intended to reach non-derivative claims" that had no effect on the *res.* *Id.* at 68. According to the Court, the claims against Manville's insurers "are not derivative of Manville's liability, but rather seek to recover from Travelers for its own alleged misconduct." *Id.*

Unlike the claims against the settling insurers in *Manville* (or the asbestos claims against Combustion Engineering's affiliates)[9], the Pennsylvania plaintiff's claims against Pfizer under Section 400 are vicarious and derivative under state law. Thus, they satisfy the principal criterion identified by the *Manville* Court. In addition, while Pfizer rather than Quigley would pay the liability, the same is generally true of all derivative liability. The master must answer for the torts of his servant, the successor must satisfy the claims of its predecessor, and the parent corporation must pay the debts of its

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[8] The Court noted that § 524(g) was enacted in response to the *Manville* proceedings and "must be interpreted in the same manner." *Johns–Manville*, 517 F.3d at 67.

[9] The *Combustion Engineering* Court emphasized that the claims asserted against the debtor's subsidiaries were not "derivative" because they "[arose] from different products, involved different asbestos- containing materials, and were sold to different markets." 391 F.3d at 231. In contrast, Pfizer's and Quigley's alleged liability arises from the manufacture and sale of the same product to the same person.

alter ego subsidiary. Moreover, Pfizer may be entitled to indemnity from Quigley for any liability as an apparent manufacturer. *See Burch v. Sears, Roebuck & Co.,* 467 A.2d 615, 624 (Pa. Super. Ct. 1983) (non-manufacturing retailer of defective product sold under its name was secondarily liable, and was entitled to indemnity from the actual manufacturer, who was primarily liable). Consequently, a Section 400 claim may ultimately have a direct impact on Quigley.

Accordingly, the Section 400 claims asserted against Pfizer by the Pennsylvania plaintiffs are covered by the Amended Injunction, and the Angelos Firm and its clients are directed to cease prosecuting them. This opinion does not address any other claims that may be asserted against Pfizer under a different theory.

So Ordered.

Amended Preliminary Injunction of the United States Bankruptcy Court for the Southern District of New York (December 6, 2007)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
		Chapter 11
QUIGLEY COMPANY, INC.,	:	Case No. 04-15739 (SMB)
	:	
QUIGLEY COMPANY, INC.,	:	Adv. Proc. No. 04-04262 (SMB)
Plaintiff,	:	
v.	:	
A. C. Coleman, THE OTHER PARTIES LISTED ON EXHIBIT A TO THE COMPLAINT, JOHN DOES 1-1000 AND JANE DOES 1-1000,	:	
Defendants.	:	

AMENDED INJUNCTION PURSUANT TO 11 U.S.C. §§ 105(a) AND 362(a) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 7065

The Court (Beatty, J.), having entered an Order dated December 17, 2004 (the "Original PI Order") in connection with plaintiff, debtor and debtor in possession Quigley Company, Inc.'s ("Quigley")

motion, pursuant to sections 105(a) and 362(a) of title 11, United States Code (the "Bankruptcy Code"), and Rule 65 of the Federal Rules of Civil Procedure made applicable by Rule 7065 of the Federal Rules of Bankruptcy Procedure, dated September 3, 2004, for, *inter alia*, a preliminary injunction staying, restraining and enjoining the commencement or continuation of any and all actions or other proceedings against Pfizer Inc. ("Pfizer"), which allege personal injury or wrongful death based upon purported exposure to asbestos, silica, mixed dust, talc, or vermiculite, or which arise out of such personal injury or wrongful death claims, including without limitation, any contract actions and proceedings involving settlement agreements negotiated or allegedly negotiated by Pfizer, and staying, restraining and enjoining all parties from taking any further action against Pfizer, including any action against any property in which both Pfizer and Quigley have a legal, equitable, beneficial, contractual or other interest including, without limitation, any insurance policies or proceeds thereof in which Pfizer and Quigley have a shared interest, and including the prosecution or commencement of any other action against Pfizer for the purpose of collecting upon such claims (any of the foregoing claims shall be referred to in this order as an "Asbestos Related Claim"); and the self-styled Ad Hoc Committee of Tort Victims (the "Ad Hoc Committee"), having moved on May 2, 2007 for an order modifying the Original PI Order and for other relief (the "Ad Hoc Committee Motion"), and Quigley and Pfizer having filed objections to such motion; and based on the motion, the objections, and the hearings held in connection therewith, the Court

finds and concludes that the scope of the preliminary injunction under the Original PI Order shall be amended as follows.

NOW THEREFORE, IT IS HEREBY

ORDERED, that pursuant to sections 105(a) and 362(a) of the Bankruptcy Code, during the pendency of Quigley's chapter 11 case, all parties, including, without limitation, the defendants in this action, their agents, servants, employees and counsel, are hereby stayed, restrained and enjoined from commencing or continuing any legal action against Pfizer alleging that Pfizer is directly or indirectly liable for the conduct of, claims against, or demands on Quigley to the extent such alleged liability of Pfizer arises by reason of —

(I) Pfizer's ownership of a financial interest in Quigley, a past or present affiliate of Quigley, or a predecessor in interest of Quigley;

(II) Pfizer's involvement in the management of Quigley or a predecessor in interest of Quigley; or service as an officer, director or employee of Quigley or a related party;

(III) Pfizer's provision of insurance to Quigley or a related party;

(IV) Pfizer's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of Quigley or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

As used in this paragraph, the term "related party" means — (I) a past or present affiliate of Quigley; (II) a predecessor in interest of Quigley; or (III) any entity that owned a financial interest in — (aa) Quigley; (bb) a past or present affiliate of Quigley; or (cc) a predecessor in interest of Quigley;

and it is further

ORDERED, that any party aggrieved by a violation or threatened violation of this Order may seek to enforce this Order in a court of competent jurisdiction (the "Enforcing Court") by any procedurally appropriate means, provided, however, that prior to seeking to enforce this Order in this Court, the aggrieved party shall first request a conference with the Court; and it is further

ORDERED, that in the event the Enforcing Court finds, after notice and a hearing, that any person or entity (1) has taken action against Pfizer in violation of this Order in bad faith or for any improper purpose, such as to harass, to cause delay or to increase costs of litigation; or (2) has taken legal action against Pfizer without credible evidence that such person or entity holds a claim against Pfizer that is not enjoined pursuant to this Order, then such person or entity and/or counsel to such person

or entity shall be subject to sanctions, including, but not limited to, costs and other expenses, including attorneys' fees incurred by Quigley, Pfizer and any other party in seeking to enforce this Order in this court or any other Enforcing Court, and costs and other expenses, including attorneys' fees, incurred in connection with any claim or action brought and/or prosecuted by such person or entity in violation of this Order, and further including any other sanction that this court or any other Enforcing Court can impose under its power to punish contempt; and it is further

ORDERED, that, as and to the extent that Pfizer itself may determine and elect in writing, this Order shall not apply with respect to any pending or future claims, actions, or other proceedings against Pfizer (including but not limited to any pending or future claims for contribution or indemnity) which relate in any way to Pfizer's rights or obligations under any settlement agreements negotiated or allegedly negotiated by the Center for Claims Resolution (the "CCR") at any time prior to the termination of Pfizer's membership in CCR effective July 1, 2001; provided, however, that Pfizer shall not be entitled to, and shall not, draw on the Shared Insurance Policies or Insurance Trust for any purpose with respect to such claims, actions, or proceedings; and it is further

ORDERED, that Pfizer may, in its sole discretion and without leave of the Court, agree to allow any person or entity to take legal action with respect to a claim against Pfizer that is otherwise enjoined by this Order; provided, however, that in each such instance, Pfizer shall agree to defer its right to draw

on the Shared Insurance Policies and Insurance Trust with respect to any such claim in accordance with the following Ordered paragraph; and it is further

ORDERED, that Pfizer shall defer its right to draw on the Shared Insurance Policies and Insurance Trust with respect to any Asbestos Related Claim that is permitted to be prosecuted by this Order or agreement by Pfizer under the preceding Ordered paragraph until the earlier of (A) the withdrawal by Quigley of its proposed plan of reorganization (the "Plan") and (B) entry of an order: (a) denying confirmation of the Plan; (b) terminating the automatic stay imposed by section 362(a) of the Bankruptcy Code; (c) converting Quigley's chapter 11 case to a case under chapter 7 of the Bankruptcy Code; (d) dismissing Quigley's chapter 11 case; (e) appointing a trustee in the chapter 11 case; and/or (f) vacating this Order; provided, however, that any such deferral shall not constitute any waiver or release or otherwise affect Pfizer's rights and claims against the Shared Insurance Policies and Insurance Trust; and it is further

ORDERED, that all statutes of limitations and statutes of repose that had not expired as of September 3, 2004, with respect to any and all Asbestos Related Claims against Pfizer that are enjoined by this Order are tolled until sixty days after the above captioned adversary proceeding (Adversary Proceeding No. 04-04262 (SMB)) has been disposed of by final, non-appealable judgments, orders or decrees; and it is further

ORDERED, that the tolling of all statutes of

limitations and statutes of repose with respect to any and all Asbestos Related Claims against Pfizer that were enjoined pursuant to the Original PI Order but are not enjoined pursuant to this Order shall expire, and the limitations and repose periods under such statutes shall resume running, on the date that is ninety days from the date of the entry of this Order; and it is further

ORDERED, that pursuant to Bankruptcy Rule 7065, Quigley be, and hereby is, excused from complying with the security provisions of Fed.R.Civ.P.65(c); and it is further

ORDERED, that nothing contained in this order shall prohibit any party in interest from seeking relief from the automatic stay of section 362(a) of the Bankruptcy Code or the terms of this order by filing an appropriate motion with the Court, after appropriate notice to counsel for Quigley, Pfizer and the creditors' committee in this case; and it is further

ORDERED, that this order shall be served together with a compact disk ("CD") containing Exhibit A to the Motion (list of claims and civil actions against Pfizer and Quigley) and Exhibit B to the Motion (list of claims and civil actions against Pfizer only), and the amendments to each of Exhibits A and B, by overnight mail, Saturday delivery, if necessary, postage prepaid, within 3 days after the entry of this order, upon counsel for all known parties in interest at the time of such service who are directly affected by this order, including counsel for personal injury claimants, as provided in the Order Authorizing Listing of Addresses of Counsel for Personal Injury Claimants in Creditor Matrix in

Lieu of Claimants' Addresses and Approving Notice Procedures for Claimants, dated September 7, 2004; and it is further

ORDERED, that service in accordance with this Order shall be deemed good, sufficient and adequate notice for all purposes; and it is further

ORDERED, that any party who commences or continues in an action or engages in any act, including without limitation, efforts to obtain discovery or testimony from any person or entity, including without limitation, parties to any pending action, third parties or the plaintiffs, relating to alleged claims against Pfizer which are enjoined by this Order, who has not heretofore received notice in this adversary proceeding shall, upon receiving actual notice of this Order, take all such actions necessary to comply with this Order, including, without limitation, the withdrawal of any Asbestos Related Claim asserted against Pfizer.

Dated: New York, New York
December 6, 2007

/s/ STUART M. BERNSTEIN

CHIEF UNITED STATES BANKRUPTCY JUDGE

Preliminary Injunction of the United States Bankruptcy Court for the Southern District of New York (December 17, 2004)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
		Chapter 11
QUIGLEY COMPANY, INC.,	:	Case No. 04-15739 (PCB)
	:	
QUIGLEY COMPANY, INC.,	:	Adv. Proc. No. 04-04262 (PCB)
Plaintiff,	:	
v.	:	
A. C. Coleman, THE OTHER PARTIES LISTED ON EXHIBIT A TO THE COMPLAINT, JOHN DOES 1-1000 AND JANE DOES 1-1000, Defendants.	:	

INJUNCTION PURSUANT TO 11 U.S.C. §§ 105(a) AND 362(a) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 7065

The plaintiff, Quigley Company, Inc. ("Quigley"), debtor and debtor in possession, having moved on September 3, 2004 (the "Motion"), pursuant to sections 105(a) and 362(a) of title 11, United States

Code (the "Bankruptcy Code"), and Rule 65 of the Federal Rules of Civil Procedure made applicable by Rule 7065 of the Federal Rules of Bankruptcy Procedure, for (1) a preliminary injunction staying, restraining and enjoining the commencement or continuation of any and all actions or other proceedings against Pfizer Inc. ("Pfizer"), which allege personal injury or wrongful death based upon purported exposure to asbestos, silica, mixed dust, talc, or vermiculite, including without limitation, the actions and proceedings listed on Exhibits A and B to the Motion (as amended), or which arise out of such personal injury or wrongful death claims, including without limitation, any contract actions and proceedings involving settlement agreements negotiated or allegedly negotiated by Pfizer, and staying, restraining and enjoining all parties from taking any further action against Pfizer, including any action against any property in which both Pfizer and Quigley have a legal, equitable, beneficial, contractual or other interest including, without limitation, any insurance policies or proceeds thereof in which Pfizer and Quigley have a shared interest, and including the prosecution or commencement of any other action against Pfizer for the purpose of collecting upon such claims (any of the foregoing claims shall be referred to in this order as an "Asbestos Related Claim"); and (2) a temporary restraining order pending a hearing on the Motion for a preliminary injunction, such temporary restraining order (the "TRO") having been granted after notice, on September 7, 2004, and pursuant to an order of this Court dated September 27, 2004, such TRO having been extended until a hearing on the preliminary injunction (the "TRO Extension");

and the Court having considered and reviewed (i) Quigley's memorandum of law in support of the Motion, dated September 3, 2004, (ii) the affidavit of Paul A. Street in support of the Motion, sworn to September 2, 2004, (iii) the amended affidavit of Steven C. Kany in support of the Motion, sworn to September 7, 2004, (iv) the affidavit of David B. Killalea, sworn to November 4, 2004, and (v) Quigley's complaint, dated September 3, 2004, for declaratory and injunctive relief with respect to the Asbestos Related Claims asserted against Pfizer (the "Complaint"); and the Court having jurisdiction to consider the Motion, the Complaint and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and this matter being a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G) and (O); and based on the record established and the Court's decision at the hearings on September 7, November 1 and 17, 2004, the Court finds and concludes as follows:

1. Quigley and Pfizer are defendants in over one hundred sixty thousand Asbestos Related Claims. Quigley and Pfizer have utilized certain shared insurance policies (the "Shared Insurance Policies") and the funds contained in a certain insurance trust under which Quigley and Pfizer are joint beneficiaries (the "Insurance Trust"), to satisfy settlements, judgments and defense costs related to the Asbestos Related Claims.

2. Prior to the commencement of this chapter 11 case, Pfizer engaged in extensive settlement discussions with Quigley, present holders of Asbestos Related Claims against Pfizer and Quigley, and a representative representing the interests of holders of future demands against Pfizer and Quigley. Those

discussions resulted in Quigley's commencing this chapter 11 case with a pre-negotiated plan, which contemplates a significant contribution by Pfizer to a trust to be established under section 524(g) of the Bankruptcy Code.

3. Quigley commenced this chapter 11 case to protect the remaining limits under the Shared Insurance Policies and the amounts contained in the Insurance Trust, which will be used to fund the pre-negotiated plan of reorganization and a section 524(g) trust.

4. The Shared Insurance Policies and the amounts contained in the Insurance Trust constitute property of Quigley's estate. Each of these assets may be utilized by Pfizer and Quigley to satisfy settlements, judgments or defense costs related to Asbestos Related Claims against either of them, on a first billed, first paid basis, irrespective of amounts previously billed by or paid to Pfizer or Quigley.

5. Quigley has demonstrated that absent a stay of all pending and future Asbestos Related Claims asserted against Pfizer, plaintiffs will continue to prosecute their claims against Pfizer, which will deplete the Shared Insurance Policies and the funds in the Insurance Trust.

6. Quigley has demonstrated that depletion of the Shared Insurance Policies and the Insurance Trust assets will cause immediate and irreparable injury to Quigley's estate and impair Quigley's ability to implement its pre-negotiated chapter 11 plan and successfully reorganize under chapter 11 of the Bankruptcy Code.

7. Quigley has demonstrated that the injunctive relief provided herein is in the best interests of Quigley, its estate, creditors and parties in interest.

8. Quigley has demonstrated that in accordance with the terms of the TRO:

(a) on September 8, 2004, Quigley's court appointed noticing agent properly served a copy of the TRO (with a compact disc containing Exhibits A and B to the Motion), which contains notice of a hearing on the preliminary injunction, upon all known parties-in-interest directly affected by the TRO, including, among others, (i) counsel for all known defendants pursuant to the Order Authorizing Quigley Company, Inc. to List Addresses of Counsel for Personal Injury Claimants in Creditor Matrix in Lieu of Claimants' Addresses, and Approving Notice Procedures for Claimants, entered by this Court on September 7, 2004, and (ii) counsel for Albert Togut, the legal representative appointed by the Court to represent the interests of holders of future demands against Quigley; and

(b) on September 14, 2004, Quigley's court appointed noticing agent caused to be published in *The New York Times* and *The Wall Street Journal (National Edition)* notice of the hearing seeking the preliminary injunction.

9. Quigley has demonstrated that on September 9, 2004, its court appointed noticing agent properly served a copy of the summons and Complaint with exhibits upon, among others, (i) counsel for all known defendants pursuant to the Order Authorizing Quigley Company, Inc. to List Addresses of Counsel for Personal Injury Claimants in Creditor Matrix in Lieu of Claimants' Addresses, and

Approving Notice Procedures for Claimants, and (ii) counsel for Albert Togut, the legal representative appointed by the Court to represent the interests of holders of future demands against Quigley.

10. Quigley has demonstrated that in accordance with the terms of the TRO Extension, Quigley's court appointed noticing agent properly served a copy of the TRO Extension, which contains notice of the adjourned hearing on the preliminary injunction, upon all known parties-in-interest directly affected by the TRO, including, among others, (i) counsel for all known defendants pursuant to the Order Authorizing Quigley Company, Inc. to List Addresses of Counsel for Personal Injury Claimants in Creditor Matrix in Lieu of Claimants' Addresses, and Approving Notice Procedures for Claimants, entered by this Court on September 7, 2004, and (ii) counsel for Albert Togut, the legal representative appointed by the Court to represent the interests of holders of future demands against Quigley[1].

11. Notice of the Motion, the hearing on the Motion, and the Complaint has therefore been effectively given, consistent with Fed R. Civ. P. 65(a)(1) and section 102(1) of the Bankruptcy Code.

NOW THEREFORE, IT IS HEREBY

ORDERED, that the Motion is granted as

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[1] Quigley has further demonstrated that its court appointed noticing agent has provided notice of any adjournments of the preliminary injunction hearing to parties on the Master Service List established by Order Establishing Notice Procedures and Authorizing Debtor or Its Agent to Mail Notices, dated September 7, 2004.

provided herein; and it is further

ORDERED, that all objections to the relief sought by the Motion and in the Complaint, are overruled on their merits; and it is further

ORDERED, that pursuant to sections 105(a) and 362(a) of the Bankruptcy Code, all parties, including the defendants in this action, their agents, servants, employees and counsel, are hereby stayed, restrained and enjoined from taking any action in any and all pending or future Asbestos Related Claims against Pfizer during the pendency of Quigley's chapter 11 case; and it is further

ORDERED, that, subject to the provisions of the immediately succeeding paragraph, the automatic stay of section 362(a) of the Bankruptcy Code extends to: (1) all pending and future Asbestos Related Claims against Pfizer; and (2) against any property in which both Pfizer and Quigley have a legal, beneficial, contractual or other interest including, without limitation, the Shared Insurance Policies and the funds in the Insurance Trust; and it is further

ORDERED, that any party that asserts it holds an Asbestos Related Claim solely against Pfizer based on a product having no relation to Quigley or any product not manufactured, sold or distributed by Quigley (a "Pfizer-only Claim") may obtain relief from this order and shall not be stayed or enjoined from prosecuting such Pfizer Only Claim if, after notice and a hearing, (1) such party demonstrates to the Court, based on competent evidence, and this Court finds based upon such competent evidence, that the party has a Pfizer-only Claim, and (2) this Court finds that the Shared Insurance Policies shared by Quigley or the funds contained in the

Insurance Trust under which Quigley and Pfizer are joint beneficiaries could not be utilized to satisfy any portion of the defense costs, settlements or judgments related to the Pfizer-only Claim or that such Shared Insurance Policies or the Insurance Trust funds would not in any way be diminished or impaired by the prosecution of the Pfizer-only Claim; and it is further

ORDERED, that this Court shall have and retain jurisdiction to determine any dispute as to whether (1) a claim constitutes a Pfizer Only Claim or (2) the Shared Insurance Policies or the Insurance Trust funds will in any way be diminished or impaired by prosecution of the Pfizer-only Claim; and it is further

ORDERED, that, as and to the extent that Pfizer itself may determine and elect in writing, this order shall not apply with respect to any pending or future claims, actions, or other proceedings against Pfizer (including but not limited to any pending or future claims for contribution or indemnity) which relate in any way to Pfizer's rights or obligations under any settlement agreements negotiated or allegedly negotiated by the Center for Claims Resolution (the "CCR") at any time prior to the termination of Pfizer's membership in CCR effective July 1, 2001; provided, however, that Pfizer shall not be entitled to, and shall not, draw on the Shared Insurance Policies or Insurance Trust for any purpose with respect to such claims, actions, or proceedings; and it is further

ORDERED, that all statutes of limitations and statutes of repose that had not expired as of September 3, 2004, with respect to any and all Asbestos Related Claims against Pfizer are tolled until sixty days after the above captioned adversary proceeding (Adversary Proceeding No. 04-04262

(PCB)) has been disposed of by final, non-appealable judgments, orders or decrees; and it is further

ORDERED, that pursuant to Bankruptcy Rule 7065, Quigley be, and hereby is, excused from complying with the security provisions of Fed. R. Civ. P. 65(c); and it is further

ORDERED, that nothing contained in this order shall prohibit any party in interest from seeking relief from the automatic stay of section 362(a) of the Bankruptcy Code or the terms of this order by filing an appropriate motion with the Court, after appropriate notice to counsel for Quigley, Pfizer and the creditors' committee in this case; and it is further

ORDERED, that this order shall be served together with a compact disk ("CD") containing Exhibit A to the Motion (list of claims and civil actions against Pfizer and Quigley) and Exhibit B to the Motion (list of claims and civil actions against Pfizer only), and the amendments to each of Exhibits A and B, by overnight mail, Saturday delivery, if necessary, postage prepaid, within 3 days after the entry of this order, upon counsel for all known parties in interest at the time of such service who are directly affected by this order, including counsel for personal injury claimants, as provided in the Order Authorizing Listing of Addresses of Counsel for Personal Injury Claimants in Creditor Matrix in Lieu of Claimants' Addresses and Approving Notice Procedures for Claimants, dated September 7, 2004; and it is further

ORDERED, that service in accordance with this order shall be deemed good, sufficient and adequate notice for all purposes; and it is further

ORDERED, that any party who commences or continues in an action or engages in any act,

including without limitation, efforts to obtain discovery or testimony from any person or entity, including without limitation, parties to any pending action, third parties or the plaintiffs, relating to alleged claims against Pfizer, in violation of this injunction who has not heretofore received notice in this adversary proceeding shall, upon receiving actual notice of this injunction, take all such actions necessary to comply with this injunction order, including the withdrawal of any Asbestos Related Claim asserted against Pfizer.

Dated: New York, New York
December 17, 2004

/s/ Prudence Carter Beatty
United States
Bankruptcy Judge

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing (June 12, 2012)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of June, two thousand twelve,

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In Re Quigley Company, Inc.,

Pfizer Inc.,

Appellant,

Quigley Company, Incorporated,

Debtor - Appellant,

v.

Law Offices of Peter G. Angelos,

Appellee,

Hissey Kientz L.L.P. and Hissey, Kientz & Herron

P.L.L.C.,

Intervenor - Appellee.

ORDER

Docket Number: 11-2635 (Lead)

11-2767 (Con)

Appellant Phizer [sic] Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en*

banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

11 U.S.C. § 524(g)

(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of

reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of--

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that--

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the

same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay,

present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph

(A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid

and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken

by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

Transcript of Hearing on Pfizer's Motion for Reconsideration in the United States District Court for the Southern District of New York (June 23, 2011)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: QUIGLEY,

10 CV 1573 (RJH)
----------x

June 23, 2011
4:50 p.m.

Before:

HON. RICHARD J. HOLWELL,

District Judge

APPEARANCES

BROWN RUDNICK LLP
Attorneys for Plaintiff Angelos
BY: JAMES W. STOLL
JEFFREY JONAS

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Attorneys for Defendant Pfizer, Inc.
BY: SHEILA BIRNBAUM
BERT L. WOLFF

SCHULTE ROTH & ZABEL LLP
Attorneys for Quigley
BY: MICHAEL COOK

MICHAEL PAEK

LOWENSTEIN SANDLER PC
Attorneys for Intervenor
BY: THOMAS A. PITTA

COPLIN & DRYSDALE
Attorneys for Unsecured Creditors
BY: RITA C. TOBIN
RONALD REIMSEL

APPEARANCES: (continued)

TOGUT, SEGAL & SEGAL LLP
Attorneys for Future Claims Representative
BY: RICHARD K. MILIN

THE DEPUTY CLERK: All rise.

THE COURT: Please, take your seats.

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. STOLL: Good afternoon, your Honor, James Stoll from Brown Rudnick representing the Ad Hoc Committee.

THE COURT: Mr. Stoll.

MR JONAS: Your Honor, Jeff Jonas from Brown Rudnick also for the Ad Hoc Committee.

MR. PITTA: Your Honor, Thomas Pitta of Lowenstein Sandler on behalf of Intervenor.

MS. BIRNBAUM: Good afternoon, your Honor, Sheila Birnbaum on behalf of Pfizer.

THE COURT: Ms. Birnbaum.

MR. WOLFF: Hello, your Honor, Bert Wolff, Skadden Arps, also on behalf of Pfizer.

MR. COOK: Michael Cook on behalf of Quigley.

THE COURT: Mr. Cook.

MR. MILIN: Richard Milin, Togut Segal, for the Future Claim Representative

MS. TOBIN: Rita Tobin, Caplin & Drysdale for The Unsecured Creditors.

THE COURT: Good afternoon.

MR. REIMSEL: Your Honor, on the phone, Ronald Reimsel from Caplin & Drysdale on behalf of the Unsecured Creditors Committee.

THE COURT: Mr. Reimsel, how are you today?

MR. REIMSEL: Very good, sir.

THE COURT: All right, we're here on Pfizer's motion. Mrs. Birnbaum, would you like to address it?

MS. BIRNBAUM: Yes, your Honor. Thank you so much for giving us the opportunity to argue this and for any rehearing motion. I know I have a heavy burden today because we're here on a rehearing motion. But I think that we meet the criteria for rehearing here on several grounds; on the grounds

that the Court, respectfully, overlooked factual matters that I believe really go to the heart of the issue here as to whether the Bankruptcy Court's injunction, amended injunction, was properly given to these Angelos claims.

We also believe that there was clear error, and that if this is not corrected, there will be a manifest injustice here. Because as I think we pointed out in our papers, we are very close to a plan of reorganization, and the Bankruptcy Court has stayed that proceeding until there is a determination on the issues here, because they go to the heart of many of the matters in the reorganization plan.

So I'd like to jump in, I mean, into this thicket.

THE COURT: Yes, I'm as disappointed as you that this came at the cusp of your reorganization. But maybe in the future somebody will read my local rules that says when you want argument, you put it on the notice of motion right in bold caps.

MS. BIRNBAUM: Well, I thought, when we weren't in the case at the time the original motion was filed, your Honor. But it was our understanding that your Honor said, in either oral argument on another matter, that he was going to grant oral argument. So we assumed we'll hear from the Court before the motion --

THE COURT: So here we are.

MS. BIRNBAUM: -- was decided. So we're here. And it's not too late yet. So let's see if we can -- if I can take you through this. I'm a torts person, so I

understand Section 400 and how it works, and I've learned a lot about bankruptcy in the last several months.

So what I'd like to do is just bring the Court's attention first, I think it really is important, to the terms of Judge Bernstein's injunction. And if the Court would like, I think this would be helpful if you had the language of the injunction before you, because I'm going to refer to it. If I can hand it up to the Court.

THE COURT: Yes, of course.

MR. PITTA: And I'll give -- I think all the other parties have it, but.

THE COURT: Thank you.

MS. BIRNBAUM: Your Honor, if we start with looking at the injunction. The injunction is very clear on its face. It's not confusing. It should be read for its clear language. And I think that's where the analysis has to start. And what the injunction provides is that any action is enjoined, any legal action against Pfizer alleging that Pfizer is directly or indirectly liable for the conduct of Quigley. Quigley is the debtor. Pfizer is the parent of Quigley.

To the extent such alleged liability -- and I'm emphasizing this, because I'm going to come back to this -- such alleged liability of Pfizer arises by reason of Pfizer's ownership of financial interest in Quigley.

So, I think if we look at the first part of this, and we look at Section 400, I think your Honor

concluded correctly that this 400 liability of a logo being placed on the documents -- and there is a real question whether there was a logo in Pfizer's name on any of the packaging, but we're assuming that's correct for the purposes of the analysis, and so did Judge Bernstein. And Pfizer --

THE COURT: Well, both sides, as well as Judge Bernstein and myself, agree that the two logos were on some promotion material.

MS. BIRNBAUM: That's absolute, absolutely. That's what's before the Court. Maybe on bags, maybe not, but it doesn't matter. We get to the same result for the moment.

Those, that logo was on the bag. It was put on, on the documents bag -- I'll use the word bag, but we know what we're talking about, and that logo was put on there by Quigley. And in the Court's decision, the Court does make reference to the fact that Pfizer put the logo on. There's not a scintilla of evidence in the record and the conclusion of Judge Bernstein that Quigley put it on.

Now, that's important. It's not, it's not a fact that has no importance. It's not a quibble, as --

THE COURT: Yes. And I think if you read this Court's opinion, this Court never disagreed with Judge Bernstein on that issue. The language that Pfizer quotes from my opinion is a sentence which characterizes the claims made by the appellants in the underlying 400 action. And their claim there is in fact that Pfizer placed its name on the Quigley packaging. But I was certainly cognizant of Judge

Bernstein's conclusion that it was placed there by Quigley.

The issue is, as you I think correctly point out, does that make a difference in the analysis.

MS. BIRNBAUM: And if are -- it may not make a difference in the analysis if we were talking only about Section 400. I would suggest to your Honor that it makes a difference in the analysis when we parse the words in the injunction, the amended injunction. Because it takes the first part of that, the first prong of the injunctive language, that Pfizer is directly or indirectly liable for the conduct of Quigley. Since Quigley put it on -- and I think there's another argument, I think we're going to get to the Section 400 argument -- but there's another argument that could be made; that because of Quigley's conduct in putting the logo on the materials and the name, that's why Pfizer, it can look at potential or alleged liability. So I think that it has importance for that reason as well.

But the heart of our disagreement with your Honor is how you approached the issue of the Section 400 liability. And I think you asked the question, under Section 400, what is the nature of the liability under state law. And you concluded that under state law there's an independent duty on the part of Pfizer. Well, we would suggest to you there has to be a duty. Without a duty, there's no tort law. You can't be held liable for tort. But so that the analysis should end there. That's the beginning of any analysis, is there a duty under tort law. Of course there is. There has to be. The real analysis that needed to be done when you asked, what is the nature of the

liability, is is the liability the vicarious and derivative or is it direct. And the answer there is clear under Pennsylvania law. It is derivative. It is vicarious. The only way that Pfizer can be held liable is if Quigley manufactured a defective product. Pfizer didn't manufacture, didn't distribute, had nothing to do with this.

THE COURT: Well, you know, the difficulty -- I have two observations to make. One, these are good arguments that maybe should be made in the State of Pennsylvania on a 400 claim.

But the concept of vicarious liability would seem to me for, in the area of strict liability, applies to everybody in the chain of distribution. And under Section 400 sponsors are stuck into that chain of distribution.

The manufacturer, Quigley, is, in a sense, vicariously liable; that is, it's liable without fault.

MS. BIRNBAUM: That's not what the Court means by that.

THE COURT: So is the distributor and so is the sponsor liable without fault. But it's not that there is -- it's not simply that the sponsor is liable for the acts of the manufacturer, it appeared to me, but that the sponsor's liable for sponsorship.

MS. BIRNBAUM: That's where I'm a tort lawyer, so maybe I can try to clear that up a little. This is strict liability, but it's not absolute liability. You have to find that the product is in a defective condition, unreasonably dangerous, even in the law of

Pennsylvania.

THE COURT: Right.

MS. BIRNBAUM: So if Pfizer had its name on the logo and the product wasn't defective -- and your Honor understood this, your Honor put it into his analysis -- you couldn't have any liability, except if the product was defective, and it was defective because of the a manufacturer.

THE COURT: To be sure, there's but for causation.

MS. BIRNBAUM: Right.

THE COURT: But that doesn't necessarily mean that liability arises from the fact that Quigley manufactured a product that happened to be a killer, as opposed to Pfizer, at best, permitting its trademark to sponsor a product that turns out to kill people.

MS. BIRNBAUM: Let me go back again to the injunction. Because the injunction doesn't say that the action has to arise out of the ownership interest.

The injunction merely says, that to the extent such alleged liability of Pfizer arises by reason of Pfizer's ownership. That's a very broad term, by reason of. I think where the Court may have gone off in one direction is by adding the word legally before all of this, where the Court says, legally arises. That's not in the injunction. It's not in 524(g). It's not a legal analysis from this. It could be factual analysis also. But you don't need legal here. It would be reversible, I think, to say you have to put

the word legal in here to get to the result. And that's what the Court did. It legally --

THE COURT: That's an interesting argument that you make for the first time on the motion for reconsideration, rehearing.

MS. BIRNBAUM: Oh, I think we made the motion that the Court put the word legally in, and that was improper. Because the Supreme Court has said in some civil cases, you can't add words to the injunction, you can't add words to the order. The order is clear on its face. This is not that there has to be a legal arising out of. In fact --

THE COURT: So did Judge Bernstein make that same mistake?

MS. BIRNBAUM: No. Judge Bernstein didn't make that mistake.

THE COURT: Well, he went into this elaborate reasoning that it arose out of corporate affiliation, and you're basically saying arise from means but for.

MS. BIRNBAUM: No. What I'm saying is he had to find there was a corporate affiliation, otherwise it would not have arisen by reason of Pfizer's ownership of a financial interest.

THE COURT: So let me ask you this question. Let's assume the facts are what they are, except that Quigley doesn't -- Pfizer doesn't own a single share of Quigley stock.

MS. BIRNBAUM: I would say --

THE COURT: Is there liability under 400?

MS. BIRNBAUM: Yes. But --

THE COURT: And does that liability arise out of the sponsorship of the package?

MS. BIRNBAUM: Yes. But it wouldn't fall within this injunction. That is exactly the issue. It would not fall within that. That's a hypothetical. We have a real case with real facts, and the real facts have to be looked at. As Manville said, facts are half the equation. So we can't just throw those facts out and go with the hypothetical.

You're absolutely right. If I look at this in a hypothetical way -- hypothetically, a company Caterpillar could put its name on this product, have nothing to do with --

THE COURT: And in that hypothetical situation, liability arises out of sponsorship, correct?

MS. BIRNBAUM: The liability there arises out of sponsorship, but here --

THE COURT: So why doesn't it arise out of sponsorship here?

MS. BIRNBAUM: Because the alleged liability of Pfizer here, the alleged liability of Pfizer arises because Pfizer had an ownership interest. That's how its name got on there. And it is a derivative liability. It falls right into Manville three. The reason for 526 --

THE COURT: Is the liability of Pfizer that doesn't

own a share of Quigley, derivative?

MS. BIRNBAUM: It would be -- it would be vicarious in the sense that they could seek to get indemnity.

THE COURT: Well, it would not be derivative under your analysis?

MS. BIRNBAUM: It would be. It wouldn't fall within this injunction.

THE COURT: It would not?

MS. BIRNBAUM: It would not fall within this injunction. But, but because of Pfizer's corporate ownership, it falls within the injunction because Pfizer's liable here. Pfizer is liable because the product that Quigley manufactured was defective.

THE COURT: Doesn't your analysis fall, subject to the criticism that the Second Circuit made in Johns Manville, that the other half of the equation is the law and you can't just look at the factual nexus between Manville and its insurers and that type of but for causality, but you have to analyze it in the context of the legal nature of the claims being asserted. And the legal nature of the claims being asserted here is the act of sponsorship.

MS. BIRNBAUM: Well, if we go back again to Manville three -- first of all, that analysis was under subject matter jurisdiction. Your Honor, but --

THE COURT: That doesn't get you much further.

MS. BIRNBAUM: No, because it really does.

Because, because the better case that really governs what happened here was Manville three when it went up to the Supreme Court. Because there it went up on the scope of the injunction. And what happened in that case -- and we refer to it in our papers -- what happened in that case was the Court looked at the injunction, the words of the injunction. And there the injunction said that Travelers' liability was based upon, arising out of or relating to the Travelers Insurance Company of Manville.

THE COURT: Well, but is it your position that this injunction means something different than what Section 524 means?

MS. BIRNBAUM: No. I think --

THE COURT: It is 524.

MS. BIRNBAUM: It's 524(g). And 524(g) and Manville says that if there is derivative liability, and you have -- and you're being derivatively held liable because of your ownership interest -- and here that's exactly what is happening -- that was exactly the finding of Judge Bernstein -- that is not subject to error, here. And I think what you have here, and if you look at this Manville Supreme Court case, the Court says, the Supreme Court says you have to look at these words broadly, expansively. The words here were "relation to." And what the Court also said was that the detailed findings of the Bankruptcy Court have to be looked at and considered, and based on that we find that the claims against Travelers fall within the terms of the injunction.

That's what we're arguing here. There's

subject matter jurisdiction because of the shared insurers, and we can get to that.

But Manville three in the Second Circuit doesn't say we should look at these fact. These facts are important here.

What are the facts? Quigley put the logo on. Quigley put the name on. Quigley manufactured a defective product. We're liable because Quigley manufactured a defective product and our name is on it. Now, that's not an independent duty. That's derivative. And that's exactly what 526(g) said. And what happened in Manville three was Travelers had nothing to do with Manville's products and insurance. It was being sued for truly its own independent act, its failure to inspect. Here --

THE COURT: Aren't those the same arguments that one would make in state court to defeat the Section 400 claim? Look, Judge, Pfizer, didn't make this product, Pfizer didn't put its name on the product, Pfizer didn't manufacture the products?

MS. BIRNBAUM: But that is true, your Honor. But that also goes to the nature of the liability here.

When you asked the question, what is the nature of liability, my answer is nature of liability here is derivative. And because it's derivative, it falls within 526. And it falls within the exact language of this injunction. That's why the Manville decision --

THE COURT: What I don't understand is why you say Pfizer's liability when it owns 100 percent of

Quigley is derivative, but Pfizer's liability if it didn't hold a share of Quigley would not be derivative.

MS. BIRNBAUM: I'm not saying it would be. It would still be derivative, but they wouldn't fall within the terms of this injunction. It's still derivative. But what's important here is can you fall within the terms of the 526(g) language. That's what's important and that's what we're saying is where the difference occurs. Yes, they would be derivative. They may have an indemnity agreement.

THE COURT: So you don't interpret the arise by reason of as to be equivalent of but for causation.

MS. BIRNBAUM: We -- yes. But but for the Quigley's relationship, there could not be liability here. Remember --

THE COURT: So that the liability of everybody in the chain of distribution would arise out of the manufacturer's liability.

MS. BIRNBAUM: That's true. But nobody else in the chain of distribution could get this injunction unless they were also an owner. That's the difference. The difference is there's still liability, there's still vicarious liability. You could still seek indemnification action against the manufacturer.

But here we have that extra important part, because it brings us into 524(g) and it brings us into the terms of the injunction into its clear terms. Now from that, that analysis I don't think it's hard. We're not stretching the injunction.

THE COURT: I understand your argument. I have obviously concluded differently. And I read arise by reason of to require a reference to state law, and the nature of the claim, I think that's the directive of the Second Circuit.

MS. BIRNBAUM: But the Second Circuit also says you have to look at the facts.

THE COURT: Yes, of course you have to look at the facts. And here the facts are that the logo, even if stamped on the package by Quigley's printer, it's clearly the trademark of Pfizer. And it would seem incredible for anyone to argue that the owner of the trademark didn't consent to the use of its trademark on the packaging of its hundred percent subsidiary. I don't think anything that Judge Bernstein found was to the contrary.

MS. BIRNBAUM: But we come back again to the injunction. It comes -- if you look, if you look at both the law and the facts, what is the nature of this liability? It doesn't mean that it has to arise out of the ownership. I think we differ in the analysis. And I think where you're having an issue, and I'm going to try to convince you as best I can, because I don't want to see you reversed by the Second Circuit.

THE COURT: It happens all the time.

MS. BIRNBAUM: I'd rather not? I'd rather --

THE COURT: Look at this way, on virtually every Supreme Court decision, there are four judges in stark alarming error.

MS. BIRNBAUM: Exactly, your Honor. Especially lately in the Supreme Court, there always seemed to be four.

But let me just try it one more way and see if I can get it right and explain it the way I think it needs to be read.

See, I start with the injunction. You're starting with Manville three.

THE COURT: I started with 524.

MS. BIRNBAUM: Okay, 524(g), which is the same language as this.

THE COURT: Yes.

MS. BIRNBAUM: Okay. So here the language is, the alleged liability of Pfizer. The alleged liability of Pfizer here is occurring both legally and factually under the facts and law of Section 400. Under the facts, I think we agree on the facts, but you don't give much weight to the facts.

THE COURT: No, not -- to the contrary. I accept the facts. There's clear disagreement in the record as to some of the facts, but I accept all the facts that Judge Bernstein found.

MS. BIRNBAUM: Okay, so if that's the case, then Judge Bernstein found that the reason that we, Pfizer could be held liable was because Quigley put the label, put the logo on and because they put it on because of the corporate relationship. So --

THE COURT: Yes, but you can't -- you argue that

facts are half of the story, but you can't ignore the law. When you look at Section 400 liability, it's irrelevant what the intent is of the person who is doing the sponsoring or the manufacturing or the printing. You have to look at Section 400 liability from the a point of view of the consumer; is the consumer entitled to rely upon Pfizer's logo?

I think from a -- I defer to others on tort law, but it doesn't seem to me that, that from the point of view of the perspective, from the perspective of the plaintiff in a tort case, it's not a hill of beans as to what the intent was of the person who made the package.

MS. BIRNBAUM: But I think what your Honor is doing is giving a technical reading to the causation -- to the language here from 524(g). You're saying that when you look at Section 400, a, a individual, a corporation can hypothetically be liable for just putting on its logo.

THE COURT: Or for allowing its logo to be placed on.

MS. BIRNBAUM: Or for allowing its logo to be put on. That's true, they could. But that's not our case.

THE COURT: Well, it is this case. In addition, Pfizer happens to own 100 percent of Quigley.

MS. BIRNBAUM: And therefore it falls within the terms of this injunction. You just can't divorce the analysis from those facts and the law.

And more importantly, if you look at Manville

three and Bystron and all those cases, the fact is that 526 -- 524(g) is supposed to handle issues of derivative liability when you have a parent corporation. It's the same product we're talking about, it's the same sale, it's the same plaintiff suing. This is exactly what 524(g) was meant to cover. If it doesn't cover this, then there's something wrong with the purpose of 524(g). It's exactly this. It's a cause of action in which a parent is liable for the acts of subsidiary, and it arises by reason of the ownership. It's not that you have to look at the --

THE COURT: See, that is the -- what you say has factual content to it, but it's also true that the insurance companies in Johns Manville wouldn't have been liable to the plaintiffs on the theories alleged against them, but for the fact that Johns Manville had produced asbestos-related products. And this case, I think you're correct in your papers, this case isn't on all fours with Johns Manville, although it's close, but I think the reasoning of Johns Manville, at least as of the panel that decided the past two versions of the case, requires one not to look simply at causation, factual causation, but also legal causation.

MS. BIRNBAUM: Well, I think you have to look at both. But when you look at legal causation here under Section 400, I suggest to your Honor that that also is derivative and vicarious. Because you have to have the defective product, and without the defective product, as your Honor found, there couldn't be any liability. So it's connected. The analysis is connected to more than just in the hypothetical saying you could be held liable. We fall

within the language, the exact language of the injunction. If we don't, if we don't, then there is a lot of consequences of this, and you may have -- so the Bankruptcy Court will all have to deal with, that affects futures, that affects the entire potential organization.

THE COURT: Of course. The same public policy issues are raised in this case as were in Johns Manville, right? A very difficult social problem that isn't easy to solve.

MS. BIRNBAUM: Well, maybe let me try one more time. In Johns Manville, your Honor, Travelers was being -- it was an alleged Travelers did certain acts on their own. They weren't derivative acts. The fact of the insurance was -- they had nothing to do with -- it didn't go to the heart of the issue. In Travelers, Travelers failed to warn because it had done inspections and it knew that there were issues with regard to asbestos and they failed to tell people about it. That's an independent liability.

That's not what we're arguing here. That's not what Section 400 is about. What this is about is we could only be liable for the defective product of Quigley. We can't be liable for putting the logo --

THE COURT: You can't be liable for the defective product quality of Quigley's goods, unless you put your name on the package or someone puts it on and you don't object.

MS. BIRNBAUM: Right.

THE COURT: So that's the action.

MS. BIRNBAUM: But --

THE COURT: That's the separate action.

MS. BIRNBAUM: That is the action -- but it is derivative of -- it goes to the asbestos product. It goes to the heart of Quigley's conduct. It goes to what 526(g).

THE COURT: I agree with you it's not -- this case is not identical to Johns Manville.

MS. BIRNBAUM: I think it's very far different, because we are dealing, and when you look at some of the other cases --

THE COURT: That's why it was difficult to decide.

MS. BIRNBAUM: Well, I like to make it difficult for you to decide this rehearing as well.

THE COURT: Well, I appreciate your argument. I wrestled with the decision. Obviously reasonable people can differ. I think my opinion is internally consistent. If it's wrong, it's wrong. But I'm persuaded of its consistency now. That's a dubious virtue, I suppose, but there it is.

Now, Mr. Stoll, I don't know if you wanted to argue it. I think I'm pretty much in your camp.

MS. BIRNBAUM: Your Honor, there is just one other argument.

THE COURT: Yes.

MS. BIRNBAUM: That is a fall back argument. I'll

make it since I feel --

THE COURT: Let me just, while I'm on this point, I want to underscore that perhaps my original opinion wasn't clear enough, but I did not reject or misinterpret Judge Bernstein's finding of fact that Quigley was responsible for making the labels. But there's nothing in Judge Bernstein's opinion, indeed to the contrary, he assumes and concludes as I do, that this is Pfizer's trademark and Pfizer necessarily, at least passively, allowed its name to be -- to sponsor the product. And while that may give rise to arguments under state law as to whether or not Section 400 applies, that of course isn't the issue in the bankruptcy world. Because as we know in Johns Manville, the Second Circuit thought that the state law claims were rather dubious, but said that's not the issue for us, that's an issue for another court.

So I understand your arguments, but I take issue -- I take issue with how you interpreted the decision. And to the extent the decision was unclear, I think I've now clarified.

MS. BIRNBAUM: I appreciate it your Honor, and I appreciate the give and take and your Honor's openness about what you decided.

But before you decide the motion, I really do think that you should read Manville's Supreme Court decision in which they talk about how the Supreme Court of the United States tells other courts how they should be looking at injunctions. That's where I think we part company. I think you are parsing this in a way that you're not taking the terms of the injunction into account. And you are not,

you are not, by interpreting the language by reason of, you are interpreting it in an overly technical and legal way. That is not permitted by the terms of 524(g) or by the terms of the language of this injunction. And that's where I think the issue is. And the Supreme Court decision I think may be helpful.

THE COURT: See, I would have come to the opposite conclusion. I would have said that to argue that liability here arises out of the corporate relationship is elevating form over substance, and that the substance of the claim turns on sponsorship, not on ownership.

MS. BIRNBAUM: But that's where it doesn't. It's not that the liability arises out of. It says, the alleged liability arises by reason. That's a very different phrase. It's not out of. And I think that's where I would argue makes it different. And then that the out of language is not there and this is not what we're doing. But I -- your Honor has made up his mind. Let me go to the next point, please, if I may.

THE COURT: Yes.

MS. BIRNBAUM: And that's the vacatur issue.

THE COURT: The what?

MS. BIRNBAUM: The vacatur issue. We have not -- we have not -- we have attended a settlement with the Angelos plaintiffs. We had that settlement before your Honor came down, but it was not final. And as a result of that, if we knew -- and as part of

this settlement, this whole motion would have been dismissed. So we were all taken by surprise, because I think we were waiting for oral argument and we were waiting to complete the settlement, and then we would advise your Honor that this -- you didn't have to do the work that you did and the analysis you did.

So vacating here, we think, would be an alternative to having this on the books and having to take the appeal up. Because of the fact that there is a perspective settlement and that it would be a manifest injustice if we did not be able to come in when the settlement is complete, which will be in short time, we believe, and move to have dismissed the appeal. And this, these settlements were not made because we had lost something below. We thought that the injunction was in place below and that the Court was not going to decide this without oral argument. So we would appreciate also if your Honor on rehearing --

THE COURT: Do you have any authority for my authority to do that?

MS. BIRNBAUM: I think we cited some vacatur decisions in that, your Honor, but I'll be -- I'll take another look. And I think you can do that in the interests of manifest justice on the basis of what we gave you. And if we need to, we can try to give you some more. But I do appreciate all of the time you gave us on a late afternoon in the summer.

THE COURT: Thank you.

MS. BIRNBAUM: Thank you very much, your

Honor.

THE COURT: Thank you very much.

MR. STOLL: Good afternoon, your Honor, James Stoll on behalf of the Law Offices of Peter Angelos, the appellant.

I just want to correct the record. I actually said at the beginning that I represent the Ad Hoc Committee, which was our entire group at the bankruptcy, but only The Law Offices of Peter Angelos were the appellants in this case.

Given what you said, your Honor, I'm happy to declare a victory and sit down, unless you have any questions for me.

I think on the vacatur issue, the case law -- and there is a Supreme Court case on the point -- you know, you need extraordinary circumstances that justify it; typically where there might be a taint on the judicial system because of a conflict of interest or something that could be misconstrued. So I think there is case law, there is a standard and you can look at that to see if you think it's satisfied here. But unless you have any questions of us, your Honor, we'll be happy to sit down.

THE COURT: No, I don't have any questions. I, frankly, have been on trial and didn't look at the vacatur issue before argument, and I think I've ruled on the substantive aspects of the motion. And given the timing, I think particularly if Pfizer wants to take the issue up better off not to have to wait for a second written opinion, but I'll overnight look at the

vacatur issue and simply enter a one or two line order tomorrow on whether or not that's an appropriate form of relief.

But on the substantive issue, I deny the motion formally, and that's how we'll leave it. Anybody else would like to be heard before I formally decide?

MR. PITTA: Good afternoon, your Honor, Thomas Pitta of Lowenstein Sandler. Your Honor, we did move to intervene in the appeal?

THE COURT: Yes, does anybody oppose intervention?

MR. STOLL: No, your Honor.

THE COURT: Motion is granted.

MR. PITTA: Thank you, your Honor.

THE COURT: All right, thank you for coming in. Interesting case.

MS. BIRNBAUM: Thank you, your Honor.

MR. STOLL: Thank you, your Honor.

(Adjourned)