No. 12-300

In The
Supreme Court of the United States

PFIZER INC.,

Petitioner,

v.

THE LAW OFFICES OF PETER G. ANGELOS, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the determination of the Second Circuit Court of Appeals – *i.e.*, that the preliminary injunction entered by the bankruptcy court in Quigley Company, Inc.'s pending bankruptcy case does not enjoin state law claims brought against Quigley's non-debtor parent Pfizer Inc. pursuant to Section 400 of the Restatement (Second) of Torts (1965) – was correct.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No parent corporation or publicly held company owns 10% or more of The Law Offices of Peter G. Angelos, P.C.'s stock.

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Respondent The Law Offices of Peter G. Angelos, P.C. (the "Angelos Firm") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner Pfizer Inc. ("Pfizer").

INTRODUCTION

Certiorari is plainly not warranted in this case. The decision of the Second Circuit Court of Appeals (the "Second Circuit") below is the one and only Circuit Court of Appeals case to address the meaning of the phrase "arises by reason of" within the context of section 524(g) of the Bankruptcy Code – and that decision (along with the decisions of the district court and the bankruptcy court below) are the only cases at any level of state or federal court to address the specific issue of whether claims brought pursuant to Section 400 of the Restatement (Second) of Torts (1965) are enjoined by the relevant injunctive language.

Nevertheless, Pfizer attempts to invent a series of conflicts between the decision below and the decisions of this Court and the Circuit Courts of Appeals. It does so by (i) misconstruing the decisions of this Court and the Second Circuit arising out of the *Manville* bankruptcy, (ii) erroneously asserting that an interpretation of section 524(g) should be controlled by the holdings of courts interpreting the phrase "by reason of" in completely unrelated statutory contexts, (iii) mischaracterizing the Second Circuit's approach

to statutory interpretation, and (iv) disregarding the case law precedent that actually addresses section 524(g) (case law which is entirely consistent with the Second Circuit's decision). Pfizer's tortured effort to manufacture a conflict among the courts where none exists should be rejected.

Likewise, Pfizer's attempt to magnify the significance of the Second Circuit's decision does not withstand scrutiny. The relevant issue having arisen in exactly one line of cases in the eighteen years since the enactment of section 524(g), it is not at all a "recurring" one on which this Court's guidance is urgently needed. Moreover, despite Pfizer's articulated concern that the decision below will render obsolete global resolutions of asbestos cases – supposedly because non-debtor third parties will not receive the requisite certainty and finality to make it worthwhile to contribute to asbestos trusts – Pfizer itself continues to press forward as a proponent of a Quigley Company, Inc. ("Quigley") plan of reorganization that features the same substantial contribution by Pfizer to a proposed section 524(g) asbestos trust. Lastly, even if the scope of a section 524(g) channeling injunction were an issue that might merit this Court's attention, this case constitutes an especially poor vehicle to address the subject because such an injunction has not yet been entered in the underlying Quigley bankruptcy case (and possibly never will be).

For all of the foregoing reasons, and as described in more detail below, Pfizer's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background[1]

Quigley was founded in 1916, and was thereafter generally engaged in the business of selling a range of refractory products (*i.e.*, "materials that retain their strength at high temperatures"), primarily for use in the iron, steel and glass industries. (Pet. App. 2a, 37a, 63a.) Certain of these products contained asbestos, including a product known as "Insulag." (*Id.*) In August 1968, Pfizer acquired Quigley, at which time Quigley became a wholly owned subsidiary of Pfizer. (*Id.*) In addition to Pfizer's pharmaceutical business, Pfizer itself manufactured or sold products that contained asbestos, including Kilnoise and Firex. (Pet. App. 63a.)

Following Pfizer's acquisition of Quigley, the Pfizer name, trademark, and logo appeared on various documents relating to the purchasing of asbestos and the production and sale of asbestos-containing products, including Insulag. (Pet. App. 2a, 37a, 65a.) In certain advertisements, the logo of Pfizer and its

[1] Pfizer's Appendix is cited herein as "Pet. App. ___a." Pfizer's Petition for a Writ of Certiorari is cited herein as "Pet. ___."

corporate name, along with the logo of Quigley, were printed on the advertisements, and Pfizer and Quigley were expressly identified beneath their logos as "Manufacturers of Refractories – Insulations – Paints." (Pet. App. 37a, 51a.) Pfizer's name and/or logo also appeared on bags of Insulag. (Pet. App. 37a.) In addition, Pfizer represented to the public in its 1999 annual report that it was not only a manufacturer of Insulag, but also a seller of that product. (Pet. App. 66a.) ("Through the early 1970s, Pfizer, Inc. (Minerals Division) and Quigley . . . , a wholly owned subsidiary, sold a minimal amount of one construction product and several refractory products containing some asbestos.")

The primary function of the asbestos-containing product Insulag was as an insulator in high heat environments. (Pet. App. 2a, 37a.) Insulag performed precisely as designed and expected, and was considered an effective insulation product. (Pet. App. 37a.) However, like any asbestos-containing product, Insulag is inherently dangerous because, once airborne, asbestos fibers are inhaled and become lodged in the lungs, leading over time to serious and often fatal diseases. (*Id.*) The Insulag product bearing both Pfizer's and Quigley's names and trademarks contained no warnings of the dangerous characteristics of their product. (*Id.*) In fact, marketing materials displaying the Pfizer name and logo represented the opposite, stating that the product was non-injurious: "Insulag . . . is not injurious contains no mineral oil or fine slag particles which are irritants to the body."

(*Id.*) Insulag was not safe; it was inherently, but not obviously, dangerous and caused asbestos-related disease and cancer. (Pet. App. 2a, 37a.)

Beginning in or around 1999, Respondent, the Angelos Firm, filed a number of lawsuits in the state courts of Pennsylvania on behalf of numerous clients who had been harmed by exposure to asbestos-containing products sold by Pfizer and Quigley. (Pet. App. 5a, 46a, 64a.) These lawsuits named Pfizer as a defendant-manufacturer of Insulag. (*Id.*) Among the theories of liability asserted against Pfizer was one arising under Section 400 of the Restatement (Second) of Torts (1965) – the so-called "apparent manufacturer theory" (the "Section 400 Claims"). (Pet. App. 6a, 46a, 65a.) Section 400 provides as follows: "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). The Section 400 Claims alleged that Pfizer's logo appeared on Quigley's advertising and packages of Quigley's asbestos-containing products. (Pet. App. 6a, 41a, 65a.)

II. Proceedings Below

In September 2004, Quigley filed its chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). (Pet. App. 2a, 38a, 63a.) Concurrent with Quigley's bankruptcy filing, an adversary proceeding was commenced to enjoin all asbestos-related

proceedings against Quigley's non-debtor parent Pfizer, on the basis that Quigley and Pfizer had shared rights in certain insurance policies. (Pet. App. 3a, 38a, 63a.) On September 7, 2004, the Bankruptcy Court issued a temporary restraining order, and on December 17, 2004, the Bankruptcy Court issued a preliminary injunction under sections 105(a) and 362 of the Bankruptcy Code (the "Original Injunction"), enjoining all asbestos-related claims against Pfizer, regardless of the product at issue or the theory of liability. (Pet. App. 87a-96a.)

In May 2007, as Quigley's bankruptcy case began to drag on for significantly longer than had been promised at the outset of the case, an ad hoc committee of tort victims – a group of three law firms, including the Angelos Firm, representing asbestos claimants with claims against Pfizer and Quigley – moved the Bankruptcy Court for a modification to the Original Injunction, such that the injunction would cover only those claims against Pfizer that would be covered if a channeling injunction pursuant to section 524(g) of the Bankruptcy Code were ultimately issued in Pfizer's favor. (Pet. App. 4a, 38a, 63a, 80a.)

On December 6, 2007, the Bankruptcy Court entered a modified version of the Original Injunction pursuant to sections 105(a) and 362 of the Bankruptcy Code, which tracked the language of section 524(g) of the Bankruptcy Code (the "Amended Injunction"). (Pet. App. 4a-5a, 38a-39a, 68a-69a, 79a-86a.) The Amended Injunction thus enjoined:

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.

(*Id.*)

Upon entry of the Amended Injunction, it became clear to the Angelos Firm that the Amended Injunction no longer barred certain state law claims against Pfizer, including the Section 400 Claims. (Pet. App. 5a-6a, 40a, 65a-66a.) Accordingly, in 2008, the Angelos Firm moved for summary judgment against Pfizer on the basis of, *inter alia*, the Section 400 Claims. (*Id.*) Pfizer sought relief in the Bankruptcy Court, asserting that the Amended Injunction barred the Section 400 Claims. (Pet. App. 66a.) On May 15, 2008, the Bankruptcy Court issued its Memorandum Opinion and Order Clarifying Amended Injunction (the "Clarifying Order"), concluding that the Section 400 Claims were enjoined by the Amended Injunction. (Pet. App. 61a-78a.)

On May 17, 2011, the United States District Court for the Southern District of New York (the "District Court") issued its Memorandum Opinion and Order (the "District Court Decision"), reversing the Clarifying Order, and, on May 23, 2011, entered a judgment (the "District Court Judgment") providing that the Angelos Firm was free to pursue the Section 400 Claims on behalf of its clients. (Pet. App. 36a-60a.) On June 24, 2011, the District Court entered its Memorandum Opinion and Order (the "Reconsideration Denial"), denying Pfizer's motion for reconsideration of the District Court Decision. (Pet. App. 9a.) Pfizer and Quigley appealed from the District Court Decision, the District Court Judgment, and the Reconsideration Denial to the Second Circuit. (Pet. App. 9a.)

The Second Circuit heard oral argument on September 28, 2011 and, on April 10, 2012, issued a decision affirming the District Court Judgment (the "Second Circuit Decision"). (Pet. App. 1a-35a.)

After first addressing certain jurisdictional questions, the Second Circuit next turned to the scope of the Amended Injunction, which, in pertinent part, enjoined "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 of Quigley." (Pet. App. 4a-5a) (emphasis added). Faced with the question of whether the Section 400 Claims against Pfizer allege liability that "arises by reason of" Pfizer's ownership of Quigley, the Second Circuit, like the District Court before it, determined that they did not. (Pet. App. 30a-34a.) The Second Circuit agreed with the Angelos Firm that apparent manufacturer liability under Section 400 "arises by reason of" the presence of Pfizer's name and logo on Quigley's advertising and packages of Quigley's asbestos-containing products. (Pet. App. 6a, 29a-31a.) It does not "arise by reason of" Pfizer's ownership of Quigley because such ownership is "legally irrelevant" to the liability. (Pet. App. 30a, 35a.) Accordingly, the Second Circuit concluded that the Section 400 Claims were not enjoined by the injunctive language before it. (Pet. App. 35a.)

The Second Circuit noted that "several factors" militated in favor of the construction proffered by the

Angelos Firm, and then embarked on a detailed analysis of other provisions of section 524(g) of the Bankruptcy Code. (Pet. App. 30a-33a.) The Second Circuit first observed that section 524(g)(4)(A)(ii) lists four relationships between a debtor and a third party 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. (Pet. App. 30a-31a.) Each of the four relationships was of a sort that could, *legally*, have given rise to the liability of one party for the conduct of, or claims against, the other party long before the enactment of section 524(g) (*e.g.*, pursuant to corporate veil piercing theory, successor liability theory, "direct action" liability in the insurance context, etc.). (*Id.*) Given this background legal context, the Second Circuit reasoned that these types of liability – *i.e.*, where the third party's relationship with the debtor is "legally relevant" to its purported liability – were the kind that Congress had in mind when it enacted section 524(g). (Pet. App. 32a.) Accordingly, the Second Circuit determined that the liability must arise as a "legal consequence" of one of the four enumerated relationships (that is, the relationship must be a legal cause or a legally relevant factor to the third party's alleged liability). (Pet. App. 32a, 35a.)

The Second Circuit also reasoned that another provision of section 524(g) containing the phrase "by reason of" – namely, section 524(g)(3)(A)(ii) – further supported the Angelos Firm's interpretation. (Pet. App. 33a-34a.) Starting with the proposition

that similar language contained in the same section of a statute must be accorded a consistent meaning (citing *United States v. Cunningham*, 292 F.3d 115, 118 (2d Cir. 2002)), the Second Circuit analyzed section 524(g)(3)(A)(ii) and concluded that Pfizer's interpretation of "by reason of," unlike that of the Angelos Firm, would give rise to "peculiar results and jurisdictional difficulties" that Congress could not have intended in enacting section 524(g). (*Id.*)

On April 24, 2012, Pfizer filed a petition with the Second Circuit for panel rehearing or for rehearing *en banc* of the Second Circuit Decision (the "Rehearing Petition"). (Pet. App. 97a-98a.) On June 12, 2012, the Second Circuit entered an order denying the Rehearing Petition. (*Id.*) On September 4, 2012, Pfizer filed its Petition for a Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

I. The Second Circuit Decision Creates No Conflict With Any Precedent From This Court Or The Circuit Courts Of Appeals

A. The Second Circuit Decision Does Not Conflict With Any Of The *Manville* Decisions Issued By This Court Or The Second Circuit

Pfizer begins with the erroneous assertion that the Second Circuit's interpretation of the relevant injunctive language "directly conflicts" with this Court's decision in *Travelers Indemnity Co. v. Bailey*, 557 U.S.

137 (2009), as well as the Second Circuit's decisions in *In re Johns-Manville Corp. (Manville III)*, 517 F.3d 52 (2d Cir. 2008), *rev'd sub nom. Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), and *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 644 (2010). Pfizer argues that this Court's "broad construction of the injunctive language in *Travelers* is directly applicable here" because that language "closely tracks" the language at issue in the instant case.

As an initial matter, the *Manville* cases focused "primarily" on issues of jurisdiction, and *Travelers* ultimately reversed *Manville III* on the narrow basis that the actions before it were an improper collateral attack on the 1986 *Manville* injunction which had previously become final. *See* 557 U.S. at 151-55; 517 F.3d at 60. The *Manville* courts' observations as to whether the claims at issue were covered by the pre-§ 524(g) injunction in that case were thus *dicta*, which cannot form the basis of a true conflict that merits certiorari. *See* Robert L. Stern et al., *Supreme Court Practice* 225 (8th ed. 2002) (for certiorari to be granted, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.").

Moreover, in the *Manville* cases, this Court and the Second Circuit were faced with injunctive language that included the following: "based upon, arising out of or relating to." *See Travelers*, 557 U.S. at 149; *Manville III*, 517 F.3d at 57, 61. That language is markedly different from, and unquestionably broader

than, the language at issue here – namely, "arises by reason of." While the "by reason of" language in the instant injunction requires a "causal nexus," the broad phrase "related to" appearing in the *Manville* injunction is "not necessarily tied to the concept of a causal connection." *See Feather v. United Mine Workers*, 903 F.2d 961, 965 (3d Cir. 1990); *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (Sotomayor, J.); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("The ordinary meaning of [the phrase 'relating to'] is a broad one – to stand in some relationship; to have bearing or concern; to pertain; refer; to bring into association with or connection with. . . ."); *California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]s many a curbstone philosopher has observed, everything is related to everything else.").

Addressing the injunction before it, this Court in *Travelers* agreed with the *Manville III* court that language enjoining "claims, demands, allegations, duties, liabilities and obligations" against Travelers "based upon, arising out of or relating to" Travelers' insurance coverage of Manville was sufficiently broad to cover the claims at issue. *See* 557 U.S. at 149. In reaching this conclusion, this Court expressly relied on the breadth of the phrase "relating to" (language not present in the injunction in this case): "In a statute, '[t]he phrase "in relation to," is expansive' . . . and so is its reach here." *Id.* (citing *Smith v. United States*, 508 U.S. 223, 237 (1993)). The Court found it unnecessary to stake out the ultimate bounds

of the injunction because the actions "so clearly" involved claims "based upon, arising out of or relating to" Travelers' insurance coverage of Manville. *Id.*

It is of no consequence that the asbestos trust/channeling injunction mechanism embodied in section 524(g) of the Bankruptcy Code may have been "modeled" on the *Manville* case. *See Manville III*, 517 F.3d at 61. Because Congress did not use the *Manville* injunction's same broad language when it amended the Bankruptcy Code in 1994 to add new section 524(g) – instead employing the phrase "arises by reason of" – the *Manville* courts' construction of the injunctive language there is not relevant to an interpretation of section 524(g); rather, an interpretation of section 524(g) necessarily must start with the language actually employed by Congress in that provision. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses legislative purpose.'") (citation omitted). Moreover, this Court explicitly stated in *Travelers* that it was addressing only the scope of the injunction actually entered in the *Manville* bankruptcy (and not the scope of an injunction that might have been entered pursuant to section 524(g)): "[O]wing to the posture of this litigation, we do not address the scope of an injunction authorized by [section 524(g)]." 557 U.S. at 155.

Given the dissimilarity between the *Manville* injunctive language and the more circumscribed

language at issue here, the Second Circuit Decision creates no conflict whatsoever with the *Manville* decisions.

B. The Second Circuit Decision Does Not Conflict With Any Of The Cases Cited By Pfizer Interpreting The Phrase "By Reason Of"

Neither this Court nor any of the Circuit Courts of Appeals (other than the Second Circuit below) has addressed interpretation of the phrase "arises by reason of" in the context of section 524(g) of the Bankruptcy Code. It should, therefore, be obvious that the Second Circuit Decision does not give rise to a conflict with any precedent of this Court or the Circuit Courts of Appeals such that certiorari would be warranted.[2]

Nevertheless, in an effort to drum up a reason for this Court to grant certiorari, Pfizer seeks to create a conflict where none exists. Pfizer collects a handful of cases construing a small snippet of the language at issue (the common phrase "by reason of"), in the context of statutes and contracts unrelated to section 524(g), and then seeks to graft the holdings of these cases onto the injunctive language addressed by the

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[2] *See, e.g.*, Sup. Ct. R. 10(a) (among the considerations that may merit a grant of certiorari is the situation where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the *same important matter*") (emphasis added).

Second Circuit below.[3] However, as none of these cases speaks to the interpretation of the applicable language under 11 U.S.C. § 524(g) specifically, or even the Bankruptcy Code more generally, no conflict at all exists between them and the Second Circuit Decision. *See Neguise v. Holder*, 555 U.S. 511, 520 (2009) (where "a different statute [is] enacted for a different

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[3] Each of the cases cited by Pfizer addressed interpretation of the phrase "by reason of" in a context outside of the Bankruptcy Code. *See Gross*, 557 U.S. at 176-77 (interpreting "because of" in the Age Discrimination in Employment Act of 1967 ("ADEA")); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68 (1992) (interpreting "by reason of" in the Racketeer Influenced and Corrupt Organizations Act ("RICO")); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38-40 (2d Cir. 2012) (interpreting "by reason of" in the Digital Millennium Copyright Act ("DMCA")); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1031-35 (9th Cir. 2011) (interpreting "by reason of" in the DMCA); *Robinson Knife Mfg. Co. v. Comm'r*, 600 F.3d 121, 131-32 (2d Cir. 2010) (interpreting "by reason of" in a Treasury Regulation); *Spirtas Co. v. Ins. Co. of Pa.*, 555 F.3d 647, 652 (8th Cir. 2009) (interpreting "by reason of" in the context of an indemnity agreement); *Pacific Insurance Co. v. Eaton Vance Mgmt.*, 369 F.3d 584, 589 (1st Cir. 2004) (interpreting "by reason of" in the context of an insurance policy); *New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 300 n.4 (3d Cir. 2007) (interpreting "by reason of" in the Americans with Disabilities Act ("ADA")); *United States v. Lowe*, 29 F.3d 1005, 1007-08 (5th Cir. 1994) (interpreting "by reason of" in the context of an indemnity clause in corporation's bylaws governed by Texas law); *Barry v. Barry*, 28 F.3d 848, 851 (8th Cir. 1994) (interpreting "by reason of" in Minnesota corporate indemnification statute); *Heffernan v. Pac. Dunlop GNB Corp.*, 965 F.2d 369, 374-75 (7th Cir. 1992) (interpreting "by reason of" in Delaware corporate indemnification statute).

purpose, [it] does not control" the interpretation of the statute at issue).

Pfizer's observation that this Court "has granted certiorari to resolve conflicting constructions of identical or similar language in *analogous* statutes" has absolutely no bearing on the present situation. Pet. 21 (emphasis added). Although this Court granted certiorari in *Rush Prudential HMO, Inc. v. Moran* and *Gutierrez v. Ada* (the cases relied upon by Pfizer) to address conflicting Circuit Court interpretations of the inarguably analogous statutes at issue in those cases,[4] Pfizer has not pointed to anything (nor could it) that would suggest that the Bankruptcy Code is somehow "analogous" to statutes as diverse as RICO, the ADA, the ADEA, or the DMCA, such that the courts' varying interpretations of the common phrase "by reason of" in those statutes would need to be reconciled by this Court.

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[4] *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (granting certiorari where Seventh Circuit's holding that Illinois law providing recipients of health coverage by HMOs with a right to independent medical review of certain determinations by the HMOs *was not preempted* by the Employee Retirement Income Security Act of 1974 ("ERISA") conflicted with the Fifth Circuit's holding that a similar provision under Texas law *was preempted* by ERISA); *Gutierrez v. Ada*, 528 U.S. 250, 254 (2000) (granting certiorari where Ninth Circuit's interpretation of the phrase "a majority of the votes cast" in the Organic Act of Guam conflicted with the Third Circuit's interpretation of identical language in the Revised Organic Act of the Virgin Islands).

Moreover, the cases relied upon by Pfizer in an effort to fashion a uniform rule of law – that "by reason of" necessarily connotes "but for" causation wherever and whenever it is used – are themselves demonstrative as to why Pfizer's position is fundamentally flawed. First, far from creating a universal "but for" standard, the cases are actually all over the map in terms of their interpretation of the relevant language. While some courts have interpreted the phrase "by reason of" to mean "but for" causation or something "at least approximating" but-for causation (*see, e.g.*, *Pacific Insurance*, 369 F.3d at 589), others have either declined to define what "by reason of" means[5] or determined that the language, in fact, required something different from simple "but for" causation. For example, in *Holmes*, this Court interpreted the phrase "by reason of" in section 1964 of RICO to require a showing of "proximate causation." *See* 503 U.S. at 268.

Second, rather than basing their interpretations on Pfizer's contrived theory that "by reason of" automatically means "but for" causation, the cases upon which Pfizer relies grounded their constructions on the particulars of the statute at issue (*e.g.*, other

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[5] *See, e.g.*, *Viacom*, 676 F.3d at 39-40. Pfizer erroneously states that the Second Circuit in *Viacom* "recently followed the Ninth Circuit's broad construction of 'by reason of' in [*UMG Recordings*]." Pet. 20. In fact, the Second Circuit expressly declined to address the proper interpretation of the relevant language under the DMCA. *See Viacom*, 676 F.3d at 40.

statutory language, legislative purpose and history, etc.). Again, this Court's decision in *Holmes* is instructive. In that case, the Court concluded, on the basis of RICO's specific statutory history, that "by reason of" required a showing of proximate causation. *See id.* at 265-68. Because the applicable provision of RICO was modeled on the civil-action provision of the federal antitrust laws (section 4 of the Clayton Act), which had itself been based on section 7 of the Sherman Act, the Court reasoned that lower courts' interpretation of these other statutes to require a showing of proximate causation applied with equal force to section 1964 of RICO. *See id.* at 267-68.

Similarly, when the Ninth Circuit in *UMG Recordings* addressed the meaning of the phrase "by reason of the storage" in the context of a safe harbor in the DMCA, it reached its conclusion based on "the language and structure of the statute, as well as the legislative intent that motivated its enactment." *See* 667 F.3d at 1031. Because there were "important differences" between the purposes and structure of RICO and the DMCA, the Ninth Circuit rejected an argument that the "by reason of" language under the DMCA should be interpreted in the same manner as the RICO provision had been interpreted by this Court in *Holmes*. *See id.* at 1031-33. Unlike in *Holmes*, there was no indication that the DMCA was modeled on RICO or the Clayton Act. *See id.* at 1033. In addition, an analysis of other provisions of the DMCA made clear that a reading of the language "by reason of" to require proximate causation would create

internal statutory conflicts by rendering other statutory language superfluous. *See id.*[6]

Put simply, the cases cited by Pfizer concerning the meaning of the phrase "by reason of," which arrive at varying interpretations based on the particular statutory context in which they arise, do not conflict with the Second Circuit's interpretation of that language in an entirely different context and do not provide a reason for this Court to grant certiorari.

C. The Second Circuit Decision Does Not Conflict With Any Decisions Of This Court Concerning Statutory Construction

Pfizer also maintains that the Second Circuit Decision creates untenable conflicts with decisions of this Court on the subject of statutory construction. Pfizer errs again in suggesting that the Second Circuit "effectively rewrote the statute by inserting terms

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[6] Other cases relied upon by Pfizer also make clear that their interpretations of the phase "by reason of" are tethered to the specifics of the statute being interpreted. *See, e.g., Robinson Knife*, 600 F.3d at 131-32 (construing the phrase "by reason of" in a Treasury Regulation in light of the applicable regulatory and legislative history and another regulation related to the one directly at issue); *Heffernan*, 965 F.2d at 375-76 (in analyzing whether former director was party to a suit "by reason of the fact that he is or was a director" within the meaning of the Delaware corporate indemnification statute, court concluded that a broad interpretation of the "by reason of" language was warranted in light of the purposes and policies underlying the Delaware indemnification statute).

that improperly narrow the scope of a 524(g) injunction" (supposedly by inappropriately adding the word "legally" into the phrase "arises by reason of"). Pet. 21. This contention is wholly without merit.

The Second Circuit commenced its analysis by observing that the injunctive language at issue did not explicitly indicate whether "by reason of" refers to legal or factual causation. (Pet. App. 30a.) Because the precise definition of the term was not supplied, it was necessary for the Second Circuit to undertake a careful consideration of the injunctive language *within its specific context* – examining the nature of the relationships enumerated in 11 U.S.C. §§ 524(g)(4)(A)(ii)(I)-(IV) and the use of the phrase "by reason of" in another subsection of section 524(g). (Pet. App. 30a-35a.) On the basis of this analysis, the Second Circuit concluded that the Angelos Firm's interpretation (*i.e.*, that "arises by reason of" referred to legal causation) was more consonant with Congressional intent and with other provisions of the Bankruptcy Code. (Pet. App. 30a, 34a-35a.)

The Second Circuit's approach of examining the relevant language within its specific statutory context, and in a manner that gave the language a consistent and logical meaning in all places where it was used in the statute, is unquestionably in accord with settled principles of statutory interpretation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme.") (citation omitted); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Furthermore, there was nothing at all improper in the Second Circuit's determination not to hinge its analysis on Pfizer's cases interpreting the phrase "by reason of" in completely different statutory contexts. *See, e.g., Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1988 (2011) (Breyer, J., dissenting) (instructing that "statutory context must ultimately determine the word's coverage" because "neither dictionary definitions nor the use of the word 'license' in an unrelated statute can demonstrate what scope Congress intended the word 'licensing' to have *as it used that word in this federal statute*") (emphasis in original).

Notably, the approach taken by the Second Circuit is no different from that taken by this Court in *Holmes* when it held that "by reason of" required a showing of "proximate cause" under section 1964 of RICO (based on the particular statutory context in which it arose). *See* 503 U.S. at 265-68. Nor is it any different from *UMG Recordings*, where the Ninth Circuit concluded that "by reason of" connoted "but for" causation (based on the particular statutory context in which it arose). *See* 667 F.3d at 1031-33. Like the courts in *Holmes* and *UMG*, the Second Circuit did not insert words into the injunctive language or otherwise engage in improper statutory construction; it simply interpreted the injunctive language within

its specific statutory context, as compelled by applicable Court precedent.

D. The Second Circuit Decision Is Entirely Consistent With The Decisions Of This Court And The Circuit Courts Of Appeals Concerning Section 524(g)

As noted *supra*, no Circuit Court of Appeals (other than the Second Circuit below) has interpreted the phrase "by reason of" under section 524(g) of the Bankruptcy Code. Nor has this Court had an occasion to address this issue.[7] It is nevertheless noteworthy that the Second Circuit Decision is entirely consistent with all other decisional case law substantively addressing section 524(g).

The Third Circuit's decision in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), which Pfizer does not mention in its petition, is revealing. Although addressing a different factual context and focusing on a different aspect of section 524(g), *Combustion* is completely consistent with the Second

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[7] This Court has twice mentioned Bankruptcy Code section 524(g), but it has never come close to interpreting the scope of that provision. *See Travelers*, 557 U.S. at 155 (addressing scope of the injunction entered in the *Manville* bankruptcy, but expressly declining to address the scope of a section 524(g) injunction because such an injunction was not before the Court); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.34 (1999) (in connection with addressing certification of a settlement class action, mentioning section 524(g) in a footnote).

Circuit Decision in that it (i) made clear that section 524(g)'s channeling injunction applies only in the limited circumstances covered by the statute and (ii) rejected a plan proponent's attempt to extend the channeling injunction beyond the plain language of the statute. *See id.* at 233-35. The Third Circuit agreed with the lower court's determination that section 524(g) did not authorize a channeling injunction over the independent, non-derivative third-party actions against two non-debtor affiliates of the debtor. *See id.* at 233. Because the non-debtor affiliates were not alleged to be "liable for the conduct of, claims against, or demands on" the debtor (but rather were alleged to be independently liable), and because the alleged liability did not arise by reason of the affiliates' ownership of the debtor (in fact, the debtor owned them), section 524(g) did not extend to the claims at issue. *See id.* at 235.

Interestingly, the Third Circuit then went on to reject the bankruptcy court's attempt to extend the channeling injunction, pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, to include non-derivative claims against the non-debtors. *See id.* at 235-37. Although the Third Circuit acknowledged that extending the injunction to the non-debtor affiliates would facilitate the debtor's reorganization by permitting significant contributions by the non-debtors to the asbestos trust, the Court refused to allow the bankruptcy court to use section 105(a) to issue an injunction that did not satisfy the terms of section 524(g): "[B]ecause § 524(g) expressly

contemplates the inclusion of third parties' liability within the scope of a channeling injunction – and sets out the specific requirements that must be met in order to permit inclusion – the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g)." *See id.* at 235-38 (footnotes omitted).

Thus, notwithstanding Pfizer's myriad pronouncements as to the intended breadth of the relevant injunctive language and the reorganization-facilitating benefits to be gleaned from a broad interpretation, *Combustion* is instructive that the injunctive language is limited and must be interpreted only in accordance with its express terms.[8]

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[8] As discussed *supra*, the Second Circuit Decision is consistent with the Second Circuit's decision in *Manville III*, which addressed language that was decidedly different from the language at issue below. The Second Circuit Decision is likewise consistent with *Manville III*'s brief discussion of section 524(g), where the Second Circuit noted, in *dicta*, that section 524(g) would have to be interpreted in the same manner as the injunction before it (*i.e.*, so as to conform with the bankruptcy court's jurisdiction) and that section 524(g) was not intended to reach "non-derivative" claims. *See* 517 F.3d at 67-68. The Second Circuit reasoned that section 524(g) would not reach the claims at issue in *Manville III* because they were non-derivative in nature and, as claims seeking to recover directly against Travelers for its own conduct, would have no impact on the *res* of the bankruptcy estate. *See id.* at 68. Acknowledging this discussion in *Manville III*, the Second Circuit below declined to reach the Angelos Firm's alternative argument that the Section 400 Claims cannot be enjoined because they are "not derivative in nature as a matter of Pennsylvania law," because the fact that the Section

(Continued on following page)

II. Pfizer Significantly Overstates The "Recurring" Nature Of Issue Decided Below And The Impact Of The Second Circuit Decision On Asbestos Cases

Endeavoring to convince this Court of the supposed importance of the issues presented by this case, Pfizer argues that certiorari should be granted because (i) the scope of section 524(g) is a question that "frequently arises in asbestos-related chapter 11 cases" and (ii) the Second Circuit Decision is likely to adversely impact the possibility of global resolutions of asbestos liability. Neither of these contentions has merit.

Despite Pfizer's bold declarations as to the "recurring" nature of the issue addressed by the Second Circuit Decision, in fact, *no other Circuit Court of Appeals* has ever been called upon to address the scope of the relevant injunctive language. Indeed, with respect to the particular issues addressed by the Second Circuit (and the other courts below) – *i.e.*, the meaning of the phrase "arises by reason of" within the injunctive language and whether claims brought under Section 400 of the Restatement (Second) of Torts are enjoined by such language – the Angelos Firm is not aware of a single other decision by any federal or state court addressing these subjects. Nor has Pfizer

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400 Claims "do not attempt to fix on Pfizer liability 'arising by reason of' Pfizer's 'ownership of a financial interest in' Quigley" was dispositive that the claims were not enjoined. (Pet. App. 35a.)

directed this Court to such a case. Given the infrequency with which this issue has arisen (only one line of cases in the eighteen years since section 524(g) was enacted), it is apparent that Pfizer is drastically overstating the need for this Court to weigh in on the issue.[9]

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[9] Pfizer inexplicably cites *In re Thorpe Insulation Co.*, 677 F.3d 869 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 119 (2012), for the proposition that the scope of a section 524(g) channeling injunction is "a legal issue that *frequently* arises in asbestos-related chapter 11 cases." Pet. 27 (emphasis added). But *Thorpe Insulation* in no way stands for that proposition; nor does it even serve as a solitary *example* of a situation in which a court was asked to address the scope of a section 524(g) injunction. In that case, the Ninth Circuit merely listed the statutory requirements of a § 524(g) injunction and concluded that anti-assignment clauses in contracts between the insurers and the debtor were preempted by federal bankruptcy law because enforcing them would "stand as an obstacle to completion of a successful § 524(g) plan." *See* 677 F.3d at 877-78, 888-91. The bulk of the opinion focused on issues of equitable mootness and insurer standing. *See id.* at 879-88. Nowhere in *Thorpe Insulation* is the scope of a § 524(g) injunction called into question or addressed.

Pfizer's observation that the Second Circuit Decision's interpretation of the injunctive language "has already been invoked" by the United States District Court for the District of Delaware in *In re W.R. Grace & Co.* is similarly unhelpful to its cause. *See* 475 B.R. 34, 99 & n.58 (D. Del. 2012). Although *W.R. Grace* mentioned the Second Circuit Decision in passing, it decided a completely unrelated issue – specifically, that a section 524(g) injunction did not extend to a company whose relationship with the debtor consisted of certain contractual indemnity agreements, because that company's alleged liability did not arise by reason of any of the four enumerated circumstances in section 524(g)(4)(A)(ii). *See id.* at 99-100.

Furthermore, Pfizer greatly exaggerates the impact of the Second Circuit Decision on the willingness of non-debtor third parties to contribute to § 524(g) asbestos trusts in connection with global resolutions of asbestos liability. Indeed, Pfizer's own conduct with respect to the Quigley bankruptcy strongly belies the gravity of this concern. Notwithstanding the issuance of the Second Circuit Decision, Pfizer, itself a non-debtor third party, has continued to press forward with a proposed Quigley plan of reorganization pursuant to which it will contribute hundreds of millions of dollars to a section 524(g) trust.

At a hearing before the Bankruptcy Court subsequent to the issuance of the Second Circuit Decision, Pfizer advised the court that it intended to proceed as a proponent of a Quigley plan of reorganization that featured the same substantial contribution that Pfizer had previously proposed to make. Pfizer's counsel advised the Bankruptcy Court as follows:

> Notwithstanding [the Second Circuit Decision], . . . we'd like to proceed and try to move forward towards confirmation as quickly as the parties are ready to proceed. . . . We intend to move forward and not to reduce the amount of compensation we were offering. We intend to move forward with the plan as we previously negotiated.

See Transcript of May 10, 2012 Status Conference, *In re Quigley Co., Inc.*, Case No. 04-15739 (Bankr. S.D.N.Y. May 24, 2012), ECF No. 2379, at 4. Although

Quigley's most recently proposed plan of reorganization (the "Fifth Amended Quigley Plan") seeks to channel derivative claims against Pfizer to a section 524(g) asbestos trust, it does not purport to enjoin Section 400 Claims; such claims are expressly carved out of the channeling injunction (unless and until this Court or the Second Circuit rule, subsequent to the confirmation of the Fifth Amended Quigley Plan, that the Second 400 Claims *are* enjoined by section 524(g)). *See* Quigley Company, Inc. Fifth Amended And Restated Plan Of Reorganization Under Chapter 11 Of The Bankruptcy Code, *In re Quigley Co., Inc.*, Case No. 04-15739 (Bankr. S.D.N.Y. Aug. 13, 2012), ECF No. 2431, §§ 11.6(a), (b)(viii).

In light of Pfizer's election, in the wake of the Second Circuit Decision, to press forward with a proposed Quigley plan under which it would make the same substantial contribution, it is difficult to take seriously the assertion that contributions by other non-debtor third parties "would likely never have been" made if they had known that the issuance of a section 524(g) injunction would not necessarily resolve each and every asbestos-related claim.[10]

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[10] Pfizer also meekly posits that the Second Circuit Decision has the potential to affect existing asbestos trusts and revive previously resolved asbestos claims. Pet. 29-30. Pfizer's attempt to heighten the seeming importance of the decision below by speculating as to a possible parade of horribles – unsupported by anything in the record or otherwise – should be disregarded.

III. This Case Is In Any Event A Poor Vehicle For The Court To Interpret The Scope Of A Section 524(g) Channeling Injunction

Even if the scope of a section 524(g) channeling injunction were an issue that might merit review by this Court, certiorari should not be granted here. The present case is a poor vehicle for this Court to address this topic because no section 524(g) injunction has yet been issued in the underlying Quigley bankruptcy case, and it is possible that such an injunction may never be issued.

The Amended Injunction, which tracks the language of section 524(g), was entered pursuant to the Bankruptcy Court's authority under sections 105(a) and 362(a) of the Bankruptcy Code. A channeling injunction *pursuant to section 524(g)* will be entered in Quigley's bankruptcy case – if at all – only in connection with an order confirming a plan of reorganization that contains such an injunction. 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 [section 524(g)] to supplement the injunctive relief of a discharge under this section."). In addition, the "district court that has jurisdiction over the reorganization case" must either issue or affirm the order confirming the plan containing the channeling injunction. 11 U.S.C. § 524(g)(3)(A). The channeling injunction becomes "valid and enforceable" only after the time for appeal of the district court's order. 11 U.S.C. § 524(g)(3)(A)(i).

Quigley's bankruptcy case has been pending since September 2004, and the Bankruptcy Court has not yet entered an order in the case confirming a plan of reorganization with a § 524(g) injunction. Nor has the District Court issued or affirmed such an order. On September 8, 2010, the Bankruptcy Court issued a decision denying confirmation of Quigley's proposed Fourth Amended and Restated Plan of Reorganization. *See In re Quigley Co.*, 437 B.R. 102 (Bankr. S.D.N.Y. 2010). Quigley and Pfizer are now seeking to effectuate and obtain approval for the Fifth Amended Quigley Plan, but confirmation has not yet occurred.

Far from embodying an "ideal vehicle" for interpreting of the scope of a section 524(g) channeling injunction, this case actually constitutes a particularly inappropriate vehicle because Pfizer's petition emanates from a bankruptcy case in which a § 524(g) injunction has not been issued (and possibly never will). This Court has previously recognized that opining on the meaning of a statute where its provisions do not yet apply is akin to "rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *See Watson v. Buck*, 313 U.S. 387, 402 (1941). In light of the circumstances, the Court should not select this case – instead of another of the purportedly numerous "recurring" instances – to weigh in on the scope of section 524(g) of the Bankruptcy Code. Rather, as this Court has done many times before, it should decline to address the issue until the "question emerges precisely

framed and necessary for decision." *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

CONCLUSION

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

Respectfully submitted,

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