No. 22-1079

IN THE

Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,
Petitioner,
v.

KAISER GYPSUM COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

Laura A. Foggan
Counsel of Record
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2774
lfoggan@crowell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT.................................... 2

ARGUMENT 6

I. AN INSURER WITH A FINANCIAL STAKE IN A CHAPTER 11 BANKRUPTCY PLAN HAS STANDING UNDER BOTH ARTICLE III AND SECTION 1109(B). 6

A. Standing Under Section 1109(b) is Coextensive with Article III. 6

B. Insurer Financial Interests Confer Chapter 11 Standing. 7

1. The Insurance Mechanism and CGL Coverage... 10

2. Mass Tort Bankruptcies............................ 13

3. Insurer Rights Potentially Affected by a Debtor's Chapter 11 Plan.................. 16

4. "Insurance Neutrality" Alone Does Not Determine Standing........................... 19

II. IMPOSING A MORE STRINGENT STANDING REQUIREMENT THAN ARTICLE III AND THE BANKRUPTCY CODE PRESCRIBE WOULD NOT ONLY BE BAD LAW BUT BAD POLICY. 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm., 321 B.R. 147 (D.N.J. 2005) 3, 8

Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008) 22

Fuller-Austin Insulation Co. v. Highlands Insurance Co., 135 Cal.App.4th 958 (2006) 17, 19

In re Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. Aug. 26, 2022) 14

In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985) 3, 6

In re Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022), *aff'd*, 650 B.R. 87 (D. Del. 2023), *appeals filed*, Nos. 23-1664 through 23-1678, and 23-1780 ....9, 14, 15, 21

In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004) 3

In re Congoleum Corp., No. 03-51524, 2005 WL 712540 (Bankr. D.N.J. Mar. 24, 2005) 4

In re Glob. Indus. Techs., Inc.,
645 F.3d 201 (3d Cir. 2011) 3, 6, 8, 21

In re Heating Oil Partners,
No. 08-CV-1976, 2009 WL 5110838 (D. Conn. Dec. 17, 2009), *aff'd sub nom.*, *In re Heating Oil Partners, LP*, 422 F. App'x 15 (2d Cir. 2011) 8

In re James Wilson Assocs.,
965 F.2d 160 (7th Cir. 1992)............................... 6

In re Johns-Manville Corp.,
36 B.R. 743 (Bankr. S.D.N.Y. 1984) 3

In re Kaiser Gypsum Co.,
60 F.4th 73 (4th Cir. 2023) 4, 5

In re LTL Mgmt., LLC,
652 B.R. 433 (Bankr. D.N.J. July 28, 2023) 14

In re Mallinckrodt PLC,
639 B.R. 837 (Bankr. D. Del. Feb. 8, 2022) 14

In re Motors Liquidation Co.,
580 B.R. 319 (Bankr. S.D.N.Y. 2018) 3

In re PWS Holding Corp.,
228 F.3d 224 (3d Cir. 2000) 7

In re Standard Insulations, Inc.,
138 B.R. 947 (Bankr. W.D. Mo. 1992) 8

In re Stone Barn Manhattan LLC,
405 B.R. 68 (Bankr. S.D.N.Y. 2009) 2-3

In re Thorpe Insulation Co.,
677 F.3d 869 (9th Cir. 2012)........................... 3, 8

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014).. 7

M.F.A. Mut. Ins. Co v. Cheek,
363 N.E.2d 809 (Ill. 1977)................................ 11

Phar-Mor, Inc. v. *Coopers & Lybrand*,
22 F.3d 1228 (3d Cir. 1994) 4

State Farm Mut. Ins. Co. v. Secrist,
33 P.3d 1272 (Colo. Ct. App. 2001) 12

UNR Industries, Inc. v. Continental Casualty Co.,
942 F.2d 1101 (7th Cir. 1991)..................... 17, 19

Statutes

11 U.S.C. § 524(g)...................................... 13, 17, 19

11 U.S.C. § 524(g)(2)(B)(i)..................................... 14

11 U.S.C. § 524(g)(4)(A)(ii)(III) 14

11 U.S.C. § 1109(b)..........................2, 3, 4, 5, 6, 7, 16

11 U.S.C. § 1129(a).. 4

U.S. Constitution

U.S. Const., Art. 3, § 2, cl. 1.................................... 7

Other Authorities

7 *Collier on Bankruptcy* ¶ 1109.01[1] (2022) 3

14 *Couch on Ins.* § 199:1 (3d ed. 2023) 12

14 *Couch on Ins.* § 200:1 (3d ed. 2023) 11

14 *Couch on Ins.* § 217:4 (3d ed. 2023) 12

Joseph E. Stiglitz, *Risk, Incentives and Insurance: The Pure Theory of Moral Hazard,* 8 Geneva Papers Risk & Ins. 4 (1983) 10-11

Kenneth J. Arrow, *Insurance, Risk and Resource Allocation in* ESSAYS IN THE THEORY OF RISK BEARING 134 (1971) 10

1 Robert P. Redemann & Michael F. Smith, *Law & Prac. of Ins. Coverage Litig.* § 4.9 (West 2017) 11

Ronen Avraham, *The Economics of Insurance Law–A Primer*, 19 Conn. Ins. L.J. 29 (2012) 10

Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Economics Perspective*, 72 Tex. L. Rev. 1681, 1684 (1994) 10

INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") and American Property Casualty Insurance Association ("APCIA") (collectively, "Amici") are trade associations of property and casualty insurance companies. Together, Amici represent the vast majority of commercial and personal lines insurance companies in the United States. Amici seek to help courts resolve important insurance cases, regularly appearing as *amicus curiae* in state and federal courts around the country.[1]

APCIA is the primary national trade association for home, automobile, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies represent 63 percent of the U.S. property-casualty insurance market, including 73 percent of the commercial insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

CICLA is a trade association of major property and casualty insurance companies. Through *amicus*

---

[1] No part of this brief was authored in whole or in part by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of this brief other than *amici curiae* and their counsel.

curiae briefs, CICLA seeks to help courts understand and resolve the core coverage issues of greatest importance to insurers today. CICLA has participated as *amicus curiae* in many insurance cases in state and federal appellate courts across the United States.

In this case, the Court is asked to decide whether an insurer, whose debtor-insured argues it has financial responsibility for the personal injury claims asserted in bankruptcy, is a "party in interest" that may object to the debtor-insured's Chapter 11 plan of reorganization. This issue is vital to Amici, whose members routinely issue insurance policies to companies that may later seek Chapter 11 bankruptcy protection, often, as here, driven by massive alleged tort liabilities that the insured seeks to impose in bankruptcy on its insurers.

SUMMARY OF ARGUMENT

The Bankruptcy Code's plain text empowers any "party in interest" to "raise" and "be heard on any issue" in a Chapter 11 proceeding. 11 U.S.C. § 1109(b). Section 1109 of Chapter 11 of the U.S. Bankruptcy Code provides: "(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

Section 1109(b) grants a broad right to all parties in interest to participate in the case. Courts construe the term "party in interest" "broadly 'to insure fair representation of all constituencies impacted in any significant way by a Chapter 11 case.'" *In re Stone Barn Manhattan LLC*, 405 B.R. 68, 74 (Bankr.

S.D.N.Y. 2009) (quoting *In re Johns-Manville Corp.*, 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984)). Courts have interpreted Section 1109(b) to extend standing to all entities with a "practical stake in the outcome of the proceedings," *In re Amatex Corp.*, 755 F.2d 1034, 1041-42 (3d Cir. 1985), and to allow a party-in-interest to participate in a Chapter 11 case so long as that party satisfies the standing requirements of Article III. *In re Glob. Indus. Techs., Inc.,* 645 F.3d 201, 211 (3d Cir. 2011).

By providing an illustrative list of persons or entities that are "parties in interest," Section 1109 makes clear that the term encompasses "anyone holding a direct financial stake in the outcome of the case[.]" 7 *Collier on Bankruptcy* ¶ 1109.01[1] (2022); *In re Thorpe Insulation Co.*, 677 F.3d 869, 884 (9th Cir. 2012) (collecting cases); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 n.21 (3d Cir. 2004) (same). In particular, a party "who is the primary source of funding or whose exposure would be increased as the result of a settlement or other binding agreement" has standing. *In re Motors Liquidation Co.*, 580 B.R. 319, 350 (Bankr. S.D.N.Y. 2018). "[P]arties with potential responsibility to pay claims against debtors regularly have standing to participate in bankruptcy cases." *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 158 (D.N.J. 2005). Insurers of the debtor satisfy this test: they are financially interested in the liabilities to be paid by and on behalf of the debtor.

Congress intended Section 1109(b) to "confer[] broad standing at the trial level" and to "promot[e] greater participation in reorganization cases." *In re Glob. Indus. Techs.*, 645 F.3d at 211 (internal

quotation marks and citations omitted). Neither Section 1109(b)'s purpose nor its plain text permits courts to apply their own gloss to the statute to restrict insurers' participation in bankruptcy proceedings, as the Fourth Circuit did here. Barring insurers who will be asked to bear the financial brunt of a reorganization plan from being heard during the confirmation process, "certainly does not comport with the notion of fair play that . . . underlies § 1109." *In re Congoleum Corp.*, No. 03-51524, 2005 WL 712540, at *2 (Bankr. D.N.J. Mar. 24, 2005) (*citing Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3d Cir. 1994)).

Indeed, preventing insurers from voicing their objections, and denying bankruptcy courts the benefit of important insurer insights about a proposed plan, would serve only to undermine the fairness and effectiveness of bankruptcy proceedings. Bankruptcy courts must determine whether a plan "complies with the applicable provisions" of the Code and has been "proposed in good faith." 11 U.S.C. § 1129(a). Section 1109(b) authorizes broad participation in the plan approval process, coextensive with the requirements of Article III, precisely to help courts accomplish these statutory duties. Allowing insurers with a direct interest in the proceedings to make their case helps the court make informed decisions, promotes fairness, and contributes to the efficient resolution of complex matters. Insurers often play a significant role in bankruptcy cases and their ability to voice concerns ensures a more comprehensive and just decision-making process.

The Fourth Circuit nevertheless held that Petitioner Truck Insurance Exchange ("Truck") could

not object to Kaiser Gypsum's proposed Chapter 11 plan. *In re Kaiser Gypsum Co.*, 60 F.4th 73 (4th Cir. 2023). Determining that "courts are split on the interplay of Article III and § 1109(b)," the court barred Truck from being heard based on a flawed analysis and wooden application of the judge-made "insurance neutrality" test, a limitation not found in the Code or supported by Article III. *Id.* at 88 n. 10. The court of appeals erred. Impairing contractual coverage defenses is not the only way a debtor-insured's plan can impact the insurer.[2] Thus, examining insurance neutrality is necessary, but not sufficient, to determine insurer standing. A plan that nominally preserves an insurer's coverage defenses still affects the insurer's financial and pecuniary interests as the potential indemnitor of the debtor-insured. For example, the plan may spike the number and dollar amount of claims allowed against the debtor that the insurer will be asked to pay.

An insurer that potentially bears financial responsibility for claims against the debtor must be permitted to participate in the confirmation process

---

[2] It may undermine an insurer's contractual right to control settlement or defense of the claims, remove any incentive for the debtor-insured to cooperate with its insurer in the defense of claims, or abrogate an insurer's right to contribution from other carriers. And most obviously, it may impair the financial interests of any insurer of the debtor-insured who faces financial responsibility for the claims against the debtor-insured to be resolved under the plan. The reasoning below and application of Section 1109(b) to the undisputed facts are untenable. To base whether an insurer has a stake in the bankruptcy plan solely on whether it negates coverage defenses ignores the potential for other, critical effects on insurers' interests, a result made worse by the re-alignment of interests and incentives in mass tort bankruptcies.

and voice objections to the plan. That straightforward reading of Section 1109(b) protects both the integrity of the bankruptcy proceeding and the vitality of liability insurance.

ARGUMENT

I. AN INSURER WITH A FINANCIAL STAKE IN A CHAPTER 11 BANKRUPTCY PLAN HAS STANDING UNDER BOTH ARTICLE III AND SECTION 1109(b).

A. Standing Under Section 1109(b) is Coextensive with Article III.

To object to a Chapter 11 bankruptcy plan, an insurer need only establish that it is a "party in interest" under Section 1109(b) of the Bankruptcy Code. 11 U.S.C. § 1109(b). Consistent with the development of 1109(b) in broadening access to bankruptcy proceedings, the Third Circuit has defined a "party in interest" as one who "has a sufficient stake in the proceeding so as to require representation." *In re Glob. Indus. Techs.*, 645 F.3d at 210; *In re Amatex Corp.*, 755 F.2d at 1042 ("Section 1109(b) must be construed broadly to permit parties affected by a chapter 11 proceeding to appear and be heard.") (internal quotation marks and citation omitted). *See also In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992) (describing a party in interest as "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding").

Section 1109(b) thus requires simply that an objector have a "personal stake" in the proceeding, making it co-extensive with Article III standing, which requires that a litigant "have suffered or be

imminently threated with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action[.]" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (rejecting applicability of "prudential standing" principles and looking to terms of the statute defining the cause of action to determine whether a plaintiff was allowed to bring suit); U.S.C.A. Const. Art. 3, § 2, cl. 1. *See In re Global Indus. Techs.*, 645 F.3d at 211 ("Interpreting the 'party in interest' requirement as an additional obstacle to bankruptcy standing would frustrate the purpose of §1109(b), which was intended to 'confer[] broad standing at the trial level[.]") (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 249 (3d Cir. 2000)).

B. Insurer Financial Interests Confer Chapter 11 Standing.

Under Section 1109(b) and Article III, an insurer seeking to be heard need not do more than establish that it has a financial stake in the bankruptcy plan – that it may suffer some injury in fact if the plan is approved. By looking solely to the judge-made "insurance neutrality" doctrine, the court below imposed a more stringent standing test that contradicts the plain language of the Bankruptcy Code, and wrongly limited an insurer's "interest" in the plan solely to insurance coverage defenses.

At its core, insurer standing is based on the fact that the insurer will be asked to pay the bankruptcy claims against the debtor.[3] "[B]ankruptcy courts have

---

[3] As the Third Circuit explained in finding that insurers have standing, "[w]hen a federal court gives its approval to a plan that

recognized that a liability insurer is a 'party in interest' where the debtor's insurer is responsible to pay claims brought against the debtor." *In re Heating Oil Partners*, No. 08-CV-1976, 2009 WL 5110838, at *5 (D. Conn. Dec. 17, 2009), *aff'd sub nom.*, *In re Heating Oil Partners, LP*, 422 F. App'x 15 (2d Cir. 2011) (citing *In re Standard Insulations, Inc.*, 138 B.R. 947, 950 (Bankr. W.D. Mo. 1992)). In *Standard Insulations*, where objections by the debtor's insurers to personal injury claims were met with an argument that the insurers lacked standing, the court found that because the "insurers are responsible for payment of injury claims", they were "parties in interest . . . and have standing to object to claims against the estate." *Standard Insulations*, 138 B.R. at 950. *See also Baron & Budd, P.C.*, 321 B.R. at 158 (noting "that parties with potential responsibility to pay claims against debtors regularly have standing to participate in bankruptcy cases").

How the bankruptcy proceeding and plan handles the number and value of claims against the debtor-insured may ultimately increase the liabilities of the insurer. That financial interest is enough. *In re Thorpe*, 677 F.3d at 885 (insurers have standing where "the real-world impacts" of a plan "increases insurance exposure and likely liabilities of" insurers). It is no coincidence that the approval of a reorganization plan commonly if not universally results in an explosion of the number of claims filed against the debtor. For example, in the Boy Scouts of America bankruptcy,

---

allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed. In short, they at least have bankruptcy standing." *In re Glob. Indus. Techs.*, 645 F.3d at 204.

the number of prepetition claims against the Boy Scouts as of the petition date was 275 sexual abuse lawsuits and another 1,400 claims that had been asserted informally without a lawsuit. *See* Debtor's Informational Brief at 3, *In re Boy Scouts of America*, No. 20-10343 (Bankr. D. Del. Feb 18, 2020) (Dkt. No. 4). After the reorganization plan was approved, the number of non-duplicative proofs of claim (for sexual abuse) exceeded 82,200. *See In re Boy Scouts of Am.,* 642 B.R. 504, 533-34 (Bankr. D. Del. 2022), *aff'd*, 650 B.R. 87 (D. Del. 2023), *appeals filed*, Nos. 23-1664 through 23-1678, and 23-1780. That sheer volume of claims resulting from a bankruptcy plan increases the opportunity for overinflated and unsupported claims. The impact of a poorly structured plan that, for example, makes it easier for unsupported claims to be paid, may be catastrophic for the insurer.

Of course, a plan that overrides insurance policy terms or diminishes an insurer's right to assert defenses to coverage in subsequent litigation also establishes an insurer's right to be heard. But the Fourth Circuit's stunted analysis went no further than considering impairment of Truck's contractual insurance coverage defenses. In so doing, it failed to appreciate the broader insurer interests at stake and the tremendous financial impact an insured's reorganization plan may have on insurers in a mass tort bankruptcy.

To fully appreciate how insurers' economic interests are impacted by bankruptcy proceedings involving their debtor-insureds requires an understanding of how insurance works.

1. The Insurance Mechanism and CGL Coverage

Insurance is a delicate risk transfer mechanism that balances the costs for an insurer to assume the risk that its insured will be held liable with the policyholder's ability to manage and retain that risk. An insurance contract transfers a specified risk of loss from the policy buyer to the insurance company, under specific terms and conditions, and with specific future rights and responsibilities assumed by each party. Because the insurer can reduce its overall risk by writing many policies for different policyholders (*i.e.*, by spreading risk), the insurer may be better able to bear risk than is an individual policyholder. As a result, the insurer can charge a premium low enough to attract policyholders who are averse to risk but high enough to cover the insurer's expected costs from selling a policy and to produce a reasonable level of expected profit. Both the insurer and the policyholder benefit from this transaction. *See generally* Ronen Avraham, *The Economics of Insurance Law–A Primer*, 19 Conn. Ins. L.J. 29 (2012); Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Economics Perspective*, 72 Tex. L. Rev. 1681, 1684 (1994) (citing Kenneth J. Arrow, *Insurance, Risk and Resource Allocation in* ESSAYS IN THE THEORY OF RISK BEARING 134, 134-36 (1971)).

An insurer's ability and willingness to assume the risk that the insured may face future tort liability are affected by various factors, including the problem of "moral hazard" in which a policyholder may lack incentives to reduce its liability. *Id.*; Joseph E. Stiglitz, *Risk, Incentives and Insurance: The Pure Theory of Moral Hazard,* 8 Geneva Papers Risk & Ins.

4, 8 (1983). Insurance contracts are designed to reduce problems that limit the insurability of risk, through defined parameters for coverage, policy exclusions, and contract terms and conditions. In commercial general liability ("CGL") policies such as those at issue here, the insurer agrees to pay damages for sums the insured is legally obligated to pay to third parties that have suffered bodily injury (or property damage) as a result of the insured's business activities. Under a primary CGL policy, the insurer typically also agrees to provide the policyholder a defense against those future claims. Critically, the insurer retains the right to control all aspects of the defense and settlement of any future lawsuit. *See* 14 *Couch on Ins.* § 200:1 (3d ed. 2023); 1 Robert P. Redemann & Michael F. Smith, *Law & Prac. of Ins. Coverage Litig.* § 4.9 (West 2017) ("[T]he duty to defend gives the insurer the right to control the conduct of the litigation."). The insured, in turn, must cooperate in that defense (something that is routinely impaired when claims are channeled to bankruptcy trusts). *See, e.g.*, *M.F.A. Mut. Ins. Co v. Cheek*, 363 N.E.2d 809, 811 (Ill. 1977) (noting the objective of the duty to cooperate "to prevent collusion between the insured and the injured").

If the policyholder were responsible for defense but not for the payment of tort claims, it would have less incentive to resist those claims or to negotiate lower settlements, resulting in potentially higher settlement amounts, which would require higher premiums, over time. Allocating control of defense and settlement to the insurer helps deter against possible collusive agreements between policyholders and claimants that could benefit those parties at the insurer's expense, thus driving up costs and

premiums over time. *State Farm Mut. Ins. Co. v. Secrist*, 33 P.3d 1272, 1275 (Colo. Ct. App. 2001) ("The purpose of a cooperation clause is to protect the insurer in its defense of claims by obligating the insured not to take any action intentionally and deliberately that would have a substantial, adverse effect on the insurer's defense, settlement, or other handling of the claim.").

Certain other insurance policy provisions enable the insurer to defend against the claims and help prevent collusion. For example, CGL policies usually prohibit an insured from making voluntary payments to tort claimants, and require that the insured provide timely notice and cooperate in the insurer's investigation of any claims. *See generally* 14 *Couch on Ins.* § 199:1 *et seq.* (3d ed. 2023). An insured's affirmative cooperation in the defense of claims is particularly important in long-tail claims such as asbestos or sex abuse claims, where the relevant evidence may be decades in the past.

Insurers also typically obtain other rights in the insurance transaction. For instance, insurers usually have a right to contribution from another insurer that owes coverage for the same loss but has not paid its equitable share. 14 *Couch on Ins.* § 217:4 (3d ed. 2023).

Insurance underwriting decisions are made based on the wording and operation of the insurance policy – including the insurer's right to control the defense and settlement of claims – and against the backdrop of the applicable legal doctrines, such as the right to contribution. These contractual terms and legal

rights and obligations affect the basic economics of the insurance agreement.

2. Mass Tort Bankruptcies

In 1994, Congress responded to the massive tort litigation arising from long-tail asbestos bodily injury claims by enacting Section 524(g) of the Bankruptcy Code. 11 U.S.C. § 524(g). That provision allows a debtor that satisfies certain requirements to channel all asbestos claims, both present and future, that have been or might be asserted against it to a trust, freeing the debtor from any liability. 11 U.S.C. § 524(g)(2)(B)(i). Section 524(g) expressly contemplates insurer involvement in a Chapter reorganization under that provision by listing insurers as beneficiaries of the channeling injunction. 11 U.S.C. § 524(g)(4)(A)(ii)(III).

Although Section 524(g) is limited to asbestos liabilities, it has become a model for mass tort bankruptcies involving other products, as another case this Court is considering this term (*Harrington v. Purdue Pharma*, No. 23-124 (U.S.)) illustrates. Indeed, Chapter 11 filings have become increasingly common in recent years in the context of many mass

torts (*e.g.*, talc,[4] sexual abuse,[5] other opioid cases[6] and earplugs[7]).

The debtor's insurance policies often become a central part of any such mass tort case. The goal of the debtor is typically to obtain a complete resolution of all its potential liability while paying as little as possible out of its own pocket to resolve the claims against it. The goal of the claimants and their plaintiff lawyers is usually to obtain as much as possible in payment of the claims. The debtor's insurers often become the source to which both the debtor and the claimants look.

For this very reason, there is a high risk of collusion or, at a minimum, an explosion of claims that the debtor has little incentive to question. Besides the *Garlock* case discussed in Truck's brief, one recent, highly-publicized case, the Chapter 11 filing for Boy Scouts of America, provides a striking example. When it filed for bankruptcy, the Boy Scouts faced only around 275 lawsuits and another approximately 1,400 in threatened actions. *See* Debtor's Informational Brief at 3, *In re Boy Scouts of Am.*, No. 20-10343 (Bankr. D. Del. Feb 18, 2020) (Dkt. No. 4). But after that filing and a relentless advertising campaign by the plaintiffs' bar, more than

---

[4] *E.g.*, *In re LTL Mgmt., LLC*, 652 B.R. 433 (Bankr. D.N.J. July 28, 2023).

[5] *E.g.*, *In re Boy Scouts of Am.*, 642 B.R. at 533-34.

[6] *E.g.*, *In re Mallinckrodt PLC,* 639 B.R. 837 (Bankr. D. Del. Feb. 8, 2022).

[7] *E.g.*, *In re Aearo Techs. LLC*,, 642 B.R. 891 (Bankr. S.D. Ind. Aug. 26, 2022).

82,000 proofs of claim were filed. *See In re Boy Scouts of Am.*, 642 B.R. at 533-34. Many of those claims were filed in the names of claimants by counsel under engagement letters in which the lawyers agreed only to represent the claimants in pursuing their claims in the Boy Scouts' bankruptcy and not in tort litigation. *Id.* at 617 & n.510.

Given this phenomenon, a liability insurer most certainly has a concrete interest in the outcome of its debtor-insured's bankruptcy proceedings. A surge in the claims allowed under the bankruptcy plan against the debtor-insured harms the insurer by increasing its exposure, even if its coverage defenses are truly preserved.

Insurer participation in Chapter 11 proceedings is important to ensuring the integrity of the bankruptcy process because that process ultimately realigns the interests of the debtor with those of the claimants in obtaining the plan's approval. Once the plan is approved, and it obtains a discharge and the protection of a channeling injunction, the debtor has no ongoing incentive to limit the costs of defending paying claims and any liability for those claims. And the main interest of current claimants and their counsel, is to increase the number and allowed amount of the tort claims. Thus, while there are significant efficiencies for managing mass tort liabilities through bankruptcy, inherent in that process is a realignment of the insured's economic incentives and a lack of safeguards against the allowance of overstated and potentially invalid

claims.[8] All of this makes participation in the bankruptcy by insurers – who will ultimately be asked to foot the bill for most or all of those claims – critical.

3. Insurer Rights Potentially Affected by a Debtor's Chapter 11 Plan

Courts generally agree that an insurer is a "party in interest" and therefore has standing under § 1109(b) if the bankruptcy plan abrogates the insurer's right to assert coverage defenses. But some courts, including the Fourth Circuit here, limit their inquiry to this question, overlooking the many other ways bankruptcy plans may impair the broader interests of insurers in protecting their policyholders and themselves against overvalued or fraudulent claims.

For example, a plan that purports to maintain an insurer's coverage defenses could nonetheless allow claims at amounts far above their actual value and

---

[8] Transparency in asbestos bankruptcies and the appropriate resolution of claims filed in such proceedings has long been of concern. Thus, the Department of Justice has filed objections to proposed plans of reorganization and disclosure statements in several asbestos bankruptcies seeking (1) to increase the transparency of trust operations and (2) to ensure that the requirements for submitting claims to post-confirmation trusts guarantee that only deserving claims receive compensation. *See, e.g.*, *In re Duro Dyne Nat'l Corp.*, No. 18-27963 (Bankr. D.N.J. Feb. 8, 2019) (Dkt. Nos. 140, 447); *In re Maremont Corp.*, No. 19-10118 (Bankr. D. Del. Mar. 4, 2019) (Dkt. No. 112) (combined disclosure statement/plan objection); *In re Kaiser-Gypsum Co.*, No. 16-31602 (Bankr. W.D.N.C. Nov. 6, 2018) (Dkt. No. 1299); *In re Sepco Corp.*, No. 16-50058 (Bankr. N.D. Ohio Aug. 7, 2019) (Dkt. No. 620); *In re Imerys Talc Am., Inc.,* No. 19-10289 (Bankr. D. Del. Oct. 4, 2020) (Dkt. No. 2279) (supplemental objection).

out of line with the claimants' injuries or the payment of claims for which little to no proof of injury is required. Then, the insurer's financial interests are impaired -- especially so if in subsequent coverage litigation, the bankruptcy court's approval of the plan is cited as a legal determination that the claim allowances were proper.

This is not a hypothetical concern. It has arisen in actual cases. For example, in *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101 (7th Cir. 1991), the Seventh Circuit held that the valuation of asbestos claims that occurred in the insured's bankruptcy proceedings was binding on insurers for purposes of indemnity coverage. The court further rejected the insurer's coverage defenses, leaving insurers to foot the bill for the full amount of the claims as allowed in the bankruptcy case.

Fuller-Austin Insulation Co. v. Highlands Insurance Co., 135 Cal.App.4th 958, 966 (2006), provides another example. There, the debtor utilized section 524(g) to resolve its asbestos liabilities. In the later coverage action, the trial court ruled that those bankruptcy proceedings conclusively determined the debtor's liability for purposes of indemnification by insurers, resulting in a fixed amount that the insurers were required to pay. To be sure, that ruling was reversed on appeal, where the California Court of Appeal held that the statute was not intended "to eradicate [the insurers'] rights under their insurance policies." *Id.* But absent that reversal and determination that the insurers had standing, the insurers would have been stuck with an enormous, grossly-inflated liability. Indeed, before Fuller-Austin's bankruptcy, its losses had been estimated at

$16 million. Yet, the Chapter 11 plan allowed claims in the amount of $1 billion.

As these cases illustrate, the mere fact of bankruptcy court approval of a Chapter 11 plan has sometimes been held to establish the quantum of an insurer's liability, with significant and potentially dire financial consequences. Moreover, even if the quantum of payment owed is not established, a proposed bankruptcy plan may increase the likelihood of collusion and self-dealing. It may impede insurers' rights regarding the defense and settlement of claims. Any significant impairment of an insurer's right to control the defense and settlement of claims could also diminish the insurer's other contractual rights by altering the incentives for and dynamics of cooperation between the insured and the insurer.

A bankruptcy plan may also undercut contribution rights among insurers. Some plans, for example, appear to abrogate an insurer's right to seek and obtain contribution from any insurer that has settled with the debtor with respect to payments for indemnity and or defense. If so, the plan would undermine the economic and equitable objectives of the insurer's right to contribution.

In short, an insurer has a stake in more than its coverage defenses; it has a stake in whether – and if so, how and how many – claims are allowed against its insured. The Fourth Circuit's decision below ignores this basic economic reality.

4. "Insurance Neutrality" Alone Does Not Determine Standing

The court below held that Truck lacked standing to object to the plan of reorganization because the plan "expressly preserved Truck's coverage defenses and the Debtors' assistance-and-cooperation obligations under the policies, thereby placing Truck in the same position as it was pre-bankruptcy." 60 F.4th at 84. The Court wrongly conflated the narrow question whether Truck's coverage defenses were preserved with the broader question of whether Truck was a party in interest for standing purposes, *i.e.,* – whether Truck has a stake in bankruptcy plan.

But even the analysis of the narrow insurance neutrality test applied by the Fourth Circuit was too cramped.[9] Retaining coverage defenses alone does not constitute "insurance neutrality" and cannot begin to support a conclusion that an insurer is not a "party in interest." For example, while the Fourth Circuit focused exclusively on coverage defenses and assistance-and-cooperation, the Chapter 11 plan of reorganization negotiated in *In re Madison Square Boys & Girls Club, Inc.*, No. 22-10910 (S.D.N.Y. July 21, 2023 (Dkt. No. 574), provides, not only that

---

[9] Among other things, the court ignored how the imprimatur of a bankruptcy court's approval of a plan alone has altered insurers' rights. In multiple Section 524(g) cases, despite the purported "insurance neutrality" of the approved Chapter 11 plans, trustees for the asbestos trust later cited the plan's approval as evidence of the validity of claims. *See UNR Indus.*, 942 F.2d 1101; *Fuller-Austin Insulation*, 135 Cal.App.4th at 966. As these examples show, a plan that purports to reflect insurance neutrality often still results in prejudice to insurer contractual and financial interests.

nothing in the plan shall impair the insurers' rights to assert a coverage defense in future litigation, but also that nothing in the plan, *among other things*, shall:

- impose, or shall be deemed or construed to impose, any obligation on any Non-Settling Insurance Company to provide a defense for, settle, or pay any judgment with respect to, any Abuse Claim;

- constitute a trial, a judgment, an adjudication on the merits, or evidence establishing the liability of any Non-Settling Insurance Company in subsequent litigation for any Claim;

- constitute, or be deemed to constitute, a determination of the reasonableness of the amount of any Claim;

- be deemed to grant to any Person or Entity any right to sue any Non-Settling Insurance Company directly, in connection with a Claim;

- [bind any] Non-Settling Insurance Company . . . in any current or future litigation concerning a[] Claim or an [] Insurance Policy by any factual findings or conclusions of law issued in connection with Confirmation of the Plan, and no such findings of fact or conclusions of law shall have any res judicata or collateral estoppel effect on any Claim, defense, right, offset or counterclaim that has been asserted or that

> may be asserted in any current or subsequent litigation concerning a[ ] Claim or an [ ] Insurance Policy.

Doc. 574, at 71-72.[10] The stark contrast between the Fourth Circuit's limited test and this extensive list of negotiated protections underscores how important interests and protections are overlooked when insurers are shut out of the process.

II. IMPOSING A MORE STRINGENT STANDING REQUIREMENT THAN ARTICLE III AND THE BANKRUPTCY CODE PRESCRIBE WOULD NOT ONLY BE BAD LAW BUT BAD POLICY.

Insurers can play a vital role in supporting the integrity of the bankruptcy process. Indeed, the Third Circuit has recognized that, often, insurers are the only parties to the proceeding with an economic incentive to raise issues that go to the integrity and fairness of the reorganization. *In re Glob.*, 645 F.3d at 214. In the context of mass tort bankruptcies, the approval of the debtor's plan of reorganization is typically followed by an "explosion of claims," as it was in *Global Industries. See, e.g.*, *In re Boy Scouts of Am.,* 642 B.R. at 533-34. The ability to police such

---

[10] *See also In re T H Agriculture & Nutrition, LLC*, No. 08-14692 (S.D.N.Y. Br. Feb. 10, 2009) (Dkt. No. 301 Ex. A) (nothing in the plan or any judgment or any statement made by the bankruptcy court shall "constitute an adjudication, judgment, trial, hearing on the merits, finding, conclusion, other determination, or evidence or suggestion of any such determination" establishing liability, coverage obligation, value of the present and future claims, or reasonableness of settling a particular claim, among other things).

claims that might not be payable (not only for fraud, but also to the extent that claims are barred by the applicable statute of limitations or are subject to other available defenses), or might be overvalued, becomes exponentially more important in the wake of a Chapter 11 bankruptcy, where the insured's release from liability may make it indifferent to these issues.

A plan may impact the rights of future claimants, and, in turn, undermine the fairness and efficiency of the bankruptcy process. By helping to ensure only legitimate claims and amounts are paid, insurer participation advances one of Chapter 11's fundamental purposes: "the creditors' interest in maximizing the value of the bankruptcy estate." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). The incentives of current claimants, their attorneys, and the plan's trustee may be to accelerate payments and fees, thus reducing the funds available to future claimants. By contrast, insurers have strong incentives not to "overpay" current claimants and to consider evidence of exposure and medical impairment to avoid paying too much for weak claims.

Finally, a process that adversely impacts an insurer's interests without the right to be heard may also harm the market for liability insurance. It increases the risk to insurers, requiring them in turn to increase premiums and potentially reducing the availability of insurance to consumers. A judge-made rule of standing like that adopted by the Fourth Circuit below that precludes an insurer from having any say at all in its debtor-insured's bankruptcy plan, so long as the plan purports to preserve the insurer's coverage defenses, is bad law because it overlooks the

many other ways in which a bankruptcy proceeding can adversely affect the rights and financial interests of such an insurer. It also is bad policy because it harms both the bankruptcy and insurance systems.

CONCLUSION

An insurer who may be asked to pay a bankruptcy claim is a "party in interest" that may object to a Chapter 11 plan of reorganization. Recognizing insurer standing to be heard with respect to a debtor-insured's a bankruptcy plan comports with the Code and Article III, and benefits bankruptcy courts and the insurance system.

Respectfully submitted,

Laura A. Foggan
Counsel of Record
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2774
lfoggan@crowell.com