No. _____

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Most courts of appeals to have addressed the issue have concluded that a chapter 11 debtor is obligated to pay in full the necessary expenses of administering its chapter 11 case, including the full cost of the insurance that it purchases to cover tort claims arising from its operations in bankruptcy. *See, e.g., Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997). This Court has likewise concluded that "the cost of insurance against tort claims arising during [bankruptcy] is an administrative expense payable in full." *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968). The court below, however, reached a contrary conclusion, and the question presented is:

Whether a chapter 11 debtor is obligated to pay in full as an administrative expense the cost of necessary insurance that it purchases during the course of its chapter 11 case?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14(b) and 29.6, Petitioner National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") makes the following disclosures:

1. National Union is a wholly-owned subsidiary of Chartis U.S., Inc. Chartis U.S., Inc. is a wholly-owned subsidiary of Chartis Inc. Chartis Inc. is a wholly-owned subsidiary of AIUH LLC. AIUH LLC is a wholly-owned subsidiary of American International Group, Inc., which is a publicly-owned corporation.

2. With the exception of the AIG Credit Facility Trust, a trust established for the sole benefit of the United States Treasury, no parent entity or publicly-held entity owns 10% or more of the stock of American International Group, Inc.

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PRELIMINARY STATEMENT

This matter arises out of the chapter 11 bankruptcy case of the LTV Corporation ("LTV") and certain of its subsidiaries and affiliates, including VP Buildings, Inc. ("VP Buildings") and four other VP entities (collectively, the "VP Debtors").[1] Under the Bankruptcy Code, a chapter 11 debtor is generally authorized to operate its business after commencing its bankruptcy case. 11 U.S.C. §§ 1101(1), 1107, 1108 (authorizing operation of business). An operating debtor will necessarily incur certain expenses, and in relevant part, the Code provides that the "actual, necessary costs" of operating the debtor's business in bankruptcy qualify as "administrative expenses" payable in full on a priority basis. *Id.* §§ 503(b), 507(a)(2); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4-5 (2000). This priority gives third parties an incentive to supply the debtor with necessary goods and services (including insurance) while the debtor seeks to reorganize. Indeed, as this Court has explained, administrative priority for the cost of insurance is necessary, "else insurance could not be obtained." *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968).

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[1] The VP Debtors are VP Buildings; United Panel, Inc.; Varco Prudent International, Inc.; VP-Graham, Inc.; and LTV Walbridge, Inc. Pet. App. 20a.

LTV and the VP Debtors commenced their chapter 11 cases in 2000. Thereafter, petitioner National Union Fire Insurance Company of Pittsburgh, PA ("National Union") supplied the VP Debtors with workers' compensation and other insurance[2] for tort claims that arose in 2001 during the course of their chapter 11 proceedings. At issue is whether the full cost of the workers' compensation portion of this insurance is properly payable as an administrative expense.

A business cannot operate in chapter 11 without complying with applicable workers' compensation regulations, which generally require an operating debtor to maintain adequate workers' compensation insurance coverage. *See* 28 U.S.C. § 959. Accordingly, the VP Debtors purchased workers' compensation insurance from National Union and agreed to pay National Union the full amount of the cost of this insurance.

Debtors in bankruptcy are often short on cash and therefore typically prefer to pay for their insurance over time. In this case, rather than pay a single, large, fixed, up-front premium of over $6 million for its insurance, LTV and its

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[2] For ease of reference, this Petition will refer to all such insurance as "workers' compensation insurance."

affiliates agreed to pay a much smaller, variable up-front premium of approximately $967,131, and agreed to pay the balance of the cost of their insurance (approximately $4,952,583) under the terms of a "deductible reimbursement" arrangement.[3] Under this common type of payment structure, the debtors' obligation to make payments extended into the future beyond the particular year (2001) for which they obtained coverage.

In 2003, after National Union had supplied its insurance coverage, but while the VP Debtors were still making their payments to National Union for this insurance, the VP Debtors confirmed their chapter 11 plan (the "Plan"). Under the Bankruptcy Code, a bankruptcy court cannot confirm a chapter 11 plan unless the plan provides for the payment in full of all administrative expenses. 11 U.S.C. § 1129(a)(9). Complying with this provision, the debtors' Plan provides that all administrative expenses will be paid in full, and appropriate reserves have been established for the full payment of administrative claims liquidated after confirmation. United States District Court Appendix ("USDC App.")

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[3] The term "deductible reimbursement" refers to LTV's and the VP Debtors' share of the cost of National Union's payment of workers' compensation benefits to injured employees.

II-A110, 118.[4] After the bankruptcy court confirmed their Plan, however, the VP Debtors objected to making further payment to National Union for their workers' compensation insurance, asserting that payments due post-confirmation (*i.e.*, after confirmation of their Plan) were not entitled to be treated as expenses of administration.

The bankruptcy court agreed, concluding that, after confirmation, it was no longer necessary for them to continue paying for the insurance they purchased as an expense of administration. Following a prior decision of the Sixth Circuit addressing the same question, *Zurich American Insurance Co. v. Lexington Coal Co., LLC (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008), the district court agreed with the bankruptcy court, as did a panel of the Sixth Circuit, concluding that it was also bound by *HNRC*. As two of the concurring circuit judges below observed, however, the decision in *HNRC* conflicts with authoritative decisions of other courts of appeals, is contrary to this Court's deci-

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[4] The term "USDC App." refers to the United States District Court Appendix that was filed by National Union in the United States District Court for the Northern District of Ohio (Eastern Division) in the proceedings below pursuant to that court's local rules. The USDC App. was filed on March 10, 2008 as an attachment to National Union's Opening Brief under District Court docket entry 16.

sion in *Reading*, and will have the disastrous effect of making workers' compensation insurance unavailable on extended payment terms in bankruptcy cases within the Sixth Circuit. Pet. App. 15a-18a. Specifically, no insurer will be willing to permit a chapter 11 debtor to pay for its insurance over time if, by simply confirming its chapter 11 plan, the debtor may eliminate its obligation to make its scheduled payments. Pet. App. 18a. Because the decision below following *HNRC* conflicts with the decisions of other courts of appeals, is contrary to this Court's decision in *Reading*, and addresses a vitally important question of bankruptcy law, certiorari is warranted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is reported at 606 F.3d 835. The opinion of the United States District Court for the Northern District of Ohio, Pet. App. 19a, is unpublished but is available at 2008 WL 4445075. The opinion of the United States Bankruptcy Court for the Northern District of Ohio, Pet. App. 30a, is unpublished.

JURISDICTION

The bankruptcy court possessed jurisdiction over the bankruptcy proceedings. 28 U.S.C. §§ 1334, 157. On December 21, 2007, the bank-

ruptcy court issued its order denying administrative expense status to that portion of National Union's claim representing the unpaid cost of National Union's insurance at the time the VP Debtors confirmed their chapter 11 Plan, Pet. App. 30a, and entered judgment on the same date. USDC App. I-A13. National Union timely appealed on December 31, 2007. USDC App. I-A14. The district court possessed jurisdiction over the appeal pursuant to 28 U.S.C. § 158. On September 29, 2008, the district court affirmed the Bankruptcy Court's judgment. Pet. App. 19a. On October 24, 2008, National Union timely appealed. Pet. App. 6a. The Sixth Circuit possessed jurisdiction pursuant to 28 U.S.C. §§ 1291, 158(d). On June 4, 2010, the Sixth Circuit affirmed and entered judgment on the same date. Pet. App. 1a. LTV's petition for rehearing en banc was denied on August 31, 2010. Pet. App. 48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Pursuant to Supreme Court Rule 14(f), the relevant provisions of 11 U.S.C. §§ 503 and 507(a)(2) are reprinted at Pet. App. 50a.

STATEMENT

For many years, National Union provided LTV and its subsidiaries (including the VP Debtors) with workers' compensation, automobile li-

ability, and general commercial liability insurance coverage. USDC App. I-A39. On December 29, 2000, LTV and the VP Debtors filed their respective bankruptcy petitions. USDC App. I-A55. During 2001, following the commencement of the bankruptcy proceedings, National Union continued to provide worker's compensation insurance to the VP Debtors. USDC App. I-A39, 44-48. Only the VP Debtors' obligations under the post-petition 2001 National Union policies (i.e., those in place after the filing of their bankruptcy cases) are at issue.

National Union's workers' compensation policies were "loss-sensitive," meaning that "the cost of most losses were to be reimbursed by LTV" and the VP Debtors, respectively. USDC App. I-A39. The way workers' compensation policies of this kind typically work, the insurer (here National Union) fronts the monthly payments that must be paid to employees injured on the job during the coverage period (here 2001), which payments often extend well into the future for the duration of the employees' disabilities. The insurer then bills the employer (here the VP Debtors) for the employer's share of these losses. Pursuant to the terms of the policies in this case,[5] the VP Debtors owed National Union for

[5] The relevant payment terms are contained in three documents that work together as an integrated whole: (1) the Payment Agreement; (2) the Schedule of Policies and

amounts due both before and after they confirmed their Plan as reimbursement for the cost of National Union's payment of benefits to workers injured in 2001. Accordingly, National Union filed administrative expense claims against the VP Debtors for these obligations (and likewise for similar obligations owed by LTV and certain of its other affiliates). USDC App. II-A185, 189-91; USDC App. III-A255-318; USDC App. IV-A319-340, 411-12.

LTV and the VP Debtors responded by commencing an adversary proceeding challenging the administrative expense claims. Pet. App. 32a. The parties agreed to arbitrate the dispute, and in June 2004, the bankruptcy court entered an agreed order compelling arbitration. USDC App. IV-A413-17. The order provided that the arbitrators' award would establish the amount of National Union's post-petition claims as a fixed sum, and that the bankruptcy court would then decide whether National Union's post-petition claims would be afforded administrative expense status. USDC App. IV-A415.

The arbitrators found, *inter alia*, that National Union had a total post-petition claim against LTV and its affiliates for $2,494,498

Payment Obligations; and (3) the Large Risk Rating Plan Endorsement. USDC App. I-A39, 45-48; USDC App. II-A171-81, 192-212; USDC App. III-A213-217.

based solely on insurance issued for the post-petition policy year 2001. Pet. App. 33a; USDC App. I-A40-42. Pursuant to the relevant agreements, this amount consisted of deductible reimbursement obligations – benefits National Union paid to employees injured in 2001 for which LTV and its affiliates had not yet reimbursed National Union, reserves for benefits that National Union would pay to these injured employees in the future, and allocated expenses in paying benefits. USDC App. I-A40-42. National Union asserts that the VP Debtors' approximate share of this amount is $993,769. USDC App. I-A41. Following the liquidation by arbitration of the VP Debtors' obligation, National Union settled with LTV and all other LTV entities except the VP Debtors. USDC App. IV-A419.

After the arbitration liquidated the VP Debtors' post-petition obligation to National Union, the VP Debtors moved for summary judgment on the disputed portion of National Union's administrative expense claims (*i.e.*, the cost of National Union's payment to employees injured in 2001 for benefits liquidated and billed after confirmation of the Plan). The bankruptcy court granted the VP Debtors' motion, citing two reasons. First, the court held that the VP Debtors' bankruptcy estates ceased to exist upon confirmation of the Plan in 2003, concluding that any amounts due "that arise post-confirmation necessarily cannot satisfy the requirement that they

'preserve the estate' and would not be entitled to administrative expense status." Pet. App. 42a (quoting 11 U.S.C. § 503(b)).

Second, the bankruptcy court held that National Union sought payment for amounts "that have not yet arisen pursuant to the terms of its agreement with VP Debtors, because National Union itself has not paid the claims . . . National Union instead seeks payment of estimated claims that it may, or may not, have to pay at some future date." Pet. App. 42a. The bankruptcy court concluded that expenses that remained unliquidated at the time of plan confirmation were not "actual" and therefore not allowable. Pet. App. 42a, 47a. On appeal, the district court affirmed, following the intervening decision of the Sixth Circuit addressing the same general issue, *Zurich American Insurance Co. v. Lexington Coal Co., LLC (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008). Pet. App. 18a.

On June 4, 2010, a panel of the Sixth Circuit also affirmed, concluding that the cost of National Union's insurance was not "actual" because the unbilled, post-confirmation amounts would not become fixed until National Union made benefit payments to injured employees in the future and sought reimbursement from the VP Debtors. Pet. App. 10a-12a. In other words, rather than focus on whether National Union provided a benefit to the estate by supplying

valuable insurance coverage in 2001 while the VP Debtors were in bankruptcy, the Court below focused on *when* the payments for this insurance were supposed to be calculated and paid. Because the VP Debtors confirmed their Plan before they completed their payments, what otherwise would have been an "actual" expense without plan confirmation became one that was no longer "actual," and the VP Debtors were thereby excused from further payment.

In reaching its decision, the Court below explained that it was "bound by" the Sixth Circuit's prior decision in *HNRC*. Pet. App. 12a. In *HNRC*, the Sixth Circuit adopted the decision of a district court that held that insurance costs that a debtor incurs during its bankruptcy case are not properly administrative expenses to the extent the amount of the costs were not yet fixed at the time the debtor confirmed its chapter 11 plan. Pet. App. 8a-9a. In the instant case, Circuit Judge Cook wrote a concurrence, which Judge White joined, to "separately . . . question *HNRC*'s holding and to urge en banc review of the application of that rule to the present case." Pet. App. 13a (Cook, J., concurring).

As Judge Cook noted, "no party disputes that the debtor's survival as an operating entity required the insurance National Union provided." Pet. App. 14a (Cook, J., concurring). Nevertheless, "under *HNRC*'s holding, by sched-

uling prospective payments (some of which arise after plan confirmation), the debtor receives a windfall, avoiding the entire post-confirmation portion of the obligation." Pet. App. 14a (Cook, J., concurring). As Judge Cook explained, the rationale behind *HNRC* was that "such post-confirmation payments (unlike the pre-confirmation payments made on the same contract covering the same service) cannot qualify as actual, necessary, or a benefit to the estate by virtue of their post-confirmation nature." Pet. App. 14a (Cook, J., concurring). But as Judge Cook concluded, under applicable law as adopted by other courts of appeals, "the timing of the payments should not affect the analysis of whether the cost of the service can satisfy the criteria necessary to qualify for administrative priority." Pet. App. 14a-15a (Cook, J., concurring).

As Judge Cook noted, the courts of appeals have generally adopted one of two relevant "frameworks" for considering whether an obligation is entitled to administrative priority: "1) when the debtor obligates itself to pay or 2) when the service is rendered." Pet. App. 15a (Cook, J., concurring). As Judge Cook observed, National Union's claim qualifies for administrative expense status under either of these tests because National Union rendered its service (*i.e.*, supplied the necessary insurance coverage) in 2001 during the pendency of the VP Debtors' bank-

ruptcy case, and the VP Debtors contracted for this service during their case. Pet. App. 16a (Cook, J., concurring) ("Under either framework, National Union's claimed administrative expense qualifies – VP Debtors signed the insurance contract post-petition, incurring liability then, and acquired actual, not potential, insurance coverage."). Following *HNRC*, however, the Court below felt obliged to chart a different course, concluding that the time the "creditor bills the debtor for its services" is the dispositive test, and if this occurs after confirmation of the debtor's plan, the creditor is simply out of luck. Pet. App. 15a (Cook, J., concurring).

As Judge Cook noted, the *HNRC* standard turns on an evaluation of whether the *cost* of the creditor's goods and services was "necessary" because the cost provided a benefit to the bankruptcy estate at the time the cost is billed. Pet. App. 13a (Cook, J., concurring). But as Judge Cook explained, "a *cost* cannot be necessary to or benefit anyone, let alone a bankrupt estate," and "the better approach asks whether a creditor provided a necessary service for the estate's benefit and preservation during the debtor's bankruptcy proceeding . . . ." Pet. App. 16a (Cook, J., concurring).

As Judge Cook explained further, "[t]he Supreme Court held in *Reading* . . . that 'the cost of insurance against tort claims arising during

[bankruptcy] is an administrative expense payable in full . . . .'" Pet. App. 16a (Cook, J., concurring). And as Judge Cook noted, "[t]he *HNRC* decision fails to adequately account for this clear and controlling statement of law." Pet. App. 17a (Cook, J., concurring). Although the VP Debtors argued that *Reading* applies only to "insurance premium[s] . . . (and that this case implicates only loss-sensitive deductible reimbursement payments)," Judge Cook observed that this is "a distinction without difference" because "[a]ll agree that the post-confirmation insurance payments at issue represent part of the price of the insurance." Pet. App. 17a (Cook, J., concurring). Judge Cook further reasoned that, "[i]f instead of insurance this case involved the purchase of raw materials for steel that the debtor, a steel producer, needed to fulfill an order, and managed to purchase on similar terms, no one would seriously contend that because the payments were slated to occur post-confirmation the steel was not necessary to preserve the estate." Pet. App. 17a (Cook, J., concurring).

In conclusion, Judge Cook observed: "The *HNRC* decision will, as National Union warns, likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting." Pet. App. 18a (Cook, J., concurring). Accordingly, she urged that "[t]he full court should use this case to take another look at *HNRC*." Pet. App. 18a (Cook, J., concurring). In

spite of Judge Cook's appeal, however, the Court below denied National Union's subsequent petition for rehearing en banc, and this petition followed. Pet. App. 48a (Cook, J., concurring).

REASONS FOR GRANTING THE WRIT

Chapter 11 debtors frequently arrange to purchase on credit the goods and services they need to operate during the course of their bankruptcy cases, and correspondingly arrange to pay for these goods and services over time. The Bankruptcy Code specifically authorizes this, 11 U.S.C. § 363(c)(1), and the prospect of payment on a priority "administrative expense" basis encourages creditors to agree to these kinds of credit terms. To this end, section 503(b)(1)(A) of the Bankruptcy Code provides that priority administrative expenses include "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A).

In order to qualify as an "actual, necessary" cost of "preserving the estate," most courts of appeals look to see if the particular expense is one incurred in connection with a transaction by the chapter 11 debtor on behalf of its bankruptcy estate, and whether the particular goods and services that the creditor supplied provided a tangible benefit to the estate. If so, the associated cost is entitled to administrative expense priority. In this case, there is no question that

National Union supplied vital insurance coverage pursuant to a transaction with the VP Debtors on behalf of their bankruptcy estates during the course of their bankruptcy cases and did so for the benefit of their estates. Plainly, without National Union's insurance, the VP Debtors would not have been able to operate. The only question that the Court below addressed was whether a portion of the *cost* of this insurance consisting of amounts National Union would bill after the VP Debtors confirmed their chapter 11 Plan qualifies as an "actual, necessary" expense.

Applying the standard analysis under section 503, most courts of appeals would conclude that the full cost of National Union's insurance coverage would qualify as an administrative expense because (1) it involved a transaction with the chapter 11 VP Debtors, and (2) the insurance coverage provided a necessary benefit. *See, e.g., Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997). Following *HNRC*, however, the Court below concluded that the portion of the cost of this insurance unbilled at the time of confirmation of the VP Debtors' Plan did not qualify because this cost was not yet "actual" at the time of confirmation and, thus, did not supply a benefit. Pet. App. 10a-12a. Of course, the price a debtor must pay for something is never a benefit to the debtor or its estate; it is the goods or services that the debtor receives (*e.g.*, insurance) in exchange for the cost

that supplies the benefit. Thus, by insisting that the cost of the insurance provide a benefit rather than the insurance itself, the Court below established a standard that can never be met. Nonetheless, as the concurrence pointed out, that is what the Court below concluded.

This approach conflicts with the standard other courts of appeals have adopted and applied. It likewise conflicts with the decision of this Court in *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968). As this Court stated in *Reading*, "'actual and necessary costs' should include costs ordinarily incident to operation of a business," and added that the full cost of insurance should also be included. *Id.; see also Texas Comptroller of Pub. Accounts v. Megafoods Stores, Inc. (In re Megafoods Stores, Inc.)*, 163 F.3d 1063, 1071-72 (9th Cir. 1998); *Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437-38 (5th Cir. 1998); *Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 19-21 (1st Cir. 1997); *Al Copeland Enters., Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233, 239-40 (5th Cir. 1993); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). The decision below cannot be reconciled with this approach.

Moreover, as the concurrence in this case also pointed out, the decision below is likely to have gravely negative consequences for the administration of chapter 11 cases by rendering unavailable insurance coverage on extended payment terms. Finally, this case presents an appropriate vehicle to resolve the question presented because the issue is raised squarely and is outcome-determinative. For these reasons, certiorari is warranted.

A. The Decision Below Conflicts with the Decisions of Other Courts of Appeals.

Section 503(b)(1)(A) of the Bankruptcy Code provides that administrative expenses include "the actual, necessary costs and expenses of preserving the estate" and sets forth a nonexclusive list of allowable expenses. 11 U.S.C. § 503(b); *Einstein/Noah Bagel Corp. v. Smith (In re BCE West, L.P.)*, 319 F.3d 1166, 1172 (9th Cir. 2003). Administrative expenses "are, as a rule, entitled to priority over prepetition unsecured claims." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4-5 (2000) (citing 11 U.S.C. §§ 507(a)(1), 726(a)(1), 1129(a)(9)(A)).

To be deemed an "actual, necessary" administrative expense, a debt must (1) arise from a transaction with the bankruptcy estate, and (2) directly and substantially benefit the estate.

Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 816 (6th Cir. 1997); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). This two-part test is "essentially an effort to determine whether the underlying statutory purpose will be furthered by granting priority to the claim in question, and [courts should] apply it in that spirit." *In re Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984). Indeed, "application of [administrative expense priority] to Chapter [11] arrangements is primarily a means of implementing the statutory objective of facilitating the rehabilitation of insolvent businesses." *Mammoth Mart*, 536 F.2d at 954;[6] *accord Boeing N. Am., Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018, 1026 (9th Cir. 2005) ("The purpose of administrative priority status is to encourage third parties to contract with the bankruptcy estate for the benefit of the estate as a whole"); *Mass. Div. of Employment & Training v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.)*, 291 F.3d 111, 124 (1st Cir. 2002)

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[6] In *Mammoth Mart*, the court discussed section 64(a)(1) of the Bankruptcy Act, 11 U.S.C. § 104(a)(1). 536 F.3d at 952, 954. Section 64(a)(1) is the predecessor to section 503(b)(1)(A), and the same administrative expense priority analysis applies to both statutes because the relevant statutory provision was left "essentially unchanged." *Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437 (5th Cir. 1998); *see also Jartran*, 732 F.2d at 586.

("the administrative priority is necessary to induce potential contractors to do business with the debtor-in-possession, which in turn is necessary to prevent the business from collapsing entirely with the filing"); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1453-54 (11th Cir. 1992) ("Obviously, without a guarantee of first-priority payment, third parties would not deal with a business in chapter 11 reorganization, and the goal of rehabilitation could not be achieved."); *Jartran*, 732 F.2d at 586 ("If a reorganization is to succeed, creditors asked to extend credit after the petition is filed must be given priority so they will be moved to furnish the necessary credit to enable the bankrupt to function.").

It is unquestioned that National Union's claim in this case arose from a transaction with the bankruptcy estate. The VP Debtors have argued, however, that the relevant unpaid cost of the insurance that they purchased in 2001 – the deductible reimbursement portion consisting of National Union's payment of benefits to employees injured in 2001 and unbilled at the time of confirmation of their Plan – is not an "actual" expense because the amount was not fixed at the time of confirmation, but would depend on the actual amount of benefits paid. The Court below agreed, concluding that it was bound by its prior decision in *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 536 F.3d 683

(6th Cir. 2008). Pet. App. 12a. But the fact that the VP Debtors were obligated to pay their deductible obligation over time, and that the precise amount of the payments were subject to change, does not make the post-confirmation obligation any less "actual" – it simply makes it "unliquidated." *See* Pet. App. 14a (Cook, J., concurring) ("the timing of the payments should not affect the analysis of whether the cost of the service can satisfy the criteria necessary to qualify for administrative priority.").

Section 503(b) does not require that, in order to be "actual," the administrative expense claim must be "liquidated" at a particular point in time. Indeed, section 101(5) of the Bankruptcy Code provides that a "claim" includes any right to payment regardless of whether it is "liquidated" or "unliquidated." 11 U.S.C. § 101(5). It is therefore not surprising that other courts of appeals, in contrast to the decision below, have concluded that unliquidated amounts can properly constitute an administrative expense. *E.g., Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997) (concluding that the full cost of workers' compensation insurance is properly an administrative expense); *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 934 (1st Cir. 1993); *cf. Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm. Network, Inc.)*, 490 F.3d 1325, 1335 (11th Cir. 2007). In-

deed, *Hemingway* explicitly approved the estimation of administrative expenses. 993 F.2d at 934.

As the concurrence below pointed out, the relevant standard adopted by other courts of appeals "focus[es] not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered." Pet. App. 15a (Cook, J., concurring). Although the concurrence noted that National Union's claimed administrative expense would qualify under either version of this analysis, the Court below felt constrained by *HNRC* to follow a different path.

As Judge Cook's concurrence below further observed, the decision below fundamentally parts company with the decisions of other courts of appeals by focusing "on whether the [insurer's] claim itself – a cost – provided an actual and necessary benefit to the estate." Pet. App. 13a (Cook, J., concurring) (citing *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008)). As Judge Cook reasoned, "framed this way, there can be just one answer – a *cost* incurred by a business (let alone a bankrupt one) by definition provides no benefits and, arguably, does not become actual or necessary until the debtor receives the bill, which may not occur until after plan confirmation." Pet. App. 13a-14a (Cook, J., concur-

ring). This is contrary to the clear weight of authority. As the concurrence explained, "[o]nly by analyzing the cost's purpose – assessing the *services* provided in exchange – can courts determine whether the expense meets § 503(b)'s requirements." Pet. App. 14a (Cook, J., concurring). Indeed, "given that a *cost* cannot be necessary to or benefit anyone, let alone a bankrupt estate, the better approach asks whether a creditor provided a necessary service for the estate's benefit and preservation during the debtor's bankruptcy proceedings, not whether the creditor billed the debtor for those services during that time." Pet. App. 16a (Cook, J., concurring).

Other courts of appeals, of course, have followed the "better approach," focusing on whether the *consideration* an estate receives in exchange for its obligation to pay (here, insurance coverage) confers a benefit, not whether the estate's *payment* does so. *E.g., Supplee v. Bethlehem Steel Corp (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007) ("[A]n expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession, and only to the extent that the *consideration supporting the claimant's right to payment* was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (emphasis supplied); *CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d

229, 237 (4th Cir. 2005) ("[C]ourts agree that an administrative expense has two defining characteristics," including "the *consideration supporting the right to payment* provides some benefit to the estate.") (emphasis supplied); *Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988) (describing consideration as "crucial" to the right to administrative expense priority); *Mammoth Mart*, 536 F.2d at 954 ("the case law teaches that a creditor's right to payment will be afforded [administrative expense] priority only to the extent that the *consideration* supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (emphasis supplied).

These decisions illustrate that, in conflict with the position taken by the Court below, the cost itself need not separately confer a benefit to the estate. Because the courts of appeals are divided over the correct standard of law to be applied in cases of this kind, certiorari is warranted.

B. The Decision Below Conflicts with a Prior Precedent of this Court.

In 1968, this Court decided *Reading Company v. Brown*, 391 U.S. 471 (1968), an administrative expense priority case involving the predecessor to section 503(b): section 64(a)(1) of the

former Bankruptcy Act, 11 U.S.C. § 104(a)(1). In *Reading*, the bankruptcy court appointed a receiver to conduct the debtor's business of leasing an eight-story building in Philadelphia. 391 U.S. at 473. A fire destroyed the building, together with the real and personal property of petitioner Reading and others. *Id.*

Reading filed an administrative expenses claim based on the asserted negligence of the receiver. *Id.* The trustee objected, arguing that the Court should read the term "necessary" narrowly such that priority "should be given only to those expenditures without which the insolvent business could not be carried on." *Id.* at 477. In response, the Court examined the purposes of section 64(a), chapter XI, and the Bankruptcy Act as a whole to determine whether the receiver's negligence gave rise to an "actual and necessary" cost of operating the debtor's business. *Id.* at 476.

The Court declined to read the statutory term narrowly, stating that "[i]n our view the trustee has overlooked one important, and here decisive, statutory objective: fairness to all persons having claims against an insolvent." *Id.* at 477. The Court reasoned that "the question is whether the fire claimants should be subordinated to, should share equally with, or should collect ahead of [existing] creditors," *id.* at 478, stating that "[e]xisting creditors are, to be sure,

in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of imposing it on others equally innocent," *id.* at 482-83.

The Court then turned to the question of insurance, stating that "the cost of insurance against tort claims arising during an arrangement is an administrative expense payable in full under § 64a(1) before dividends to general creditors." *Id.* at 483. The Court reasoned, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained; and if a receiver or debtor in possession is to be encouraged to obtain insurance in adequate amounts, the claims against which insurance is obtained should be potentially payable in full." *Id.* The Court added that analogous cases suggest that "'actual and necessary costs' should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible." *Id.* The Court then held that "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter [11] arrangement." *Id.* at 485.

Several courts of appeals have concluded that *Reading* survived enactment of the current Bankruptcy Code, *Total Minatome Corp. v.*

Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.), 258 F.3d 385, 388 (5th Cir. 2001); *Al Copeland Enters., Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233, 239 (5th Cir. 1993), and that its rationale likewise applies to cases beyond the tort context, *Texas Comptroller of Pub. Accounts v. Megafoods Stores, Inc. (In re Megafoods Stores, Inc.)*, 163 F.3d 1063, 1071 (9th Cir. 1998). For example, courts have applied it to "situation[s] in which a bankruptcy estate may engage in activities regulated by state law while [attempting to avoid] the costs associated with that regulation," *Mass. Div. of Employment & Training v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.)*, 291 F.3d 111, 126 (1st Cir. 2002), or where "damage to the plaintiffs was caused by the postpetition operation of the estate's business." *Megafoods*, 163 F.3d at 1072 (holding that statutory interest was administrative expense) (citation & internal quotation marks omitted); *see also, e.g., Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 436 (5th Cir. 1998) (holding that costs incurred by the state in satisfaction of estate's post-petition environmental obligations were entitled to administrative expense priority); *Cumberland Farms v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 21 (1st Cir. 1997) ("This was a postpetition claim incurred during the operation of Cumberland Farms' business while it was operating under Chapter 11. We think it would be fundamentally unfair to allow Cumberland Farms to flout Flor-

ida's environmental protection laws and escape paying a penalty for such behavior."); *Copeland*, 991 F.2d at 240 (holding that statutory award of interest constituted an administrative expense) ("Copeland . . . elected not to carry out its statutory obligations under Texas law in a prompt manner. This post-petition decision on the part of Copeland resulted in monetary harm to the State . . . and resulted in Copeland's estate incurring a statutory award of interest."); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992) ("We find that a policy of ensuring compliance by trustees with state law is sufficient justification to place civil penalties assessed for postpetition mining operations in the category of 'some cases' in which 'costs ordinarily incident to operating of a business' are accorded administrative expense priority.") (citation omitted); *Spunt v. Charlesbank Laundry (In re Charlesbank Laundry)*, 755 F.2d 200, 203 (1st Cir. 1985) (holding civil fine qualified for administrative expense priority because "[t]he debtor in this case *deliberately* continued a violation of law month after month presumably because it was more lucrative for the business to operate outside the zoning ordinance than within it."); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 955 (1st Cir. 1976) ("When the debtor-in-possession . . . accepts services from a third party without paying for them, the debtor-in-possession itself caused legally

cognizable injury, and the resulting claims for compensation are entitled to first priority.").

In the circumstances of this case, the relevant administrative expense – National Union's claim for unpaid deductible reimbursements – involves the cost of insurance *that applicable state law requires* a debtor to have in order to operate, which requirement applies in chapter 11 proceedings, 28 U.S.C. § 959(b).[7] The VP Debtors' attempt to avoid paying the full cost of the insurance that was necessary in order for them to reorganize is, at bottom, an effort to avoid

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[7] Almost every state requires businesses to carry workers' compensation insurance or prove their financial ability to pay all workers' compensation claims that may arise. The vast majority of the states where the VP Debtors did business so required. *See* USDC App. IV-A390 (listing locations in, among other places, Alabama, Arkansas, California, Missouri, North Carolina, Tennessee, and Wisconsin)); *see also* Mo. Rev. Stat. § 287.128.7 (knowing failure to carry workers' compensation insurance is a misdemeanor); Ark. Code Ann. § 11-9-404(a) (every employer must carry workers' compensation insurance or prove to regulators a financial ability to pay); Ala. Code § 25-5-8 (similar); Cal. Labor Code § 3700 (similar); N.C. Gen. Stat. § 97-93(a) (similar); Tenn. Code Ann. § 50-6-405(a) (similar); Wis. Stat. § 102.28(2)(a) (similar)). The VP Debtors also did business in Ohio and Texas. USDC App. IV-A390. In Ohio, workers' compensation must be insured through a state fund, and in Texas, the workers' compensation system is optional. *See* Ohio Rev. Code Ann. § 4123.35; Tex. Lab. Code Ann. § 406.002.

paying the cost of complying with applicable regulatory obligations.

Applying the rationale of *Reading*, courts have concluded that the proper focus is whether a particular expense is necessary to continued, post-petition operation of the insolvent business, because "the conceptual justification for administrative expense priority [is] that creditors must pay for those expenses necessary to produce the distribution to which they are entitled." *H.L.S.*, 151 F.3d at 437. Accordingly, although the trustee argued in *H.L.S.* that the costs incurred by Texas in conjunction with plugging unproductive wells did not "benefit" the estate, the Fifth Circuit disagreed, noting that "this is true – in the sense that the bankrupt estate and its creditors would have been happy to abandon the unproductive wells, leaving them unplugged in abdication of HLS's obligations under Texas law." *Id.* at 438. But, according to the court, "bearing in mind that the 'benefit' requirement is simply a gloss on the underlying concept of what is 'necessary,' our notion of 'benefit' cannot be limited to the narrow sense that the trustee urge[d]." *Id.; see also Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997) (holding that an insurer was entitled to administrative priority for its claim for postpetition workers' compensation premiums) ("There can be no doubt that continuing workers' compensation insurance is essential to preserving the estate of

a Chapter 11 debtor in possession. Under state law, MEI could not have remained in business without maintaining workers' compensation insurance or investing in a regulated program of self insurance."); *N.P. Mining*, 963 F.2d at 1458 ("when a trustee or debtor in possession operates a bankruptcy estate, compliance with state law should be considered an administrative expense. Otherwise, the bankruptcy estate would have an unfair advantage over nonbankruptcy competitors. A mining operation could, under the protection of chapter 11, cut costs by ignoring safety and environmental violations.").

All of these cases follow *Reading*, and in doing so have "attempted to avoid a situation in which a bankruptcy estate may engage in activities regulated by state law while avoiding the costs associated with that regulation." *Boston Reg'l*, 291 F.3d at 126. In contrast, the decision below lets the VP Debtors' estates keep the benefit, but avoid the burden, of the insurance that National Union supplied. It leaves National Union obligated to pay benefits to employees injured in 2001, but with no way to obtain the very reimbursement from the VP Debtors that the VP Debtors agreed to pay. Certiorari is warranted because the decision below contravenes both the letter and the spirit of *Reading*.

C. The Decision Below Involves a Question of Exceptional Importance.

The decision below, left standing, will have gravely negative consequences for chapter 11 reorganizations. It creates a loophole allowing a debtor in bankruptcy to avoid paying for necessary insurance purchased during the course of its bankruptcy proceeding by the simple expedient of confirming its plan before a creditor submits its bill or otherwise liquidates its claim. Applied in other contexts, the rationale of the decision below would permit a debtor to escape environmental obligations that it incurred during the course of its reorganization proceedings by confirming its plan prior to the liquidation of its environmental liabilities. It would similarly permit a debtor to escape tort, tax, and contractual liabilities. As Judge Cook explained below, this result is best described as a "windfall." Pet. App. 14a (Cook, J., concurring).

Under such conditions, no insurer will be willing to provide insurance to a bankrupt debtor on extended payment terms. *See* Pet. App. 18a (Cook, J., concurring) ("The *HNRC* decision [and the majority decision below] will, as National Union warns, likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting."). This can only hurt cash-strapped debtors seeking to reorganize, because insisting on full, up-front payment would

create an up-front drain on the debtor's scarce resources, putting debtors in bankruptcy at a competitive disadvantage with businesses outside of bankruptcy that can obtain insurance on credit. Such an outcome is contrary to the key rehabilitative policy of chapter 11 and section 503(b). *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

Finally, this case presents an appropriate vehicle for the Court to address the question presented. Resolution of the split of authority among the courts of appeals is not likely to be resolved absent intervention by this Court. The Sixth Circuit's position is firmly entrenched: in the decision below, it reaffirmed its initial decision in *HNRC* and denied en banc consideration. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 29, 2010

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED JUNE 4, 2010

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0159p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL UNION FIRE INSURANCE CO., *Appellant,*

v.

VP BUILDINGS, INC., *Appellee.*

No. 08-4537

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 08-00196—Donald C. Nugent, District Judge.

Argued: December 4, 2009

Decided and Filed: June 4, 2010

Before: KENNEDY, COOK, and WHITE, Circuit Judges.

Appendix A

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KENNEDY, J., delivered the opinion of the court, in which COOK and WHITE, JJ., joined. COOK, J. (pp. 8-11), delivered a separate concurring opinion in which WHITE, J., joined.

OPINION

CORNELIA G. KENNEDY, Circuit Judge. National Union Fire Insurance Company ("National Union") appeals the district court's affirmance of the bankruptcy court's decision disallowing National Union's petition for administrative expenses. National Union provided the estate with workers' compensation insurance, and asks that the estate's contractual obligation to reimburse it for certain anticipated payments be granted administrative expense priority. Both the bankruptcy court and the district court rejected this argument, finding that the claim was not "actual" and did not benefit the estate. Because this case is controlled by our decision in *In re HNRC Dissolution Co.*, 536 F.3d 683 (6th Cir. 2008), we **AFFIRM**.

Appendix A

I. FACTUAL AND PROCEDURAL BACKGROUND

LTV Steel Company, Inc. and its subsidiaries filed voluntary petitions for Chapter 11 bankruptcy on December 29, 2000. LTV's subsidiaries include VP Buildings, Inc., United Panel, Inc., Varco Pruden International, Inc., VP-Graham, Inc., and LTV-Walbridge, Inc., collectively the "VP debtors."

The parties agree that National Union provided the LTV entities, including VP debtors, with workers' compensation insurance during calendar year 2001. This insurance, mandated by state law, guarantees that injured workers will be compensated in a timely manner regardless of the financial health of the employer. When an injury occurs in a covered year (such as 2001), National Union's insurance coverage is implicated. However, the actual payments to an injured employee are often required for years, or even decades, after the covered year.

The parties agree that under the terms of this agreement, which was entered into post-petition for post-petition activities and incorporates an earlier agreement, LTV and the VP Debtors are ultimately responsible for any workers' compensation claim that is incurred in 2001, regardless of when the benefits are actually paid

(subject to certain limits not at issue). When a workers' compensation claim matures for an injury that occurred in 2001, the parties' contract requires National Union to pay the entirety of the claim and seek reimbursement from the VP Debtors. This obligation of the VP Debtors is described in the contract as "deductible loss reimbursements," and defined as "the portion of any *Loss* and *ALAE* [Allocated Loss Adjustment Expense] [National Union] pay[s] that [VP Debtors] must reimburse [National Union] for under any 'Deductible' or 'Loss Reimbursement' provisions of a *Policy*." The contract makes it clear that the VP Debtor's "Payment Obligation" means "the amounts that [VP Debtors] must pay [National Union]", and includes "any portions thereof not yet due and payable [of] *Deductible Loss Reimbursements...*" In return for National Union advancing this money, National Union charged LTV a premium (which was paid) and obtained collateral.

Employees were injured in 2001, imposing an obligation on National Union to pay out future benefits. National Union asked that the reimbursement of this obligation for payments that are not due until after the closure of the bankruptcy estate be given administrative priority status. Because the injured employees' claims are ongoing in nature, there is uncertainty as to the amount that National Union will ultimately

pay. The parties agreed to arbitrate the amount of National Union's claim. The arbitration panel concluded that National Union's reimbursement claim for all LTV entities is valued at $2,494,498 for 2001. The arbitration award did not allocate liability to the various subsidiaries. Teresita Miranda, a manager with American International Companies, submitted an unsigned declaration that asserts, based on her review of the records, $993,769 is the amount that is attributable to the VP Debtors. The VP Debtors dispute this figure. The "[c]onfidential source data" supporting Miranda's conclusion has not been provided to the court.

The bankruptcy plan to liquidate the VP Debtors' assets and dissolve the estates was confirmed by order of the bankruptcy court on December 17, 2003. The bankruptcy court denied National Union's claim for administrative expense priority on December 21, 2007. The court concluded that the expense was not "actual" because National Union had not yet paid the benefits for the years after the closure of the bankruptcy estate. Moreover, the bankruptcy court found that reimbursement of the payments would not benefit the estate. National Union appealed, elected to have the case heard by the district court rather than the BAP, and the district court affirmed the bankruptcy court on Septem-

ber 29, 2008. National Union filed a timely notice of appeal.

II. DISCUSSION

"We review the bankruptcy court's decision directly, according no deference to the district court. The bankruptcy court's findings of fact are reviewed for clear error, and questions of law are reviewed de novo." *Phar-Mor, Inc. v. McKesson Corp.*, 534 F.3d 502, 504 (6th Cir. 2008) (quoting *In re S. Air Transp., Inc.*, 511 F.3d 526, 530 (6th Cir. 2007)).

The bankruptcy code provides that administrative expenses, "the actual, necessary costs and expenses of preserving the estate," 11 U.S.C. § 503(b)(1)(A), "are, as a rule, entitled to priority over prepetition unsecured claims," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000) (citing 11 U.S.C. §§ 507(a)(1), 726(a)(1), 1129(a)(9)(A)). "The purpose of [this priority] is to facilitate the rehabilitation of insolvent businesses by encouraging third parties to provide those businesses with necessary goods and services." *In re United Trucking Service, Inc.*, 851 F.2d 159, 161 (6th Cir. 1988) (citing *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976)). However, "[c]laims for administrative expenses under § 503(b) are strictly construed because priority claims reduce the funds

available for creditors and other claimants." *In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001). "'[A] debt qualifies as an 'actual, necessary' administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate.'" *In re Eagle-Picher Industries, Inc.*, 447 F.3d 461, 464 (6th Cir. 2006) (quoting *Pension Benefit Guar. Corp. v. Sunarhauserman, Inc.* (*In re Sunarhauserman, Inc.*), 126 F.3d 811, 816 (6th Cir. 1997)). The party seeking the priority "has the burden of proving that his claim constitutes an administrative expense." *McMillan v. LTV Steel, Inc.*, 555 F.3d 218, 226 (6th Cir. 2009) (citing *In re White Motor Corp.*, 831 F.2d 106, 110 (6th Cir. 1987)).

The parties agree that the provision of insurance benefitted the estate, and that the transaction was entered into post-petition. However, the parties dispute whether the claim is "actual" under the meaning of the Bankruptcy Code and whether National Union's claim for reimbursement benefitted the estate.

We do not decide this case without precedent. In a published opinion, we recently adopted the reasoning of a district court that rejected the claimant's arguments:

To that effect, the narrow application of § 503(b)(1)(A) is rather unambiguous on its face: the claimed expense must have been an "actual" cost that is "necessary" to the "preservation" of the estate. *See In re Patch Graphics,* 58 B.R. at 745 (citing *In re Club Dev. & Mgmt. Corp*., 27 B.R. 610, 612 (9th Cir. BAP 1982)) ("An administrative expense may not be allowed absent a finding that the expense is necessary for preserving the estate."). It is in this regard that Zurich's claim fails as a simple matter of statutory interpretation on both fronts: the claimed expenses are not "actual" (i.e., not yet realized) and the payment thereof, when the obligations are realized, cannot act to preserve an estate that no longer exists. At the moment Zurich's Claim was filed on the bar date for administrative expense claims, the ultimate loss projection for the deductible obligations was entirely speculative by nature and prospective by definition.

Nevertheless, despite LCC's subtle mention otherwise, there can be no question that Zurich will be forced to "advance" a substantial portion, if not all, of the deductible obligations in question. A key consideration, however,

> is the reality that Zurich is only contractually obligated to pay the deductibles, and subsequently seek reimbursement, once the claims actually "arise." Zurich contends that "arise" in this context should be viewed from a more macro perspective, effectively arguing that, even though the legal obligation to pay the expenses will not accrue until sometime in the future, the underlying event giving rise to the future claim (e.g., an employee's initial injury) necessarily occurred during the bankruptcy administration. In other words, Zurich asserts that the accrual of the claims should essentially relate back to the underlying insurance coverage as part and parcel of the relevant insurance policies, which include the premium obligations that were assigned administrative priority and satisfied accordingly. But Zurich does not, and cannot, provide any direct authority to support the contention that expenses necessarily realized post-confirmation can legally be characterized as "actual" under the Code.

In re HNRC Dissolution Co., 371 B.R. 210, 225-26 (E.D. Ky. 2007) (footnotes omitted), *aff'd*, 536 F.3d 683 (6th Cir. 2008) (per curiam), *cert. de-*

nied, 129 S. Ct. 2866 (2009).[1] Following this logic, National Union's claim will not be "actual" until it has made a payment and seeks reimbursement from the insured, which will typically occur years post-confirmation.

National Union argues that *HNRC* is distinguishable on several factual grounds, but none of the offered differences are material. First, National Union observes that the claimant in *HNRC* had only estimated the future indebtedness through a "report prepared by actuaries." *See id.* at 211. In contrast, National Union has, through arbitration, reduced its future indebtedness to all LTV entities to a specific figure by which all parties are bound. With some of the uncertainty of naked actuarial estimation reduced by reason of arbitration to which each side is bound, National Union posits, the claim is more "actual" here than in *HNRC*. The arbitration process may have tested the parties' actuarial estimates, but it did not change the nature of

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[1] Appellee brings to our attention that the Supreme Court denied certiorari in the *HNRC* case. We note this fact but afford it no weight because the denial of certiorari provides no guidance to this court, except to leave in place *HNRC* as binding law in this circuit. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

the claim to an "actual" total due by the debtors during the pendency of the bankruptcy estate. Under the terms of National Union's contract, the need for reimbursement only arises when payments are made. Until the payments are due, they are "not yet realized." *See id*. at 225. And under the reasoning of *HNRC*, it is only then that the claim becomes "actual."

Next, National Union argues that its claim can be paid under the provisions of the debtor's plan here because the plan creates a priority claims trust account from which administrative claims that are "not allowed as of the Effective Date" of the plan may be paid. However, it does not argue or point to any evidence that this was not the case in *HNRC* or how this transforms the claim to actual.

National Union further contends that the contractual language requiring reimbursement is different. In this case, the language of VP's contract provides that the payment obligation includes future deductible loss reimbursements that are not yet due. In *HNRC*, the insurance contract also required reimbursement of certain deductible amounts as they were incurred.[2] We

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[2] The appellant submits these documents along with a motion for the court to take judicial notice. The

can discern no meaningful distinction between the language of the two contracts.

The claimant also argues that *HNRC* was wrongly decided and conflicts with the Supreme Court's decision in *Reading Co. v. Brown*, 391 U.S. 471 (1968). Because we are bound by the prior panel's decision, we do not consider these arguments further. *See* 6 Cir. R. 206 ("Reported panel opinions are binding on subsequent panels."); *see also*, *e.g., Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001). There are two exceptions to this rule: an intervening Supreme Court decision, or the prior decision is overruled en banc. Neither exception applies to this case.

We are bound by *HNRC* to conclude that National Union's request for reimbursement is not an "actual" expense within the meaning of the bankruptcy code. In light of this conclusion, we do not address whether the reimbursement benefitted the estate or otherwise qualified for administrative expense priority.

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motion was unopposed. We can take judicial notice of the factual record that provides the basis for a court's judgment. *See Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980). We grant the motion and consider the factual record as attached to the motion.

III. CONCLUSION

Because the arguments raised by appellant are foreclosed by our decision in *HNRC*, we **AFFIRM**.

CONCURRENCE

COOK, Circuit Judge. Constrained by the rule announced in *HNRC*, I concur in the majority opinion. I write separately to question *HNRC*'s holding and to urge en banc review of the application of that rule to the present case.

HNRC holds that post-confirmation claims for deductible reimbursements by an insurance company fail to qualify as actual and necessary expenses that benefit the estate, and thus cannot attain administrative expense priority as a matter of law. The *HNRC* panel[1] focused on whether the claim itself—a cost—provided an actual and necessary benefit to the estate. But framed this

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[1] The panel published an adopt-and-affirm opinion. *See In re HNRC Dissolution Co.*, 536 F.3d 683 (6th Cir. 2008) (adopting 371 B.R. 210, 225–26 (E.D. Ky. 2007)).

way, there can be just one answer—a *cost* incurred by a business (let alone a bankrupt one) by definition provides no benefits and, arguably, does not become actual or necessary until the debtor receives the bill, which may not occur until after plan confirmation. Only by analyzing the cost's purpose—assessing the *services* provided in exchange—can courts determine whether the expense meets § 503(b)'s requirements.

In our case, no party disputes that the debtor's survival as an operating entity required the insurance National Union provided. But under *HNRC*'s holding, by scheduling prospective payments (some of which arise after plan confirmation), the debtor receives a windfall, avoiding the entire post-confirmation portion of the obligation. The *HNRC* court accepted this result on grounds that such post-confirmation payments (unlike the pre-confirmation payments made on the same contract covering the same service) cannot qualify as actual, necessary, or a benefit to the estate by virtue of their post-confirmation nature. But the timing of the payments should not affect the analysis of whether the cost of the service can satisfy the criteria necessary to qualify for administrative priority.

Although *HNRC* noted a lack of authority "support[ing] the contention that expenses nec-

essarily realized post-confirmation can legally be characterized as 'actual' under the Code," 371 B.R. 225–26, this statement ignores the two existing analytical frameworks—one developed by our circuit and the other by our sister circuits—both of which counsel in favor of treating the deductible reimbursements at issue as an administrative expense. Notably, the reasoning of these courts focused not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered. This court, in particular, looks to when "the acts giving rise to a liability took place, not when they accrued" to determine administrative priority. *In re Sunarhauserman*, 126 F.3d 811, 818 (6th Cir. 1997). Confirming that payment timing lacks legal significance in this circuit's bankruptcy law, we held that when a debtor enters a pre-petition agreement to pay for services, making post-petition payments (even if the services were actually rendered post-petition) does not transform the obligation into an administrative expense. *Id*. at 816; *accord In re White Motor Corp.*, 831 F.2d 106, 110 (6th Cir. 1987). Other courts contrast an actual benefit with a potential one, holding that "the mere potential of benefit to the estate is insufficient for the claim to acquire status as an administrative expense." *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 866 (4th Cir. 1994) (internal emphasis, quotation marks, and citations omitted; outlining

similar holdings in other courts). Under either framework, National Union's claimed administrative expense qualifies—VP Debtors signed the insurance contract post-petition, incurring liability then, and acquired actual, not potential, insurance coverage.

The *HNRC* court likewise erred in rejecting the insurer's claim as neither "necessary to preserve the estate," nor for the "benefit of the estate." The panel held that "[t]he bottom line remains that [the insured] is not contractually obligated to pay any of the deductible obligations in question until claims are filed, which will necessarily occur post-confirmation." 371 B.R. 226. A cost incurred post-confirmation, so *HNRC* tells us, cannot be necessary to preserve or benefit an estate that no longer exists. But given that a *cost* cannot be necessary to or benefit anyone, let alone a bankrupt estate, the better approach asks whether a creditor provided a necessary service for the estate's benefit and preservation during the debtor's bankruptcy proceedings, not whether the creditor billed the debtor for those services during that time.

The Supreme Court held in *Reading Co. v. Brown*, 391 U.S. 471 (1968), that "the cost of insurance against tort claims arising during [bankruptcy] is an administrative expense payable in full . . . before dividends to general credi-

tors." *Id.* at 483. The *HNRC* decision fails to adequately account for this clear and controlling statement of law. Though VP Debtors argue that *Reading Co.* applies to insurance premium payments only (and that this case implicates only loss-sensitive deductible reimbursement payments), they posit a distinction without difference. All agree that the post-confirmation insurance payments at issue represent part of the price of the insurance. If instead of insurance this case involved the purchase of raw materials for steel that the debtor, a steel producer, needed to fulfill an order, and managed to purchase on similar terms, no one would seriously contend that because the payments were slated to occur post-confirmation the steel was not necessary to preserve the estate.

This court consistently holds that when an estate derives a benefit from goods, services, or its own actions (breaching a contract, for example), the associated cost qualifies as an administrative expense, even when the cost remains unknown at plan confirmation. *See In re Eagle-Picher Indus., Inc.*, 447 F.3d 461, 464 (6th Cir. 2006) (citing with approval the practices of this and other courts allowing tort, patent infringement, trademark infringement, and breach of contract claims as administrative expenses); *In re United Trucking Serv. Inc.*, 851 F.2d 159, 162 (6th Cir. 1988) (concluding damage estimates

rather than actual damages could serve as the basis for calculating the amount of an administrative expense for a breach of contract claim). Neither the contingent or unliquidated nature of a claim nor the timing of the payments should affect whether the service in question qualifies as an actual expense necessary to preserve the estate.

The *HNRC* decision will, as National Union warns, likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting. The full court should use this case to take another look at *HNRC*.

APPENDIX B – MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO (EASTERN DIVISION) DATED SEPTEMBER 29, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,	)	CASE NO.: 1:08 CV 196
Appellant,	)	JUDGE DONALD C. NUGENT
v.	)	
VP BUILDINGS, INC.,	)	MEMORANDUM OPINION AND
Appellee.	)	ORDER

This matter is before the Court upon an appeal from a December 21, 2007 Order of the United States Bankruptcy Court for the Northern District of Ohio. (ECF # 1.) Before the Bankruptcy Court, Appellant National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") sought allowance of an administrative

expense claim against Appellee VP Buildings, Inc. and certain affiliated entities (collectively the "VP Debtors").[1] The VP Debtors objected to the allowance of this claim, and sought judgment in their favor disallowing the administrative expense claim to the extent that the claim accrued post-confirmation. The Bankruptcy Court ultimately denied National Union's request for administrative expense status to the extent that it sought payment of claims paid post-confirmation or claims estimated to be paid in the future. Hence, the Bankruptcy Court granted summary judgment to the VP Debtors on National Union's administrative expense claim.

On appeal, National Union seeks reversal of the summary judgment granted to the VP Debtors on its administrative expense claim. For the reasons that follow, the decision of the Bankruptcy Court is AFFIRMED.

I.

The following constitutes a brief history of the background relevant to the instant bank-

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[1] The VP Debtors include VP Buildings, Inc., United Panel, Inc., Varco Pruden International, Inc., VP-Graham, Inc., and LTV-Walbridge, Inc. – all subsidiaries of the LTV Corporation.

ruptcy appeal: On December 29, 2000, the VP Debtors filed voluntary Chapter 11 petitions. On December 17, 2003, the Bankruptcy Court confirmed the VP Debtors' First Amended Joint Plan of Liquidation and dissolved the bankruptcy estates.

National Union provided insurance coverage to the VP Debtors both before and after they filed the Chapter 11 petitions. More specifically, from 1987 through 2001, National Union provided the VP Debtors with workers' compensation, automobile liability and general commercial liability insurance coverage. In September 2003, National Union filed administrative expense claims for "premiums, deductibles, self-insured retention, re-imbursement obligations, fees, expenses and related costs incurred after the date of their bankruptcy petitions." (ECF # 16 at 17.) The VP Debtors challenged the administrative expense claims.

In June 2004, the Bankruptcy Court entered an agreed order compelling arbitration of this dispute. Pursuant to the Order, the award was to establish the amount of Nation[al] Union's post-petition claims, and the Bankruptcy Court would then determine whether such claims were administrative expenses. National Union claims that, as determined in the arbitra-

tion, the amount of its claim against the VP Debtors is $993,769.00.[2] (*Id*. at 18-19.)

National Union and the VP Debtors filed cross–motions for summary judgment on National Union's administrative expense claim. In resolving the Motions, the Bankruptcy Court stated the following:

> It is undisputed that VP Debtors' obligation to reimburse National Union for loss deductibles does not arise until National Union actually pays such claims. It is further undisputed that National Union seeks administrative expense status for claims that it paid post-confirmation and claims that have not yet arisen and are simply estimates by National Union of potential future payments. Pursuant to the terms of the VP Debtors' confirmed plan, the estates of the VP Debtors were dissolved as of the plan's effective date. Accordingly,

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[2] The VP Debtors, however, have asserted that this amount was never determined to be properly allocable by the arbitration panel. (ECF # 19 at 7, n.3.) Further, the VP Debtors state that they "have not substantiated that they are liable for such amount." (*Id.*)

> the VP Debtors' bankruptcy estates ceased to exist as of the plan's effective date, December 17, 2003. The issue then is whether National Union is entitled to an administrative expense claim for expenses that did not arise, pursuant to the terms of the agreement with VP Debtors, until after the VP Debtors ceased to exist.

(ECF # 1 at 7-8 (internal citations omitted).) In the December 21, 2007 Memorandum of Opinion and Order, the Bankruptcy Court found that National Union's request for administrative expense status failed in two regards. First, because the claims at issue arose post-confirmation, the Bankruptcy Court found that they cannot be said to have preserved the estate under 11 U.S.C. § 503(b). (*Id.* at 8.) Second, because National Union sought payment of estimated claims that it may, or may not, have to pay at some future date, the Bankruptcy Court determined that such expenses are not "actual" as required by § 503(b). (*Id.*) Based upon these findings, the Bankruptcy Court denied National Union's request for administrative expense status to the extent that it sought payment of claims paid post-confirmation or claims estimated to be paid in the future, and granted summary judgment to the VP Debtors accordingly. (*Id.* at 11.)

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II.

According to National Union, the issue here is whether it is entitled to payment for the insurance coverage it provided to the VP Debtors' bankruptcy estates for part of the period after filing the bankruptcy petition, but before the confirmation of the liquidating plan, specifically for 2001. (ECF # 16 at 6.) In its Opening Brief, National Union asserts that the relevant payment terms were set forth in two documents, namely the 1999 Payment Agreement and the 2001 Schedule of Policies and Payment Obligations, which required the VP Debtors to partially reimburse many of the payments made by National Union. (*Id.* at 8-10.) National Union explains that the re-imbursements took place in various forms, which it summarizes as follows:

> National Union was responsible for claims after 2001 for occurrences that fell within the 2001 policies but had not yet been reported, and for additional costs on claims already reported. In turn, the Debtors were obligated to reimburse National Union for these payments. These obligations remained in force until all were paid and were expressly agreed to be part of the price that the Debtors agreed to pay for the

> workers' compensation insurance coverage that National Union provided for the post-petition, pre-confirmation period.

(*Id.* at 13.)[3] National Union contends that the insurance coverage it provided post-petition was necessary to the VP Debtors' continued operations and conferred benefits on the bankruptcy estates. (*Id.* at 14-16.) As such, National Union asserts that the claim is entitled to administrative expense priority. (*Id*. at 21.)

> From a policy perspective, National Union argues:
>
> It makes perfect sense that buying insurance would be deemed part of the actual and necessary cost and expense of preserving the estate and, thus, entitled to administrative priority. Without the

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[3] National Union states that the loss-sensitive premiums and reimbursement requirements worked to the VP Debtors' advantage, in that, rather than paying a large up-front premium in exchange for National Union paying the entire loss and bearing more of the risk, the VP Debtors paid a much lower premium up front, shared the cost with National Union, and paid their deductibles over time. (ECF # 16 at 13.)

> priority, no one would sell insurance to a debtor in possession, and all hope of keeping the business running as a "going concern" for the eventual benefit of creditors would be lost.

(*Id.* at 23 (internal citation omitted).) National Union contends that, because the VP Debtors understood the obligations associated with purchasing the insurance and obtained the benefits of such coverage, they cannot now avoid paying for it. (*Id.* at 24.)

III.

National Union has appealed the December 21, 2007 Order of the Bankruptcy Court pursuant to 28 U.S.C. § 158, and this Court shall review its conclusions of law *de novo*. *See In re Made in Detroit*, 414 F.3d 576, 580 (6th Cir. 2005).

The statute relevant to this appeal, entitled "Allowance of administrative expenses," provides that administrative expense status shall be allowed for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The Sixth Circuit applies what is known as the "benefit to the estate test," which allows administrative expense status only if: (1) the debt arose from a transaction with the

bankruptcy estate and (2) it directly and substantially benefitted the estate. *See In re Sunarhauserman, Inc.*, 126 F.3d 811, 816 (6th Cir. 1997). National Union bears the burden of demonstrating its entitlement to an administrative expense priority by a preponderance of the evidence. *See In re Liberty Fibers Corp.*, 383 B.R. 713, 716 (E.D. Tenn. 2008). Further, the Sixth Circuit has instructed that administrative expense priorities should be narrowly construed in order to maximize the value of the estate preserved for the benefit of creditors. *See id.* at 717.

As noted above, the Bankruptcy Court found that, because the claims at issue arose post-confirmation, they cannot be said to have preserved the estates under § 503(b). The Bankruptcy Court made this determination based upon the fact that the bankruptcy estates ceased to exist as of December 17, 2003, the date it entered its Order confirming the First Amended Joint Plan of Liquidation. Despite National Union's arguments to the contrary, courts within this district have indeed recognized the termination of the estate upon confirmation. *See, e.g.*, *In re HRP Auto Ctr., Inc.*, 130 B.R. 247, 256 (Bankr. N.D. Ohio 1991) (finding that the bankruptcy estate "ceases to exist upon confirmation"); *see also Guy v. Terex Corp.*, No. 91-3687, 1992 WL 88978, at *4 (6th Cir. April 30, 1992) ("Because there is no need to preserve an estate that has been ter-

minated, costs that are incurred after that time are not administrative expenses of the estate."). Because National Union's post-confirmation claims cannot be said to have preserved the estates, which terminated on December 17, 2003, the Bankruptcy Court properly denied such claims administrative expense status.

The Bankruptcy Court likewise found that, because National Union sought payment of estimated claims that it may, or may not, have to pay at some future date, such expenses are not "actual" as required by § 503(b). This Court agrees that estimates of future claims are not "actual" as required by the statute. That is, the relevant test requires that the actual, necessary costs and expenses the [sic] of preserving the estate must result in a benefit to the estate. Thus, the estate must receive a real benefit from the transaction before administrative expense priority will be assigned. In this case, National Union seeks administrative expense status for speculative future claims arising post-confirmation that cannot be said to benefit the estates. As recognized by the Bankruptcy Court, such claims, by definition, are not actual under the statute.

Finally, this Court would be remiss in failing to address National Union's argument that the Bankruptcy Court's ruling results in a windfall to the VP Debtors, which may have a chilling

effect on the willingness of insurance companies to provide coverage after the filing of a bankruptcy petition. There exists no dispute that the insurance allowed the VP Debtors to operate legally during the bankruptcy. To that end, the VP Debtors paid premiums to National Union under the policy, which were administrative expenses of the estates. In this way, both National Union and the VP Debtors received the benefit of their insurance bargain. Thus, there exists no windfall and no resulting chilling effect under these circumstances.

IV.

The Court has reviewed the December 21, 2007 Order of the Bankruptcy Court *de novo*. Moreover, it has considered all of the filings of the parties, the oral arguments presented by counsel, and the relevant law. Based upon this review, the Court finds no error in the December 21, 2007 Order. Thus, the Bankruptcy Court's denial of National Union's request for administrative expense priority status is AFFIRMED. This case is TERMINATED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: September 29, 2008

APPENDIX C – MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO (EASTERN DIVISION) DATED DECEMBER 21, 2007

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

In Re:	**In Proceedings Under Chapter 11**
LTV STEEL COMPANY, INC.,	**Case No.: 00-43866**
Debtor.	**CHIEF JUDGE RANDOLPH BAXTER**

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Motion of National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") for Summary Judgment and VP Buildings, Inc.'s opposition and Cross-Motion for Summary Judgment. National Union also opposes VP Buildings' Cross-Motion. This Court

has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. This is a core proceeding pursuant to 11 U.S.C. § 157(a)(2)(B) and (O). After considering the parties' pleadings, including supplemental memoranda, and conducting a hearing, the Court rules as follows:

*

National Union seeks allowance and payment of an unsecured claim against VP Debtors in the amount of $7,758,832.00.[1] National Union further seeks allowance of an administrative expense claim against VP Debtors in the amount of $993,769.00. VP Debtors objects to the allowance of both claims and seeks judgment in its favor disallowing the unsecured claim as late filed and disallowing the administrative expense claim to the extent the claim accrued post-confirmation.

The following facts appear undisputed: National Union provided insurance coverage to LTV and LTV related-debtors. This coverage spanned both pre and post-petition time periods. As a re-

[1] In its Motion, National Union also sought payment from New Copperweld Debtors but has since settled its claim against them.

sult of the coverage provided, National Union filed certain claims against LTV and against each of the jointly-administered LTV-related debtors. Certain of the debtors objected to the claims and filed an adversary proceeding against National Union, Adv. Proc. No. 04-4018.

In the adversary proceeding, the complainants objected to National Union's claims and asserted a right to seek a return of certain letter of credit proceeds. National Union filed a Motion to Compel Arbitration. That Motion was initially opposed, but the parties later entered into an agreed order and the proceeding was referred to arbitration. The agreed order, in pertinent part, provided that:

> E. The award of the arbitrators shall establish the amount of National Union's pre-petition and/or post-petition claims, if any, in these cases, and upon completion of the arbitration the claims shall be allowed in the amounts so determined....
>
> F. The Bankruptcy Court shall decide whether National Union's post-petition claims are afforded administrative status.

(June 16, 2004 Order in Adv. Proc. 04-4018).

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The Panel of Arbitrators conducted hearings and considered the evidence adduced. The Panel issued a decision on February 28, 2006, in which it found that, *inter alia,* National Union had a post-petition claim in the amount of $2,494,498.00 and a general unsecured claim in the amount of $7,758,832.00.[2]

National Union then filed a Motion with this Court for an Order 1) confirming arbitration award; 2) allowing certain of National Union's Claims Against Certain Copperweld and VP Debtors; and 3) For Leave to File Such Award Under Seal. According to the Motion, National Union alleges that it is entitled to the following:

VP Debtors	$2,499,498	Administrative Claim
New Copperweld	$2,499,498	Administrative Claim

[2] The Court granted the Motion of New Copperweld to file confidential pleadings. *(See* March 7, 2007 Order). The Motion was filed based on a Confidentiality Agreement entered into by the parties with respect to the Arbitration Award. This Order refers only to matters raised by the parties in non-sealed documents and is therefore consistent with the order granting the Motion to file confidential pleadings.

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VP Debtors	$7,758,832	VP Class 3-A Claim
Copperweld Distribution Trust	$7,758,832	Copperweld Class 3 Claim

The Motion was opposed by the VP and New Copperweld debtors and this Court set a briefing schedule for dispositive motions. National Union has since settled with the Copperweld Distribution Trust and New Copperweld debtors. There is now pending before the Court National Union's motion for summary judgment, the VP Debtors' Cross-Motion and opposition to National Union's motion, and National Union's opposition to VP Debtors' Cross-Motion.

**

National Union moves for summary judgment on its administrative expense claim against the VP Debtors in the amount of $993,769.00.[3] National Union also seeks sum-

[3] This is the amount of the post-petition claim National Union attributes to VP Debtors. *See* National Un-

mary judgment on its unsecured claim against the VP Debtors in the amount of $7,758,832.

National Union alleges that its post-petition claim is entitled to administrative expense status because the post-petition insurance coverage provided a necessary benefit to the VP Debtors. With respect to its unsecured claim against VP Debtors, National Union asserts that pursuant to the order referring the adversary proceeding to arbitration, the claim shall be allowed in the amount determined by the Panel.

VP Debtors moves for an order of summary judgment 1) expunging National Union's unsecured proof of claim in its entirety and 2) disallowing National Union's request for payment of its administrative claim. VP Debtors allege that National Union has not met its burden regarding the administrative expense status of its post-petition claim and that only those amounts paid prior to confirmation could be entitled to administrative expense status pursuant to *In re HNRC Dissolution Co.,* 371 B.R. 210 (E.D. KY. 2007).

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ion's Amended Supplemental Memorandum in Support of Motion for Summary Judgment filed July 23, 2007.

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The dispositive issue for the Court is whether there exists any genuine issue of material fact in dispute with respect to allowance of National Union's unsecured and administrative expense claims against VP Debtors.

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Summary judgment is appropriate where there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c)(made applicable by Fed. R. Bankr. P. 7056); *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986). Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-movant to establish the existence of a material fact. *Id.*

In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). A genuine issue for trial exists when there is "sufficient evidence on which the jury could reasonably find for the plaintiff." *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

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National Union's motion with respect to its unsecured claim is well-premised. VP Debtors object to National Union's unsecured claim, alleging that it was filed on December 4, one day after the December 3, 2002 Bar Date for filing proofs of claim set by this Court. (*See* this Court's October 15, 2002 Order and Bankruptcy Rule 3003(c)(3), Federal Rules of Bankruptcy Procedure). The agreed arbitration order specifically stated that the claims would be allowed in the amount determined by the Panel. (June 16, 2004 Order in Adv. Proc. 04-4018 at ¶ E). The Panel determined that the amount of National Union's unsecured claim against the VP Debtors was $7,758,832. The arbitration order also specifically reserved administrative expense status for this Court to decide. (June 16, 2004 Order in Adv. Proc. 04-4018 at ¶ F). No other issues relating to the allowance of claims was reserved. Specifically, the agreed order did not reserve decision regarding the timeliness of claims for this Court's resolution. Accordingly, to the extent that VP Debtors had a defense of untimeliness to National Union's unsecured claim, such defense should have been asserted in the arbitration proceeding. National Union is allowed a non-priority unsecured claim against VP Debtors in the amount of $7,758,832. VP Debtors' request

to have the non-priority unsecured claim expunged because it was late-filed is denied.

*****

National Union also seeks an administrative expense claim against VP Debtors in the amount of $993,769.00. Pursuant to the agreed order, the determination of administrative expense status of National Union's claim was reserved for this Court. (June 16, 2004 Order in Adv. Proc. 04-4018 at ¶ F). It is undisputed that some portion of National's [sic] Union's administrative claim is for loss deductibles on claims that National Union has not yet paid or paid post-confirmation. (*See* National Union's opposition to VP Debtors' Motion at pg. 4 and VP Debtors' Cross-Motion at pg. 16). VP Debtors allege that only claims which were paid prior to confirmation are entitled to administrative expense status. (VP Debtors' Cross-Motion at pg. 16). National Union alleges that post-petition insurance coverage, regardless of when claims are liquidated, is entitled to payment as an administrative expense. (National Union's opposition to VP Debtors' Cross-Motion at pg. 4).

Section 503 of the Bankruptcy Code addresses the requirements for the allowance of administrative expenses and provides, in pertinent part:

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> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--
>
> > (l)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered *after* the commencement of the case; ...

11 U.S.C. § 503(b)(1)(A). The two-part test in the Sixth Circuit to determine whether a claimed expense should receive administrative expense status pursuant to § 503(b) is 1) whether the debt arose from a transaction with the bankruptcy estate, and 2) whether such transaction directly and substantially benefitted the estate. *See In re Sunarhauserman, Inc.* 126 F.3d 811, 816 (6th Cir. 1997). Administrative expenses under § 503(b) are "narrowly construed in order to maximize the value of the estate preserved for the benefit of all creditors." *In re Colortex Industries, Inc.,* 19 F.3d 1371,1377 (11th Cir. 1994).

The applicant bears the burden of proving its entitlement to an administrative expense award under 11 U.S.C. § 503(b) and it must demonstrate by a preponderance of the evidence that a substantial contribution was made. *In re*

Buttes Gas & Oil Co., 112 B.R. 191, 193 (Bankr. S.D. Tex. 1989). *See also In re TransAmerican Natural Gas Corp.,* 978 F.2d 1409, 1416 (5th Cir. 1992)(the party seeking an administrative expense claim has the burden to prove by a preponderance of the evidence that it is entitled to such claim); *In re Visi-Trak, Inc.,* 266 B.R. 372, 374 (Bankr. N.D. Ohio 2001). Once the applicant has made a prima facie showing of entitlement to administrative expense status, the burden of production shifts to the objector. *In re Gulf Coast Orthopedic Center, Inc.,* 283 B.R. 335, 340 (Bankr. M.D. Fla. 2002); *In re Primary Health Services, Inc.,* 227 B.R. 479, 484 (Bankr. N.D. Ohio 1998).

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It is undisputed that VP Debtors' obligation to reimburse National Union for loss deductibles does not arise until National Union actually pays such claims. (*See* National Union's Opposition to VP Buildings' Motion at pg. 3). It is further undisputed that National Union seeks administrative expense status for claims that it paid post-confirmation and claims that have not yet arisen and are simply estimates by National Union of potential future payments. (*See* Exhibit A to Ciaccio Affidavit, filed under seal and National Union's Opposition to VP Buildings' Motion at pgs. 3-4). Pursuant to the terms of the

VP Debtors' confirmed plan, the estates of the VP Debtors were dissolved as of the plan's effective date. (*See* December 17, 2003 Order Confirming VP Debtors' Plan at pg. 16). Accordingly, the VP Debtors' bankruptcy estates ceased to exist as of the plan's effective date, December 17, 2003. *Id.* The issue then is whether National Union is entitled to an administrative expense claim for expenses that did not arise, pursuant to the terms of its agreement with VP Debtors, until after the VP Debtors ceased to exist. (*See* National Union's Opposition to VP Buildings' Motion at pg. 3).

It is a basic canon of statutory construction that "[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed. 290 (1989). Further, "[t]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *United States* v. *Palacios-Suarez,* 418 F.3d 692, 697 (6th Cir. *2005) citing United States v. Boucha,* 236 F.3d 768, 774 (6th Cir. 2001).

Herein, National Union seeks approval of its administrative expense claim pursuant to §

503(b), which states that administrative expense status is reserved for "the actual, necessary costs and expenses of preserving the estate." National Union's request for administrative expense status fails in two regards. First, it is undisputed that the VP Debtors' bankruptcy estates ceased to exist as of December 17, 2003, the date this Court entered its order confirming VP Debtors' plan. (*See* December 17, 2003 Order Confirming VP Debtors' Plan at pg. 16). Accordingly, any claims that arise post-confirmation necessarily cannot satisfy the requirement that they "preserve the estate" and would not be entitled to administrative expense status. Second, National Union seeks payment of claims that have not yet arisen pursuant to the terms of its agreement with VP Debtors, because National Union itself has not paid the claims. (*See* National Union's Opposition to VP Buildings' Motion at pg. 3). National Union instead seeks payment of estimated claims that it may, or may not, have to pay at some future date. Accordingly, such expenses are not "actual" as required by § 503(b). It is further noted that, unlike § 502, which provides a mechanism for estimating general unsecured claims, § 503(b) does not contain a similar provision for claims estimation.

There is no controlling Sixth Circuit authority with respect to the issue of whether expenses incurred post-confirmation satisfy the

administrative expense requirements found in § 503(b). Nor does it appear that any other circuits have addressed this specific issue. However, the Eastern District of Kentucky recently issued a decision, *In re HNRC Dissolution Co.,* 371 B.R. 210 (E.D. KY. 2007), which addressed the issue and which this Court finds persuasive and well-reasoned. In that case, an insurer who sought payment of an administrative expense claim in the amount of $14,500,000.00 for prospective post-confirmation deductible payments on insurance policies entered into by the debtors' estate. The purchaser of the debtors' assets objected to the request for administrative expense on the basis that such future loss deductibles did not satisfy the actual and necessary requirements found § 503(b). The bankruptcy court denied the request for administrative expense and the insurance company appealed.

The district court affirmed the bankruptcy court on appeal. The court noted that at the time the insurance company would be contractually allowed to seek reimbursement from the debtor for payment of the loss deductibles, "the estate will have already dissolved and the Debtors will cease to exist. Consequently, payment of the claimed expenses will in no way act to preserve an estate when there is no estate to preserve." 371 B.R. at 226. The court further noted that the general priority scheme of the Bank-

ruptcy Code is to be strictly construed and that "the payment of the deductibles, when and if they should arise (i.e., become 'actual'), does not provide a direct and substantial benefit to, nor act to preserve, a bankruptcy estate where there is no longer an estate to benefit." *Id.* at 228. This analysis is consistent with the plain language of § 503(b), as discussed above.

Other courts faced with the request for administrative expenses which arose post-confirmation have reached a similar result. In an unpublished decision, the Sixth Circuit rejected the idea that expenses incurred after an estate is dissolved can be administrative:

> The logic of this conclusion becomes apparent upon an examination of the Bankruptcy Code's purpose for giving special priority to administrative expenses. Administrative expenses are given priority because they are actual, necessary costs of preserving the estate. Because there is no need to preserve an estate that has been terminated, costs that are incurred after that time are not administrative expenses of the estate.

Guy v. *Terex Corp.,* No. 91-3687, 1992 WL 88978 at *4. *See also, In re Barker Medical Co., Inc.,* 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985) ("Ad-

ministration of the estate ended with confirmation of the plan. The costs were not incurred by the estate, but were incurred by the debtor after discharge and after confirmation at a time when no estate existed.... By definition, the costs cannot be administrative expenses."); *In re Frank Meador Buick,* 65 B.R. 200, 213 (W.D. Va. 1986)("After confirmation of a plan under Chapter 11, administration of the estate ceases to exist. Thus it is impossible to classify taxes or rents that accrue post-confirmation as administrative expenses for the simple reason that after confirmation there is no longer an estate to administer."); *In re Pauling Auto Supply, Inc.,* 158 B.R. 789, 794 (Bankr. N.D. Iowa 1993) ("Inasmuch as there is no estate, a post-confirmation creditor is unable to obtain administrative status for a post-confirmation claim because there is no estate to preserve."); and *In re James Frederick Severson,* 53 B.R. 8, 10 (Bankr. D. Or. 1985)("For losses or expenses incurred after [confirmation], there could be no claim allowable under § 503(b)(1)(A) as an expense of preserving the estate since no estate existed after that date.")

National Union's argument that the decision in *In re HNRC* is contrary to Sixth Circuit authority is not well-premised. The cases cited by National Union involve situations where an administrative expense claim arose pre-confirmation but was not paid until post-

confirmation. *See e.g. In re Eagle-Picher Industries,* 447 F.3d 461 (6th Cir. 2006). Herein, however, National Union is seeking payment of administrative expenses that did not arise until post-confirmation or may never become actual. *(See* Exhibit A to Ciaccio Affidavit, filed under seal and National Union's Opposition to VP Buildings' Motion at pgs. 3-4). As the court in *HNRC* stated:

> In the end, beyond the reality that the deductibles will not come due until after the estate dissolved (which is also common in the post-confirmation judgment cases), it is the special case here that the deductible obligations do not even exist until claims arise whereby Zurich must advance payment.

371 B.R. at 228. As stated by National Union in its papers, "reimbursement does not fall due until the loss is settled or otherwise paid." (*See* National Union's Opposition to VP Buildings' Motion at pg. 3). To the extent National Union is seeking reimbursement from VP Debtors on claims it paid post-confirmation, such request does not satisfy the requirements of § 503(b)(1) because the estates ceased to exist at confirmation. Necessarily, claims which National Union is merely estimating it may have to pay at some point in the future also do not satisfy § 503(b)(1)

requirements. Accordingly, National Union's request for administrative expense status is denied to the extent it seeks payment of claims paid post-confirmation or claims estimated to be paid in the future.

******

Accordingly, National Union's Motion for Summary Judgment is hereby granted, in part, and is hereby denied, in part, as determined herein. It is further ordered that VP Debtors' Cross Motion for Summary Judgment is hereby granted, in part, and is hereby denied, in part, as determined herein. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter
JUDGE RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES
BANKRUPTCY COURT

Dated,
this 21 day of
December 2007.

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 31, 2010

No. 08-4537

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 31 2010
LEONARD GREEN, Clerk

NATIONAL UNION FIRE INSURANCE COMPANY,	)	
Appellant,	)	
v.	)	ORDER
VP BUILDINGS, INC.,	)	
Appellee.	)	

BEFORE: KENNEDY, COOK, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court,

* Judge Moore recused herself from participation in this ruling.

and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E – STATUTORY APPENDIX

11 U.S.C. § 503: Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including--

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on

which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C),

as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543

of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

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11 U.S.C. § 507: Priorities

(a) The following expenses and claims have priority in the following order:

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(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

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