No. 17-1208

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE W.R. GRACE & CO. *et al.*,

Reorganized Debtors,

CONTINENTAL CASUALTY COMPANY;
TRANSPORTATION INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

JEREMY B. CARR *et al.*,

Defendants-Appellants.

On Appeal from United States Bankruptcy Court
for the District of Delaware
Bankruptcy Case No. 01-01139
Bankruptcy Adv. No. 15-50766-KJC

BRIEF OF APPELLEES CONTINENTAL CASUALTY COMPANY AND TRANSPORTATION INSURANCE COMPANY

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September 20, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit Rule 26.1, the Appellees state as follows:

Continental Casualty Company is a wholly owned subsidiary of The Continental Corporation, which in turn is a wholly owned subsidiary of CNA Financial Corporation. A majority of the shares of CNA Financial Corporation are held by Loews Corporation. No other publicly held corporation holds 10% or more of the stock of CNA Financial Corporation.

Transportation Insurance Company is a wholly owned subsidiary of Continental Casualty Company.

Dated: September 20, 2017

s/ Michael S. Giannotto
Counsel for Appellees

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INTRODUCTION

This appeal grows out of the Chapter 11 bankruptcy of W.R. Grace & Co. ("Grace"). Appellants ("Montana Plaintiffs") allege that they were exposed to asbestos from a now-shuttered mine and mill in Libby, Montana once owned and operated by Grace. They have instituted lawsuits against the Appellees (collectively, "CNA") in Montana, seeking to hold CNA liable in tort for purported injuries caused by exposure to asbestos emitted by Grace from that mine and mill. Their Complaints allege that CNA, as Grace's insurer, failed to warn them of and protect them from exposure to Grace's asbestos emissions.

Through these lawsuits, Montana Plaintiffs are attempting an end-run around the channeling injunction entered by the District Court as part of the confirmed Grace Plan of Reorganization. That injunction, which is authorized by Section 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g), protects Grace and certain "Asbestos Protected Parties" (including "Settled Asbestos Insurance Companies") from liability for claims premised on exposure to asbestos or asbestos-containing products mined or manufactured by Grace or otherwise derived from Grace operations or products ("Grace asbestos"). This Court should affirm the Bankruptcy Court's decision that the channeling injunction bars Montana Plaintiffs' claims.

The channeling injunction was tailored to apply to the full extent authorized by Section 524(g). It protects CNA—a "Settled Asbestos Insurance Company" under the Plan—from any asbestos claims seeking to hold it "directly or indirectly" liable for the conduct of or claims against Grace by reason of CNA's having provided insurance to Grace. By operation of the Plan, all such claims are instead channeled for payment to a Trust. Montana Plaintiffs are eligible to obtain compensation from that Trust for their asbestos-related injuries, and they can pursue claims against entities that are not "Asbestos Protected Parties." But they cannot pursue "Asbestos Protected Parties" such as CNA. The Bankruptcy Court and the District Court determined that extending the injunction to claims against CNA was "fair and equitable" in light of CNA's substantial contribution of $84 million into the Trust to pay Grace's personal-injury liabilities. APP0446.

By their state court actions, Montana Plaintiffs are effectively seeking to recover twice from CNA for injuries caused by exposure to Grace asbestos—once from the Trust (which CNA helped to fund), and once from CNA directly. None of Montana Plaintiffs' arguments in support of this attempt has merit.

First, Montana Plaintiffs argue that their claims are tied, at best, solely to breaches of duties under CNA's workers' compensation policies, and that those policies are excluded from the protection of the channeling injunction because they supposedly do not provide coverage for "Asbestos-Related Claims" as defined in

CNA's settlement agreement with Grace. There is a remarkable disconnect between this argument and Montana Plaintiffs' actual claims: none of them is actually seeking workers' compensation benefits, and only one of them is *even a former Grace worker*. In any event, the policies at issue clearly are protected by the channeling injunction. They not only provide workers' compensation coverage, but they also provide employers' liability coverage to Grace for any asbestos-related tort actions against it arising out of employee injury—actions that are clearly "Asbestos-Related Claims."

Nor do Montana Plaintiffs' claims fall within the narrow exclusion from the injunction for claims based on "rights or obligations" that "pertain solely to coverage" for statutory workers' compensation claims—an exception intended to preserve Grace employees' ability to collect statutory workers' compensation benefits. Again, Montana Plaintiffs are not seeking workers compensation benefits. The supposed duties that CNA allegedly breached relate to inspection and loss-control services performed by CNA at Grace's Libby facility. The policies make clear that these services are applicable to *both* the employers' liability and workers' compensation portions of the policies. As such, they do not pertain "solely" to "workers' compensation coverage," and therefore do not fall within the carve-out to the injunction.

Second, Montana Plaintiffs contend that their claims fall outside the scope of Section 524(g)(4). At bottom, their position is that Section 524(g)(4) allows courts only to enjoin claims against insurers that seek to recover the proceeds of insurance policies issued to the debtor, but does not allow courts to enjoin claims against the same insurer based on the same alleged injuries from the debtor's asbestos if the plaintiffs purport to seek damages from the insurer's other assets. Neither the text of Section 524(g)(4), Congress's purposes in enacting the provision, nor this Court's precedent supports such a restrictive reading. As discussed below, Montana Plaintiffs' claims seek to hold CNA "indirectly liable" for the conduct of and claims against Grace because they are based *entirely* on alleged exposure to Grace asbestos. And their claims arise "by reason of" CNA's provision of insurance to Grace because they are premised on alleged inspections and loss-control services performed by CNA that are a routine part of the relationship between a liability insurer and its insured.

If Montana Plaintiffs' position were to prevail, it could undermine Congress's objective in enacting Section 524(g) by compromising courts' ability to resolve asbestos bankruptcies through trusts that equitably allocate a debtor's assets to present and future asbestos claimants. Depriving insurers of finality, and exposing them to an endless stream of asbestos-related tort claims based on insurance services provided to the debtor, would deter insurers from entering

settlements in the first place. And without insurers' participation, asbestos trusts would be badly underfunded, leaving present and future asbestos claimants without adequate compensation.

Montana Plaintiffs have tried to minimize the threat their legal theories pose to future asbestos bankruptcies, as they have argued that the prospect of tort liability has not in the past prevented insurers from entering settlements to fund Section 524(g) trusts. But insurers have agreed to these settlements precisely because claims like those now asserted by Montana Plaintiffs have not previously been made against settled insurers. If that changes, insurers will be less willing to settle and will, at a minimum, likely require (as CNA did here) that trusts indemnify them for liabilities they might incur to asbestos claimants in the tort system—depriving the trusts of assets.

STATEMENT OF ISSUES

1. (a) Have Montana Plaintiffs waived a challenge to whether CNA's "Workers' Compensation and Employer's Liability" policies are identified as "Subject Policies" protected by the channeling injunction, and (b) leaving the waiver issue aside, are the CNA policies protected under the Grace Plan because they are among the "known and unknown policies" issued by CNA that may provide coverage for "Asbestos-Related Claims"?

2. Did the Bankruptcy Court correctly hold that Montana Plaintiffs' tort claims against CNA are covered by the channeling injunction despite the Plan's carve-out for "rights or obligations" under a policy that "pertain solely to coverage" for statutory workers' compensation claims?

3. Did the Bankruptcy Court correctly hold that Montana Plaintiffs' claims against CNA fall within the scope 11 U.S.C. § 524(g)(4) because Montana Plaintiffs seek to hold CNA "indirectly liable" for the conduct of, and claims against, Grace "by reason of" CNA's provision of insurance to Grace?

RELATED CASES AND PROCEEDINGS

CNA does not dispute Montana Plaintiffs' statement of related cases and proceedings.

BACKGROUND

I. Legal Background

Tort liability for asbestos exposure poses "unique problems and complexities" for the bankruptcy system. *In re Combustion Eng'g,* 391 F.3d 190, 234 (3d Cir. 2004). "Given the lengthy latency period of asbestos-related diseases, companies facing asbestos risk have no way finally to resolve or even effectively estimate their exposure." *In re Plant Insulation Co.*, 734 F.3d 900, 905-06 (9th Cir. 2013). Moreover, there is an inherent conflict of interest among claimants because if current claimants exhaust a debtor's resources and force it to "collapse and liquidate," "untold numbers of future claimants will be left without recovery." *Id.* at 906.

To address this problem, Congress in 1994 enacted Section 524(g) of the Bankruptcy Code, which is modeled on the "creative solution to asbestos liability developed during the bankruptcy of the Johns-Manville Corporation." *In re W.R. Grace & Co.*, 729 F.3d 311, 320 (3d Cir. 2013). The statute authorizes bankruptcy courts to enjoin and channel to post-confirmation trusts all present and future asbestos-related tort claims against the debtor. The trusts in turn compensate claimants in a manner that ensures fair and equitable treatment of present and future claimants. *See* 11 U.S.C. § 524(g)(1)-(2). The trust and the channeling injunction "help[] achieve the purpose of Chapter 11 by facilitating the

reorganization and rehabilitation of the debtor," while providing future claimants with an "evergreen" source of funding. *Combustion Eng'g*, 391 F.3d at 234.

Facilitating settlements of coverage disputes between a debtor and its insurers is critical to the funding of asbestos trusts and the success of a Chapter 11 rehabilitation. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 141 (2009) (insurance settlements were the "cornerstone" of the Manville reorganization). Indeed, insurance is often the only viable source of assets to fund such trusts. *See In re Plant Insulation*, 734 F.3d at 906. Insurers are willing to enter into settlements, and to give up defenses to coverage, only if they can obtain finality as to obligations for claims based on exposure to the debtor's asbestos. *See* 140 Cong. Rec. S4521, S4523 (daily ed., Apr. 20, 1994) (Sen. Graham). If such protection were unavailable "[t]here would never be finality, the Trust would be underfunded, and asbestos claimants would continue to suffer from the vagaries of the tort system." *In re Plant Insulation*, 734 F.3d at 909.

Recognizing the importance of finality to insurers, Congress provided in Section 524(g)(4) that district courts may extend the channeling injunction entered in favor of the debtor to actions against an identified third party that:

> "is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of," *inter alia*, "the third party's provision of insurance to the debtor or a related party."

11 U.S.C. § 524(g)(4)(A)(ii)(III). For an insurer to receive this protection, the court must first find that extending the injunction is "fair and equitable" in view of the benefits the insurer provided to the trust. 11 U.S.C. § 524(g)(4)(B)(ii). As one of the legislation's co-sponsors explained, the statute was intended to provide courts with "injunctive power" to "protect … debtors and certain third parties, such as their insurers, from future asbestos product litigation" in exchange for "submit[ting] to the stringent requirements" for creating a Section 524(g) trust. 140 Cong. Rec. S4521, S5423 (daily ed., Apr. 20, 1994) (Sen. Graham).

II. Factual Background

A. The Grace Plan, The Trust, And The Channeling Injunction.

Beginning in the 1970s, Grace began to face a steady stream of asbestos-related suits arising from its products and operations, including from exposure to asbestos at its Libby operations. Grace ultimately filed voluntary Chapter 11 petitions in 2001. *In re W.R. Grace*, 475 B.R. 34, 64 (Bankr. D. Del. 2012). Grace emerged from bankruptcy on February 3, 2014, after its First Amended Plan of Reorganization (the "Plan") was confirmed and upheld on appeal. APP0520-23.

The Plan is the product of years of negotiations and contested proceedings involving Grace, representatives for present and future asbestos claimants, and various third parties including Grace's liability insurers. One key aspect of the Plan is a several-billion dollar Section 524(g) asbestos personal-injury trust (the

"Trust") established to equitably compensate existing and future claimants injured by Grace asbestos. APP0223, APP0225, APP0227-28. The Plan directs that all claims for personal injury against Grace and certain "Asbestos Protected Parties" premised on exposure to Grace asbestos—"Asbestos PI Claims"[1]—must seek compensation from the Trust. APP0225-30. It also includes a Section 524(g) channeling injunction, which makes the Trust the "sole recourse" for such claims. APP0230-33.

"Asbestos Protected Parties" include, *inter alia,* "Settled Asbestos Insurance Companies." APP0225. "Settled Asbestos Insurance Companies," in turn, include insurance companies (like CNA) that have entered into settlements with Grace with respect to policies identified in Exhibit 5 to the Plan. APP0227. The Plan further provides that a settled insurer is protected from claims "to the fullest extent, but only to the extent, provided by [S]ection 524(g)" of the Bankruptcy Code. *Id.*

B. The Grace-CNA Settlement.

Beginning in 1973, CNA issued commercial general liability policies, umbrella policies, excess policies, and workers' compensation and employers' liability policies to Grace. APP0183, APP0185-218, APP0524-48, APP0549-64, APP0565-80. Before 2010, CNA and Grace had litigated the scope of CNA's obligation to pay for Grace's asbestos liabilities. APP0416-18.

[1] "Asbestos PI Claims" are defined in Section 1.1.34 of the Plan. APP0223-24.

In November 2010, CNA entered a settlement with Grace (the "Grace-CNA Settlement"), in which CNA agreed to provide $84 million to the Trust for the purpose of compensating persons injured by exposure to Grace asbestos. APP0352-53. CNA relinquished substantial defenses to coverage under the policies it had issued to Grace and accelerated its obligations under several high-level excess policies. APP0415. CNA made these concessions in exchange for a broad release of all rights and obligations concerning asbestos-related claims arising under the "Subject Policies" CNA had issued to Grace. APP0342-44, APP0351-53, APP0358-60. The terms of the settlement were supported not only by Grace, but by court-appointed counsel for both existing and future asbestos claimants. APP0428-39, APP0440-51.

Following court approval of the Grace-CNA Settlement, Exhibit 5 to the Plan was revised to provide that the CNA companies are "Settled Asbestos Insurance Companies" as to all insurance policies defined in the Settlement Agreement as "Subject Policies." APP0227, APP0368.

III. Procedural History

In 2014, after the Plan went into effect, Montana Plaintiffs filed tort actions against CNA in Montana state court, alleging injury from exposure to Grace asbestos. APP0125-58. Over 1,000 similar claims have been made by Montana claimants against CNA, which are being held in abeyance pending this appeal.

Montana Plaintiffs allege that CNA, while serving as Grace's workers' compensation carrier, came to know of the risks from asbestos exposure at Grace's Libby operations, and yet failed to warn workers, their families, and the communities about those risks or ensure that Grace adopted adequate controls to prevent asbestos exposure. APP0153-54. In particular, each Montana complaint alleges (using identical wording) that:

- "CNA, through Continental Casualty Co., was the workers' compensation carrier for W.R. Grace from July 1, 1973 to July 1, 1976. CNA, through Transportation Ins. Co. or Continental Casualty Co., was the workers' compensation carrier for W.R. Grace from July 1, 1976 to 1996." APP0153.

- "CNA's professional staff included industrial hygienists and medical doctors with expertise in occupational [exposure]" who "inspect[ed] Grace Libby operations" and "CNA was well aware of the hazards of asbestos exposure." APP0153-54.

- CNA was negligent in (a) "failing to recommend or require sufficient measures and standards for employee education, warning the workers, their families and the community, protection against asbestos dust going to workers' homes and into the community, dust control … and medical monitoring," (b) "failing to sufficiently test and monitor the effectiveness of dust control," (c) "failing to obtain medical information on the incidence of disease and deaths at the Grace operations," and (d) "failing to sufficiently use" the information it did have on dust control and asbestos disease. *Id.*

In their opening brief, Montana Plaintiffs now assert that their claims are based on CNA's "negligen[ce] in the design and implementation of dust-control measures" at Libby, and that CNA *increased* the risks of asbestos exposure. Montana Pls.' Br. 10; *see id.* at 31, 44, 47. But there are no allegations in their

Montana complaints (and no record evidence) to support these new assertions. APP0153-54. Moreover, although Montana Plaintiffs base their claims on CNA's role as a workers' compensation carrier, the vast majority of them were *not* employed by Grace.[2] And *none* of the Montana Plaintiffs seeks statutory workers' compensation benefits. APP0022. Rather, they are Libby community members who seek tort damages, on top of any compensation that they may obtain from the Trust that CNA helped to fund.

CNA filed an adversary proceeding to enforce the channeling injunction and bar Montana Plaintiffs' claims. APP0109-58. The Bankruptcy Court granted CNA's motion for summary judgment, which was supported by the Trust as an amicus curiae. APP0001-25, APP0460-502.[3]

The Bankruptcy Court ruled that the Montana actions seek "to hold CNA indirectly liable for [Grace]'s conduct and products" within the meaning of Section 524(g) because the claims against CNA are premised only on injuries caused by exposure to asbestos due to Grace's operations. APP0011-13. The Court also ruled that the Montana actions "fall within the plain language and natural reading"

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[2] CNA noted in the Bankruptcy Court that 26 of the 27 plaintiffs had never been employed by Grace, and Montana Plaintiffs did not dispute this representation. *See* ECF No. 15-1 at 10 (Sept. 8, 2015).

[3] The Bankruptcy Court concluded that the adversary action was a core proceeding, but, in any event, the parties consented to the Bankruptcy Court's entry of a final order on the cross-motions for summary judgment. *See* ECF No. 8 at 2; ECF No. 32 at 32 ("11/24/15 Tr.").

of Section 524(g)(4)'s requirement that alleged liability "arises by reason" of CNA's provision of insurance to Grace "because the basis for the alleged undertakings by CNA (industrial hygiene services or inspections of Grace's facilities) arise wholly out of the insurance relationship." APP0013-21. And the Court rejected the Montana Plaintiffs' attempt to limit Section 524(g) protection to claims that seek "insurance [policy] proceeds," reasoning that nothing in the text of Section 524(g)(4) imposes such a restriction. APP0015.

The Bankruptcy Court also rejected Montana Plaintiffs' contention that their tort claims fall within the Plan's and the Grace-CNA Settlement's narrow carve-outs for statutory workers' compensation claims. APP0022. The Court emphasized that Montana Plaintiffs are not pursuing workers' compensation claims and that the injunction would not interfere with any state laws concerning coverage for such claims. *Id.*

SUMMARY OF ARGUMENT

I. Montana Plaintiffs' tort claims against CNA arise by reason of insurance policies that are subject to the Plan's channeling injunction.

A. Montana Plaintiffs contend that their claims are not subject to the channeling injunction because CNA's "Workers' Compensation and Employers' Liability" policies are not identified in Exhibit 5 to the Plan. They waived this argument below, and it is meritless. Exhibit 5 references the Grace-CNA

Settlement, which protects as settled policies "*all known and unknown* policies" issued to Grace by CNA in the relevant time period that "actually or potentially provide insurance coverage" for any "Asbestos-Related Claims." The employers' liability provisions of the policies at issue cover such claims, as defined by the Grace-CNA Settlement because they cover tort claims against Grace for asbestos-related injuries.

B. Montana Plaintiffs' tort claims do not fall within the narrow carve-outs in the Grace Plan and the Grace-CNA Settlement, which exclude from the channeling injunction "rights and obligations" in CNA policies that "pertain solely to coverage" for statutory workers' compensation benefits. The Montana complaints do not assert claims for statutory workers' compensation benefits, and they are not seeking to recover based on the breach of any duties related solely to workers' compensation coverage. Rather, Montana Plaintiffs' claims are premised on alleged breaches of duties deriving from inspections and loss-control services allegedly performed by CNA in its role as an insurer. Any rights or obligations for CNA to provide such services do not pertain *solely* to workers' compensation coverage, but instead, as the policies themselves make plain, arise from policy conditions that also apply to CNA's employers' liability coverage.

C. Montana Plaintiffs' arguments rely on the false premise that their claims are tied particularly to CNA's role as a workers' compensation carrier. In

fact, they are based on CNA's role as Grace's insurer more generally, including with respect to settled Comprehensive General Liability ("CGL") policies. Allowing their claims to go forward would thus undermine CNA's undisputed protection from suits premised on its CGL coverage for Grace.

II. Montana Plaintiffs' claims fall within the scope of Section 524(g)(4) because they (1) seek to hold CNA "indirectly liable" for "the conduct of" and "claims against" Grace, and (2) "arise[] by reason of" CNA's "provision of insurance" to Grace.

A. Montana Plaintiffs' claims against CNA are based *entirely* on alleged exposure from Grace asbestos. They allege that CNA is liable for failing to warn them of, and protect them against, the risks associated with Grace asbestos. Courts, including this one, have recognized that the source of the plaintiffs' alleged injuries is critical to deciding whether claims are derivative for purposes of Section 524(g)(4). *See Combustion Eng'g*, 391 F.3d at 231, 234. If a plaintiff's claims against an insurer arise from exposure to the debtor's asbestos, then its allegations effectively seek to hold that insurer "indirectly liable" for the conduct of, and claims against, the debtor. In arguing to the contrary, Montana Plaintiffs insist that Section 524(g) only allows injunctions for actions that seek the proceeds of policies issued to the debtor. But that argument is contrary to the text, structure, and legislative history of Section 524(g)(4), as well as this Court's precedent.

B. Montana Plaintiffs' claims arise "by reason" of CNA's provision of insurance to Grace. They allege that CNA was negligent when it inspected Grace's Libby facilities, and that CNA failed to make recommendations as to how Grace could limit asbestos exposure. These alleged activities are directly connected to, and indeed are part-and-parcel of, CNA's role as Grace's insurer. Montana Plaintiffs do not dispute this factual connection, but contend that CNA must show that its alleged liability arises as a "legal consequence" of having provided insurance to Grace. Nothing in Section 524(g)'s text supports this restriction, which is contrary to the ordinary meaning of "by reason of." But even if Section 524(g)(4) did call for a "legal consequence" test, CNA's provision of insurance is legally relevant to Montana Plaintiffs' claims.

C. The Bankruptcy Court had core jurisdiction to issue, construe, and apply the channeling injunction, which was initiated by the debtor and issued as part of Plan confirmation—a core proceeding under Title 11. *See In re Anes*, 195 F.3d 177, 180 (3d Cir. 1999). Any challenge to the Bankruptcy Court's jurisdiction now to issue that injunction would be barred by *res judicata*. *Travelers*, 557 U.S. at 142, 150. In addition, "related to" jurisdiction exists to enjoin Montana Plaintiffs' claims against CNA, which are derivative of their claims against Grace and thus have the clear potential to affect the bankruptcy estate, as Congress recognized in enacting Section 524(g)(4).

STANDARD OF REVIEW

This Court reviews the Bankruptcy Court's summary judgment decision *de novo*. *See In re Klaas*, 858 F.3d 820, 827 (3d Cir. 2017).

ARGUMENT

I. Montana Plaintiffs' Complaints Are Subject To The Channeling Injunction Even Though Their Claims Are Premised On CNA's Breach Of Duties Under Its "Workers' Compensation" Policies.

CNA settled with Grace and agreed to pay $84 million to the Trust to compensate asbestos claimants (including Montana Plaintiffs) to secure finality from claims based on exposure to Grace asbestos. The Plan was amended to include claims arising out of the settled CNA policies within the protections of the channeling injunction. That injunction only excludes claims seeking statutory workers' compensation benefits from its scope. All other asbestos-related claims arising by reason of CNA's provision of insurance to Grace are directed to the Trust. Montana Plaintiffs are not seeking statutory workers' compensation benefits. This Court should reject their attempt to twist the provisions of the Grace Plan and the Grace-CNA Settlement to exempt their tort claims from the injunction.

A. The Channeling Injunction Applies To CNA's Policies For "Workers' Compensation And Employers' Liability."

1. Montana Plaintiffs have waived their lead argument on appeal. They now contend (at 11-18) that their tort claims fall outside the channeling injunction

because "CNA's Workers' Compensation Policies" supposedly do not provide coverage of "Asbestos-Related Claims," and therefore are not identified as protected "Asbestos Insurance Policies" in Exhibit 5 to the Grace Plan. This argument was not raised below. Although Montana Plaintiffs did raise a different "not identified" argument in their motion to dismiss (at 2 n.5), they conspicuously failed to reassert even that argument in their summary judgment opposition, after CNA had pointed out its flaws.[4] And, at the hearing on the parties' cross-motions for summary judgment, Montana Plaintiffs' counsel stated that he was "not sure" whether CNA's policies are identified in Exhibit 5, but that "it doesn't matter." 11/24/15 Tr. 66.

Although Montana Plaintiffs fault (at 15) the Bankruptcy Court for not addressing their current theory, it was not an "err[or]" for the court not to "reach" an argument that they failed to preserve. Rather, because Montana Plaintiffs did not present this argument in their summary judgment filing, and stated at oral argument that it "doesn't matter," this Court should "deem it waived." *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 288 (3d Cir. 2014).

2. Montana Plaintiffs' argument as to whether CNA's policies are identified in Exhibit 5 is also meritless. Under the Plan, the channeling injunction extends to "Settled Asbestos Insurance Compan[ies]" to the extent of any

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[4] ECF No. 22, at 14 (Bankr. D. Del. Nov. 2, 2015).

"Asbestos Insurance Policy" "identified" in Exhibit 5 as the subject of a settlement agreement. APP0225, APP0227-28, APP0230. Exhibit 5 lists CNA as a "Settled Asbestos Insurance Company" as to all CNA policies that are identified as "Subject Policies" in the Grace-CNA Settlement. APP0327. The settlement, in turn, defines "Subject Policies" to include 22 separate policies as well as all other "*known and unknown* policies" issued to Grace by CNA incepting before June 30, 1985 that "actually or potentially provide insurance coverage for any 'Asbestos-Related Claims.'" APP0351, APP0396 (emphasis added).[5] This catch-all provision was included in the settlement precisely to ensure that CNA would have finality as to all asbestos-related claims, even if no dispute then existed between Grace and CNA under a particular policy or if CNA had issued policies of which it was currently unaware.

By its plain terms, CNA's policies for "Workers' Compensation and Employers' Liability" are encompassed within this definition because they are

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[5] Montana Plaintiffs contend in a footnote (at 16 n.54) that one of the identified CNA policies is not covered by the injunction because it incepted in 1991. APP0217. That argument is *doubly* waived because Montana Plaintiffs did not raise it below, and they have only referenced it in a footnote in their opening brief, *see John Wyeth & Bros. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n. 6 (3d Cir. 1997) ("[A]rguments raised in passing (such as, in a footnote) … are considered waived."). Regardless, Montana Plaintiffs' state-court complaints did not and could not have relied on any actions undertaken pursuant to this 1991 policy as a basis for CNA's liability because the Grace mine in Libby shut down in 1990. *See In re W.R. Grace*, 729 F.3d at 314; APP0128.

"known and unknown" CNA policies. Montana Plaintiffs' observation (at 15-16) that these policies were not expressly enumerated in Exhibit 5 is of no moment. Although the Plan's definition of "Settled Asbestos Insurance Company" requires a *settlement agreement* between Grace and an insurer to be "listed" in Exhibit 5 (and the Grace-CNA Settlement is listed, APP0327), the definition only requires covered policies to be "identified" in Exhibit 5—not specifically listed, APP0227. And both Exhibit 5 and the Grace-CNA Settlement expressly caution that the policies covered by channeling injunction "include *but are not limited to*" the policies specifically listed. APP0327, APP0396 (emphasis added).[6]

Although Montana Plaintiffs raised several objections to the Grace-CNA Settlement before it was approved by the Bankruptcy Court, they never objected to the "all known or unknown" language used to identify the settled policies as too vague or otherwise inappropriate. Moreover, Montana Plaintiffs were well aware, at the time the Grace-CNA settlement was approved by the Bankruptcy Court, that CNA's Workers' Compensation and Employers' Liability policies were "Subject Policies" under the Grace-CNA Settlement. During the bankruptcy, counsel for Montana Plaintiffs had filed suit against CNA in Montana state court, based on the same theory and the same alleged breach of duties under workers' compensation

[6] The policies of several other insurers are identified in Exhibit 5 using a defined term from their respective settlements, rather than by listing every policy. APP0321 (Aetna), APP0322 (Allianz), APP0331 (Hartford), APP0334-35 (MCC).

policies as the Montana Plaintiffs now allege in their Montana suits. *See In re W.R. Grace*, 115 F. App'x 525, 566-67 (3rd Cir. 2004). Montana Plaintiffs objected to the Grace-CNA Settlement on the grounds that the channeling injunction might bar such claims post-bankruptcy. *See* Libby Claimants' Objection to Debtors' Mot. to Approve Settlement with the CNA Cos. at 31-32, *In re W.R. Grace & Co.*, No. 01-1139, ECF No. 25955, (Bankr. D. Del. Dec. 23, 2010) (expressing concern that, if the settlement were approved, suits based on loss control services that were performed "because CNA provided workers compensation to Grace" might be barred by the channeling injunction).

Montana Plaintiffs ultimately acknowledge (at 16) that the Grace-CNA Settlement's definition of "Subject Policies" controls. But they insist (at 17-18) that claims arising out of CNA's workers' compensation policies are not protected by the channeling injunction because these policies supposedly do not offer coverage for "Asbestos-Related Claims." They are incorrect.

The Grace-CNA Settlement defines "Asbestos-Related Claims" to include "Asbestos-Related Bodily Injury Claims." APP0342-43. That term, in turn, is defined to include any claims (other than "Workers' Compensation Claims") made against Grace for asbestos-related bodily injuries caused by exposure to Grace

asbestos—pursuant to any legal theory. *Id.*[7] The settlement defines "Workers' Compensation Claims" (by reference to the Plan's definition, APP0352) as claims "for benefits under a state mandated workers' compensation system" by a "past, present, or future employee" of Grace. APP0227 (emphasis added).

Montana Plaintiffs assert (at 17) that (1) because workers' compensation claims are not "Asbestos-Related Claims" under the Grace-CNA Settlement, (2) "CNA Workers' Comp Policies do not cover Asbestos-Related Claims," and therefore (3) "the CNA Workers' Compensation Policies" are not "Subject Policies" identified in Exhibit 5 because "Subject Policies" only include policies that "actually or potentially provide insurance coverage for Asbestos-Related Claims." But because premise (2) is clearly wrong, conclusion (3) does not follow.

None of the CNA policies at issue pertain *solely* to coverage for statutory workers' compensation benefits. Rather, as the policies' titles reveal, they provide coverage to Grace for "Workers' Compensation" *and* "Employers' Liability." APP0186-87, APP0196-97, APP0200, APP0205-09. Employers' liability coverage is often paired with workers' compensation coverage to provide coverage for "tort liability" incurred by the insured for injuries that "do not come under the exclusive remedy provisions of workers' compensation." 9A *Couch on Insurance* § 133:4 (3d ed. 2017); *see also* 1 *Holmes's Appleman on Insurance* § 1.17, at 79-

[7] The Plan's definition of "Asbestos PI claims" similarly includes all personal-injury claims based on exposure to Grace asbestos. APP0223-25.

80 (2d ed. 1996). Thus, the policies at issue here require CNA not only to pay "benefits required of the insured by the workmen's compensation law," but *also* to "pay on behalf of the insured [*i.e.*, Grace] all sums which the insured shall become legally obligated to pay as damages because of bodily injury to an employee by accident or disease," in addition to certain consequential damages suffered by family members or third-party contribution claims. APP0187, APP0197, APP0213. There is no exclusion for diseases or injuries suffered by employees due to exposure to asbestos. The "Employers' Liability" portions of these policies provided, or potentially provided, coverage for "Asbestos-Related Claims" as defined in the Grace-CNA Settlement. As such, the policies are "Subject Policies" as defined in the Grace-CNA Settlement.

The fact that these policies offer coverage for statutory workers' compensation benefits *in addition to* employer liability coverage is irrelevant. Nothing in the "Subject Policies" definition suggests that a policy must cover *only* "Asbestos-Related Claims" to receive protection under the injunction. To the contrary, as Montana Plaintiffs acknowledge (at 19-20), the Grace Plan and the Grace-CNA Settlement make clear that multiple-coverage policies are "Subject Policies," except to the extent, and only to the extent, of any rights or obligations that "pertain solely to coverage" for workers' compensation claims.

B. Montana Plaintiffs' Tort Claims Are Not Subject To The Narrow Carve-Outs For Statutory Workers' Compensation Benefits.

Montana Plaintiffs also contend (at 18-22) that their claims are not subject to the channeling injunction because they are premised on rights and obligations arising out of workers' compensation policies. APP0223, APP0351. This argument, too, lacks merit.

1. Under the Plan, a "Settled Asbestos Insurance Company" is protected by the channeling injunction only with respect to any "Asbestos Insurance Policy" identified in Exhibit 5. APP0227. The definition of "Asbestos Insurance Policy" contains a proviso that excludes:

> any rights or obligations under any insurance policy or settlement agreement … to the extent, but *only to the extent*, that such rights or obligations pertain *solely* to coverage for Workers' Compensation Claims.

APP0223 (emphasis added). The Grace-CNA Settlement includes the same carve-out in its definition of "Subject Policies." APP0351, APP0396.

Montana Plaintiffs insist that these carve-outs decide the case. They contend (at 21-22) that their tort claims are based on the "breach of the Montana Plaintiffs' rights or CNA's obligations under the CNA Workers' Comp Policies." This argument, however, ignores both the scope of CNA's policies and the language of the carve-outs. As discussed, pp. 24-25, *supra*, CNA's policies for "Workers' Compensation *and Employers' Liability*," APP0188, APP0198, APP0211

(emphasis added), unquestionably include rights and obligations that do not "pertain solely" to workers' compensation coverage—a fact Montana Plaintiffs obscure by using the shorthand "CNA Workers' Comp Policies" to describe these multiple-coverage policies. Montana Pls.' Br. 3. Montana Plaintiffs simply ignore the word "solely" that is contained in the definition of "Asbestos Insurance Policy." The key question is whether Montana Plaintiffs' state-law claims are based exclusively on rights or obligations from these policies that pertain solely to workers' compensation coverage. The claims clearly are not.

Montana Plaintiffs are not seeking statutory workers' compensation benefits or alleging that CNA breached any state-law statutes to investigate, process, and pay such claims. APP0022. Rather, Montana Plaintiffs allege that CNA is liable in tort due to its negligence in failing to warn about asbestos risks identified through inspections and in failing to "recommend or require" Grace to adopt measures that would minimize asbestos exposure. APP0153-54. These allegations are connected to CNA's risk-assessment and loss-control efforts, which do not "pertain *solely*" to workers' compensation coverage. APP0223, APP0351, APP0396 (emphasis added).

"Solely" is a restrictive term—its plain meaning is "[o]nly, merely, exclusively,"[8] or "to the exclusion of all else."[9] Montana Plaintiffs' claims are not

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[8] Concise Oxford English Dictionary 1373 (12th ed. 2011).

premised on rights and obligations concerning workers' compensation coverage "to the exclusion of all else." As noted, the policies also provide employer's liability coverage, and most of the policy's conditions "apply to *all* coverages"—*i.e.*, to coverage for *both* workers' compensation and employers' liability. APP0188, APP0198 (emphasis added); *see also* APP0215-16. Among the generally applicable conditions is CNA's right "to inspect … the workplaces, operations, machinery, and equipment" at Grace (*id.*)—the very right that gives rise to Montana Plaintiffs' allegation that "CNA was negligent in the inspection of the Grace Libby operations" because it "fail[ed] to report and act upon known hazardous conditions." APP0154.

Contrary to Montana Plaintiffs' assertion (at 22), there is nothing inconsistent about CNA's contention that their claims do not derive from rights or obligations that "pertain solely" to coverage for "workers' compensation benefits," and CNA's additional argument, addressed in Part II.B, *infra*, that Montana Plaintiffs' claims are covered under Section 524(g)(4) because they arise "by reason of" CNA's provision of insurance to Grace. The key terms are materially different, so the result is too. The Montana claims arise by reason of CNA's provision of insurance-related inspection and loss-control services to Grace (and are thus covered by Section 524(g), *see* pp. 43-51, *infra*). But, as just discussed,

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[9] Merriam-Webster's Collegiate Dictionary 1187 (11th ed. 2003).

the alleged duties under which Montana Plaintiffs' claims arise do not relate "solely" to workers' compensation coverage for statutory benefits.

2. Montana Plaintiffs' contention (at 23-28) that the Bankruptcy Court's reading of the injunction would "void enforceable statutory duties concerning workers' compensation" coverage is similarly meritless. The various "rights and obligations" that they cite (*e.g.*, accepting, investigating, and settling claims, filing paperwork with the State, and paying expenses associated with claims adjustment) have *nothing* to do with this action. *See* pp. 25-28, *supra*.

Moreover, the channeling injunction does not excuse CNA from any applicable provisions of the Montana Workers' Compensation Act. All of the relevant statutes and regulations relating to workers' compensation remain in force as to CNA and all other Grace insurers. Thus, as the Bankruptcy Court correctly concluded, "the channeling injunction simply does not interfere with coverage for, or payment of, workers' compensation claims." APP0022.

Montana Plaintiffs' purported concerns about federal preemption and interference with state police powers (at 26-28, 50-53) are similarly misguided. Montana Plaintiffs rely primarily (at 26-27) on *Irving Tanning Co. v. Maine Superintendent of Insurance*, 496 B.R. 644 (B.A.P. 1st Cir. 2013). But there, the debtors proposed a liquidation plan that directly violated state law because it would have turned over to the debtors certain self-insurance funds that did not belong to

them, but had been set aside pursuant to state workers' compensation statutes to pay injured workers. The court concluded that it was impermissible for the plan to "prematurely terminate the state-law rights of the Debtors' employees to seek compensation" for their workplace injuries from these designated funds. *Id.* at 665. By contrast, here, the channeling injunction does not cut off payments for workers' compensation benefits, compel violations of state workers' compensation law, or otherwise interfere with "the scheme for distributions under State workers' compensation law[s]." Montana Pls.' Br. 27. To the contrary, the Plan expressly stipulates that it "leaves unaltered the legal, equitable, and contractual rights" of the holders of statutory workers' compensation claims. APP0581.

Although the channeling injunction does have a preemptive effect, it does not impact coverage for workers' compensation benefits or statutory/regulatory provisions applicable to workers' compensation insurers. Rather, it merely preempts Montana Plaintiffs from bringing state-law suits for damages against CNA based on their exposure to Grace asbestos. But channeling (and thus preempting) such state-law tort claims is *the point* of Section 524(g). *See In re Federal-Mogul Global Inc.*, 684 F.3d 355, 378-79 (3d Cir. 2012). Because Congress's "purpose to preempt" these state tort claims is "clear and manifest," there is no work for any "presumption against preemption" to do. *Farina v. Nokia Inc.*, 625 F.3d 97, 117 (3d Cir. 2010).

C. Montana Plaintiffs' Claims Are Also Premised On CNA's General Role as Grace's Insurer.

Montana Plaintiffs insist (at 13 n.40, 25-26) that their claims relate only to CNA's role as workers' compensation provider to Grace. They presumably take this position because even they acknowledge that CNA's CGL policies are "Subject Policies" protected under the Plan, and thus any claims premised upon alleged breaches of duties under such policies would be barred by the channeling injunction. But Montana Plaintiffs' attempt to isolate this one policy type from CNA's overall portfolio for Grace is inconsistent with the actual allegations of their complaints.

Montana Plaintiffs' central claim is that CNA assumed a duty to Libby community members by engaging in workplace inspections and providing "industrial hygiene" recommendations to Grace as part of its loss-reduction efforts. APP0152-54. The implications of this apparently limitless notion of an insurer's legal duty to protect community members from its insured are remarkable. Under Montana Plaintiffs' theory, all insurers would be liable in tort to entire communities for any injurious activities undertaken by their insureds, without any regard for policy limits, so long as the insurer knew or should have known that the insured was causing injury and did not step in to prevent it. We know of no courts that have accepted this unbounded theory of liability.

Nevertheless, Montana Plaintiffs' own reasoning could potentially lead to suits based on breaches of duties under CNA's CGL policies because those polices too provided CNA with the right "to inspect Grace facilities." APP0174-75. Montana Plaintiffs insist (at 13 n.40) that the CGL policies are not relevant because "they excluded claims of employees" and thus "had nothing to do with workplace safety or disclosure of hazards to Grace workers." That argument is puzzling because, once again, almost *none* of Montana Plaintiffs are former Grace workers. *See* pp. 13, *supra*.

Permitting Montana Plaintiffs to insist that claims premised on CNA's general role as an insurer arise *only* out of its workers' compensation coverage would eviscerate the protections that CNA received under the channeling injunction by settling its CGL policies with Grace. Moving forward, such a precedent could undermine the ability of dual CGL and workers' compensation insurers to achieve finality in asbestos bankruptcies by creating a roadmap for tort plaintiffs to plead around channeling injunctions, thereby disincentivizing settlements needed to fund trusts.

II. Montana Plaintiffs' Claims Fall Within Section 524(g)(4).

The Bankruptcy Court also correctly held that Montana Plaintiffs' claims are enjoinable under Section 524(g)(4)(A) because they seek to hold CNA "directly or indirectly liable" for "the conduct of, claims against, or demands on" the debtor

that "arise[] by reason of" the "provision of insurance to the debtor." 11 U.S.C. § 524(g)(4)(A).

A. Montana Plaintiffs Seek To Hold CNA Indirectly Liable For Grace's Conduct, And For Claims Against Grace Because Their Claims Are Based On Exposure To Grace Asbestos.

1. Section 524(g)(4) authorizes the court to "enjoin actions against" third parties that are "derivative" of claims against the debtor. *Combustion Eng'g*, 391 F.3d at 234. Montana Plaintiffs' claims fit squarely within that authority: they are suing CNA for allegedly failing to take steps to prevent injuries caused by *Grace's* operations, and thus are trying to hold CNA "indirectly liable" for Grace's "conduct" and for claims against Grace.

But-for the Grace bankruptcy, Montana Plaintiffs would have tort claims against Grace based on the *same* alleged injuries caused by the *same* alleged exposures to Grace asbestos. Given the bankruptcy, they may seek compensation from the Trust.[10] APP0227-30. They may also pursue, and, in fact, are pursuing,

[10] Indeed, to address objections by Montana Plaintiffs and others exposed to Grace asbestos in Libby, the Plan's proponents made revisions to the Trust Distribution Procedures to make them more favorable to Libby asbestos claimants like Montana Plaintiffs, including: (1) adding a new disease classification, with increased dollar payments, for severe disabling pleural disease, a condition supposedly suffered predominantly by Libby claimants; (2) waiving the requirement that claimants show occupational exposure to Grace asbestos; (3) allowing claimants to seek increased recoveries from the Trust if their condition deteriorates; and (4) providing a "claims multiplier" that potentially allows these claimants to recover up to eight times more from the Trust than other claimants with similar

claims against parties that are not protected by the channeling injunction, such as the State of Montana, BNSF Railway, and International Paper Co. APP0129-48, APP0154-57. But the channeling injunction makes the Trust the "sole recourse" for their claims against an "Asbestos Protected Party" like CNA that has provided substantial funding to the Trust. APP0230.

Courts, including this one, have recognized that the application of Section 524(g)(4) turns on whether the plaintiff seeks to hold an insurer liable for asbestos exposure from the debtor's products or operations. In the Pittsburgh Corning Corporation bankruptcy, Judge Fitzgerald (who presided over many asbestos-related bankruptcies, including the Grace proceeding) relied on this principle. Judge Fitzgerald concluded that tort claims against the debtors' corporate parents were "derivative" and could be channeled under Section 524(g)(4) "to the extent" that the parents were "alleged to be jointly and severally liable for *[the debtor's] products* or conduct." *In re Pittsburgh Corning Corp.*, 417 B.R. 289, 293 (Bankr. W.D. Pa. 2006) (emphasis added); *accord In re Pittsburgh Corning Corp.*, 453 B.R. 570, 575-76 (Bankr. W.D. Pa. 2011). By contrast, Judge Fitzgerald also ruled that Section 524(g) could *not* be used to enjoin claims against a debtor's parents arising from products *not produced by the debtor itself*. 453 B.R. at 603-04. Similarly, in *Combustion Engineering,* this Court held that the district court could

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asbestos-related injuries. *See In re W.R. Grace & Co.*, 446 B.R. 96, 114 n.26 (Bankr. D. Del. 2011).

not enjoin asbestos-related claims against two of the debtor's affiliates because the affiliates' alleged asbestos-related liability arose from products they had manufactured themselves—*not from the debtor's products*. 391 F.3d at 231, 234.

This case is the converse of *Combustion Engineering*. Montana Plaintiffs allege that CNA is liable for alleged injuries caused by *Grace's* asbestos emitted by *Grace's* operations. APP0012-13; *accord* Montana Pls.' Br. 32 (acknowledging that "Grace's [a]sbestos" [c]aused" their alleged injuries). As a result, Montana Plaintiffs' claims against CNA are "derivative" of claims against Grace, and they "can be channeled under § 524(g)." *In re Pittsburgh Corning*, 417 B.R. at 293.

Montana Plaintiffs insist (at 32-34) that Section 524(g)(4) does not authorize an injunction against all third-party claims alleging "injury from the debtor's asbestos." They note (at 32) that Section 524(g)(2) states that all claims against the debtor caused by asbestos are channeled to an asbestos trust (without requiring that the debtor's own asbestos be at issue), but that Section 524(g)(4) "uses narrower language" when addressing the authority to enjoin claims against third parties. But the fact that Section 524(g)(4)'s scope only extends to "a subset of the liabilities that are enjoined against the debtor" is unremarkable.

It is undisputed that Section 524(g)(4) cannot be used to bar *all* claims against an insurer resulting from asbestos exposure (as Section 524(g)(2) allows as to the debtor) because the statute only authorizes injunctions against claims that are

derivative of the debtor's conduct and arise "by reason" of certain recognized relationships. For example, if CNA (like Travelers in the *Manville* case) were sued by claimants alleging exposure to some other company's asbestos, Section 524(g)(4) would not apply because the claims would not be derivative of claims against Grace. *See* pp. 36-41, *infra*. Similarly, if CNA had gone into business selling Grace asbestos products, then the injunction would offer no protection because Section 524(g)(4) does not extend to claims against the debtor's contractors. *See* pp. 43–50, *infra*. But these limitations on Section 524(g)(4)'s scope do not apply to this action, as Montana Plaintiffs' claims against CNA are derivative of their claims against Grace and arise by reason of CNA's role as Grace's insurer.

2. Montana Plaintiffs also contend that their tort claims are not subject to Section 524(g)(4) because they are suing CNA for its "own actions and omissions." According to them, the channeling injunction extends only to "direct actions" or "indirect attempt[s]" to recover policy proceeds because such proceeds are part of the debtor's estate. Montana Pls.' Br. 31. But the statute's text, structure, and history, as well as circuit precedent, foreclose this narrow reading of "indirectly liable."

First, nothing in Section 524(g)(4) indicates that a bankruptcy court may only enjoin suits to recover assets that are (allegedly) property of the debtor's

estate. If Congress had intended such a limitation, it could have said so in the statute. In fact, such a construction would largely nullify the protections that Section 524(g) authorizes for the three other categories of claims (other than insurer claims) that Congress identified: suits alleging liability by reason of a party's (1) ownership of a financial interest in the debtor, (2) involvement in the management of the debtor, or (3) involvement in a transaction changing the debtor's corporate structure or in a loan altering its financial condition. 11 U.S.C. § 524(g)(4)(A)(ii)(I)-(II), (IV). In each of these actions, asbestos claimants typically would seek to recover from the third party's *own assets* (*e.g.*, under a corporate veil piercing theory), rather than from assets that are part of the estate.

Second, Montana Plaintiffs' interpretation would make Section 524(g)(4)(A)(ii)(III) superfluous, contrary to basic canons of statutory interpretation. *See DelRio-Mocci v. Connolly Props Inc.*, 672 F.3d 241, 249 (3d Cir. 2012). Before Congress enacted Section 524(g), it was already well-established that bankruptcy courts could bar suits against a debtor's insurers that seek recovery of policy proceeds. *See*, *e.g.*, *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988) ("Numerous courts have determined that a debtor's insurance policies are property of the estate, subject to the bankruptcy court's jurisdiction."). The *Manville* injunction went further, barring asbestos-related claims against settled insurers "based upon, arising out of or related to" any

of the insurer's policies, which included claims "seeking any and all damages[,] *other than or in addition to policy proceeds*." *Travelers*, 557 U.S. at 142, 150 (emphasis added). Congress then sought to "codif[y]" the Johns-Manville trust mechanism. *In re Federal-Mogul*, 684 F.3d at 359; *see* H.R. Rep. No. 103-835, at 41 (1994) (explaining that Section 524(g) was intended "to strengthen" the "injunction/trust mechanisms" at issue in *Manville* and "to offer … certitude to other asbestos trust/injunction mechanisms" if they adhere to the same standards for protecting present and future asbestos claimants).

Third, Montana Plaintiffs' position is inconsistent with this Court's decision in this Grace Chapter 11 case. In the appeal from Plan confirmation, Montana and Canada argued that the Bankruptcy Court erred by enjoining their claims against Grace for contribution and indemnification based on "failure-to-warn" lawsuits brought against them by asbestos tort plaintiffs. *In re W.R. Grace*, 729 F.3d at 324. This Court rejected that argument, relying on Section 524(g)(1)(B), which allows bankruptcy courts to enjoin actions against a debtor "for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery" as to claims channeled to an asbestos trust. This Court reasoned that although Montana and Canada were being sued for their *own* alleged misconduct, under theories different from those that might have been asserted directly against Grace, their contribution/indemnity claims against Grace depended on the fact that the

underlying tort plaintiffs "were allegedly harmed by Grace's asbestos-related products and operations." *Id.* at 324. As such, the Court held that the Montana and Canada actions against Grace were "brought 'for the purpose of … indirectly … receiving payment or recovery' for asbestos-related … claims" against Grace. *Id.* As the Court explained, a contrary interpretation "would effectively rewrite" the statute by ignoring its "explicit inclusion of actions that 'indirectly' seek recovery on asbestos-related claims." *Id.* at 325.

This Court should interpret "indirectly" in Section 524(g)(4) the same way. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("[S]imilar language contained within the same section of a statute must be accorded a consistent meaning."). Just as contribution and indemnification claims against Grace premised on Montana's failure-to-warn liability are "indirect" attempts to recover for asbestos-related claims against Grace, so too are failure-to-warn-and-protect claims against a Grace insurer "indirect" efforts to hold that insurer liable for the debtor's conduct and for claims against the debtor.

3. Montana Plaintiffs also erroneously contend (at 34-35) that the Bankruptcy Court "misapprehended … basic principles of tort law." They rely (at 34) on the premise that tort plaintiffs may at times pursue distinct theories of liability against "each culpable actor" when there is an "overlapping injury." But the question here is not whether, absent the channeling injunction, Montana

Plaintiffs could bring *state*-law claims against CNA for its alleged contribution to their injuries. Indeed, if Montana Plaintiffs could not assert state-law claims against CNA, there would be no need for Section 524(g) protection. Rather, the question is whether, as a matter of *federal* law and the ordinary meaning of "indirectly," their suits against CNA attempt to hold CNA "indirectly" liable for Grace's conduct and claims against Grace. The clear answer is yes. *See* pp. 37-39, *supra*. And contrary to Montana Plaintiffs' argument, courts do refer to liability as "indirect" even if (1) the defendant is accused of engaging in "misconduct" itself, and (2) there is no "agency" relationship between the defendant and the actor who directly caused the plaintiff's injury. For instance, copyright law "impos[es] *indirect* liability" on defendants that induce or contribute to direct infringement. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929 (2005) (emphasis added). The same rule (and the same terminology) applies in patent law. *See, e.g.*, *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir. 2004) (describing the doctrine of "indirect infringement").

4. Finally, Montana Plaintiffs rely on the Second Circuit's decision in *In re Johns-Manville Corp.*, 517 F.3d 52 (2008), which they say (at 35-38) ruled in their favor on the "very question" presented here. In fact, the Second Circuit's decision is not on point because the plaintiffs there did not seek to hold the insurer (Travelers) indirectly liable for failing to prevent exposure to the debtor's asbestos.

Rather, the *Manville* proceeding involved claims against "dozens"—and in certain cases, hundreds—of asbestos product manufacturers, distributors, and premises owners, alleging injuries from *their* asbestos products and *their* operations. *In re Johns-Manville Corp.*, No. 82-11656, 2004 WL 1876046, at *19 (Bankr. S.D.N.Y. Aug. 17, 2004) (emphasis added); *see also* Montana Pls.' Br. 35 n.88 (conceding that "claimants injuries" in the Manville litigation "resulted from exposure to asbestos of other asbestos manufacturers as well as Manville"). Travelers' argument that it should be protected from liability caused by non-debtor products was based only on the allegation that it had learned of the dangers of asbestos during its "long tenure as Manville's primary insurer." *Johns-Manville*, 517 F.3d at 57-59. Here, by contrast, Montana Plaintiffs' claims against CNA arise solely due to their alleged exposure to the debtor's asbestos. They are thus clearly seeking to hold CNA indirectly liable for the conduct of, and claims against, Grace.

Moreover, the injunction in *Manville* was not a Section 524(g) channeling injunction—a point the Supreme Court emphasized in reversing the Second Circuit's decision, *see Travelers*, 557 U.S. at 155. And although the Second Circuit opined on the scope of Section 524(g)—both in its original decision, *In re Johns Manville Corp.*, 517 F.3d at 67-68, and on remand from the Supreme Court, 600 F.3d 135, 153 (2010)—this Court should not rely on another circuit's dicta in

applying Section 524(g) to materially different facts. *See In re Quigley Co.*, 676 F.3d 45, 62 (2d Cir. 2012) (noting that the court's "brief[]" discussion of Section 524(g) in the *Manville* appeal was "not necessary to its holding").

B. Montana Plaintiffs' Claims Against CNA Arise "By Reason" Of CNA's Provision Of Insurance To Grace.

Montana Plaintiffs' claims also fall squarely within the "relationship" requirement of Section 524(g)(4) because they "arise[] by reason of" CNA's provision of insurance to Grace.

1. The key statutory phrase in Section 524(g)(4), "by reason of," simply connotes a causal relationship. Its ordinary meaning is "because of,"[11] and the phrase generally "requires only but for causation," *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 301 n.4 (3d Cir. 2007). In some circumstances courts have read "by reason of" to imply a proximate causation requirement, *see Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-66 (1992), which calls for a sufficiently "direct" relationship between cause and effect, *see Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017).

Montana Plaintiffs' claims against CNA easily satisfy this causal standard. Their allegations concern duties that CNA supposedly assumed (and allegedly breached) by undertaking inspections and making loss-control recommendations.

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[11] Webster's II New Riverside University Dictionary 980 (1984).

APP0153-54. These activities are intrinsic to the provision of casualty or workers' compensation insurance.

When insurers issue an insurance policy, they must "evaluat[e] which risks to insure and at what price." Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1420 (2013). Insurers underwriting policies (for CGL, employers' liability, or workers' compensation coverage) typically will inspect a policyholder's business to determine the potential for liability when setting the policy terms and premiums. *See* George E. Rejda, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 112 (11th ed. 2011) ("Rejda") ("In … casualty insurance, the underwriter may require a physical inspection before the application is approved. For example, in workers' compensation insurance, the inspection may reveal unsafe working conditions[.]"). Likewise, in the course of providing coverage, "[a]ll major liability insurance carriers … offer risk management or loss control services" in order to minimize their exposure. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 210 (2012).[12]

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[12] *See also* DAVID F. UTTERBACK ET AL., U.S. DEP'T OF HEALTH HUMAN SERVS., Pub. No. 2014-110, WORKERS' COMPENSATION INSURANCE: A PRIMER FOR PUBLIC HEALTH 22 (2014), http://www.cdc.gov/niosh/docs/2014-110/pdfs/2014-110.pdf ("Many insurance carriers have loss prevention programs to identify and describe the particular risks that exist at policyholders' establishments, make recommendations for their abatement, and offer loss prevention services to help policyholders manage these risks."); Ins. Info. Inst., Commercial Insurance,

"These services include advice on … occupational safety and health." Rejda, at 125.

Montana Plaintiffs' claims against CNA arise by reason of these routine insurance practices. They allege that CNA, which had a right under its policies to inspect Grace's workplaces and operations (APP0174-75, APP0188, APP0198, APP0215), was negligent in how it performed those inspections and communicated asbestos risk (APP0154). And they further allege that, by providing industrial-hygiene recommendations to Grace, CNA did not do enough to protect workers, their families, and Libby community members from Grace asbestos. APP0153. These claims could not have been made against CNA but-for its provision of insurance to Grace; indeed, they arise *directly* from that insurance relationship.

2. Dissatisfied with the ordinary meaning of "by reason of," Montana Plaintiffs advocate (at 44-49) for a narrower definition. They insist that the term "requires that the non-debtor's alleged liability arise as a *legal* … consequence" of a recognized statutory relationship, meaning that the relationship—*e.g.*, the provision of insurance—is a "legal cause or legally relevant factor to the third party's alleged liability," not merely the "*factual*" cause of that liability. Montana Pls.' Br. 44 (quotation marks omitted).

"Company Operations," http://www.iii.org/publications/commercial-insurance/how-it-functions/company-operations ("Loss control activities aimed at preventing or reducing the size of losses due to accidents … have been integral to the insurance industry as far back as 1752[.]").

Montana Plaintiffs offer scant textual support for their reading. They baldly assert (at 47) that "[t]he words 'by reason of' "suggest a legal reason." Remarkably, they base this contention on a supposed contrast between "by reason of" and "caused by" or "because of." Montana Plaintiffs concede (*id.*) that if Congress had used these latter phrases, it would have implied "that a factual relationship would suffice." But as noted above, p. 43, *supra*, "by reason of" simply *means* "because of," and courts have repeatedly treated these phrases as *synonymous*. *See, e.g.*, *Burrage v. United States*, 134 S. Ct. 881, 889 (2014) (equating "by reason of" with "because of" and "based on"); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013) ("[T]he ordinary meaning of 'because of' is 'by reason of' or 'on account of'" (citation omitted)); *New Directions*, 490 F.3d at 301 n.4 (equating 'by reason of' with 'but for' causation). Montana Plaintiffs' lead textual argument thus cuts strongly *against* their interpretation.

Montana Plaintiffs also rely on the Second Circuit's decision in *In re Quigley*. There, the plaintiffs sued the corporate parent (Pfizer) of the debtor (Quigley), which had manufactured asbestos-containing products. 676 F.3d at 47. Plaintiffs sued Pfizer based on an "apparent manufacturer" theory of liability, arising from the fact that, after Pfizer's acquisition of Quigley, the Pfizer name, logo, and trademark appeared on marketing materials for Quigley products. *Id.*

Pfizer argued that these claims were barred by the bankruptcy court's preliminary injunction (which incorporated the language of Section 524(g)(4)) because the plaintiffs' claims "arose by reason of" Pfizer's "ownership of a financial interest" in Quigley, 11 U.S.C. § 524(g)(4)(A)(i)(I)—*i.e.*, Pfizer only placed its logo on Quigley's products because it had acquired Quigley. *Id.* at 59. The Second Circuit held that this factual relationship was insufficient, and that the preliminary injunction could not apply to claims against Pfizer because its interest in Quigley was not a "legal cause of or a legally relevant factor to" its alleged liability as the apparent manufacturer of Quigley's products. *Id.* at 60.

The Second Circuit acknowledged that Section 524(g)(4) does not "explicitly indicate" that only legal causation is relevant. *Id.* The court relied, however, on the fact that the four relationships protected by Section 524(g)(4) "could, *legally*, have given rise to *actual* liability in appropriate circumstances prior to § 524(g)'s enactment." *Id.* Based on that commonality, the court inferred that Congress must have had "this sort of liability … in mind." *Id.* at 61. Even if the court's surmise about what Congress had "in mind" were accurate, it would not suggest that Congress intended *to limit* Section 524(g)(4) to claims in which the relationship with the debtor is itself a legal trigger for liability. As noted above, the legislative history of Section 524(g) provides no hint that Congress intended courts to apply an artificially narrow meaning of "by reason of," which would limit

channeling injunctions to suits seeking insurance policy proceeds. To the contrary, the available evidence is that Congress intended to codify the Manville injunction, and the channeling injunction in that plan was *not* restricted by a "legal consequence" test. *See* pp. 38-39, *supra*.

What really appears to have motivated the Second Circuit's decision is concern that applying a "but-for" standard would allow bankruptcy courts to enjoin claims "bearing only an accidental nexus to an asbestos bankruptcy." *Quigley*, 676 F.3d at 61. But ordinary proximate causation fully addresses this issue by screening out but-for causes that are not sufficiently "direct." *Bank of Am. Corp.*, 137 S. Ct. at 1306. As discussed, the claims against CNA easily satisfy any directness requirement.

In any event, *Quigley* is distinguishable from this case, as the Bankruptcy Court correctly recognized. APP0021. Pfizer did not argue that the use of its logo was standard practice for any parent-subsidiary relationship, or occurred because of provisions in the agreement pursuant to which it had acquired Quigley. *Quigley*, 676 F.3d at 62. Indeed, retailers routinely put their name on store-brand products even though they have no ownership of the actual manufacturers. Here, by contrast, Montana Plaintiffs' allegations that CNA breached a duty to warn and protect third parties are premised on "alleged undertakings by CNA (i.e., industrial hygiene services or inspections of Grace's facilities) [that] arise wholly out of the

insurance relationship." APP0021; *see also* pp. 42-43, *supra*. Thus, CNA's role as Grace's insurer is, at a minimum, "a legally relevant factor" to CNA's "alleged liability." *Quigley*, 676 F.3d at 60.

3. Montana Plaintiffs also contend (at 47-48) that applying the ordinary meaning of "by reason of" would "lead to absurd results." Courts "rarely" rely on assertions that a statutory interpretation could produce "absurd results" as a reason "to override unambiguous legislation." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002). And the standard is demanding: "[a]n interpretation is absurd when it defies rationality or renders the statute nonsensical and superfluous," producing outcomes "so contrary to perceived social values that Congress could not have intended [them]." *United States v. Fontaine*, 697 F.3d 221, 228 (3d Cir. 2012) (quotation marks omitted).

Montana Plaintiffs' arguments do not even approach this standard. They advance a hypothetical (at 48) in which an insurer, by reason of its role as an insurer, participates on a committee to design and implement a safety program to mitigate asbestos hazards along with a union, a state official, independent consultants, and engineers. That imagined scenario is far removed from the allegations at issue here. Nevertheless, there would be nothing "absurd" about applying Section 524(g)(4) to bar asbestos-related claims against the insurer in this hypothetical but not against other committee members, just as the injunction here

bars tort claims against CNA but not against other defendants that are not "Asbestos Protected Parties." *See* p. 10, *supra*. Congress made a judgment that because insurers are the primary funders of asbestos trusts, *see In re Plant*, 734 F.3d at 906, they should receive protection against future asbestos claims to induce them to settle. It is not "absurd" for Congress to have decided that because neither the "union," "State health officer[s]," nor various consultants and engineers make multi-million dollar contributions to asbestos trusts (as CNA did here), they should not receive these protections.

4. Finally, Montana Plaintiffs make the novel suggestion (at 50-53) that Section 524(g)(4) does not authorize injunctions barring claims against workers' compensation insurers because such insurance supposedly is not provided "to the debtor," but rather is a stand-alone statutory obligation of the insurer. This argument also lacks merit. To begin with, workers' compensation insurance is written for the employer. In the case of CNA's policies, Grace is the named insured (APP0190-92, APP0200, APP0205-08), Grace paid the premiums (Montana Pls.' Br. 12), and the provision of insurance satisfied Grace's obligations under the relevant workers' compensation statutes (*id.* at 51).

But in any event, the CNA policies at issue also cover employers' liability in addition to workers' compensation, and the duties CNA allegedly breached relate to both coverages. *See* pp. 24-25, *supra*. There is no plausible argument that the

employers' liability provisions do not "provide insurance" to the debtor. Montana Pls.' Br. 51 (emphasis omitted). The policies specifically oblige CNA "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages" for specified harms to employees. APP0187, APP0197; *see also* APP0211-14 . Nor do the mechanics of how "worker[s]" may obtain payments for "statutory benefits" under Montana law (Montana Pls.' Br. 51) limit Section 524(g)(4)'s reach here. For the final time: most of Montana Plaintiffs are not former workers, and none of them are seeking statutory workers' compensation benefits.

C. The Bankruptcy Court Had Jurisdiction To Interpret And Apply The Channeling Injunction.

Montana Plaintiffs briefly question (at 40-41) whether the Bankruptcy Court had jurisdiction to enter the channeling injunction. But they quickly retreat, noting (at 41) that "the issue before the Bankruptcy Court was not whether it had general bankruptcy jurisdiction to enjoin the Montana claims" but only whether Section 524(g)(4) is satisfied. We agree.

1. The Bankruptcy Court clearly had jurisdiction to construe and apply the channeling injunction that issued as part of the Grace Plan. Section 524(g) confers "exclusive jurisdiction" over any proceeding involving the "application" or "construction" of a channeling injunction to the District Court that entered the injunction. 11 U.S.C. § 524(g)(2)(A). (That authority has been delegated to the

Bankruptcy Court, pursuant to 28 U.S.C. § 157(a)). Moreover, the Bankruptcy Court had core "arising under" jurisdiction to issue that injunction in the first place because it was initiated by the debtor in its own Chapter 11 case, involved a right created by the Bankruptcy Code, and was issued as part of Plan confirmation, which established the Trust that is the centerpiece of the Plan. *See In re Anes*, 195 F.3d at 180 (citing 28 U.S.C. §§ 157(b)(2)(L), 1334).[13]

Any challenge to whether the Bankruptcy Court had jurisdiction to enter the channeling injunction in the first place is now barred by *res judicata*. *See Travelers*, 557 U.S. at 151-54. The Grace Plan, including the injunction, was final after it was confirmed (with the participation of representatives for present and future asbestos claimants, including Montana Plaintiffs) and upheld on appeal. APP0520-23. Accordingly, it is simply too late "to reevaluate" whether the court had jurisdiction to enjoin tort claims against CNA and other insurers. *Travelers*, 557 U.S. at 151-53 ("[E]ven subject-matter jurisdiction … may not be attacked collaterally[.]").

2. In any event, the Bankruptcy Court plainly had jurisdiction to enjoin Montana Plaintiffs' claims against CNA, even if the injunction were premised only

[13] *See also In re W.R. Grace*, 729 F.3d at 338 (the Bankruptcy Court had jurisdiction to confirm the Plan and enter the channeling injunction); *In re W.R. Grace*, 475 B.R. at 75 (the Bankruptcy Court had core jurisdiction to issue the injunction because it "involves a right created by the federal bankruptcy law" (citation omitted)).

on the court's "related to" jurisdiction. "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected [to] the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Although "related to" jurisdiction is not "limitless," *id.*, it extends broadly to any proceeding whose outcome could "*conceivably have any effect on the estate being administered in bankruptcy*," *Combustion Eng'g*, 391 F.3d at 226 (quoting *Pacor*, 743 F.2d at 994). The state-law claims at issue here easily clear this low threshold.

First, tort claims against an insurer that satisfy Section 524(g)(4)'s conditions will, as a general matter, have the potential to affect the *res* of the estate. Such claims are derivative of claims against the debtor, arise by reason of the insurance relationship with the debtor, and—absent protection from a channeling injunction—would discourage insurers from settling insurance policies that are part of the estate and contributing to an asbestos trust. What insurer, after all, would agree to pay tens of millions of dollars (or more) to settle its asbestos liability with a debtor if it would still face unlimited tort liability based on *the same asbestos exposures* and arising by reason of *the same insurance policies* that it purported to settle? *See In re Plant*, 734 F.3d at 909 (depriving insurers of "finality," by exposing them "to indirect asbestos liability," would have caused the

asbestos trust to "be underfunded"). Congress recognized this problem when it enacted Section 524(g)(4), and thus made a judgment that asbestos-related claims against insurers and other third parties with statutorily-identified relationships with the debtor *necessarily* have a conceivable effect on the estate even when the plaintiff seeks damages *from the third party*. This Court should defer to that congressional judgment. *See Travelers*, 557 U.S. at 155 (recognizing that Section 524(g)(4) is now the benchmark for determining the court's authority to enjoin claims against third parties); *Pace v. Am. Int'l Grp., Inc.*, No. 08-cv-945, 2010 WL 1325657, at *5-6 (N.D. Ill. Mar. 30, 2010) ("the special purpose of channeling injunctions under [Section] 524(g)" "essentially resolves [any] jurisdictional challenge" to an injunction that comes within the statute's scope).[14]

Contrary to Montana Plaintiffs' suggestion (at 39), jurisdiction is not limited to claims that seek the estate's funds. *See Pacor*, 743 F.2d at 994 ("related to" proceedings "need not necessarily be against the debtor or against the debtor's property"). Even the Second Circuit, whose decisions Montana Plaintiffs have invoked, has clarified that the "conceivable effect" test controls, and that

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[14] In *Combustion Engineering*, there was no statutorily-recognized relationship between the debtor and the third parties subject to the proposed injunction, and all parties agreed that Section 524(g)(4) did not apply. 391 F.3d at 234-35. Rather, the bankruptcy court had issued an injunction pursuant to its general equitable power under 11 U.S.C. § 105(a). *Id.* at 233, 235-38. But Section 105 itself "makes clear" that it "does not provide an independent source of federal subject matter jurisdiction." *Id.* at 224-25 (citing 11 U.S.C. § 105(c)).

jurisdiction extends to *any* suits that merely "pose[] the specter of direct impact on the *res*." *Quigley*, 676 F.3d at 58.

Second, Montana Plaintiffs' claims against CNA will directly affect the estate because CNA has a contractual right to indemnification from the Trust if CNA is held liable for their claims.[15] APP0016-17, APP0376. Contrary to Montana Plaintiffs' contentions (at 42 n.95), this Court has distinguished "mere precursor" claims in which the third party would have "to bring an entirely separate proceeding" against the debtor for common-law contribution and indemnification, from cases like this one "involv[ing] *contractual* indemnity obligations between the debtor and the non-debtor that *automatically* result[] in indemnification liability against the debtor." *Combustion Eng'g*, 391 F.3d at 226 (quoting *Pacor*, 743 F.2d at 995). In that latter category, the bankruptcy court has jurisdiction over third-party claims because they will unquestionably affect the estate. *Pacor*, 743 F.2d at 995.

Here, CNA has a contractual right to indemnity and it does not need to initiate a separate proceeding to vindicate that right. Rather, CNA would simply

[15] Under the Settlement Agreement, the Trust must indemnify CNA up to $13 million if CNA is held liable for "Asbestos-Related Bodily Injury Claims," which include the types of claims made by Montana Plaintiffs—*i.e.*, claims against CNA based on CNA's failure to warn of and protect them from the dangers of Grace asbestos. APP0343, APP0376.

deduct the Trust's indemnity obligation from its own periodic payments to fund the Trust. APP0381.

Montana Plaintiffs contend (at 40-41) that the Trust's contractual obligation to indemnify CNA should be disregarded because the Grace-CNA Settlement supposedly cannot be used to "create jurisdiction." Their insinuation that the settlement was structured to manufacture jurisdiction is unfounded; CNA had every incentive to protect its interests as a condition of its $84 million settlement with Grace, given indications during the bankruptcy proceeding that counsel for Montana Plaintiffs might bring tort suits against settled insurers despite the channeling injunction. The indemnification provision applies not to any and all potential claims against CNA, but only to tort claims that are derivative of Grace's conduct. APP0376-77.

Combustion Engineering did not involve any indemnification agreement that could have required the debtor to make payments to a third party, and the third-party's contribution to the trust did not settle claims between the third party and the estate. 391 F.3d at 230. Rather, the debtor's holding-company parent simply asserted that its ability to contribute to the estate was contingent on enjoining claims for unrelated asbestos liability against two of its other subsidiaries. *Id.* at 228. The cases cited in *Combustion Engineering* merely hold that parties cannot establish federal-court jurisdiction by consent or stipulation, which is not at issue

here. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982); *In re Resorts Int'l, Inc.*, 372 F.3d 154, 160-61 (3d Cir. 2004).

CONCLUSION

The Court should affirm the order of the Bankruptcy Court.

Dated: September 20, 2017

Respectfully submitted,

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CERTIFICATE OF ADMISSION TO BAR

The undersigned certifies that all attorneys whose names appear within this brief are members of the Bar of this Court.

Dated: September 20, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 12,320 words as calculated by the word processing system used to prepare this brief. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using 14 point Times New Roman.

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Dated: September 20, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit using the CM/ECF system.

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STATUTORY APPENDIX

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28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) **(1)** Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) **(1)** Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

* * *

11 U.S.C. § 524. Effect of discharge

* * *

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

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

(2) **(A)** Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction,

or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

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

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

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

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

(aa) each such debtor;

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

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

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

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

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or

indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

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

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

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

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

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

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

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

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

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

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

(aa) the debtor;

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

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

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

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

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

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

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

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

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28

or any reference of a proceeding made prior to the date of the enactment of this subsection.