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Non-Settling Insurers Now Have a Seat at the Bankruptcy Table

Justice Sonia Sotomayor delivered the Supreme Court’s unanimous opinion¹ in [*Truck Insurance Exchange v. Kaiser Gypsum Company, Inc., et al.*](#) (Case No. 22-1079) (“*Kaiser Gypsum*”). Reversing the opinion of the United States Court of Appeals for the Fourth Circuit in *In re Kaiser Gypsum Co., Inc.*, 60 F.4th 73 (4th Cir. 2023), the Court held that, pursuant to section 1109(b) of the Bankruptcy Code, “[a]n insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with, or affected by, the proceedings to be a ‘party in interest’ that can raise objections to a reorganization plan.” In doing so, the Court rejected, as “conceptually wrong” and making “little practical sense,” the “insurance neutrality” doctrine that denies insurers the status of parties in interest in confirmation-related matters if the proposed plan neither increases the insurer’s pre-petition obligations nor impairs its rights under the insurance policies it has issued to the debtors.

Kaiser Gypsum is an asbestos mass tort Chapter 11 case. A plan of reorganization (“KG Plan”) was confirmed on September 12, 2021. The KG plan provided, *inter alia*, for uninsured claims to be administered by an asbestos claims trust (“KG Asbestos Trust”), while insured claims were to be resolved through the tort system and paid (less a small deductible) by the debtors’ primary liability insurer, Truck Insurance Exchange (“Truck”). As a condition to the receipt of a distribution under the KG Plan, uninsured asbestos claimants were required to provide the KG Asbestos Trust with: (i) evidence of claims they have filed with other asbestos trusts; and (ii) an executed release that allows the KG Asbestos Trust to obtain information concerning those claims (collectively, “Anti-Fraud Disclosures”). Holders of insured claims were not required to provide the Anti-Fraud Disclosures.

Truck objected to confirmation of the KG Plan contending, *inter alia*, that: (i) the KG Plan was not proposed in good faith, as evidenced by its failure to require insured asbestos claimants to make the

Anti-Fraud Disclosures; and (ii) the KG Plan purportedly relieved the debtors of their assistance and cooperation obligations under their policies with Truck and precluded Truck from raising Kaiser Gypsum's bankruptcy conduct as a defense in future coverage disputes. Following the bankruptcy court's recommendations, the district court confirmed the KG Plan. In doing so, the district court limited the scope of Truck's standing with respect to confirmation-related issues to the question of whether the KG Plan was "insurance neutral," a question the district court answered in the affirmative. Based on the express provision of the KG Plan that the debtors would continue to fulfill their cooperation obligations to Truck, the district court overruled Truck's objection that the KG Plan relieved the debtors of those obligations. The Fourth Circuit affirmed, finding that: (i) the insurance neutrality of the KG Plan precluded Truck's status as a party in interest with respect to confirmation-related issues; and (ii) the plan did not alter Truck's contractual rights.

In reversing the Fourth Circuit, the Supreme Court concluded that the following factors compel a broad reading of section 1109(b) standing: (i) the statute's "capacious" nature; (ii) the illustrative, and not exhaustive, nature of the list of "parties in interest" included in the statute; (iii) the ordinary, dictionary meanings of the terms "party" and "interest"; and (iv) the historical development of U.S. bankruptcy law demonstrating Congressional intent to promote increasingly broader participation in bankruptcy cases. According to the Supreme Court, a broad reading of section 1109(b) reflects the means by which "[b]ankruptcy reorganization proceedings can affect an insurer's interests in myriad ways," including (but by no means limited to): (i) the impairment of the insurer's contractual right to control settlement and defend claims; (ii) the abrogation of its right to contribution from other insurers; and (iii) the confirmation of collusive plans prejudicing the insurer. The Court then focused on three specific factors in demonstrating that Truck was sufficiently concerned with and affected by the confirmation process in *Kaiser Gypsum* to be a party in interest: (i) Truck's obligation to pay the bulk of asbestos claims against the debtors; (ii) the KG Plan's failure to require holders of insured asbestos claims to provide Anti-Fraud Disclosures, thereby exposing Truck to

a significant risk of paying fraudulent or duplicative asbestos claims; and (iii) the minimal incentive of the debtors or the asbestos claimants to limit the post-confirmation costs of resolving those claims. As a party in interest, Truck was entitled to appear and be heard on confirmation issues and the rulings of the courts below that the “insurance neutrality” of the KG Plan was error requiring reversal of the Fourth Circuit’s opinion.

The Supreme Court addressed the “insurance neutrality” doctrine. According to the Supreme Court, the doctrine mistakenly focuses solely on the insurer’s pre-petition policies and obligations and ignores all of the ways confirmation of a Chapter 11 plan can negatively impact the insurer’s rights and interests. By doing so, the doctrine erroneously conflates the merits of an insurer’s confirmation objection with the threshold question under section 1109(b) of whether the insurer qualifies as a part in interest. In other words, the doctrine misdirects the standing analysis under section 1109(b) from an inquiry as to whether the confirmation proceedings might directly impacts the insurer to whether a specific plan impacts the insurer.

When all is said and done, *Kaiser Gypsum* simply provides an insurer with a seat at the bankruptcy table, acknowledging that an insurer has a right to be heard as a party in interest during the pendency of the bankruptcy case, including, most importantly, when there are issues concerning the confirmation of a plan of reorganization. As Justice Sotomayor twice made clear in the opinion, section 1109(b) provides insurers, *qua* insurers, neither a vote on nor a veto of a reorganization plan; it provides them with a voice in a bankruptcy case. Insurers will still need to present relevant evidence and applicable legal authority in support of their objections to plan confirmation. Nevertheless, insurers now have a voice with respect to confirmation to which attention must be paid.

Finally, it is likely that the United States Court of Appeals for the Third Circuit will be the first appellate court to consider and apply *Kaiser Gypsum*. On March 15, 2024, the United States Bankruptcy Court for the District of New Jersey confirmed the *Third Modified Eighth Amended Plan of Reorganization in In re Diocese of Camden* (“Camden Plan”) (Case No. 20–21257, D.I. 3684). Dissenting insurers

have appealed the confirmation of the Camden Plan, challenging, *inter alia*, the “insurance neutrality” doctrine. On June 10, 2024, a petition for a direct appeal was filed; a ruling on the petition to the Third Circuit to consider the direct appeal is expected shortly from the Third Circuit.

¹Justice Samuel Alito did not participate in the case.

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