

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THE TRAVELERS INDEMNITY :

4 COMPANY, ET AL., :

5 Petitioners :

6 v. : No. 08-295

7 PEARLIE BAILEY, ET AL.; :

8 - - - - - x

9 and

10 - - - - - x

11 COMMON LAW SETTLEMENT :

12 COUNSEL, :

13 Petitioner :

14 v. : No. 08-307

15 PEARLIE BAILEY, ET AL. :

16 - - - - - x

17 Washington, D.C.

18 Monday, March 30, 2009

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States
21 at 10:03 a.m.

22 APPEARANCES:

23 BARRY R. OSTRAGER, ESQ., New York, N.Y.; on behalf of
24 the Petitioners.

25 SAMUEL ISSACHAROFF, ESQ., New York, N.Y.; on behalf

1 of the Respondents Cascino Asbestos Claimants.

2 JACOB C. COHN, ESQ., Philadelphia, Pa, on behalf of the

3 Respondent Chubb Indemnity Insurance Company.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-295, Travelers Indemnity Company v. Bailey, and Common Law Settlement Counsel v. Bailey.

Mr. Ostrager.

ORAL ARGUMENT OF BARRY R. OSTRAGER

ON BEHALF OF THE PETITIONERS

MR. OSTRAGER: Mr. Chief Justice, and may it please the Court:

In 1988, the Second Circuit decided in two separate decisions that a bankruptcy court exercising its core jurisdiction had properly confirmed the plan of reorganization that resolved present and future claims against Johns-Manville and the insurers who funded Manville's reorganization plan. Last year, despite its decades-old rulings to the contrary, the Second Circuit sustained a collateral attack on the confirmation order and held that the bankruptcy court lacked subject matter jurisdiction back in 1986 to enjoin direct actions against Travelers, quote, "based upon, arising out of, or related to," close quote --

JUSTICE GINSBURG: Mr. Ostrager, you have characterized the Second Circuit's decision in a way the

1 Second Circuit did not. The Second Circuit said: The
2 confirmation of the 1986 order stands, but that order
3 did not encompass what was added in 2004; that is, that
4 order dealt with the debtor, with Manville and the
5 insurer's obligation to cover Manville's liability. The
6 Second Circuit said: Now, this 2004 order, which
7 concerns independent actions against insurers for their
8 own wrong, was never encompassed in the order that they
9 affirmed. So I think it's quite unfair to say it's a
10 collateral attack on the 1986 order.

11 MR. OSTRAGER: Justice Ginsburg, the
12 bankruptcy court judge, interpreting his own order,
13 explicitly held that the 1986 order was intended and was
14 always intended to enjoin direct actions against
15 Travelers based upon, arising out of, or relating to the
16 insurance policies Manville purchased from Travelers.

17 JUSTICE GINSBURG: At the time of the 1986
18 order, had these independent actions started? I thought
19 at the time of the 1986 order the concerns were suits
20 involving Manville's liability and the insurers'
21 derivative obligation to cover.

22 MR. OSTRAGER: Justice Ginsburg, at the time
23 of the 1986 order there had been various forms of direct
24 action filed against Manville, and the bankruptcy court
25 concluded, and the Second Circuit recognized, that a

1 settlement with the insurers was essential for the
2 reorganization and rehabilitation of Manville --

3 JUSTICE GINSBURG: The insurers, to the
4 extent of the insurance proceeds. That's what created
5 the pot that made the settlement fund. But what I'm
6 trying to get at is this extra piece, because the only
7 information we have is that Manville -- there was the
8 conversation that's reported in the Chubb brief. This
9 question came up, well, what about actions against the
10 insurers for their own wrongs? And the answer was, oh,
11 those aren't covered.

12 MR. OSTRAGER: The plan of reorganization as
13 ultimately confirmed contained the language to which I
14 directed the Court. It -- a plan of confirmation
15 included all aspects of the resolution of the Manville
16 estate. The confirmation order was all about ensuring
17 fairness to all claimants. It was all about expanding
18 the value of the estate, and it was all about
19 rehabilitating the debtor for the benefit of its
20 employees, suppliers, and local claimants.

21 JUSTICE SOUTER: Well, Mr. Ostrager, is --
22 help me out, because this is an issue of fact, and I
23 don't have the record in front of me now. But didn't
24 the 1986 order expressly include permission for certain
25 actions alleging insurer misconduct to proceed, those

1 that had already been filed?

2 MR. OSTRAGER: It did. It did, yes.

3 JUSTICE SOUTER: I drew the implication from
4 that that the -- that the bankruptcy court thought its
5 order would be barring such actions if they had not
6 already been filed. Am I right on the -- on the -- at
7 least on the record point?

8 MR. OSTRAGER: You are right on the record
9 point. However, Judge Lifland in the hearings that were
10 associated with his clarifying order was very explicit
11 that he use the words "based upon, arising out of, or
12 related to" for the express purpose of granting
13 Travelers the broadest relief that could be afforded to
14 Travelers post-confirmation. And --

15 JUSTICE SOUTER: But he was saying that --
16 in effect, that was simply articulating rather more than
17 he had done the first time around and what he intended
18 the first time around.

19 MR. OSTRAGER: Well, he certainly intended
20 to make the cornerstone of the Manville reorganization
21 work. And as the Second Circuit itself held, in a
22 subsequent collateral attack, the O'Malley case --
23 reported at 100 F.3d 944, a 1996 case where there was a
24 challenge to the bankruptcy court's reaffirmation and
25 continuation of the '86 order, Second Circuit held in

1 1996 that such an injunction is essential to the success
2 of the settlement, and its continuation was well within
3 the discretion of the trial court.

4 JUSTICE ALITO: Was the Second Circuit's
5 decision based on an interpretation of the confirmation
6 order or was it based on subject matter jurisdiction?

7 MR. OSTRAGER: The Second Circuit order was
8 explicitly predicated on the theory that the bankruptcy
9 court lacked subject matter jurisdiction back in 1986 to
10 enjoin these direct actions.

11 Now, we submit that the Second Circuit
12 clearly erred, because it conflated the entirely
13 distinct concept of the court's subject matter
14 jurisdiction and the propriety of the court's exercise
15 of subject matter jurisdiction. This was a distinction
16 that this Court expressly recognized 75 years ago in the
17 *Continental Illinois v. Rock Island Railroad*.

18 JUSTICE SCALIA: Well, there is a
19 distinction between jurisdiction and whether the action
20 taken by the bankruptcy court comes within the statute.
21 But at some point, at some point surely the two overlap.
22 I mean, suppose -- you know, you say simply because it
23 is a bankruptcy action it comes within the bankruptcy
24 clause and there is jurisdiction. But what if the
25 bankruptcy court in connection with the bankruptcy

1 decrees that a totally unrelated company has to pay a
2 certain amount of money and it's conceded that this
3 company has no relation to the bankruptcy, but the court
4 says, this is a national problem and this other company
5 ought to contribute.

6 MR. OSTRAGER: Justice Scalia --

7 JUSTICE SCALIA: Do you think that would be
8 within the bankruptcy power?

9 MR. OSTRAGER: Justice Scalia, clearly the
10 Congress in fashioning over the years expansive
11 safeguards facilitating growth and change in the
12 bankruptcy law as our nation's commerce has grown has
13 done that.

14 JUSTICE SCALIA: They can do anything under
15 the bankruptcy law?

16 MR. OSTRAGER: No. Subject to appropriate
17 safeguards. Now, in order to confirm a plan of
18 reorganization a -- a debtor must meet all 16
19 requirements of section 1129.

20 JUSTICE SCALIA: Okay, that's fine. I'm not
21 arguing about that. I'm arguing about the principle
22 that you are asking us to accept, to wit, that this
23 challenge cannot possibly be based upon jurisdiction.
24 Surely there are some things that simply do not fall
25 within the bankruptcy power. Isn't that true?

1 MR. OSTRAGER: I would agree that that is
2 so.

3 JUSTICE SCALIA: Okay. And that --

4 MR. OSTRAGER: This is not our case.

5 JUSTICE SCALIA: Well, what you are saying
6 is this does fall within the bankruptcy power. But
7 don't tell us that it is not a challenge based upon the
8 jurisdiction of the court and based exclusively upon the
9 statute. It could be based upon both.

10 MR. OSTRAGER: Justice Scalia, I would say
11 that the bankruptcy court in this case unquestionably
12 had jurisdiction over the Manville reorganization under
13 28 U.S.C. 1334(b) as the Manville reorganization was a
14 civil proceeding arising under Title 11 of the
15 Bankruptcy Code.

16 JUSTICE GINSBURG: The Second Circuit's view
17 was that the bankruptcy court has no authority, no
18 subject matter jurisdiction, when the debtor -- debtor's
19 liability is not in question. The Second Circuit
20 thought, rightly or wrongly, that when the liability is
21 between two- the question is between two nondebtors,
22 Travelers on the one hand, the claimants on the other,
23 Manville is not in the picture. That's what the Second
24 Circuit said, it falls outside the domain of the
25 bankruptcy court, and that could be wrong or it could be

1 right. But in the Second Circuit's view the bankruptcy
2 court lacked authority to deal with the nondebtors'
3 liability to the claimants.

4 MR. OSTRAGER: There were, Justice Ginsburg,
5 60 pages of findings of fact indicating that the direct
6 action suits against Manville was an end run around the
7 --

8 JUSTICE GINSBURG: The direct actions
9 against Travelers.

10 MR. OSTRAGER: Against Travelers, were an
11 end run around the discharge of Manville, and that all
12 of the claims against Travelers arose out of and flowed
13 to the insurance relationship.

14 JUSTICE STEVENS: Mr. Ostrager, may I ask
15 this question. I -- I was unable to find the complaints
16 in the voluminous filings here. Do any of the
17 plaintiffs' cases seek recovery from assets of the
18 estate that would reduce the payments to creditors of
19 Manville?

20 MR. OSTRAGER: Well, the reason that this is
21 so critical is that --

22 JUSTICE KENNEDY: Can you answer my
23 question?

24 MR. OSTRAGER: They do not seek assets of
25 the estate, although Travelers would potentially have

1 contribution claims against Manville because all of the
2 claims --

3 JUSTICE KENNEDY: But why does the
4 bankruptcy court have jurisdiction to enjoin third party
5 actions against some creditor of the estate?

6 MR. OSTRAGER: The Respondents actually
7 concede that bankruptcy courts have subject matter
8 jurisdiction to enjoin actions against non-debtors in
9 appropriate circumstances. That's the Chubb brief at
10 pages 22 and 40.

11 JUSTICE KENNEDY: But if those actions won't
12 affect the estate at all, I just don't understand sort
13 of the basic theory, and I don't really understand the
14 theory of the plaintiffs' cases, either. I don't
15 understand -- I can't figure out what anybody expects to
16 collect from Travelers for what they did. The fact that
17 they defended cases certainly was proper for them as an
18 insurance company. This is mysterious case to me.

19 MR. OSTRAGER: Justice Stevens , you are
20 absolutely right that these direct action cases have
21 never been sustained because they all relate to the
22 discharge by Travelers of Travelers' obligations as
23 Manville's insurer, and that's one of the reasons why
24 the bankruptcy court judge issued the injunction.

25 Now, the Second --

1 JUSTICE GINSBURG: These were cases in the
2 State courts and, as I understand it, so far none of
3 them have succeeded.

4 MR. OSTRAGER: That is correct.

5 The Second Circuit also completely ignored
6 the enactment by Congress of sections 524(g) and (h) of
7 the Bankruptcy Code, which are modelled on the Manville
8 reorganization, and expressly grandfather the Manville
9 injunction as a final order that could not be revoked.

10 JUSTICE GINSBURG: How could you say they
11 ignored it when they had several pages devoted to 524,
12 and they said it was -- it didn't cover these so-called
13 direct actions, which really aren't what we generally
14 call direct actions. But the Second Circuit did address
15 what Congress did to codify essentially the Manville
16 device.

17 MR. OSTRAGER: I would respectfully
18 disagree. 524(g) specifically says that asbestos --
19 asbestos channeling injunction "shall be valid and
20 enforceable and may not be revoked or modified by any
21 court except through direct appeal." And 524(h)(i)
22 specifically says that the pre-1994 asbestos channeling
23 injunctions shall be considered to meet all of the
24 requirements of 524(g)(2), which is in our appendix at
25 page 471, which means that they automatically meet

1 524(g)(3)(A)(i) and may not be revoked or modified
2 except through appeal.

3 JUSTICE STEVENS: How do -- how do these
4 pending actions have any impact on fulfilling the
5 objections -- objectives of the channeling instruction
6 or affect the disposition of the assets in the estate?
7 I just don't understand it.

8 MR. OSTRAGER: The essential issue here,
9 Justice Stevens, is that there would have been no
10 Manville reorganization --

11 JUSTICE STEVENS: Yes, but there has been
12 one and it's been a success.

13 MR. OSTRAGER: It's been a remarkable
14 success. Asbestos claimants have received -- 660,000
15 asbestos claimants have received --

16 JUSTICE STEVENS: None of whom would be
17 affected --

18 MR. OSTRAGER: -- more than \$2.8 billion.

19 JUSTICE KENNEDY: But none of whom would be
20 affected if these suits go forward, as I understand it.
21 I'm missing something very important, I think.

22 MR. OSTRAGER: The point is that there
23 couldn't have been have a Manville reorganization
24 without the insurance settlements. The Second Circuit
25 recognized that. The Second Circuit further recognized

1 that these direct actions violate the express terms of
2 the injunction that Judge Lifland, the bankruptcy judge,
3 granted in this case.

4 JUSTICE KENNEDY: Why isn't it harmless
5 error?

6 MR. OSTRAGER: The 524(g)(4)(A)(2)(iii)
7 specifically authorizes asbestos channeling injunctions
8 that bar any claim against the third party to be
9 directly or indirectly liable for claims against the
10 debtor.

11 CHIEF JUSTICE ROBERTS: So if part of the
12 settlement -- I mean, Travelers says, we need to get
13 more out of this before we're going to put in all the
14 policy funds; the bankruptcy judge says, well, you are
15 going to be immune from any traffic accident liability;
16 and there is a traffic accident and Travelers said:
17 Well, the bankruptcy court said I don't have to pay. Is
18 that all right? It's within the jurisdiction as you
19 read it because it involves Travelers it's related to
20 the funds they submitted into the trust account. Is
21 that --

22 MR. OSTRAGER: Mr. Chief justice, that would
23 not be covered and that is certainly not what the
24 bankruptcy court intended or said.

25 CHIEF JUSTICE ROBERTS: No, I know they that

1 didn't intend anything with respect to traffic
2 accidents. But my question is how far does your theory
3 reach?

4 MR. OSTRAGER: This Court has recognized in
5 the Katz case that bankruptcy extends beyond the res.

6 CHIEF JUSTICE ROBERTS: So there would be
7 jurisdiction in the hypothetical that I posed?

8 MR. OSTRAGER: Not in the hypothetical you
9 posed. On direct appeal that would clearly be excluded
10 because it wouldn't meet --

11 CHIEF JUSTICE ROBERTS: Right, on direct
12 appeal. Are you suggesting it would be barred -- that
13 Travelers would have protection under a collateral
14 attack?

15 MR. OSTRAGER: I don't think we need to
16 reach that issue in this case. There is no question
17 that in connection with exercising its subject matter
18 jurisdiction over the Manville reorganization the
19 bankruptcy court had the power under section 105 of the
20 Bankruptcy Code to issue any order, process or judgment
21 necessary or appropriate to carry out the provisions of
22 Title 11.

23 JUSTICE KENNEDY: Well, but it seems to me
24 you --

25 JUSTICE SCALIA: But you acknowledge that

1 that's not true. You acknowledge that they couldn't
2 have issued the hypothetical order that the Chief
3 Justice proposed, even if that was necessary, even if
4 Travelers said, we will not kick in the money up to the
5 limits of our liability unless you make us immune from
6 all traffic accidents. You acknowledged that that's no
7 good, right?

8 MR. OSTRAGER: In this order the -- the
9 limitation on the injunction was based upon arising out
10 of or related to. I would submit that the traffic
11 accident falls outside the scope of --

12 CHIEF JUSTICE ROBERTS: Why is that? It --
13 it involves one -- it involves the insurance company,
14 its coverage of Johns-Manville. And the Travelers is
15 saying: Look, we are not going to do it unless you give
16 us this -- this broader immunity, and the bankruptcy
17 judge does it. I don't know why it would be outside the
18 jurisdiction of the bankruptcy court. It is clearly
19 related to allowing the settlement to go forward.

20 MR. OSTRAGER: Well, I -- I think we have an
21 act of Congress, 524(g) and (h), which --

22 JUSTICE GINSBURG: May I interrupt you
23 there? Because you told me that the Second Circuit
24 ignored 524(g), and I'm looking at page 33a of the
25 petition for cert and the Second Circuit addresses

1 524(g), and its discussion continues for a couple pages.
2 I don't see how that's ignoring the issue.

3 MR. OSTRAGER: With -- with respect, I
4 believe that there are express findings of fact that the
5 bankruptcy court made which were adopted by the district
6 court, which were embraced in full by the Second
7 Circuit, and we have a -- a pure issue of law here.

8 JUSTICE GINSBURG: And may I -- may I have
9 an answer to my question about the Second Circuit
10 ignoring 524(g) when they devoted two and a half pages
11 to it?

12 MR. OSTRAGER: I believe that they clearly
13 misinterpreted the intent of 524(g) and (h). They
14 clearly misperceived the fact that Congress had
15 expressly grandfathered the Manville injunction in
16 524(g).

17 JUSTICE GINSBURG: Another mystery in this
18 most mysterious case: If it was so clear that the
19 original order, the 1986 order, insured Travelers that
20 it would have no liability for asbestos claims, period,
21 then why did it put up \$400 million, much more than it
22 had put up originally, in order to settle with people
23 who were bringing precisely that kind of claim?

24 MR. OSTRAGER: During the course of the five
25 years of proceedings before the bankruptcy court, the

1 case was referred to mediation before the Honorable
2 Mario Cuomo. And in connection with that mediation
3 there was a business decision made to secure releases
4 much broader than the injunction that was contained.
5 Travelers would in connection with the mediation process
6 participate in a settlement.

7 JUSTICE GINSBURG: What was the difference
8 between the release that you say flowed from the 1986
9 order and the releases that were obtained with the
10 \$400 million?

11 MR. OSTRAGER: One was a general -- one was
12 a general release and the other was a release based
13 upon, arising out of, or related to the Manville
14 insurance policies that Travelers purchased --

15 JUSTICE GINSBURG: So, specifically what was
16 not included in the 1986 release that was included as a
17 result of the settlement negotiations?

18 MR. OSTRAGER: It -- an absolute, broad
19 general release by 80,000 people. Now, I want to --

20 JUSTICE GINSBURG: But I would like to know
21 the difference. What would -- what would Travelers be
22 liable for under the 1986 order as you read it, that
23 they got freedom from as a result of this settlement?

24 MR. OSTRAGER: Potentially -- potentially
25 the traffic accident that Mr. Chief Justice referenced.

1 I want to reserve --

2 JUSTICE GINSBURG: So then -- so that the
3 2000 clarification order did exonerate them from traffic
4 accidents?

5 MR. OSTRAGER: It's a general release.

6 I -- I want to conclude and reserve the
7 balance of my time by noting that "Redefining the scope
8 of a long-final confirmation order unravels intricate
9 transactions so as to knock the props out from under the
10 authorization for every transaction that has taken
11 place." That's a quote from the Second Circuit's
12 decision in Chateaugay Corp., 10 F.3d 944. And that
13 creates an unmanageable, uncontrollable situation for
14 courts and litigants alike.

15 JUSTICE GINSBURG: I have one question
16 before you reserve the rest of your time. That is, you
17 said this is -- this is a sweeping release that
18 Travelers got in settlement for the claims of many
19 parties. But some people were not there and those are
20 the people who still want to bring their claims.

21 MR. OSTRAGER: I would say that the --

22 JUSTICE GINSBURG: I haven't asked my
23 question.

24 MR. OSTRAGER: Oh, I'm sorry.

25 JUSTICE GINSBURG: I would like to know what

1 -- what notice did the people who were left out of the
2 settlement, who were not part of the settlement, who
3 say, so we want our day in court -- what notice did they
4 have and what opportunity to be heard?

5 MR. OSTRAGER: There was broad notice to the
6 people who would be affected by the issuance of the
7 injunction. This Court has recognized --

8 JUSTICE SOUTER: How did they get the
9 notice? You say it's broad notice. What exactly was
10 done?

11 MR. OSTRAGER: There were newspaper blasts
12 repeatedly, all sorts of public notice, radio
13 announcements. But we are dealing with a special
14 remedial scheme that expressly forecloses successive
15 litigation by non-litigants and in the bankruptcy
16 context --

17 JUSTICE GINSBURG: How can it be successive
18 when they didn't even get their -- I mean they -- these
19 people haven't had a day in court. They may have a
20 claim that's no good. All State courts so far have said
21 their claim is no good. But they have a right --

22 MR. OSTRAGER: This is what Congress has
23 made provision for in 524(g) and (h). This is what I
24 believe the Court contemplated in Ortiz at page 846,
25 also in Martin v. Wilks, also in Taylor v. Stargell.

1 And I think this rule was foreshadowed as long ago as
2 Mullaney v. Central Hanover Trust Company.

3 JUSTICE GINSBURG: The rule -- the
4 particular rule that I am asking you about is that
5 people who have not had their day in court can be
6 precluded --

7 MR. OSTRAGER: Yes.

8 JUSTICE GINSBURG: -- on the basis of
9 newspaper notice and radio announcements?

10 MR. OSTRAGER: As the court said in
11 Mullaney, beneficiaries whose interests are either
12 conjectural or future, although they could be --

13 JUSTICE GINSBURG: That was the best
14 possible notice, which included regular mail notice.

15 MR. OSTRAGER: Not -- not with respect to
16 future claimants who haven't had any disease. There has
17 to be finality. That's what 524(g) and (h) says. A
18 confirmation order has to be final. As the Court said
19 in Stohl, there has to be a beginning of litigation and
20 a place to end litigation.

21 I would like to reserve, if I may, with
22 respect, the balance of my time for rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Issacharoff.

25 ORAL ARGUMENT OF SAMUEL ISSACHAROFF

1 ON BEHALF OF THE RESPONDENTS
2 CASCINO ASBESTOS CLAIMANTS

3 MR. ISSACHAROFF: Mr. Chief Justice, and may
4 it please the Court:

5 As the Court has indicated, this is a
6 question of jurisdiction, and the issue is whether a
7 bankruptcy court may enter an order that goes to a
8 nondebtor, offers a release against independent State
9 law claims.

10 JUSTICE KENNEDY: Well, as to the 1986 order
11 it seemed to me that the counsel for the Petitioner
12 might have answered the question posed by the Chief
13 Justice with the traffic accident hypothetical: That is
14 an interesting question of subject matter jurisdiction,
15 and maybe there is subject matter jurisdiction, maybe
16 there isn't, but that issue as to the 1986 order is
17 final. Now, that brings us to the -- the later order,
18 2004, 2006. And then the question is whether or not
19 that's just a reiteration of the earlier order or a
20 further expansion of jurisdiction that could be reached.

21 Why couldn't the counsel for Petitioner have
22 given that answer?

23 MR. ISSACHAROFF: Well, the counsel for
24 Petitioner can't give that answer for two separate
25 reasons. The first has to do with the subject matter

1 jurisdiction limitation of a bankruptcy court: That as
2 soon as the release is outside the debtor's estate and
3 impact on the debtor's estate or the debtor/creditor
4 relationship, that places it beyond the power of the
5 bankruptcy court.

6 JUSTICE KENNEDY: But, putting aside
7 questions of notice, if these parties had been
8 represented in the appeal of the 1986 order, maybe the
9 subject matter jurisdiction ruling was correct; maybe it
10 was incorrect; but it's done.

11 MR. ISSACHAROFF: If -- if these parties had
12 been present, if they had been appealed, if this had
13 been in effect a settlement orchestrated through the
14 bankruptcy court, then there might be the -- the ability
15 to liquidate the class action.

16 JUSTICE KENNEDY: So then it's just a
17 question of personal jurisdiction and notice. It is not
18 a question of subject matter jurisdiction, because
19 subject matter jurisdiction can be concluded in an
20 earlier order and there can be no collateral attack if
21 you've been a party.

22 MR. ISSACHAROFF: Justice Kennedy, it is a
23 question of subject matter jurisdiction if it is not to
24 be a consensual agreement. If there is not to be -- the
25 purpose of notice is to give you the opportunity to opt

1 out and to object --

2 JUSTICE BREYER: I don't think there's a
3 notice question. I thought there were 5,538 plaintiffs
4 here and -- that you represent, and every one of them
5 has already gotten money from the trust except for two
6 who have filed claims against it. So I imagine if
7 that's so, they certainly know about it.

8 MR. ISSACHAROFF: They do know about it.

9 JUSTICE BREYER: Okay, so there is no notice
10 problem. If there were a notice problem I guess there
11 would be a due process problem. So, I don't see what
12 notice has any more to do with this than the NCAA
13 tournament.

14 MR. ISSACHAROFF: Justice Breyer, I
15 misunderstood Justice's Kennedy's question to be about
16 1986, not about the present. And in 1980 -- in the
17 original confirmation, these people had not filed suit,
18 had not made claims at the time.

19 JUSTICE BREYER: Well, in the original
20 confirmation there are problems in asbestos cases, like
21 other bankruptcy cases, of giving people notice.
22 Bankrupt people often give notice to many who aren't
23 there. And I don't know that -- maybe there is a
24 constitutional problem with some of them, but I would
25 have thought jurisdiction under the statute is clear.

1 MR. ISSACHAROFF: Well, the question is --

2 JUSTICE BREYER: What is -- is this about
3 notice?

4 MR. ISSACHAROFF: No, I don't believe it is
5 about notice.

6 JUSTICE BREYER: I didn't think so. I
7 thought this was about the case of the meaning of the
8 words in the statute that they have authority in the
9 bankruptcy court to issue any order, process or judgment
10 that is necessary or appropriate to carry out the
11 provisions of the title. And we've said that the test
12 is whether the outcome of the proceeding -- this is the
13 other State proceeding -- could conceivably have any
14 effect on the estate being administered in bankruptcy.
15 So, as I understood it, that's the test.

16 MR. ISSACHAROFF: I agree.

17 JUSTICE BREYER: That's what -- that's what
18 this Court said. Now, they may be few and far between,
19 an order like this, but where there are special reasons
20 for it -- suppose it's a pension fund and you want to
21 reorganize the company and this is the employees' --
22 they're -- the employees' pension fund's worried about
23 claims which are related directly. Or suppose it's an
24 officer, or suppose it's a worker, and to reorganize the
25 company you must cut the claims off. And otherwise, it

1 is down the drain for everyone, no more money in the
2 fund, no more jobs for the employees.

3 Now, what is it here that would say there is
4 no special circumstance such that a bankruptcy judge can
5 ever do it, no matter what?

6 MR. ISSACHAROFF: In -- in your example,
7 Justice Breyer, you rely upon this Court's decision in
8 Celotex, which adopted the Pacor test from the Third
9 Circuit. And in each case that has applied that, the
10 question is whether there is a potential impact upon the
11 estate of the bankrupt. The critical issue in this case
12 is that not a single one of the claims that is presented
13 ir seeks to be enjoined here has any potential impact on
14 the --

15 JUSTICE BREYER: Is what you are saying also
16 true of the various other asbestos cases that have, I
17 think, done this?

18 MR. ISSACHAROFF: There is no asbestos case
19 that I am aware of that has released third party claims
20 that have no impact on the debtor. I am not aware of a
21 single one.

22 JUSTICE BREYER: Well, of course, this has
23 enormous practical impact on the debtor. If not him --
24 not this one, because it's already a done deal -- you
25 will never get insurance companies --

1 MR. ISSACHAROFF: No, I don't --

2 JUSTICE BREYER: -- to go into this kind of
3 thing if they are going to be sued for the very act of
4 helping the debtor defend the asbestos cases. And so, I
5 can't imagine an insurance company in its right mind
6 going into that when in fact all these suits are still
7 open. That presumably is why the bankruptcy judge cut
8 it off.

9 MR. ISSACHAROFF: I think that the facts of
10 record indicate that Travelers went into this particular
11 deal full well knowing that it was not getting this kind
12 of release because that kind of release was not
13 available. And I think --

14 JUSTICE SOUTER: What do you -- what do you
15 make of the provision of the 1986 order to the effect
16 that, as I understand it and as I asked your brother a
17 moment ago, existing claims based upon misbehavior of
18 the -- of the insurance company were not cut off? The
19 reasonable implication, I think, of that is that any
20 future claims based upon insurance company misconduct
21 would be cut off by the terms of the '86 order.

22 What -- what do you say about that
23 implication?

24 MR. ISSACHAROFF: Justice Souter, I would
25 say two things. First of all, that the record speaks to

1 specific negotiations between Travelers and Manville and
2 between all the insurers and Manville on prospective
3 liabilities of the -- of the insurance companies, so
4 that the bankruptcy court can be read to be just
5 cleaning up what had happened retrospectively up until
6 that point.

7 JUSTICE SOUTER: Yes, but it was prospective
8 liability based upon misconduct of the insurance
9 company, not merely derivative of -- of its insurance
10 contract in -- in the conventional sense.

11 MR. ISSACHAROFF: I -- I understand that.
12 But it's also important -- I think that there was a
13 question raised by Justice Alito a minute ago about what
14 exactly had happened in 1986 and whether the Second
15 Circuit was making findings of fact or findings of law.

16 In 1988, in the MacArthur case, the Second
17 Circuit relied on section 1334(d) as the jurisdictional
18 basis for upholding the district -- the bankruptcy
19 order. Section 1334(d), which is now recodified as
20 1334(e), has to do only with the disposition of the
21 assets of the estate, the property of the estate.

22 And so, the Second Circuit order in 19 -- in
23 1988, which is the controlling legal authority on what
24 the scope of the release was, went only to the property
25 of the estate. And so, I don't think that there was any

1 understanding at the time by anyone that there was a
2 release of claims that were independent of the property
3 of the estate or made -- or had no hold upon or
4 potential impact upon the property of the estate.

5 JUSTICE BREYER: Why does it say -- it
6 doesn't say that. What it says in the release is it
7 says: We are releasing or everybody is enjoined from
8 bringing a suit for policy claims against Travelers, and
9 a policy claim is any and all claims based upon, arising
10 out of, or relating to any insurance policy.

11 And then the bankruptcy judge, in thousands
12 of findings, I guess, said that your lawsuits do relate
13 to the relevant insurance policies. Indeed, the claims
14 are based upon the joint -- the obligation of Travelers
15 to defend those very policies, given the obligation to
16 defend Johns-Manville.

17 So the relation is exceedingly close, and
18 the language covers it, and there are thousands of pages
19 of findings, I guess, that show that.

20 MR. ISSACHAROFF: Well, Your Honor, some of
21 the releases that are in effect in this case go to
22 conduct that occurred after 1986. Some of them have to
23 do with claims. For example, the Wise claim which is
24 referred to in the Second Circuit's opinion has to do
25 with claims that have nothing to do with the coverage of

1 Manville. They have to do with actions taken with
2 regard to other insurers. This is an exceedingly --

3 JUSTICE KENNEDY: Settlement clauses often
4 release future claims; standard stuff in a release
5 clause.

6 MR. ISSACHAROFF: Absolutely, Your Honor.
7 Contract clauses do it and class actions do it,
8 consensual agreements, when there is notice, the
9 opportunity to opt out, and there is volition; they
10 often release much broader. But a bankruptcy court is
11 an extraordinary proceeding. A bankruptcy court is an
12 obligation that rights are terminated without any
13 consensual --

14 JUSTICE KENNEDY: But that is subject matter
15 jurisdiction and that is foreclosed. Now, if you are
16 talking about personal jurisdiction that may be
17 something else.

18 MR. ISSACHAROFF: No, I'm not talking --

19 JUSTICE KENNEDY: But you're talking about
20 subject matter jurisdiction and that has been foreclosed
21 by the earlier Circuit Court of Appeals' opinion. And
22 the court of appeals' opinion that we are reviewing now
23 seems to conflate that issue.

24 MR. ISSACHAROFF: I don't believe so, Your
25 Honor. I think that in the 1988 opinion in the

1 MacArthur case, the Second Circuit was quite clear that
2 all that was being released was claims against insurance
3 proceeds that had been delivered and had become property
4 of the estate, whose depletion could affect the estate.

5 JUSTICE SOUTER: Okay. If that is -- if
6 that is the case -- let's assume that that is -- that it
7 was that narrow. The fact remains, however, that at
8 this point, as Justice Kennedy has suggested several
9 times, my understanding is at least that you cannot
10 collaterally attack the jurisdiction of the court who
11 entered the order it did. And the only claim that you
12 can make now is that the order by its terms did not
13 cover your cases.

14 Do you agree?

15 MR. ISSACHAROFF: I agree that that is the
16 general rule, that is correct. I agree further that the
17 Second Circuit expressly held at page 31a that the error
18 of the bankruptcy court was that it subsequently
19 interpreted the order more broadly than the Second
20 Circuit had affirmed in 1988. I think that that's the
21 heart of the case, because --

22 JUSTICE SOUTER: So it's a question of the
23 scope of the order?

24 MR. ISSACHAROFF: Yes, it is.

25 JUSTICE SOUTER: Okay.

1 MR. ISSACHAROFF: Yes, it is. There is a
2 question which this Court has actually not addressed,
3 which is about the prospective application of an order
4 that is entered without subject matter jurisdiction. I
5 don't think there is any case squarely on point.

6 Certainly there are cases that allow
7 prospective collateral challenges to an order entered
8 without personal jurisdiction. I don't think the Court
9 has addressed the subject matter jurisdiction, but it
10 doesn't have to --

11 JUSTICE ALITO: But didn't this --

12 JUSTICE SOUTER: I didn't mean to cut you
13 off. I'm sorry.

14 MR. ISSACHAROFF: I don't think the Court
15 has to address this here, Your Honor, because in this
16 case, the initial order only went -- as affirmed by the
17 Second Circuit, only went to the property of the estate.
18 And second --

19 JUSTICE SOUTER: May I then raise a question
20 there? I mean, I think there is a legitimate question
21 about that, given the -- given the rather general terms
22 of the -- of the scope of the order. And I would like
23 your response to this. It seems to me as a background
24 consideration that we should have in mind in
25 interpreting how broad that order was. It's been raised

1 a couple times; Justice Breyer raised it a moment ago.
2 And it's this: It is one argument to say that the
3 bankruptcy court does not have jurisdiction, and
4 derivatively an order that it issued should not be
5 interpreted to cover, any claim that does not affect or
6 cannot deplete the bankruptcy estate taken as a given
7 fact at the time this later case is brought.

8 Another view of jurisdiction would be that
9 the bankruptcy court has jurisdiction and hence an order
10 might be interpreted to cover any cases which, if
11 contemplated, would have precluded the settlement that
12 created the bankruptcy estate. If Travelers had thought
13 that it was going to be liable for these cases of
14 insurer misconduct, it might very well have said: We're
15 not forking over X hundred millions of dollars, leaving
16 this exposure open. So that the bankruptcy estate would
17 never have attained the size that it attained if the --
18 if the insurer and everybody else had not understood
19 that these later claims would be -- were being cut off.

20 Is that argument a relevant -- number one,
21 is that a legitimate jurisdictional argument? And
22 number two, is it a relevant argument that we should
23 bear in mind -- in trying to figure out how broad the
24 '86 order really was?

25 MR. ISSACHAROFF: Your Honor, you gave two

1 alternative definitions of jurisdiction. The first one
2 we have no problem with. Obviously that's our
3 argument --

4 JUSTICE SOUTER: Everybody accepts at that
5 much.

6 MR. ISSACHAROFF: Right. The second one, I
7 think that this Court has to go back to the Syngenta
8 case, which I think is quite instructive on this point.
9 In Syngenta there was a settlement in a Federal court
10 action. There is no question that the parties settled,
11 that the monies were paid, everything was done pursuant
12 to that settlement. Then one of the parties goes into
13 State court and files a claim that was clearly subsumed
14 within the settlement.

15 The district court tried to issue an order,
16 saying: I have to have power over this, because
17 otherwise there could never have been a settlement. And
18 this Court unanimously reversed on the grounds that that
19 had to be brought through the State court system,
20 because you could not get jurisdiction simply because of
21 the expediency, the necessity, any of these terms do not
22 afford an affirmative grant of jurisdiction to the
23 Court. So I think --

24 JUSTICE GINSBURG: Can you answer the
25 question practically, the insurers would not have

1 settled, there would have been no 1986 order, if they
2 didn't have this broader liability? They say without
3 global protections they never would have contributed to
4 the trust fund. And I would like you to answer that
5 question.

6 MR. ISSACHAROFF: We don't know that, Your
7 Honor. We know that the record indicates that they did
8 not believe in 1985, when they signed a letter among all
9 the counsel that was submitted to the court, that they
10 were getting any such release. So there's nothing in
11 the record that indicates that they would not have gone
12 into this deal, and in fact, there have been many, many
13 asbestos workouts since that time, none of which have
14 releases that do not affect the debtor's estate.

15 So I don't know that the factual premise is
16 there. But let's assume that it was, for the purposes
17 of the question. Let's assume that no insurance company
18 would go -- go into this, unless they get releases that
19 go far beyond normal jurisdiction of a bankruptcy court.
20 I think that under Syngenta that has to be given to them
21 by Congress. Congress in 1334 gave specific forms of
22 jurisdiction. It gave the "arising under" and "arising
23 in" which pertained to the activities of the bankrupt,
24 of the debtor; and it gave "related to" and "related
25 to," as this Court interpreted in Celotex, adopting the

1 Third Circuit standard, "related to" means that it has
2 an impact upon the estate of the debtor.

3 JUSTICE ALITO: Isn't that what the Congress
4 gave them in the 1994 Bankruptcy Act?

5 MR. ISSACHAROFF: No. The Bankruptcy Act
6 actually has very interesting language on point. The
7 Bankruptcy Act says, in 524(g)(4)(ii), says that the
8 relief is for demands on the debtor, that flow from
9 demands on the debtor, and by reason of the demands on
10 the debtor. That is the trigger language before we get
11 to Roman numeral (iii), which has to do with insurance.

12 So if one actually looks at the statute, the
13 form of the statute is that there is releases to the
14 extent that there is a claim of derivative liability.

15 JUSTICE ALITO: Do you dispute the
16 proposition that that statute was passed in large part
17 for the purpose of codifying what was done in this case?

18 MR. ISSACHAROFF: I do not --

19 JUSTICE ALITO: The sort of thing that was
20 done in this case?

21 MR. ISSACHAROFF: I do not dispute that at
22 all. But what was done in this case was not simply what
23 Judge Lifland did, but what Judge Lifland did as
24 affirmed by the Second Circuit. The bankruptcy court
25 does not have stand-alone powers to make determinations

1 as pertain to, particularly, common law actions. That
2 goes back to the Marathon Pipeline issue that this Court
3 had to -- had to address and that Congress sought to fix
4 by maintaining a tight hold on the "relating to"
5 jurisdiction of the Court and making sure that that's
6 reviewable by the district court and by the court of
7 appeals. So the -- yes, Congress codified the -- the
8 Manville deal in -- in 1994, but they did so as it was
9 interpreted by the controlling courts.

10 JUSTICE BREYER: In your view, if Smith has
11 a 2 or \$4 billion claim against company X and the
12 pension fund together, company X is in bankruptcy, and
13 so the judge says: "I want to enjoin this claim, we
14 will settle it," you know, but the pension fund --
15 doesn't -- doesn't the bankruptcy judge -- if in fact
16 without the pension fund you couldn't reorganize,
17 wouldn't the bankruptcy judge have authority to cut off
18 the claim against the pension fund?

19 It's a question of whether the company goes
20 down the drain or whether it doesn't. And --

21 MR. ISSACHAROFF: The rule --

22 JUSTICE BREYER: -- the pension fund is all
23 mixed up in this together.

24 MR. ISSACHAROFF: The rule of thumb, Justice
25 Breyer, is that if there is an automatic indemnity

1 against the -- the --

2 JUSTICE BREYER: No, there is nothing here
3 in indemnity.

4 MR. ISSACHAROFF: Then our position is that
5 it does not have authority.

6 JUSTICE BREYER: And that would be true of
7 all the workforce and they have claims against the
8 individual members of the workforce? They have -- it
9 seems to me it would be an unusual case, I agree with
10 you on that, but to say never -- to say never is what is
11 bothering me.

12 MR. ISSACHAROFF: Well, I think that it
13 comes down to two questions, Justice Breyer. One is
14 whether the constitutional authority under Article I
15 reaches beyond --

16 JUSTICE BREYER: Well, why not -- because
17 there is a good constitutional protection; it's called
18 the due process clause. If the bankruptcy judge goes
19 too far, it's a due process violation.

20 MR. ISSACHAROFF: No, I don't -- I -- I
21 disagree with that, Justice Breyer. I think that the
22 bankruptcy court has to point to statutory authority.

23 JUSTICE BREYER: Well, there's language,
24 broad language.

25 MR. ISSACHAROFF: Broad language.

1 JUSTICE BREYER: Broad language.

2 MR. ISSACHAROFF: Yes, in the statute, yes.
3 Yes, there is broad language in the statute. The
4 "relating to" language is quite broad. But the
5 "relating to" language has been interpreted, and every
6 court that has looked at it, this Court and -- this
7 Court and every court of appeals, without any dissent in
8 any court of appeals that has looked at this issue --
9 has decided that "relating to" means an impact on the
10 estate. Without that, the bankruptcy power has no
11 tethers.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Cohn.

14 ORAL ARGUMENT OF JACOB C. COHN

15 ON BEHALF OF THE RESPONDENT

16 CHUBB INDEMNITY INSURANCE COMPANY

17 MR. COHN: Mr. Chief Justice, and may it
18 please the Court:

19 A discharge in bankruptcy wipes away a
20 debtor's liability for its prepetition conduct. Yet
21 Travelers' interpretation of the 1986 orders gives
22 Travelers broader protection than even Manville could
23 obtain because it gives Travelers immunity for its
24 knowledge. Bankruptcy discharges do not erase a
25 debtor's knowledge.

1 If Manville started making asbestos products
2 again after its discharge, it would not be immune for
3 claims that it acted with the knowledge that asbestos is
4 dangerous. Yet, that is precisely the protection that
5 Travelers argues that it is entitled to here.

6 And to take, for example, the Wise
7 complaint -- which The Travelers, Petitioners, put forth
8 as a typical claim here -- and you look at the class
9 they purport to represent, they purport to represent a
10 class of disappointed claimants against three companies,
11 Combustion Engineering, AC&S, and A&I, none of which are
12 Manville. They claim that they are not seeking even to
13 recover for asbestos bodily injury claims. Instead,
14 they claim that they settled their claims too cheaply
15 with Combustion Engineering because, for example, in the
16 1990s allegedly, decades, 15 years after the
17 confirmation and discharge of Manville, Travelers in
18 defending Combustion Engineering, with the knowledge
19 that asbestos is dangerous or whatever from working with
20 Manville, provided false interrogatory responses on
21 behalf of Combustion Engineering. That is how far
22 afield the proffered interpretation of the 1986 order
23 goes.

24 JUSTICE ALITO: Is it not the case that most
25 of the claims are claims based on -- based on Manville?

1 MR. COHN: Are they claims --

2 JUSTICE ALITO: Relating to what Travelers
3 did in relation to Manville, rather than other
4 companies.

5 MR. COHN: I don't think it's related to
6 what they did. I think the distinction here is relating
7 to what they know. The point is --

8 JUSTICE ALITO: You're -- you're making the
9 argument that some of these claims concern things that
10 Travelers did in relation to the defense of other
11 asbestos manufacturers. Now, maybe that means that the
12 -- the bankruptcy court interpreted the order too
13 broadly or -- in that respect. But what does that have
14 to do with the main issue here?

15 MR. COHN: If an asbestos claimant, an
16 independent action plaintiff, is seeking to recover from
17 Travelers for Manville-derived liability, it's barred.
18 That was the purpose of the remand by the Second Circuit
19 having provided the appropriate measuring stick to the
20 bankruptcy court to go look at these complaints and
21 figure out whether or not in fact somebody's trying to
22 take money out of Travelers' pocket for Manville's
23 liabilities.

24 JUSTICE SOUTER: But isn't it the case, to
25 make sure I understand it, the Wise complaints are the

1 -- are the exception. They are the only complaints, as
2 I understand it in this current round of litigation,
3 that claims that the actual harm to them resulted from
4 actions other than actions of Manville. Is that
5 correct?

6 MR. COHN: The statutory -- not exactly.
7 The statutory direct actions, which account for 400
8 million of the half billion dollars they'd like to pay
9 to these alleged contemnors, all have to do with claims-
10 handling practices of Travelers with respect to other
11 insureds besides Manville.

12 The Common Law independent actions allege
13 that the insurance industry as a whole learned of the
14 dangers of asbestos. It has a free-standing duty to the
15 world to warn the world of the dangers of asbestos.
16 Chubb Indemnity Insurance Company was not a Manville
17 insurer, yet Chubb is alleged to have been in cahoots
18 with the rest of the industry in failing to warn the
19 world, and, therefore, they along with the rest of the
20 insurance industry face unlimited liability unrelated to
21 insurance policies for this --

22 JUSTICE SOUTER: No, I understand -- or
23 maybe I don't -- maybe I don't understand the -- every
24 step in the liability claim. My only question was,
25 among the plaintiffs, is it correct that the only

1 plaintiffs who claim they were hurt physically by
2 asbestos as a result of the actions of somebody, the
3 only ones who are claiming that the somebody was other
4 than Manville are the Wise plaintiffs. Is that correct?

5 MR. COHN: I think not.

6 JUSTICE SOUTER: No?

7 MR. COHN: I think that every asbestos
8 claimant by and large has a claim against Manville, but
9 that doesn't mean they are not --

10 JUSTICE SOUTER: Simply because of
11 Manville's position in the --

12 MR. COHN: The ubiquity of Manville asbestos
13 and their activities makes practically everybody, if not
14 everybody, a Manville claimant, at least --

15 JUSTICE SOUTER: So -- so that you are
16 saying in effect everybody ultimately is claiming
17 against Manville, the Wise plaintiffs and every other
18 set of plaintiffs in this -- in this group of direct
19 liability claimants, right?

20 MR. COHN: Well, is or can. But that
21 doesn't mean that they are attempting to assert
22 liability against an insurance company because of
23 Manville's own conduct.

24 JUSTICE SOUTER: I -- I understand your
25 cause of action. Okay. I don't want to --

1 MR. COHN: So, getting back to the next
2 point I would like to make is, as Mr. Issacharoff has
3 stated, the Second Circuit was presented and the
4 bankruptcy court was presented in 1986 with a plan and
5 with an order that was stated to be premised upon the
6 derivative liability of Travelers for Manville.

7 JUSTICE BREYER: Who stated it? Who stated
8 that? I mean, when I -- I read what the judge said at
9 the time. I've read language of the order, and I
10 haven't found there anything that said that. What it
11 talked about was policies that were seriously
12 intertwined with the liability of Manville.

13 MR. COHN: Well, the insurance settlement
14 order, which is what is at issue here -- which is not
15 the channeling injunction order, by the way; it was
16 entered before that -- was premised upon the policies
17 being property of the estate. That was --

18 JUSTICE BREYER: Is this the confirmation
19 order?

20 MR. COHN: The confirmation order is
21 actually not directly at issue.

22 JUSTICE BREYER: That's different. Okay.
23 So the confirmation order --

24 MR. COHN: The confirmation order is
25 purposely --

1 JUSTICE BREYER: But there's another piece
2 of paper called "the insurance settlement order," which
3 says that the confirmation order and all these other
4 definitions and the injunction just refer to derivative
5 liability?

6 MR. COHN: The --

7 JUSTICE BREYER: Yes or no?

8 MR. COHN: -- definition of -- yes --

9 JUSTICE BREYER: Yes?

10 MR. COHN: No. The definition of --

11 JUSTICE BREYER: No? Okay. All right.

12 MR. COHN: -- of "policy claims" is
13 contained in the --

14 JUSTICE BREYER: Well, then I don't see what
15 has to do with it.

16 MR. COHN: Well, the definition of "policy
17 claims" is contained in the settlement order, which is
18 December 18, 1986. It was a free-standing order that
19 was entered --

20 JUSTICE BREYER: All right. That's a
21 different definition than the definition of "policy
22 claims" in the injunction, presumably.

23 MR. COHN: There are two injunctions, Your
24 Honor.

25 JUSTICE BREYER: All right. I have a

1 confirmation order, an injunction. It defines "policy
2 claims" in both as a lawsuit relating to any or all of
3 the insurance policies.

4 MR. COHN: That is the injunction in the
5 insurance injunction.

6 JUSTICE BREYER: And your other piece of
7 paper says what?

8 MR. COHN: The other piece of paper is even
9 clearer. That's why they don't rely on it. It says,
10 you may not seek to recover asbestos health obligations,
11 which are the future Manville-derived asbestos claims
12 from Travelers, from a settling insurance company. They
13 don't even try to argue that the channeling injunction
14 gets them there. They're arguing that the insurance
15 policy buy-back order, if you want to call it that, the
16 insurance settlement order pursuant to which they
17 retired their insurance obligations was -- the
18 definition of "policy claims" was --

19 JUSTICE BREYER: You go on. Don't worry.
20 I'll look it up.

21 MR. COHN: Thank you.

22 CHIEF JUSTICE ROBERTS: Why doesn't the Due
23 Process Clause fully protect you? If the bankruptcy
24 court made a mistake and purported to exercise
25 jurisdiction over your claims, then I suppose you have,

1 in particular cases if you can establish it, a due
2 process claim that fully protects you.

3 MR. COHN: Chubb, Mr. Chief justice, in fact
4 has an alternative argument that was never reached that,
5 as a non-Manville insurer, it was in a position of an
6 unrepresented future claimant, and in fact it cannot be
7 constitutionally bound by res judicata to the 1986
8 order.

9 CHIEF JUSTICE ROBERTS: I saw in the -- I
10 guess it was in the Travelers' reply brief, the
11 suggestion that there was a future -- somebody
12 representing future claimants.

13 MR. COHN: Future tort claimants, not future
14 insurance defendants.

15 CHIEF JUSTICE ROBERTS: Where is that?

16 MR. COHN: Cause of action claimants.

17 CHIEF JUSTICE ROBERTS: Where is that
18 limitation spelled out?

19 MR. COHN: Well, if you look at the order
20 that -- that appoints the future claims representative,
21 it is to represent the interests of people who have been
22 exposed to Manville asbestos but have not yet been --
23 manifested harm because of the long latency period of
24 asbestos injuries.

25 CHIEF JUSTICE ROBERTS: Is that a

1 description of the clients at issue here? They've been
2 -- they've all been exposed to asbestos?

3 MR. COHN: It's not a description of Chubb,
4 Your Honor.

5 CHIEF JUSTICE ROBERTS: I know, but I'm
6 asking about the claimants.

7 MR. COHN: The claimants presumably were
8 people that were -- the individual independent action
9 plaintiffs presumably were represented by the future
10 claimants' representative in 1986 and were at that time
11 future claimants or else their -- you know, their harm
12 would have arisen well before and they wouldn't be in
13 these cases in this decade.

14 If there are no further questions, Your
15 Honor --

16 JUSTICE GINSBURG: Yes, in the -- at the
17 time of 1986, there were many claims against Manville,
18 of course, for Manville's liability. These later suits
19 in State court about the insurance company's independent
20 obligation -- I asked this to counsel on the other side
21 -- to what extent was there such litigation in 1986?

22 MR. COHN: May I respond?

23 CHIEF JUSTICE ROBERTS: Sure.

24 MR. COHN: There were no independent actions
25 of the flavor that you are seeing here. I am not aware

1 of any claim like that. There were claims by other
2 Manville coinsureds. There were claims by Manville, and
3 there may have been some direct actions. I'm just
4 simply not familiar -- we didn't come into this case
5 until 2004, when our rights were impugned. So I don't
6 know the answer to whether or not there was anything
7 just like this, but I doubt it.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Five minutes, Mr. Ostrager.

10 REBUTTAL ARGUMENT OF BARRY R. OSTRAGER

11 ON BEHALF OF THE PETITIONERS

12 MR. OSTRAGER: Thank you. I have five quick
13 points I want to make.

14 First, the Second Circuit upheld the core
15 factual findings that, quote, "the instant claims
16 against Travelers arise out of its provision of
17 insurance coverage to Manville," close quote. That's
18 from the Second Circuit opinion. It's in the appendix
19 at page 33.

20 Second, there is no use of the word
21 "derivative" in either the confirmation order, the
22 settlement order, or 524(g). 524(g), about which we
23 haven't spoken enough, clearly and unmistakably reflects
24 Congress's intent to allow channeling injunctions that
25 bar claims against a debtor and those, like insurers,

1 who are directly or indirectly liable for claims against
2 the debtor. That is 524(g)(4)(A)(ii) and Roman (iii).
3 524(g) expressly provides an asbestos channeling
4 injunction shall be valid and enforceable and may not be
5 revoked or modified by any court except for an appeal.

6 We cite in our reply brief the fact that a
7 Senate report accompanying an earlier version of the
8 bill clarified that 524(g) is -- quote, "is not meant to
9 give the bankruptcy courts authority which they do not
10 already possess and simply codifies the court's ability
11 to issue supplemental permanent injunctions which are
12 irrevocable except on appeal."

13 There is a final judgment in this case
14 confirming the plan of reorganization. The Second
15 Circuit issued that -- confirmed that judgment twice,
16 once in the MacArthur case and once in the Cane case.
17 And then in the O'Malley case, which is a 1996 case, the
18 Second Circuit rejected a collateral attack on the
19 confirmation order on two grounds.

20 First, they found that the performance of
21 the futures representative that Judge Lifland had
22 appointed and which was incorporated in 524(g) and
23 modelled on the Manville reorganization proceeding --
24 the Second Circuit found that the legal representative,
25 quote, "took an active and aggressive role in protecting

1 future claimants in this litigation."

2 And, secondly, the Second Circuit rejected
3 the challenge to the continuation of the 1986 order
4 enjoining the suits against insurers as being without
5 merit because such an injunction was essential to the
6 success of the settlement, and its continuation was well
7 within the court's discretion.

8 As respects Chubb, Judge Koetle in affirming
9 Judge Liflin's 2004 order, specifically found that
10 Chubb, a multinational insurer that has paid more than a
11 billion dollars to resolve asbestos-related claims, was
12 clearly on notice of these proceedings. We cite in our
13 reply brief on pages 10 and 11 several 524(g)
14 injunctions that have run to the benefit of Chubb which
15 contain the exact same "based upon, arising out of, or
16 related to" language that appears in the original
17 Manville order.

18 We didn't cite -- but it's a matter of
19 public record -- that Chubb paid \$550 million to resolve
20 through a bankruptcy proceeding with Fibreboard
21 liabilities relating to Fibreboard receiving the same
22 "based upon, arising out of, or related to" protection.

23 The Manville plan carries out the core
24 values of bankruptcy. The Manville trust has made
25 payments to 660,000 asbestos claimants -- that's at

1 record at 139 -- funded by \$2.8 million of proceeds from
2 insurance settlements and the sale of the reorganized
3 and rehabilitated Manville --

4 JUSTICE BREYER: Is there anything you want
5 to say about the practical thing I have in the back of
6 my mind which may be false? That language permits your
7 position, but it certainly has rarely been implemented,
8 if ever. And I see that, but in the back of my mind is
9 the fact that if we start mucking around and give narrow
10 meanings to these things now, there are going to be
11 hundreds of thousands of people who won't get
12 compensated who have asbestos --

13 MR. OSTRAGER: Precisely.

14 JUSTICE BREYER: Is that true?

15 MR. OSTRAGER: That is absolutely --

16 JUSTICE BREYER: Is there anything to back
17 that up?

18 MR. OSTRAGER: And I -- I wanted to point
19 out that in your dissent in the Ortiz case you said that
20 judges can and should search aggressively for ways
21 within the framework of existing law to avoid delay and
22 expense so great as to bring about a massive denial of
23 the injunction --

24 JUSTICE BREYER: I said that.

25 JUSTICE GINSBURG: That was the dissenting

1 opinion.

2 MR. OSTRAGER: I understand that.

3 But you were -- on that particular point you
4 were correct. And we have a General Motors -- we have a
5 General Motors potential that I can see.

6 JUSTICE GINSBURG: But there are two
7 decisions of this Court, Abcam and Ortiz, that reject
8 that position.

9 MR. OSTRAGER: In Ortiz the -- the Court
10 absolutely recognized that where you have a special
11 statutory scheme that is designed as 524(g) and (h) is
12 to deal with these types of issues, that is an exception
13 to Hansberry versus Lee. I cannot --

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 That case is submitted.

16 (Whereupon, at 11:06 a.m., the case in the
17 above-entitled matter was submitted.)

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A				
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