

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

20 The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States

22 at 10:03 a.m.

23 APPEARANCES:

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25 the Petitioners.

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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 insurers' 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, literally, the record in front of me now.
24 But didn't the 1986 order expressly include permission
25 for certain actions alleging insurer misconduct to

1 proceed, those 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 used 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, the Second Circuit held

1 in 1996 that such an injunction is essential to the
2 success of the settlement, and its continuation was well
3 within 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 a 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*. There's
18 no --

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

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

7 MR. OSTRAGER: Justice Scalia --

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

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

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

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

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

1 within the bankruptcy power. Isn't that true?

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

4 JUSTICE SCALIA: Okay. And that --

5 MR. OSTRAGER: This is not our case.

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

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

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

1 bankruptcy court. And that could be wrong or it could
2 be right. But in the Second Circuit's view the
3 bankruptcy court lacked authority to deal with the
4 nondebtors' liability to the claimants.

5 MR. OSTRAGER: There were, Justice Ginsburg,
6 60 pages of findings of fact indicating that the direct
7 action suits against Manville was an end run around the
8 --

9 JUSTICE GINSBURG: The direct action suits
10 against Travelers.

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

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

21 MR. OSTRAGER: Well, what -- the reason that
22 this is so critical is that, as the --

23 JUSTICE STEVENS: Can you answer my
24 question?

25 MR. OSTRAGER: They do not seek assets of

1 the estate, although Travelers would potentially have
2 contribution claims against Manville because all of the
3 claims --

4 JUSTICE STEVENS: But -- but why does a
5 bankruptcy court have jurisdiction to enjoin third-party
6 actions against some creditor of the estate?

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

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

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

1 Now, the Second --

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

5 MR. OSTRAGER: That is correct.

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

11 JUSTICE STEVENS: How do these cases --

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

19 MR. OSTRAGER: I would respectfully
20 disagree. 524(g) specifically says that asbestos --
21 asbestos channeling injunction "shall be valid and
22 enforceable and may not be revoked or modified by any
23 court except through direct appeal." And 524(h)(i)
24 specifically says that the pre-1994 asbestos channeling
25 injunctions shall be considered to meet all of the

1 requirements of 524(g)(2), which is in our appendix at
2 page 471, which means that they automatically meet
3 524(g)(3)(A)(i) and may not be revoked or modified
4 except through appeal.

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

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

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

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

18 JUSTICE STEVENS: None of whom would be
19 affected --

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

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

24 MR. OSTRAGER: But the point is that there
25 couldn't have been have a Manville reorganization

1 without the insurance settlements. The Second Circuit
2 recognized that. The Second Circuit further recognized
3 that these direct actions violate the express terms of
4 the injunction that Judge Lifland, the bankruptcy judge,
5 granted in this case.

6 JUSTICE STEVENS: Why isn't it harmless
7 error?

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

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

24 MR. OSTRAGER: Mr. Chief Justice, that would
25 not be covered, and that is certainly not what the

1 bankruptcy court intended or said.

2 CHIEF JUSTICE ROBERTS: No, I know they that
3 didn't intend anything with respect to traffic
4 accidents. But my question is how far does your theory
5 reach?

6 MR. OSTRAGER: This Court has recognized in
7 the Katz case that bankruptcy extends beyond the res.
8 And --

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

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

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

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

1 JUSTICE KENNEDY: Well, but it seems to me
2 you --

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

11 MR. OSTRAGER: In this order, the -- the
12 limitation on the injunction was based upon "arising out
13 of or related to." I would submit that the traffic
14 accident falls outside the scope of that.

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

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

25 JUSTICE GINSBURG: May I interrupt you

1 there? Because you told me that the Second Circuit
2 ignored 524(g), and I'm looking at page 33a of the
3 petition for cert, and the Second Circuit addresses
4 524(g), and its discussion continues for a couple pages.
5 I don't see how that's ignoring the issue.

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

11 JUSTICE GINSBURG: May I have an answer to
12 my question about the Second Circuit ignoring 524(g)
13 when they devoted two and a half pages to it?

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

18 JUSTICE GINSBURG: If it --

19 MR. OSTRAGER: -- in 524(g).

20 JUSTICE GINSBURG: Another mystery in this
21 most mysterious case: If it was so clear that the
22 original order, the 1986 order, ensured Travelers that
23 it would have no liability for asbestos claims, period,
24 then why did it put up \$400 million, much more than it
25 put up originally, in order to settle with people who

1 were bringing precisely that kind of claim?

2 MR. OSTRAGER: During the course of the 5
3 years of proceedings before the bankruptcy court, the
4 case was referred to mediation before the Honorable
5 Mario Cuomo. And in connection with that mediation,
6 there was a business decision made to secure releases
7 much broader than the injunction that was contained.
8 Travelers would, in connection with the mediation
9 process, participate in a settlement.

10 JUSTICE GINSBURG: What was the difference
11 between the release that you say flowed from the 1986
12 order and the releases that were obtained with the
13 \$400 million?

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

18 JUSTICE GINSBURG: So, specifically what was
19 not included in the 1986 release that was included as a
20 result of the settlement negotiations?

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

23 JUSTICE GINSBURG: But I would like to know
24 the difference. What would -- what would Travelers be
25 liable for under the 1986 order as you read it --

1 MR. OSTRAGER: Potentially --

2 JUSTICE GINSBURG: -- that they got freedom
3 from as a result of this settlement?

4 MR. OSTRAGER: Potentially the traffic
5 accident that Mr. Chief Justice referenced.

6 I want to reserve --

7 JUSTICE GINSBURG: So then -- so that the
8 2000 clarification order did exonerate them from traffic
9 accidents?

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

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

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

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

2 JUSTICE GINSBURG: I haven't asked my
3 question.

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

5 JUSTICE GINSBURG: I would like to know what
6 -- what notice did the people who were left out of the
7 settlement, who were not part of the settlement, who
8 say, so we want our day in court -- what notice did they
9 have and what opportunity to be heard?

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

13 JUSTICE SOUTER: How did they get the
14 notice? You say it's broad notice. What exactly was
15 done?

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

22 JUSTICE GINSBURG: How can it be successive
23 when they didn't even get their -- I mean they -- these
24 people haven't had a day in court. They may have a
25 claim that's no good. All State courts so far have said

1 their claim is no good. But they have a right to sue.

2 MR. OSTRAGER: This is what Congress has
3 made provision for in 524(g) and (h). This is what I
4 believe the Court contemplated in Ortiz at page 846,
5 also in Martin v. Wilks, also in Taylor v. Sturgell.
6 And I think this rule was foreshadowed as long ago as
7 Mullane v. Central Hanover Trust Company.

8 JUSTICE GINSBURG: The rule -- the
9 particular rule that I am asking you about is that
10 people who have not had their day in court can be
11 precluded --

12 MR. OSTRAGER: Yes.

13 JUSTICE GINSBURG: -- on the basis of
14 newspaper notice and radio announcements?

15 MR. OSTRAGER: As the Court said in Mullane,
16 that "beneficiaries whose interests are either
17 conjectural or future, or although they could be" --

18 JUSTICE GINSBURG: That was the best
19 possible notice, which included regular mail notice.

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

1 I'd like to reserve, if I may, with respect,
2 the balance of my time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Issacharoff.

5 ORAL ARGUMENT OF SAMUEL ISSACHAROFF

6 ON BEHALF OF THE RESPONDENTS

7 CASCINO ASBESTOS CLAIMANTS

8 MR. ISSACHAROFF: Mr. Chief Justice, and may
9 it please the Court:

10 As the Court has indicated, this is a
11 question of jurisdiction, and the issue is whether a
12 bankruptcy court may enter an order that goes to a
13 nondebtor, offers a release against independent State
14 law claims.

15 JUSTICE KENNEDY: Well, as to the 1986 order
16 it seemed to me that the counsel for the Petitioner
17 might have answered the question posed by the Chief
18 Justice with the traffic accident hypothetical: That is
19 an interesting question of subject matter jurisdiction,
20 and maybe there is subject matter jurisdiction, maybe
21 there isn't, but that issue as to the 1986 order is
22 final. Now, that brings us to the -- the later order,
23 2004, 2006. And then the question is whether or not
24 that's just a reiteration of the earlier order or a
25 further expansion of jurisdiction that can be reached.

1 Why couldn't the counsel for Petitioner have
2 given that answer?

3 MR. ISSACHAROFF: Well, the counsel for
4 Petitioner can't give that answer for two separate
5 reasons. The first has to do with the subject matter
6 jurisdiction limitation of a bankruptcy court, that as
7 soon as the release is outside the debtor's estate and
8 impact on the debtor's estate or the debtor/creditor
9 relationship, that places it beyond the power of the
10 bankruptcy court.

11 JUSTICE KENNEDY: But putting aside
12 questions of notice, if these parties had been
13 represented in the appeal of the 1986 order, maybe the
14 subject matter jurisdiction ruling was correct; maybe it
15 was incorrect; but it's done.

16 MR. ISSACHAROFF: If -- if these parties had
17 been present, if they had been appealed, if this had
18 been in effect a settlement orchestrated through the
19 bankruptcy court, then there might be the -- the ability
20 to release as a class action --

21 JUSTICE KENNEDY: So then it's just a
22 question of personal jurisdiction and notice. It's not
23 a question of subject matter jurisdiction --

24 MR. ISSACHAROFF: It is --

25 JUSTICE KENNEDY: -- because subject matter

1 jurisdiction can be concluded in an earlier order and
2 there can be no collateral attack if you've been a
3 party.

4 MR. ISSACHAROFF: Justice Kennedy, it is a
5 question of subject matter jurisdiction if it is not to
6 be a consensual agreement. If there is not to be -- the
7 purpose of notice is to give you the opportunity to opt
8 out and to object --

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

15 MR. ISSACHAROFF: They do know about it.
16 You're --

17 JUSTICE BREYER: Okay, so there is no notice
18 problem. If there were a notice problem, I guess there
19 would be a due process problem. So, I don't see what
20 notice has any more to do with this than the NCAA
21 tournament.

22 [Laughter.]

23 MR. ISSACHAROFF: Justice Breyer, I
24 misunderstood Justice Kennedy's question to be about
25 1986, not about the present. And in -- in the original

1 confirmation, these people had not filed suit, had not
2 made claims at the time.

3 JUSTICE BREYER: Well, in the original
4 confirmation, there are problems in asbestos cases, like
5 other bankruptcy cases, of giving people notice.
6 Bankrupt people often give notice to many who aren't
7 there. And I don't know that -- maybe there's a
8 constitutional problem with some of them, but I would
9 have thought jurisdiction under the statute is clear.

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

11 JUSTICE BREYER: And so what is -- is this
12 about notice?

13 MR. ISSACHAROFF: No, I don't believe it is
14 about notice.

15 JUSTICE BREYER: No. I didn't think so. I
16 thought this was about the case of the meaning of the
17 words in the statute that they have authority in the
18 bankruptcy court to issue any order, process, or
19 judgment that is necessary or appropriate to carry out
20 the provisions of the title. And we've said that the
21 test is whether the outcome of the proceeding -- this is
22 the other State proceeding -- could conceivably have any
23 effect on the estate being administered in bankruptcy.
24 So, as I understood it, that's the test.

25 MR. ISSACHAROFF: I agree.

1 JUSTICE BREYER: That's what -- that's what
2 this Court said. Now, they may be few and far between,
3 an order like this, but where there are special reasons
4 for it -- suppose it's a pension fund, and you want to
5 reorganize the company, and this is the employees' --
6 they're -- the employees' pension fund is worried about
7 claims which are related directly. Or suppose it's an
8 officer, or suppose it's a worker, and to reorganize the
9 company you must cut the claims off. And otherwise, it
10 is down the drain for everyone, no more money in the
11 fund, no more jobs for the employees.

12 Now, what is it here that would say there is
13 no special circumstance such that a bankruptcy judge can
14 ever do it, no matter what?

15 MR. ISSACHAROFF: In -- in your example,
16 Justice Breyer, you rely upon this Court's decision in
17 Celotex, which adopted the Pacor test from the Third
18 Circuit. And in each case that has applied that, the
19 question is whether there is a potential impact upon the
20 estate of the bankrupt. The critical issue in this case
21 is that not a single one of the claims that is presented
22 or seeks to be enjoined here has any potential impact on
23 the --

24 JUSTICE BREYER: Is what you are saying also
25 true of the various other asbestos cases that have, I

1 think, done this?

2 MR. ISSACHAROFF: There is no asbestos case
3 that I am aware of that has released third-party claims
4 that have no impact on the debtor. I am not aware of a
5 single one.

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

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

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

18 MR. ISSACHAROFF: I think that the facts of
19 record indicate that Travelers went into this particular
20 deal full well knowing that it was not getting this kind
21 of release because that kind of release was not
22 available. And I think --

23 JUSTICE SOUTER: What do you -- what do you
24 make of the provision of the 1986 order to the effect
25 that, as I understand it and as I asked your brother a

1 moment ago, existing claims based upon misbehavior of
2 the -- of the insurance company were not cut off? The
3 reasonable implication, I think, of that is that any
4 future claims based upon insurance company misconduct
5 would be cut off by the terms of the '86 order.

6 What -- what do you say about that
7 implication?

8 MR. ISSACHAROFF: Justice Souter, I would
9 say two things. First of all, that the record speaks to
10 specific negotiations between Travelers and Manville and
11 between all the insurers and Manville on prospective
12 liabilities of the -- of the insurance companies, so
13 that the bankruptcy court can be read to be just
14 cleaning up what had happened retrospectively up until
15 that point.

16 JUSTICE SOUTER: Yes, but it was prospective
17 liability based upon misconduct of the insurance
18 company, not merely derivative of -- of its insurance
19 contract in -- in the conventional sense.

20 MR. ISSACHAROFF: I -- I understand that.
21 But it's also important -- I think that there was a
22 question raised by -- by Justice Alito a minute ago
23 about what exactly had happened in 1986 and whether the
24 Second Circuit was making findings of fact or findings
25 of law.

1 In 1988, in the MacArthur case, the Second
2 Circuit relied on section 1334(d) as the jurisdictional
3 basis for upholding the district -- the bankruptcy
4 order. Section 1334(d), which is now recodified as
5 1334(e), has to do only with the disposition of the
6 assets of the estate, the property of the estate.

7 And so, the Second Circuit order in 19 -- in
8 1988, which is the controlling legal authority on what
9 the scope of the release was, went only to the property
10 of the estate. And so, I don't think that there was any
11 understanding at the time by anyone that there was a
12 release of claims that were independent of the property
13 of the estate or made -- or had no hold upon or
14 potential impact upon the property of the estate.

15 JUSTICE BREYER: Why does it say -- it
16 doesn't say that. What it says in the release is it
17 says: We are releasing or everybody is enjoined from
18 bringing a suit for policy claims against Travelers, and
19 a policy claim is any and all claims based upon, arising
20 out of, or relating to any insurance policy.

21 And then the bankruptcy judge, in thousands
22 of findings, I guess, said that your lawsuits do relate
23 to the relevant insurance policies. Indeed, the claims
24 are based upon the joint -- the obligation of Travelers
25 to defend those very policies, given the obligation to

1 defend Johns-Manville.

2 So the relation is exceedingly close, and
3 the language covers it, and there are thousands of pages
4 of findings, I guess, that show that.

5 MR. ISSACHAROFF: Well, Your Honor, some of
6 the releases that are in effect in this case go to
7 conduct that occurred after 1986. Some of them have to
8 do with claims -- for example, the Wise claim which is
9 referred to in the Second Circuit's opinion has to do
10 with claims that have nothing to do with the coverage of
11 Manville. They have to do with actions taken with
12 regard to other insurers. This is an exceedingly --

13 JUSTICE KENNEDY: Well, settlement clauses
14 often release future claims. It's standard stuff in a
15 release clause.

16 MR. ISSACHAROFF: Absolutely, Your Honor.
17 Contract clauses do it and class actions do it,
18 consensual agreements, when there is notice, the
19 opportunity to opt out, and there is volition, they
20 often release much broader. But a bankruptcy court is
21 an extraordinary proceeding. A bankruptcy court is an
22 obligation that rights are terminated without any
23 consensual --

24 JUSTICE KENNEDY: But that's subject matter
25 jurisdiction, and that is foreclosed. Now, if you are

1 talking about personal jurisdiction that may be
2 something else.

3 MR. ISSACHAROFF: No, I'm not raising the
4 personal --

5 JUSTICE KENNEDY: But you're talking about
6 subject matter jurisdiction, and that has been
7 foreclosed by the earlier circuit court of appeals'
8 opinion. And the court of appeals' opinion that we are
9 reviewing now seems to conflate that issue.

10 MR. ISSACHAROFF: I don't believe so, Your
11 Honor. I think that in the 1988 opinion in the
12 MacArthur case, the Second Circuit was quite clear that
13 all that was being released was claims against insurance
14 proceeds that had been delivered and had become property
15 of the estate, whose depletion could affect the estate.
16 And --

17 JUSTICE SOUTER: Okay. If that is -- if
18 that is the case -- let's assume that that is -- that it
19 was that narrow. The fact remains, however, that at
20 this point, as Justice Kennedy has suggested several
21 times, my understanding is at least that you cannot
22 collaterally attack the jurisdiction of the court who
23 entered the order it did. And the only claim that you
24 can make now is that the order by its terms did not
25 cover your cases.

1 Do you agree?

2 MR. ISSACHAROFF: I agree that that is the
3 --the general rule, that is correct. I agree further
4 that the Second Circuit expressly held, at page 31a,
5 that the error of the bankruptcy court was that it
6 subsequently interpreted the order more broadly than the
7 Second Circuit had affirmed in 1988. I think that
8 that's the heart of the case, because --

9 JUSTICE SOUTER: So it's a question of the
10 scope of the order?

11 MR. ISSACHAROFF: Yes, it is.

12 JUSTICE SOUTER: Okay.

13 MR. ISSACHAROFF: Yes, it is. There is a
14 question which this Court has actually not addressed,
15 which is about the prospective application of an order
16 that is entered without subject matter jurisdiction. I
17 don't think there's any case squarely on point.

18 Certainly there are cases that allow
19 prospective collateral challenges to an order entered
20 without personal jurisdiction. I don't think the Court
21 has addressed the subject matter jurisdiction, but it
22 doesn't have to --

23 JUSTICE ALITO: But didn't this --

24 JUSTICE SOUTER: They do -- I didn't mean to
25 cut you off. I'm sorry.

1 JUSTICE ALITO: No, go ahead.

2 MR. ISSACHAROFF: I don't think the Court
3 has to address this here, Your Honor, because in this
4 case, the initial order only went -- as affirmed by the
5 Second Circuit, only went to the property of the estate.
6 And the Second --

7 JUSTICE SOUTER: May I then raise a question
8 there? I mean, I think there is a legitimate question
9 about that, given the -- given the rather general terms
10 of the -- of the scope of the order. And I would like
11 your response to this. It seems to me as a background
12 consideration that we should have in mind in
13 interpreting how broad that order was. It's been raised
14 a couple times; Justice Breyer raised it a moment ago.
15 And it's this: It is one argument to say that the
16 bankruptcy court does not have jurisdiction and
17 derivatively an order that it issued should not be
18 interpreted to cover any claim that does not affect or
19 cannot deplete the bankruptcy estate taken as a given
20 fact at the time this later case is brought.

21 Another view of jurisdiction would be that
22 the bankruptcy court has jurisdiction and hence an order
23 might be interpreted to cover any cases which, if
24 contemplated, would have precluded the settlement that
25 created the bankruptcy estate. If Travelers had thought

1 that it was going to be liable for these cases of
2 insurer misconduct, it might very well have said: We're
3 not forking over X hundred millions of dollars, leaving
4 this exposure open. So that the bankruptcy estate would
5 never have attained the size that it had attained if the
6 -- if the insurer and everybody else had not understood
7 that these later claims would be -- were being cut off.

8 Is that argument a relevant -- number one,
9 is that a -- a legitimate jurisdictional argument? And
10 number two, is it a relevant argument that we should
11 bear in mind -- in trying to figure out how broad the
12 '86 order really was?

13 MR. ISSACHAROFF: Your Honor, you gave two
14 alternative definitions of "jurisdiction." The first
15 one we have no problem with. Obviously that's our
16 argument --

17 JUSTICE SOUTER: Everybody accepts it's at
18 least that much.

19 MR. ISSACHAROFF: Right. The second one, I
20 think that this Court has to go back to the Syngenta
21 case, which I think is quite instructive on this point.
22 In Syngenta, there was a settlement in a Federal court
23 action. There is no question that the parties settled,
24 that the moneys were paid, everything was done pursuant
25 to that settlement. Then one of the parties goes into

1 State court and files a claim that was clearly subsumed
2 within the settlement.

3 The district court tried to issue an order,
4 saying: I have to have power over this, because
5 otherwise there could never have been a settlement. And
6 this Court unanimously reversed on the grounds that that
7 had to be brought through the State court system,
8 because you could not get jurisdiction simply because of
9 the expediency, the necessity, any of these terms do not
10 afford an affirmative grant of jurisdiction to the
11 Court. So I think --

12 JUSTICE GINSBURG: Can you answer the
13 question -- practically the insurers would not have
14 settled, there would have been no 1986 order, if they
15 didn't have this broader liability? They say without
16 global protection they never would have contributed to
17 the trust fund. And I'd like you to answer that
18 question.

19 MR. ISSACHAROFF: We don't know that, Your
20 Honor. We know that the record indicates that they did
21 not believe, in 1985, when they signed a letter among
22 all the counsel that was submitted to the court, that
23 they were getting any such release. So there's nothing
24 in the record that indicates that they would not have
25 gone into this deal, and in fact, there have been many,

1 many asbestos workouts since that time, none of which
2 have releases that do not affect the debtor's estate.

3 So I don't know that the factual premise is
4 there. But let's assume that it was, for the purposes
5 of the question. Let's assume that no insurance company
6 would go -- go into this, unless they get releases that
7 go far beyond normal jurisdiction of a bankruptcy court.
8 I think that under Syngenta that has to be given to them
9 by Congress. Congress in 1334 gave specific forms of
10 jurisdiction. It gave the "arising under" and "arising
11 in" which pertain to the activities of the bankrupt, of
12 the debtor. And it gave "related to." And "related
13 to," as this Court interpreted in Celotex, adopting the
14 Third Circuit standard, "related to" means that it has
15 an impact upon the estate of the debtor. And it's --

16 JUSTICE ALITO: But isn't that what the
17 Congress gave them in the 1994 Bankruptcy Act?

18 MR. ISSACHAROFF: No. The Bankruptcy Act
19 actually has very interesting language on point. The
20 Bankruptcy Act says, in 524(g)(4)(ii), says that the
21 relief is for demands on the debtor, that flow from
22 demands on the debtor, and by reason of the demands on
23 the debtor. That's the trigger language before we get
24 to Roman numeral (iii), which has to do with insurance.

25 So if one actually looks at the statute, the

1 form of the statute is that there is releases to the
2 extent that there is a claim of derivative liability.

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

6 MR. ISSACHAROFF: I do not --

7 JUSTICE ALITO: The sort of thing that was
8 done in this case?

9 MR. ISSACHAROFF: I do not dispute that at
10 all. But what was done in this case was not simply what
11 Judge Lifland did, but what Judge Lifland did as
12 affirmed by the Second Circuit. The bankruptcy court
13 does not have stand-alone powers to make determinations
14 as pertain to, particularly, common law actions. That
15 goes back to the Marathon Pipeline issue that this Court
16 had to -- had to address and that Congress sought to fix
17 by maintaining a tight hold on the "relating to"
18 jurisdiction of the Court and making sure that that's
19 reviewable by the district court and by the court of
20 appeals. So the -- yes, Congress codified the -- the
21 Manville deal in -- in 1994, but they did so as it was
22 interpreted by the controlling courts.

23 JUSTICE BREYER: In your view, if Smith has
24 a \$2 or \$4 billion claim against company X and the
25 pension fund together, company X is in bankruptcy, and

1 so the judge says: I want to enjoin this claim, we will
2 settle it, you know, but the pension fund -- doesn't --
3 doesn't the bankruptcy judge -- if in fact without the
4 pension fund you couldn't reorganize, wouldn't the
5 bankruptcy judge have authority to cut off the claim
6 against the pension fund?

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

9 MR. ISSACHAROFF: The rule --

10 JUSTICE BREYER: -- the pension fund was all
11 mixed up in this together.

12 MR. ISSACHAROFF: The rule of thumb, Justice
13 Breyer, is that if there is an automatic indemnity
14 against the -- the bankrupt --

15 JUSTICE BREYER: No, there is nothing here
16 in indemnity.

17 MR. ISSACHAROFF: Then our position is that
18 it does not have authority.

19 JUSTICE BREYER: And that would be true of
20 all the workforce and they have claims against the
21 individual members of the workforce? They have -- it
22 seems to me it would be an unusual case, I agree with
23 you on that, but to say never -- to say never is what's
24 bothering me.

25 MR. ISSACHAROFF: Well, I think that it

1 comes down to two questions, Justice Breyer. One is
2 whether the constitutional authority under Article I
3 reaches beyond --

4 JUSTICE BREYER: Well, why not -- because
5 there is a good constitutional protection; it's called
6 the Due Process Clause. If the bankruptcy judge goes
7 too far, it's a due process violation.

8 MR. ISSACHAROFF: No, I don't -- I -- I
9 disagree with that, Justice Breyer. I think that the
10 bankruptcy court has to point to statutory authority,
11 and that --

12 JUSTICE BREYER: Well, there's language,
13 broad language.

14 MR. ISSACHAROFF: Broad language in the
15 statute?

16 JUSTICE BREYER: Yes.

17 MR. ISSACHAROFF: Yes, there is broad
18 language in the statute. The "relating to" language is
19 quite broad. But the "relating to" language has been
20 interpreted, and every court that has looked at it, this
21 Court and may I just finish -- this Court and every
22 court of appeals, without any dissent in any court of
23 appeals that has looked at this issue, has decided that
24 "relating to" means an impact on the estate. Without
25 that, the bankruptcy power has no tethers.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Cohn.

3 ORAL ARGUMENT OF JACOB C. COHN
4 ON BEHALF OF THE RESPONDENT
5 CHUBB INDEMNITY INSURANCE COMPANY

6 MR. COHN: Mr. Chief Justice, and may it
7 please the Court:

8 A discharge in bankruptcy wipes away a
9 debtor's liability for its prepetition conduct. Yet
10 Travelers' interpretation of the 1986 orders gives
11 Travelers broader protection than even Manville could
12 obtain because it gives Travelers immunity for its
13 knowledge. Bankruptcy discharges do not erase a
14 debtor's knowledge.

15 If Manville started making asbestos products
16 again after its discharge, it would not be immune for
17 claims that it acted with the knowledge that asbestos is
18 dangerous. Yet, that is precisely the protection that
19 Travelers argues that it is entitled to here.

20 And to take, for example, the Wise
21 complaint -- which the Travelers, Petitioners, put forth
22 as a typical claim here -- and you look at the class
23 they purport to represent, they purport to represent a
24 class of disappointed claimants against three companies,
25 Combustion Engineering, AC&S, and A&I, none of which are

1 Manville. They claim that they are not seeking even to
2 recover for asbestos bodily injury claims. Instead,
3 they claim that they settled their claims too cheaply
4 with Combustion Engineering because, for example, in the
5 1990s allegedly, decades, 15 years after the
6 confirmation and discharge of Manville, Travelers in
7 defending Combustion Engineering, with the knowledge
8 that asbestos is dangerous or whatever from working with
9 Manville, provided false interrogatory responses on
10 behalf of Combustion Engineering. That is how far
11 afield the proffered interpretation of the 1986 order
12 goes.

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

15 MR. COHN: Are they claims --

16 JUSTICE ALITO: Relating to what Travelers
17 did in relation to Manville, rather than other
18 companies.

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

22 JUSTICE ALITO: No. You're -- you're making
23 the argument that some of these claims concern things
24 that Travelers did in relation to the defense of other
25 asbestos manufacturers. Now, maybe that means that the

1 -- the bankruptcy court interpreted the order too
2 broadly or -- in that respect. But what does that have
3 to do with the main issue here?

4 MR. COHN: If an asbestos claimant, an
5 independent action plaintiff, is seeking to recover from
6 Travelers for Manville-derived liability, it's barred.
7 That was the purpose of the remand by the Second Circuit
8 having provided the appropriate measuring stick to the
9 bankruptcy court to go look at these complaints and
10 figure out whether or not in fact somebody's trying to
11 take money out of Travelers' pocket for Manville's
12 liabilities.

13 JUSTICE SOUTER: But isn't it the case, to
14 make sure I understand it, the Wise complaints are the
15 -- are the exception? They are the only complaints, as
16 I understand it in this current round of litigation,
17 that claims that the actual harm to them resulted from
18 actions other than actions of Manville. Is that
19 correct?

20 MR. COHN: The statutory -- not exactly.
21 The statutory direct actions, which account for 400
22 million of the half billion dollars they'd like to pay
23 to these alleged contemnors, all have to do with claims-
24 handling practices of Travelers with respect to other
25 insureds besides Manville.

1 The common law independent actions allege
2 that the insurance industry as a whole learned of the
3 dangers of asbestos. It has a free-standing duty to the
4 world to warn the world of the dangers of asbestos.
5 Chubb Indemnity Insurance Company was not a Manville
6 insurer, yet Chubb is alleged to have been in cahoots
7 with the rest of the industry in failing to warn the
8 world, and, therefore, they along with the rest of the
9 insurance industry face unlimited liability unrelated to
10 insurance policies for this --

11 JUSTICE SOUTER: No, I understand -- or
12 maybe I don't -- maybe I don't understand the -- every
13 step in the liability claim. My only question was,
14 among the plaintiffs, is it correct that the only
15 plaintiffs who claim they were hurt physically by
16 asbestos as a result of the actions of somebody, the
17 only ones who are claiming that the somebody was other
18 than Manville are the Wise plaintiffs. Is that correct?

19 MR. COHN: I think not.

20 JUSTICE SOUTER: No?

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

24 JUSTICE SOUTER: Simply because of
25 Manville's position in the --

1 MR. COHN: The ubiquity of Manville asbestos
2 and their activities makes practically everybody, if not
3 everybody, a Manville claimant, at least --

4 JUSTICE SOUTER: So that -- so that you are
5 saying in effect everybody ultimately is claiming
6 against Manville, the Wise plaintiffs and every other
7 set of plaintiffs in this -- in this group of direct
8 liability claimants?

9 MR. COHN: Well, is or can. But that
10 doesn't mean that they are attempting to assert
11 liability against an insurance company because of
12 Manville's own conduct.

13 JUSTICE SOUTER: I -- I understand your
14 cause of action. Okay. I don't want to take up any
15 more --

16 MR. COHN: So, getting back to the next
17 point I'd like to make is, as Mr. Issacharoff has
18 stated, the Second Circuit was presented and the
19 bankruptcy court was presented in 1986 with a plan and
20 with an order that was stated to be premised upon the
21 derivative liability of Travelers for Manville.

22 JUSTICE BREYER: Who stated it? Who stated
23 that? I mean, when I -- I read what the judge said at
24 the time. I've read language of the order, and I
25 haven't found there anything that said that. What it

1 talked about was policies that were seriously
2 intertwined with the liability of Manville.

3 MR. COHN: Well, the insurance settlement
4 order, which is what is at issue here -- which is not
5 the channeling injunction order, by the way; it was
6 entered before that -- was premised upon the policies
7 being property of the estate. That was --

8 JUSTICE BREYER: Is this the confirmation
9 order?

10 MR. COHN: The confirmation order is
11 actually not directly at issue.

12 JUSTICE BREYER: That's different. Okay.
13 So the confirmation order --

14 MR. COHN: The confirmation order is
15 purposely --

16 JUSTICE BREYER: But there's another piece
17 of paper called "the insurance settlement order," which
18 says that the confirmation order and all these other
19 definitions and the injunction just refer to derivative
20 liability?

21 MR. COHN: The --

22 JUSTICE BREYER: Yes or no?

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

24 JUSTICE BREYER: Yes?

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

1 JUSTICE BREYER: No? Okay. All right.

2 MR. COHN: -- of "policy claims" is
3 contained in the --

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

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

10 JUSTICE BREYER: All right. That's a
11 different definition than the definition of "policy
12 claims" in the injunction, presumably.

13 MR. COHN: There are two injunctions, Your
14 Honor.

15 JUSTICE BREYER: Right. I have a
16 confirmation order and injunction. It defines "policy
17 claims" in both as a lawsuit relating to any or all of
18 the insurance policies.

19 MR. COHN: That is the injunction in the
20 insurance injunction.

21 JUSTICE BREYER: And your other piece of
22 paper says what?

23 MR. COHN: The other piece of paper is even
24 clearer. That's why they don't rely on it. It says,
25 you may not seek to recover asbestos health obligations,

1 which are the future Manville-derived asbestos claims,
2 from Travelers, from a settling insurance company. They
3 don't even try to argue that the channeling injunction
4 gets them there. They're arguing that the insurance
5 policy buy-back order, if you want to call it that, the
6 insurance settlement order pursuant to which they
7 retired their insurance obligations was -- the
8 definition of "policy claims" was --

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

11 MR. COHN: Thank you.

12 CHIEF JUSTICE ROBERTS: Why doesn't the Due
13 Process Clause fully protect you? If the bankruptcy
14 court made a mistake and purported to exercise
15 jurisdiction over your claims, then I suppose you have,
16 in particular cases if you can establish it, a due
17 process claim that fully protects you.

18 MR. COHN: Chubb, Mr. Chief justice, in fact
19 has an alternative argument that was never reached that,
20 as a non-Manville insurer, it was in a position of an
21 unrepresented future claimant, and in fact it cannot be
22 constitutionally bound by res judicata to the 1986
23 order.

24 CHIEF JUSTICE ROBERTS: I saw in the -- I
25 guess it was in the Travelers' reply brief, the

1 suggestion that there was a future -- somebody
2 representing future claimants.

3 MR. COHN: Future tort claimants, not future
4 insurance defendants.

5 CHIEF JUSTICE ROBERTS: Where is that?

6 MR. COHN: Cause of action claimants.

7 CHIEF JUSTICE ROBERTS: Where is that
8 limitation spelled out?

9 MR. COHN: Well, if you look at the order
10 that -- that appoints the future claims representative,
11 it is to represent the interests of people who have been
12 exposed to Manville asbestos but have not yet been --
13 manifested harm because of the long latency period of
14 asbestos injuries.

15 CHIEF JUSTICE ROBERTS: Is that a
16 description of the clients at issue here? They've been
17 -- they've all been exposed to asbestos?

18 MR. COHN: It's not a description of Chubb,
19 Your Honor.

20 CHIEF JUSTICE ROBERTS: I know, but I'm
21 asking about the claimants.

22 MR. COHN: The claimants presumably were
23 people that were -- the individual independent action
24 plaintiffs presumably were represented by the future
25 claimants' representative in 1986 and were at that time

1 future claimants or else their -- you know, their harm
2 would have arisen well before and they wouldn't be in
3 these cases in this decade.

4 If there are no further questions, Your
5 Honor --

6 JUSTICE GINSBURG: Yes, in the -- at the
7 time of 1986, there were many claims against Manville,
8 of course, for Manville's liability. These later suits
9 -- these in State court about the insurance company's
10 independent obligation -- I asked this to counsel on the
11 other side -- to what extent was there such litigation
12 in 1986?

13 MR. COHN: May I respond?

14 CHIEF JUSTICE ROBERTS: Sure.

15 MR. COHN: There were no independent actions
16 of the flavor that you are seeing here. I am not aware
17 of any claim like that. There were claims by other
18 Manville co-insureds. There were claims by Manville,
19 and there may have been some direct actions. I'm just
20 simply not familiar -- we didn't come into this case
21 until 2004, when our rights were impugned. So I don't
22 know the answer to whether or not there was anything
23 just like this, but I doubt it.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Five minutes, Mr. Ostrager.

1 REBUTTAL ARGUMENT OF BARRY R. OSTRAGER

2 ON BEHALF OF THE PETITIONERS

3 MR. OSTRAGER: Thank you. I have five quick
4 points I want to make.

5 First, the Second Circuit upheld the core
6 factual findings that, quote, "the instant claims
7 against Travelers arise out of its provision of
8 insurance coverage to Manville," close quote. That's
9 from the Second Circuit opinion. It's in the appendix
10 at page 33.

11 Second, there is no use of the word
12 "derivative" in either the confirmation order, the
13 settlement order, or 524(g). 524(g), about which we
14 haven't spoken enough, clearly and unmistakably reflects
15 Congress's intent to allow channeling injunctions that
16 bar claims against a debtor and those, like insurers,
17 who are directly or indirectly liable for claims against
18 the debtor. That's 524(g)(4)(A)(ii) and Roman (iii).
19 524(g) expressly provides an asbestos channeling
20 injunction shall be valid and enforceable and may not be
21 revoked or modified by any court except through an
22 appeal.

23 We cite in our reply brief the fact that a
24 Senate report accompanying an earlier version of the
25 bill clarified that 524(g) is -- quote, "is not meant to

1 give the bankruptcy courts authority which they do not
2 already possess and simply codifies a court's ability
3 to issue supplemental permanent injunctions which are
4 irrevocable except on appeal."

5 There is a final judgment in this case
6 confirming the plan of reorganization. The Second
7 Circuit issued that -- confirmed that judgment twice,
8 once in the MacArthur case and once in the Kane case.
9 And then in the O'Malley case, which is a 1996 case, the
10 Second Circuit rejected a collateral attack on the
11 confirmation order on two grounds.

12 First, they found that the performance of
13 the futures representative that Judge Lifland had
14 appointed and which was incorporated in 524(g), modeled
15 on the Manville reorganization proceeding -- the Second
16 Circuit found that the legal representative, quote,
17 "took an active and aggressive role in protecting future
18 claimants in this litigation."

19 And, secondly, the Second Circuit rejected
20 the challenge to the continuation of the 1986 order
21 enjoining the suits against the insurers as being
22 without merit because such an injunction was essential
23 to the success of the settlement, and its continuation
24 was well within the court's discretion.

25 As respects Chubb, Judge Koeltl in affirming

1 Judge Lifland's 2004 order, specifically found that
2 Chubb, a multinational insurer that has paid more than a
3 billion dollars to resolve asbestos-related claims, was
4 clearly on notice of these proceedings. We cite in our
5 reply brief, on pages 10 and 11, several 524(g)
6 injunctions that have run to the benefit of Chubb which
7 contain the exact same "based upon, arising out of, or
8 related to" language that appears in the original
9 Manville order.

10 We didn't cite -- but it's a matter of
11 public record -- that Chubb paid \$550 million to resolve
12 through a bankruptcy proceeding in Fibreboard
13 liabilities relating to Fibreboard receiving the same
14 "based upon, arising out of, or related to" protection.

15 The Manville plan carries out the core
16 values of bankruptcy. The Manville trust has made
17 payments to 660,000 asbestos claimants -- that's at
18 record at 139 -- funded by \$2.8 million of proceeds from
19 insurance settlements and the sale of the reorganized
20 and rehabilitated Manville --

21 JUSTICE BREYER: Is there anything you want
22 to say about the practical thing I have in the back of
23 my mind which may be false? That language permits your
24 position, but it certainly has rarely been implemented,
25 if ever. And I see that, but in the back of my mind is

1 the fact that if we start mucking around and give narrow
2 meanings to these things now, there are going to be
3 hundreds of thousands of people who won't get
4 compensated who have asbestos --

5 MR. OSTRAGER: Precisely.

6 JUSTICE BREYER: Is that true?

7 MR. OSTRAGER: That is absolutely correct,
8 Justice Breyer.

9 JUSTICE BREYER: Is there anything to back
10 that up?

11 MR. OSTRAGER: And I -- I wanted to point
12 out that, in your dissent in the Ortiz case, you said
13 that "judges can and should search aggressively for ways
14 within the framework of existing law to avoid delay and
15 expense so great as to bring about a massive denial of
16 justice" --

17 JUSTICE GINSBURG: That was the dissenting
18 opinion.

19 JUSTICE BREYER: I said that?

20 [Laughter.]

21 MR. OSTRAGER: I understand that.

22 But you were -- on that particular point you
23 were correct. And we have a General Motors --

24 [Laughter.]

25 MR. OSTRAGER: We have a General Motors

1 potential bankruptcy --

2 JUSTICE GINSBURG: But there are two
3 decisions of this Court, Amchem and Ortiz, that reject
4 that position.

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

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

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