

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

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

1 page 471, which means that they automatically meet
2 524(g)(3)(A)(i) and may not be revoked or modified
3 except through appeal.

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

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

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

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

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

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

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

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

1 recognized that. The Second Circuit further recognized
2 that these direct actions violate the express terms of
3 the injunction that Judge Lifland, the bankruptcy judge,
4 granted in this case.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: Well, but it seems to me

1 you --

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

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

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

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

24 JUSTICE GINSBURG: May I interrupt you
25 there? Because you told me that the Second Circuit

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

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

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

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

17 JUSTICE GINSBURG: If it --

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

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

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

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

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

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

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

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

25 MR. OSTRAGER: Potentially --

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

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

5 I want to reserve --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. OSTRAGER: Yes.

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

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

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

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

25 I'd like to reserve, if I may, with respect,

1 the balance of my time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Issacharoff.

4 ORAL ARGUMENT OF SAMUEL ISSACHAROFF

5 ON BEHALF OF THE RESPONDENTS

6 CASCINO ASBESTOS CLAIMANTS

7 MR. ISSACHAROFF: Mr. Chief Justice, and may

8 it please the Court:

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

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

25 Why couldn't the counsel for Petitioner have

1 given that answer?

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

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

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

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

23 MR. ISSACHAROFF: It is --

24 JUSTICE KENNEDY: -- because subject matter
25 jurisdiction can be concluded in an earlier order and

1 there can be no collateral attack if you've been a
2 party.

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

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

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

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

21 [Laughter.]

22 MR. ISSACHAROFF: Justice Breyer, I
23 misunderstood Justice Kennedy's question to be about
24 1986, not about the present. And in -- in the original
25 confirmation, these people had not filed suit, had not

1 made claims at the time.

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

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

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

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

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

24 MR. ISSACHAROFF: I agree.

25 JUSTICE BREYER: That's what -- that's what

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

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

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

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

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

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

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

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

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

22 JUSTICE SOUTER: What do you -- what do you
23 make of the provision of the 1986 order to the effect
24 that, as I understand it and as I asked your brother a
25 moment ago, existing claims based upon misbehavior of

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

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

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

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

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

25 In 1988, in the MacArthur case, the Second

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

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

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

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

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

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

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

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

23 JUSTICE KENNEDY: But that's subject matter
24 jurisdiction, and that is foreclosed. Now, if you are
25 talking about personal jurisdiction that may be

1 something else.

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

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

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

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

24 Do you agree?

25 MR. ISSACHAROFF: I agree that that is the

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

7 JUSTICE SOUTER: So it's a question of the
8 scope of the order?

9 MR. ISSACHAROFF: Yes, it is.

10 JUSTICE SOUTER: Okay.

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

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

21 JUSTICE ALITO: But didn't this --

22 JUSTICE SOUTER: I didn't mean to cut you
23 off. I'm sorry.

24 MR. ISSACHAROFF: I don't think the Court
25 has to address this here, Your Honor, because in this

1 case, the initial order only went -- as affirmed by the
2 Second Circuit, only went to the property of the estate.
3 And the Second --

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

18 Another view of jurisdiction would be that
19 the bankruptcy court has jurisdiction and hence an order
20 might be interpreted to cover any cases which, if
21 contemplated, would have precluded the settlement that
22 created the bankruptcy estate. If Travelers had thought
23 that it was going to be liable for these cases of
24 insurer misconduct, it might very well have said: We're
25 not forking over X hundred millions of dollars, leaving

1 this exposure open. So that the bankruptcy estate would
2 never have attained the size that it had attained if the
3 -- if the insurer and everybody else had not understood
4 that these later claims would be -- were being cut off.

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

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

14 JUSTICE SOUTER: Everybody accepts it's at
15 least that much.

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

25 The district court tried to issue an order,

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

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

16 MR. ISSACHAROFF: We don't know that, Your
17 Honor. We know that the record indicates that they did
18 not believe, in 1985, when they signed a letter among
19 all the counsel that was submitted to the court, that
20 they were getting any such release. So there's nothing
21 in the record that indicates that they would not have
22 gone into this deal, and in fact, there have been many,
23 many asbestos workouts since that time, none of which
24 have releases that do not affect the debtor's estate.

25 So I don't know that the factual premise is

1 there. But let's assume that it was, for the purposes
2 of the question. Let's assume that no insurance company
3 would go -- go into this, unless they get releases that
4 go far beyond normal jurisdiction of a bankruptcy court.
5 I think that under Syngenta that has to be given to them
6 by Congress. Congress in 1334 gave specific forms of
7 jurisdiction. It gave the "arising under" and "arising
8 in" which pertain to the activities of the bankrupt, of
9 the debtor. And it gave "related to." And "related
10 to," as this Court interpreted in Celotex, adopting the
11 Third Circuit standard, "related to" means that it has
12 an impact upon the estate of the debtor. And it's --

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

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

22 So if one actually looks at the statute, the
23 form of the statute is that there is releases to the
24 extent that there is a claim of derivative liability.

25 JUSTICE ALITO: Do you dispute the

1 proposition that that statute was passed in large part
2 for the purpose of codifying what was done in this case?

3 MR. ISSACHAROFF: I do not --

4 JUSTICE ALITO: The sort of thing that was
5 done in this case?

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

20 JUSTICE BREYER: In your view, if Smith has
21 a \$2 or \$4 billion claim against company X and the
22 pension fund together, company X is in bankruptcy, and
23 so the judge says: I want to enjoin this claim, we will
24 settle it, you know, but the pension fund -- doesn't --
25 doesn't the bankruptcy judge -- if in fact without the

1 pension fund you couldn't reorganize, wouldn't the
2 bankruptcy judge have authority to cut off the claim
3 against the pension fund?

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

6 MR. ISSACHAROFF: The rule --

7 JUSTICE BREYER: -- the pension fund was all
8 mixed up in this together.

9 MR. ISSACHAROFF: The rule of thumb, Justice
10 Breyer, is that if there is an automatic indemnity
11 against the -- the bankrupt --

12 JUSTICE BREYER: No, there is nothing here
13 in indemnity.

14 MR. ISSACHAROFF: Then our position is that
15 it does not have authority.

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

22 MR. ISSACHAROFF: Well, I think that it
23 comes down to two questions, Justice Breyer. One is
24 whether the constitutional authority under Article I
25 reaches beyond --

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

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

9 JUSTICE BREYER: Well, there's language,
10 broad language.

11 MR. ISSACHAROFF: Broad language in the
12 statute?

13 JUSTICE BREYER: Yes.

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Cohn.

25 ORAL ARGUMENT OF JACOB C. COHN

1 ON BEHALF OF THE RESPONDENT

2 CHUBB INDEMNITY INSURANCE COMPANY

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

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

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

17 And to take, for example, the Wise
18 complaint -- which the Travelers, Petitioners, put forth
19 as a typical claim here -- and you look at the class
20 they purport to represent, they purport to represent a
21 class of disappointed claimants against three companies,
22 Combustion Engineering, AC&S, and A&I, none of which are
23 Manville. They claim that they are not seeking even to
24 recover for asbestos bodily injury claims. Instead,
25 they claim that they settled their claims too cheaply

1 with Combustion Engineering because, for example, in the
2 1990s allegedly, decades, 15 years after the
3 confirmation and discharge of Manville, Travelers in
4 defending Combustion Engineering, with the knowledge
5 that asbestos is dangerous or whatever from working with
6 Manville, provided false interrogatory responses on
7 behalf of Combustion Engineering. That is how far
8 afield the proffered interpretation of the 1986 order
9 goes.

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

12 MR. COHN: Are they claims --

13 JUSTICE ALITO: Relating to what Travelers
14 did in relation to Manville, rather than other
15 companies.

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

19 JUSTICE ALITO: No. You're -- you're making
20 the argument that some of these claims concern things
21 that Travelers did in relation to the defense of other
22 asbestos manufacturers. Now, maybe that means that the
23 -- the bankruptcy court interpreted the order too
24 broadly or -- in that respect. But what does that have
25 to do with the main issue here?

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

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

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

23 The common law independent actions allege
24 that the insurance industry as a whole learned of the
25 dangers of asbestos. It has a free-standing duty to the

1 world to warn the world of the dangers of asbestos.
2 Chubb Indemnity Insurance Company was not a Manville
3 insurer, yet Chubb is alleged to have been in cahoots
4 with the rest of the industry in failing to warn the
5 world, and, therefore, they along with the rest of the
6 insurance industry face unlimited liability unrelated to
7 insurance policies for this --

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

16 MR. COHN: I think not.

17 JUSTICE SOUTER: No?

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

21 JUSTICE SOUTER: Simply because of
22 Manville's position in the --

23 MR. COHN: The ubiquity of Manville asbestos
24 and their activities makes practically everybody, if not
25 everybody, a Manville claimant, at least --

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

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

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

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

18 JUSTICE BREYER: Who stated it? Who stated
19 that? I mean, when I -- I read what the judge said at
20 the time. I've read language of the order, and I
21 haven't found there anything that said that. What it
22 talked about was policies that were seriously
23 intertwined with the liability of Manville.

24 MR. COHN: Well, the insurance settlement
25 order, which is what is at issue here -- which is not

1 the channeling injunction order, by the way; it was
2 entered before that -- was premised upon the policies
3 being property of the estate. That was --

4 JUSTICE BREYER: Is this the confirmation
5 order?

6 MR. COHN: The confirmation order is
7 actually not directly at issue.

8 JUSTICE BREYER: That's different. Okay.
9 So the confirmation order --

10 MR. COHN: The confirmation order is
11 purposely --

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

17 MR. COHN: The --

18 JUSTICE BREYER: Yes or no?

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

20 JUSTICE BREYER: Yes?

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

22 JUSTICE BREYER: No? Okay. All right.

23 MR. COHN: -- of "policy claims" is
24 contained in the --

25 JUSTICE BREYER: Well, then I don't see what

1 it has to do with it.

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

6 JUSTICE BREYER: All right. That's a
7 different definition than the definition of "policy
8 claims" in the injunction, presumably.

9 MR. COHN: There are two injunctions, Your
10 Honor.

11 JUSTICE BREYER: Right. I have a
12 confirmation order and injunction. It defines "policy
13 claims" in both as a lawsuit relating to any or all of
14 the insurance policies.

15 MR. COHN: That is the injunction in the
16 insurance injunction.

17 JUSTICE BREYER: And your other piece of
18 paper says what?

19 MR. COHN: The other piece of paper is even
20 clearer. That's why they don't rely on it. It says,
21 you may not seek to recover asbestos health obligations,
22 which are the future Manville-derived asbestos claims,
23 from Travelers, from a settling insurance company. They
24 don't even try to argue that the channeling injunction
25 gets them there. They're arguing that the insurance

1 policy buy-back order, if you want to call it that, the
2 insurance settlement order pursuant to which they
3 retired their insurance obligations was -- the
4 definition of "policy claims" was --

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

7 MR. COHN: Thank you.

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

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

20 CHIEF JUSTICE ROBERTS: I saw in the -- I
21 guess it was in the Travelers' reply brief, the
22 suggestion that there was a future -- somebody
23 representing future claimants.

24 MR. COHN: Future tort claimants, not future
25 insurance defendants.

1 CHIEF JUSTICE ROBERTS: Where is that?

2 MR. COHN: Cause of action claimants.

3 CHIEF JUSTICE ROBERTS: Where is that
4 limitation spelled out?

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

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

14 MR. COHN: It's not a description of Chubb,
15 Your Honor.

16 CHIEF JUSTICE ROBERTS: I know, but I'm
17 asking about the claimants.

18 MR. COHN: The claimants presumably were
19 people that were -- the individual independent action
20 plaintiffs presumably were represented by the future
21 claimants' representative in 1986 and were at that time
22 future claimants or else their -- you know, their harm
23 would have arisen well before and they wouldn't be in
24 these cases in this decade.

25 If there are no further questions, Your

1 Honor --

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

9 MR. COHN: May I respond?

10 CHIEF JUSTICE ROBERTS: Sure.

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Five minutes, Mr. Ostrager.

22 REBUTTAL ARGUMENT OF BARRY R. OSTRAGER

23 ON BEHALF OF THE PETITIONERS

24 MR. OSTRAGER: Thank you. I have five quick
25 points I want to make.

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

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

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

25 There is a final judgment in this case

1 confirming the plan of reorganization. The Second
2 Circuit issued that -- confirmed that judgment twice,
3 once in the MacArthur case and once in the Kane case.
4 And then in the O'Malley case, which is a 1996 case, the
5 Second Circuit rejected a collateral attack on the
6 confirmation order on two grounds.

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

14 And, secondly, the Second Circuit rejected
15 the challenge to the continuation of the 1986 order
16 enjoining the suits against the insurers as being
17 without merit because such an injunction was essential
18 to the success of the settlement, and its continuation
19 was well within the court's discretion.

20 As respects Chubb, Judge Koeltl in affirming
21 Judge Lifland's 2004 order, specifically found that
22 Chubb, a multinational insurer that has paid more than a
23 billion dollars to resolve asbestos-related claims, was
24 clearly on notice of these proceedings. We cite in our
25 reply brief, on pages 10 and 11, several 524(g)

1 injunctions that have run to the benefit of Chubb which
2 contain the exact same "based upon, arising out of, or
3 related to" language that appears in the original
4 Manville order.

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

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

16 JUSTICE BREYER: Is there anything you want
17 to say about the practical thing I have in the back of
18 my mind which may be false? That language permits your
19 position, but it certainly has rarely been implemented,
20 if ever. And I see that, but in the back of my mind is
21 the fact that if we start mucking around and give narrow
22 meanings to these things now, there are going to be
23 hundreds of thousands of people who won't get
24 compensated who have asbestos --

25 MR. OSTRAGER: Precisely.

1 JUSTICE BREYER: Is that true?

2 MR. OSTRAGER: That is absolutely correct,
3 Justice Breyer.

4 JUSTICE BREYER: Is there anything to back
5 that up?

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

12 JUSTICE GINSBURG: That was the dissenting
13 opinion.

14 JUSTICE BREYER: I said that?

15 [Laughter.]

16 MR. OSTRAGER: I understand that.

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

19 [Laughter.]

20 MR. OSTRAGER: We have a General Motors
21 potential bankruptcy --

22 JUSTICE GINSBURG: But there are two
23 decisions of this Court, Amchem and Ortiz, that reject
24 that position.

25 MR. OSTRAGER: In Ortiz, the -- the Court

1 absolutely recognized that where you have a special
2 statutory scheme that is designed as 524(g) and (h) is
3 to deal with these types of issues, that is an exception
4 to *Hansberry v. Lee*. I cannot --

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

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

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