Supreme Court, U.S.
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Nos. 08-295 & 08-307

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners,

-and-

COMMON LAW SETTLEMENT COUNSEL,

Petitioner,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

JACOB C. COHN
Counsel of Record
WILLIAM P. SHELLEY
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2147

Counsel for Respondent Chubb Indemnity Insurance Company

219131

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, in interpreting injunctions contained in the Insurance Settlement and Confirmation Orders entered by the Bankruptcy Court in 1986 (the "1986 Orders"), the Court of Appeals:

1. Properly analyzed the jurisdictional limitations of the Bankruptcy Court in entering those orders;

2. Correctly concluded that the Bankruptcy Court lacked jurisdiction in 1986 over claims against non-debtor insurers that were not derivative of insurance policies that constituted property of the Debtors' estates;

3. Correctly interpreted the 1986 Orders in a manner consistent with the scope of the Bankruptcy Court's jurisdiction in 1986; and, therefore,

4. Correctly vacated the Bankruptcy Court's 2004 "Clarifying Order" and remanded the matter for further consideration of whether any of the "Direct Action" complaints violate the 1986 Orders.

RULE 29.6 DISCLOSURE

Chubb Indemnity Insurance Company is a wholly-owned subsidiary of Federal Insurance Company, which in turn is a wholly owned subsidiary of The Chubb Corporation, which is publicly held. No publicly held company otherwise directly or indirectly owns 10% or more of Chubb Indemnity Insurance Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The 1986 Injunctions 2

B. Travelers Claims that the Direct Action Lawsuits Violate the 1986 Injunctions .. 6

C. "Injunction Enforcement" Morphs into Court-Sanctioned Settlements 7

REASONS FOR DENYING THE PETITIONS .. 12

A. In Harmony with Precedents of Other Circuits, and Its Precedents in This Case, the Second Circuit Correctly Interpreted the Scope of the 1986 Injunctions by Reference to the Bankruptcy Court's Contemporaneous Jurisdictional Restrictions 12

Contents

Page

B. The Interlocutory Nature of the Second Circuit's Ruling Further Militates in Favor of Denying the Petitions 17

C. The Esoteric Issues Petitioners Seek to Raise Are Unlikely to Provide Meaningful Guidance in Future Cases 18

D. Numerous Alternative Grounds, Not Reached by the Second Circuit, Likewise Would Have Required that the Clarifying Order Be Vacated 19

1. The Clarifying Order Suffered from Additional Jurisdictional Defects . . . 19

2. The Clarifying Order Impermissibly Sought to Reward, Rather than Punish, Alleged Violators of the 1986 Injunctions 22

3. The Clarifying Order Impermissibly Expanded the Scope of the 1986 Injunctions to Extend Protection to Additional Entities 24

Contents

Page

4. The Clarifying Order Impermissibly Approved a Preferential Settlement Fund for Select Manville "Stakeholders" in Contravention of 11 U.S.C § 524(g) as Well as an Overriding Goal of the Manville Plan 24

5. Chubb Cannot Constitutionally be Bound to the Bankruptcy Court's 1986 Injunctions and 2004 Clarifying Order 26

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

CASES

Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.,
638 F.2d 7 (2d Cir. 1980) 21

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 1

American Construction Co. v. Jacksonville, T. & K. W. R. Co.,
148 U.S. 372 (1893) 17

Armstrong World Industries, Inc. v. Adams,
961 F.2d 405 (3d Cir. 1992) 21

Central Va. Cmty. College v. Katz,
546 U.S. 356 (2006) 14

In re Combustion Engineering, Inc.,
391 F.3d 190 (3d Cir. 2004) 1, 16

Crawford v. Honig,
37 F.3d 485 (9th Cir. 1994) 28

Kane v. Johns-Manville Corp.,
843 F.2d 636 (2d Cir. 1988) 26

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 1

Page

Stephenson v. Dow Chemical Co., 273 F.3d 249 (2d Cir. 2001), *aff'd by evenly divided Court,* 539 U.S. 111 (2003) 27, 28

United States v. Pauley, 321 F.3d 578 (6th Cir. 2003) 20, 23

In re Zale Corp., 62 F.3d 746 (5th Cir. 1995) 15

STATUTES AND RULES

11 U.S.C. § 105(a) 24

11 U.S.C. § 524(e) 1

11 U.S.C. §§ 524(g) .... *passim*

11 U.S.C. § 524(g)(4)(A)(ii)(III) 16

11 U.S.C. § 524(g)(4)(B)(ii) 25

11 U.S.C. § 524(h) 2, 24

Fed. R. Civ. P. 23 1

INTRODUCTION

Nothing about this case recommends it as a meritorious candidate for the issuance of a writ of certiorari to this Court. There is no inter-circuit conflict. The Second Circuit's decision was interlocutory, and broke no new doctrinal ground. To the contrary, its ruling is entirely consistent with the rulings of a number of other courts, most especially the Third Circuit's decision in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), recognizing and enforcing limitations upon the jurisdiction and/or power of bankruptcy courts to grant non-debtor injunctions/releases (which as a general rule are not permitted under 11 U.S.C. § 524(e)). Indeed, the issues that Petitioners seek to raise are unlikely to arise in another situation remotely similar to this one.

While Travelers purports (at 24) to invoke this Court's supervisory powers over the Second Circuit, it was the Second Circuit that itself was forced to police the jurisdictional boundaries of the Bankruptcy Court. The Bankruptcy Court, purportedly engaged in injunction enforcement proceedings, instead undertook to approve what were in essence a series of three mandatory class action settlements of the kind even an Article III court has no authority to approve.[1] These settlements not only required the Bankruptcy Court to

[1] This Court's back-to-back decisions in *Amchem Prods. v. Windsor*, 521 U.S. 591, 627 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), struck down similar attempts to engineer mandatory class-action settlement schemes in asbestos mass-tort litigation under Fed. R. Civ. P. 23.

reward alleged contemnors for their own violations of court orders, but purported to "clarify" the rights of unrepresented absent parties who had asserted no Direct Action Claims, expanded the scope of the 1986 Injunctions to protect additional entities, and violated the requirements of § 524(g) by establishing separate settlement funds to provide preferential treatment to select beneficiaries of the Manville Trust.

The petitions should be denied.

STATEMENT OF THE CASE

A. The 1986 Injunctions

This landmark case, filed in 1982, pioneered a novel approach to mass asbestos-disease claims in the context of Chapter 11 reorganization proceedings. Present and future asbestos bodily injury claims were channeled to a trust fund for consideration and payment, while the reorganized debtors were discharged of further liability to the asbestos claimants. The trust had two major sources of funding -- an 80% stake in the stock of reorganized Manville,[2] and the proceeds of settlements between Manville and its liability insurers. In 1994, Congress ratified this approach with the enactment of 11 U.S.C. §§ 524(g-h).

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[2] Except where noted, the capitalized terms used in this brief shall have the meaning ascribed to them in the Bankruptcy Court's Findings of Fact and Conclusions of Law and Clarifying Order. Appendix citations are to the Appendix to Travelers' Petition. References to "A-__" are to the Appendix filed in the Second Circuit.

Travelers Indemnity Company ("Travelers Indemnity") was Manville's primary liability insurer from 1947-1976. Aetna Casualty and Surety n/k/a Travelers Casualty and Surety ("Travelers C&S")[3] separately issued excess liability policies to Manville. (A-116). Respondent Chubb Indemnity Insurance Company ("Chubb") had no insurance relationship with Manville and had no involvement in this case prior to June 2004.

In 1984, Travelers Indemnity settled its insurance coverage litigation with Manville. (A-116). Other insurers, including Travelers (then Aetna) C&S also settled with Manville. On December 18, 1986, the Bankruptcy Court entered the Insurance Settlement Order, approving all then-pending insurance settlements. (295-456a).

The Insurance Settlement Order contains the Insurance Injunction that, with limited exceptions, bars the assertion against Settling Insurers of "Policy Claims," defined as

> any and all claims . . . (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer

[3] Before 1996, Travelers C&S had no relationship with the Travelers group of companies and, unlike Travelers Indemnity, was not a primary insurer of Manville. Nevertheless, the Bankruptcy Court incorrectly lumped these two entities (and others) together in its findings and conclusions.

> Group based upon, arising out of or relating to the Policies [of the respective settling insurer].

(430a). "Policy Claims" were not nullified, but were instead channeled to the "Settlement Fund" consisting of the combined settlements paid by the settling Manville insurers. (441a).

On December 22, 1986, the Manville Plan was confirmed. The Confirmation Order contained the Channeling Injunction. The Channeling Injunction prohibits "All Persons" from taking action "for the purpose of, directly or indirectly, collecting . . . with respect to any Claim, Interest or Other Asbestos Obligation . . . against or affecting the Debtors . . . or any of the Settling Insurance Companies." (286-287a). "Claim," "Interest" and "Other Asbestos Obligation" are terms defined by the Manville Plan and refer to claims arising from or derivative of Manville's own liabilities. (A-422, A-426, A-428). The Manville Trust assumed liability for "all AH [Asbestos Health] Claims, Other Asbestos Obligations and Indemnification Liabilities." (A-403). The Confirmation Order "channeled" all such claims to the Manville Trust. (286-288a). The Confirmation Order further transferred the insurance Settlement Fund to the Manville Trust. (280a).

Contrary to the Travelers-authored findings adopted by the Bankruptcy Court in 2004, back in the 1980s Travelers[4] itself agreed that the Insurance Settlement

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[4] Chubb uses the term Travelers to refer to those entities (and their then-existing affiliates) that settled with Manville in the 1980s and were actually granted the benefit of the (Cont'd)

Order was not intended to enjoin actions that did not seek the proceeds from Manville's insurance policies. In a 1985 memorandum urging the Bankruptcy Court to approve Manville's settlement with Travelers Indemnity, Manville's counsel wrote: "*Manville does not seek to have this Court release its Settling Insurers from any claims by third parties based on the Insurer's own tortious misconduct towards the third party*, as opposed to its misconduct towards Manville." (A-962, 1025 (emphasis added)). The Committee of Asbestos Related Litigants, nonetheless, expressed the concern that the proposed order could bar claims involving "the Settling Insurers' own tortious and bad-faith misconduct in refusing to defend, settle and pay claims." (A-544, 578-79). This dispute was resolved by the proponents of the settlement, *including Travelers Indemnity*, agreeing that "[t]he channeling order is intended only to channel claims against the *res* to the Settlement Fund and *the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers*."[5] (A-1116, 1118 (emphasis added)).

(Cont'd)

Bankruptcy Court's 1986 Injunctions. The Clarifying Order, however, defined "Travelers" to include entities that had no relationship with any Travelers entity in 1986, thereby retroactively and impermissibly extending the benefit of the 1986 Injunctions to these new entities. To avoid blurring this distinction, where Chubb refers to "Travelers" as defined in the Bankruptcy Court's order, that term appears in quotation marks.

[5] The foregoing, of course, torpedoes Travelers' erroneous assertion (at 21) that "[i]f the original panel opinion . . . affirming the Manville confirmation order on direct appeal in 1988 . . . had reached the same conclusion as the panel opinion below, Petitioners would never have contributed to the Manville trust."

B. Travelers Claims that the Direct Action Lawsuits Violate the 1986 Injunctions

In recent years, several dozen insurers, including various Travelers entities, have been sued in so-called "Direct Action Lawsuits." These are not traditional "direct action" suits in which a claimant attempts to recover proceeds of insurance policies to satisfy claims arising from the wrongful conduct of insureds. Instead, the Direct Action Lawsuits seek to impose potentially unlimited, extra-contractual liability upon the insurers for such insurers' own alleged misconduct.

The Direct Action Lawsuits come in two basic forms, "Statutory" and "Common Law." Statutory Direct Actions are purportedly brought pursuant to consumer protection statutes and assert that insurers acted improperly in defending their insureds *other than Manville* against asbestos personal injury claims. These insurers, it is alleged, raised "fraudulent" defenses to such claims and, as a result, the claimants either settled their claims too cheaply or were dissuaded from filing suit at all.

"Common Law" Direct Action Lawsuits are based upon many of the same factual allegations, but purport to assert claims under common law theories such as conspiracy, negligent undertaking, and misrepresentation. Complaints in these cases typically allege that the "insurance industry" as a whole had some sort of freestanding duty to warn the general public about the dangers of asbestos and an unlimited liability to asbestos claimants for breaching that alleged duty. (A-1525-39). No state court has recognized these outlier

legal theories. (143a). Chubb is or was a defendant along with Travelers in a number of Common Law Direct Actions in Ohio and in Texas, but is not a party to any Statutory Direct Actions.

In 2002, Travelers moved to enjoin the Statutory and Common Law Direct Actions, claiming that such lawsuits violated Travelers' protections as settling Manville insurers under injunctive language contained in the 1986 Orders. The Bankruptcy Court entered several restraining orders in 2002 and 2003, temporarily enjoining prosecution of both the Common Law and the Statutory Direct Actions against Travelers.

C. "Injunction Enforcement" Morphs into Court-Sanctioned Settlements

Instead of ruling on the motions, the Bankruptcy Court sent the parties to mediation. The mediation resulted in a series of settlements. On March 5, 2004, Travelers entered into a settlement agreement with the Statutory Direct Action plaintiffs and their counsel pursuant to which Travelers agreed to pay $360 million plus $37.5 million of attorneys' fees. (A-662-79). In May 2004, Travelers entered into a settlement agreement with the Common Law Direct Action plaintiffs and their counsel pursuant to which Travelers agreed to pay $70 million plus $20 million of attorneys' fees. (A-799-815). Travelers also entered into a third settlement agreement with a group of plaintiffs in Hawaii who were seeking to impose liability on Travelers for its allegedly fraudulent defense during the 1990s of Combustion Engineering, a company totally unrelated to Manville. (A-840-56).

Thus, Travelers was willing to pay the Direct Action claimants and their counsel upwards of half a billion dollars to settle lawsuits that it claimed were already barred by the 1986 Injunctions. But there was a catch. Travelers would pay the money, but only if Travelers could tie the settlement to a mechanism for cutting off any further Direct Action claims against it and any potential indemnity or contribution claims from its insurer co-defendants in the Direct Action Suits. Thus, each of the Direct Action Settlement Agreements was conditioned upon the entry of an order by the Bankruptcy Court "interpret[ing]" and "clarify[ing]" that the Direct Actions always had been prohibited by the 1986 Injunctions. (A-817).

Although the Bankruptcy Court repeatedly claimed that it was "interpreting" and "enforcing" its prior injunctions, what Travelers filed were three motions *to approve settlement agreements*, not to enforce injunctions. (A-637-61, A-781-98, A-826-39). The Bankruptcy Court scheduled hearings on the motions *to approve settlement agreements*, not on the prior motions to enforce injunctions. (A-877-86). Notices of settlement were published and were mailed to individuals who previously had submitted asbestos bodily injury claims against the Manville Trust (but not to any of Travelers' co-defendants in the Direct Action Suits, such as Chubb). The notices that were approved by the Bankruptcy Court were only intended to apprise people who "filed or resolved an asbestos-related personal injury or wrongful-death claim or may do so in the future," that their "rights to file claims against

Travelers Property Casualty Company and affiliated Travelers entities may be affected *if a settlement is approved* by the Court."[6] (A-887-94, emphasis added).

To preserve its potential indemnity/contribution rights, Chubb filed a limited objection to the motion to approve the Common Law Direct Action settlement urging that the Bankruptcy Court had no jurisdiction or discretion to undertake to affect any of Chubb's rights, and that to the extent the 1986 injunctions purported to do so already, they were unenforceable as against Chubb.

On July 6, 2004, the Bankruptcy Court held an evidentiary hearing on the motions to approve the various settlement agreements. (A-1591-1645). On August 17, 2004, the Bankruptcy Court approved the settlements. The Bankruptcy Court's order confirmed that the purpose of the July 6 hearing was to hear "evidence of the fairness of th[e] settlement[s] . . ." (90a). Nevertheless, to satisfy the condition of the settlement

[6] Everything that happened before the Bankruptcy Court following the announcement of the settlement agreements was consistent with the granting of new and expanded relief to "Travelers," but entirely inconsistent with the notion of injunction "enforcement." There would have been no need to undertake a "broad, nationwide notice campaign" (A-1818) in order to enforce the 1986 Injunctions because the alleged contemnors already were before the Bankruptcy Court. Notice is only needed for approval of a settlement, and then only if the settlement order would affect rights of absent parties. If the rights of absent parties to bring Direct Actions had been extinguished pursuant to the 1986 Injunctions, there could be no reason to give them notice of anything in 2004.

agreements, the Bankruptcy Court held that the various Direct Action Lawsuits, including the Common Law Direct Actions, were barred by the Channeling Injunction. (92a). Because Travelers conditioned the settlement upon the Bankruptcy Court finding that the 1986 Injunctions had been violated – to be accompanied by judicial approval of the settlement – the Direct Action plaintiffs and their counsel happily conceded their own violations and, as more fully described at pp. 21-22, below, withdrew their opposition to Travelers' position that the Direct Action Suits were enjoined by the 1986 Injunctions.

The Bankruptcy Court concluded that "the evidence on the record and before this court establishes that the direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer." (169a). The Bankruptcy Court "clarifie[d] that the Direct Action Claims that are the subject of these proceedings are within the scope of the Confirmation Order's and the Insurance Settlement Order's prohibitions, and are — and always have been — permanently barred." (170a). The Bankruptcy Court further held that all contribution or indemnity claims against "Travelers" in connection with the Direct Action Lawsuits were barred by the Confirmation Order. (94a).

The District Court affirmed the Bankruptcy Court's Clarifying Order. However, it vacated the Clarifying Order's "gate-keeper" provision, which required potential future claimants against Travelers to obtain Bankruptcy Court approval before filing their complaints in another court, as beyond the subject matter jurisdiction of the Bankruptcy Court.

On February 15, 2008, a three-judge panel of the Second Circuit, consisting of Judges Calabrese, Sotomayor, and Wesley, vacated the Clarifying Order. In a unanimous opinion authored by Judge Wesley, the court concluded that the Bankruptcy Court had erred when it interpreted the 1986 Injunctions as barring claims "predicated upon an independent duty [allegedly] owed by Travelers to the Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds." (App. 6a). The court remanded the cause to the Bankruptcy Court to determine whether that court had jurisdiction to enjoin any of the Direct Action Lawsuits.

Motions for rehearing by the panel or *en banc* were denied, and efforts to stay issuance of the mandate were rejected by the Second Circuit and by Justice Ginsberg acting for this Court.

REASONS FOR DENYING THE PETITIONS

A. In Harmony with Precedents of Other Circuits, and Its Precedents in This Case, the Second Circuit Correctly Interpreted the Scope of the 1986 Injunctions by Reference to the Bankruptcy Court's Contemporaneous Jurisdictional Restrictions

While much of its opinion is couched in terms of jurisdictional limitations, the Second Circuit was actually reviewing the Bankruptcy Court's *interpretation* of its 1986 Injunctions. The Second Circuit accepted the Bankruptcy Court's assertion that it had intended to provide settling insurers with "global finality" in 1986. But the Second Circuit correctly observed that "global finality is only as 'global' as the bankruptcy court's jurisdiction." (30a). As a result, it held that the Bankruptcy Court erred in 2004 by "interpreting the terms 'based upon, arising out of or related to the Policies' without reference to the court's jurisdictional limits [in 1986]." (31a). As the court pointed out, "[t]he fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims." (28a).

Hence, while the Second Circuit acknowledged that it was "literally" possible to read the 1986 Injunctions as broadly as the Bankruptcy Court did, the Second Circuit ruled that it was legal error for the Bankruptcy Court to adopt such a literal interpretation instead of "read[ing] the 1986 orders to conform with the bankruptcy court's jurisdiction of the *res* of the

Manville estate." (33a). Beyond the fact that Travelers contemporaneously acknowledged such limitations on the 1986 Injunctions, such a reading comports with the Second Circuit's recognition, in its 1988 opinion affirming the Confirmation Order, that the 1986 Orders were issued pursuant to the Bankruptcy Court's "equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created." *MacArthur Co. v. Johns-Manville Corp.* (194a).

> The injunctive orders issued by the Bankruptcy Court were necessary to effectuate the Court's channeling authority, that is, to make sure that claims to Manville's insurance proceeds were, in fact, channeled to the settlement fund and could not be asserted directly against the insurers. The authority to issue the injunction is thus a corollary to the power to dispose of assets free and clear and to channel claims to the proceeds.

(199a). As the Second Circuit recognized, whether or not the Direct Action Suits have any merit, at least the complaints presented in the appellate record did not seek to collect from the policy proceeds, the *res* that was property of the Manville estate over which the Bankruptcy Court possessed jurisdiction in 1986 and which supported the exercise of *in personam* jurisdiction over those asserting interests in that *res*.

In arguing to the contrary, Travelers misconstrues the nature and scope of bankruptcy jurisdiction. "Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction . . . [and] is premised on the debtor and his estate. . . ." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 369-70 (2006). By its very nature, it is a "narrow jurisdiction." *Id.* at 378. The core purposes of bankruptcy are (1) to provide the honest but unfortunate debtor with the "fresh start" of a bankruptcy discharge, while (2) marshaling and maximizing the value of the debtor's assets for equitable distribution among his creditors. It is true, as Travelers points out, that "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res.*" *Id.* at 370. But the point this Court made in *Katz* was that bankruptcy courts may issue ancillary *in personam* orders to enforce their *in rem* adjudications, not that they may seek to discharge liabilities of non-debtors that are not derivative of the conduct of the debtor or the property of its estate.

Travelers itself acknowledged before the lower courts that the "original jurisdiction" of the bankruptcy court in 1986 to provide *in personam* injunctive protection to non-debtor insurers such as Travelers derived from its *in rem* jurisdiction over Manville's insurance policies as property of the Manville estate. (A-1833). And it was maximizing the policy proceeds for the Manville estate that provided justification for the bankruptcy court's extension of "channeling injunction" protection to the settling insurers from Policy Claims and claims that are derivative of Manville's liabilities. (164a).

The Second Circuit did not alter the scope of the 1986 Injunctions or otherwise impugn their finality, as Petitioners argue. To the contrary, it was the Bankruptcy Court that impermissibly purported to expand their scope by conflating the notion of a "Policy Claim," with Travelers' alleged "insurance relationship" with Manville. While Policy Claims were defined as claims arising from the insurance policies that were property of the estate, the "insurance relationship" construct sweeps much more broadly to include, for example, Travelers' conduct in the defense of claims in Hawaii on behalf of a wholly different insured, Combustion Engineering, separated by decades from Travelers' defense of Manville. By contrast, the Second Circuit adhered to the general doctrine of constitutional avoidance by declining to adopt an interpretation of the terms "based upon, arising out of or related to the Policies" that, while "literally" conceivable, would have resulted in the constitutionally-suspect conclusion that the Bankruptcy Court intended to exceed the boundaries of its subject matter jurisdiction in 1986.[7]

The Second Circuit further correctly distinguished other situations where the 1986 Injunctions were enforced to bar claims against Manville's insurers:

> Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated*

[7] Further, the Second Circuit's holding is consistent with the Fifth Circuit's ruling in *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), that shared facts do not support the assertion of related-to bankruptcy jurisdiction absent some potential impact upon an asset that is property of the estate.

> to the policy proceeds, quite unlike the claims in *MacArthur* and *Davis* where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies.... Moreover, the claims at issue here do not seek to collect on the basis of Manville's conduct.... Plaintiffs neither seek to recover insurance proceeds nor rely on the insurance policies for recovery. (23a).

Likewise, the Second Circuit reasoned, § 524(g) must be interpreted to conform with the jurisdiction of bankruptcy courts. (33a). The injunctive relief authorized by § 524(g)(4)(A)(ii)(III) for third parties is authorized only "to the extent such alleged liability . . . arises by reason of . . . such third parties' provision of insurance to the debtor." Consistent with the Third Circuit's holding in *In re Combustion Eng'g, Inc.*, the Second Circuit concluded that this provision permits relief only as to third-party actions in which the non-debtors' alleged liability "was derivative of the debtors." (35a). Without conceding that the Direct Action Suits have any factual or legal merit, their theories posit violations of legal duties independent of any alleged wrongful conduct by Manville or the proceeds of any policies issued to Manville. Thus, the Second Circuit properly concluded, "[b]ecause the claims here are non-derivative and have no effect on the *res*, they are outside the limits of § 524(g)." (35a). Again, the Second Circuit honored the doctrine of constitutional avoidance by declining to infer a broad Congressional intent to authorize bankruptcy courts to grant releases/

injunctive relief to non-debtors that cannot be directly tied to property of a bankruptcy debtor's estate and are not derivative of a debtor's own tort liabilities.

B. The Interlocutory Nature of the Second Circuit's Ruling Further Militates in Favor of Denying the Petitions

Interlocutory orders are particularly poor candidates for certiorari. It has long been the standard practice of this Court to refrain from issuing a writ of certiorari to review non-final orders or decrees absent some extraordinary circumstances. *See American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

Here, the Second Circuit remanded the case "for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims" in light of the guidance supplied by its opinion. No extraordinary circumstances are present here that might warrant this Court's short-circuiting the ordinary course of the underlying proceedings. To the contrary, the doctrine of constitutional avoidance again counsels restraint.

Notwithstanding these principles, Travelers argues (at 16-19) that the Second Circuit's ruling conflicts with the Supremacy Clause. But Travelers is free on remand to demonstrate, if it can, that particular Direct Action complaints in fact seek to put Travelers "in Manville's chair," as Travelers alleges (at 10), by seeking to collect proceeds of Travelers' Manville insurance policies and/ or otherwise to impose liability on Travelers that is

derivative of Manville's own tortious conduct. Travelers' argument is premature, however, because it assumes that some state's law not only would recognize the outlier legal theories asserted in the Direct Action Lawsuits, but also would permit these plaintiffs to collect Manville-derived liabilities from Travelers. Neither of these things has come to pass and there is no reason to anticipate the future creation of a state law cause of action that conflicts with the confirmed Manville Plan.

C. The Esoteric Issues Petitioners Seek to Raise Are Unlikely to Provide Meaningful Guidance in Future Cases

In addition to the lack of a circuit split and the interlocutory nature of the Second Circuit's decision, the questions for which Petitioners seek certiorari arise in a most unusual factual and procedural posture – the interpretation of a 20-year old order in the context of "injunction enforcement" proceedings that had themselves devolved into a "settlement approval" hearing. Indeed, Travelers' petition takes a page and a half to build up to a three-part "Question Presented" that obviously is of scant interest to anyone other than the parties themselves. These unique issues and circumstances do not lend themselves to a decision likely to provide broader guidance to lower courts. The questions presented by Petitioners therefore are undeserving of the attention and scarce resources of this Court.

D. Numerous Alternative Grounds, Not Reached by the Second Circuit, Likewise Would Have Required that the Clarifying Order Be Vacated

1. The Clarifying Order Suffered from Additional Jurisdictional Defects

Quite apart from the jurisdictional analysis performed by the Second Circuit in rejecting the Bankruptcy Court's 2004 interpretation of its 1986 Orders, the proceedings below and the resulting Clarifying Order suffered from additional jurisdictional deficiencies.

Lack of Ripeness: As the District Court held, the Bankruptcy Court lacked jurisdiction to predict and pass upon whether Direct Action suits that have not been filed would violate the 1986 Injunctions. Likewise, it lacked jurisdiction to predict whether as-yet-unasserted potential indemnity and/or contribution claims by Chubb against Travelers would be barred by the 1986 Injunctions. The sole source of bankruptcy jurisdiction was the Bankruptcy Court's authority to interpret and enforce its 1986 Orders. Therefore, that court would have been acting within the scope of its limited, remnant subject matter jurisdiction had it directed the plaintiffs in the challenged Direct Action Lawsuits to cease and desist from their violation of those injunctions. But the Bankruptcy Court exceeded that narrow jurisdiction by purporting to "clarify" the rights of individuals or entities that have not even sued Travelers and had not been made a party to the enforcement proceedings.

No Jurisdiction to Perform Settlement Approval: Further, the Bankruptcy Court had no jurisdiction to approve settlements, which the Petitioners conceded were neither factually nor analytically connected to the Bankruptcy Court's limited injunction enforcement jurisdiction. Travelers repeatedly emphasized that the motions to enforce the 1986 Injunctions were "*analytically and legally distinct* from the settlement agreements," (A-1818), and acknowledged that the approvals of the settlement agreements were *"wholly separate"* from the Bankruptcy Court's merits rulings. (A-1802-03, A-1821-22) (emphasis added). *See also* (A-1818-19) (motion to enforce the Confirmation Order was "separate and distinct issue" from whether to approve the settlement agreements), (A-1855) (approval of settlements was "[s]eparate and distinct from its conclusion that the pending direct action claims violated the Confirmation Order"). Moreover, approving settlements that *reward* injunction violators for those very violations cannot be said to be part of the Bankruptcy Court's arsenal of contempt-based enforcement powers. *See United States v. Pauley*, 321 F.3d 578, 580 (6th Cir. 2003) (rewarding a party for violating court's injunction not "an available tool" for encouraging party's compliance).

Mootness: Conversely, since the Direct Action claimants and their lawyers had pre-agreed with Travelers as part of their settlements to jointly cooperate in obtaining findings that the Direct Action lawsuits violated the 1986 Injunctions, there remained no legitimate "case or controversy" to support the Bankruptcy Court's continued exercise of its narrow injunction-enforcement remnant jurisdiction.

Accordingly, constitutional mootness likewise deprived the Bankruptcy Court of subject matter jurisdiction, preventing it from entering the Clarifying Order.

By July 2004, the current Direct Action plaintiffs had agreed to settle amicably and dismiss their actions against Travelers. This mooted their dispute. "A live controversy, within the Article III jurisdiction of the federal courts, requires a plaintiff seeking relief and a defendant opposing that relief." *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 638 F.2d 7, 8 (2d Cir. 1980) (case mooted where settlement between union and company provided that union would continue to seek ruling that complaints stated valid claims, but agreed not to proceed further in an effort to obtain relief in event of favorable ruling). The absence of a truly adversarial proceeding meant that the requisite legal controversy needed to "sharpen the issues for judicial resolution" had ceased to exist. *Armstrong World Industries, Inc. v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992). The Clarifying Order therefore constituted a prohibited advisory opinion.

Any doubt about the non-adversarial nature of the proceedings before the Bankruptcy Court was explicitly dispelled by the Common Law petitioners: "mediation resulted in three settlements, affording approximately $440 million of compensation . . . in exchange for dismissal of all pending lawsuits, 84,000 releases *and the Direct Action plaintiffs' withdrawal of their opposition to Travelers' position that the Direct Actions were enjoined.*" (A-1880, emphasis added). Thus, according to the Direct Action plaintiffs, their claims are barred by the 1986 Injunctions, not because they really

are, but rather because making such a concession was part of the bargained-for consideration exchanged pursuant to settlement agreements. Indeed, Common Law Plaintiffs Counsel highlighted the academic nature of the July 6, 2004 proceedings before the Bankruptcy Court:

> [T]he settlements meant that the parties were able to present evidence and the arguments of counsel to Judge Lifland and have him rule on whether the Direct Actions against Travelers . . . were indeed barred by the Confirmation Order, *without committing to accepting the consequences of a final order if Judge Lifland did not believe that the Confirmation Order barred the Direct Actions.*

(A-1883) (emphasis added).

Since the "controversy" was moot, the Bankruptcy Court's findings, conclusions and "Clarifying Order" amounted to an impermissible advisory opinion.

2. The Clarifying Order Impermissibly Sought to Reward, Rather than Punish, Alleged Violators of the 1986 Injunctions

If the Bankruptcy Court were correct in finding that the 1986 Injunctions clearly barred the Direct Action cases, then the Bankruptcy Court's approval of the Direct Action settlements through the Clarifying Order constituted a serious abuse of discretion. The Bankruptcy Court's jurisdiction was to enforce its orders

and *punish* violators, not to bless their misconduct by approving settlements designed to reward the violators and their counsel for these very violations.

A consensual resolution cannot have as its foundation a judicial ruling that finds a party in violation of that court's injunction and then rewards that party for its conduct: "[C]ourts should not use their authority . . . to reward parties' contempt of prior orders." *United States v. Pauley*, 321 F.3d at 581. Thus, "blatant refusal to comply with a court order would have warranted contempt proceedings, but certainly not a reward for their obstruction." *Id.* at 582.

No matter how Petitioners tried to disguise it, the Clarifying Order sought to bestow an enormous reward upon the Direct Action plaintiffs and their counsel premised upon their supposed violation of the 1986 Injunctions. If the Direct Action Lawsuits violated the prior injunctions, Travelers was entitled to the enforcement of those injunctions without paying "consideration" to the violators. Because courts simply cannot condone a party's profiting from violations of their orders, the Bankruptcy Court's entry of the Clarifying Order approving such a "settlement" constituted a manifest abuse of discretion that independently would have required that the Clarifying Order be vacated.

3. The Clarifying Order Impermissibly Expanded the Scope of the 1986 Injunctions to Extend Protection to Additional Entities

The "Clarifying Order" undeniably represents an expansion of the protection of the 1986 Injunctions — at least with respect to "Travelers" affiliates like Citigroup, Inc., which were not "affiliates" of any Travelers entities back in 1986. The Bankruptcy Court had no jurisdictional basis for doing so, which provided yet another independent ground for vacating the Clarifying Order.

4. The Clarifying Order Impermissibly Approved a Preferential Settlement Fund for Select Manville "Stakeholders" in Contravention of 11 U.S.C § 524(g) as Well as an Overriding Goal of the Manville Plan

Even if jurisdiction existed to extend the protection of the 1986 Injunctions to additional "Travelers" entities, any such protection would have had to satisfy the requirements of § 524(g). While the original injunctions may have been issued in reliance upon an expansive reading of 11 U.S.C. § 105(a), Travelers agrees that "Section 524(g) specifically applies to the Manville injunction by virtue of Section 524(h)," enacted in 1994. (A-1219).

It follows, therefore, that any expansion of the protection of the 1986 Injunctions, whether it be expanding the scope of Travelers' protections or defining new entities like Citigroup within the definition of "Travelers" for the first time, must comply with

§ 524(g)'s requirements. Congress has laid down express conditions to the provision of injunctive relief to non-debtors. Specifically, 11 U.S.C. § 524(g)(4)(B)(ii) requires non-debtor parties to justify extension of injunctive relief through the provision of additional benefits *to the trust*, not to preferred groups of claimants.

Yet, none of the settlements approved by the Bankruptcy Court provide for the settlement funds, or any other amounts, to be deposited into the Manville Trust to benefit all claimants, present and future. Instead, the settlements authorize payment of all of the settlement proceeds to select Direct Action plaintiffs and their counsel. Moreover, the bankruptcy court's failure to adhere to this requirement not only violates § 524(g), but does violence to a central tenet of the Manville Plan.

Common Law Settlement Counsel has described the Direct Action plaintiffs as the "last remaining stakeholders in the Manville Estate." (A-1905-06). They claim that although "other stakeholders had been satisfied years ago," these "last remaining stakeholders in the Manville Estate, have not been." *Id.* As Manville "stakeholders," these Direct Action Claimants were represented, either actually or virtually, in the Manville bankruptcy and therefore are bound by the Manville Plan, which, consistent with the classic limited fund model, marshaled assets and placed them in the Manville Trust for their *non-preferential* payment to current and future asbestos claimants on an identical basis. This requirement reflects a cornerstone goal of the Manville Plan and the Manville Trust – to provide identical treatment to all claimants, current and future,

"by virtue of the Injunction, which channels all claims to the Trust." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988).

Common Law Settlement Counsel bluntly acknowledged that the Direct Action Settlements attempt an end-run around the Manville Trust to obtain preferred access to additional purportedly Manville-derived funds because these Manville "stakeholders" otherwise "would very likely be unable to recover any money from the nearly depleted Manville Trust." (A-1908-09). Travelers confirmed that the settlement funds are "separate and apart from the Manville Trust." (A-1817). Because the settlements did not comply with § 524(g), the Bankruptcy Court was not permitted to extend the scope of "Travelers'" injunctive relief through the Clarifying Order.

5. Chubb Cannot Constitutionally be Bound to the Bankruptcy Court's 1986 Injunctions and 2004 Clarifying Order

As explained above, the Bankruptcy Court had no subject matter jurisdiction in the first place to render an advisory opinion as to whether any potential future indemnification or contribution claim by Chubb against Travelers would violate the 1986 Injunctions. In addition, another set of constitutional and jurisdictional concerns independently prevented the Bankruptcy Court both from exercising jurisdiction *ab initio* over Chubb, a non-Manville insurer, in 1986 and from purporting to "clarify" Chubb's rights under the 1986 Injunctions in 2004.

In 1986, Chubb at most was a potential future claimant, which could not be given the notice and opportunity to be heard — as due process required in order to bind Chubb to the results of those proceedings to which it was a stranger at that time. Travelers itself emphasized to the Bankruptcy Court that the Common Law Direct Action lawsuits that are being asserted against Chubb are based upon legal theories that are "unprecedented now" and were "unimaginable then." (A-1217). Unlike future asbestos claimants, for whom the Bankruptcy Court appointed a legal representative to protect their rights during the bankruptcy proceedings, no effort was made to protect Chubb or other non-Manville insurers through a virtual representative, and no provisions were made to provide appropriate consideration for the confiscation of Chubb's rights.

Chubb's predicament mirrors the situation in *Stephenson v. Dow Chemical Co.,* 273 F.3d 249, 258 (2d Cir. 2001), *aff'd by evenly divided Court,* 539 U.S. 111 (2003), in which an injunction against future Agent Orange litigation was held *not* to bind future claimants who were not adequately represented in the prior proceedings:

> Defendants likewise strenuously argue that the district court's injunction against future litigation prevents these appellants from maintaining their actions. While it is true that "[a]n injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience," [citations omitted], defendants' injunction-based argument

> misses the point. The injunction was part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation. If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment, which includes the injunction on which defendants rely, is not binding as to these plaintiffs.

Stephenson, 273 F.3d at 257. *See also, e.g.*, *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir. 1994) (finding that when absent class members were not adequately represented in a post-settlement modification of a class-wide injunction, "*res judicata* did not bar them from collaterally attacking the [modification] proceedings").

One set of petitioners, Common Law Settlement Counsel, agreed with Chubb that the Bankruptcy Court lacked jurisdiction to bind Chubb to its 1986 Injunctions: "Common Law Settlement Counsel agrees that there is no circumstance under which Chubb could be bound by the Confirmation Order" because Chubb "never insured Manville." (A-1925, n.15). "Chubb is not bound by any of Judge Lifland's rulings respecting Travelers." (A-1928, n.16).

Although the District Court rejected Chubb's contention, the Second Circuit never reached Chubb's meritorious argument on this point, which constitutes an additional, independent reason why neither the 1986 Injunctions, nor the Clarifying Order, are binding upon Chubb.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

JACOB C. COHN
Counsel of Record
WILLIAM P. SHELLEY
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2147

Counsel for Respondent Chubb Indemnity Insurance Company