

No. _____ 08 - 307 SEP 4 - 2008

IN THE OFFICE OF THE CLERK
William K. Suter, Clerk
Supreme Court of the United States

COMMON LAW SETTLEMENT COUNSEL,
Petitioners,

v.

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE
COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL,
LEE FLETCHER ANTHONY, CHUBB INDEMNITY
INSURANCE COMPANY, ASBESTOS PERSONAL INJURY
PLAINTIFFS AND CASCINO ASBESTOS CLAIMANTS,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1986, the Bankruptcy Court, having subject-matter jurisdiction over the Johns-Manville bankruptcy cases and proceedings therein, confirmed a plan of reorganization. Through the confirmation order and related orders, the Bankruptcy Court exercised its statutory authority to approve non-debtor, third-party injunctions in favor of, among others, the debtors' insurance companies. Those insurance companies then paid approximately \$850 million to fund a trust created under the plan for the benefit of certain victims of asbestos-related diseases. In 2004, the Bankruptcy Court entered an order holding that particular lawsuits brought against certain of the debtors' insurance companies were enjoined under the 1986 orders. The District Court affirmed that decision. The Second Circuit reversed on the sole ground that the Bankruptcy Court did not have "jurisdiction" to enjoin those lawsuits. The question presented is:

Once a bankruptcy court's subject-matter jurisdiction over a case attaches, whether the court must have a separate jurisdictional basis to approve a third-party injunction provision in a plan of reorganization or related confirmation order.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 DISCLOSURE**

The Petitioners, Common Law Settlement Counsel, include The Law Offices of Lawrence Madeksho LLC (“Madeksho”), The Law Offices of Bruce Carter (“Carter”), Bevan & Associates LPA, Inc. (“Bevan”) and The Bogdan Law Firm (“Bogdan”). The Petitioners represent individuals harmed by exposure to asbestos who are pursuing common law claims against insurance companies and who entered into the settlement agreement underlying this appeal. Pursuant to Supreme Court Rule 29.6, none of Madeksho, Carter, Bevan and Bogdan is owned by a parent corporation, and no publicly held corporation owns 10% or more of the stock in Madeksho, Carter, Bevan or Bogdan.

Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp., appellees in the case below, are filing a separate petition for a writ of certiorari.

Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony, Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs and Cascino Asbestos Claimants, appellants in the case below, are respondents to this petition for a writ of certiorari.

Statutory Settlement Counsel and Hawaii Settlement Counsel were appellees in the case below.

OneBeacon America Insurance Company and Continental Casualty Company initially were appellants in the case below and are no longer parties to this case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (the "Second Circuit") dated February 15, 2008 (Appendix to the Petition ("App." A)) is reported at 517 F.3d 52. The Judgment of the Second Circuit dated February 15, 2008 (App. B) is

unreported. The Opinion & Order of the United States District Court for the Southern District of New York (the "District Court") dated March 28, 2006 (App. C) is reported at 340 B.R. 49. The Order Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction (the "Clarifying Order") of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") dated August 17, 2004 (App. D) is unreported. The Findings of Fact and Conclusions of Law Regarding Travelers Motions for Approval of Certain Settlement Agreements and For Entry of a Clarifying Order (the "Findings and Conclusions") of the Bankruptcy Court dated August 17, 2004 (App. E) is unreported, but may be found at 2004 WL 1876046. The orders of the Second Circuit denying rehearing or rehearing en banc dated May 8, 2008 (App. F) are unreported.

BASIS FOR JURISDICTION

The judgment of the Second Circuit was entered on February 15, 2008. (App. 1a-35a.) The petitions for rehearing and for rehearing en banc were denied on May 8, 2008. (App. 183a-188a.) This Court granted the Petitioners' Application For Extension Of Time To File A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit, to September 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 157(a) provides:

Each district court may provide that any or all cases under title 11 and any or all proceedings

arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 157(b)(1) provides:

Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(b)(2)(L) provides:

Core proceedings include, but are not limited to—

...

(L) confirmations of plans;

28 U.S.C. § 1334(a) provides:

Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

28 U.S.C. § 1334(b) provides:¹

Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all

¹ As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005), the language "Except as provided in subsection (e)(2), and" was added to 28 U.S.C. § 1334(b).

civil proceedings arising under title 11, or arising in or related to cases under title 11.

STATEMENT OF THE CASE

A. The Unprecedented Bankruptcy Case of Johns-Manville

By August 26, 1982, the date that the Johns-Manville Corporation and certain affiliated entities ("Manville") filed voluntary petitions pursuant to Chapter 11 of the Bankruptcy Code, approximately 12,500 lawsuits on behalf of over 16,000 claimants had been filed against Manville, the "world's largest miner of asbestos and a major manufacturer of insulating materials and other asbestos products." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988). Those suits stemmed from respiratory diseases, including certain forms of lung cancer, that had been linked to exposure to asbestos fibers. (*Id.*) Manville proposed a plan of reorganization (the "Manville Plan") to address the existing claims and the anticipated "massive personal injury liability in the future." *Id.* Judge Lifland, who has presided over the cases for more than 20 years, later recognized:

the key to confirmation of the Manville Plan was the creation of a mechanism through which asbestos victims could be compensated with funds contributed by Settling Insurers. The Court understood that insurers would not contribute funds without receiving assurance that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved. The Court also understood that in order to facilitate the insurance settlements,

the Confirmation Order needed to contain a centralization of disputes provision to ensure that Settling Insurers would not be required to expend resources litigating the scope of the Court's Orders across the country.

(App. 167a.)

On December 22, 1986, the Bankruptcy Court confirmed the Manville Plan (the "Confirmation Order") and, as part of the confirmation proceeding, approved a series of settlements (the "Insurance Settlement Order") with Manville's insurance carriers, including Travelers.² (App. 108a.) The Manville Plan provided for the establishment of the Manville Personal Injury Settlement Trust (the "Manville Trust"), the channeling of asbestos personal injury and other claims to the Manville Trust, and Manville's transfer of certain property to the Manville Trust, including approximately \$850 million from settlements with their insurers (\$80 million of which came from Travelers). (App. 7a-8a.) In consideration for the insurers' settlements, the Confirmation Order and the Insurance Settlement Order contained broad injunctions in favor of, among others, Travelers (the "Injunctions"). (*Id.*; 168a.)

B. The Bankruptcy Court Interprets, Enforces and Clarifies the Manville Plan

Notwithstanding the Injunctions, certain persons injured by exposure to asbestos thereafter commenced

²Travelers means The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup, Inc., The Travelers Insurance Company, Travelers Life and Annuity Company and each of their respective direct or indirect parents, subsidiaries and sister companies. (App. 4a n.3.)

lawsuits on statutory and common law grounds against Travelers in various jurisdictions throughout the United States based on the insurer's own alleged misconduct (the "Direct Actions"). (App. 8a-10a.) As a result, Travelers filed a Motion for Temporary Restraining Order and Preliminary Injunction in the Bankruptcy Court, seeking to bar the Direct Actions on the grounds that they violated the Injunctions. (App. 106a.) The Bankruptcy Court agreed and granted the motion. (App. 106a-107a.)

Thereafter, following a lengthy Court-ordered mediation over which former New York Governor Mario Cuomo presided, some of the parties reached settlements that provided for the establishment of funds totaling approximately \$440 million. (App. 11a.) On March 26, 2004, Travelers filed motions to approve the settlements and a Motion for an Order Interpreting and Enforcing the Confirmation [sic] Including the Insurance Settlement Order and the Channeling Injunction, seeking enforcement of the Injunctions and a clarification that such injunctions prohibited the prosecution of the Direct Actions against Travelers. (App. 107a-108a.)

Following an evidentiary hearing, the Bankruptcy Court entered its Findings and Conclusions, which detail the basis for the Clarifying Order. (App. 105a-182a.) In the Clarifying Order, the Bankruptcy Court made clear that the Injunctions underlying the Manville Plan, the Confirmation Order and the Insurance Settlement Order enjoined all present and future Direct Actions against Travelers, as well as any related contribution or indemnity claims. (App. 173a.) The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. § 1334, when it entered the

Findings and Conclusions and the Clarifying Order, interpreting and applying its own 1986 orders.

On appeal, the District Court substantially affirmed the Bankruptcy Court's Findings and Conclusions and the Clarifying Order. (App. 36a-78a.)

C. The Second Circuit Reverses Solely on Jurisdictional Grounds

The Second Circuit reversed the District Court's decision. The court recognized that "[i]t is undisputed that the bankruptcy court had continuing jurisdiction to interpret and enforce its own 1986 orders. . . . there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders. . . ." (App. 15a.) However, the Second Circuit held that the Bankruptcy Court did not have jurisdiction in 1986 to enter the Injunctions with respect to the Direct Actions. (*Id.*; 31a.) In doing so, the Second Circuit considered whether the Bankruptcy Court would have had jurisdiction in 1986 over the Direct Actions, rather than whether the Bankruptcy Court had jurisdiction over the case and the Plan confirmation proceeding. On May 8, 2008, the Second Circuit denied rehearing or rehearing en banc. (App. 183a-188a.)

REASONS FOR GRANTING THE WRIT

As with the petitions for a writ of certiorari filed in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) and *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995), this petition addresses a federal issue of exceptional importance — the extent of a bankruptcy court's

jurisdiction. In this case, that issue arises in the context of a bankruptcy court's jurisdiction to confirm a plan of reorganization containing non-debtor, third-party injunctions. The Second Circuit blurred the distinct concepts of jurisdiction and statutory authority when, in 2008, it invalidated non-debtor, third-party injunctions entered in 1986 as part of the Manville Plan, the Confirmation Order and the Insurance Settlement Order. Its ruling threatens the finality of confirmed plans in mass tort and complex business cases, and unduly denies relief to common law claimants suffering from asbestos-related diseases. Only this Court may further clarify the distinction between a court's *adjudicatory authority* (jurisdiction) and the *standards* that should govern its award or denial of relief (statutory authority). Until this Court does so, the confusion evidenced by the Second Circuit's decision will continue.

A. The Second Circuit's Decision Obscures the Distinction Between Jurisdiction and Statutory Authority.

This Court has long recognized that “[j]urisdiction . . . is a word of many, too many, meanings.” *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867 (2004) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). In considering whether a time limit in a Federal Rule of Bankruptcy Procedure is jurisdictional, the Court observed that, “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claims-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s

adjudicatory authority.” *Id.* at 455, 124 S. Ct. at 915, 157 L. Ed. 2d 867; *see also Eberhart v. United States*, 546 U.S. 12, 16, 126 S. Ct. 403, 405, 163 L. Ed. 2d 14 (2005); *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999) (“[a]nother example . . . arises out of the unfortunate penchant of judges and legislators to use the term ‘jurisdiction’ to describe the technically distinct notion of a court’s authority to issue a specific type of remedy in a case in which the threshold requirements of subject-matter . . . jurisdiction are not open to question”); *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.), *cert. denied*, 497 U.S. 1029, 110 S. Ct. 3283, 111 L. Ed. 2d 792 (1990). Certiorari is warranted in this case, as the Second Circuit’s decision is in direct conflict with the requirement that the fundamental distinction between jurisdiction and statutory authority be maintained.

The issue here concerns a bankruptcy court’s core jurisdiction to confirm a plan of reorganization versus its statutory authority to include specific provisions within such a plan. Section 1334 of title 28 is the only statute that confers bankruptcy jurisdiction, and it does so exclusively in the district courts.³ In accordance with 28 U.S.C. § 157(a), district courts may refer “any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11” to the bankruptcy

³ Specifically, 28 U.S.C. § 1334(a) grants original and exclusive jurisdiction over cases commenced under the Bankruptcy Code on the district courts. Complementing that grant is the vesting in the district courts under 28 U.S.C. § 1334(b) of “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b).

courts, which the District Court has done. 28 U.S.C. § 157(a); S.D.N.Y. General Order M-61 (July 11, 1984). By virtue of that reference, a bankruptcy court is authorized to enter final judgments with respect to proceedings “arising under” or “arising in” a bankruptcy case. 28 U.S.C. §§ 1334 and 157(b). One such “core proceeding” is “confirmations of plans.” 28 U.S.C. § 157(b)(2)(L). *C.f. Kontrick*, 540 U.S. at 453, 124 S. Ct. at 914, 157 L. Ed. 2d 867 (“Section 157(b)(2)(J) instructs only that ‘objections to discharges’ are ‘[c]ore proceedings’ within the jurisdiction of the bankruptcy courts”).

Once a bankruptcy court’s jurisdiction to confirm a plan of reorganization is determined, the focus shifts to whether the Bankruptcy Code authorizes such bankruptcy court to approve particular provisions within the proposed plan.⁴ 11 U.S.C. §§ 101 *et seq.*

⁴ In this case, the question of statutory authority concerned a bankruptcy court’s ability to approve a third-party injunction in a plan. Although applying different standards, numerous Circuit Courts of Appeal have upheld non-debtor, third party injunctions in plans of reorganization. *See, e.g., Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005); *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir.), *cert. denied*, 537 U.S. 816, 123 S. Ct. 85, 154 L. Ed. 2d 21 (2002); *Securities and Exchange Comm’n v. The Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088, 113 S. Ct. 1070, 122 L. Ed. 2d 497 (1993); *Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959, 110 S. Ct. 376, 107 L. Ed. 2d 362 (1989). Even the Circuit Courts that found such provisions impermissible did so on statutory authority grounds. *See Resorts Int’l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243, 116 S. Ct. 2497, 135 L. Ed. 2d 189 (1996); *Landsing Diversified Properties-II v. The First Nat’l Bank and Trust Co. of*

The decision to confirm a plan with specific provisions is subject to appeal, but only within the prescribed time limitation. Fed. R. Bankr. P. 8002. When the time limitation expires, the bankruptcy court's decision becomes final, whether it was right or wrong. "Once subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou*, 199 F.3d at 45; *see also Wey*, 895 F.2d at 431 ("[c]ourts may err, even offend against the Constitution, without losing subject-matter jurisdiction").

Here, more than two decades after the Bankruptcy Court confirmed the Manville Plan, the Second Circuit considered whether the Bankruptcy Court's decision to approve the Injunctions was right or wrong by characterizing the inquiry as one of "jurisdiction." By so doing, the Second Circuit disregarded the Bankruptcy Court's core jurisdiction over confirmation of plans and thereby ignored the mandate of *Kontrick*, *Prou* and *Wey* that courts distinguish between jurisdiction and statutory authority. Accordingly, the Second Circuit's decision requires this Court's review and reversal.

B. As a Result of the Second Circuit's Decision, The Finality of Chapter 11 Plans Is Uncertain.

By holding that one provision of a confirmed plan requires a separate jurisdictional basis, the Second Circuit's decision threatens another vital principle — finality. *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S. Ct. 134, 138, 83 L. Ed. 104 (1938) ("[i]t is just as important that there should be a place to end as that

Tulsa (In re Western Real Estate Fund, Inc.), 922 F.2d 592 (10th Cir. 1990), *op. modified by*, 932 F.2d 898 (10th Cir. 1991).

there should be a place to begin litigation”), *reh’g denied*, 305 U.S. 675, 59 S. Ct. 250, 83 L. Ed. 437 (1938). Any non-debtor, third party injunction or release provision of a confirmed plan of reorganization would be subject to review on jurisdictional grounds at any time. “A litigant generally may raise a court’s lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.” *Kontrick*, 540 U.S. at 455, 124 S. Ct. at 915, 157 L. Ed. 2d 867 (citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)). No integrated, contractually binding agreement regarding a non-debtor, third party injunction or release provision would ever become final, as this case illustrates, thereby rendering uncertain the finality of Chapter 11 plans. This would particularly impact mass tort and other large business reorganizations which often rely upon third party injunctions and releases. (*See, supra*, fn. 4.)

In this case, as a result of the lack of finality, hundreds of filed lawsuits that otherwise would have been barred under the Clarifying Order will continue. (*See, e.g.*, App. 92a-104a.) Undoubtedly, more will follow, thereby exhausting already-taxed judicial resources. Further, individuals suffering from asbestos-related diseases who may have been able to get needed funds from the settlements totaling \$440 million will be forced to wait until those litigation matters are resolved. Accordingly, the number of citizens harmed, the judicial resources that will be expended and the doubt created with respect to the finality of orders, all as a result of the Second Circuit’s decision, also compel a grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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