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SECOND CIRCUIT CLARIFIES THAT THE BANKRUPTCY COURT LACKED JURISDICTION TO ENTER “CLARIFYING ORDER” IN *JOHNS-MANVILLE*

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On Feb 15, 2008, in *Travelers Casualty & Surety Co. v. Chubb Indemnity Insurance Co. (In re Johns-Manville Corp.)*,¹ the Second Circuit reversed the district court’s affirmance of the bankruptcy court’s 2002 Clarifying Order that determined that its 1986 channeling order was broad enough to bar lawsuits brought against Travelers Casualty and Surety Company (Manville’s former primary insurer) for Travelers’ own allegedly unlawful actions during their defense of asbestos lawsuits. The Second Circuit held that the bankruptcy court lacked jurisdiction—in 1986—to include within its groundbreaking order confirming the Manville Chapter 11 plan an injunction barring lawsuits by asbestos personal injury claimants against Manville’s long-standing primary insurer, Travelers, for torts that Travelers allegedly committed in the course of the decades-long asbestos wars.²

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History

Let's go back a couple of decades to when the Manville bankruptcy was born. On August 26, 1982, facing 12,500 lawsuits for personal injury and wrongful death caused by asbestos that the company mined and distributed in various forms, Manville filed for Chapter 11 relief.³ Manville was "the largest supplier of [raw] asbestos in the United States' from the 1920s until the 1970s."⁴ Manville was responsible for providing raw asbestos to approximately 58 countries, as well as producing asbestos-based products from its own factories.⁵ Asbestos, it was learned, had significant health risks for many individuals leading to, in many cases, long and agonizing deaths.⁶ As a result, Manville "became the target of a growing number of products liability lawsuits in the 1960s and 1970s."⁷

As the first mass-tort bankruptcy case in the modern era, the presiding judge and the litigants had to more or less invent a solution. This task was made immensely more difficult by the unusual fact that the latency period for symptoms for asbestos disease is decades long. Therefore, the number of litigants who might sue the company was uncertain.⁸ Nevertheless, it was estimated that "approximately 50,000 to 100,000 additional suits could be expected from persons who had already been exposed to Manville asbestos."⁹ The years of litigation that preceded the bankruptcy depleted Manville's assets and insurance coverage.¹⁰ By the time the bankruptcy case was filed, Manville's major asset was its remaining insurance coverage.¹¹ Moreover, Manville was embroiled in lawsuits with its insurers over policy coverage issues.¹²

In 1986, the debtor and a group of Manville's insurers, including Travelers, settled their cov-

erage disputes for approximately \$770 million, which was used to fund the bankruptcy estate.¹³ Manville's primary insurer, Travelers, contributed approximately \$80 million to the Manville bankruptcy estate, which was in addition to the \$20 million it had previously spent defending litigation against Manville.¹⁴ The contributions of the insurers were predicated upon an injunction to be issued by the bankruptcy court that would bar suits against the participating insurers and "channel" all claims against such insurers into the new Personal Injury Settlement Trust made up of these insurers' contributions.¹⁵

On December 18, 1986, the bankruptcy court approved the insurance settlements, which provided for the channeling of all personal injury claims against the debtor to the Settlement Fund, the release of the participating insurance companies and an injunction barring all suits against the insurers "based upon, arising out of, or related to the [settled] policies."¹⁶

Four days after the entry of the Insurance Settlement Order, the bankruptcy court confirmed Manville's plan of reorganization, adopting into the order confirming the plan the findings and conclusions of the court's prior order approving the insurance coverage settlements.¹⁷ The injunction, contained in the Confirmation Order, stated that "all persons" were enjoined from taking any action against the insurance companies "for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any *Claim, Interest,...* or *Other Asbestos Obligation*" that would affect "the debtors... or any of the Settling Insurance companies or any property of any of the foregoing[.]"¹⁸ The terms "Claim," "Interest" and "Other Asbestos Obligation" were defined in the Confirmation

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Order. A "Claim" for the purposes of this injunction was "a claim against one or more of the Debtors[.]" An "Interest" pertained to the rights of the stockholders. "Other Asbestos Obligations" was defined to mean "all debts, obligations or liabilities... other than Claims, for death, personal injuries or personal damages... to the extent caused or allegedly caused... by exposure to asbestos... and arising or allegedly arising... from acts or omissions... of one or more of the Debtors."¹⁹ The Confirmation Order's "channeling injunction," now commonplace, was the "cornerstone" of the Manville plan.²⁰

Current Dispute

Fast forward 16 continuously litigious years. In 2002, Travelers asked the bankruptcy court to enter a temporary injunction staying proceedings in 26 lawsuits that were pending in various state courts as violations of the 1986 injunctions and to enforce those injunctions against the alleged contemnors.

The 26 lawsuits alleged that Travelers—not Manville—had violated laws (in some cases statute-based; others common-law-based) in the course of defending against asbestos personal injury claims.²¹ These lawsuits alleged that Travelers acquired early knowledge of asbestos' toxic hazards and conspired with its insureds (including Manville), and with other asbestos insurers, to conceal these dangers and also influenced its insureds (including Manville) not to disclose their own knowledge of the hazards of asbestos.²² Many of the lawsuits made assertions similar to these: "Travelers facilitated the presentation of fraudulent 'state of the art' defenses while understanding, via Manville, that asbestos was hazardous. Travelers wrote memoranda about the potential litigation crises that would arise from asbestos.... Travelers learned about many asbestos claims in the 1950s, via Manville... [and] set forth 'sworn answers containing factual errors' in response to interrogatories."²³ The plaintiffs in these direct action lawsuits argued that the injunction in the Confirmation Order, by its own terms, did not cover the allegations contained in the lawsuits in question. They focused on the definitions in the 1986 injunctions which, they argued, limited the

scope of the injunctions to claims against settling insurers that arose out of the actions or omissions of Manville, not Travelers.

The bankruptcy court granted the temporary restraining order and, after holding several hearings on the motion, referred the parties to mediation.²⁴ The mediation produced three settlements. One settlement dealt with the various statute-based suits and provided \$360 million to those alleged contemnors.²⁵ The settlement agreement provided \$15 million to a separate group of claimants from Hawaii.²⁶ The alleged contemnors who sued on commonlaw theories settled for \$70 million.²⁷ Of course, the funding for these new settlements came from Travelers, the very party that hauled these plaintiffs into the bankruptcy court for allegedly violating the 1986 injunctions.²⁸

The settlements required active participation by the bankruptcy court. Before Travelers would pay the alleged contemnors, the bankruptcy court would, in essence, have to grant Travelers' motion and enforce the 1986 injunctions against the plaintiffs, finding that the direct action lawsuits violated the 1986 injunctions. As this was a stipulation among the parties, the alleged contemnors were contractually bound not to contest the ruling. The settlements also required the bankruptcy court to issue a "clarification" of its 1986 injunctions to specifically enjoin all such future lawsuits by all persons, including those who did not consent to, or enter into, any of the proposed settlements.²⁹ Moreover, those seeking to recover from this new fund had to provide Travelers with a release.³⁰

The bankruptcy court held a hearing on August 17, 2004.³¹ It approved the settlement agreements and entered the Clarifying Order, that found that the direct action lawsuits against Travelers were violative of the 1986 injunctions.³²

The channeling injunction contained within the Confirmation Order provided that claims "based upon, arising out of, or related to any or all of the *Policies* are transferred, and shall attach solely to the Settlement Fund."³³ The bankruptcy court held that the direct action lawsuits violated the 1986 injunctions. To support that conclusion the court found that "Travelers learned virtually everything it knew about asbestos from its relationship with

Manville.”³⁴ The bankruptcy court further found that “the gravamen of [the] Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers’ insurance relationship with Manville,... claims against Travelers based on such actions or omissions necessarily ‘arise out of’ and ‘related to’ the Policies.”³⁵ These findings were supported by a raft of evidence, which was essentially un rebutted. As argued by one appellant, it is not surprising that this evidence was un rebutted, since the nominally “adverse” parties already contractually bound themselves not to contest such a finding.³⁶ It is also just as likely that these findings and the evidence upon which they were based were simply un rebuttable.

The bankruptcy court concluded that its jurisdiction to clarify the 1986 plan injunction—and thereby implicitly to enjoin parties who either were not then before the court or who affirmatively opposed the settlements from pursuing similar direct action lawsuits—was derived from three sources: (1) § 1142(b) of the Bankruptcy Code because it “vests the Court with authority to oversee implementation of the plan and retain jurisdiction for acts necessary for the consummation of the plan”; (2) § 105(a), giving bankruptcy courts the power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]”; and (3) the court’s inherent power to interpret and enforce its prior orders.³⁷

The District Court’s Decision

The district court affirmed the bankruptcy court’s Clarifying Order, including its explicit injunction of other direct actions filed by persons not part of the settlement, agreeing that the court had jurisdiction to do so. However, the district court did reverse one part of the bankruptcy court’s Clarifying Order: the part of the order that provided a “gate-keeping” injunction. The gate-keeping injunction required any person who wished to bring a similar action against Travelers in the future to first seek permission from the bankruptcy court to file the lawsuit. Only if the bankruptcy court found that any such proposed lawsuit had no material connection with Manville would the lawsuit be allowed to proceed.³⁸ The district court

held that the bankruptcy court was without jurisdiction to enter such a gate-keeping order and, therefore, reversed as to that limited issue.³⁹

The Court of Appeals Decision

As framed by the Second Circuit, the controversy was primarily one of jurisdiction. The appellants argued that “the bankruptcy court failed to properly distinguish between (a) claims that seek to recover directly from Travelers for Travelers’ separate acts and (b) true Direct Action suits that seek to recover from an insurer contractually obligated to indemnify Manville for its misconduct. Appellees, on the other hand, are of the view that the bankruptcy court was merely enforcing its prior order.”⁴⁰

While quickly agreeing with the litigants and the lower courts that the bankruptcy court had jurisdiction to interpret and enforce its own 1986 orders, the Second Circuit explained that although “there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction. Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed statutory and common law claims.”⁴¹

One of the principal arguments of the appellees, found persuasive by the bankruptcy and district courts, was that the Second Circuit had already held that the 1986 injunctions were within the bankruptcy court’s jurisdiction. The case they cited as providing the ultimate decision was *MacArthur Co. v. Johns-Manville Corp.*⁴² The Second Circuit rejected that argument, holding that *MacArthur* was not on point.

The MacArthur Company was a Manville asbestos distributor. It claimed to be a co-insured under “vendor endorsements” contained in Manville’s insurance policies.⁴³ MacArthur argued that its claims were independent contractual obligations of the insurance companies and, therefore, were not within the scope of the 1986 injunctions. The court of appeals in *MacArthur* disagreed. It explained that because MacArthur’s claim for defense and indemnification from

the insurance company would have reduced the amount of insurance available to satisfy claims against Manville, MacArthur's claim affected an asset of the estate—Manville's insurance coverage. Because MacArthur's claim affected an asset of the bankruptcy estate, the bankruptcy court had jurisdiction to bar MacArthur's claims even if that claim was theoretically against the insurer and not against Manville.⁴⁴

The circuit court found support for this conclusion in *In re Davis*.⁴⁵ In *Davis*, the Fifth Circuit refused to vacate the automatic stay that arose with Manville's filing of bankruptcy in 1982. At the time, there were several classic direct action lawsuits pending against Manville in Louisiana state courts. The *Davis* court held that the bankruptcy court in New York had the authority to "enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt estate."⁴⁶ The rationale of the Fifth Circuit was that the statute in Louisiana that created a right to a direct action against an insurer "does not create an independent cause of action against the insurer, it merely grants a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured."⁴⁷

In its reversal of the district court's affirmance of the Clarifying Order, the Second Circuit explained that "[t]he claims at issue in *MacArthur* and *Davis* differ significantly from the statutory and common law claims at issue here. Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* 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[.]"⁴⁸ Because the claims in this matter did not arise from Manville's conduct, but only the conduct of Travelers, the Second Circuit held this case to be different from *MacArthur* and *Davis*.

Instead, the Second Circuit determined this case was much closer to another Fifth Circuit case, *Feld v. Zale Corp (In re Zale Corp.)*.⁴⁹ In *Zale*, the creditors' committee announced that it planned to sue certain of Zale's officers and directors. Zale's pri-

mary insurer, providing director and officer coverage, was Cigna Insurance Company (CIGNA). National Union Fire Insurance Company (UNFIT) had issued Zale an insurance policy that provided coverage in excess of CIGNA's primary policy limits.⁵⁰ Zale, CIGNA, and the targeted officers and directors entered into an agreement that would have provided for CIGNA to pay less than its full limits, but would open the door for additional liability to be borne by UNFIT. As part of the proposed settlement, the bankruptcy court was required to enter an injunction barring UNFIT from suing CIGNA for its conduct in the course of this settlement agreement.⁵¹ UNFIT argued that its bad-faith-settlement claims against CIGNA were not "related to" Zale's bankruptcy for purposes of jurisdiction under 28 U.S.C. § 1334(b), and therefore the bankruptcy court lacked jurisdiction to enjoin it from suing CIGNA.

The Fifth Circuit agreed, observing that "courts have held that a third-party action does not create 'related to' jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate.... [T]he district court's desire to 'foster and encourage and then preserve settlement in federal court' does not in and of itself confer jurisdiction."⁵² The issue in *Zale*, as the Fifth Circuit saw it, was "not whether the bankruptcy court had jurisdiction over the settlement and CIGNA, but whether the bankruptcy court had jurisdiction over an attempt to enjoin an action between... UNFIT and CIGNA."⁵³ The Fifth Circuit answered this question in the negative.

The Second Circuit agreed with the Fifth Circuit's analysis in *Zale*, noting that, as in *Zale*, the direct action plaintiffs sought recovery from Manville's insurer for the insurer's own wrongdoing and not the wrongdoing of Manville. Since the direct action plaintiffs were pursuing the assets of Travelers and not the property of Manville, their recoveries, if any, could not conceivably affect the Manville bankruptcy estate. Accordingly, the Second Circuit held that "the bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers."⁵⁴

Observations

The bankruptcy court's findings were extensive and the evidence adduced in support was overwhelmingly persuasive. There really was little doubt that Travelers and Manville were joined at the hip in battle for decades with asbestos victims and their resourceful attorneys. Manville was the lead defendant in nearly every asbestos case in the nation.⁵⁵ "There is little doubt that, in a literal sense, the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville. The bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion. However, the 1986 orders must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate."⁵⁶

As the Second Circuit saw it, "the factual determination was only half of the equation. The nature and extent of Travelers' duty to the Direct Action plaintiffs is a function of state law. Neither court [bankruptcy court or district court] looked to the laws of the states where the claims arose to determine if indeed Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose."⁵⁷ What was important to the Second Circuit was that the State in which the direct action was pending recognized that an insurer owed a duty to the plaintiff separate and apart from the duties owed to the plaintiff by the insured. If the State did recognize an independent duty, either under its statutory or common law, then the plaintiff cannot be deprived of the opportunity to prove that Travelers had breached it. Also, most certainly, the plaintiff could not be deprived of this right under the rubric of 28 U.S.C. § 1334 jurisdiction.⁵⁸

However, with all the discussion about the nature of the duty, what determined this case was that the money that would have to be paid by Travelers if it lost a direct action trial could not be taken from Manville or the Manville Trust, nor could the money paid by Travelers deplete any insurance policy owned by Manville. In short, a loss by Travelers would have no conceivable effect on

the debtor or its property. This case, then, was a simple application of the now talismanic test for a bankruptcy court's "related to" subject matter jurisdiction under 28 U.S.C. § 1334(b): "the usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."⁵⁹

Obviously, Manville and Travelers underestimated the resourcefulness of the asbestos plaintiffs when they crafted the plan of reorganization in 1986. If the company and the insurers had the benefit of nearly 20 years of hindsight, they might very well have added one more safety lock to the seemingly airtight plan. What was missing was a provision requiring the Manville Trust to indemnify Travelers against lawsuits like the ones at issue here.

In *Pacor*, the court held that a lawsuit between two nondebtors was not related to the Manville bankruptcy case because the court found no present claim for the debtor (Manville) to indemnify the defendant (*Pacor*).⁶⁰ In cases like *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*,⁶¹ on the other hand, courts have held that the third parties had a clear present right to indemnification by the debtor; accordingly, "related to" subject matter jurisdiction existed.⁶² Therefore, what was lacking in the Manville plan of reorganization in 1986 was a contractual indemnity from Manville for actions against Travelers seeking recovery only from the assets of the insurer. Had the Manville plan included such an indemnity, the effect on the Manville estate would have been obvious, and the result of this case would have almost certainly been different.

Research References: Norton Bankr. L. & Prac. 3d §§ 58:6, 114:6, 114:9, 114:10

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Notes

1. *Travelers Casualty & Surety Co. v. Chubb Indemnity Insurance Co. (In re Johns-Manville Corp.)*, 517 F.3d 52 (2d Cir. 2008).
2. Seeing no material difference in the analysis between the theories advanced in support of the claims of the

asbestos personal injury claimants and the potential future claims of insurers who might one day wish to assert indemnity claims against Travelers, the Second Circuit also held that the Manville bankruptcy court lacked jurisdiction to enjoin indemnity actions arising from the asbestos personal injury claimants' new lawsuits. *Johns-Manville Corp.*, 517 F.3d at 60 n. 17.

3. See *Johns-Manville*, 517 F.3d at 56 n. 1; see also *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988).
4. *Johns-Manville*, 517 F.3d at 55-6 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 742 (E.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993).
5. *Johns-Manville*, 517 F.3d at 56.
6. *Kane*, 843 F.2d at 639.
7. *Johns-Manville*, 517 F.3d at 56.
8. *Johns-Manville*, 517 F.3d at 56.
9. *Kane*, 843 F.2d at 639.
10. *Johns-Manville*, 517 F.3d at 56.
11. *Johns-Manville*, 517 F.3d at 56.
12. *Johns-Manville*, 517 F.3d at 56.
13. *Johns-Manville*, 517 F.3d at 56.
14. *Johns-Manville*, 517 F.3d at 57.
15. *Johns-Manville*, 517 F.3d at 57.
16. *In re Johns-Manville Corp.*, No. 82 B 11656, 2004 WL 1876046, at *15 (Bankr. S.D.N.Y. 2004 Aug. 17, 2004), aff'd in part, vacated in part, 340 B.R. 49 (S.D.N.Y. 2006), vacated, 517 F.3d 52 (2d Cir. 2008).
17. Appellant asbestos personal injury plaintiffs argued that it was only the finding and conclusions of the 1986 Settlement Order that were adopted into the Confirmation Order, and not the personal injury settlement injunction itself. See *Brief of Objectors-Appellants Asbestos Personal Injury Plaintiffs*, No. 06-2099-bk(L), 2006 WL 5004096, at *16 (Oct. 13, 2006) (referring to section (gg) of the Confirmation Order). The court of appeals did not address this issue.
18. See *In re Johns-Manville Co.*, Case No. 82 B 11656 to 11676, *Order Confirming Debtors' Second Amended and Restated Plan of Reorganization*, at 25, ¶ 29 (Dec. 22, 1986) (emphasis added).
19. See *Brief of Objectors-Appellants Cascino Asbestos Plaintiffs*, No. 06-2099-bk(L), 2006 WL 5004126, at *10-11 (2d Cir. Dec. 4, 2006) (emphasis added).
20. *In re Johns-Manville Corp.*, 340 B.R. 49, 55 (S.D. N.Y. 2006), vacated, 517 F.3d 52 (2d Cir. 2008). Because there was doubt concerning the legality of these mechanisms, Congress enacted as part of the Bankruptcy Reform Act of 1994, new §524(g) of the Bankruptcy Code, that adopted the Manville plan as the model for future asbestos cases. *Johns-Manville*, 517 F.3d at 57 n. 9; see also *Johns-Manville*, 340 B.R. at 63; see generally H.R. Rep. 103-835, at 41 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3349.
21. The evidence suggested that over 96% of the plaintiffs had already filed claims against the Manville Trust.
22. *Johns-Manville*, 340 B.R. at 55. All of the courts and the appellees called these lawsuits "Direct Action lawsuits." See, e.g., *Johns-Manville*, 517 F.3d at 57-8. Superficially, these lawsuits do appear to be classic direct action

lawsuits: "A lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." BLACK'S LAW DICTIONARY 472 (7th ed. 1999). They are similar only because they are lawsuits filed against insurance companies for personal injuries caused by their insureds. However, they are, as the court of appeals ultimately held, and as appellants vigorously argued, quite different from the classic "direct action" lawsuit, in that they assert claims based on the alleged wrongdoing of the insurer and that are not derivative of the alleged wrongdoing of the person insured.

23. *Johns-Manville*, 2004 WL 1876046, at *19 (quoting *West Virginia Litigation Complaint*).
 24. *Johns-Manville*, 2004 WL 1876046, at *19.
 25. *Johns-Manville*, 2004 WL 1876046, at *22.
 26. *Johns-Manville*, 2004 WL 1876046, at *23.
 27. *Johns-Manville*, 2004 WL 1876046, at *22.
 28. This result infuriated Appellant, Chubb Indemnity Insurance Company, which vociferously argued that rewarding parties found to have violated court orders with millions of dollars is plainly against public policy. See *Reply Brief for Appellant Chubb Indemnity Ins. Co.*, Case No. 06-2099-bk(L), 2006 WL 5004128, at *11.
 29. As stated earlier, note 2, *supra*, the Clarifying Order also provided that other insurers who might have been or ever became included within such direct action lawsuits would be barred from bringing indemnity claims against Travelers. Hence, the appeal by Chubb.
 30. *Johns-Manville*, 517 F.3d at 59.
 31. One of the many issues argued by the appellants that were not addressed by the Second Circuit was whether this hearing was one to approve the settlement agreements or was a hearing on Travelers' motion to enforce the injunction. See *Reply Brief for Objector-Appellant Chubb Indemnity Ins. Co.*, Case No. 06-2099-bk(L), 2006 WL 5004128, at *6.
 32. *Johns-Manville*, 517 F.3d at 59.
 33. *Johns-Manville*, 2004 WL 1876046, at *15 (emphasis added).
 34. *Johns-Manville*, 517 F.3d at 59 (quoting *Johns-Manville*, 2004 WL 1876046, at *13).
 35. *Johns-Manville*, 517 F.3d at 60 (quoting *Johns-Manville*, 2004 WL 1876046, at *32).
- Appellant Cascino Asbestos Claimants argued that the bankruptcy and district courts erred by adopting Travelers' blurring of the difference between the 1986 plan injunction's terminology, insurance "Policies," and the new phrase, insurance "relationship." See *Brief for Objectors-Appellants Cascino Asbestos Claimants*, Case No. 06-2099-bk(L), 2006 WL 5004129, at *14-15. Claims arising out of the Manville/Travelers insurance policies are a far smaller set than those arising out of the amorphous insurance "relationship." In its 2004 opinion approving the settlement agreements, the bankruptcy court stated: "This Court's conclusion that claims 'based upon, arising out of, or related to' the Travelers/Manville relationship would adversely affect the Manville estate during reorganization was unanimously and conclusively determined to be a sufficient nexus for the channeling injunction [by] the Second Circuit." *Johns-Manville*, 2004 WL 1876046, at *28 (citing *MacArthur Co. v. Johns-Man-*

ville Corp., 837 F.2d 89, 93-94 (2d Cir. 1988)). However, the Second Circuit did *not* use the term insurance "relationship" in *MacArthur*, but said "the Bankruptcy Court found as a fact that to permit actions against Manville's insurers arising from Manville's policies would adversely affect property of the estate and would interfere with reorganization." *MacArthur*, 837 F.2d at 93 (emphasis added).

In its opinion affirming the bankruptcy court, the district court did not address the difference in the nomenclature and its effect on the outcome. The Second Circuit, on the other hand, did explain that the Manville/Travelers insurance relationship is "of little significance from a jurisdictional standpoint." *Johns-Manville*, 517 F.3d at 67.

36. See *Brief of Objector-Appellant Chubb Indemnity Ins. Co.*, Case No. 06-2099-bk(L), 2006 WL 5004130, at *25-26 (arguing, as a result, that "the bankruptcy court's findings, conclusions and 'Clarifying Order' amounted to an impermissible advisory opinion").
37. *Johns-Manville*, 2004 WL 1876046, at *26-27.
38. *Johns-Manville*, 340 B.R. at 65.
39. *Johns-Manville*, 340 B.R. at 66 n.12.
40. *Johns-Manville*, 517 F.3d at 60.
41. *Johns-Manville*, 517 F.3d at 60-1. The parties argued about whether the bankruptcy court had jurisdiction in 2004, long postconfirmation, to issue what the appellants considered a "new" injunction. However, the court of appeals focused primarily on whether the bankruptcy court in 1986 had the power to enter the form of injunction which it explicitly crafted in 2004. It viewed the issue as whether the bankruptcy court, even as part of a plan of reorganization, can enter an injunction that would bar claimants from suing third parties under the circumstances existing in this case. *Johns-Manville*, 517 F.3d at 65 n. 23.
42. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988).
43. *MacArthur*, 837 F.2d at 90.
44. *Johns-Manville*, 517 F.3d at 66] (quoting *MacArthur*, 837 F.2d at 92-93) (internal citations omitted).
45. *In re Davis*, 730 F.2d 176 (5th Cir. 1984).
46. *Davis*, 730 F.2d at 184.
47. *Johns-Manville*, 517 F.3d at 62 (quoting *Descant v. Administrators of Tulane Educ. Fund*, 639 So. 2d. 246, 249 (La. 1994)).
48. *Johns-Manville*, 517 F.3d at 63.
49. *Feld v. Zale Corp (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995).
50. *Zale*, 62 F.3d at 749.
51. *Zale*, 62 F.3d at 749-50.
52. *Zale*, 62 F.3d at 753-54 (citations and footnotes omitted).
53. *Zale*, 62 F.3d at 755.
54. *Johns-Manville*, 517 F.3d at 65.
55. See *Kane*, 843 F.2d at 639.
56. *Johns-Manville*, 517 F.3d at 67.
57. *Johns-Manville*, 517 F.3d at 63.
58. One of the most interesting arguments, proven to be hopelessly academic because no court addressed it, was that the issue in this case was not one of subject

matter jurisdiction at all, but one of the court's authority to order this particular form of relief when exercising its undisputed jurisdiction to dispose of a controversy before it. See *Brief of Movant-Appellee Common Law Settlement Counsel*, Case No. 06-2099-bk(L), 2006 WL 5004097, at *13.

59. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).
60. *Pacor*, 743 F.2d at 995.
61. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996).
62. *Dow Corning*, 86 F.3d at 490.