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 WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF FUTURE CLAIMANTS REPRESENTATIVES IN SUPPORT OF NONE OF THE PARTIES

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STATEMENT OF THE AMICI'S INTEREST[1]

The Amici filing this brief are Eric D. Green, Esquire,[2] Martin J. Murphy, Esquire,[3] Lawrence Fitzpatrick, Esquire,[4] and Walter Taggart, Esquire.[5]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Eric D. Green served as the court-appointed legal representative for future asbestos personal injury claimants in the following cases: (i) *In re Mid-Valley, Inc.*, 305 B.R. 425 (Bankr. W.D. Pa. 2004); (ii) *In re Federal-Mogul Global, Inc.*, 282 B.R. 301 (Bankr. D. Del. 2001); (iii) *In re Babcock & Wilcox Co.*, 274 B.R. 230 (Bankr. E.D. La. 2002); and (iv) *In re Fuller-Austin Insulation Co.*, Case No. 98-2038 (Bankr. D. Del. 1998). He continues to serve as the court-appointed legal representative for future asbestos personal injury claimants for the following trusts, established to make payments to present and future tort claimants in the aforementioned cases: the DII Industries, LLC Asbestos PI Trust; the DII Industries, LLC Silica PI Trust; the Federal Mogul U.S. Personal Injury Asbestos Trust; the Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; and the Fuller-Austin Asbestos Settlement Trust.

[3] Martin J. Murphy served as the court-appointed legal representative for future asbestos personal injury claimants in *In re Kaiser Aluminum Corp.*, Case No. 02-10429 (Bankr. D. Del. 2002). He continues to serve as the court-appointed legal representative for future asbestos personal injury claimants for the Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust.

[4] Lawrence Fitzpatrick currently serves as the court-appointed legal representative for future asbestos personal (Cont'd)

They were appointed, pursuant to 11 U.S.C. § 524(g), by bankruptcy courts presiding over the chapter 11 cases of asbestos companies, to serve as the legal representatives of future claimants—those who manifest asbestos disease from exposure to the debtor companies' products after the confirmation of a chapter 11 reorganization plan. The basic task of the "Future Claimants Representatives" under the Bankruptcy Code is to ensure that future claimants are treated fairly and similarly to current claimants in the chapter 11 plan. They respectfully submit this *amicus curiae* brief pursuant to Supreme Court Rule 37(3), and they file

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(Cont'd)

injury claimants in the following cases: (i) *In re Global Industrial Technologies, Inc.*, Case No. 02-21626 (Bankr. W.D. Pa. 2002); (ii) *In re North American Refractories Co.*, Case No. 02-20198 (Bankr. W.D. Pa. 2002); and (iii) *In re Pittsburgh Corning Corp.*, Case No. 00-22876 (Bankr. W.D. Pa. 2000). He served as the court-appointed legal representative for future asbestos personal injury claimants in *In re ACandS, Inc.*, 2008 Bankr. LEXIS 2169 (Bankr. D. Del. 2002), and continues to serve as the court-appointed legal representative for future asbestos personal injury claimants for the ACandS Asbestos Settlement Trust.

[5] Professor Walter Taggart served as the court-appointed legal representative for future asbestos personal injury claimants in *In re Pacor*, Case No. 86-03251 (Bankr. E.D. Pa. 1986), and in *In re United States Mineral Products Company*, Case No. 01-2471 (E.D. Pa. 2001). He continues to serve as a member of the Trustees Advisory Committee for the Pacor Settlement Trust and the court-appointed legal representative for future asbestos personal injury claimants for the United States Mineral Products Company Personal Injury Asbestos Trust.

the brief without taking a position in favor of either side on the ultimate merits of this case.

Because channeling injunctions pursuant to Section 524(g) are essential to the task of protecting the interests of the future asbestos claimants, the Future Claimants Representatives have an interest that the bankruptcy courts retain sufficient jurisdiction under 28 U.S.C. § 1334 and power under Section 524(g) to ensure that those channeling injunctions are effective. Section 524(g)(4)(B)(i) mandates the appointment of a Future Claimants Representative as a prerequisite to the issuance of a channeling injunction affecting future claimants. Without the participation of a Future Claimants Representative, a debtor would remain subject to future asbestos liability and would be unable to effectively reorganize. In addition, the Future Claimants Representative has the ability, as a practical matter, to block the issuance of a channeling injunction. Unquestionably, it is the ability to deliver a broad and final channeling injunction that is the primary tool of the Future Claimants Representative in carrying out his or her duties.

The appeal involves the channeling injunction put in place by the 1986 confirmation order in the Manville bankruptcy. The channeling injunction at issue in this appeal was not entered pursuant to Section 524(g). Nonetheless, in construing the *Manville* Confirmation Order, the Second Circuit discussed Section 524(g) extensively. (App. to Pet. Cert. at 29a-31a.)[6] In so doing,

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[6] All citations to "App. to Pet. Cert." refer to the appendix accompanying the petition for certiorari in No. 08-295.

the Second Circuit unnecessarily injected uncertainty about the scope of bankruptcy court jurisdiction under Section 1334 and the power of a bankruptcy court pursuant to Section 524(g) to enter an injunction to channel to a trust certain claims that would otherwise be asserted directly against a debtor's insurers under state tort and contract law. A ruling that creates uncertainty about the scope of such injunctions—and thus about the protection that insurers can receive by agreeing to fund an asbestos compensation trust—will undermine the policy Congress evinced in the plain language of Section 524(g). This Court should remove the cloud of uncertainty the Second Circuit has created. A ruling that upholds bankruptcy courts' broad jurisdiction and power to channel claims against insurers that arise out of or relate to the insurers' provision of insurance to a debtor is necessary to preserve the settled expectations of asbestos debtors and their stakeholders, claimants, and insurers, as well as to encourage insurers to reach the comprehensive settlements that are essential to the funding of asbestos compensation trusts. Unless this uncertainty is removed, the Second Circuit's decision may let loose a flood of asbestos litigation that has in large part been successfully channeled to over 40 asbestos compensation trusts created under Section 524(g), under the supervision of the bankruptcy courts.

SUMMARY OF THE ARGUMENT

This appeal raises issues of great import to the over one million future asbestos claimants whose interests are represented by the Future Claimants Representatives. The ability of such claimants to achieve

timely, fair, and meaningful compensation for the asbestos-related injuries they will suffer over the next decades depends largely on the viability of asbestos compensation trusts of the type at issue in this appeal.

The Future Claimants Representatives have been appointed in bankruptcy proceedings pursuant to Section 524(g) to represent persons who have been exposed to asbestos, and who have not yet brought personal injury claims or lawsuits but will assert such claims once their injuries become manifest. The Future Claimants Representatives are charged by Congress and the federal courts with ensuring that future claimants are treated fairly and similarly to current claimants. The work of the Future Claimants Representatives, and others, has led to the creation of more than 40 asbestos compensation trusts pursuant to Section 524(g). These trusts enable companies responsible for asbestos personal injuries to fully resolve all of their present and future asbestos liabilities, and at the same time provide a dedicated source of funds to compensate current and future claimants. The creation of asbestos compensation trusts has benefited both asbestos claimants and companies seeking to resolve their asbestos-related liabilities and thus remain economically viable and competitive.

Because the Future Claimants Representatives do not have a position as to whether all of the claims Travelers seeks to enjoin under the *Manville* Confirmation Order have a "reasonable nexus" to the Manville estate, they have not filed this brief in support of any party. In particular, the Future Claimants Representatives do not take a position on whether the

bankruptcy court has the jurisdiction and power to issue injunctions that relate to claims against a debtor's insurers arising out of the insurers' provision of coverage to entities *other than the debtor*. The Future Claimants Representatives submit, however, that both Section 1334 and Section 524(g) must be construed to afford bankruptcy courts broad authority to enjoin, in connection with a comprehensive settlement of asbestos-coverage disputes between a debtor and its insurers, claims against the insurers by third parties that arise out of or relate to the insurers' provision of insurance to the debtor. A restrictive ruling that would preclude the bankruptcy courts from issuing such injunctions would run counter to well-established case law interpreting Section 1334 and the language of Section 524(g), would disturb settled expectations, and most damagingly, would discourage insurers from entering into settlements that provide funding for asbestos compensation trusts and thereby compensate asbestos plaintiffs for their injuries. The results would be fewer asbestos compensation trusts and a great increase in asbestos-related litigation in state and federal courts—a huge and unnecessary step backwards.

The Second Circuit's discussion of Section 524(g) (even though that statute was not directly at issue in *Manville*) gives rise to a concern that this case could result in an unduly narrow or ambiguous interpretation of Section 1334 and Section 524(g), which in turn would undermine the effectiveness of Section 524(g). In this brief, the Future Claimants Representatives show that this Court and the lower courts have consistently adopted a broader view of jurisdiction under Section

1334 than did the Second Circuit below. In addition, the Second Circuit suggested a narrower application of channeling injunctions to claims against insurers under Section 524(g) than the plain language of that statute mandates. In particular, Section 524(g) does not make the distinction between "derivative" and "non-derivative" claims upon which the Second Circuit based its decision. Whether claims against a third party can be subject to a channeling injunction pursuant to Section 524(g) depends on the specific claims, relationships, and facts and circumstances before the court in each bankruptcy proceeding. Because relationships among debtors and their insurers and other third parties take a great variety of forms, the application of Section 524(g) to third-party claims requires a fact-intensive, case-by-case analysis. This Court should not "amend" Section 524(g) by adopting the "derivative" versus "non-derivative" distinction that the Second Circuit has created. More fundamentally, this Court should do nothing to narrow the bankruptcy courts' jurisdiction to craft, when appropriate, channeling injunctions to bar claims relating to the debtor or arising out of its conduct, including claims against the debtor's insurers relating to or arising out of the insurers' provision of insurance to the debtor.[7]

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[7] The Amici take no position as to whether the jurisdiction and power of the bankruptcy court would extend to the issuance of injunctions that would seek to channel claims against the debtor's insurers related to the insurers' provision of coverage to entities other than the debtor.

ARGUMENT

I. Through Section 524(g), Congress Affirmed the Power of the Bankruptcy Courts to Create Asbestos Compensation Trusts for the Benefit of Future Claimants.

A. Future Claimants and Future Claimants Representatives

Foundational principles of bankruptcy law require that debtors receive a "fresh start" upon emerging from bankruptcy, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006), and that creditors of the same class be treated equally, *Begier v. IRS*, 496 U.S. 53, 58 (1990). Implementation of these principles is particularly difficult when the debtor faces potential personal-injury claims arising from exposure to asbestos, since the resulting latent diseases may not manifest themselves for years, or even decades, after exposure. Thus, individuals who have been injured by exposure to asbestos but show no symptoms at the time a bankruptcy petition is filed by the responsible party—i.e., "future claimants"—cannot recognize themselves as claimants in time to seek relief from the debtor.

Congress addressed this latency problem when it crafted Section 524(g) in 1994. Preventing a viable business from being swamped by asbestos claims while at the same time protecting the rights of the asbestos-exposure victims is a delicate endeavor, with the risk of an improvident resolution being borne almost entirely by the future claimants. Congress recognized that, absent a party with real authority to negotiate for, and

make agreements binding on, future claimants, the resulting plan of reorganization of an asbestos defendant could be skewed at the expense of the claimants who are yet to appear.

For example, if the debtor is allowed to channel its asbestos liability to a claims-resolution trust that is acceptable to present claimants but does not adequately provide for future claimants, the future claimants would be left without recourse when the trust's corpus is ultimately exhausted. On the other hand, if the debtor is not permitted to channel its asbestos liability away from its business, the specter of future asbestos-related claims arising from the business's past operations would cripple its ability to raise capital, reducing the value available for future claimants. Finally, if the debtor fails to resolve both present and future asbestos liability, then, in all likelihood, the debtor will be liquidated piecemeal by present claimants, again leaving potentially nothing for those whose injuries appear in the years ahead. Thus, it is imperative to the future claimants that any resolution of an asbestos bankruptcy case provide for a trust with sufficient resources, and adequate protections, to ensure that the future claimants will not be short-changed. Because it is impossible for future claimants to protect their own interests, Congress fashioned Section 524(g) of the Bankruptcy Code to provide for the appointment of a Future Claimants Representative to protect the future claimants' interests in the bankruptcy process. 11 U.S.C. § 524(g)(4)(B)(i).

Although the total number of future claimants is uncertain, it has been estimated that there will be

between 1.5 million and 2.5 million future claims for asbestos-related injuries against the Manville trust alone. Stephen J. Carroll et al., RAND Institute for Justice, *Asbestos Litigation* 114 (2005), *available at* http://www.rand.org/Pubs/documented_briefings/2005/DB397.pdf. As of summer 2004, 73 asbestos defendants had filed for bankruptcy. *Id.* at 109. More have filed since then. Based on the number of asbestos bankruptcy cases and the asbestos products with which the debtors were associated, the persons already appointed and serving as Future Claimants Representatives likely represent all, or nearly all, of the future claimants.

B. Asbestos Compensation Trusts under Section 524(g)

Section 524(g) of the Bankruptcy Code makes clear that bankruptcy courts have jurisdiction (1) to establish trusts for the benefit of future claimants with asbestos-related injuries ("asbestos compensation trusts"), and (2) to issue "channeling injunctions" preventing future asbestos claimants from taking legal action against any entity—including insurers—other than the asbestos compensation trust established in the chapter 11 reorganization of the relevant debtor. Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994). An asbestos compensation trust must "assume the liabilities of a debtor" that has been named in a suit for asbestos-related injuries, must "be funded in whole or in part by the securities of 1 or more debtors" involved in the reorganization plan under which the asbestos compensation trust is created, and must have the ability to exercise "a majority of the voting shares of" each debtor, the debtor's parent,

or a subsidiary that is also a debtor. 11 U.S.C. § 524(g)(2)(B)(i). Additionally, before a channeling injunction can be entered, the bankruptcy court must appoint a Future Claimants Representative to protect the interests of the future claimants and must determine that the injunction is "fair and equitable" to potential future claimants. 11 U.S.C. § 524(g)(4)(B).

The creation of asbestos compensation trusts has benefited both injured claimants and debtors, while also promoting judicial efficiency. By permitting a debtor to cleanse itself of asbestos-related liabilities through bankruptcy, Congress has enabled such debtors to truly obtain a fresh start through bankruptcy and continue to operate. Indeed, as a result of Supreme Court decisions, Section 524(g) is the *only* means by which a company can fully resolve all of its present and future asbestos liabilities.[8]

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[8] Since the enactment of Section 524(g), this Court has rejected at least two proposed class action settlements that sought to resolve future asbestos claims: *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem*, this Court noted that Congress had not adopted rules to permit the adjudication of asbestos claims on behalf of future claimants through a class action, and questioned whether "class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* at 628-29.

Subsequently, in *Ortiz*, this Court observed that "serious constitutional concerns" were implicated by using class action settlements in such a manner, 527 U.S. at 845, noting in particular that application of Rule 23(b)(1)(B) to resolve mass torts implicated the due process rights of absent future

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In the absence of Section 524(g), each future claimant would likely have to seek redress in state or federal courts, which is a costly and inefficient method of resolving such claims, and—more importantly—is meaningful only if assets of the defendant business still exist at the time a future claimant manifests an injury. The Bankruptcy Code furthers the interests of future claimants by mandating the appointment of a Future Claimants Representative to protect their interests in the debtor's reorganization, ensuring that to the fullest extent possible, funds exist to satisfy the claims of the future claimants when they ripen, and providing that asbestos compensation trusts are at least partially funded by the debtor and its insurers, thereby allowing future claimants to benefit from the debtor's fresh start under bankruptcy law.

C. Asbestos Compensation Trusts Accomplish Their Goals.

Empirical evidence shows that asbestos compensation trusts improve the economic position of future claimants. By way of example, through negotiations the Future Claimants Representative in the Halliburton bankruptcy *(In re Mid-Valley, Inc.)* succeeded in increasing over tenfold the value of the

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claimants, *id.* at 845-47, whose rights, in contrast, receive greater protection under the Bankruptcy Code. Such concerns led the Court to find that the *Ortiz* class certification was defective. Much as it had in *Amchem*, the Court focused on the "divergent interests of the presently injured and future claimants." *Id.* at 853.

cash component of the res with which the asbestos compensation trust was funded. Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down but Not Out*, 63 N.Y.U. Ann. Surv. Am. L. 727, 768-69 (2008). In addition, the res that was agreed to for the asbestos compensation trust included almost 60 million shares of Halliburton stock. *Id.* at 769. Between December 2002, when the parties first agreed on the res, and the time of the confirmation hearing, the stock of Halliburton had increased in value by 50%. *Id.* By the time the Halliburton stock was sold by the trust, the value of the stock had more than doubled, and the sale proceeds were sufficient to cover the projected liabilities over the life of the trust. *Id.* at 770 n.195. Future claimants will receive full compensation for their injuries, and the debtor was able to recover its credit status in the capital markets and emerge from the bankruptcy proceeding as a robust, competitive entity. This is what is meant by a "win-win" solution.

D. Insurers Should Remain Eligible for Protection Under Section 524(g).

In deciding this case, the Court must be careful not to eviscerate Section 524(g) by limiting bankruptcy court jurisdiction such that it would no longer extend to plaintiffs asserting against a debtor's insurers claims that arise out of the insurers' provision of coverage to the debtor. In many asbestos bankruptcies, the most significant asset of the debtor available to compensate persons injured by asbestos is the debtor's insurance. Even in bankruptcies in which the debtor has significant other assets, the proceeds of the debtor's liability insurance policies are often the major asset that is used

to compensate persons who have been exposed to the debtor's asbestos. For example, the asbestos compensation trust that resulted from the Babcock & Wilcox Company bankruptcy cases has been funded, to date, with nearly $1 billion of insurance settlement proceeds.[9] Such proceeds and policies arise out of and relate directly to the debtor's activity in exposing claimants to asbestos and the associated risks of injury. The ability of insurers to protect themselves from asbestos liability, following the contribution of their insurance policies to an asbestos compensation trust and the confirmation of a plan of reorganization, has been critical to the success of reorganizations employing Section 524(g).

Liability insurers are willing to enter into comprehensive settlements in connection with asbestos-related bankruptcy proceedings only because, pursuant to Section 524(g), the insurers can obtain channeling injunctions barring actions against them that arise out of or relate to the debtor's liability. Without the ability to offer insurers the benefits of channeling injunctions—finality and protection from further claims—Future Claimants Representatives would have little leverage in dealing with insurers and little ability to negotiate favorable insurance settlements for the benefit of future

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[9] *See In re Babcock & Wilcox Co.*, Case No. 00-10992 (Bankr. E.D. La. 2002), Summary Disclosure Statement as of November 10, 2005 Under Section 1125 of the Bankruptcy Code with Respect to the Joint Plan of Reorganization as of September 28, 2005, as Amended Through November 10, 2005, Proposed by the Debtors, the Asbestos Claimants' Committee, the Future Asbestos-Related Claimants' Representative, and McDermott Incorporated [Docket No. 6913], at p. 13.

claimants, including accelerated payments to properly fund asbestos compensation trusts. Thus, the Section 524(g) process, a process that has proven highly effective in efficiently and fairly resolving mass asbestos liabilities, would be seriously undermined by a ruling that creates uncertainty about the post-bankruptcy protections afforded to insurers that agree to fund asbestos compensation trusts.

II. Section 1334 Provides Bankruptcy Courts with Subject Matter Jurisdiction to Issue Injunctions to Preclude Third-Party Actions Against Insurers, Where the Outcomes of Such Actions Could Have a "Conceivable Effect" on the Bankruptcy Estate or Would Otherwise Affect the Administration of the Estate.

A. Section 1334(b) Must Be Construed Broadly Under Supreme Court and Other Federal Case Law.

The Second Circuit concluded that the bankruptcy court lacks both the jurisdiction under Section 1334 and the power under Section 524(g) to enjoin third-party claims against a debtor's insurer. This startling conclusion rests on a radically narrow construction of bankruptcy court jurisdiction that improperly constrains the "related to" clause of Section 1334(b). The Second Circuit's conclusion contravenes the broad scope of bankruptcy court jurisdiction that this Court and other federal courts have repeatedly recognized. It also undermines the congressional intent that Sections 1334(b) and 524(g) be interpreted broadly. Such constrained interpretation, if allowed to stand, will

prevent the full application of Section 524(g) as a tool to resolve asbestos-related bankruptcies and compensate asbestos claimants.

Article I of the Constitution vests Congress with the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Pursuant to that grant, Congress conferred upon the district and bankruptcy courts broad jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). In *Celotex Corp. v. Edwards*, this Court, construing the breadth of "related to" jurisdiction under the statute, approved the proposition that "'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'" *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (*quoting Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

Jurisdiction pursuant to Section 1334(b) exists if a matter is related to the bankruptcy, whether or not the matter arises out of the bankruptcy. *See Feld v. Zale Corp.,* 62 F.3d 746, 752 (5th Cir. 1995) ("to ascertain whether jurisdiction exists, 'it is necessary only to determine whether a matter is at least "related to" the bankruptcy.'" (*quoting In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995))). Courts have established that the jurisdictional requirement of Section 1334(b) is met when the "outcome of [the] proceeding *could conceivably have any effect* on the estate being administered in bankruptcy." *Pacor, Inc.*, 743 F.2d at

994, *quoted in Celotex Corp.*, 514 U.S. at 308 (emphasis added). *See also In re Walker*, 51 F.3d at 569; *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); 1 *Collier on Bankruptcy* ¶ 3.01[4][c][ii] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008). "Related to" jurisdiction has also been framed in terms of whether the claims could potentially affect the handling or administration of the estate. *See In re Dow Corning Corp.*, 86 F.3d 482, 494 (6th Cir. 1996). These tests for relatedness are consistent with the broad jurisdictional mandate of Section 1334(b). *See, e.g.*, 1 *Collier on Bankruptcy* ¶ 3.01[4][c][ii] (noting that courts generally "seem to recognize the importance of a generous definition of 'related to' jurisdiction in encouraging the expeditious and efficient administration of bankruptcy cases").

In *Celotex*, for example, this Court affirmed the jurisdiction of the bankruptcy court to issue an injunction barring a suit against Celotex's surety, because allowing asbestos plaintiffs to proceed with the suit would have hampered the bankruptcy court's ability to foster a comprehensive settlement with all of Celotex's insurers. *See Celotex*, 514 U.S. at 309-10. Similarly, in *Dow Corning*, the Sixth Circuit held that the bankruptcy court and district court had jurisdiction to enjoin breast-implant suits against the debtor's co-defendants because, if the claims against the co-defendants were allowed to continue, they would have given rise to claims against the debtor for contribution and common law indemnity, and therefore would have "affect[ed] the size of the [bankruptcy] estate." *Dow Corning*, 86 F.3d at 494. The court in *Dow Corning* also observed that

automatic liability (i.e., where a judgment has already been rendered) was not a prerequisite for "related to" liability, noting:

> "A key word in [the] test is conceivable. Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on the debtor's rights, liabilities, options, or freedom of action or the handling and administration of the bankrupt estate."

Dow Corning, 86 F.3d at 491 (*quoting In re Marcus Hook Dev. Park Inc.*, 943 F.2d 261, 264 (3d Cir. 1991)) (internal quotation marks omitted; alteration by *Dow Corning* court).

In *In re Drexel Burnham Lambert Group, Inc.*, the Second Circuit held that the bankruptcy court had jurisdiction to enjoin suits against the debtor's former directors and officers because the injunction facilitated a settlement agreement and thus played an important part in the debtor's reorganization plan. 960 F.2d 285, 293 (2d Cir. 1992). *See also In re Metromedia Fiber Network*, 416 F.3d 136, 141 (2d Cir. 2005) ("a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's Reorganization Plan" (*citing Drexel*, *supra*)); *Munford v. Munford*, 97 F.3d 449, 453-54 (11th Cir. 1996) (upholding bankruptcy court's jurisdiction to enjoin suits against a third party, as part of a settlement between the debtor and the third party, where the settlement offer was conditioned on the court's entry of the injunction; "related to" jurisdiction existed because

the non-settling defendants' contribution and indemnity claims affected the ability of the estate to receive its settlement).

B. The Second Circuit Applied the Test of "Relatedness" Too Narrowly.

Twenty years after affirmance by the same court on a direct appeal, a different panel of the Second Circuit opened a door previously locked shut, when it reversed course and concluded that the *Manville* bankruptcy court had "enjoin[ed] claims over which it had no jurisdiction." (App. to Pet. Cert. at 18a.) The Second Circuit's decision narrowed the "relatedness" test in contravention of the statutory grant, and policy of broad construction, of bankruptcy court jurisdiction. In so doing, it undermined the policy rationale and effectiveness of Section 524(g).

In essence, the Second Circuit found that there was no relatedness jurisdiction because the third-party plaintiffs "make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate." (*Id.* at 29a.) The res of the debtor's estate, however, is not the limit of bankruptcy court jurisdiction. The Second Circuit distinguished this case from cases in which jurisdiction was found to enjoin third-party claims that necessarily sought recovery from the same insurance policies that were in the possession of the bankruptcy estate. (*Id.* at 21a-25a.) But neither of the distinguished cases stands for the proposition that relatedness jurisdiction exists *only* when the third-party

plaintiff is seeking recovery from insurance policies that are property of the bankruptcy estate.[10]

The Second Circuit also engaged in an overly narrow interpretation of "relatedness" by looking to the link between the substantive legal claims asserted by the debtor and the non-debtors against the insurance companies. In this regard, the Second Circuit looked to whether the third party alleged a claim that was founded on a legal duty independent of the one asserted by the debtor. According to the Second Circuit, the district court should have looked to the law of the states where the third-party claims arose, to determine whether Travelers had an "independent legal duty in its dealing with plaintiffs." (*Id.* at 23a–24a.) Along these lines, the Second Circuit asked whether Travelers owed a duty to the third-party claimants independent of its contractual obligations to indemnify those injured by the tortious conduct of Manville. According to the court, "[i]f such a duty exists, then the fact that it arises from a common nucleus of operative facts involving Travelers and

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[10] In attempting to distinguish *MacArthur* and *Davis*, the Second Circuit incorrectly recast a sufficient condition as a necessary one. There is no disagreement among courts that federal jurisdiction exists over a claim seeking direct recovery from the res of the bankruptcy estate. But it is also true that, as recognized in *Drexel* and *Metromedia*, injunctions that "play[ ] an important part in the debtor's reorganization plan" provide a sufficient basis for jurisdiction. *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141 (*quoting In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 293). In this case—at least to the extent that the injunction in question is related to the insurers' coverage of Manville—the requisite standard has been met.

Manville . . . is of little significance from a jurisdictional standpoint." (*Id.* at 32a.) But the Second Circuit erred in implying that jurisdiction does not exist if there is an "independent legal duty" on which the third-party claims are premised. That is because the question of whether an independent legal duty exists is separate from and not determinative of the question of relatedness: whether the claim *would have a conceivable effect* on the bankruptcy estate.

Here, it is unquestionable that the third-party claims at issue—at least to the extent such claims are related to insurers' provision of insurance coverage to the debtor—have an impact on the bankruptcy estate: they directly affect settlements that the insurers will enter into with debtor policyholders and under which the insurers will contribute to the asbestos compensation trust. These settlements are critical to the establishment and success of the trust because they effectively accelerate the insurers' coverage for asbestos claims that might not be made against the debtor or the trust for years into the future. Without them, there may be no trust and no reorganized debtor. Insurers enter into these settlements because, pursuant to Section 524(g), they benefit from injunctions by the bankruptcy court barring all present and future actions against them that arise from or relate to the debtor's liability. Without broad injunctive protection, insurers will not participate.

By applying the test of relatedness so narrowly, the Second Circuit jeopardized important policy interests recognized by Congress in enacting Section 524(g). As the Second Circuit itself recognized in this case,

Section 524(g) "provides a unique form of supplemental injunctive relief for an insolvent debtor confronting the particularized problems and complexities associated with asbestos liability." (App. to Pet. Cert. at 33a-34a (*citing* H.R. Rep. 103-835, at 40, as reprinted in 1994 U.S.C.C.A.N. 3340, 3348 (1994)).) Section 524(g) thus advances the purpose of chapter 11 by "facilitating the reorganization and rehabilitation of the debtor as an economically viable entity." (*Id.* at 34a.) This policy will be undermined by a ruling that casts doubt on—not to mention one that punches holes in—the protection liability insurers can receive against end-run, so-called direct claims.

To construe "related to" jurisdiction broadly does not imply there are no limits to the jurisdictional scope of Section 1334(b). The jurisdiction does not extend to those cases where there is no "reasonable nexus" to the bankruptcy estate. 1 *Collier on Bankruptcy* ¶ 3.01[4][c][ii][B]; *see also Dow Corning*, 86 F.3d at 488. But "related to" jurisdiction will almost always be broad enough to encompass injunctions against claims relating to an insurer's provision of coverage to the debtor, whether those claims sound in tort, statute, or some other duty, because the "reasonable nexus" between the debtor's estate and those claims will almost always be present. The Amici submit that the "reasonable nexus" test has been met with respect to the claims relating to insurers' provision of insurance to a debtor. This does not suggest that "related to" jurisdiction would necessarily provide a basis for a bankruptcy court to enjoin claims based on coverage an insurer provided to an entity other than the debtor. In the case of a claim arising out of the insurance coverage of a non-debtor,

the bankruptcy court's jurisdiction depends on a searching inquiry into the facts and circumstances concerning the basis of the "reasonable nexus."

III. Whether a Third-Party Claim Against an Insurer Can Be Subjected to a Channeling Injunction Pursuant to Section 524(g) in the First Instance Is a Fact-Intensive Inquiry That Should Be Left to the Sound Discretion of the Bankruptcy Courts and Thus Reviewed Under a Liberal Standard to Effectuate Congress's Broad Mandate Under Section 524.

A. Congress Intended That Section 524(g) Cover a Broad Array of Claims Against Insurers, Not Just Claims Against a Debtors' Insurance Policy.

Contrary to the Second Circuit's holding, a claim may fall within the purview of Section 524(g) even though the claim is based on the insurer's own independent state law obligations, and even though the claim seeks recovery from the insurer's own assets (rather than the proceeds of the insurance policies). Section 524(g) was modeled on the 1986 injunction issued by the bankruptcy court in *Manville*. *See* 140 Cong. Rec. H10752, at H1765 (daily ed. October 4, 1994). Indeed, in Section 524(h), Congress ratified the injunction that had been issued in *Manville*. That 1986 injunction—like Section 524(g)—precludes third-party actions against insurers not only for claims that are based upon the insurance policy (i.e., claims for policy proceeds) but also, more broadly, claims that arise out of or relate to the policies.

The text of Section 524(g) is clear that injunctions protecting non-debtors may bar lawsuits seeking to recover from the non-debtors' own funds (rather than funds that are part of the debtor's estate), and that are brought pursuant to state law doctrines. A debtor's corporate parents, affiliates, officers, and lenders (along with insurers) are expressly eligible for third-party protection under Sections 524(g)(4)(A)(ii)(I)-(IV). As to a debtor's insurers, Section 524(g)(4) allows for broad protection. It states in pertinent part:

> Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third parties arises by reason of . . . (III) the third party's provision of insurance to the debtor. . . .

Section 524(g)(4)(A)(ii)(III).

The foregoing requirements are satisfied where a suit seeks to hold an insurer liable because of its provision of coverage to the debtor, even if the claimant alleges that the insurer had an independent state law duty toward the claimant. Although no such theory of an independent state law duty apparently has been successful, the Second Circuit's decision provides fodder for creative lawyers to invent a claim or theory to attempt to circumvent a channeling injunction. The

mere threat that circumvention could be so easily achieved would itself be damaging to the policy and purposes behind Section 524(g).[11] Plaintiffs alleging that an insurer of the debtor, by reason of its status as the debtor's insurer, had an independent "duty to warn" them of the dangers of the debtor's product are seeking to hold the insurer liable for the asbestos-related injury caused by their exposure to the debtor's product, and thus, in the language of Section 524(g)(4)(A)(ii), to hold the insurer "indirectly liable for the conduct" of the debtor. Claims based on "bad faith" and state trade practice laws are seeking to hold the insurer liable for the manner in which it, as required by its insurance policy, defended the debtor, and thus are seeking to hold the insurer "indirectly liable" for the "claims against" the debtor, within the meaning of Section 524(g). 11 U.S.C. § 524(g)(4)(A)(ii).

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[11] In addition, exempting claims premised on an "independent state law duty" from the bankruptcy court's power to channel claims pursuant to Section 524(g) invites circumvention that offends the Supremacy Cause, U.S. Const. art VI, cl.2. Under the Second Circuit's holding, creative lawyers can sidestep a final order of the federal bankruptcy court by pleading that a plaintiff was owed an independent state law duty. This would make state courts the arbiters of whether a claim was subject to a prior federal bankruptcy court order. Under the Supremacy Clause, however, it is the federal bankruptcy court, and not the state courts, that the Constitution empowers to determine the scope of federal orders. *Perez v. Campbell*, 402 U.S. 637, 649-51 (1971) (outcome codified by Congress in 11 U.S.C. 525(a)); Brief for Petitioners, *The Travelers Indemnity Co. v. Bailey*, No. 08-295, at 39-43 (U.S. January 26, 2009).

If actions cannot be enjoined under Section 524(g), merely because the plaintiffs are not seeking the policy proceeds or are allegedly basing their claims on some *ex contractu* or "independent state tort law" obligation, the incentives that Congress established for insurers to settle up-front will be removed, and more post-bankruptcy third-party actions will be encouraged, leading to an inequitable distribution of funds among claimants. A weakening of the bankruptcy court's power to issue an injunction under Section 524(g) risks upsetting settled expectations with respect to Section 524(g) injunctions that have already been issued in favor of insurers in asbestos-related bankruptcies, and will ultimately mean much less money for present and future asbestos victims. It is essential to the interest of present and future asbestos claimants to be able to consummate overall up-front settlements of insurance disputes, including the ability, where appropriate, to seek a settlement encompassing *ex contractu* and tort recoveries from the insurers.[12]

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[12] The fact that Section 524(g) conferred the bankruptcy courts with this power further supports the argument that Section 1334(b) provides broad jurisdiction to do so. *See* Section II, *supra*. Congress would not have enacted Section 524(g) had it not been of the view that bankruptcy courts possess the subject matter jurisdiction under Section 1334(b) to issue the injunctions authorized by Section 524(g). *Cf. United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.") Accordingly, the scope of "related to" jurisdiction in Section 1334 must be construed to be at least as extensive as the reach of Section 524(g).

B. Section 524(g) Does Not Speak of "Derivative" and "Non-Derivative" Claims.

In reaching its holding that the claims in the "direct action" suits "are outside the limits of § 524," the Second Circuit relied on a distinction between "derivative" and "non-derivative" claims. (App. to Pet. Cert. at 34a-35a.) Neither of those terms nor the distinction they embody is found in the text of Section 524(g) itself, the Congressional Record, or other legislative history surrounding the enactment of Section 524(g). The text of Section 524(g) is not so limited, and the judicial gloss the Second Circuit applied does violence to that text as well as to the congressional intent. Therefore, in accordance with the plain language of Section 524(g), this Court should remand this matter to the bankruptcy court for further proceedings with an instruction that the text of 524(g) provides the bankruptcy court with the power to enjoin third-party suits to the extent that the suits relate to the insurers' provision of coverage to a debtor. Only by following the text of the statute can the bankruptcy court faithfully apply the broad power that Congress so clearly intended to afford bankruptcy courts in the context of asbestos bankruptcies.[13]

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[13] The statutory text does not include the terms "derivative" and "non-derivative." It is a long-standing and cardinal rule that in interpreting a statute, one looks to the plain language of the statute to determine its intent.

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating

(Cont'd)

Even if Section 524(g) were ambiguous, and it is not, there would be no basis for the "derivative" versus "non-derivative" distinction the Second Circuit employed. Although the Second Circuit suggested that Congress intended in enacting Section 524(g) to leave "non-derivative" claims beyond the reach of channeling injunctions, the Second Circuit provided no reference to the Congressional Record or any other statutory history that would support this finding of alleged intent. In fact, the Congressional Record is devoid of any reference to the "derivative" versus "non-derivative" distinction that the Second Circuit has determined was so clearly intended.[14] The Second Circuit's reliance on

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> names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Caminetti v. United States, 242 U.S. 470, 490 (1917) (interpreting the White Slave Traffic Act). Although this Court has had to issue periodic reminders, this rule of statutory interpretation remains paramount. *See, e.g., BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." (alteration in original) (internal citations removed)).

[14] *See* 140 Cong. Record H10752, at H10765. The Congressional Record also reveals no concern regarding the bankruptcy court's efforts to extend as broad an injunction as possible to Manville's insurers.

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its impression of congressional intent has no grounding and is not a substitute for the plain language of Section 524(g).

The source of the extra-statutory "derivative" nomenclature is not statutory history, but rather a borrowing of dicta from the Third Circuit decision in *In re Combustion Eng'g*, 391 F.3d 190 (3d Cir. 2004). The Second Circuit's reliance on *In re Combustion Eng'g* to determine congressional intent is misplaced. In that case, the Third Circuit used the term "derivative" in a different context from the one in which the Second Circuit employed it below, and the Third Circuit's analysis does not reveal any evidence of congressional intent that would support the Second Circuit here.

In *In re Combustion Eng'g*, the Third Circuit determined that claims alleged against two of the

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> "To those companies willing to submit to the stringent requirements in this section designed to ensure that the interests of asbestos claimants are protected, the bankruptcy courts' injunctive power will protect those debtors and certain third parties, *such as their insurers*, from future asbestos product litigation of the type which forced them into bankruptcy in the first place."

140 Cong. Rec. S4521, S4523 (daily ed. April 11, 1994) (statement of Sen. Brown) (emphasis added). The committee reports similarly fail to discuss the limitation of section 524(g) based on a "derivative" distinction. *See* S. Rpt. No. 102-279, at 42 (1992); H Rpt. No. 103-835, at 52-53.

debtor's non-bankrupt affiliates, Lummus and Basic, could not be channeled to the asbestos trust under "related to" jurisdiction or the "equitable powers" available under Section 105(a). *Id.* at 224-38. In reaching this decision, the Third Circuit found that the claims against Lummus and Basic arose "from different products, involved different asbestos-containing materials, and were sold to different markets." *Id.* at 231. Moreover, the Third Circuit found that "the lack of indemnification obligations . . . , the lack of derivative liability or unity of interest . . . , the minimal corporate affiliation of Combustion Engineering with Lummus and Basic, and the indirect effects on the Plan [of reorganization]" precluded the application of a channeling injunction under Section 105(a) to the claims against Lummus and Basic. *Id.* at 233. The Third Circuit did not analyze what made the claims "derivative" or "non-derivative," or how that analysis would affect the application of Section 524(g). Indeed, because neither the bankruptcy court nor the district court had made "explicit findings whether the § 524(g) requirements were satisfied with respect to the channeling injunction as applied to the independent, non-derivative claims against Basic and Lummus" (*id.* at 237-38), an analysis of the application of Section 524(g) to claims against Basic and Lummus would have been misplaced.

More fundamentally, the Third Circuit's decision in *In re Combustion Eng'g* provides no basis for the Second Circuit's finding below that Congress intended to limit the ambit of Section 524(g) injunctions to actions "against third parties to those where a third party has derivative liability for the claims against the debtor." (App. to Pet. Cert. at 34a (*quoting In re Combustion*

Eng'g, 391 F.3d at 234).) Although the Third Circuit referred, in a footnote, to congressional intent to limit the injunction mechanism "to third-party actions against non-debtors in which the liability alleged was derivative of the debtor[,]" the two sources cited by the Third Circuit do not demonstrate that intent. *In re Combustion Eng'g*, 391 F.3d at 235 n.47 (*citing* 140 Cong. Rec. H10752, H10765; *MacArthur Co. v. Johns-Manville*, 837 F.2d 89, 92-93 (2d Cir. 1988)). The portions of the Congressional Record that the Third Circuit cites do not discuss "derivative" or "non-derivative" claims. Likewise, although *MacArthur Co.* used the adjective "derivative" to describe claims by Manville's insured vendor against Manville's insurers, it provides no insight as to Congress's intent in enacting Section 524(g) six years later.

Moreover, in seizing upon the "derivative" versus "non-derivative" distinction to support its analysis, the Second Circuit chose terms that have multiple legal meanings, some of which can be opaque.[15] Thus, not only is the distinction not supported by statute, it adds murkiness to precise statutory language. Although the "derivative" versus "non-derivative" distinction may

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[15] For example, in corporate law, courts continue to struggle with the distinction between "derivative" and "direct" stockholder claims. *See, e.g., Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1035-36 (Del. 2004) (describing the various tests that have been employed for determining whether an action is direct or derivative). Likewise, in the copyright context, even though Section 101 of Title 17 defines a "derivative" work, parties continue to litigate the contours of the term. *See, e.g., Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1299-1300 (11th Cir. 2008).

serve as a useful shorthand in some situations, it should not be grafted onto Section 524(g) as a test to determine a bankruptcy court's power to enjoin asbestos claims against the debtor's insurers.

The Second Circuit remanded this matter to the bankruptcy court to "examine whether, in light of [the Second Circuit's] opinion, it had jurisdiction to enjoin any of the instant claims." (App. to Pet. Cert. at 36a.) This Court should remand this matter with an instruction that, according to the text of Section 524(g) and not the "derivative" versus "non-derivative" analysis set forth in the Second Circuit opinion, the bankruptcy court has the authority to enjoin the third-party suits to the extent that the suits relate to insurers' coverage of a debtor, regardless of the legal theory on which the claim may be based and regardless of whether the claim seeks recovery beyond the insured's policy limits or the res. Because the reach of injunctions issued pursuant to Section 524(g) is broad, and there exists a wide variety of relationships between debtors and their insurers, the application of Section 524(g) to claims beyond that point must involve a context-specific and fact-intensive inquiry. That inquiry should be carried out by following the language of Section 524(g), not short-circuited by the "derivative" versus "non-derivative" test that the Second Circuit needlessly created.

CONCLUSION

Without taking a position on the ultimate merits of this case in favor of either side, Amici Curiae Eric D. Green, Martin J. Murphy, Lawrence Fitzpatrick, and Walter Taggart file this brief because they believe that in reaching the result below, the Second Circuit too narrowly interpreted the bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 1334 and the bankruptcy court's power to issue channeling injunctions under 11 U.S.C. § 524(g). Accordingly, the Amici Curiae respectfully request that this Court remand this matter for further proceedings consistent with an instruction that the bankruptcy court's broad jurisdiction under § 1334 and power under § 524(g) encompasses the jurisdiction and power to issue injunctions that relate to claims against insurers arising out of or relating to policies insurers issued to a debtor—whether those claims arise in tort, statute, or otherwise. The Amici Curiae take no position, however, as to whether the bankruptcy court's jurisdiction under § 1334 and power under § 524 extend to injunctions that relate to claims against Travelers arising out of Travelers' provision of coverage to entities other than Manville.

Respectfully submitted,

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