No. 08-307

IN THE

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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONERS

RONALD BARLIANT
KATHRYN A. PAMENTER
Counsel of Record
KENNETH S. ULRICH
GOLDBERG KOHN BELL BLACK ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3300
Chicago, Illinois 60603
(312) 201-4000

Attorneys for Common Law Settlement Counsel

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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, which enforced its 1986 orders, which in turn had provided 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 subject-matter jurisdiction over those enjoined lawsuits. The question presented is:

Whether a bankruptcy court having subject-matter jurisdiction over a plan confirmation proceeding also 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 PROCEEDINGS

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.

Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp., appellees in the case below ("Travelers"), filed a separate petition for writ of certiorari (No. 08-295), which was granted on December 12, 2008, and is being heard with this case.

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 in this case.

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.

RULE 29.6 STATEMENT

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.

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OPINIONS AND ORDERS BELOW

The opinion of the Second Circuit dated February 15, 2008 (App. A)[1] is reported at 517 F.3d 52. The Judgment of the Second Circuit dated February 15, 2008 and entered on June 26, 2008 (App. B) is

[1] All citations herein to "App." refer to the Appendix contained in the Common Law Settlement Counsel's Petition for Writ of Certiorari filed with this Court on September 4, 2008.

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 opinion and 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.) The petition for writ of certiorari was filed on September 4, 2008, and granted on December 12, 2008. The Court consolidated this case with *The Travelers Indemnity Co. v. Bailey*, Case No. 08-295. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 1121(a) provides:

> The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

11 U.S.C. § 1123(b)(6) provides:

> Subject to subsection (a) of this section, a plan may—
>
> (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

11 U.S.C. § 1129(a)(1) provides:

> The court shall confirm a plan only if all of the following requirements are met:
>
> (1) The plan complies with the applicable provisions of this title.

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:

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

STATEMENT OF THE CASE

A. The Unprecedented Bankruptcy Cases 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*. Bankruptcy Judge Lifland, who has now presided over the Manville cases for more than 26 years, later recognized that:

> 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. (App. 108a.) When he confirmed the Manville Plan, Judge Lifland observed that, "[t]he plan is the product of more than four years of effort to grapple with a social, economic and legal crisis of national importance within the statutory framework of chapter 11." *In the Matter of Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988); *see also MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir. 1988), *cert. denied*, 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988).

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 the settlements with insurers ($80 million of which came from Travelers). (App. 7a-8a.) The Confirmation Order and the Insurance Settlement Order contained broad injunctions in favor of, among others, Manville's insurers (the "Injunctions"). (*Id.*; 168a.) Judge Lifland stated that the "injunction sought by the Debtor in its Plan of Reorganization . . . is concededly a cornerstone of the

Plan." *Johns-Manville*, 68 B.R. at 624. Similarly, the Second Circuit recognized in 1988 that:

> Between 1984 and 1986, the insurers agreed to settle with Manville for approximately [$850] million. The settlements provided that, in exchange for cash payments, the insurers would be relieved of all obligations related to the disputed policies and the insurers would be protected from claims based on such obligations by injunctive orders of the Bankruptcy Court. The insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal. Since the insurance settlements are a cornerstone of Manville's proposed plan of reorganization . . . the Bankruptcy Court's orders are a critical part of the entire reorganization.

MacArthur, 837 F.2d at 90.

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

Notwithstanding the Injunctions, certain persons injured by exposure to asbestos commenced asbestos-related lawsuits against Travelers in various courts on statutory and common law grounds (the "Direct Actions"). (App. 8a-10a.) The Direct Action plaintiffs alleged that Travelers was liable to them for its own conduct in connection with its insurance relationship with Manville. (*Id.*) The Direct Actions included 26 actions against Travelers pending in Louisiana, Massachusetts, Texas and West Virginia state courts. (App. 10a.) "Of the 4,230 named plaintiffs in the lawsuits for whom information was obtained, at least 4,079 (over 96%) of them had already filed claims against the Manville Trust." (App. 10a, n.11.) In

response to these lawsuits, on June 19, 2002, 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; 107a.) On March 26, 2004, Travelers filed motions to approve the settlements and a Motion for an Order Interpreting and Enforcing the Confirmation 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 had always enjoined all present and future Direct Actions against Travelers, as well as any related contribution or indemnity claims. (App. 85a-89a.)

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 did not dispute the Bankruptcy Court's findings and conclusions that the Injunctions, by their terms, enjoined the Direct Actions because those actions arose out of and were related to Travelers' insurance relationship with Manville. (App. 28a ("'the Direct Action Claims against Travelers 'inescapably' relate to its insurance relationship with Manville'") (quoting *In re Johns-Manville Corp*., 340 B.R. 49, 64 (S.D.N.Y. 2006))). Indeed, the Second Circuit acknowledged, "[t]here 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." (App. 29a.)

The Second Circuit, however, reversed the Bankruptcy Court's clarification of the 1986 orders. In doing so, the Second Circuit held that the Bankruptcy Court did not have jurisdiction in 1986 to enter the Injunctions with respect to the Direct Actions. (App. 31a.)

SUMMARY OF ARGUMENT

Confronted with thousands of existing lawsuits and the prospect of thousands more future claims, Manville sought relief by filing one of the first mass tort bankruptcy cases. Judge Lifland approved a novel mechanism that allowed Manville to reorganize its financial affairs and resolve those claims in an orderly fashion when he confirmed the Manville Plan in 1986. The lynchpin to solving this complex set of

overwhelming and unique problems was the inclusion of the Injunctions in the Manville Plan. As a result of the Bankruptcy Court's confirmation of the plan, Manville emerged from bankruptcy, creditors' claims were satisfied, and hundreds of thousands of individuals have been compensated for injuries arising from exposure to asbestos.

Over twenty years after the entry of the order confirming the Manville Plan, however, the Second Circuit decided that the Injunctions as written were "inappropriate." (App. 27a.) The Second Circuit disregarded the finality of the Confirmation Order by refusing to enforce the Injunctions in accordance with their terms. The Second Circuit's decision is particularly troubling because in no area of law is the doctrine of finality more important than when it is applied to chapter 11 plans of reorganization. As exemplified by the Manville Plan, chapter 11 plans are typically the product of complex negotiations and litigation that result in the adjustment of claims, interests and expectations. Parties to the case, and others whose affairs may be affected by the plan, rely on its terms. For this reason, it is vital that courts considering challenges to the confirmation of a plan of reorganization respect the difference between the bankruptcy court's jurisdiction (which may be challenged at any time) and its statutory authority (which cannot be challenged after the confirmation order has become final). The Second Circuit ignored that distinction.

It is for Congress, not the courts, to define the scope of federal jurisdiction. In bankruptcy cases, Congress vested jurisdiction over proceedings arising under title 11 in the federal courts. Congress also authorized bankruptcy courts, upon referral from the

district courts, to adjudicate proceedings arising under title 11, including a proceeding to confirm a plan. Consequently, the Manville Bankruptcy Court had the authority to decide whether the plan, including the Injunctions therein, was authorized by federal law.

Because the Bankruptcy Court had subject-matter jurisdiction of the plan confirmation proceeding, there was no reason for the Second Circuit to consider whether it also had jurisdiction over the Direct Actions. Manville asked the Bankruptcy Court to decide that the plan was authorized by title 11; it did not ask the court to decide "the legitimacy of" any other actions. (App. 32a.) Federal "arising under" jurisdiction is not restricted simply because resolution of the federal question may affect state-created interests. Moreover, the Second Circuit's concern that injunctions prohibiting claims against non-debtors might be abusive has been addressed in other circuits by construing title 11 in ways that carefully limit the courts' statutory authority. The Second Circuit may have thought that those limits were exceeded in 1986, but its attempted remedy in 2008 came too late. The Injunctions approved with the confirmation of the Manville Plan are final and must be enforced according to their terms. The Second Circuit's refusal to do so must be reversed.

ARGUMENT

A. The Bankruptcy Court had Jurisdiction to Confirm a Plan that Contained Provisions Enjoining the Direct Actions.

The Second Circuit incorrectly stated that "the bedrock jurisdictional issue [is] . . . whether the bankruptcy court had jurisdiction over the disputed

statutory and common law claims." (App. 15a.) The Second Circuit's error is grounded in its conflation of jurisdiction with statutory authority. This Court has recognized the importance of the distinction. For example in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), this Court distinguished between "federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Id*. at 503, 126 S. Ct. at 1238. In doing so, this Court held that the 15-employee threshold under title VII is not a jurisdictional issue, stating that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* at 515, 126 S. Ct. at 1245 (quoting *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 394, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)); *see also Bell v. Hood*, 327 U.S. 678, 685, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946) ("the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction."); *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867 (2004) ("[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").

Subject-matter jurisdiction is "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998)

(emphasis in original). "Only Congress may determine a lower federal court's subject matter jurisdiction." *Kontrick*, 540 U.S. at 452, 124 S. Ct. at 914 (citing U.S. Const., art. III, § 1). Section 1334 of title 28 of the United States Code is the only statute in which Congress confers bankruptcy jurisdiction, and it does so exclusively in the district courts. Specifically, 28 U.S.C. § 1334(a) grants original and exclusive jurisdiction over cases commenced under the Bankruptcy Code on the district courts. 28 U.S.C. § 1334(a). 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). "Congress aimed to give the term 'civil proceedings' in § 1334(b) an expansive interpretation." *In re Cuyahoga Equip. Corp*., 980 F.2d 110, 114 (2d Cir. 1992).

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 courts, which the District Court has done. 28 U.S.C. § 157(a); S.D.N.Y. General Order M-61 (July 11, 1984). "Anything that occurs within a case is a proceeding." 1 *Collier on Bankruptcy* ¶ 3.01[4][c], 3-18 (15th ed. rev. 2008) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977) (Sec. 1471)). In Justice Holmes' classic formulation, "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 586, 60 L. Ed. 987 (1916). Thus, a proceeding arises under title 11 if the right sought to be enforced is created by the Bankruptcy Code. *See Banque Nationale de Paris,*

(Canada) v. Murad (In re Housecraft Indus. USA, Inc.), 310 F.3d 64, 69-70 (2d Cir. 2002) (in finding arising under jurisdiction "even [where] the litigation could not affect the estate," the Second Circuit stated, "[b]ecause the . . . claims clearly invoke substantive rights created by bankruptcy law, they necessarily 'arise under' Title 11").

Proceedings that arise under title 11 are "core proceedings," and a bankruptcy court is authorized to enter final judgments with respect to such proceedings. 28 U.S.C. § 157(b).[2] Section 157(b)(2) of title 28 sets forth a non-exhaustive list of core proceedings. One such core proceeding that arises under title 11 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 ("Section 157(b)(2)(J) instructs only that 'objections to discharges' are '[c]ore proceedings' within the jurisdiction of the bankruptcy courts"). Plan confirmation proceedings arise under title 11 because the right to propose and seek confirmation of a plan of reorganization is created by title 11. 11 U.S.C. §§ 1121-1129.

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[2] Due to their view of the issues in this case, Petitioners Common Law Settlement Counsel are not asserting in this appeal either of the other two bases of jurisdiction under 28 U.S.C. § 1334, "arising in" or "related to" jurisdiction. "'Arising in' [jurisdiction] acts as the residual category of civil proceedings, and includes such things as administrative matters...." 1 *Collier on Bankruptcy* ¶ 3.01[4][c], 3-27 (15th ed. rev. 2008). "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

In this case, twenty-three years ago, Manville commenced a proceeding to confirm a plan of reorganization by filing the Manville Plan in accordance with § 1121 of the Bankruptcy Code. *See* 11 U.S.C. § 1121(a) ("The debtor may file a plan . . . ."). The Bankruptcy Courts' adjudicatory authority over the confirmation proceeding was to "hear and determine" that proceeding and to "enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1). In order to determine the proceeding and enter an appropriate judgment, the Bankruptcy Court was required to apply the rules of decision provided in title 11 that governed confirmation of the Manville Plan. Those rules of decision are set out in § 1129 of the Bankruptcy Code, which is the statutory authority for the confirmation of a plan. *See* 11 U.S.C. § 1129(a) ("The court shall confirm a plan only if all of the following requirements are met. . . .") Consequently, as an exercise of its subject-matter jurisdiction, the Bankruptcy Court was required to decide whether the provisions of the Manville Plan satisfied the substantive conditions of § 1129, one of which is whether "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Among those applicable requirements are that the plan contain only provisions mandated or authorized by § 1123 of the Bankruptcy Code.

Having jurisdiction over the Manville confirmation proceeding pursuant to 28 U.S.C. § 1334 and the reference from the District Court under 28 U.S.C. § 157(a), the Bankruptcy Court had the "power to adjudicate" whether the provisions of the plan were authorized by title 11. *Steel Co.*, 523 U.S. at 89, 118 S. Ct. at 1010. The Injunctions were among those provisions in the Manville Plan. Indeed, objectors to the plan "challenge[d] . . . the power of this court to

issue the injunction . . . ." *Johns-Manville*, 68 B.R. at 624. The Bankruptcy Court resolved that objection by deciding that "the Injunction contemplated by the Plan is well within its equitable and statutory authority." *Id.* at 626.

The decision to confirm a plan 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 v. United States*, 199 F.3d 37, 45 (1st Cir. 1999); *see also United States v. Wey*, 895 F.2d 429, 431 (7th Cir.) ("[c]ourts may err, even offend against the Constitution, without losing subject-matter jurisdiction"), *cert. denied*, 497 U.S. 1029, 110 S. Ct. 3283, 111 L. Ed. 2d 792 (1990). Here, the time to appeal the Bankruptcy Court's approval of the Injunctions passed over twenty years ago. In fact, the appellate courts affirmed the Bankruptcy Court's approval of the Confirmation Order. *See Kane*, 843 F.2d at 636. Because the Bankruptcy Court had jurisdiction to decide whether the Injunctions were permitted by federal law to be in the plan of reorganization, the Second Circuit erred by imposing a separate requirement of jurisdiction over the Direct Actions. Consequently, its decision must be reversed.

B. When a Federal Court's "Arising Under" Jurisdiction has been Invoked, that Court Must Enforce the Applicable Federal Law.

The Second Circuit's stated concern that "federal bankruptcy courts [will] displac[e] state courts for large categories of disputes" if it upheld the

Bankruptcy Court's Clarifying Order was misplaced. (App. 29a (internal quotations omitted).) Where, as in this case, federal jurisdiction exists with respect to a proceeding that arises under a United States statute, it is federal, not state, law that provides the rules of decision. Federal courts do not displace state courts when they apply those federal rules of decision; rather, they carry out their duty to adjudicate questions of federal law.

When Congress has vested "arising under" jurisdiction of an action or proceeding in federal courts, it is the responsibility of those courts to exercise that jurisdiction to protect the federal interest underlying the statute from which the action or proceeding arises. This Court has recognized that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S. Ct. 1712, 1720, 135 L. Ed. 2d 1 (1996); *see also Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-13, 125 S. Ct. 2363, 2367, 162 L. Ed. 2d 257 (2005) (Congress has granted "arising under" jurisdiction to federal courts so that when "a serious federal interest" is involved the parties will have the benefits of "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."), *reh'g denied*, 545 U.S. 1158, 126 S. Ct. 25, 162 L. Ed. 2d 923 (2005). Those purposes could not be served if federal courts were required, or allowed, to defer to state courts every time a state-created interest might be involved in a proceeding arising under federal law.

Manville, like thousands of other bankruptcy debtors, sought to restructure its financial affairs under chapter 11 of the Bankruptcy Code, and there

is a strong federal interest in such restructuring. *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 527, 104 S. Ct. 1188, 1196, 79 L. Ed. 2d 482 (1984) ("the policy of chapter 11 is to permit successful rehabilitation of debtors. . . ."). The mechanism that Congress established for such restructurings, *i.e.* plans of reorganization, is available only in a case under title 11, and it is for the federal courts to determine the scope of the relief that may be granted. 28 U.S.C. § 1334(a) (district courts have exclusive jurisdiction of bankruptcy cases). That relief under a plan may affect rights and interests created by state law does not limit federal jurisdiction. Indeed, every plan will contain provisions that conflict with state-created rights and interests, even if it does no more than discharge debts and extinguish property interests arising under state law. *See* 11 U.S.C. § 1141 (confirmation of a plan discharges debts and terminates equity interests except as otherwise stated in plan).[3] Courts that confirm plans, such as the Bankruptcy Court in Manville, do not decide issues of state law; rather, they decide only whether the provisions of a proposed plan are authorized by federal law.

The Bankruptcy Court had jurisdiction (that is, the adjudicatory authority) to decide whether the Injunctions satisfied applicable standards of

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[3] Congress has authorized the bankruptcy courts to approve a wide variety of other means to achieve restructurings, many of which may affect state interests. *See* 11 U.S.C. § 1123(a)(5) (listing means of implementation of plans). In fact, Congress has declared that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157(b)(3). Thus, Congress decided that the involvement of state-created rights will not limit bankruptcy court jurisdiction.

substantive law under the Bankruptcy Code (that is, statutory authority). It required no other jurisdiction to carry out its responsibility to adjudicate whether the Injunctions were authorized by federal statute. Therefore, the Second Circuit's holding that the Bankruptcy Court was without jurisdiction in 1986 to approve the Injunctions must be reversed.

C. Title 11, Which Sets Forth a Bankruptcy Court's Statutory Authority to Grant Relief, Adequately Limits the Relief that May Be Granted.

Courts considering the propriety of non-debtor, third-party injunctions and releases in proposed plans cite to § 105(a), § 1123(b)(6) or both of those sections of the Bankruptcy Code, which (i) provide a bankruptcy court the broad authority to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" and (ii) permit a reorganization plan to "include any . . . appropriate provision not inconsistent with the applicable provisions of this title," respectively. 11 U.S.C. §§ 105(a) and 1123(b)(6). *See, e.g.*, *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 656-57 (6th Cir.), *cert. denied*, 537 U.S. 816, 123 S. Ct. 85, 154 L. Ed. 2d 21 (2002) (citing both provisions); *Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694, 701 (4th Cir.), *cert. denied*, 493 U.S. 959, 110 S. Ct. 376, 107 L. Ed. 2d 362 (1989) (citing § 105(a)).[4]

Applying these statutory provisions, circuit courts have determined that under title 11, non-debtor,

[4] Since 1994, courts have also cited § 524(g) in asbestos-related cases.

third-party injunctions or releases may be permitted under certain circumstances. *See, e.g., Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 657-58 (7th Cir. 2008); *Dow Corning*, 280 F.3d at 663; *A.H. Robins*, 880 F.2d at 701-02. In each case, though, in exercising their statutory authority under §§ 105(a) and 1123(b)(6), the courts applied a stringent standard as to whether to approve a non-debtor, third-party injunction or release provision in a plan. For example, the Sixth Circuit has established a seven-part test: whether (1) there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) the non-debtor has contributed substantial assets to the reorganization; (3) the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) the impacted class, or classes, has overwhelmingly voted to accept the plan; (5) the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and (7) the bankruptcy court made a record of specific factual findings that support its conclusions. *Dow Corning*, 280 F.3d at 658.[5]

[5] In *Airadigm*, the Seventh Circuit applied a fact-intensive analysis to determine whether the release was "not inconsistent with any provision of the bankruptcy code" and was "appropriate" because it "was necessary for the reorganization and appropriately tailored." 519 F.3d at 657-58. In *Metromedia*, the

After carefully construing and applying the standards of §§ 105(a) and 1123(b)(6), circuit courts have denied non-debtor, third-party injunction or release provisions on those statutory authority grounds, *see*, *e.g.*, *Dow Corning*, 280 F.3d at 658-59; *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000), while others have approved such provisions, *see, e.g., Airadigm*, 519 F.3d at 655; *Metromedia*, 416 F.3d at 136; *A.H. Robins*, 880 F.2d at 701-02. Indeed, a decision upon which the Second Circuit relied, *In re Combustion Eng'g*, *Inc.*, 391 F.3d 190 (3d Cir. 2004), illustrates that circuit courts have limited the reach of plan injunctions by narrowly construing title 11. In that case, the court reversed a plan injunction on the ground that it was not authorized under title 11. *Id.* at 233.[6] Even the early circuit court decisions

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Second Circuit stated that "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005). In *A.H. Robins*, the Fourth Circuit stated that "[1] where the Plan was overwhelmingly approved, [2] where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover… and [3] where the entire reorganization hinges on the debtor being free from indirect claims," it was within the bankruptcy court's equitable power to enjoin the suits. 880 F.2d at 702.

[6] The Third Circuit, in its discussion of the bankruptcy court's jurisdiction, did not consider "arising under" jurisdiction of the plan confirmation proceeding. Rather, like the Second Circuit in this case, it merely assumed without discussion that the only possible basis for the bankruptcy court's adjudicative authority was "related to" jurisdiction, which Petitioners Common Law Settlement Counsel do not argue in this case. *Id.* at 224. This Court has "described such unrefined dispositions as 'drive-by

that found such injunction provisions impermissible did so on statutory authority grounds, namely by applying 11 U.S.C. § 524(e). *See Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 (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 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). As these decisions demonstrate, the perceived concern of the Second Circuit — namely that "a nondebtor release is a device that lends itself to abuse" (App. 26a) — may be adequately addressed by limiting the bankruptcy courts to legitimate statutory authority.[7]

The analysis in each of *Dow Corning*, *A.H. Robins* and the other cases cited above comports with this Court's decision in *United States v. Energy Resources*

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jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511, 126 S. Ct. at 1242-43 (quoting *Steel Co.*, 523 U.S. at 91, 118 S. Ct. 1003).

[7] Much of the Second Circuit's discussion addressed the District Court's reliance upon *MacArthur*, *In re Davis*, 730 F.2d 176 (5th Cir. 1984) (per curium), to which other parties before the District Court and the Second Circuit had cited, and *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). *MacArthur* and *Davis* involved "plaintiffs [who] sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies." (App. 20a.) The Second Circuit did not address in its opinion Petitioners Common Law Settlement Counsels' argument set forth herein, and as such its discussion of *MacArthur* and *Davis* is not pertinent. Further, *Zale* is inapplicable, as it involves the direct appeal of an injunction provision within a settlement agreement, rather than a plan injunction.

Co., Inc., 495 U.S. 545, 110 S. Ct. 2139, 109 L. Ed. 2d 580 (1990). There, this Court recognized that chapter 11 plans may include provisions not expressly authorized in the Bankruptcy Code. This Court understood that "[t]he Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund." 495 U.S. at 549, 110 S. Ct. at 2142. Nevertheless, relying upon §§ 105, 1123(b)(5) (which is now 1123(b)(6)) and 1129, this Court held that "the Bankruptcy Courts have not transgressed any limitation on their broad power. . . . [and] may order the IRS to apply tax payments to offset trust fund obligations where it concludes that this action is necessary for a reorganization's success." 495 U.S. at 551, 110 S. Ct. at 2143. This Court in *Energy Resources* understood that the issue of the propriety of a plan provision was a question of statutory authority.

As the foregoing cases demonstrate, there is no need for courts to characterize issues of statutory authority as issues of jurisdiction. Regardless of its reasons, the Second Circuit erred in doing so.

D. The Finality of Chapter 11 Plans is Uncertain as a Result of the Second Circuit's Decision.

As this Court has said, "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S. Ct. 134, 138, 83 L. Ed. 104 (1938), *reh'g denied*, 305 U.S. 675, 59 S. Ct. 250, 83 L. Ed. 437 (1938). Chapter 11 plans are integrated agreements representing compromises of interests by multiple parties. Upon the entry of a final, non-appealable order confirming a plan, the

debtor and all parties-in-interest must be able to rely on that order and carry-out the terms of the plan. Otherwise, the reorganization is rendered illusory.

The principle of finality is particularly significant in the case of mass tort and other large business reorganizations, like Manville, which often rely upon non-debtor, third-party injunctions and releases. For example, the Manville insurers contributed approximately $850 million to the Manville Trust in reliance upon the final approval of the Injunctions over twenty years ago. If the Second Circuit's opinion is upheld, that reliance will have been misplaced. As the Second Circuit recognized in 1988, "[t]he insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal." *MacArthur*, 837 F.2d at 90. That entitlement, though, no longer exists because the insurers' contributions were distributed long ago to hundreds of thousands of claimants suffering from asbestos-related diseases.

Moreover, as a result of the Second Circuit's refusal to treat the Confirmation Order as a final order, hundreds of filed Direct Actions that otherwise would have been barred under the Confirmation 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.

The Second Circuit's decision renders non-debtor, third party injunction or release provisions of a confirmed plan of reorganization, similar to the Injunctions here, subject to review on jurisdictional

grounds at any time. The importance of the finality of confirmation orders requires that courts exercise particular care when distinguishing between jurisdiction and statutory authority. The Bankruptcy Court did so in 1986 when considering whether to approve the Injunctions in the Manville Plan. *Johns-Manville,* 68 B.R. at 626. The Second Circuit erred in 2008 in refusing to enforce the Injunctions on jurisdictional grounds. Because the Bankruptcy Court had "arising under" jurisdiction of the confirmation proceeding in 1986 and exercised that jurisdiction in approving the Manville Plan and the Injunctions therein, the 1986 orders are final.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed, and the case remanded for further appellate proceedings in that court.

Respectfully submitted,

RONALD BARLIANT
KATHRYN A. PAMENTER
Counsel of Record
KENNETH S.ULRICH
GOLDBERG KOHN BELL BLACK
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3300
Chicago, Illinois 60603
(312) 201-4000

Attorneys for Common Law Settlement Counsel