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The Permissibility of Bringing an Action Against Johns-Manville's Insurers Despite Injunctive Orders

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Introduction

It is well known that bankruptcy courts have jurisdiction over all of the property of the debtor's estate, no matter where the estate is located.[1] Bankruptcy courts have the power to preserve that jurisdiction by enjoining proceedings that would remove property from the bankrupt estate.[2] Title 11 of the United States Code (the "Bankruptcy Code") has broadly defined property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case."[3] Section 541(a)(1) of the Bankruptcy Code has been defined broadly[4] to include "all kinds of property, including tangible or intangible property."[5] As one example, courts have determined that a debtor's insurance policies are to be construed as

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[1] *See* Straton v. New, 283 U.S. 318, 320-21 (1931) (stating that the purpose of the Bankruptcy Act (11 USCA) is to "place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors.")
[2] *See* Loewi Realty Corp. v. Chanticleer Assoc., Ltd. *(In re* Chanticleer Assoc., Ltd.*),* 592 F.2d 70, 73-74 (2d Cir.1979).
[3] 11 U.S.C. § 541(a)(1) (1982).
[4] *In re* Allied Digital Techs. Corp., 306 B.R. 505, 509 (Bankr. D. Del.2004) ("The Supreme Court has interpreted 541(a)(1) broadly.")
[5] United States v. Whiting Pools, Inc., 462 U.S. 198, 204–05 n. 9, 103 S.Ct. 2309, 2313 n. 9, 76 L.Ed.2d 515 (1983) (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5868).

property of the estate, and are therefore subject to the bankruptcy court's jurisdiction.[6] It is now well-settled that under § 541(a)(1) of the Bankruptcy Code that "a debtor's liability insurance is considered property of the estate."[7] Furthermore, "an overwhelming majority of courts have concluded that liability insurance policies fall within § 541(a)(1)'s definition of estate property."[8] An issue that has arisen is whether the bankruptcy court has jurisdiction to protect a debtor's interest in its insurance policies through injunctive orders, and guidance has come in several decisions.

Johns-Manville was formerly a Fortune 500 company that operated mining, manufacturing, and forest products businesses.[9] Johns-Manville is most well-known as the world's largest miner and producer of raw asbestos products, selling raw asbestos in 58 countries and distributing asbestos-based products across a broad range of industries.[10] Johns-Manville then became the center of a number of products liability lawsuits alleging personal injuries as a result of asbestos exposure.[11] This resulted from numerous scientific studies that linked exposure to asbestos fibers to respiratory conditions, such as lung cancer.[12] In the 1980s, Johns-Manville was named the defendant in over 12,000 lawsuits brought by over 16,000 claimants, with additional suits being filed consistently, resulting in over 400 new suits every month.[13] The significant source of strain on the company was the possibility of facing tens of thousands of

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[6] *See* MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 92 (2d Cir. 1988).
[7] See *In re* MF Global Holdings Ltd., 496 B.R. 117, 190 (Bankr. S.D.N.Y. 2012) (stating it is well-settled that a debtor's liability insurance is considered property of the estate and whether the proceeds of a liability insurance policy are property of the estate are guided by the language and scope of the specific policies at issue).
[8] *In re Vitek, Inc.,* 51 F.3d 530, 533 (5th Cir. 1995).
[9] *In re* Johns-Manville Corp., 534 B.R. 553, 556 (Bankr. S.D.N.Y. 2015).
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*

lawsuits from unknown asbestos victims, as a person exposed to Johns-Manville asbestos may not develop an identifiable injury for decades.[14] As a result of the potential for future liability, Johns-Manville filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in August of 1982.[15]

When Johns-Manville filed its Chapter 11 bankruptcy proceeding, it was entangled in extensive litigation with its insurance carriers concerning the insurance coverage for asbestos-related liabilities.[16] Johns-Manville entered into settlements with its insurance carriers in order to avoid insurance litigation and to best fund a reorganization plan.[17] A settlement agreement was reached in which insurers contributed $770 million to a trust benefitting asbestos personal injury claimants.[18] The insurers entered into the settlement under the agreement that, in exchange for the cash settlement, the insurers would be relieved of all ongoing and future obligations related to the disputed policies. The insurers secured protection from claims through injunctive orders from the bankruptcy court.[19]

Furthermore, the insurers were able to terminate the settlement if the injunctive orders were not issued or if they were set aside on appeal.[20] Pursuant to Rule 9019(a) of the Federal

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[14] Kane v. Johns-Manville Corp., 843 F.2d 636, 638-39 (2d Cir. 1988) (noting "[a] significant characteristic of these asbestos-related diseases is their unusually long latency period. An individual might not become ill from an asbestos-related disease until as long as forty years after initial exposure. Hence, many asbestos victims remain unknown, most of whom were exposed in the 1950's and 1960's before the dangers of asbestos were widely recognized. These persons might not develop clinically observable symptoms until the 1990's or even later.")
[15] *Id.* ("From the outset of the reorganization, all concerned recognized that the impetus for Manville's action was not a present inability to meet debts but rather the anticipation of massive personal injury liability in the future.")
[16] MacArthur Co. v. Johns-Manville Corp., 837 F. 2d at 90.
[17] *See id.*
[18] *See In re* Johns-Manville Corp., 534 B.R. at 557.
[19] MacArthur Co. v. Johns-Manville Corp., 837 F. 2d at 90.
[20] *See id.*

Rules of Bankruptcy Procedure, the bankruptcy court approved the settlement.[21] The bankruptcy court issued such injunctive orders, understanding that the orders were an essential part of the entire reorganization of Johns-Manville.[22] The settlement agreement approved by the bankruptcy court resulted in an order confirming the plan of reorganization (the "Confirmation Order"), and an additional settlement order (the "Insurance Settlement Order") together known as the "1986 Orders."[23] Under the 1986 Orders, Johns-Manville and its insurers were released from further liability, but present and future claimants could claim against the trust.[24]

This article discusses the possibility of bringing a new cause of action against Johns-Manville's insurers in light of the 1986 Orders. Part I addresses two distinct complaints brought by two entities, one in the context of a contract claim brought by a distributor of Johns-Manville asbestos products, and the other in the context of a tort claim brought by a worker who contracted asbestosis. In both of these scenarios, the respective plaintiffs were barred from bringing their cause of action as a result of the 1986 Orders. Part II discusses and compares a direct action complaint brought by groups of plaintiffs against Travelers, one of Johns-Manville's insurers. In this scenario, however, the plaintiffs were permitted to bring their direct action complaint.

I. 1986 Orders are a bar to future claims against Johns-Manville's insurers

A. Distributor brings a contract claim

MacArthur Company and Western MacArthur Company (collectively known as "MacArthur") was a distributor of Johns-Manville products, and had a vendor endorsement with

[21] Fed. R. Bankr. P. 9019(a)
[22] *See id.*
[23] *In re* Johns-Manville Corp., 534 B.R. at 557.
[24] *See id.*

Johns-Manville.[25] MacArthur claimed this endorsement entitled itself, as a distributor, to insurance coverage for product liability resulting from the sale of Johns-Manville products.[26] MacArthur contended the bankruptcy court settlement impaired its vendor endorsement rights, as its "contractual rights could not lawfully be extinguished by the bankruptcy court's injunctive orders."[27] The bankruptcy court initially dismissed MacArthur's objections, in that MacArthur's "interest in the policies is highly speculative" and that any claim it had, based on Manville's insurance, should have been asserted in the bankruptcy court.[28] The district court then affirmed the orders of the bankruptcy court.[29] Importantly, on appeal to the Second Circuit, MacArthur's legal argument was based upon its belief that the bankruptcy court did not have jurisdiction and authority to enjoin suits against Johns-Manville's insurers.[30]

As a debtor's insurance policies are considered property of their estate, they are subject to the bankruptcy court's jurisdiction.[31] In earlier proceedings of the case, the bankruptcy court found that Johns-Manville's insurance policies and their proceeds are "substantial property of the Johns-Manville estate, which would be diminished if, and to the extent that, third party direct actions against the insurance carriers result in plaintiffs' judgments."[32] The bankruptcy court determined that MacArthur's rights as an insured vendor were derived from Johns-Manville's rights as the primary insured.[33] Therefore, MacArthur's derivative rights were no different than those of asbestos victims, who are also barred from asserting direct actions against John-

[25] MacArthur Co. v. Johns-Manville Corp., 837 F. 2d at 90.
[26] *See id.*
[27] *Id.* at 90-1.
[28] *See id.*
[29] *See id.*
[30] *See id.*
[31] *See id.* at 92.
[32] *In re* Johns-Manville Corp., 26 B.R. 420, 435 (Bankr. S.D.N.Y. 1983).
[33] *See id.*

Manville's insurers.[34] The court ultimately ascertained no difference between rights based in contract and rights based in tort.[35] Regardless of a basis in contract or tort law, the appellate court determined that a third party would be seeking to collect from the proceeds of the Johns-Manville's insurance policies, based on Johns-Manville's conduct.[36]

Because MacArthur's claims were based upon Johns-Manville's own insurance coverage, MacArthur's claims were determined to be indistinguishable from Johns-Manville's insurance coverage.[37] Therefore, both were within the bankruptcy court's jurisdiction.[38] The bankruptcy court asserted jurisdiction over Johns-Manville's insurance policies,[39] as the insurance policies were one of the most valuable assets of the estate.[40] Therefore, the bankruptcy court also asserted jurisdiction over MacArthur's rights as an insured vendor, because they are tied to Johns-Manville's primary insurance policy.[41] The bankruptcy court essentially had jurisdiction over MacArthur's claims because the claims were inseparable from the insurance coverage. The Second Circuit then determined that the 1986 Orders by the bankruptcy court were correctly ordered, as a bankruptcy court had equitable and statutory power to dispose of a debtor's property free and clear of any third party interests, and could then channel those interests to the proceeds that, as a result, were created.[42]

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[34] *See id.*
[35] *See id.*
[36] *See id.*
[37] *See id.*
[38] *See id* at 93.
[39] *Id.* at 92.
[40] *In re* Johns-Manville Corp., 517 F.3d 52, 56 (2d Cir. 2008) (noting bankruptcy court was cognizant that Johns-Manville's insurance policies were the bankruptcy estate's most valuable asset).
[41] MacArthur Co. v. Johns-Manville Corp., 837 F. 2d at 92-3 (2d Cir. 1988).
[42] *See id.* at 91.

MacArthur further contended that it was denied due process as a matter of law because it received notice of the insurance settlements after the settlements had been negotiated.[43] However, MacArthur and all other interested parties were provided with notice and a hearing before the bankruptcy court approved the settlements.[44] In order for the notice to be deemed sufficient, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, and must express no opinion on merits of settlement."[45] Beyond these requirements, under Federal Rule of Civil Procedure 23(e)[46] district courts have virtually complete discretion as to the manner of giving notice to class members.[47] The Second Circuit determined that the notice of the proposed settlements met the requirements of due process.[48]

B. Asbestos worker brings a tort claim

Mr. Salvador Parra was an individual who, after contracting asbestosis from handling asbestos, sued certain producers, distributors, and insurers of asbestos products, including Johns-Manville and Marsh USA ("Marsh").[49] Marsh is an insurer of Johns-Manville.[50] Parra alleged these parties knew or should have known about asbestos-related health hazards.[51] Parra filed suit in 2009 claiming Marsh had conspired with other industry-related companies to withhold

[43] *See id.* at 94.
[44] *See id.*
[45] Handschu v. Special Services Div., 787 F.2d 828, 832-33 (2d Cir. 1986).
[46] *See* Fed.R.Civ.P. 23(e).
[47] *See* Handschu v. Special Services Div., 787 F.2d 828, 832-33.
[48] MacArthur Co. v. Johns-Manville Corp., 837 F. 2d at 94.
[49] *In re* Johns-Manville Corp., 534 B.R. at 558.
[50] *Id.* at 557.
[51] *See id.*

information concerning the dangers of asbestos.[52] According to Parra, Marsh should be held liable for "negligent undertakings, conspiracy, aiding, and abetting courses of conduct."[53]

Pursuant to the plan of reorganization of Johns-Manville, Marsh contributed $29.75 million to the future claimants' trust. In exchange, Marsh was relieved of all liability related to their insurance of Johns-Manville and would be protected from claims via injunctive orders of the bankruptcy court.[54] This settlement agreement was approved by the court, resulting in the court entering the Confirmation Order and the 1986 Orders.[55] Under the 1986 Orders, Johns-Manville and its insurers were released from further liability, but present and future claimants could claim against the trust.[56] Part of the settlement agreement included the appointment of a legal representative by the bankruptcy court, in order to ensure the rights of future claimants.[57]

Parra alleged that Marsh has a "unique" relationship with Johns-Manville, in that Marsh functioned as Johns-Manville's insurance department, beyond operating as just its broker, which was maintained over a forty-year relationship.[58] Marsh filed a motion to enforce the Confirmation Order ("the Motion") asserting that Parra's claims were "squarely within" the injunction protection in the 1986 Orders.[59] The Motion by Marsh requested the bankruptcy court to enjoin Parra from prosecuting his claims.[60] However, Parra believed that in order for Marsh's Motion to be procedurally effective, Marsh would have had to file an adversary proceeding, as per Federal Rule of Bankruptcy Procedure 7001(7), arguing that the Motion by Marsh was

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[52] *See id.*
[53] *Id.*
[54] *See id.*
[55] *See id.*
[56] *See id.*
[57] *See id.* at 556-57.
[58] *See id.*
[59] *See id* at 558-559.
[60] *See id.* at 559.

essentially seeking a new injunction.[61] In response, Marsh argued that it is not seeking a new injunction, but rather is seeking to enforce the 1986 Orders,[62] in which case an adversary proceeding would not be required. The bankruptcy court agreed that Marsh did not need to file an adversary proceeding because the Motion did not seek a new injunction, but only enforcement of the 1986 Orders.[63] The bankruptcy court granted Marsh's Motion, stating that Marsh was relieved of all liability, consistent with the Confirmation Order.[64]

The bankruptcy court interpreted the 1986 Orders, declaring that the determining factor is not the intent of the parties, but the intent of the issuing court.[65] In *U.S. v. Spallone*, the United States Court of Appeals for the Second Circuit stated that a lower court's interpretation of a document is restricted to the "four corners" of the document, unless the court must resolve ambiguities.[66] As the Supreme Court had determined that the injunctive provisions of the 1986 Orders were not ambiguous,[67] the bankruptcy court construed the language "related to" broadly, determining that claims against Marsh did relate to Marsh's insurance coverage of Johns-Manville, and were therefore barred by the injunction.[68]

Another of Parra's arguments regarded the future claimants' legal representative, who represented Parra against Marsh because Parra was a "future asbestos claimant," and therefore he fell within the scope of the future claimants' representative's mandate.[69] Parra contended that the future claimants' legal representative may have represented him with respect to his claims

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[61] U.S.B.R. 7001; *In re* Johns-Manville Corp., 534 B.R. at 559 (Bankr. S.D.N.Y. 2015) (alleging Motion is procedurally defective because Marsh failed to file an adversary proceeding).
[62] *In re* Johns-Manville Corp., 534 B.R. at 562.
[63] *See id*. at 562.
[64] *Id.* at 569-69.
[65] U.S. v. Spallone, 399 F.3d 415, 424 (2d Cir. 2005).
[66] *In re* Johns-Manville Corp., 534 B.R. at 563-66 (Bankr. S.D.N.Y. 2015).
[67] Travelers Indem. Co. v. Bailey, 557 U.S. 137, 149-50 (2009).
[68] *In re* Johns-Manville Corp., 534 B.R. at 564-65 (Bankr. S.D.N.Y. 2015).
[69] *See id.* at 566.

against Johns-Manville itself, but did not represent him with respect to his claims against Johns-Manville's settling insurers, such as Marsh, for their independent misconduct.[70] However, the court found that "limiting the role of the future claimants' representative would be inappropriate."[71] The court stated that nothing in the bankruptcy court's order that appointed the future claimants' representative limited the scope of his representation to only claims against Johns-Manville, and not against Johns-Manville's insurers.[72] The court further explained that Parra cited no authority and provided no compelling reason why the representative would be authorized to represent Parra with respect to claims against Johns-Manville, but not against the settling insurers, in this case, Marsh.[73] The court determined that because the future claimants' representative represented Parra against both Johns-Manville and Johns-Manville's insurers (such as Marsh), and because the future claimants' representative received constitutionally sufficient notice, Parra therefore received proper due process.[74]

II. 1986 Orders are not a bar to future claims against Johns-Manville's insurers

In contrast, in a case in which the plaintiffs were permitted to bring a cause of action against one of Johns-Manville's insurers,[75] Travelers,[76] the plaintiffs were essentially allowed to do so because as a matter of state law, Travelers owed an independent duty to the plaintiffs. The

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[70] *See id*. at 566 (Bankr. S.D.N.Y. 2015) (admitting Parra was a "future asbestos claimant" whose interests were within the scope of the future claimants' representative's mandate).
[71] *See id.* at 567.
[72] *See id.* at 567 (endowing the representative with full statutory rights and duties of representation available to an official committee.).
[73] *Id.*
[74] *See id.* at 567-68.
[75] *In re* Johns-Manville Corp.*,* 517 F.3d 52 (2d Cir. 2008).
[76] "Travelers is defined as The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries, and sister companies, as well as each of their respective predecessors, successors, assigns, officers, and directors.

plaintiffs were not claiming against the *res* of the Manville estate, but rather were seeking damages against Travelers, unrelated to Manville's insurance policy proceeds.[77]

The plaintiffs were comprised of two groups, one suing on the basis of statutory regulation of insurance practices, and the other suing on the basis of common law claims. Together, the plaintiffs alleged that Travelers acquired knowledge about the dangers of asbestos from as early as the 1950s and influenced Johns-Manville's purported failure to disclose knowledge about asbestos risks.[78] The plaintiffs contended Travelers engaged in a conspiracy in violation of state law, and that Travelers violated alleged duties to disclose asbestos-related information.[79] Plaintiffs' argument rested on the belief that the bankruptcy court was lacking jurisdiction to enjoin third-party non-debtor suits against Travelers.[80] The core of the plaintiffs' allegations centered on the belief that the bankruptcy court failed to distinguish between claims that seek recovery directly from Travelers based on Travelers distinct and independent acts, and those classic "Direct Actions" that seek recovery from an insurer contractually obligated to indemnify Johns-Manville for Johns-Manville's misconduct.[81]

On appeal to the district court, the district court considered two issues. The first issue was whether the bankruptcy court had jurisdiction over the statutory and common law claims. The district court found that the bankruptcy court did have jurisdiction over these claims, as the bankruptcy court intentionally used broad language in the 1986 Orders so as to cover Direct Action suits, which would be necessary in order to induce Travelers to contribute to the Manville

[77] *In re* Johns-Manville Corp., 517 F.3d at 52.
[78] *See id.* at 57.
[79] *See id.*
[80] *See id.* at 60.
[81] *See id.*

Trust.[82] The second issue the district court considered was whether the 1986 Orders themselves were a proper exercise of jurisdiction over non-debtors, and found that the bankruptcy court has subject matter jurisdiction to enjoin Direct Action claims because it affects the property of the estate.[83]

The Second Circuit distinguished the claim made in *MacArthur* from the statutory and common law claims brought by the plaintiffs. The court stated that even Travelers admitted that the statutory and common law claims sought damages from Travelers unrelated to the policy proceeds, whereas in *MacArthur*, the plaintiffs sought indemnification or compensation for the misconduct of Johns-Manville, to be paid out of Johns-Manville's insurance policies.[84] Furthermore, the claims here were based on Traveler's own bad acts, not those based on Johns-Manville's conduct.[85] The court determined that the issue of whether Travelers had a duty to the Direct Action plaintiffs was based on state law, and neither the district court nor the bankruptcy court looked to the laws of the states to determine if Travelers had an independent legal duty to the plaintiffs.[86] Because the plaintiffs sought to recover from Travelers for Travelers own wrongs, the bankruptcy court had no jurisdiction over the settlement claims.

The plaintiffs raised no claims against Johns-Manville's insurance coverage, and therefore had no claim against Johns-Manville's bankruptcy assets. Thus, there was no

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[82] *See id.* at 61 (finding it "reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville trust, which was key to the confirmation of the Manville [Bankruptcy] Plan.")
[83] *See id.* (stating that "[s]uits that seek direct recovery authorized by state statutes from Travelers' insurance policies would reduce the estate's recovery from those policies, thus affecting the 'property of the estate.'")
[84] *See id.* at 63.
[85] *See id.*
[86] *See id.*

bankruptcy court jurisdiction to enjoin the Direct Action claims against Travelers.[87] The court further explained that it was inappropriate for the bankruptcy court to enjoin claims brought against third-party non-debtors solely because of a third-party's financial contribution to a debtor's estate. If that were allowed, "a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions."[88] The Second Circuit therefore determined that the bankruptcy court lacked subject-matter jurisdiction over the dispute.[89]

Conclusion

The Johns-Manville litigation has seemingly become law of its own kind, setting new precedent through both legislation and case law. 11 U.S.C.A § 524(g) was enacted in response to the bankruptcy court's actions in early proceedings of the *In re Johns-Manville* cases. The legislation centers around a unique form of supplemental injunctive relief provided to an insolvent debtor faced with the specialized problems and difficulties of asbestos liability.[90] The sampling of Johns-Manville related cases above discuss the 1986 Injunctive Orders and the ability to sue Johns-Manville insurers when faced with those orders.

The outcome seems two pronged, focusing on (1) whether a possible claim to be pursued falls within the jurisdiction of the bankruptcy court which issued the 1986 Orders, and (2) if a claim does fall within the bankruptcy court's jurisdiction, whether the claim violates the 1986 orders. The court will likely bar a new complaint as within the jurisdiction of the 1986 Orders if it relates to Johns-Manville's misconduct, insurance, or insurance policy as part of the estate. However, if a complaint is divorced from Johns-Manville's conduct or its related insurance, and

[87] *See id.* at 65.
[88] *In re* Combustion Eng'g, Inc., 391 F.3d 190, 228 (3d Cir. 2004).
[89] *In re* Johns-Manville Corp., 517 F.3d 52, 66 (2d Cir. 2008).
[90] *See id.* at 67.

is a claim against the independent action of an insurance provider, it is likely not within the jurisdiction governing the 1986 Orders. Therefore, the ability to bring a new suit related to asbestos conduct will likely turn on whether the wrongdoings originated from Johns-Manville or its insurer in relation to its insurance coverage, or based on the separate wrongdoings of a Johns-Manville insurance provider independent from its insurance coverage.