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Non-Debtor Releases and Travelers V. Bailey: A Circuit Split that is Likely to Remain

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Background and Introduction

Including non-debtor releases or restructuring provisions in Chapter 11 plans of reorganization is a widespread and controversial practice. These provisions are not expressly provided for in—and may be expressly prohibited by—the Bankruptcy Code.[2] The circuits have long been split on the issue of whether or not these provisions are appropriate and, if so, when. The Second, Fourth, and Sixth Circuits are the most accepting of the provisions.[3] In contrast, the Fifth, Ninth, and Tenth Circuits prohibit non-debtor releases and their accompanying injunctions, holding them to violate 11 U.S.C. § 524(e)'s declaration that the debtor's discharge does not affect the liability of another party on a debt.[4] The Third Circuit has not definitively ruled on the

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[1] W.P. Toms Distinguished Professor of Law and Director of the James L. Clayton Center for Entrepreneurial Law at The University of Tennessee College of Law. The author filed an amicus brief in *Kenton County v. Delta*, urging the court to grant certiorari and suggesting that non-debtor releases unrelated to the res of the debtor's estate were not authorized by the Bankruptcy Code.

[2] *See generally* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959.

[3] *See, e.g., In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992); *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989).

[4] *See, e.g., In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re Zale Corp.*, 62 F.3d 746, 759-62 (5th Cir. 1995); *In re Western Real Estate Fund*, 922 F.2d 592, 600-02 (10th Cir.

propriety of non-debtor releases. However, when disapproving of a release that it found would be unacceptable under any circuit's standard given the lack of supporting findings of fact from the bankruptcy court, the Third Circuit noted "with some concern that the Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin Plaintiff's claims against non-debtors."[5] The *Continental Airlines* court concluded its discussion of the subject by stating "[w]e must remain mindful that bankruptcy jurisdiction is limited, as is the explicit grant of authority to bankruptcy courts."[6]

Where accepted, non-debtor releases have been justified primarily by reliance on 11 U.S.C. § 105(a), the Bankruptcy Code's "all writs" provision, which provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[7] Article I bankruptcy courts deploy § 105(a) much more aggressively than the Article III district courts do their corresponding all writs provision, 28 U.S.C. § 1625(a).[8] Section 105(a), however, is not and should not be mistaken for an independent grant of subject

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1990), *modified on other grounds*, 932 F.2d 898 (10th Cir. 1991), *rehearing denied* (Jan. 23, 1991).

[5] *In re Continental Airlines*, 203 F.3d 203, 214 n. 12 (3d Cir. 2000) (surveying circuits and collecting cases).

[6] *Id.* at n. 12.

[7] 11 U.S.C. § 105(a) (2006).

[8] See Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall,* 35 ARIZ. ST. L.J. 793 (2003).

matter jurisdiction.[9] Rather, an examination of whether the proposed release or restructuring provision falls within the bankruptcy court's "related to" jurisdiction is necessary. *Id.* No clear standard for evaluating this sort of jurisdiction has emerged. The most widely cited test is that from *Pacor v. Higgins*,[10] which grounded related-to jurisdiction on the non-debtor claim's having an "effect on the estate."[11] That standard is difficult or impossible to coherently apply, especially when the "effect" that is pointed to is a general benefit to the estate or to the debtor's reorganization efforts.[12] Such a standard leads to jurisdiction without limits.[13]

In *The Travelers Indemnity Company v. Bailey*[14] ("*Travelers v. Bailey*"), the United States Supreme Court was presented with the opportunity to resolve this circuit split and answer the question of whether or not bankruptcy courts have jurisdiction to release non-debtors from claims of other non-debtors that have no impact upon and are not derived from the *res* of the bankruptcy estate. Instead of reaching the question, however, the Court, in an opinion authored by Justice Souter and joined in by Justices Roberts, Scalia, Kennedy, Thomas, Breyer, and Alito, disposed of the case under the principles of res judicata and the bar on collaterally attacking a

[9] *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224-25 (3d Cir. 2004).

[10] 743 F.2d 984 (3d Cir. 1984).

[11] *Id.* at 994.

[12] *See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L. J. 1, 56-57 & n. 238 (1998) (collecting cases).

[13] *Id.*; *See generally* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 869-921 (2000).

[14] 129 S.Ct. 2195 (2009).

final order without opining on the scope of bankruptcy jurisdiction or the propriety of non-debtor releases. The result was to reverse the Second Circuit, which had held that the bankruptcy court had exceeded its subject matter jurisdiction when it issued the non-debtor release and related injunction, and to provide no answer to the question on which certiorari had been granted. The question was again presented to the Court in the next term in *Ad Hoc Committee of Kenton County Bondholders v. Delta Air Lines, Inc.*,[15] ("*Kenton County v. Delta*"), this time in the form of a request for direct review. The Court denied certiorari without comment, however.

Travelers v. Bailey

In *Travelers v. Bailey*, the Court was faced with an appeal emanating from the 1986 reorganization of the Johns-Manville Corporation ("Manville") some 23 years after the Manville plan of reorganization was confirmed. Direct appeals of the confirmation and settlement orders in that case had long ago been exhausted, but in August 2004, the bankruptcy court had issued an order "clarifying" the terms of its earlier orders, and it was this order that was at issue in *Travelers v. Bailey*.

The background of *Travelers v. Bailey*, the Manville reorganization, while complex, is fairly easily summarized. Asbestos litigation took off in the late 1960s and 1970s and has since become the longest running mass tort litigation in the history of the United States.[16] Manville, the nation's largest asbestos product manufacturer and distributor was a defendant in a

[15] 130 S. Ct. 539 (2009) (granting the author's motion for leave to file a brief as amicus curiae and denying the petition for certiorari).

[16] Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1, 2 (2009).

substantial number of asbestos suits and sought relief under chapter 11 in order to stay the actions and reorganize. It confirmed its plan of reorganization in 1986. The plan provided a theretofore unknown structure which captured the essence of a successful chapter 11 reorganization – separating the company's productive assets from its liabilities.

Under the plan, a series of trusts was created, into which Manville stock and future profits were placed for the benefit of asbestosis claimants.[17] Also placed into these trusts was $770 million of settlement funds from Manville's insurers.[18] A channeling injunction issued directing that all asbestos claims be asserted against the trusts rather than Manville or the insurers.[19] Finally, a non-debtor release of creditors' claims against the contributing insurance companies was included.[20] This structure, created by the attorneys and approved by Bankruptcy Judge Lifland, was novel, creative, pragmatic, and unsupported by statute or precedent at the time.[21]

At the time of the confirmation of Manville's Plan, it appears that the parties contemplated that the non-debtor release of claims would encompass only claims that could be characterized as "insurer actions" – those in which the insurers were liable pursuant to their

[17] *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988).

[18] *Id*.

[19] *In re Johns-Manville Corp.*, 517 F.3d 52, 57 (2d Cir. 2008).

[20] *Id*.

[21] Thereafter, presumably at the urging of insurance companies and those with similar interests, the structure was specifically authorized in a slightly modified form by Congress when it enacted 11 U.S.C. section 524(g), applicable specifically to asbestos mass tort cases like Manville.

insurance policies – rather than claims that could be characterized as "independent actions" – those in which the insurers were liable under consumer-protection laws and at common law because of their own, independent actions in suppressing information and the like.[22] The specific definition of what claims would be channeled to the trust and from which the non-debtor contributing insurance companies would be released was:

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[22] *Travelers Indem. Co. v. Bailey*, Appellate Brief for Respondents Pearlie Bailey et al., 2008 U.S. Briefs 295, *8; 2009 U.S. S. Ct. Briefs LEXIS 165 at **17, 2009 WL 507021 at *9 (February 25, 2009). This brief quotes a letter in the record from counsel for Manville to Travelers in which he states "The Court has *in rem* jurisdiction over the policies and thus the power to enter appropriate orders to protect that jurisdiction. *The channeling order is intended only to channel claims against the res* to the Settlement Fund and the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers." *Id*. (emphasis in original). Similarly, the bankruptcy court's own orders appear to have distinguished between the insurer actions and independent actions, limiting its injunction to the former by excluding the latter. *Id*. This letter is also quoted in Chubb Indemnity Insurance Company's brief in the matter, along with the letter in which Travelers confirms this understanding in reply. *Travelers Indem. Co. v. Bailey*, Appellate Brief for Respondent Chubb Indem. Ins. Co., 2008 U.S. Briefs 295, *6, 2009 U.S. S. Ct. Briefs LEXIS 166, **13-14, 2009 WL 507020 at *6 (February 25, 2009). *See also Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2208 (dissent by Justice Stevens explaining the difference between insurer actions and independent actions and avoiding use of the term "direct action" which, in this context, would be a misnomer).

> Any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.[23]

In an appeal of the Manville confirmation order, the Second Circuit approved the trust/channeling/non-debtor release structure under 11 U.S.C. section 363(f), using a somewhat strained analogy to the sale of estate property free and clear of liens that then attach to the proceeds of sale, and 11 U.S.C. section 105(a), the all writs provision of the Bankruptcy Code.[24]

Thereafter, the trust went into operation, paying claims, until it too started facing insolvency.[25] By 1995, it could only pay 10% on the dollar to claimants, and by 2001 that

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[23] *See* Appellate Brief for Respondent Chubb Indem. Ins. Co., *supra* note 22, at *4-*5.

[24] *In re Johns-Manville Corp.*, 837 F.2d 89, 91 (2d Cir. 1988). *See also* Silverstein, *supra* note 16, at 2.

[25] *See In re Joint E. & S. Dists. Asbestos Litig.*, 878 F.Supp. 473, 479 (S.D.N.Y. 1995) (generally speaking about how the current claims far outweighed the claims foreseen at the creation of the trust in both number and severity). *See also* Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 163 (2009) (stating that the Johns-Manville trust became insolvent and that the asbestos bar adapted to this fact by shifting its focus to companies with more remote connections to asbestosis in order to collect); Ronald Barliant et al., *From Free-Fall to Free-for-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 449 (2004) (stating that lawmakers praised the Johns-Manville trust system even after the trust became insolvent and had to be modified).

disbursement percentage had dropped to 5%, or a nickel on the dollar.[26] As of 2004, the trust had paid out approximately $3.1 billion, which translates to an average per victim amount of $3,000.[27] Its funding has been criticized as inadequate, and its procedures criticized as too lax and favorable to plaintiffs' attorneys, leading to quick payments in its early life to claimants and their attorneys, resulting in inadequate funds being behind for claims that would be asserted in the future.[28]

Because of the channeling order and non-debtor release, plaintiffs later asserting claims looked to other defendants and other theories of liability to recover damages for asbestosis caused by Manville's products. Alleging liability for breach of common law duties and under state consumer-protection statutes, the plaintiffs began filing suit against the contributing insurance companies directly.[29] These were not "direct actions"[30] under the insurance policies,

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[26] James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 262-64 (2006). *See generally In re Joint E. & S. Dists.*, 878 F. Supp. 473 (containing charts and calculations demonstrating the vast disparity between the expected "shelf-life" of the Johns-Manville trust and the actual number and dollar amounts of claims that had been made as of 1995; these charts and calculations provide a snapshot of how the original formulators of the trust were not nearly as prescient as they had hoped or thought.).

[27] *See* Stengel, *supra* note 26, at 263.

[28] *See* Silverstein, *supra* note 16; *see also* Stengel, *supra* note 26, at 263.

[29] *See* Appellate Brief for Respondents Pearlie Bailey et al., *supra* note 22, at *9-*10.

[30] The term "direct action" is a term of art meaning an action brought to recover under an insurance policy that is brought against the insurer directly, without naming the insured as a party-defendant. *See* BLACK'S LAW DICTIONARY 491 (8th ed. 2004).

rather they were independent actions, alleging that the insurance companies themselves had wronged the plaintiffs.[31]

Although it denied liability in these actions, Travelers Indemnity Company and others settled the cases for over $400 million, paying this amount over into a new set of trusts (not into the Manville trust and not into the bankruptcy estate) for current (not future) claims.[32] Importantly, this settlement was conditioned on the bankruptcy court entering what was termed a "Clarifying Order" relating to the now long final Manville plan confirmation order that would enjoin all future Manville-related claims against the settling insurance companies.[33] It was this clarifying order that was at issue in *Travelers v. Bailey*.

The "clarified" injunction in the new order provided:

> The commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn, breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation,

[31] "For instance, in *Wise v. Travelers Indemnity Co.*, 192 F. Supp. 2d 506 (N.D. W. Va. 2002), the plaintiffs alleged . . . that the insurance companies willfully misrepresented facts relating to the insurance coverage at issue. This conduct, plaintiffs argued, constitutes a violation of [the West Virginia statute] prohibiting unfair methods of competition and unfair or deceptive acts or practices, for which there are independent sources of liability." *See* Appellate Brief for Respondents Pearlie Bailey et al., *supra* note 22, at *15.

[32] *See* Appellate Brief for Respondents Pearlie Bailey et al., *supra* note 22, at *11-*12.

[33] *Id.*

> negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.[34]

Thus, the injunction that had been originally entered to enjoin claims "*arising out of or relating to any or all of the Policies*"[35] had now been "clarified" to enjoin claims that "*arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos.*" In support of this clarification, the court found that Travelers':

> knowledge of the hazards of asbestos was derived from its nearly three decade insurance relationship with Manville and the performance by Travelers of its obligations under the Policies, including through the underwriting, loss control activities, defense obligations, and generally through its lengthy and confidential insurance relationship under the policies . . . . Travelers learned virtually everything it knew about asbestos from its relationship with Manville.[36]

Judge Lifland, the original bankruptcy judge in the Manville case, issued the clarifying order.

While there is a certain logic to the bankruptcy court's clarification – "Policies" was arguably really a proxy for Travelers' entire relationship with Manville – so all the court was arguably doing is substituting what was really meant – entire relationship and knowledge – for the proxy term. The weakness in this argument is that it seems to gloss over the distinction between insurer actions and independent actions that the parties so carefully preserved during the Manville reorganization proceedings.[37]

On appeal, the district court affirmed the bankruptcy court, but, on further appeal, the Second Circuit reversed, holding that the independent actions (as distinct from what would later be called the "insurer actions" by Justice Stevens in his dissent) were outside of the subject matter jurisdiction of the bankruptcy court in 1986, and thus were not and could not have been enjoined in the 1986 order.[38] The "1986 orders must be read to conform with the bankruptcy

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[34] *Id.* at *12.

[35] *Id*. at *48 (emphasis added).

[36] *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2200-01 (2009).

[37] *See* Appellate Brief for Respondents Pearlie Bailey et al., *supra* note 22, at *9.

[38] *Johns-Manville Corp. v. Chubb Indemnity Insurance Co.* (*In re Johns-Manville Corp.*), 517 F.3d 52, 67 (2d Cir. 2008).

court's jurisdiction over the *res* of the Manville estate."[39] The same result would apply, the Second Circuit reasoned, with regard to the 2004 "clarifying order."[40]

The Supreme Court reversed the Second Circuit, albeit on very narrow grounds. Boiled to its essence, the Court held that, because the Manville confirmation order became final and direct review of that order was concluded years ago, the question of whether or not the bankruptcy court had jurisdiction to enjoin independent claims in addition to insurer claims was not properly before the Second Circuit. As a result, the Court could resolve the case by reference to the unsurprising proposition that a court has jurisdiction to interpret and clarify its own orders. The theme of the importance of finality, perhaps heightened by the asbestos/mass tort context of the case, runs throughout the majority opinion.

As to the distinction between insurer claims and independent claims that the parties appear from the record to have sought to preserve in the original confirmation order, carving out the independent claims from the injunction and the non-debtor release, the Court dismissed that consideration by applying the plain meaning rule. It found that, even if the evidence in the record supported that interpretation, since the confirmation order was clear on its face, it would have its unambiguous terms enforced notwithstanding evidence that a different meaning was intended.[41] The Court made no mention of the compelling need that the parties felt for entry of a "clarifying" order regarding the "unambiguous" confirmation order. A need that Travelers spent $440 million in additional settlement funds plus attorneys' fees to satisfy.

The Court explicitly noted that its holding was a narrow one. It held merely that final orders in bankruptcy court are not subject to collateral attack, even when the allegation is that the orders exceeded the jurisdiction of the bankruptcy court. In doing so, the Court was consistent with its prior cases which hold that final judgments of a bankruptcy court are entitled to the protections of res judicata unless the action was such an obvious act outside the court's

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[39] *Id.* The court continued: "Interpreting the orders otherwise risks federal bankruptcy courts "displac[ing] state courts for large categories of disputes in which some[one] . . . may be bankrupt. *Id.*

[40] *Id*. at 65, "Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers."

[41] *Travelers*, 129 S. Ct. at 2204.

jurisdiction that it constitutes manifest abuse. These include *Celotex Corp. v. Edwards*,[42] in which the court rebuffed a collateral attack on an injunction to prevent a creditor from drawing on a surety bond previously posted by the debtor; the *New Haven Inclusion Cases*,[43] in which the court held that an order regarding disposition of stock subject to a later determination of value in the New Haven Railroad reorganization was res judicata; *Chicot County Drainage Dist. v. Baxter State Bank*,[44] where the court held that even when a statute on which a municipal reorganization plan was based was declared unconstitutional, the order confirming the plan was res judicata; *Stoll v. Gottlieb*,[45] where the court rejected a collateral attack on a plan provision that purported to bar a creditor from proceeding on a third-party guaranty; and *Oriel v. Russell*,[46] where the court held that a turnover order could not be collaterally attacked in a contempt proceeding.[47]

The Court concluded by emphasizing that it was not resolving "whether a bankruptcy court, in 1986 or today, could properly enjoin claims against non-debtor insurers that are not derivative of the debtor's wrongdoing, nor decides whether any particular respondent is bound by the 1986 Orders."[48] This last point is an interesting one, and one that had not been taken up by the Second Circuit. Chubb Indemnity Insurance Company had long maintained that it had not received constitutionally satisfactory notice to be bound by the original Manville bankruptcy orders. By not addressing and dismissing that argument, the Court may have provided indirect support for the notion that it might recognize due process shortfalls in some bankruptcy notice practices that are quite aggressive and limited, including arguments that future claimants cannot be bound by a bankruptcy court order, either with or without a future claims representative.[49]

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[42] 514 U.S. 300, 306-307 (1995).

[43] 399 U.S. 392, 481 (1970).

[44] 308 U.S. 371, 375 (1940).

[45] 305 U.S. 165, 171 (1938).

[46] 278 U.S. 358, 363 (1929).

[47] Kenneth N. Klee, *Klee on Travelers Indemnity Co. v. Bailey*, 2009 LEXIS EMERGING ISSUES 4472 (October 13, 2009).

[48] *Travelers*, 129 S. Ct. at 2198.

[49] *See, e.g., Bosiger v. U.S Airways*, 510 F.3d 442, 451 (4th Cir. 2007); *In re J.A. Jones, Inc.*, 492 F.3d 242, 249 (4th Cir. 2007); *Jones v. Chemetron Corp.*, 212 F.3d 199, 209-210 (3rd Cir. 2000).

Justice Stevens dissented in a separate opinion and was joined by Justice Ginsberg. He did not find the confirmation order's meaning to be "plain" and would have affirmed the Second Circuit on the ground that the bankruptcy court exceeded its subject matter jurisdiction.[50]

Kenton County v. Delta –Cert. Denied

The Court was again presented with the opportunity to examine the propriety of non-debtor releases in *Ad Hoc Committee of Kenton County Bondholders v. Delta Airlines, Inc*.[51] That case concerned the power of a bankruptcy court to release claims against non-debtors and also restructure the debts of non-debtors, as well as the judicially-created doctrine of equitable mootness, which some criticize in the bankruptcy context as providing too much insulation of bankruptcy court orders from effective review by Article III judges.[52] Faced with the petition for certiorari in the *Kenton County* case, the Court summarily denied the petition, as it does with most cases upon which review is sought. Although denial of certiorari is not a decision on the merits, it indicates that the case was not of interest to four or more of the justices.[53] But at least four of the justices *were* interested in hearing *Travelers v. Bailey*. One explanation may be that what attracted the justices in *Travelers* was the res judicata and bar on collateral attack issues, rather than the non-debtor release issue. This, in turn would suggest that the current composition of the court is unlikely to take up the issue of non-debtor releases any time soon, and the circuit split on the issue is likely to remain.

Conclusion

To date, *Travelers v. Bailey* has been cited for four unsurprising propositions, all of which were established law before the case was decided: (1) the phrase "in relation to" should

[50] *Travelers*, 129 S. Ct. at 2208 (Stevens, J., dissenting).

[51] 130 S. Ct. 539 (2009).

[52] George W. Kuney, *Slipping into Mootness*, 2007 NORTON ANN. SURV. OF BANKR. LAW, Part 1, §3 (West 2007).

[53] *New York v. Uplinger*, 467 U.S. 246, 250 (1984) ("As long as we adhere to the Rule of Four, four justices have the power to require that a case be briefed, argued, and considered at a postargument conference.").

be interpreted expansively;[54] (2) courts plainly have jurisdiction to interpret and enforce prior orders;[55] (3) collateral attacks on final orders are ordinarily not permitted;[56] and (4) when considering whether or not to grant relief that is requested, the bankruptcy court must consider whether or not it has jurisdiction.[57]

Travelers v. Bailey presented the Court with the opportunity to consider the propriety of non-debtor releases, and a majority of the court determined that it would avoid that issue and rule instead on the grounds of res judicata and the bar on collateral attacks of final judgments. When presented with the opportunity for direct review of a case involving the propriety of non-debtor releases, in *Ad Hoc Committee of Kenton County Bondholders v. Delta Airlines, Inc.*, the Court denied certiorari, indicating to this author that review of the propriety of non-debtor releases was not on the agenda of a sufficient number of the Justices, meaning that the current fragmented state of the law on this issue is likely to remain.

[54] See, e.g., *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 91 (D. Mass. 2009) (citing *Travelers*, 129 S. Ct. at 2203).

[55] See, e.g., *In re Midnight Pass Inc.*, 2009 Bankr. LEXIS 3584 at *30, 2009 WL 3583957 at *11 (Bankr. D. Mass.).

[56] See, e.g., *In re Chesnut*, 2009 U.S. App. LEXIS 27686 at *9-*10, 2009 WL 4885018 at *3 (5th Cir.).

[57] See, e.g., *In re Mal Dunn Assocs., Inc.*, 406 B.R. 622, 630 (Bankr. S.D.N.Y. 2009).