

12-1094-bk(L)
In Re: JOHNS-MANVILLE CORPORATION Common Law Settlement Counsel, et al.
v. The Travelers Indemnity Co., et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: January 10, 2013 Decided: July 22, 2014)

Docket Nos. 12-1094-bk(L), 12-1150-bk(Con), 12-1205-bk(Con)

IN RE: JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE
INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION,
JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES
CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by
merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE
PRODUCTS CORPORATION and MANVILLE SERVICE CORPORATION, MANVILLE
INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE
INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION,
ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION,
JOHNS-MANVILLE IDAHO, INC., MANVILLE CANADA SERVICE INC., SUNBELT
CONTRACTORS, INC.,

Debtors.

COMMON LAW SETTLEMENT COUNSEL, STATUTORY AND HAWAII DIRECT ACTION
SETTLEMENT COUNSEL,

Movants-Appellants,

ASBESTOS PERSONAL INJURY PLAINTIFFS,

Interested Parties-Appellants,

v.

THE TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY
COMPANY, f/k/a AETNA CASUALTY AND SURETY COMPANY,

Objectors-Appellees.*

*The Clerk of the Court is instructed to conform the caption in
accordance herewith.

1 B e f o r e: WINTER, POOLER, and CHIN, Circuit Judges.

2
3 Appeal from a judgment of the United States District Court
4 for the Southern District of New York (John G. Koeltl, Judge),
5 reversing the bankruptcy court's final judgment (Burton R.
6 Lifland, Judge) that had enforced settlement agreements and
7 compelled appellees to make payments to asbestos plaintiffs under
8 the agreements. We vacate the district court's order and order
9 reinstatement of the final judgment of the bankruptcy court.

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32 Appellees The Travelers Indemnity
33 Company & Travelers Casualty and Surety
34 Company.

35
36 WINTER, Circuit Judge:

37
38 Common Law Settlement Counsel, Statutory and Hawaii Direct
39 Action Settlement Counsel, and Asbestos Personal Injury

1 Plaintiffs¹ appeal from Judge Koeltl's reversal of a bankruptcy
2 court's final judgment. Bankruptcy Judge Lifland had required
3 appellees -- The Travelers Indemnity Company and Travelers
4 Casualty and Surety Company (together, "Travelers") -- to pay
5 over \$500 million to asbestos plaintiffs based on Travelers'
6 obligations under certain settlement agreements (the
7 "Agreements"). The district court reversed, holding that
8 conditions precedent to payment under the Agreements were never
9 met, and that Travelers' obligation to pay therefore never
10 matured.

11 Because we conclude that the relevant conditions precedent
12 were satisfied, we vacate the district court's order and remand
13 with instructions to reinstate the bankruptcy court's final
14 judgment. In addition, given that Travelers did not timely raise
15 its arguments regarding the Agreements' conditions that the
16 movants either execute a specific number of releases and deliver
17 them into escrow or dismiss their claims with prejudice, we deem
18 those arguments waived. Finally, we hold that the bankruptcy
19 court correctly applied prejudgment interest to the amount owed
20 and that it correctly calculated the total payment due from the
21 appropriate date.

¹ The nature of the various appellants will become clear, to the extent relevant, in the course of this opinion. The Asbestos Personal Injury Plaintiffs are six asbestos personal injury claimants who stand to recover from the Common Law Settlement Trust.

1 BACKGROUND

2 For many years, Travelers was the primary insurer for the
3 Johns-Manville Corporation ("Manville"), once the largest
4 supplier of asbestos and asbestos-containing products. In re
5 Johns-Manville Corp. (Manville I), Nos. 82 B 11656, 82 B 11657,
6 82 B 11660, 82 B 11661, 82 B 11665, 82 B 11673, 82 B 11675, 82 B
7 11676(BRL), 2004 WL 1876046, at *2-3 ¶¶ 1, 3, *5 ¶ 12 (Bankr.
8 S.D.N.Y. Aug. 17, 2004). In 1982, after asbestos-related health
9 problems triggered litigation, Manville, faced with the prospect
10 of tremendous liability, filed a Chapter 11 petition for
11 bankruptcy protection and reorganization. In re Johns-Manville
12 Corp. (Manville II), 340 B.R. 49, 54 (S.D.N.Y. 2006); Travelers
13 Indem. Co. v. Bailey, 557 U.S. 137, 140 (2009).

14 With Manville entangled in bankruptcy proceedings, asbestos
15 plaintiffs began to file direct-action² suits against Travelers
16 and other insurers based on the insurers' relationships with
17 Manville. Manville II, 340 B.R. at 55. At the same time,
18 Travelers and other insurers were involved in a policy-coverage
19 dispute with Manville, and numerous contribution, indemnity, and
20 cross claims were asserted among Manville's insurers. Id.;
21 Manville I, 2004 WL 1876046, at *14-15 ¶¶ 54, 57.

22 Consequently, Travelers and the other insurers entered into
23 a settlement agreement with Manville. Pursuant to the

² A "direct action" is "[a] lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." Black's Law Dictionary 525 (9th ed. 2009).

1 settlement, Travelers agreed to contribute roughly \$80 million to
2 a trust established as part of the bankruptcy estate (the
3 “Manville Trust”) in exchange for a complete release of Manville
4 policy-related liabilities. Manville I, 2004 WL 1876046, at *15
5 ¶¶ 58, 61. The bankruptcy court provided extensive notice
6 regarding the settlement, and it also appointed a Future Claims
7 Representative (“FCR”) to represent future asbestos claimants
8 during relevant proceedings. In re Johns-Manville Corp.
9 (Manville IV), 600 F.3d 135, 140-41 (2d Cir. 2010).

10 The bankruptcy court eventually approved the settlement and
11 entered two orders, the Insurance Settlement Order and the
12 Confirmation Order (together, the “1986 Orders”). Manville I,
13 2004 WL 1876046, at *15-16 ¶¶ 60-61, 64. The 1986 Orders were
14 “meant to provide the broadest protection possible to facilitate
15 global finality for Travelers as a necessary condition for it to
16 make a significant contribution to the Manville estate.” Id. at
17 *31 ¶ 23. The Insurance Settlement Order released Travelers and
18 the other settling insurers from Manville-related obligations,
19 enjoined “all future claims for bad faith or insurer misconduct,”
20 and channeled all such claims to the Manville Trust. Id. at *15
21 ¶ 61. The Confirmation Order confirmed Manville’s reorganization
22 plan, incorporating the Insurance Settlement Order by reference
23 and enjoining “all persons from commencing any action against any
24 of the Settling Insurance Companies for the purpose of, *directly*
25 *or indirectly*, collecting, recovering or receiving payment of, on

1 or with respect to any Claim . . . or Other Asbestos
2 Obligation” Id. at *16 ¶ 64 (internal citation and
3 quotation marks omitted).

4 Despite the 1986 Orders, asbestos plaintiffs filed more
5 actions against Travelers in several states. Id. at *17 ¶ 70.
6 The majority of these claims did not allege violations derivative
7 of Manville’s actions; instead, they were based on Travelers’ own
8 alleged wrongdoing as Manville’s insurer. Although it is a
9 misnomer, see infra note 3, we will style these claims as the
10 “Direct Actions.” The Direct Actions were brought by three
11 categories of plaintiffs. We will call them the “Statutory
12 Direct Action Plaintiffs,” “Hawaii Direct Action Plaintiffs,” and
13 “Common Law Direct Action Plaintiffs.” They asserted two
14 categories of claims. First, the Statutory Direct Action
15 Plaintiffs and Hawaii Direct Action Plaintiffs alleged, among
16 other things, that Travelers “conspired to violate state laws
17 prohibiting unfair insurance . . . practices” by fraudulently
18 perpetuating a “state of the art” defense, id. at *18-19 ¶¶ 74-
19 79, and allegedly misrepresenting Manville’s knowledge of
20 asbestos hazards. Second, the Common Law Direct Action
21 Plaintiffs claimed similarly that Travelers violated common law
22 duties when it failed to disclose what it knew about asbestos

1 hazards from its relationship with Manville. Id. at *19 ¶¶
2 80-82.³

3 Relying on the 1986 Orders, in June 2002, Travelers moved
4 before the bankruptcy court to enjoin the Direct Actions.
5 Manville II, 340 B.R. at 55. The bankruptcy court issued a
6 temporary restraining order against prosecution of certain
7 lawsuits against Travelers but also referred the matter to
8 mediation. Id. The mediation, conducted by former New York
9 Governor Mario M. Cuomo, resulted in the three Settlement
10 Agreements between Travelers and the Statutory, Hawaii, and
11 Common Law Direct Action Plaintiffs. In re Johns-Manville Corp.
12 (Manville III), 517 F.3d 52, 58 (2d Cir. 2008); Manville I, 2004
13 WL 1876046, at *1, *22-23 ¶¶ 96, 101, 105. In all, Travelers
14 agreed to pay up to \$360 million to the Statutory Plaintiffs, up
15 to \$15 million to the Hawaii Plaintiffs, and up to \$70 million to
16 the Common Law Plaintiffs, in three respective funds separate
17 from the Manville Trust. Manville I, 2004 WL 1876046, at *22-23
18 ¶¶ 96, 101, 105.

19 Under the Agreements, the Direct Action Plaintiffs were to
20 be paid from the funds, but only after three conditions were
21 satisfied. Id. at *22 ¶¶ 96-100. These conditions, described in
22 detail immediately infra, concerned the breadth of an order to be

³ As noted by the Supreme Court in Travelers Indem. Co. v. Bailey, 557 U.S. 137, 143 n.2 (2009), these suits were not direct actions “in the terms of strict usage,” because they sought “to hold Travelers liable for independent wrongdoing rather than for a legal wrong by Manville.” Nevertheless, because all courts in the course of this litigation have dubbed these suits “direct actions,” we do so here. See In re Johns-Manville Corp. (Manville IV), 600 F.3d 135, 142 (2d Cir. 2010).

1 entered by the bankruptcy court ("Clarifying Order") regarding
2 the interpretation of the 1986 Orders, the finality of the
3 Clarifying Order, and various provisions regarding disposal of
4 the Direct Actions.

5 First, the Agreements required that the bankruptcy court,
6 once it approved the settlements, enter a "Clarifying Order."
7 The Statutory and Hawaii Direct Action Settlement Agreements
8 required that the Clarifying Order "contain[] prohibitions
9 against Claims at least as broad as those contained in Exhibit
10 A." App. at 231, 269. Similarly, the Common Law Direct Action
11 Agreement required that the Clarifying Order contain language
12 "substantially in the form" of Exhibit A.⁴ Id. at 307.

13 Exhibit A of each Agreement was a proposed Clarifying Order
14 containing provisions barring all claims against Travelers
15 arising out of, or relating to, Travelers' handling of asbestos-
16 related claims, including contribution and indemnity claims. The
17 proposed Clarifying Order also expressly barred the new,
18 nonderivative Direct Actions that were the subject of the
19 settlements. Finally, each Exhibit A conveyed that the proposed
20 Clarifying "Order is an order clarifying the Confirmation Order
21 [of the 1986 Orders]" and that all the barred claims listed

⁴ Although the language of the Common Law Direct Action Settlement Agreement differs somewhat from that of the Statutory and Hawaii Direct Action Settlement Agreements, we find, as did both the district court and the bankruptcy court, that the distinctions are not meaningful with regard to the issues on appeal. See In re Johns-Manville Corp. (Manville VI), 845 F. Supp. 2d 584, 588 & nn.4&6 (S.D.N.Y. 2012); In re Johns-Manville Corp. (Manville V), 440 B.R. 604, 612 n.12 (Bankr. S.D.N.Y. 2010). We therefore reject the Common Law Settlement Counsel's arguments that rely on supposed differences in the Agreements' language.

1 within the proposed Clarifying Order were "covered by the
2 Confirmation Order and permanently enjoined as against Travelers,
3 which [was] released therefrom under the Confirmation Order."
4 Id. at 245, 283.

5 Second, the Clarifying Order had to become a "Final Order"
6 under the Agreements' definition, i.e., an order from which no
7 appeal is taken, or an order that has been "affirmed by the
8 highest court to which such order was appealed or certiorari has
9 been denied and the time to take any further appeal or petition
10 for certiorari shall have expired." Id. at 228, 265, 304.

11 Third, another set of conditions precedent required either
12 the execution and delivery into escrow of at least 49,000 general
13 releases of claims (under the Statutory Direct Action Settlement
14 Agreement), at least 14,000 general releases of claims against
15 Travelers (under the Common Law Direct Action Settlement
16 Agreement), or dismissals with prejudice of all named plaintiffs'
17 pending claims against Travelers (under the Hawaii Direct Action
18 Settlement Agreement).

19 With the Agreements in place, the parties moved for the
20 bankruptcy court's approval in 2004. Manville I, 2004 WL
21 1876046, at *1. Various third parties filed objections,
22 including Chubb Indemnity Insurance Company ("Chubb"). Chubb had
23 issued asbestos-related insurance policies -- although it never
24 insured Manville -- and complained that any potential
25 contribution and indemnification claims it might have against
26 Travelers would be unlawfully barred if the Clarifying Order were

1 entered by the bankruptcy court. Manville II, 340 B.R. at 54,
2 56; see also Manville IV, 600 F.3d at 143-44. Chubb and the
3 other objectors argued that the bankruptcy court lacked subject
4 matter jurisdiction to enjoin third parties' Direct Actions and
5 related claims against nondebtors. Additionally, Chubb objected
6 on due process grounds, arguing that it could not be bound by the
7 Clarifying Order because it had never received constitutionally
8 sufficient notice of the 1986 Orders. Manville IV, 600 F.3d at
9 143, 147.

10 On August 17, 2004, the bankruptcy court rejected the
11 objections and approved all three Agreements. It also entered
12 the Clarifying Order (the "2004 Orders"). The language of the
13 Clarifying Order was substantially the same as the language
14 contained in each Agreement's appended Exhibit A. The bankruptcy
15 court concluded that it had authority to enter both the
16 Clarifying Order and the 1986 Orders, and that the Direct Actions
17 -- and related contribution and indemnity claims -- were barred
18 by the 1986 Orders.⁵ Manville I, 2004 WL 1876046, at *26-28 ¶¶
19 1-9, *30-34 ¶¶ 17-35.

20 Chubb and the other objectors appealed. The district court
21 affirmed the bankruptcy court's order in all material respects.

⁵ Specifically, the bankruptcy court determined that potential claims by insurers such as Chubb were properly barred by the 1986 Orders. In re Johns-Manville Corp. (Manville I), Nos. 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665, 82 B 11673, 82 B 11675, 82 B 11676(BRL), 2004 WL 1876046, at *34 ¶ 38 (Bankr. S.D.N.Y. Aug. 17, 2004); see also id. at *33-34 ¶¶ 34-35. Additionally, the bankruptcy court reasoned that a "judgment reduction provision" "protect[ed] the interests of non-settling defendants in the direct action claims so completely as to render their objections to the settlements moot." Id. at *34 ¶ 38.

1 It concluded that the bankruptcy court had authority to enter the
2 Clarifying Order because it had jurisdiction to enter the 1986
3 Orders and that the Clarifying Order interpreted and enforced
4 those orders. Manville II, 340 B.R. at 59-67. The district
5 court also reasoned that Chubb, a sophisticated insurer, received
6 sufficient notice regarding its purported claims. Id. at 68. It
7 determined further that, even if notice in the usual sense was
8 lacking, Chubb's claims could be foreclosed upon because of the
9 special nature of the remedial scheme at issue: reorganization
10 of the bankruptcy estate. Id. at 68-69.

11 The objectors appealed again, and this court vacated and
12 remanded, concluding that entry of the 1986 Orders (as
13 interpreted by the Clarifying Order) exceeded the proper bounds
14 of the bankruptcy court's jurisdiction insofar as they enjoined
15 state-law claims, nonderivative of the debtor's wrongdoing, that
16 did not seek recompense from the Manville corpus. Manville III,
17 517 F.3d at 61-68. Having vacated on these grounds, this court
18 deemed it unnecessary to reach Chubb's due process argument. Id.
19 at 60 n.17.

20 The Supreme Court granted certiorari and then reversed.
21 Bailey, 557 U.S. at 137, 147. The Court held that the Direct
22 Actions were -- and always had been -- barred by the 1986 Orders,
23 and it concluded that this court had erred in reevaluating the
24 bankruptcy court's jurisdiction to enter those orders: "the 1986
25 Orders became final on direct review over two decades ago";
26 "whether the Bankruptcy Court had jurisdiction and authority to

1 enter the injunction in 1986 was not properly before th[e Court]
2 in 2008” Id. at 148.

3 The Court concluded that the Clarifying Order’s entry was a
4 proper exercise of the bankruptcy court’s jurisdiction because it
5 “plainly had jurisdiction to interpret and enforce its own prior
6 orders.” Id. at 151. The Clarifying Order, therefore, did not
7 expand the scope of the 1986 Orders. The Court did not
8 determine, however, whether any parties in particular were bound
9 by the 1986 Orders, nor did it assess the propriety, as a general
10 matter, of a bankruptcy court enjoining third-party claims
11 against nondebtors that were not derivative of the debtor’s
12 wrongdoing. See id. at 155. The Supreme Court remanded for this
13 court to consider whether Chubb was bound by the 1986 Orders and
14 the Clarifying Order. Id. at 155-56.

15 On remand, this court concluded that Chubb was not bound by
16 the 1986 Orders -- nor, by extension, the Clarifying Order --
17 because it had not been afforded constitutionally sufficient
18 notice of the 1986 Orders and their attendant proceedings.
19 Manville IV, 600 F.3d at 138, 148-49, 158. Underpinning this
20 holding was the determination that the bankruptcy court
21 interpreted the 1986 Orders to have in personam, not just in rem,
22 effect. Id. at 153-54. This court expressly refused to
23 determine the effect of this holding on the Agreements, however,

1 leaving remaining issues to be resolved by “the parties, with the
2 aid of the bankruptcy court.” Id. at 159.⁶

3 In September 2010, counsel for the Direct Action Plaintiffs,
4 claiming that all the conditions precedent had been satisfied,
5 moved before the bankruptcy court to compel Travelers to make the
6 payments required by the Agreements. Travelers objected,
7 contending only that the breadth and finality conditions
8 precedent to payment under the Agreements were unsatisfied
9 because Chubb was now free to bring claims against it. In re
10 Johns-Manville Corp. (Manville V), 440 B.R. 604, 613-15 (Bankr.
11 S.D.N.Y. 2010).

12 The bankruptcy court granted the Direct Action Settlement
13 Counsel’s motions to compel. See id. at 615. The court
14 concluded that the disputed conditions precedent had been
15 satisfied. It reasoned that: (i) a Clarifying Order of the
16 required breadth had been entered in 2004, see id. at 613-14;
17 (ii) the Order became a “Final Order” when “it was affirmed by
18 the Supreme Court, the court of last resort, in Bailey on June
19 18, 2009,” id. at 614; and, (iii) even after Manville IV’s
20 holding that Chubb was not bound by the injunctions due to its
21 lack of notice, the Order enjoined the bargained-for breadth of
22 claims, id. It explicitly noted for the record that satisfaction
23 of the release/dismissal conditions precedent was not disputed by

⁶ Travelers filed petitions for writs of certiorari and mandamus with the Supreme Court, and the petitions were denied on November 29, 2010. See Travelers Indem. Co. v. Chubb Indem. Ins. Co., 131 S. Ct. 644 (2010).

1 Travelers. Id. at 608. The bankruptcy court directed Travelers
2 to fulfill its payment obligations immediately. Id. at 615.

3 Proceedings regarding the propriety and amount, if any, of
4 prejudgment interest then began. Travelers sought to broaden the
5 issues by claiming, for the first time, that the Agreements'
6 conditions precedent regarding disposal of the Direct Actions had
7 not been met. The bankruptcy court rejected this attempt on the
8 ground that Travelers had not asserted this issue in response to
9 the motion to compel. A final judgment was subsequently issued
10 against Travelers requiring it to pay over more than \$500 million
11 (more than \$65 million of which was prejudgment interest).

12 The district court reversed on February 29, 2012, holding
13 that the disputed conditions precedent had not been satisfied
14 because (i) the breadth of the language represented in each
15 Agreement's Exhibit A had been narrowed by this court's Manville
16 IV decision; and (ii) the Clarifying Order never became a "Final
17 Order" as defined in the Agreements. In re Johns-Manville Corp.
18 (Manville VI), 845 F. Supp. 2d 584, 592-96 (S.D.N.Y. 2012). The
19 district court therefore did not determine whether other
20 conditions precedent under the Agreements had been satisfied, nor
21 did it rule on matters pertaining to the bankruptcy court's award
22 of prejudgment interest. This appeal followed.

23 DISCUSSION

24 We review a bankruptcy court's decision that has
25 subsequently been appealed to the district court "independently."
26 In re Baker, 604 F.3d 727, 729 (2d Cir. 2010). In doing so, we

1 accept the bankruptcy court's "factual findings unless clearly
2 erroneous but review[] its conclusions of law de novo." Id.

3 a) Contested Conditions Precedent

4 The interpretation of unambiguous settlement-agreement terms
5 is a question of law subject to de novo review. See Tourangeau
6 v. Uniroyal, Inc., 101 F.3d 300, 307 (2d Cir. 1996). The
7 Agreements here are "governed by and construed in accordance with
8 the laws of the State of New York." App. at 239, 276, 312.

9 Under New York law, "a written agreement that is complete, clear
10 and unambiguous on its face must be enforced according to the
11 plain meaning of its terms." Greenfield v. Philles Records,
12 Inc., 98 N.Y.2d 562, 569 (2002). New York law also requires
13 strict compliance with settlement agreements, which are binding
14 and enforceable contracts between parties. IDT Corp. v. Tyco
15 Grp., S.A.R.L., 13 N.Y.3d 209, 213-14 (2009). Further,
16 "[e]xpress conditions must be literally performed; substantial
17 performance will not suffice." MHR Capital Partners LP v.
18 Presstek, Inc., 12 N.Y.3d 640, 645 (2009).

19 1) Breadth and Finality of the Clarifying Order

20 The parties primarily contest whether: (i) the breadth of
21 the bankruptcy court's Clarifying Order met the breadth
22 requirement in Exhibit A of the Agreements; and (ii) the
23 Clarifying Order became "final" within the definition of the
24 Agreements. These questions, of course, govern whether the
25 conditions precedent to Travelers' obligation to pay have been
26 satisfied. We conclude that they have been satisfied.

1 A) Breadth

2 Under both the Statutory and Hawaii Direct Action
3 Settlement Agreements, the relevant condition precedent requires
4 entry of “a Clarifying Order containing prohibitions against
5 Claims at least as broad as those contained in Exhibit A”
6 App. at 231, 269. Similarly, under the Common Law Direct Action
7 Agreement, the relevant condition precedent requires the “[e]ntry
8 of an order or orders of the Bankruptcy Court, issued pursuant to
9 the [1986 Orders] . . . substantially in the form attached hereto
10 as Exhibit A” Id. at 307.

11 We begin by observing that the injunctive language found in
12 each Agreement’s appended Exhibit A was included, nearly
13 verbatim, in the Clarifying Order. Travelers concedes as much.
14 But Travelers argues, and the district court agreed, that this
15 court’s holding in Manville IV diminished the reach of the
16 Clarifying Order because the order became “jurisdictionally void”
17 as to Chubb, 600 F.3d at 158, which failed to receive
18 constitutionally sufficient notice of the 1986 Orders. Travelers
19 asserts that, consequently, the Clarifying Order does not
20 “contain[] prohibitions against Claims at least as broad as those
21 in Exhibit A,” because Chubb could potentially bring a claim
22 against Travelers. Brief for Appellees at 40-41 (internal
23 quotation marks omitted). We disagree.

24 The Clarifying Order’s injunctive language was affirmed in
25 Bailey and has not been altered since. In Bailey, the Supreme
26 Court determined that the bankruptcy court had, in substance,

1 properly interpreted the 1986 Orders in the Clarifying Order with
2 respect to the new, nonderivative Direct Actions: "The
3 Bankruptcy Court correctly understood that the Direct Actions
4 fall within the scope of the 1986 Orders" 557 U.S. at
5 148. The injunction that Bailey approved, therefore, bars not
6 only those traditional direct-action claims that sought redress
7 from Travelers based on Manville's own wrongdoing, but also those
8 nonderivative claims against nondebtor Travelers that were the
9 subject of the 2002-2004 settlement negotiations. The Clarifying
10 Order, as a restatement of the 1986 Orders' injunction, precludes
11 claimants who have brought any Direct Actions -- or related
12 indemnity or contribution claims -- from further prosecution of
13 those claims against Travelers. Id. at 149-50; Manville VI, 845
14 F. Supp. 2d at 595.

15 Travelers had maintained that the 1986 Orders enjoined the
16 Direct Actions throughout the 2002-2004 settlement negotiations,
17 Manville I, 2004 WL 1876046, at *21 ¶ 93, but its position was
18 not vindicated until Bailey was issued. Bailey thus affirmed the
19 scope of the injunctive language contained within the Agreements'
20 Exhibit As, and the Clarifying Order bars all such claims -- all
21 it was meant to do.

22 The fact that Chubb may collaterally attack the
23 applicability of the Clarifying Order to actions it might bring
24 -- because it never received constitutionally sufficient notice
25 -- does not alter our conclusion. The error in Travelers'
26 reading of the Clarifying Order stems from the conflation of two

1 separate issues: (i) a party's ability to collaterally attack an
2 order for lack of constitutional notice; and (ii) the integrity
3 of that order and the breadth of claims it bars.

4 Travelers' reading asks us to adopt an interpretation of the
5 Clarifying Order that could not reasonably have been intended by
6 the parties, whatever Travelers' private hopes and dreams, and is
7 not supported by the language of the Agreements. The
8 interpretation proposed by Travelers would have required the
9 bankruptcy court either to: (i) certify that all potential
10 claimants -- all entities and individuals on the planet, from now
11 until the end of time -- have received constitutionally
12 sufficient notice of the 1986 Orders and their relevant
13 proceedings; or (ii) bar all claimants whether or not they had
14 constitutionally sufficient notice. But neither action could
15 have been intended by sophisticated parties because each would
16 have been well beyond the bankruptcy court's power. Undoubtedly,
17 that is the reason why no such requirement is found in the
18 Agreements' terms or their Exhibit As, whatever Travelers'
19 "secret or subjective intent." Klos v. Lotnicze, 133 F.3d 164,
20 168 (2d Cir. 1997).

21 The district court disagreed that Travelers' position
22 required the bankruptcy court "'to enter an order clarifying that
23 all Direct Action claims were enjoined . . . regardless of
24 whether the parties . . . received constitutionally sufficient
25 notice of the 1986 Orders.'" Manville VI, 845 F. Supp. 2d at 593
26 (quoting Manville V, 440 B.R. at 613). It correctly noted that

1 Travelers is not seeking to enforce an injunction against
2 claimants in an unconstitutional manner but is asking only for a
3 recognition that the disputed condition precedent was never
4 fulfilled. However, this argument, like the argument rejected
5 above, proceeds on the erroneous premise that the Agreements
6 called for a Clarifying Order that bound entities without
7 constitutionally sufficient notice. As such, the Agreements, or
8 the ensuing Clarifying Order, would have been a nullity, and
9 common canons of contract construction call upon us to reject
10 such an interpretation, see Restatement (Second) of Contracts §
11 203 (1981), which is not a difficult task where, as here, such an
12 interpretation finds no support in the language.

13 Moreover, Travelers' interpretation amounts to a contractual
14 term that is incapable of ever being fulfilled, because some
15 claimant somewhere on the planet could always appear to attack
16 the order collaterally. See id. § 76 cmt. b. Such an impossible
17 condition -- with no support in contractual language and clearly
18 not intended by the parties -- would have rendered the contract a
19 nullity from its inception. See id.

20 Travelers' interpretation must be rejected for the
21 additional reason that the parties bargained only for a
22 clarification, not an expansion, of the 1986 Orders, and the
23 jurisdictional reach of those Orders was already at issue at the
24 time of negotiations. Leaving aside the separate issue,
25 discussed supra, of whether the bankruptcy court could have
26 extended the Orders' scope, the portions of the Agreements at

1 issue here evidence no intent by the parties that the Clarifying
2 Order would do so. Manville IV, therefore, was rooted in an
3 interpretation of the breadth of the 1986 and Clarifying Orders,
4 but that breadth had already been determined to be coextensive
5 with respect to the issues here and could not have been affected
6 by our decision in that case.

7 Rooted in the 1986 Orders, the Clarifying Order could bar
8 claims only by those parties that received constitutionally
9 sufficient notice of the 1986 Orders and relevant proceedings.
10 As a party to the proceedings leading up to the 1986 Orders,
11 Travelers knew the scope of notice attendant to those
12 proceedings. For example, Travelers knew that an FCR was
13 appointed by the bankruptcy court to represent the interests of
14 future asbestos claimants, but that no equivalent FCR had been
15 appointed regarding the interests of future indemnity and
16 contribution claimants.

17 To be sure, had Travelers believed that the bankruptcy court
18 exercised in rem as opposed to in personam jurisdiction in
19 entering the 1986 Orders, it might also have believed that the
20 Clarifying Order's injunction barred Chubb's attack. See, e.g.,
21 Manville II, 340 B.R. at 68-69. Of course, the in personam
22 nature of the jurisdiction exercised by the bankruptcy court in
23 releasing nondebtors from third-party claims demands that any
24 party barred by the 1986 Orders (and by extension, the Clarifying
25 Order) must have received constitutionally sufficient notice
26 accordant with that jurisdiction.

1 But Travelers recognized the possibility of this: "In its
2 October 26, 2009 post-argument submission, Travelers argued that
3 the bankruptcy court's notice procedures relating to the 1986
4 Orders were 'wholly consistent' with the exercise of 'both in rem
5 jurisdiction and in personam jurisdiction over all Chubb
6 entities.'" Manville IV, 600 F.3d at 154 n.14. Travelers also
7 conceded that the claims underlying the Direct Actions, which
8 were the subject of the 2002-2004 negotiations, were
9 "unimaginable" during the proceedings that led to the 1986
10 Orders. Travelers' Reply Brief at 5, Manville V (No. 82-11656-
11 brl); App. at 642.

12 Nonetheless, the pertinent portions of the Agreements did
13 not provide for an injunction any greater than that contained
14 within the 1986 Orders, nor did they address issues of notice or
15 due process. A court "will not imply a term where the
16 circumstances surrounding the formation of the contract indicate
17 that the parties, when the contract was made, must have foreseen
18 the contingency at issue and the agreement can be enforced
19 according to its terms." Reiss v. Fin. Performance Corp., 97
20 N.Y.2d 195, 199 (2001). We decline Travelers' invitation to look
21 beyond the Agreements' obvious meaning and to consider Travelers'
22 subjective hopes.

23 We therefore hold the Clarifying Order contains an
24 injunction as broad as, or substantially in the form of, that
25 contained in the Agreements' Exhibit As.
26

1 B) Finality

2 We next consider whether the Clarifying Order became final
3 and unappealable after the Supreme Court's ruling in Bailey.
4 Travelers argues here, and the district court concluded, that
5 when Manville IV "reversed" the district court's decision "as to
6 Chubb," 845 F. Supp. 2d at 594, it rendered the Clarifying Order
7 not final. We conclude, as the bankruptcy court did, that the
8 Clarifying Order became final under the Agreements' definition
9 once Bailey was decided by the Supreme Court.

10 As noted, under the Agreements, a "Final Order" is an order
11 from which no appeal is taken or one that has been "affirmed by
12 the highest court to which such order was appealed or certiorari
13 has been denied and the time to take any further appeal or
14 petition for certiorari shall have expired." App. at 227-28,
15 265, 304.

16 In reviewing the 2004 Orders, Bailey rejected the
17 jurisdictional challenges brought by Chubb and the other
18 objectors. It determined that the 1986 Orders, having been final
19 for decades, were no longer subject to challenges to the
20 bankruptcy court's power to enjoin third-parties from bringing
21 claims that did not affect the res of the bankruptcy estate
22 against nondebtors. Bailey, 557 U.S. at 152 ("[O]nce the 1986
23 Orders became final on direct review (whether or not proper
24 exercises of bankruptcy court jurisdiction and power), they
25 became res judicata to the parties and those in privity with them
26" (internal quotation marks omitted)). The Court also

1 held, just as this court had in Manville III, that the bankruptcy
2 court “plainly had [subject matter] jurisdiction to interpret and
3 enforce its own prior orders.” Id. at 151.

4 Therefore, the pertinent portion of the injunction contained
5 within the Clarifying Order, as an extension of the 1986 Orders,
6 was similarly not subject to challenges regarding the bankruptcy
7 court’s subject matter jurisdiction. Once Bailey determined that
8 the bankruptcy court had jurisdiction to interpret the scope of
9 the 1986 Orders, the Clarifying Order became a “Final Order”
10 under the Agreements’ definition.

11 Travelers argues that: (i) Bailey’s remand to this court,
12 and (ii) this court’s subsequent reversal of the district court
13 in Manville IV, indicate that the Clarifying Order never became
14 final. Neither argument is persuasive.

15 First, the Supreme Court in Bailey reversed Manville III’s
16 vacatur of the 2004 Orders (for the bankruptcy court’s purported
17 lack of jurisdiction). This effectively reinstated the 2004
18 Orders, including the Clarifying Order. The Supreme Court’s
19 remand with respect to Chubb’s due process argument had no
20 bearing on the Clarifying Order’s finality. The case was
21 remanded for a determination of whether Chubb failed to receive
22 constitutionally sufficient notice of the 1986 Orders and whether
23 Chubb was thus bound by them and the Clarifying Order. 557 U.S.
24 at 155. That issue was then decided by this court in Manville
25 IV.

1 Second, while Manville IV reversed as to Chubb, it did not
2 alter any aspect of the Clarifying Order, the meaning of which is
3 discussed in detail above. The fact that Chubb is not bound by
4 the 1986 Orders does not, therefore, render the 1986 Orders any
5 less "final." In sum, neither Bailey nor this court's holding in
6 Manville IV deprived the Clarifying Order of finality.

7 As the Supreme Court recognized, "the 1986 Orders became
8 final on direct review over two decades ago." 557 U.S. at 148.
9 It would defy logic to hold that the Clarifying Order, as an
10 extension of the 1986 Orders, is not "final" simply because Chubb
11 did not receive constitutionally adequate notice of the 1986
12 proceedings. If the 1986 Orders are final despite the
13 inapplicability of the orders to Chubb, it follows that the
14 Clarifying Order is just as final.

15 Therefore, the Clarifying Order became final, as that term
16 is defined in the Agreements, once Bailey was issued.

17 2) Conditions Precedent Regarding Releases/Dismissals

18 We next consider the Agreements' conditions precedent that
19 require either the escrowing of a certain number of releases or
20 the dismissal of claims with prejudice. We hold that Travelers'
21 arguments in that regard are waived.

22 For Travelers' payment obligation to mature under the Hawaii
23 Direct Action Settlement, plaintiffs must dismiss with prejudice
24 all claims against Travelers. Under the Common Law Direct Action
25 Settlement Agreement, at least 14,000 general releases must be

1 executed and delivered into escrow before Travelers is required
2 to pay into the settlement fund.

3 Travelers argues that these conditions precedent have not
4 been satisfied. Appellants assert that Travelers has waived
5 these arguments by failing to raise them properly before the
6 bankruptcy court in its papers in opposition to appellants'
7 motions to compel.

8 The motions to compel by their very nature, and explicitly
9 to boot, put the various issues regarding satisfaction of the
10 conditions precedent in play. Travelers' opposition to the
11 motions recognized this by claiming that the conditions precedent
12 regarding the breadth and finality of the Clarifying Order were
13 not satisfied. As a result, the bankruptcy court understood, and
14 noted explicitly, that Travelers raised no objection regarding
15 the release/dismissal conditions precedent. It stated:

16 Pursuant to the Settlements, Travelers'
17 payment obligations are contingent upon the
18 satisfaction of three conditions precedent.
19 These conditions, stated in general terms,
20 are as follows: (a) entry of an order by
21 this Court that becomes a "Final Order"
22 clarifying that the Direct Actions were, and
23 had always been, barred by this Court's
24 injunction contained in the 1986
25 Orders . . .; (b) entry of an order, that
26 becomes a "Final Order" approving the
27 proposed Settlements; and (c) the execution
28 and delivery into escrow of a specified
29 number of General Releases None of
30 the Parties disputes that conditions (b) and
31 (c) have been satisfied.

32
33 Manville V, 440 B.R. at 608 (footnote omitted).

1 Once the bankruptcy court determined that the Clarifying
2 Order met the breadth and finality requirements, it ordered
3 briefing and held oral argument regarding the issue of whether
4 plaintiffs were entitled to interest on the settlement proceeds
5 based on Travelers' breach. Id. at 615. The arguments that
6 Travelers sought to raise were that the motions to compel lacked
7 adequate supporting evidence that the release/dismissal
8 conditions had been met.

9 The bankruptcy court did not rule on the merits of those
10 arguments. At the oral argument, the bankruptcy court noted
11 Travelers' earlier concession that certain conditions precedent
12 had been satisfied: "If I recall back in all of the Sturm [and]
13 Drang here, we had conditions which we'll label A, B and C. And
14 I think Travelers certainly conceded that B and C were met and
15 claimed that A was not met. I opined otherwise. And that's
16 where we stand." App. at 857.

17 On appeal to the district court, Travelers argued again that
18 the release/dismissal conditions had not been satisfied. The
19 district court did not reach these arguments, having found that
20 the conditions precedent regarding scope and finality had not
21 been fulfilled. See Manville VI, 845 F. Supp. 2d at 596.

22 These arguments were available to Travelers in the
23 bankruptcy court, and Travelers has not offered any reason for
24 its failure to raise these issues in a timely manner in that
25 court. Although we have discretion to consider a waived argument
26 where necessary to avoid manifest injustice, "the circumstances

1 normally do not militate in favor of an exercise of discretion to
2 address . . . new arguments on appeal where those arguments were
3 available to the [parties] below and they proffer no reason for
4 their failure to raise the arguments below." In re Nortel
5 Networks Corp. Sec. Litig., 539 F.3d 129, 133 (2d Cir. 2008)
6 (internal quotation marks omitted).

7 In its brief on appeal, Travelers notes only that it raised
8 these issues in the district court and does not claim to have
9 raised them in its opposition in the bankruptcy court to the
10 motions to compel. In opposing those motions, Travelers argued
11 to the bankruptcy court only that the condition precedent
12 regarding breadth and finality called for denial of the motions.
13 Clearly, a failure to satisfy other conditions precedent should
14 have been raised at that time. Instead, Travelers, which has had
15 the benefit of competent, imaginative, and meticulous counsel,
16 waited until the bankruptcy court disposed of the arguments
17 before it on the motions to compel and turned to the prejudgment
18 interest question. Under these circumstances, we see no reason
19 to exercise our discretion to entertain Travelers' untimely
20 arguments. We, therefore, consider these arguments waived.

21 c) Calculation of Prejudgment Interest

22 Finally, we consider whether the bankruptcy court's award of
23 prejudgment interest was appropriate and, if so, whether the
24 court erred in determining the date from which the award was
25 calculated.

1 Travelers argues that the award is inappropriate because the
2 Agreements do not include an express provision regarding
3 prejudgment interest. Under New York law, however, the
4 beneficiaries of the settlements are entitled to statutorily
5 prescribed interest: "Interest shall be recovered upon a sum
6 awarded because of a breach of performance of a contract"
7 N.Y. C.P.L.R. 5001(a). We therefore hold that the bankruptcy
8 court did not err in its decision to award such interest.

9 Travelers argues further that the bankruptcy court erred in
10 determining the date interest began to accrue. A court's
11 decision to award prejudgment interest running from a date
12 certain is a question of fact, see Ginett v. Computer Task Grp.,
13 Inc., 962 F.2d 1085, 1101 (2d Cir. 1992), subject to reversal
14 only if clearly erroneous. Interest accrues "from the earliest
15 ascertainable date the cause of action existed." N.Y. C.P.L.R.
16 5001(b). The bankruptcy court correctly found that Travelers'
17 payment obligations have been "due and owing since June 18,
18 2009," when the Supreme Court upheld the Clarifying Order in
19 Bailey. Manville V, 440 B.R. at 615.

20 Travelers asserts that no "Final Order" as defined by the
21 Agreements could have existed until the proceedings were
22 concluded, which, according to Travelers, was November 29, 2010,
23 when the Supreme Court denied Travelers' petitions for certiorari
24 and mandamus with respect to Manville IV. This argument assumes
25 incorrectly that Chubb's due process claim had any bearing on the
26 finality of the Clarifying Order. As discussed above, however,

1 that is not the case. The bankruptcy court did not err in its
2 assessment of prejudgment interest.

3 CONCLUSION

4 We have considered appellees' remaining arguments and find
5 them to be without merit. For the foregoing reasons, the order
6 of the district court is vacated, and we remand with instructions
7 to reinstate the order of the bankruptcy court.