Nos. 26 EAP 2018 and 27 EAP 2018 (Consolidated)

In the

Supreme Court of Pennsylvania

WILLIAM C. ROVERANO and JACQUELINE ROVERANO, H/W,

Plaintiffs-Appellants

v.

JOHN CRANE, INC. and BRAND INSULATIONS, INC.,

Defendants-Appellees.

WILLIAM C. ROVERANO,

Plaintiff-Appellant

v.

JOHN CRANE, INC.,

Defendant-Appellee.

AMICI CURIAE BRIEF OF PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, PENNSYLVANIA MANUFACTURERS' ASSOCIATION, INSURANCE FEDERATION OF PENNSYLVANIA, PENNSYLVANIA ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PENNSYLVANIA DEFENSE INSTITUTE, PHILADELPHIA ASSOCIATION OF DEFENSE COUNSEL, PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEES

Appeal from the Order of the Superior Court of Pennsylvania Entered on December 28, 2017 at Nos. 2837 EDA 2016 and 2847 EDA 2016 Consolidated, Reversing the July 27, 2016 Order of the Court of Common Pleas, Philadelphia County, March Terms 2014, No. 1123, Dealing with the Fair Share Act, and Remanding for a New Trial to Apportion the Jury Verdicts

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QUESTIONS PRESENTED

(1) Whether, under this issue of first impression, the Superior Court misinterpreted the Fair Share Act, 42 Pa. C.S. § 7102, in holding that the Act requires the jury to apportion liability on a percentage basis as opposed to a per capita basis in this strict liability asbestos case?

(2) Whether, under this issue of first impression, the Superior Court misinterpreted the Fair Share Act in holding that the Act requires the jury to consider evidence of any settlements by the plaintiffs with bankrupt entities in connection with the apportionment of liability amongst joint tortfeasors?

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are organizations representing companies that are asbestos defendants and their insurers, business federations, Pennsylvania defense lawyers, and civil justice organizations.[2] We have a substantial interest in this case as discussed below.

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[1] No person or entity other than the *amici*, their members, or counsel paid in whole or in part for the preparation of this brief or authored any part of the brief.

[2] The Pennsylvania Chamber of Business and Industry is The Statewide Voice of Business with thousands of statewide members representing businesses of all sizes and industry sectors.

The Pennsylvania Manufacturers' Association is the leading voice for manufacturing in the Commonwealth. Since 1909, PMA has served Pennsylvania workers and employers by defending free enterprise and working to build a more competitive and prosperous Pennsylvania.

The Insurance Federation of Pennsylvania, with approximately 200 insurer members, is the Commonwealth's leading trade association for commercial insurers of all types.

The Pennsylvania Association of Mutual Insurance Companies has represented the mutual insurance industry since 1907 and includes almost 110 property and casualty insurers.

First, this case will determine whether the increasingly peripheral defendants in asbestos litigation today—still-solvent companies that became more of a focus of

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Organized in 1969, the Pennsylvania Defense Institute is one of the largest organizations of its kind with approximately 600 lawyers, executives of insurance companies, self-insurers, and independent adjusters.

For over 70 years, the Philadelphia Association of Defense Counsel has been attending to the professional needs of lawyers for civil defendants. PADC is believed to be the nation's longest continuously operating local defense organization.

The Pennsylvania Coalition for Civil Justice Reform is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional and trade associations, health care providers, nonprofit entities, taxpayers and others dedicated to legal fairness.

The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers to improve the asbestos litigation environment. The Coalition includes Century Indemnity Company; San Francisco Reinsurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

The National Association of Manufacturers, the nation's largest manufacturing association, is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs in the U.S.

The American Tort Reform Association is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The American Insurance Association is a leading national trade association representing more than 330 major property and casualty insurance companies. AIA members collectively underwrite more than $134 billion in direct property and casualty premiums nationwide, and range in size from small companies to the largest insurers with global operations.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners.

the litigation following the exit of the more principal manufacturers and suppliers of asbestos-containing products in bankruptcy—will pay their "fair share" of a harm or will be forced to pay a disproportionate share. Over 120 companies have filed bankruptcy due at least in part to asbestos-related liabilities, and more bankruptcies are certain. Forcing defendants to pay inordinate awards is unsound, fundamentally unfair, and contrary to the legislature's intent.

Second, we support the uniform application of tort law. Asbestos plaintiffs deserve empathy, but asbestos cases are subject to the same rules that apply to other types of toxic torts. The Fair Share Act includes no special asbestos "carve-out."

Third, we are asking the Court to reject gamesmanship and inconsistent claiming activity that undermines the Act and the integrity of Pennsylvania's civil justice system.

SUMMARY OF THE ARGUMENT

The first question presented should be answered "No." The legislature intended for each liable defendant to pay its "Fair Share," and that can only happen if a jury apportions liability on a percentage share basis for all theories of liability in all cases. In contrast, a per capita allocation could leave a minor player paying a disproportionate share while potentially giving a windfall to a more culpable trial defendant. Each trial defendant would pay the same amount despite having different degrees of responsibility. That is not the policy of the Act.

Further, per capita allocation, by definition, means that no defendant can ever be more than 50% at fault. This would negate the potential application of joint liability under the Act for any defendant that is 60% or more at fault. Plaintiffs seem willing to give up this benefit to try to hold minor players disproportionately liable, but that is not the policy set by the legislature.

The second question presented also should be answered "No." The asbestos litigation environment has changed substantially over the past four decades. Despite the fact that the members of the "asbestos industry"—former major asbestos producers—have virtually all exited the tort system in bankruptcy, plaintiffs continue to manifest disease from exposure to their products. A jury should be allowed to consider if a plaintiff has filed a claim and been paid by an asbestos trust formed by one of those companies in bankruptcy. The letter and spirit of the Act would be violated if juries can be misled into imposing disproportionate liability on solvent defendants because alternative exposure evidence has been kept from them.

Finally, the Court should exercise leadership to fill a gap that exists in the Act by requiring asbestos plaintiffs to file and disclose all trust claims before trial, and preferably before the end of discovery.

Under the Act, a nonparty's fault can be considered only if there has been a "release" with the plaintiff. By strategically choosing to delay the filing of asbestos

trust claims until after trial (as plaintiffs routinely do), a plaintiff can prevent trust-related exposures from being considered by the jury for purposes of apportionment.

Plaintiffs will manipulate their trust claim filings to "double dip." They will delay trust claim filings until post-verdict to prevent juries from assigning fault to bankrupt entities. This may allow them to recover 100% from tort defendants. Then, they will file asbestos trust claims post-trial and recover again for the exact same injury. Further, plaintiffs have asserted exposures in tort cases that are inconsistent with information submitted to asbestos trusts.

ARGUMENT

I. THE FAIR SHARE ACT REQUIRES PERCENTAGE SHARE (PRO RATA), NOT PER CAPITA, APPORTIONMENT IN ALL CASES

The Act's uniform application of percentage share (pro rata) apportionment based on individual liability harmonizes Pennsylvania law regarding negligence and strict liability law for all torts. Experience in other states shows that juries are well equipped to apply the legislature's policy choice.

A. Jurors in Other States Apportion Fault in Asbestos Cases

Juries in states with some of the nation's busiest asbestos dockets routinely engage in percentage share apportionment in asbestos cases. *See* Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, 26 T.M. Cooley L. Rev. 681, 682 (2009) ("Many

jurisdictions have abandoned the doctrine of pure joint and several liability in toxic-tort cases and have instead enacted systems for apportioning liability.").

For example, Ohio and Michigan provide for apportionment of liability on a specific percentage basis, including for entities not present at trial. *See* Ohio Rev. Code § 2307.23; Mich. Comp. Laws § 600.6304; Mich. Comp. Laws § 600.2957.[3] Texas juries assign a percentage share "to each [person] causing or contributing to cause in any way the harm for which recovery of damages is sought," as "to each cause of action asserted," including each claimant, each defendant, each settling person, and each responsible third party. Tex. Civ. Prac. & Rem. Code § 33.003.[4]

In California, the "percentage of apportionment of noneconomic damages is calculated on the basis of a defendant's fault as compared to all other possible tortfeasors, referred to as the 'universe of tortfeasors.'" Hong & Haffke, 26 T.M. Cooley L. Rev. at 695; *see also* Cal. Civ. Code § 1431.2; *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992).[5] New York generally allows the culpability of bankrupt

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[3] *See, e.g., Avram v. McMaster-Carr Supply Co.*, 2009 WL 5875047 (Mich. Cir. Ct. Wayne Cty. Dec. 2, 2009) (allocating 50% share of fault to defendant).

[4] *See, e.g., Smith v. Crane Co.*, 2007 WL 8087338 (Tex. Dist. Ct. Galveston Cty. Nov. 21, 2007) (jury assigned 2% and 50% of fault to two defendants and 48% to third parties).

[5] *See, e.g., Silvia v. Albay Co.*, 2017 WL 9898848 (Cal. Super. San Fran. Cty. Dec. 5, 2017) (jury assigned roughly 2% of fault to defendant, 78% to plaintiff, and 20% to others); *Booker v. Imerys Talc Am.*, 2017 WL 6944530 (Cal. Super. Alameda Cty. Dec. 11, 2017) (jury assigned 40% and 60% of fault to two defendants); *Shaw v. John Crane, Inc.*, 2017 WL 1735352 (Cal. Super. San Fran. Cty. Feb. 20, 2017) (jury found the defendant 2% at fault).

nonparties to be included when calculating a defendant's liability for noneconomic losses. *See* N.Y. Civ. Prac. L. & R. §§ 1601-1602; *In re New York City Asbestos Litig. (Tancredi v. ACandS, Inc.)*, 6 A.D. 3d 352 (N.Y. App. Div. 2004).[6] Other states with asbestos cases also apportion liability on a percentage share basis.[7]

Further, jurors in Pennsylvania federal court and Philadelphia County have apportioned liability on a percentage share basis in asbestos cases. *See e.g.*, *Rabovsky v. Air & Liquid Sys. Corp.*, 2016 WL 5404451 (E.D. Pa. Sept. 28, 2016) (jury in mesothelioma case assigned 30% liability to defendant at trial); *Ihlenfield v. Crown Cork & Seal*, 2014 WL 4787978 (Pa. Com. Pl. Phila. Cty. May 20, 2014 (jury in mesothelioma case assigned 24% of fault to trial defendant); *Leaman v. John Crane, Inc.*, 2013 WL 6831241 (Pa. Com. Pl. Phila. Cty. Oct. 4, 2013) (jury in mesothelioma case assigned percentages ranging from 2%-76% to 13 defendants).

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[6] *See, e.g., In re New York City Asbestos Litig.* (*Murphy-Clagett v. A.O. Smith Water Prods. Co.*, 2018 WL 4698010 (N.Y. Sup. Ct. N.Y. Cty. Oct. 1, 2018) (jury assigned 25% each to three defendants, 10% to another, and 2.5% to six other entities); *Robaey v. Air & Liquid Sys. Corp*., 2018 WL 4944382 (N.Y. Sup. Ct. N.Y. Cty. Oct. 11, 2018) (jury assigned fault to defendants ranging from 10% to 40%); *In re New York City Asbestos Litig.* (*Assenzio v A.O. Smith Water Prods. Co.)*, 2015 WL 667907 (N.Y. Sup. Ct. N.Y. Cty. Feb. 5, 2015) (jury assigned specific percentages of liability to asbestos defendants).

[7] *See, e.g.*, Ind. Code § 34-51-2-8; La. Civ. Code. art. 2323; Miss. Code § 85-5-7; N.D. Cent. Code § 32-03.2-02; Okla. Stat. tit. 23, § 15; Tenn. Code § 29-11-107; W. Va. Code § 7; W. Va. Code § 55-7-13d; Wis. Stat. §§ 895.045.

B. Jurors Have Sufficient Evidence for Pro Rata Apportionment

Percentage share apportionment in asbestos cases works because jurors typically hear extensive evidence allowing them to differentiate between products, exposures, and defendants. This case was no exception.

The jury heard detailed evidence regarding the location and duration of Mr. Roverano's different jobs (R. 429a-430a; 439a; 654a); his exposures to numerous asbestos products not manufactured by defendants Brand Insulation (Brand) or John Crane (JCI) (R. 430a; 436a; 440a; 441a; 455a; 497a); the levels of asbestos exposure associated with working around different products (R. 654a; 659a-660a); the extent to which different products emitted asbestos dust (R. 463a-470a); the potency of different fibers in the various products (R. 973a); the extent to which Mr. Roverano's exposures were within background levels (R. 654a; 659a-660a; 669a); his "occasional" exposure to Brand products for a limited period (R. 655-657a); his use of JCI products only five to ten times (R. 483a-484a); the fact that JCI products contained less potent chrysotile asbestos fibers (R. 963a; 973a-974a); and Mr. Roverano's non-occupational exposures to asbestos. (R. 470a-472a).

Plaintiffs' own expert, Dr. Gelfand, testified that products that emit fibers at or below background levels cannot contribute to asbestos disease. (R. 775a). This testimony was important because the jury heard further expert testimony that JCI's

packing products emitted asbestos dust at or below background levels, (R. 621a-624a; 630a), and that Mr. Roverano's exposure to insulation installed by Brand employees was within background levels. (R. 654a, 659-60a.). The jury also heard extensive expert testimony comparing the fiber-per-cubic-centimeter (f/cc) emission levels of packing and insulation products with background air levels. (R. 621a-623a; 629a-630a; 670a; 671a). Finally, the jurors heard evidence regarding Mr. Roverano's thirty-year smoking history. (R. 442a; 490a-494a; 531a-533a; 539a; 545a; 551a; 770a-771a; 781a-783a; 957a-973a).

Such evidence provides jurors with an ample basis for comparing products, exposures, and defendants. Certainly, percentage share apportionment based on such evidence is no more—and likely less—speculative than in other cases where jurors were required to apportion liability. *See, e.g., Allen v. Mellinger*, 784 A.2d 762 (Pa. 2001) (auto accident case in which liability was apportioned pro rata to two drivers and PennDOT); *Russell v. Albert Einstein Med. Ctr.*, 673 A.2d 876 (Pa. 1996) (pro rata apportionment in medical malpractice case against multiple healthcare providers); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 507 A.2d 1 (Pa. 1986) (pro rata apportionment in death case).

C. Per Capita Apportionment Would Undermine the Act

Defendants and the Superior Court's decision thoroughly address the text and intent of the Fair Share Act, but two additional points warrant consideration.

First, the Act expressly makes all claims seeking recovery against multiple defendants or released nonparties subject to "apportionment" or "attribution of liability" by the "trier of fact." 42 Pa. C.S. § 7102(a.1), (a.2). This legislative deference to the trier of fact contradicts the argument of plaintiffs and their *amici* that the Act "does not dictate how the apportionment should be performed or who should apportion[.]" Brief for Plaintiffs' *Amici Curiae*, p. 3. By authorizing the "trier of fact" to apportion, the Act necessarily *requires* percentage share apportionment because trial courts alone apportion per capita.

Second, to address the inconvenient fact that per capita apportionment would obviate the Act's exception for defendants found 60% or more liable, *see* §7102(a.1)(3)(iii), plaintiffs argue that none of § 7102(a.1)(3)'s exceptions apply to strict liability defendants. *See* Brief for Appellants, p. 22 ("[T]he effect is that all defendants found liable in strict liability will have several liability only—they will not be subject to the 60% threshold exception, just as they will not be subject to the other exceptions in §7102(a.1)(3)."). Plaintiffs' argument cannot be reconciled with § 7102(a.1)(3)'s exceptions or § 7102(a.1)'s declaration that the entire section applies "actions for strict liability." 42 Pa. C.S. § 7102(a.1). The argument also ignores the hazardous substance exception in §7102(a.1)(3)(iv), which is itself a strict liability exception.

As the Superior Court unanimously held and this Court recently noted in dicta in *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 n. 7 (Pa. 2016), the Fair Share Act applies to strict liability asbestos cases. This Court should not recognize statutory exceptions that the legislature declined to create. *See Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 951 (Pa. 2008) ("[W]e are not at liberty to create other[] [exceptions] that the Legislature, in its wisdom, chose not to include in the text of the statute.").

II. THE FAIR SHARE ACT REQUIRES JURIES TO CONSIDER SETTLEMENTS BY PLAINTIFFS WITH ASBESTOS TRUSTS

A. Emergence of Trust System and Search for Solvent Defendants

Originally, and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured friable, amphibole-containing thermal insulation. *See* James S. Kakalik et al., *Costs of Asbestos Litigation* 3 (RAND Corp. 1983). Mass claims pressured "most of the lead defendants and scores of other companies" into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation, such as Johns-Manville Corp. and Owens Corning Corp. Steven J. Carroll et al., *Asbestos Litigation* 67 (RAND Corp. 2005).

In bankruptcy, these companies created scores of trusts that collectively hold *billions* of dollars to pay asbestos claimants injured as a result of exposure to their products. *See* S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 537 (2013) ("Section 524(g) of

the Bankruptcy Code authorizes the entry of an injunction that channels all of a debtor's asbestos-related liabilities to a bankruptcy trust, which is established by the debtor to pay all valid current and future asbestos claims."); U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011) ($36.8 billion in asbestos trusts as of 2011). Each trust reflects a company that exited the tort system in bankruptcy.[8]

The asbestos trust system is non-adversarial; filing a trust claim is much easier and faster than bringing a lawsuit. *See* John J. Hare & Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency*, 15 Mealey's Asb. Bankr. Rep. 1, 3 (Apr. 2016) ("Plaintiffs' lawyers routinely advertise their ability to file trust claims 'quickly and easily,' and tell potential clients that paralegals evaluate potential trust claims and undertake the filing process. The evidence also demonstrates that trust claims are paid more quickly than tort claims."); Marc Scarcella & Peter Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14 Mealey's Asb. Bankr.

[8] *See also* William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675 (2014) (asbestos trusts "answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades"); Marc Scarcella & Peter Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 Mealey's Asbestos Bankr. Rep. 33, 33–34 (June 2013) (describing how scores of former asbestos producers "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims").

Rep. 32, 39 (2015) ("Unlike lawsuits filed in the tort system, the trust compensation process is intended to avoid the time, expense, and resource burden often associated with litigation.").

To recover from an asbestos trust, a claimant files a short claim form which, among other things, "requires a statement of injury; information sufficient to establish asbestos exposure attributable to the trust's predecessor . . . and a determination as to whether the claimant is seeking expedited or individual review." S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 317-18 (2013).[9] The claimant will also submit evidence of exposure, such as a "work history, Social Security records, invoices, employer records, or deposition testimony of the claimant or coworkers taken in asbestos litigation," and "medical reports or records sufficient to support a diagnosis for the specific disease being claimed or, if applicable, a copy of a death certificate." U.S. Gov't Accountability Office, *supra*, at 18; *see also* Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1 ("Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical

[9] For a representative trust claim form, see Manville Personal Injury Settlement Trust 2002 TDP Proof of Claim Form, http://www.claimsres.com/wp-content/uploads/2016/11/POC02V4.pdf.

records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.").

If a trust determines that a claim meets the criteria required for payment, the trust will make an offer based on a percentage of the "scheduled value" for the alleged injury, as set forth on a grid. A recent deposition of the general counsel of the Manville Trust established that there is no backlog and that an offer can be made within days after submission. *See* Deposition of Jared Garelick, in *Cummings v. General Elec*., No. 13-CI-006374 (Jefferson Ky. Cir. Ct. Dec. 14, 2015), at 34-36. After the offer is accepted, payments tend to be made quickly.[10]

It is common for claimants to receive multiple trust payments, since each trust operates independently and many workers were exposed to different products. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014). In a recent bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff's recovery was estimated to be $1–1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Tech., LLC*., 504 B.R. 71, 96 (Bankr. W.D.N.C. 2014).

[10] The U.S. GAO estimates that approximately 97-98% of trust claims are processed on this expedited basis. *See* U.S. Gov't Accountability Office, *supra*, at 20. Only a tiny percentage of claimants seek individual review in the hopes of obtaining more compensation from the trusts. *See id*. at 554; Deposition of Jared Garelick, *supra*, at 37-38.

Civil asbestos litigation also continues to march on. Following the wave of bankruptcies among asbestos manufacturers in 2000-2002, plaintiffs' lawyers began "a search for new recruits to fill the gap in the ranks of defendants." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007). They shifted "away from the traditional thermal insulation defendants and towards peripheral and new defendants…." Marc Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991-2010*, 27 Mealey's Litig. Rep.: Asb. 1, 1 (Nov. 2012); Carroll et al. at xxiii (plaintiffs began to "press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

Asbestos litigation became an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asb. 19 (Mar. 2002) (quoting Mr. Scruggs, a plaintiffs' attorney).[11] Many of today's asbestos defendants are associated with chrysotile-containing products "such as gaskets, pumps, automotive

[11] The Towers Watson consulting firm has identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation." Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013).

friction products, and residential construction products." Scarcella et al., *The Philadelphia Story*, at 1.[12] Newer and formerly peripheral defendants are "now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007).

B. The Fair Share Act Accounts for Changes in the Litigation

The Fair Share Act accounts for changes in asbestos plaintiffs' choice of defendants by allowing juries to consider the fault of anyone who has entered into a "release" with the plaintiff, including asbestos trusts. The Act must be read this way to have any semblance of embodying the "Fair Share" concept in asbestos cases.

Today, a plaintiff can file numerous trust claims—recall, it was estimated in the *Garlock* case that the *average* mesothelioma plaintiff files claims with *twenty-two* trusts. If apportionment is not allowed for settled asbestos trust claims, then juries will never consider these exposures in determining fault. The jury would not weigh a plaintiff's exposures to thermal insulation that countless plaintiffs claimed

[12] Chrysotile is "far less toxic than other forms of asbestos." *In re Garlock Sealing Tech., LLC.*, 504 B.R. 71, 75 (Bankr. W.D.N.C. 2014); *see also Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 846 (D. Md. 2017) ("[*C*]*hrysotile* asbestos is classified in an entirely separate mineralogical family from *amphibole* asbestos and is widely considered less potent."), *appeal dismissed*, 2017 WL 7135451 (4th Cir. Oct. 23, 2017); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488 (6th Cir. 2005).

as their *primary* source of exposure for decades until those companies went bankrupt. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 238 (2006) (noting "[a]s leading plaintiffs' counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented" between 50% and 75% of the liability share); Scarcella et al., *The Philadelphia Story*, at 11 ("The results from the study of the Philadelphia asbestos cases indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of exposure to those products is greatly diminished compared to the claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories.").

Requiring juries to wear blindfolds as to alternative sources of exposure so they are misled into imposing disproportionate liability on potentially far less culpable entities is unjust. Defendants should be held liable for a harm they cause, but the policy of the Act is that defendants are not responsible for the fault of others (subject to specific exceptions not present here).

Without a mechanism for juries to apportion fault to bankrupt entities, asbestos defendants pay inflated amounts. This has led to bankruptcy and drains resources that will be needed by future claimants. *See Garlock*, 504 B.R. at 73 (describing how a formerly peripheral gasket manufacturer became a target of

asbestos cases following the bankruptcy wave until the company was forced into bankruptcy).

Further, while asbestos trust payouts are far quicker than court proceedings once a trust is established and paying claims, claimants may have to wait years for the creation of a trust when a company is driven into bankruptcy. *See* Stengel, 62 N.Y.U. Ann. Surv. Am. L. at 260–61 ("RAND looked at eleven major asbestos bankruptcies and found that the average duration between filing and plan confirmation (which is the earliest date payments could start) was six years. One case took ten years. During these periods the trusts pay no money to claimants. Furthermore, in the typical case plan confirmation itself can precede any payment by months, if not years, due to various startup delays.").

Plaintiffs justify trying to impose disproportionate liability by arguing that trusts do not pay the same values the bankrupt entities paid when they were still in the tort system. The argument is a red herring. As explained, total trust recoveries by plaintiffs are substantial. More importantly, the legislature recognized that in multi-tortfeasor situations, from multi-car accidents involving uninsured or underinsured drivers to asbestos lawsuits, there is always a risk of less than a full recovery once joint liability is abolished. The legislature nevertheless decided to join many other states and provide for "fair share" liability rather than impose

disproportionate liability on solvent tortfeasors.[13] Fair share liability keeps more asbestos defendants in the tort system. Plaintiffs' proposal would compound the problem they raise by forcing more companies to exit the tort system in bankruptcy.

III. THE COURT SHOULD CLOSE A LOOPHOLE IN THE FAIR SHARE ACT AND COMPEL PLAINTIFFS TO FILE ALL ASBESTOS TRUST CLAIMS BEFORE TRIAL

The Court should take this opportunity to employ its Article V. Section 10(c) authority to close a procedural loophole that undermines the Fair Share Act.

A. Plaintiffs Will Delay Trust Claims to Evade the Act, Double Dip, and Continue to Assert Inconsistent Exposure Histories

Under the Act, the jury may assign fault to a nonparty, such as a trust, *only* if there has been a "release." By strategically delaying the filing of trust claims until after trial, plaintiffs will prevent trust-related exposures from being considered by juries: no trust claim = no "release" = no apportionment under the Act.[14]

Also, by manipulating the timing of trust claim filings to occur post-trial, plaintiffs will "double dip" — i.e., receive full compensation in the tort system by

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[13] Workers' compensation is another area where the legislature has made a policy judgment that provides claimants with less than a full tort recovery. That policy has been respected.

[14] *See* Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 15 Mealey's Litig. Rep.: Asbestos 28, 34 (Nov. 2015) ("[T]wo prominent plaintiff attorneys in Garlock's bankruptcy gave sworn deposition testimony that it is their practice to wait until the tort case has concluded to file bankruptcy trust claims."); Joseph W. Belluck et al., *The Asbestos Litigation Tsunami—Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 511 (2013) (quoting a New York City asbestos plaintiffs' lawyer as stating, "we do not file the bankruptcy claims until after the case is resolved").

preventing apportionment to bankrupt entities, then file asbestos trust claims and recover again for the exact same injury. *See* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xv (RAND Corp. 2011) (by manipulating the timing of trust filings, "total plaintiff compensation and payments by the defendants that remain solvent can increase. In the extreme, the plaintiff can receive full compensation in the tort system and then receive additional compensation from the trusts.").[15]

Further, plaintiffs may continue to allege exposure histories in tort cases that are inconsistent with assertions later made in asbestos trust claims. *See* William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 679 (2014) (claimants "make trust submissions based upon alleged exposure histories that are at stark variance from the tales they tell in the tort system").[16]

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[15] *See also* Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 26, 2014, at A12 ("Court documents show the ugly specifics of 'double-dipping'—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness….").

[16] *See also* Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185, 1196–97 (2014) ("The absence of transparency continues to create a loophole that allows claimants to present contradictory theories of exposure and to manipulate causation evidence to fit the specific defendants named in the complaint or who are left standing at trial."); Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in*

B. *Garlock* Demonstrates Gamesmanship

There is evidence that these abuses are already widespread, as described by a federal bankruptcy judge in the watershed *Garlock* opinion. *See In re Garlock Sealing Tech., LLC.*, 504 B.R. 71, 96 (Bankr. W.D.N.C. 2014).[17]

Historically, Garlock was a relatively small player in the asbestos tort system and was "very successful in settling (and rarely trying)" lawsuits filed against it. *Id*. at 73. After virtually all thermal insulation defendants exited the tort system by the early 2000s, Garlock, a gasket manufacturer, became a "focus of plaintiffs' attention" primarily because it was still solvent. *Id.* Garlock faced challenges defending itself in this new environment because "evidence of plaintiffs' exposure to other asbestos products often disappeared." *Id.* The judge in *Garlock* said that was the result of "the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other

Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy, 15 Mealey's Asbestos Bankr. Rep. 1, 2 (Aug. 2015) ("The abuse occurs most often when claimants allege certain facts to support their trust claims and then allege inconsistent facts to support their tort claims. For instance, claimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those exposures when they target solvent defendants in tort litigation.").

[17] *See also Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) ("The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system.").

viable defendants)." *Id.* at 84. The judge concluded that the missing evidence "had the effect of unfairly inflating the recoveries against Garlock." *Id.* at 86.[18]

For example, in a Philadelphia case that Garlock settled for $250,000, the plaintiff "did not identify exposure to any bankrupt companies' asbestos products." *Id.* at 84. Further, in answers to interrogatories, the plaintiff's lawyers said the plaintiff had "no personal knowledge" of such exposure. *Id.* at 85. Six weeks earlier, "those same lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by the plaintiff, that stated that he 'frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning . . . asbestos-containing pipe covering.'" *Id.* In total, the plaintiff's lawyers "failed to disclose exposure to 20 different asbestos products for which [the plaintiff] made Trust claims," including 14 claims supported by sworn statements that "contradicted the plaintiff's denials in the tort discovery." *Id.*

Since the *Garlock* decision was issued, numerous reports have confirmed that "[w]e are now past the time when [the case examples in *Garlock*] can be referred to as mere anomalies." Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial. Advoc. 479, 488 (2014).

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[18] *See also id.* at 94 (stating that the withholding of exposure evidence by asbestos plaintiffs' lawyers was "widespread and significant").

For instance, a 2015 study of almost 1850 mesothelioma lawsuits resolved by industrial product manufacturer Crane Co. from 2007 through 2011 revealed "a similar pattern of systematic suppression of trust disclosures [as] was documented in the Garlock bankruptcy." Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 15 Mealey's Litig. Rep.: Asbestos 28, 34 (Nov. 2015). Utilizing publicly available discovery data from Garlock's bankruptcy case, the study found that in cases where Crane Co. was a codefendant with Garlock, 80% of trust claim forms or related exposures "were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings." *Id.*[19]

More recently, a November 2017 bankruptcy filing by Bestwall LLC, an affiliate of Georgia-Pacific, LLC, described other instances where "asbestos plaintiffs, at a minimum, inconsistently and selectively disclosed exposure evidence to support or strengthen their cases against non-bankrupt companies." Informational Brief of Bestwall LLC, *In re Bestwall LLC*, 2017 WL 4988527, at 20 (Bankr. W.D.N.C. Nov. 2, 2017).

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[19] Other recent studies have documented delays in trust claim filings by plaintiffs and additional instances of "inconsistent claiming behavior and allegations between the tort and trust systems" by plaintiffs. Peter Kelso & Marc Scarcella, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* 9 (U.S. Chamber Inst. for Legal Reform 2015); *see also* Mark A. Behrens, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (U.S. Chamber Inst. for Legal Reform 2016); Mark A. Behrens et al., *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System* 3 (Ill. Civil Justice League 2017).

For example, a Philadelphia plaintiff who sued Bestwall "identified no exposures to amphibole products" and "testified that he had no occupational exposure to asbestos whatsoever." *Id.* at 28. The plaintiff's asbestos trust and bankruptcy filings "told an entirely different story." *Id.* at 29. He "submitted no fewer than seventeen asbestos trust claims, all based on exposures not disclosed in his tort case, including claims against . . . trusts responsible for amphibole insulation." *Id.*

In June 2018, a RICO action brought in Illinois federal court by appellee JCI against a Philadelphia asbestos plaintiffs' firm was dismissed on personal jurisdiction grounds but the Seventh Circuit said "the claims JCI levies are serious and ought to be examined." *John Crane, Inc. v. Shein Law Ctr.*, Ltd., 891 F.3d 692, 696 (7th Cir. 2018). JCI alleged that the law firm defendants "concealed information during discovery regarding their clients' exposure to asbestos from other manufacturers' products so that they could extract larger recoveries from JCI…. After winning verdicts against JCI, the defendants allegedly filed claims against the bankrupt manufacturers' trusts." *Id*. at 694.

In recent weeks, even the United States Department of Justice has said that secrecy regarding trust filings has made it "nearly impossible to detect when plaintiffs are seeking recovery based on factual representations that may be incompatible with other representations previously made in other litigation or before

other trusts." Statement of Interest on Behalf of the United States of America Regarding Plans of Reorganization for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., at 8, *In re Kaiser Gypsum Co., Inc*., No 16-31602 (JCW), (Bankr. W.D.N.C. Sept 13, 2018).

C. Trust Transparency: Solution to Trust Claim Fraud and Abuse

Delayed trust filings, suppression of trust-related exposure evidence, inconsistent claiming activities, and double dipping are all an abuse of the system. These practices are unfair to defendants and hurt deserving future claimants.

The solution is simple: require asbestos plaintiffs to file and disclose all available trust claims before trial, and preferably before the end of discovery. *See* Mark A. Behrens, *Asbestos Trust Transparency*, 87 Fordham L. Rev. 107 (2018). The Court should adopt this reform on its own or by initiating a rule.

Pre-trial filing and disclosure of asbestos trust claims already appears to be the practice in some Pennsylvania counties[20] and is the practice in many states.[21]

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[20] *See Thibeault v. Allis Chalmers Corp. Prod. Liab. Tr.,* No. 07-27545, ¶ 10 (Pa. Ct. Cm. Pl. Montgomery Cty. Feb. 22, 2010) (case management order) ("No later than one hundred twenty (120) days prior to trial, each plaintiff shall have filed any and all Asbestos Bankruptcy Trust claims available to him or her. Contemporaneous with all such filings, Plaintiff(s) shall provide complete and accurate copies of all such filings . . . to all Defendants."); *Hartman v. Carborundum Co.*, No. 2003-CV-4490-AS, ¶ 1(f) (Pa. Ct. Cm. Pl. Dauphin Cty. May 6, 2015) (case management order) ("Plaintiff shall file any and all Asbestos Bankruptcy Trust Claims available to him or her…. Contemporaneous with all such filings, Plaintiff shall provide complete and accurate copies of all such filings . . . to all Defendants.").

[21] *See In re Massachusetts State Court Asbestos Litig*., Amended Pre-Trial Order No. 9, ¶ XIII(C)(7)(o) (Mass. Super. Ct. Middlesex Cty. June 27, 2012) (case management order for all asbestos litigation in Massachusetts); Ariz. Rev. Stat. § 12-782; Iowa Code §§ 686A.1–.9; Kan.

The experience elsewhere has been that plaintiffs who promptly file their trust claims do not experience delays getting their cases to trial.[22] Also, prompt filing of asbestos trust claims can lead to potentially substantial trust claim recoveries by asbestos plaintiffs and their families while the plaintiffs are still living.

CONCLUSION

The Court should affirm the Superior Court's unanimous decision and, on its own or by rule, require plaintiffs to file asbestos trust claims before trial (preferably before the end of discovery) to further the policies embodied in the Fair Share Act.

Respectfully submitted,

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[22] *See* John J. Hare & Daniel J. Ryan, Jr., *The More Things Change: Bankruptcy Trust Reform and the Status Quo in Asbestos Litigation*, 85 Def. Counsel J. 1 (Oct. 2018).

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 6,922 words per the word-counting feature of Microsoft Word 2016, excluding the parts specified in Pa. R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this Brief complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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