No. 22-1079

IN THE
Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,
Petitioner,
v.
KAISER GYPSUM COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct. AAJ has participated in a number of cases before this Court as amicus curiae concerning asbestos-related litigation, including *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), both of which concerned attempts to effectuate a global settlement of claims by persons exposed to asbestos.

AAJ is concerned that Petitioner has advanced an unwarranted attack on the civil justice system in its endeavor to misuse the bankruptcy system by claiming a speculative injury that does not meet the requirements to be a party in interest authorized to object to a bankruptcy plan.

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Petitioner Truck Insurance Exchange asks this Court to hold that it is a party in interest as the insurer of an asbestos defendant so that it can object to a bankruptcy plan supported by its insured, Kaiser Gypsum Company. Truck understands that it must meet Article III standing requirements to be a "party in interest" and claims it does so because any judgments resulting from future trials in various state and federal courts will come from its insurance reserves. Truck holds those funds because of the insurance contract terms it agreed to with its client years ago and for which it charged premiums it deemed sufficient.

Truck does not deny that its responsibility to pay these possible future judgments would not give it standing; it would only be carrying out its responsibilities as an insurer. Instead, Truck posits that it may end up overpaying judgments because of the possibility that fraud could occur and that damage to its reserves constitutes a sufficiently cognizable injury to satisfy Article III standing. It does not.

Truck's alleged injury is speculative and conjectural, based on events that may never happen. It presupposes that, without its objections to the bankruptcy plan and the subsequent inclusion of its preferred safeguards for the trials that will take place in venues around the country, trial courts will fail to implement anti-fraud safeguards or give it the discovery or leeway it needs to point a finger at other potential defendants and thereby limit the apportionment of responsibility by a jury to its insured. It presupposes that fraud is rampant in asbestos litigation, although

it has only a gut feeling that it may have taken place in some of the 38,000 nationwide lawsuits to date in which it has "paid hundreds of millions of dollars on Kaiser's behalf." Pet. Br. 11 (citing J.A.163-64). It presupposes that fraud is rampant even though it can only point to a single, decade-old case that is just one unrepresentative example in the vast sea of asbestos cases over some 50 years of litigation.

Even if this Court were to credit Truck's concerns, the insurer lacks standing to assert an objection. It has suffered no injury, and the injury it projects in the future is speculative, conjectural, and unlikely. Its presuppositions do not bear up under scrutiny.

To argue otherwise, Truck attacks the civil justice system and recites a mythology surrounding asbestos litigation that exists only in imagination. Through case management orders, fact sheets, well-crafted discovery regimes, and standard practices, trial courts throughout the country provide parties and juries with all the tools they need to ventilate all possible conclusions, while allowing defendants to put absent and even unnamed co-defendants on trial for shares of the liability. At this very mature point in this litigation, a work history is all a party, plaintiff or defendant, needs to develop a clear picture of all potential asbestos exposures. The terrain is well-mapped.

Truck's suppositions also place responsibility for assuring fair trials in the wrong place. Trial courts, state and federal, have a tremendously positive track record in following fair procedures and using their discretion to craft the case to its needs. A single bankruptcy court with no experience dealing with juries

cannot duplicate the knowledge of our trial courts or specify procedures for the trial courts to use. Asbestos law is tort law, which also means that it is state law. Our Federalism demands that it be governed at the state level and not by a single bankruptcy court.

ARGUMENT

I. TRUCK ADVANCES A SPECULATIVE AND FABRICATED INJURY THAT IS PREMISED ON THE FALSE NOTION THAT COURTS, PARTIES, AND THEIR COUNSEL WILL ENGAGE IN FRAUD.

A. Truck Identifies No Cognizable Injury and So Cannot Be a Party in Interest.

1. An Insurer Obligated by Contract to Pay a Future Liability Does Not Suffer Injury Even When It Makes That Payment.

Truck argues that it has standing to object to a bankruptcy plan because, *eventually*, it *may* have to pay liabilities to be determined at various *future* trials for those claims against its insured that the bankruptcy plan places back in the tort system to pursue the Debtors' insurance policies. Of course, an insurer suffers no injury when it pays a judgment covered by the premiums it charged for a liability covered by the insurance contract for years. After all,

> insurance is a contract by which one party (the insurer), for a consideration that usually is paid in money, either in a lump sum or at different times during the continuance of the risk, promises to make a certain payment,

> usually of money, upon the destruction or injury of "something" in which the other party (the insured) has an interest.

1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 1:6 (3d ed. 2009) (footnote omitted).

In other words, liability insurance exists to pay the insured's liability damages according to the contract between them. Discharging that contractual responsibility to pay adjudicated liabilities does not render Truck an interested party in the bankruptcy proceeding of its client. Its obligation to pay pursuant to the contract between them is derivative of its insured and does not stand on an independent basis any more than a bank holding the account from which the money is paid might claim an interest.

Truck apparently understands this premise and does not claim that paying an adjudicated liability qualifies it to assert interested-party status. Instead, it speculates that a possible danger exists that fraud *could* occur and inflate the amount of money it might have to pay as adjudicated in separate proceedings. Not only is that assumption unwarranted because it skews the applicable litigation process through which these cases proceed fairly and properly, as explained *infra*, but it also treats rampant speculation about fraud as if it were a qualifying concrete injury. It plainly is not.

2. Truck's Alleged Injury Is Speculative and Does Not Qualify as an Injury-in-Fact and, If an Injury Were to Occur, It Would Not Be Causally Connected to the Bankruptcy Plan or Its Inability to Object.

Truck accurately tells this Court through extensive briefing of the issue that its party-in-interest status depends on its satisfaction of Article III standing requirements. Pet. Br. 20-31. It cannot meet those requirements.

This Court established that the "irreducible constitutional minimum of standing" under Article III requires three elements, the first of which is an "injury in fact" that is both "concrete and particularized," as well as, "actual or imminent, [and] not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). The second element requires a "causal connection between the injury and the conduct complained of." *Id.* And the third element demands that the injury be "likely, as opposed to merely speculative, and that the injury will be redressed by a favorable decision." *Id.* (citation omitted). Truck meets none of these requirements.

Truck "bears the burden of establishing these elements," *id.* at 561, but does not and cannot meet that burden. "A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (citing *Black's Law Dictionary* 479 (9th ed. 2009)). Although certain intangible harms can meet the concreteness requirement, the injury asserted must bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 341.

Here, Truck is concerned that the trials it is obligated to defend under Kaiser's insurance policies could result in excess damage judgments. Yet, that

type of anticipatory concern, essentially accusing the state courts of preparing to adopt unfair and improper practices without any reasonable basis, is beyond speculative and certainly not imminent. It also is causally unconnected to the bankruptcy plan.

As the entity responsible for paying Kaiser's liabilities pursuant to a legitimate insurance policy, Truck asks this Court to assume impropriety in the process to come, simply because Kaiser, its client, agreed to a plan that did not include Truck's preferred safeguards. That the two companies, insurer and insured, had discussed insisting upon them, *see* Pet. Br. 11-12, provides no ballast to Truck's concerns. Kaiser's decision not to pursue Truck's favored safeguards for trials that will take place after the bankruptcy plan is approved does not mean that Truck will be defrauded or that safeguards will not exist. Trial courts across the country will not abandon their responsibilities to conduct fair and proper trials just because a bankruptcy plan did not provide Truck's desired anti-fraud instructions. Trial courts are experienced at sniffing out impropriety and endeavor to assure fairness to all parties. Hundreds of thousands of asbestos cases have reached final judgment without *any* allegation of fraud.

The bottom line is that Truck proffers no redressable concrete injury. It merely speculates that an injury might be possible. Still, before any trial takes place, Truck has no obligation to pay anything—and it will have every opportunity to ask trial courts to install the safeguards it supposes it needs.

The way that insurance works confirms the attenuated nature of Truck's asserted injury claim. Under the consistent approach to insurance law applied across jurisdictions, "the fact that a loss is occasioned through the fault of the insured does not alone trigger the insurer's liability." 7A *Couch on Insurance*, supra, at § 103:14 (footnote omitted). An insurer's obligation to pay a "'legal liability,' as used in a policy of insurance, means a liability such as a court of competent jurisdiction will recognize and enforce between parties litigant." *Id.* (footnote omitted).

Here, the bankruptcy plan sends asbestos-injury claimants to trial in the tort system. Pet. Br. 12-13 (citing Pet. App. 227a). No court has assessed liability in any of these future cases. At this point, no one knows which, if any, claimants will prevail or whether any judgment rendered will raise any issues for either side. Truck asks this Court to assume that judgments laden with fraud will emerge. Yet, no fair assumption supports that rampant speculation.

Instead, an appropriate analogy to Truck's position is standing at the appellate stage, which must be met to the same extent as the plaintiffs must do so before the trial court. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997). Generally, an appeal requires an adverse final judgment. *See* 28 U.S.C. § 1291. The bankruptcy plan does not create any final judgments and the decision to send a case to trial would not provide a basis for appeal under most circumstances.

B. Truck Premises Its Need to Participate in the Bankruptcy Proceedings on a Fundamental Mischaracterization of Asbestos Litigation.

1. This Court Should Presume That Trial Courts Operate Diligently to Assure a "Fair Trial in a Fair Tribunal."

This Court should presume that state and federal trial courts operate in accordance with fair and proper processes, rather than postulate that the opposite would occur, as Truck proposes. Every court must conduct itself in accordance with the requirements of due process. *See* U.S. Const. amend. V; *id.* amend. XIV, § 1. The due process clauses impose a fundamental requirement of a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). That requirement "protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). It also "prevent[s] the States from denying potential litigants use of established adjudicatory procedures," that would impair their rights. *Id.* For that reason, it is fundamental that due process guarantees "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Meaningful hearing in this instance means the trial court, not the bankruptcy court.

Truck has advanced no suggestion that the courts hearing these cases would violate its due-process rights. Truck has proffered no evidence that trial courts have previously allowed it to be victimized by

fraud. At best, Truck states that, in cases tried in the tort system, it has already "paid hundreds of millions of dollars on Kaiser's behalf in over 38,000 lawsuits nationwide." Pet. Br. 11 (citing J.A.163-64). Rather than provide any basis to think that fraud took place, it weakly reports that Kaiser felt some were unfair and suspected "misconduct" or "fraud." Pet. 11 (citing J.A. 106). The extrapolation it asks this Court to accept is both insensible and cannot qualify as an allegation of prior fraud, let alone a predictor of future fraud. A losing party usually believes it should have prevailed or that the damages should have been higher or lower depending on its own self-interest.

More importantly, the difference between damages awarded by the trusts and damages resulting from trials, which Truck treats as significant, is easily explained. The bankruptcy trusts, having finite funds, pay claimants only a portion of the liability they owe, what a RAND study described as "pennies on the dollar." Stephen J. Carroll et al., *Asbestos Litigation*, RAND Corp., 102 (2005), https://www.rand.org/pubs/monographs/MG162.html. It is not surprising that a trial typically featuring expert witnesses and extensive evidence would yield higher damages than an administrative settlement procedure that lacks adversarial features and provides set damages. The trusts settle claims with amounts "set by reference to the several shares of the predecessor debtor, particularly its settlement history." Bruce Mattock et al., *Clearing Up the False Premises Underlying the Push for Asbestos Trust "Transparency,"* 23 Widener L.J. 725, 744 (2014).

It is also important to keep in mind that allegations of fraud receive special and careful treatment in the law. Our system of justice does not allow such an allegation to be tossed out as casually as Truck does. When pleading a cause of action of the kind that Truck asserts before this Court, the law requires a party to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Here, Truck provides no reason to believe the trial courts will tolerate any improper actions. The long history of asbestos litigation refutes Truck's supposition that fraud is rampant or would otherwise be so if its objection is not heard.

2. Asbestos Litigation Has Attracted a False and Distorted Narrative That Distorts Its Processes and Undermines Truck's Expressed Concerns.

Asbestos litigation has proven that it has valuably identified industry misconduct. Inhaled asbestos fibers cause a variety of medical conditions, a primary one of which is mesothelioma, "a cancer that forms in the thin tissue that lines many of your internal organs." *Mesothelioma*, Ctr. for Disease Control & Prevention (June 28, 2023), https://www.cdc.gov/cancer/mesothelioma/index.htm. The Mayo Clinic describes it as "aggressive" and "deadly." *Mesothelioma*, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/mesothelioma/symptoms-causes/syc-20375022 (last visited Jan. 29, 2024).

In a bid to resist responsibility for the damage asbestos has caused to countless lives, defendants have

propagated a mythology about fraudulent overclaiming that lacks substance. Truck replays those accusations to justify its claim to be an interested party.

To begin, it is useful to recall, as the Ad Hoc Committee on Asbestos Litigation of the Judicial Conference of the United States stated in 1991:

> It is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s.

Report of the Judicial Conference Ad Hoc Comm. on Asbestos Litigation, at 2 (Mar. 1991).

The problems faced in asbestos litigation are exacerbated by a "latency period that may last as long as 40 years for some asbestos related diseases." *Id.* The plaintiffs, often working for contractors and sent from site to site for their work,[2] frequently cannot pinpoint the locations or the manufacturer of the asbestos inhaled multiple decades earlier, any more than a worker is likely to know the manufacturer of the nails or screws they utilized at the time. The litigation, however, developed revelations about "outrageous misconduct" on the part of asbestos manufacturers and suppliers who knew the dangers inherent in the product and neither warned nor took protective measures for the workers exposed to it. Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 10-18, 34-

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[2] *See* Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945, 964 n.86 (2003).

36, 45 (1985) (summarizing the known hazards and describing what was learned from the asbestos industry through litigation, particularly in *Borel v. Fibreboard Paper Prods. Corp.*, 473 F.2d 1076 (5th Cir. 1974), the landmark case that first held that each exposure constituted a substantial contributing factor in causing asbestos diseases).

The hallmark of the American tort system is the award of damages "designed to provide '*compensation* for the injury caused to plaintiff by defendant's breach of duty.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986) (quoting 2 Fowler V. Harper et al., *Law of Torts* § 25.1, at 490 (2d ed. 1986) (emphasis in original)); *see also Smith v. Wade*, 461 U.S. 30, 52 (1983) (compensatory damages should be "in an amount appropriate to compensate the plaintiff for his loss."); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 797 n.62 (3d Cir. 1994) ("In a tort case, unlike a takings case, the goal is to compensate the plaintiff 'for all injuries proximately caused by the defendant's action.'") (citation omitted).

Yet, the system of asbestos bankruptcy trusts established in the wake of Johns Manville's pioneering trust[3] pays claimants just "pennies on the dollar,"[4] with the actual amount paid being a fraction of the percentage of responsibility the trust's sponsor would otherwise be assessed. *See* Mattock et al., *supra*, at 744; *see also Norfolk & W. Ry. Co. v. Ayers*, 538 U.S.

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[3] *See generally In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355 (3d Cir. 2012) (describing the development of the trusts); *see also* Bruce Mattock et al., *supra*, at 738-41 (same).
[4] Carroll et al., *supra*, at 102.

135, 186 (2003) (Kennedy, J., concurring in part, dissenting in part) (noting that the "Johns–Manville Trust for asbestos claimants, for example, [went] from a fund that promised to pay 100% of the value of liquidated claims to a fund that now pays only 5%") (citation omitted).

Truck assays a distorted narrative to legitimize its hypothetical concern that fraud could take place in the upcoming trials if Truck cannot object to the bankruptcy plan and add supposed "safeguards" for the cases sent to trial. It lodges much of its projection about fraud based on the one-off *Garlock* litigation—an interlocutory decision that never once used the word "fraud"—yet neither musters nor indicates any other instances of supposed fraud than that 10-year-old case. *See* Pet. Br. 8-9. Nor does Truck proffer any evidence that it was victimized by asbestos litigation fraud in the tens of thousands of cases it has tried. Instead, it tells this Court that safeguards instituted post-*Garlock* have satisfactorily eliminated its concerns about fraud and simply seeks their installation within the bankruptcy plan, Pet. Br. 9-10, an argument it may make to trial courts.

Still, even Truck's single example of a decade-old case, *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014), is significantly overplayed. While the *Garlock* court's suggestion of nondisclosure was widely trumpeted by the defense bar, Truck has no other examples. Its rendition of *Garlock* also does not advise this Court that further investigation revealed that at least some of information deemed fraudulently withheld was not fraud. It was an attempt to comply with protective orders that were later

revised so disclosure could occur. *See In re Motions Seeking Access to 2019 Statements*, 585 B.R. 733, 741 (D. Del. 2018), *aff'd sub nom. In re A C & S Inc*, 775 F. App'x 78 (3d Cir. 2019). The situation was unique and never duplicated again.

Truck also describes the related false narrative of "double-dipping," which accuses claimants of secretly filing overlapping claims with multiple trusts in a bid to be "overcompensated." Pet. Br. 8. Defendants repeatedly assert this canard, which has just as often been refuted, but it persists and recalls the saying that "a lie can travel halfway around the world before the truth can get its boots on." *Warner Bros. Ent. v. Jones*, 611 S.W.3d 1, 2 (Tex. 2020) (footnote omitted).

To be sure, asbestos claimants make claims against multiple defendants. A U.S. Navy shipyard worker, for example, will work on many vessels with asbestos-containing boilers, pipes, insulation, gaskets, and other items manufactured and supplied by multiple companies. Claims against each of them are entirely appropriate. When that claim is made against an asbestos bankruptcy trust, the claimant must provide medical evidence of an asbestos-related disease and product-identification evidence supporting the claim that the trust has responsibility for paying the claim. Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, 12(2) Mealey's Asbestos Bankr. Rpt. 1, 5 (Feb. 2013). The trusts, which have limited assets, then pay claims but on a smaller scale than full compensation would support. *See* Carroll et al., *supra*, at 102.

At this point in the litigation's history, there is no mystery to any defendant about what potential claims can be made because they have access to voluminous information about what was present at what time at a shipyard, or any other work site. Work histories provide the guidance needed.

When asbestos cases go to the tort system, like any other case, verdicts assign shares of liability. Defendants typically seek to assign larger shares to other defendants, including absent defendants, sometimes referred to as "empty chairs." *See* 1 *Comparative Negligence Manual* § 14:9 (3d ed. 2023). Under some so-called transparency bills enacted in some states to require that plaintiffs reveal all *potential* claims, defendants can require plaintiffs to file claims against defendants or trusts for whom exposure is suspected even when the claim has yet to be developed. *See, e.g.*, Ohio Rev. Code § 2307.953(C)(1)(a)-(c).

Though the claimant has limited information about these claims, making any such claim problematic, the Ohio law is invoked by a defendant who provides the court with a list of potential claims known to the defendant, *see id.* at § 2307.953(A), demonstrating that ample sources of that information exist apart from a claimant. The purpose of the statute is to allow defendants to reduce their potential liability by putting forth evidence that the plaintiff was exposed to other asbestos sources, even if the other claims are denied. Inselbuch et al., *supra*, at 8 (footnote omitted); *see also* Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 Tul. L. Rev. 1039, 1053 (2014).

Truck's entire plea is premised on the same idea that its anti-fraud additions to the plan would allow it to tell a jury that various empty chairs, rather than Kaiser was responsible for a higher portion of claimant's asbestos disease. Seeking license to do so through objections to a bankruptcy plan cannot be the proper way to accomplish that task or to achieve fairness to all parties, which ought to be the product of individualized determinations based on state law and trial procedure.

Even if it does not prevail in this case, Truck can pursue that strategy without missing a beat. State law controls a party's ability to present all alleged tortfeasors in the apportionment question posed to a jury, including nonparties who may include unknown tortfeasors and persons alleged to be negligent but not liable in damages because of immunity or some other reason. *See, e.g.*, *Scott v. Cnty. of Los Angeles*, 32 Cal. Rptr. 2d 643, 647 (Ct. App. 1994) ("[A] defendant may be found liable for noneconomic damages only in proportion to the total fault of all persons whose acts were a legal cause of the plaintiff's injuries, whether or not all such persons have appeared in the action, and whether their acts were intentional or negligent."). In fact, longstanding California law, similar to the law in other several-liability jurisdictions, places the burden on defendants to develop evidence of fault attributable to others. *See Sparks v. Owens-Illinois, Inc.*, 38 Cal. Rptr. 2d 739 (Ct. App. 1995) ("Owens-Illinois undisputedly had the burden to establish concurrent or alternate causes by proving: that Sparks was exposed to defective asbestos-containing products of other companies; that the defective designs of the other companies'

products were legal causes of the plaintiffs' injuries; and the percentage of legal cause attributable to the other companies.").

The ability to deflect liability onto others allows defendants to speculate to the jury about who else bears responsibility. Because claimants usually do not know the manufacturer of the asbestos to which they or their decedent were exposed decades earlier, plaintiffs' counsel depends heavily on work history to extrapolate the likely exposures, a process that defendants are equally adept at performing.

The elaborate dance that Truck proposes in the bankruptcy proceeding is utterly unnecessary if prophylactic fraud prevention is its actual goal. What likely asbestos exposures any particular claimant might have experienced, at this point in this mature litigation, more than four decades old, is easily known by all parties based on a plaintiff's work history. Counsel who represent asbestos defendants have participated in so many discoveries that, more than a decade ago, it was already "highly likely that there are very few job sites for which defendants do not have a library of data demonstrating which other defendants' products were present." Inselbuch et al., *supra*, at 9. The time that has passed since that was written makes it even more likely the potential defendants have been mapped out by defense counsel, as the Ohio law presupposes.

The information Truck seeks through an adjustment of the bankruptcy plan comes not from the plaintiffs themselves, but from "discovery of suppliers and sales records, and depositions of co-workers, not the

plaintiffs' memories." Inselbuch et al., *supra*, at 9. Asbestos industry consultants agree that other likely exposures are readily available based on a claimant's work history. *See* Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12(11) Mealey's Asbestos Bankr. Rep. 2, 12 (June 2013).

Rather than be imposed through a bankruptcy plan, the trial courts hearing these cases enjoy ample authority to determine the scope of discovery, with appellate review available on an abuse of discretion standard. *See, e.g.*, *Clark v. Hanley*, 89 F.4th 78, 98 (2d Cir. 2023); *United States v. Grigsby*, 86 F.4th 602, 616 (5th Cir. 2023). What is true about the scope of a trial court's discretion in the federal judiciary is also true in the state judiciaries. *See, e.g.*, *Minges v. State*, 192 N.E.3d 893, 896 (Ind. 2022); *Williams v. Superior Ct.*, 398 P.3d 69, 75 (Cal. 2017); *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 805 S.E.2d 664, 669 (N.C. 2017); *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003).

As the Fourth Circuit has recognized, the discretion of "district courts to supervise discovery, including the imposition of sanctions for discovery abuses, [fits within] part of their case-management authority." *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 (4th Cir. 2014). Indeed, asbestos trial courts have made tremendously effective use of their case-management authority.

In testimony before an American Bar Association task force on asbestos litigation, two judges who presided over federal and state multi-district litigation

praised the effectiveness of case management orders in assuring that both sides got what they needed. Both Judge Robreno, who presided over a federal asbestos MDL in the Eastern District of Pennsylvania for a lengthy period of time, and his Texas MDL counterpart, Judge Davidson, testified that trying cases on a "one-plaintiff, one-defendant" basis achieved efficiency and outcomes that worked for all parties even with limited discovery periods. Vairo, *supra*, at 1057 (reporting on the judges' testimony and citing transcripts). Both judges utilized carefully crafted case management orders. *Id.* Counsel for both sides also testified that case management orders provided the assurances and confidence they needed for fair procedures. They told the same task force that judges crafted orders that balanced defendants' discovery needs with plaintiffs' needs to obtain a quicker trial date when the claimant was dying. *Id.* at 1054.

II. TO IMPOSE "SAFEGUARDS" THROUGH A BANKRUPTCY PLAN AT THE BEHEST OF AN INSURER IS TO RENDER NATIONAL WHAT IS PROPERLY STATE LAW.

Asbestos litigation takes place under the umbrella of state tort law. Whether heard in state or federal court, the *Erie* doctrine assures that courts apply the substantive laws of the States. Tort law is state law; "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

There are specific instances where a federal common law is recognized, such as the rights and duties of

the United States on commercial paper,[5] "whether the water of an interstate stream must be apportioned between the two States,"[6] and certain "unique federal interests,"[7] but none of the exceptions apply here. The only one that is plausibly colorable at all, unique federal interests, was extensively examined by the Fifth Circuit and rejected. It concluded that "a uniquely federal interest" was absent and that "practical problems that would attend the displacement of state law, suggesting that Congress, rather than the courts should be the "the body responsible for balancing competing interests and setting national policy" here. *Jackson*, 750 F.2d at 1327.

Amicus suggests that that conclusion was correct and revision of a bankruptcy plan through an insurer's objection, particularly as proposed here, raises serious federalism issues and affects the ability of state courts to render fair judgments.

CONCLUSION

For the foregoing reasons, amicus urges this Court to affirm the judgment of the U.S. Court of Appeals for the Fourth Circuit.

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[5] *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943).

[6] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

[7] *Jackson v. Johns-Manville*, 750 F.2d 1314, 1325 (5th Cir. 1985) (en banc) ("[T]o be 'uniquely federal' and thus a sufficient predicate for the imposition of a federal substantive rule, an interest must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign.").

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