[J-12-00]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SUZANNE BAKER, ADMINISTRATRIX OF THE ESTATE OF ALBERT J. BAKER, AND WIFE OF ALBERT J. BAKER	:	No. 43 E.D. Appeal Dkt. 1999
	:	Appeal from the Judgment of Superior Court entered on 3/30/99 at No. 784 PHL 1997, reversing in part and affirming in part the Order entered on 1/16/97 in the Court of Common Pleas, Philadelphia County, Civil Division at 2257 January term, 1989
v.	:	
AC&S, INC.; AMCHEM PRODUCTS, INC.; AMERICAN ENERGY PRODUCTS, INC.; ANCHOR PACKING CO.; ARMSTRONG WORLD INDUSTRIES, INC.; ASBESTOS PRODUCTS MFG. CORPORATION; ATLAS TURNER, LTD.; BASIC INCORPORATED; CAREY CANADA; CELOTEX CORPORATION; DANA CORPORATION; DI DISTRIBUTORS, INC., F/K/A DELAWARE INSULATION CO.; EAGLE PICHER INDUSTRIES, INC.; FIBREBOARD CORPORATION; FOSTER WHEELER CORPORATION; GAF CORPORATION; GARLOCK, INCORPORATED; GEORGIA-PACIFIC CORPORATION; H & A CONSTRUCTION, INC.; H.K. PORTER CO., INC.; J.W. ROBERTS, LTD.; JOHN CRANE HOUDAILLE, INC., A/K/A CRANE PACKING CO.; KEENE CORPORATION; NATIONAL GYPSUM; OWENS-CORNING FIBERGLASS; WOENS-ILLINOIS, INC.; PFIZER, INC.; PITTSBURGH CORNING CORPORATION; RAYMARK INDUSTRIES, INC.; ROCK WOOL MANUFACTURING CO.; SMITH & KANZLER; SOUTHERN TEXTILE CORPORATION; SPRAY-CRAFT CORP.; SPRAYON RESEARCH CORPORATION;	:	

T & N PLC.; U.S. MINERAL PRODUCTS; UNITED STATES GYPSUM CO.; W.R. GRACE CO. :

APPEAL OF: AC&S, INC. : ARGUED: February 1, 2000

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: June 26, 2000**

I join in the majority's disposition and in its assessment of the general application of Pennsylvania jurisprudence with respect to written releases. I write, however, because, in light of the binding class action settlement effectuated among the Manville Trust, asbestos health claimants, Manville codefendants and others, I consider this case to be, first and foremost, a "Trust" case. The majority concludes that all paths through the operative Trust instrument (the Trust Disposition Process or "TDP") lead to the same destination, namely, the direct application of Pennsylvania law to the pro tanto release consummated between the Trust and the Bakers; therefore it is able to avoid a detailed review of the TDP. As a central point of their arguments, however, Appellant ACandS, Inc. and its amicus curiae contend that a provision of the TDP implicated by following the single, proper pathway through the document engrafts additional substantive terms upon the Baker/Trust release prior to the application of Pennsylvania law, and thus, that the true question presented in this appeal is: what effect does Pennsylvania law give to the Baker/Trust release as modified by the TDP? As I agree with ACandS's position on this point, I would address its argument and answer the question that it presents as follows.

Preliminarily, I note that the lead and dissenting opinions from the en banc Superior Court panel present careful examinations of a series of threshold questions pertinent to the present appeal; therefore, a close review of those expressions provides essential context.

Judge Schiller, writing for the Superior Court majority, initially framed the primary issue as "whether in the context of a strict liability action pursuant to the provisions of the Uniform Contribution Among Tortfeasors Act . . ., and applicable case law, a pro tanto release executed by the plaintiffs in favor of the Manville Trust should be enforced according to its express terms to reduce the plaintiffs' recovery against the non-settling tortfeasor." Baker v. AC&S, Inc., 729 A.2d 1140, 1144 (Pa. Super. 1999).[1] The majority then reviewed the historical background of the Manville Trust; the broad-scale settlements among the Trust, asbestos health claimants, Manville codefendants in asbestos-related actions, and distributors of Manville products; and the resulting Manville Trust Disposition Process (the "TDP"), the operative document by which the parties agreed that their rights and remedies should be governed. In summary, in response to the assertion of massive claims, Johns-Manville Corporation, manufacturer and distributor of asbestos products, filed a bankruptcy petition, and the Trust was established to succeed to Johns-Manville's massive asbestos-related liabilities. The Trust was subsequently restructured in light of the fact that the value of Trust assets (no more than $2.5 million) was dwarfed by projected claims (between $21 and $25 billion). In connection with such restructuring, the district court certified a mandatory, non-opt-out class of asbestos health claimants, codefendants, distributors and certain others as beneficiaries. See In re Joint Eastern and Southern Districts Asbestos Litigation, 878 F. Supp. 473, 579 (E.D.N.Y. & S.D.N.Y. 1996), aff'd in pertinent part, 78 F.3d 764 (2d Cir. 1996). The purpose of the settlement was to distribute equivalent shares of claims' values (scheduled at some ten-percent of the claims), and to maximize the finite assets available to Trust beneficiaries by significantly reducing the Trust's operating and

[1] Judge Schiller also restated the issue to focus more closely upon the effect of its resolution, as follows: "whether under the unique circumstances of this case the plaintiffs or the non-settling tortfeasor should bear the burden of the shortfall between the consideration paid by the Manville Trust ($30,000) and its allocated share of the damages awarded to the plaintiff ($440,000), a difference of $410,000." Id.

litigation expenses. See id. All Trust beneficiaries became bound by the terms of a settlement stipulation requiring abidance by the terms of the TDP, "designed to remove the Trust from the tort system and equitably distribute limited Trust assets among its beneficiaries." Baker, 729 A.2d at 1156 (Eakin, J., dissenting)(citing Joint Asbestos Litig., 878 F. Supp. at 491-95).

Judge Schiller's preliminary discussion constituted an acknowledgment of the centrality of the TDP to resolution of this action, as the parties to this appeal are Trust beneficiaries whose rights and remedies are governed by the TDP, Baker, 729 A.2d at 1145; accordingly, he proceeded with an overview of the document. The TDP allows a claimant, upon meeting certain threshold requirements, to treat the Trust as a "legally responsible tortfeasor" without introduction of further proof; deems the Trust to be a settled joint tortfeasor; limits the rights of co-defendants to obtain contribution against the Trust to a narrow set of circumstances; and, in some instances, permits co-defendants to obtain a reduction of a verdict in respect to the Trust, whether or not the claimant's direct claim against the Trust has been resolved. See generally In re Joint Asbestos Litig., 78 F.3d at 770-71. While the setoff is ultimately measured by reference to applicable local law of contribution and verdict reduction or settlement credit, see TDP §H.3, the TDP initially imposes a different framework of rules for each of the following five categories of states: 1) pro tanto states, defined as those in which any judgment against a non-settling defendant is reduced by the amount paid or agreed to be paid by a released party, TDP §H.3.(b); 2) pro rata states, or states in which total liability is divided equally among all defendants found by the fact finder (or agreed by the parties) to be legally responsible tortfeasors including released parties, and judgments against nonsettling defendants are reduced by either the pro rata share attributable to the released parties or the amount paid or agreed to be paid by the released parties, TDP §H.3.(c); (3) apportionment states, or states in which the amount of any judgment is reduced with reference to the apportioned

share of released or absent parties, TDP §H.3(d); (4) states where the law provides for several liability with respect to all or part of a cause of action, TDP §H.3(e); and (5) states with multiple setoff rules, defined as states in which different setoff rules govern different causes of action or parts thereof or elements of damage, TDP §H.3(f).[2] The TDP also provides:

> Except as described below, in order to preserve the Trust's assets for payment of claims asserted by asbestos health claimants and to limit transaction costs of all parties, set-off credit shall be the preferred method of satisfying Co-defendant claims, regardless of whether the Trust and claimant have liquidated the underlying claim.

TDP §H.2(a).

As the parties' arguments focused upon the "pro rata" and "multiple setoff rules" categories, Judge Schiller reviewed the applicable TDP provisions. With respect to pro rata states, the specific term of the TDP addressing calculation of the amount of the setoff is as follows:

> Solely for the purpose of obtaining a set-off in a pro rata state pursuant to this subsection 3(c), regardless of whether the Trust has been given a release, or the wording of any such release, claimants in pro rata states shall be deemed to have given the Trust a joint tortfeasor release and indemnified the Trust against contribution and indemnity claims by Co-Defendants against the Trust arising from a judgment obtained by such claimants.
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> (i) Liquidated claims. Where the underlying claim has been liquidated, the set-off amount shall be either (a) the Liquidated

[2] Notably, the federal district judge presiding over the settlement, Senior Judge Jack B. Weinstein, acknowledged that these provisions are "byzantine," but indicated that the complexity merely reflects the difficulty in accommodating the laws of 50 states. See Joint Asbestos Litig., 878 F. Supp. at 545.

> Trust Payment,[3] or (b) the Trust's pro rata share of the judgment, as provided by applicable law.
>
> (ii) Unliquidated claims. Where the underlying claim has not been liquidated, the set-off amount shall be either (a) the Unliquidated Trust Payment, or (b) the Trust's pro rata share of the judgment, as provided by applicable law.

TDP §H.3.(c). With respect to states with multiple setoff rules, the TDP provides that "applicable law shall govern which set-off rules apply to each cause of action or part thereof and element of damages." TDP §H.3.(f). The Superior Court majority recognized that the TDP requires, in the first instance, an assessment of applicable state law to determine the pertinent Section H.3 category establishing the setoff rules in relation to the Trust's proportionate share of damages. In performing this assessment, it reviewed the concept of joint and several liability and the Uniform Contribution Among Tortfeasors Act,[4] and in particular, Section 8326 of the enactment, which provides, inter alia, that:

> [a] release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

42 Pa.C.S. §8326. Moreover, also pursuant to Section 8327 of the UCATA, 42 Pa.C.S. §8327, the release by the plaintiff does not relieve the settling tortfeasor from making contribution to a non-settling defendant, unless the release is given before the right to secure contribution has accrued and provides for a reduction of the verdict to the extent of

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[3] "Liquidated Trust Payment" and "Unliquidated Trust Payment" are defined under Section H.3.(a)(i) and (ii) of the TDP as the amount of the Trust's payment to the claim in circumstances in which the underlying claim has been liquidated or is unliquidated, respectively.

[4] Act of July 9, 1976, P.L. 586, No. 142 §2 (codified at 42 Pa.C.S. §§8321-8327)(the "UCATA").

the settling tortfeasor's pro rata share of damages recoverable against all other tortfeasors, i.e., the release conferred is a pro rata one. Additionally, Judge Schiller noted that Pennsylvania law generally seeks to effectuate the terms of a release as written. See Baker, 729 A.2d at 1147. He provided the following context:

> a party who signs a general release waiving all claims and discharging all parties will be precluded from thereafter suing a party who did not contribute consideration toward the release. However, if a plaintiff wants to settle with one joint tortfeasor but preserve the right to sue others, he or she can sign a pro tanto or a pro rata release. If the plaintiff settles pursuant to a pro tanto release, the plaintiff reduces his or her recovery against a non-settling joint tortfeasor by the amount of consideration paid for the release. By contrast, if a plaintiff settles pursuant to a pro rata release, the plaintiff reduces his or her recovery against the non-settling joint tortfeasor by that tortfeasor's allocated share of the total liability. Therefore, except in limited circumstances discussed infra, the parties to a release have the option to determine the amount or proportion by which the total verdict shall be reduced against the non-settling tortfeasors to reflect the settling tortfeasor's share.

Baker, 729 A.2d at 1148 (citations omitted).

With this background, Judge Schiller undertook to categorize Pennsylvania jurisprudence within the framework of Section H.3 of the TDP. Because, under Pennsylvania law, liability is allocated differently depending upon the underlying cause of action,[5] and damages allocable to non-settling defendants depend upon the terms of the

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[5] The opinion provides the following example of differing apportionment schemes under Pennsylvania law:

> In Pennsylvania, liability among joint tortfeasors is allocated differently in a negligence action than it is in a strict liability action. In a negligence action, liability is allocated among responsible tortfeasors according to percentages of comparative fault. Thus, a "pro rata" set-off is calculated based on the settling party's percentage of negligence as determined by the factfinder. However, in strict liability cases, as in the

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release provided to the settling defendant, see 42 Pa.C.S. §§8326-8327, the Superior Court majority determined that Pennsylvania falls most appropriately within the Section H.3.(f) category of states with multiple setoff rules. Baker, 729 A.2d at 1148. Judge Schiller then read Section H.3.(f) as requiring only the application of Pennsylvania law to the provisions of the Baker/Trust release, with no further reference to the other provisions of the TDP.[6] The opinion also indicated that, even if Pennsylvania were treated as a pro rata state, the TDP provides precisely the same treatment, since Section H.3(c) specifies that the amount of setoff is either the amount actually paid to the plaintiff by the Trust or the Trust's pro rata share of the judgment, as determined by reference to applicable law. Id. at 1148-49 n.23.[7]

(…continued)

> case sub judice, liability is allocated equally among responsible tortfeasors, without regard to fault. Thus, a "pro rata" setoff is calculated based upon the total liability divided by the number of defendants.

Baker, 729 A.2d at 1148 (citations omitted). Judge Schiller also noted that, in certain circumstances, Pennsylvania law allows for the imposition of several liability. See id. at 1148 & n.22 (citing Glomb v. Glomb, 366 Pa. Super. 206, 211-13, 530 A.2d 1362, 1365 (1987)(en banc), appeal denied, 517 Pa. 623, 538 A.2d 876 (1988)).

[6] As discussed infra, the opposing view, taken by the dissenting opinion and advocated by ACandS and its amicus curiae herein, is that Section H.3.(f) does not at this juncture permit a fully independent application of state law to the pertinent written release to determine setoff, but rather, requires categorization of the specific cause of action or element of damages at issue pursuant to the terms of Section H.3 (i.e., as in the nature of pro tanto, pro rata, allocation or apportionment, or several liability), and application of the setoff rules provided under the pertinent Section H.3 category.

[7] Also discussed infra is the opposing view (taken by ACandS and its amicus but not specifically advanced in the Superior Court dissent) that this conclusion overlooks the fact that Section H.3.(c) has the effect of modifying any release given by a plaintiff to the Trust by deeming the plaintiff to have indemnified the Trust against contribution and indemnity claims by codefendants, and that no such modification occurs directly under the terms of Section H.3.(f).

The majority then turned to Pennsylvania law to determine setoff, performing an analysis of Walton v. Avco Corp., 530 Pa. 568, 610 A.2d 454 (1992), Ball v. Johns-Manville Corp., 425 Pa. Super. 369, 625 A.2d 650 (1993), and Charles v. Giant Eagle, 513 Pa. 474, 522 A.2d 1 (1987). Judge Schiller determined that these cases did not, as found by the trial court, require that liability of defendants in all strict liability actions be limited to their pro rata share of a verdict. See Baker, 729 A.2d at 1149 (stating that "[w]e do not read Walton or Ball so broadly; neither case suggests that joint and several liability should be abolished in strict liability cases"). Nor did he accept ACandS's argument that such authorities require a pro rata setoff of a settling tortfeasor's full proportionate share of damages, regardless of the terms of the written release. Rather, Judge Schiller read Ball to stand only for the general proposition that, in a strict liability action, the parties' joint and several liability is to be allocated among the joint tortfeasors found liable for the plaintiff's injuries on an equal percentage basis, solely for purposes of applying the UCATA's setoff and contribution provisions. See Baker, 729 A.2d at 1150. With regard to Walton and Giant Eagle, the opinion noted that such cases concern the obligations of a non-settling tortfeasor where the settling tortfeasor paid in excess of its share of allocated liability. See id. at 150-51 (stating that "[n]either Walton nor Giant Eagle addressed the issue before this Court, which is the determination of set-off in a strict liability case where the settling defendant paid less than its allocated share of liability pursuant to a pro tanto release").[8] Thus, the Superior Court

[8] Judge Schiller described the rationale supporting Walton and Giant Eagle as follows:

> In both cases, relying upon policies in favor of promoting settlements, and avoiding a windfall to the non-settling tortfeasor, the Court required the non-settling tortfeasor to pay its full share of allocated liability in spite of the fact that the total payments to the plaintiff exceeded the amount of the jury verdict. The Court reasoned that, "[t]here is no basis for concluding that the jury verdict must serve as a cap on the total recovery that a plaintiff may receive."

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majority found that Walton and Giant Eagle should not be read to compel a court to ignore the terms of a pro tanto release in favor of a pro rata reduction to the benefit of non-settling tortfeasors in instances in which the amount of consideration provided for the release was less than the total verdict. To the contrary, Judge Schiller determined that the terms of Section 8326 of the UCATA should be given effect, and, accordingly, the pro tanto setoff in the Baker/Trust release should be honored. See Baker, 729 A.2d at 1151. He explained:

> This interpretation serves the policies emphasized in Walton and Giant Eagle in favor of encouraging settlements and of respecting their finality. This interpretation also furthers the policies reinforced in Walton and Giant Eagle that the plaintiff should be fully compensated for his injuries, and that a non-settling joint tortfeasor should not benefit from the windfall of a settling tortfeasor paying more than his or her share of allocated liability. By extension, a non-settling joint tortfeasor should not receive a windfall in the form of a release of its joint and several liability to the plaintiff simply because another joint tortfeasor settled for less than his or her allocated share of liability. To hold otherwise would be to eradicate the principles of joint and several liability, and effectively to repeal the provisions of the UCATA. Moreover, such a result would discourage settlement because plaintiffs would not have the option of negotiating a pro tanto release.

Baker, 729 A.2d at 1151.

The Superior Court majority acknowledged that ACandS was not likely to obtain remuneration from the Trust for payments made in excess of its allocated share of the verdict. It found, however, that this resulted as a consequence of the quid pro quo established by the Manville settlement and effectuated through the TDP. See id. at 1152 (stating that "AC&S was in the class of co-defendants which negotiated for and received valuable concessions in exchange for agreeing not to seek contribution from the Trust;

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Baker, 729 A.2d at 1150.

these concessions included being able to treat the Trust as a joint tortfeasor without the introduction of further proof, and receiving a set-off for the Trust's share of liability"). Judge Schiller also viewed the result of enforcing the terms of the pro rata release in this case as supported by the established policies of favoring full and fair compensation to injured victims, as well as settlements. Id. Thus, the Superior Court reversed, finding that the trial court had erred in failing to enforce the terms of the pro tanto release, and remanded, in effect, for the trial court to increase the principal amount of the verdict from $440,000 to $850,000, to account for the balance of the Trust's proportionate share.

Judge Eakin filed a dissenting opinion, joined by President Judge McEwen and Judge Joyce. Like the majority, the dissent discussed the background for and context of the Manville settlement and TDP, emphasizing the binding nature of the TDP upon all Trust beneficiaries, including the parties to the present appeal, and thus, again, the centrality of the TDP to resolution of the setoff issue presented. Judge Eakin also reviewed the pertinent provisions of the TDP, and accepted (at least for purposes of argument) that Pennsylvania may be a state with multiple setoff rules under Section H.3.(f) of the TDP. The dissent concluded, however, that the general categorization for the Commonwealth was of limited significance to the present case, as the relevant inquiry was a determination of the pertinent TDP categorization for a Pennsylvania strict liability action, since the action proceeded on such basis. See Baker, 729 A.2d at 1158 (Eakin, J., dissenting) ("accepting the majority's proposition that Pennsylvania is a state with multiple setoff rules does not defeat the more precise proposition that Pennsylvania is a pro-rata state for purposes of this strict liability action"). In this regard, Judge Eakin read the Walton, Ball and Giant Eagle cases as establishing a rule mandating that non-settling defendants be afforded a reduction in the verdict to the extent of the full amount of the pro rata share of the verdict attributable to a settling defendant. See Baker, 729 A.2d at 1159. With regard to the

majority's efforts to distinguish Walton and Giant Eagle on the basis that those cases involved settlements in amounts that exceeded the ultimate verdict, Judge Eakin stated:

> I see no basis for a rule that pro rata/pro tanto allocation depends on the ultimate ratio of settlement to verdict, as the majority's result suggests. Can the applicable principles of law change with the specific mathematics of the verdict? Does the law apply one standard when settlement exceeds that pro rata share, and another standard when it does not? I find neither logic nor fairness in such a dichotomous approach.

Baker, 729 A.2d at 1159 (Eakin, J., dissenting).

Moreover, while acknowledging that "[m]assive litigation spawned this issue, which essentially pits its unique complexity against fundamentals of Pennsylvania law on set-off and contribution," Judge Eakin concluded that "the TDP trumps the Baker/Trust release." Id. at 1155, 1159. In this regard, the dissent emphasized that the TDP provides that setoff is the preferred method of satisfying codefendant claims. See TDP §H.2.(a). It also concluded that the requirement of a pro rata setoff flowed not only from application of principles embodied in this Court's decisional law but also from a direct application of the terms of the TDP; that such application had been determined to be the product of extensive negotiation and a full and fair compromise among the Trust, asbestos health claimants and codefendants; that the settlement assured qualified asbestos health claimants some measure of recovery commensurate with the finite amount of funds available to the Trust; and that the TDP also provided a corresponding measure of protection to codefendants in the form of ensuring a pro rata release with respect to the Trust's proportionate share of damages. See id. at 1159-60; see also id. at 1155 (Eakin, J., dissenting)("[i]n such cases, the pro rata approach is preferable because . . . it reflects the reality of the Trust's limited fund status, gives effect to the terms of the TDP, and follows the guidance of cases most relevant to this issue"). The dissent stated:

> There is no reason to disregard the hard-fought negotiations of the parties in [In re Joint Asbestos Litig.], and the resulting

> balancing of interests, to give effect to a side agreement between two of the parties, especially where doing so would require a remaining party to pay almost twice the share otherwise required under the TDP and Pennsylvania law.

Baker, 729 A.2d at 1160 (Eakin, J., dissenting). Having concluded that, although the Bakers provided the Trust with a pro tanto release, such release should be accorded the effect of a pro rata one, the dissent expressed its belief that Sections 8326 and 8327 of the UCATA did not require a different result, as it determined that such provisions were not applicable to an action in strict liability. See id. Thus, the dissent would have found that the principal amount of the verdict against ACandS should have been limited to $440,000, or ACandS's own proportionate share of the verdict (comprising $410,000 less than the exposure found by the Superior Court majority).

In the present appeal, the arguments presented by the Bakers and ACandS adopt, in large part, or reflect variations upon, the positions articulated by Judges Schiller and Eakin, respectively. Of particular significance to my analysis, however, in their briefs, ACandS and its amicus curiae, Owens Corning, also developed a refinement of Judge Eakin's view concerning the consequence of the determination that Pennsylvania is a state with multiple setoff rules. They contend that such classification does not permit a court to proceed directly to an application of state law principles of setoff to the terms of the written release at issue, as the Superior Court majority did (and as does this Court's majority). Rather, ACandS and Owens Corning argue that the direction in Section H.3.(f) that "applicable law shall govern which set-off rules apply to each cause of action or party thereof and each element of damages"

> simply means that the claim must be characterized under the TDP (i.e., pro rata, pro tanto or apportionment) according to the law which the state applies to that particular claim. Thus, if (as here) the claim would be subject to a pro rata set-off, then that claim falls within the TDP's pro rata category for purposes of calculation of the set-off. Again, "applicable law" is merely a

> directive as to which section of the TDP applies -- not an invitation to ignore the TDP altogether.
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> It bears repeating that the TDP is the negotiated settlement of a **national** class action, in which the parties were forced to group and classify the widely divergent liability/apportionment rules of dozens of different jurisdictions. The TDP was designed to cover, by way of example, states like California, which imposes several liability with respect to economic damages but joint and several liability apportionment with regard to non-economic loss. In such states, a claim is classified under the TDP as several liability for economic claims and joint liability/apportionment for non-economic damages. Likewise, in Pennsylvania, strict liability claims are apportioned on a pro rata basis and such claims are thus classified under the TDP's "Pro Rata" category.
>
> Any other conclusion would be absurd. It cannot be seriously contended that where the parties painstakingly negotiated the TDP's set-off provisions, they nonetheless agreed to effectively erase the TDP in states with multiple set-off rules. Yet, this is precisely what the Superior Court majority did, and exactly the reason that this Court must reverse.

Brief of Amicus Curiae Owens Corning, at 17-18 (emphasis in original). This argument supports Judge Eakin's view that construction and application of Section H.3.(c) of the TDP is essential to the resolution of this appeal. Based upon the asserted applicability of Section H.3.(c), ACandS offers its central contention that such provision engrafts a pro rata release upon any and all settlements with the Trust covered by the provision. See Brief of Appellant ACandS, Inc., at 18-19 (stating that "the actual pro tanto language in the Baker's (sic) release with the Manville Trust is irrelevant to the set-off for the Manville Trust's share of the verdict because the Bakers are deemed to have given the Manville Trust a release which indemnifies it against cross-claims -- that is a pro rata release"). Alternatively, ACandS argues that the verdict should be reduced by the pro tanto settlement figure, then

divided equally among itself and the non-settling tortfeasors with the exception of the Trust.[9]

Upon review of the above expressions and arguments, I would apply the following eleven-part assessment: 1) the parties' respective rights and interests in relation to setoff attributable to the Manville Trust portion of the verdict must be determined first and foremost by reference to the TDP; 2) the TDP requires an initial assessment of state law to determine which of the TDP's five categories (pro tanto, pro rata, allocation or apportionment, several liability or multiple setoff rules) applies; 3) pursuant to Section H.3.(f) of the TDP, Pennsylvania is a state with multiple setoff rules; 4) Section H.3.(f), which applies to states with multiple setoff rules, requires that setoff in relation to the Trust's proportionate share of a strict liability verdict be determined pursuant to the specific provision of the TDP that applies to such cause of action (here strict liability); 5) Pennsylvania is a pro rata jurisdiction for purposes of a strict liability action under Section H.3.(c) of the TDP; 6) thus, Section H.3.(c) of the TDP, in the first instance, governs the setoff attributable to the Manville Trust in strict liability actions in Pennsylvania; 7) Section H.3.(c) works a modification of any release provided by an asbestos claimant to the Manville Trust; 8) Section H.3.(c) ultimately requires an assessment of how Pennsylvania law would treat a release as modified by the terms of Section H.3.(c); 9) under applicable state law, the release, as modified by Section H.3.(c), does not equate to a pro rata release, nor does the cumulative effect of the TDP amount to the functional equivalent of a general surrender by asbestos health claimants of the interest in pursuing full recovery against the Trust's codefendants employing the doctrine of joint and several liability; 10)

[9] This would have the effect of spreading the portion of the verdict currently allocated to the Trust among the remaining settling tortfeasors and ACandS, rendering ACandS liable for its proportionate share plus approximately one-fourth of the current Manville share (a total of $550,000), rather than for both full shares (less only the pro tanto settlement figure).

therefore, ACandS is not entitled to a pro rata reduction of the verdict; and 11) in relation to ACandS's alternative argument, Pennsylvania law does not permit the Trust to be removed from the field of joint tortfeasors in allocating shares of liability for purposes of setoff and contribution. Each phase of this analysis is discussed in greater detail below.

1) The centrality of the TDP to the resolution of the present appeal – As noted, both the lead and dissenting Superior Court opinions reflect the contractual nature and scale of the class action settlement undertaking that resulted in the TDP and, correspondingly, the importance of adherence to the negotiated terms. It is undisputed in the present appeal that the TDP governs the parties' respective rights and remedies with regard to any setoff attributable to the Trust's proportionate share of the verdict.

2-3) The initial TDP category assessment -- The majority chooses not to resolve the parties' dispute concerning whether Pennsylvania falls within the H.3.(f) category (states with multiple setoff rules) or the H.3.(c) category (pro rata states). It deems such distinction inconsequential based upon the conclusion that the provisions of Section H.3.(f) are concurrent with those of Section H.3.(c) in compelling the application of state law to determine the pertinent setoff; thus, it is able to disassociate the remainder of its analysis from the TDP and proceed to what it characterizes as the crux of the dispute, namely, whether state law mandates a pro rata or pro tanto setoff. This assessment, however, overlooks the fact that Section H.3.(c) contains specific rules that engraft additional terms upon any settlement and release (discussed further below) prior to the ultimate application of state law. Such rules are not found in Section H.3.(f); therefore, although both sections may ultimately lead to the same result (the application of state law), the terms of the contractual arrangement of rights and interests which must be assessed under applicable law is different depending upon whether Section H.3.(c) applies. Thus, I view the determinations of the proper pathway through the TDP, the applicability of Section H.3.(c),

and the effect of Section H.3.(c)'s additional rules as critical to the disposition of this appeal.

With regard to initial TDP categorization, I agree with the Superior Court majority that Pennsylvania should be deemed to be a state with multiple setoff rules under Section H.3.(f) of the TDP, see Baker, 729 A.2d at 1146-47, since our jurisprudence applies differing rules allocating liability among joint tortfeasors in relation to different causes of action and, correspondingly, different setoff rules in connection with the settlement of such causes.

4) The separate issue of categorization for purposes of a strict liability action -- Although I conclude that Pennsylvania is, in the first instance, a state with multiple setoff rules for purposes of the TDP, I differ with the Superior Court majority's interpretation of Section H.3.(f) as a directive to proceed directly to apply Pennsylvania law to the written pro tanto release under consideration. Rather, I would also consider and adopt the portion of ACandS's argument positing that Section H.3.(f)'s directive that "applicable law shall govern which set-off rules apply to each cause of action or party thereof and each element of damages" requires a separate threshold assessment categorizing the segment of state law governing the pertinent cause of action (or element of damages) within the four remaining categories enumerated under Section H.3.(c) of the TDP (pro tanto, pro rata, apportionment, or several liability). I believe that this procedure is an appropriate interpretation of the written terms of Section H.3.(f) of the TDP, and effectuates the likely shared intentions of the parties to the TDP and the courts that approved it to provide some degree of standardization in the treatment of similar claims. The approach taken by the Superior Court majority results in the application of different principles governing setoff depending upon whether the jurisdiction treats all forms of tort claims on a pro rata basis (in which case Section H.3.(c) of the TDP clearly governs), or only the ones at issue in the

case (in which case the Superior Court majority would apply state law without reference to Section H.3.(c)).[10]

5-6) Governance of the setoff attributable to the Manville Trust in strict liability actions in Pennsylvania, in the first instance, by Section H.3.(c) of the TDP -- Following from the above, it is next necessary to determine which category under Section H.3 of the TDP applies to a Pennsylvania strict liability action. In this regard, preliminarily, and as further discussed below, for the reasons stated by this Court's majority, I would not adopt the view of the Superior Court dissent that Pennsylvania jurisprudence converts any form of release in a strict liability action into a pro rata one. See Baker, 729 A.2d at 1159 (Eakin, J., dissenting). Such a conclusion, however, is not a prerequisite to categorizing strict liability actions within the H.3.(c) pro rata category. States (and causes of action) falling within the pro rata category are those in which "total liability is divided among all defendants found by the fact finder (or agreed by the parties) to be legally responsible tortfeasors including released parties." TDP §H.3.(c). Moreover, it is clear that this definition contemplates only the equal allocation of liability for purposes of contribution (rather than for the ultimate purpose of verdict setoff), as the sentence that follows speaks

[10] Also of significance, the provisions of the TDP, as well as the expressions of the courts that approved it, make clear that the document is a Trust-favored one, reflecting an abiding concern for preservation of Trust assets toward maximization of the percentage-based return for present and future Trust beneficiaries. Thus, for example, Section H.3.(c) engrafts the following Trust-favored term upon any release: "regardless of whether the Trust has been given a release, or the wording of any such release, claimants in pro rata states shall be deemed to have given the Trust a joint tortfeasor release and indemnified the Trust against contribution and indemnity claims by Co-Defendants." Under the view espoused by the Superior Court majority, the Trust would not be afforded the benefit of such term in a case such as the present one, since, although Pennsylvania may be a pro rata state for purposes of strict liability, the existence of separate rules governing different forms of action not otherwise relevant to Mrs. Baker's claim would eliminate this protection. It would seem unlikely that such result would have been intended.

directly to setoff, specifying that, in pro rata states, judgments are reduced, as provided by applicable law, by either the released party's pro rata share or the pro tanto settlement figure. See TDP §H.3.(c).[11] As noted by ACandS's amicus, such provision of the TDP essentially mimics the general rule for apportionment of liability in a strict liability action as stated in the decisional law: "liability is divided proportionately in accordance with the number of joint tortfeasors." Ball, 425 Pa. Super. at 386, 522 A.2d at 658. As Pennsylvania law generally provides for a pro rata allocation of liability among codefendants and released parties in a strict liability action, see Baker, 729 A.2d at 1149-52 (citing cases), I would find that setoff in relation to the Manville Trust portion of a Pennsylvania strict liability verdict is governed by Section H.3.(c) of the TDP.

7-8) Section H.3.(c) works a modification of the release provided by an asbestos claimant to the Manville Trust – As previously noted, Section H.3.(c) effectuates the following modification of a release given by a plaintiff to the Trust: "regardless of whether the Trust has been given a release, or the wording of any such release, claimants in pro rata states shall be deemed to have given the Trust a joint tortfeasor release and indemnified the Trust against contribution and indemnity claims by Co-Defendants." ACandS's arguments equate this language with a pro rata release.

[11] The TDP's employment of an allocation-based definition for pro rata states under Section H.3.(c) appears to be inconsistent with the setoff-based definition provided for pro tanto and allocation and apportionment states under Sections H.3.(b) and (d). This incongruity is not directly relevant to the present case, but would present complex questions in attempting to categorize a Pennsylvania negligence action under the TDP (facially, Pennsylvania might appear to be an allocation or apportionment state; however, Section H.3.(d) employs a setoff-based definition of allocation states, requiring that applicable law provide for verdict reduction with reference to the apportioned share of released or absent parties; therefore, Sections 8326 through 8327of the UCATA would clearly remove Pennsylvania from this category).

While I agree with ACandS that Section H.3.(c) is relevant, I do not agree that it confers the sought-after relief. To so find would render the language of Section H.3.(c) internally inconsistent, since the provision expressly allows for effectuation of a pro tanto setoff in states in which the applicable law would permit it. See TDP H.3.(c)(i) (providing that the setoff amount may be the Liquidated Trust Payment, i.e., the pro tanto settlement figure, where applicable state law so provides). Moreover, under Pennsylvania law, in order for a release to relieve the settling tortfeasor from making contribution to a non-settling defendant, it must provide for a reduction of the verdict against the non-settling tortfeasors to the extent of the settling tortfeasor's pro rata share of damages. See generally 42 Pa.C.S. §8327. The provision set forth above simply does not accomplish this effect, since an agreement to indemnify the Trust in the event that it is required to make payment to codefendants (subject, of course, to the restrictive rules applicable to the assertion of codefendant claims), is, in neither form nor substance, a commitment on the part of asbestos health claimants to accept a diminished verdict from codefendants in the first instance.[12] Where a pro rata release is conferred, the settling defendant's immunity from contribution results from the fact that the plaintiff has expressly agreed to surrender his right to pursue the claim against the non-settling defendants. This reasoning, however, does not work in reverse – because a settling codefendant such as the Trust otherwise possesses limited exposure to contribution claims does not mean that the plaintiff has expressly agreed to release the non-settling codefendants from joint and several liability

[12] Significantly, the pertinent provision does not contain "hold harmless and defend" language. Moreover, it is clear that, to the extent that the TDP drafters wished to provide a mandatory pro rata credit, they knew how to accomplish this effect. See, e.g., TDP §H.2.(d).

for the full amount of a verdict. Indeed, in such circumstances, the plaintiff possesses a strong incentive not to release the non-settling codefendants.[13]

ACandS and Owens Corning suggest that the asbestos defense bar would never have agreed to provide the Trust with the insulation from liability that it receives under the TDP absent the conferral of a pro rata release from asbestos health claimants. It is significant, however, that the complained-of exposure is not a consequence of the TDP, but results instead from the application in Pennsylvania of the principle of joint and several liability, which substantially advantages plaintiffs over solvent codefendants in a situation involving one insolvent defendant.[14] The TDP simply does not relieve Pennsylvania strict liability codefendants from this effect. In addition to entering the class action settlement with this burden, the Manville codefendants must have appreciated the protections afforded to Johns-Manville under the federal Bankruptcy Code; the finite assets possessed by the Trust created to resolve the flood of asbestos-related claims; their relative position in relation to the asbestos health claimants in terms of priority; and the corresponding likelihood that they would be foreclosed from achieving substantial contribution from Johns-Manville or any entity succeeding to its liabilities. Thus, it is not surprising that they would have compromised their rights against the Trust substantially in furtherance of the Trust's objective to achieve a fair overall distribution and their own desire to attain some degree

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[13] ACandS emphasizes the general language of Section H.3 indicating that setoff credit is the preferred method of addressing codefendant claims. This provision, however, does not address the amount of setoff available, which is determined, first by reference to the more specific provisions of the TDP, and ultimately by applicable state law.

[14] Indeed, ACandS would have been in precisely the same position had there never been a settlement with Johns-Manville or a TDP -- under Pennsylvania law (as interpreted by the majority), Mrs. Baker could have collected both ACandS and Johns-Manville's portions of the verdict from ACandS, leaving ACandS to look to the insolvent Manville for contribution with little likelihood of substantial recovery.

of contribution and/or setoff in relation to their claims. This appears to be the purpose and effect of the TDP -- a balanced division of Trust funds consistent with the existing rights and interests of the parties, with overlaying terms providing additional protection for the Trust corpus. There does not, however, appear to have been an incentive for the asbestos health claimants to effectuate a wholesale restructuring of their core rights and remedies vis-à-vis the Trust's codefendants. Indeed, neither ACandS nor its amicus has identified any valuable consideration tendered (or right surrendered) to asbestos health claimants in connection with the class action settlement commensurate with the highly valuable right of the claimants to pursue full recovery under a theory of joint and several liability under applicable law.[15]

[15] ACandS describes the benefit conferred upon asbestos health claimants as enabling them to bring claims against the Trust where previously no recovery would have been possible. In the first instance, this would appear to be an overstatement, since asbestos health claimants had the ability to file claims in the Manville bankruptcy proceeding to pursue some degree of recovery on their claims. Moreover, attainment by the claimants of the agreed-upon ability to pursue a ten-percent return conditioned upon submission to a claims procedure requiring a threshold determination of individual entitlement would not appear to represent a quid pro quo for the surrender of an interest as valuable as the ability to pursue full recovery against the codefendants (in the present case, the exchange would have been of a chance to obtain $30,000 for the chance to obtain $440,000). This is so particularly since the codefendants attain a corresponding benefit from the claimant's receipt of settlement funds from the Trust in the form of a verdict setoff of at least the pro tanto settlement figure. See, e.g., TDP §H.3.(c)(i).

Owens Corning emphasizes that the settlement was on a national scale, therefore suggesting that balancing of rights must be viewed on a broader basis. Owens Corning does not, however, provide any discrete examples of the interests exchanged in this broader field. Moreover, the structure of the TDP retains, in substantial part, the governance of applicable local tort principles, thus seeking to strike its balance of the parties' interests vis-à-vis the Trust within the context of individual claims. Indeed, it would be highly unlikely that a court would approve a settlement that sacrifices substantial interests of claimants in one jurisdiction in favor of the conferral of enhanced entitlements upon claimants within another.

9-10) The application of state law – As noted, I agree with the majority that, regardless of the continued vitality of Walton and Giant Eagle, the UCATA applies to strict liability actions. Accordingly, independent of the TDP, Pennsylvania law does not impose a pro rata release in the present situation.

11) ACandS's alternative argument advocating removal of the Trust from the allocation calculation -- As noted by the majority, in In re Joint Asbestos Litig., 919 F. Supp. 1 (E.D.N.Y. & S.D.N.Y. 1996), upon assessing the TDP in connection with the application of Maryland law, Judge Weinstein found that judicial modification of the terms of the class settlement was necessary to achieve a balanced result. The selected modification was to lessen the effect of joint and several liability by spreading the bulk of the Trust's proportionate share of liability among the other codefendants' shares. See id. at 8-9. Judge Weinstein reasoned that departure from the terms of the TDP and relief from the effect of Maryland law was appropriate, since "the Trust confounds the underlying assumption of Maryland law that a joint tortfeasor can be made to pay a pro rata share, irrespective of whether it pays to the plaintiff or to a co-defendant." Id. at 8.

I would defer to Judge Weinstein's assessment of Maryland law, as it is not directly pertinent to this case. As previously noted, however, in Pennsylvania jurisprudence, the impact to which he refers results, not from the terms of the TDP, but from an ordinary application of the doctrine of joint and several liability, as the same confounding effect is presented by a settling codefendant who becomes insolvent or insulates his assets from judgment. The policy of favoring the injured plaintiff in such circumstances is the very reason that joint and several liability exists and is reflected in the provisions of the UCATA delineating the contribution interests of joint tortfeasors. Thus, I view ACandS's alternative argument not as implicating any failing on the part of TDP, but as an attempt to engraft new terms upon the TDP to correct perceived unfairness that arises wholly independently. While I recognize the substantial difficulties facing Trust codefendants in complex mass

asbestos tort litigation,[16] and the arguments among courts and commentators concerning the overall fairness of the application of joint and several liability generally and in such circumstances,[17] this case was not argued or taken to evaluate a widescale restructuring of our tort law as it applies to mass tort cases, but rather, to ensure that the parties' class action settlement was implemented according to its terms.

In summary, in conformance with the majority's holding concerning the effect of Pennsylvania law in relation to written releases, ACandS could obtain a full setoff in relation to the Trust's share of the verdict only if the release provided by the Bakers, or the provisions of the TDP, contained an express agreement to surrender the interest in pursuing full recovery from the Trust's codefendants pursuant to the doctrine of joint and several liability, thereby constituting a full pro rata release. The release that the Bakers provided was pro tanto, and, although the terms of the TDP insulate the Trust from substantial exposure to a contribution claim by ACandS, they simply do not reflect a commitment on the part of the Bakers to surrender their interest in pursuing full recovery against the Trust's codefendants, including ACandS. Thus it is that I come to join Mr. Justice Cappy in affirming the order of the Superior Court.

Mr. Justice Zappala and Madame Justice Newman join this concurring opinion.

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[16] Certainly few of the Manville codefendants contributed to the overall injury to the plaintiffs' class on the scale of Johns-Manville, which was the United States' largest supplier of asbestos-related products.

[17] See, e.g., Jean Macchiaroli Eggen, Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions, 73 TEX. L. REV. 1701, 1717-21 (Jun. 1995). Certainly the burdens of joint and several liability are magnified in the context of mass tort litigation.