

**UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

In re  BESTWALL LLC,  Debtor.	Chapter 11  Case No. 17-31795 (LTB)
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**STATEMENT OF INTEREST ON BEHALF OF THE UNITED STATES OF AMERICA  
REGARDING ESTIMATION OF ASBESTOS CLAIMS**

The United States respectfully submits this statement of interest under 28 U.S.C. § 517 and 11 U.S.C. § 1109(b) to address the estimation of claims in this Chapter 11 case in which Bestwall LLC (“Debtor”) seeks to confirm a plan of reorganization that resolves current and future asbestos claims by establishing an asbestos trust under section 524(g) of the Bankruptcy Code. The United States has a strong interest in ensuring the transparency of Chapter 11 proceedings and ensuring that only valid claims receive compensation. Now that the Court has granted Bestwall’s motion for estimation of current and future mesothelioma claims, *see* Dkt. 875, Minute Order Oct. 22, 2020, the United States submits this statement to urge the Court to implement procedures that will ensure transparency and the accurate estimation of Debtor’s asbestos liabilities. In particular, the United States files this statement in support of Debtor’s pending Rule 2004 motions for orders directing submission of personal injury questionnaires and allowing examination of asbestos trusts. *See* Dkt. Nos. 1236, 1237.

As described herein, both courts and commentators have observed that a significant number of asbestos claimants in the tort system and in Chapter 11 proceedings have provided conflicting and/or inaccurate information regarding the asbestos products to which they were exposed. Some

claimants improperly have claimed exposure to one set of products in one case while claiming exposure to a different set of products in a subsequent case. In addition, some claimants have delayed filing subsequent claims in order to conceal the fact that they intend to make inconsistent allegations regarding product exposure in a subsequent case.

Recognizing this phenomenon, courts presiding over Chapter 11 proceedings increasingly are putting in place procedures requiring claimants to provide basic information documenting their allegations regarding product identification (and other elements of their claims) as well as the prior claims they have made in the tort system and to other asbestos trusts. In addition, 16 states to date have passed asbestos claim transparency legislation requiring the initial disclosure of such information using streamlined procedures at the outset of asbestos cases filed in state courts, and other states are currently considering similar legislation. Such laws require claimants to document, among other things, their prior representations regarding product exposure and to certify their exposure history in order to avoid subsequent, inconsistent representations.

While some claimants in this case may have already provided some basic information to the extent they filed cases in states adopting such procedures, the United States urges the Court to adopt similar streamlined procedures in order to collect basic information regarding product identification and other matters before estimating the claims in this case. Such procedures will assist the Court in accurately estimating Debtor's asbestos liability, deter fraudulent claims, assist in the proper allocation of sums available to pay deserving claimants, and promote transparency in this Chapter 11 case.

#### **INTERESTS OF THE UNITED STATES**

1. The United States has long had a concern with transparency in asbestos bankruptcies and the appropriate resolution of claims filed in such proceedings. Accordingly, the

Department of Justice has filed objections to individuals nominated to serve as Future Claims Representatives when appropriate to ensure that only individuals who will zealously represent the interests of future claimants receive such appointments.<sup>1</sup> Likewise, the Department has filed objections to proposed plans of reorganization and disclosure statements in several asbestos bankruptcies seeking (1) to increase the transparency of trust operations and (2) to ensure that the requirements for submitting claims to post-confirmation trusts guarantee that only deserving claims receive compensation.<sup>2</sup>

2. In addition, the United States has a potential direct financial interest in the appropriate resolution of claims in this Chapter 11 proceeding. In many cases, payment of personal injury claims will trigger reimbursement obligations to the United States under the Medicare Secondary Payer Statute (“MSP Statute”), 42 U.S.C. § 1395y(b)(2). *See Taransky v. Sec’y of Health and Human Servs.*, 760 F.3d 307, 309-10 (3d Cir. 2014). The United States therefore has a strong interest in ensuring that the estimation of claims in these proceedings is conducted in a transparent manner; that the assets of Debtor are preserved to the greatest extent possible to pay

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<sup>1</sup> *See, e.g., In re Duro Dyne National Corp.*, No. 18-27963 (MBK) (Bankr. D.N.J. Sep. 26, 2018) (Dkt. 94); *In re The Fairbanks Co.*, No. 18-41768-PWB (Bankr. N.D. Ga. Dec. 14, 2018) (Dkt. 134); *In re Maremont Corp.*, No. 19-10118 (KJC) (Bankr. D. Del. Feb. 14, 2019) (Dkt. 63); *In re Imerys Talc America, Inc.*, No. 19-10289 (LSS) (Bankr. D. Del. Apr. 10, 2019) (Dkt. 347); *In re Paddock Enterprises LLC*, No. 20-10028 (LSS) (Bankr. D. Del. Mar. 4, 2020) (Dkt. 126). The United States has also affirmatively moved to appoint certain future representatives. *See, e.g., In re The Fairbanks Co.*, No. 18-41768-PWB (Bankr. N.D. Ga. Dec. 31, 2018) (Dkt. 157); *In re Maremont Corp.*, No. 19-10118 (KJC) (Bankr. D. Del. Feb. 20, 2019) (Dkt. 68); *In re Imerys Talc America, Inc.*, No. 19-10289 (LSS) (Bankr. D. Del. Apr. 10, 2019) (Dkt. 348); *In re Paddock Enterprises LLC*, No. 20-10028 (LSS) (Bankr. D. Del. Mar. 13, 2020) (Dkt. 192).

<sup>2</sup> *See, e.g., In re Duro Dyne National Corp.*, No. 18-27963 (MBK) (Bankr. D.N.J. Feb. 8, 2019) (Dkt. 140, 447); *In re Maremont Corp.*, No. 19-10118 (KJC) (Bankr. D. Del. Mar. 4, 2019) (Dkt. 112) (combined disclosure statement/plan objection); *In re Kaiser-Gypsum Co., Inc.*, No. 16-31602 (JCW) (Bankr. W.D.N.C. Nov. 6, 2018) (Dkt. 1299); *In re Sepco Corp.*, No. 16-50058 (AMK) (Bankr. N.D. Ohio Aug. 7, 2019); *In re Imerys Talc America, Inc.*, No. 19-10289 (LSS) (Bankr. D. Del. Oct. 4, 2020) (Dkt. 2279) (supplemental objection).

the claims of legitimate asbestos victims; and that Debtor's assets are not dissipated through payment of invalid claims.

3. The United States further seeks to advise the Court of its concern that payments to legitimate asbestos claimants could be diluted through fraud, mismanagement, or abuse. The United States has a strong interest in ensuring that these proceedings are not used to facilitate fraud and abuse in other asbestos-related proceedings.

4. Accordingly, the United States submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. *See generally Hall v. Clinton*, 285 F.3d 74, 79-80 (D.C. Cir. 2002).<sup>3</sup> In addition, the United States is a party with a direct interest in this proceeding, with a corresponding right to "appear and be heard on any issue." *See* 11 U.S.C. § 1109(b); *see also In re Thorpe Insulation Co.*, 677 F.3d 869, 886-88 (9th Cir. 2012) (parties whose rights would potentially be substantially affected by asbestos-related bankruptcy plan had party-in-interest standing); *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 215 (3d Cir. 2011) (en banc).

### **BACKGROUND**

5. In 1994, Congress enacted 11 U.S.C. § 524(g), which created a comprehensive mechanism for addressing both existing and future claims for injuries caused by asbestos. Since that time, more than 60 companies have utilized section 524(g) to resolve their asbestos liabilities,

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<sup>3</sup> The Internal Revenue Service also filed Proofs of Claim against the Debtor. Claims Register Nos. 2-1 (Nov. 29, 2017); 6-1 (Aug. 28, 2019). The arguments made herein are without prejudice to any arguments the IRS may make with respect to any matter in this case. As stated above, this statement of interest is also without prejudice to any objections or arguments that may be raised by the United States, including those not related to tax claims, with respect to any disclosure statement, plan, or other matter.

establishing post-confirmation trusts to pay claims to those alleging exposure to asbestos products. *See* U.S. GAO, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3, 15 (2011).

6. In enacting section 524(g), Congress underscored that the statutory procedures were designed to implement “high standards with respect to regard for the rights of claimants.” H.R. Rep. 103-835, 41, 1994 U.S.C.C.A.N. 3340, 3349. Among other things, paying legitimate claims—and legitimate claims only—advances one of Chapter 11’s fundamental purposes: “the creditors’ interest in maximizing the value of the bankruptcy estate.” *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008).

7. In recent years, however, both courts and commentators have expressed concern with the operations of many asbestos trusts, particularly as they relate to fraudulent claims filed both within and outside the bankruptcy system. In 2010, the RAND Institute for Civil Justice conducted a comprehensive study of the 26 largest asbestos trusts then in operation, which at that time accounted for approximately 99 percent of all asbestos trust payments. *See* Dixon, McGovern, and Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice, 2010, at xi. Among other findings, the RAND Report found that, over the study period, persons who did not have malignant conditions accounted for 86 percent of all claims made to the trusts and 27 percent of all trust payments, notwithstanding that these claimants usually would not have been compensated at all for those injuries in the tort system. *Id.* at xiv. As the RAND Institute for Civil Justice later observed, “[t]rust outlays have grown rapidly since 2005” and there is evidence that “a lack of coordination between the trusts and the tort system allows plaintiffs to, in effect, recover once in the tort system and then again from the trusts.” Lloyd Dixon & Geoffrey McGovern, *Asbestos*

*Bankruptcy Trusts and Tort Compensation*, RAND Institute for Civil Justice, xi (2011). This is a concern not only for defendants, but also future asbestos claimants: “Higher trust payments to current plaintiffs mean fewer trust resources for future plaintiffs, so also of concern is whether a lack of coordination between trusts and the tort system advantages today’s plaintiffs relative to future plaintiffs.” *Id.* The report’s findings underscore, among other things, “the importance of information on exposure to the product and practices of the bankruptcy firms in determining the trusts’ effects on plaintiff compensation and on payments by defendants that remain solvent.” *Id.* at xvi. *See also id.* at 7 (noting “Defendants and plaintiffs alike raise issues concerning the fairness, transparency, and proper role of asbestos trusts in the civil justice system”).

8. Flawed claim submissions can significantly impact the estimation of claims in a Chapter 11 proceeding. For example, in *In re Garlock Sealing Technologies, LLC*, the court found that plaintiffs had withheld exposure evidence in “each and every one” of the pre-petition asbestos claims that it had sampled. 504 B.R. 71, 84 (Bankr. W.D.N.C. 2014). Indeed, in three of the cases the court reviewed, plaintiffs had filed claims against trusts established by other asbestos defendants even after representing to a court of law in a different proceeding that they had never been exposed to those defendants’ products. *Id.* at 85. The court found that, “on average plaintiffs disclosed only about 2 exposures to bankrupt[] companies’ products, but after settling with Garlock made claims against about 19 such companies.” *Id.* at 84.

9. In addition to providing inaccurate or inconsistent information regarding the products to which they were exposed, the court observed that many claimants also purposefully delayed filing claims with asbestos trusts to conceal the range of products to which they were exposed. The court found evidence, for example, that plaintiffs and their lawyers sought 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 viable defendants)." *Id.* The court concluded that "[i]t was a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information." *Id.* at 85; *see also id.* at 84 ("One of the leading plaintiffs' law firms with a national practice published a 23-page set of directions for instructing their clients on how to testify in discovery.").

10. The court determined based on its review of the evidence that asbestos litigation in the tort system had been "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." *Id.* at 82. As a result, the court concluded that it could not rely on settlement history data to estimate the asbestos claims: "[T]he settlement history data does not accurately reflect fair settlements because exposure evidence was withheld. While that practice was not uniform, it was widespread and significant enough to infect fatally the settlement process and historic data. It has rendered that data useless for fairly estimating Garlock's liability to present and future claimants." *Id.* at 94; *see also Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, No. BR 00-22876, 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.").

11. State courts presiding over asbestos litigation have reported similar findings. *See* 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, 1189 (2014) (describing *In re Asbestos Litig.: Ltd. to Montgomery*, 09C-11-217 ASB (Del. Super. Ct. Nov. 7, 2011)). For example, in describing her experience presiding over asbestos litigation, a former Delaware Superior Court judge reported that in one typical case,

despite a local standing order for asbestos cases requiring “mandatory disclosure requirements for all bankruptcy trust claims,” plaintiffs’ counsel repeatedly “assured the court that no disclosure was required because no such claims had been filed.” *Id.* at 1189-90. Yet “the day before trial, defense counsel learned that a total of twenty bankruptcy claims had been submitted to various trusts and that significant sums of money had already been received by the” plaintiffs. *Id.* at 1192.

12. Nor are such examples isolated in nature. As commentators have observed, “double dipping has . . . bedeviled the asbestos ecosystem” where plaintiffs “have double dipped by seeking funds from both the tort system and from one of the roughly sixty asbestos bankruptcy trusts.” *See* Nora Freeman Engstrom, *Retaliatory Rico and the Puzzle of Fraudulent Claiming*, 115 Mich. L. Rev. 639, 659-660 (2017) (listing examples). *See also* James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, Mealey’s (Jan. 18, 2018) (The “over-naming problem has become an epidemic, driving up costs for those entities that simply do not belong as defendants.”); S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299 (2013); Mark D. Plevin, *The Garlock Estimation Decision: Why Allowing Debtors and Defendants Broad Access to Claimant Materials Could Help Promote the Integrity of the Civil Justice System*, 23 No. 4 J. Bankr. L. & Prac. NL Art. 2 (Aug. 2014).

13. A lack of transparency in the tort system and in the post-confirmation trusts established to pay asbestos claims has allowed certain counsel to file claims in multiple venues making inconsistent representations regarding the products to which claimants were exposed. As the *Garlock* court concluded, this practice is “widespread and significant.” 504 B.R. at 94.



### STATEMENT OF THE UNITED STATES

14. The United States files this statement of interest to urge the Court to adopt procedures necessary to ensure the accurate estimation of asbestos claims. As the experience in *Garlock* and other cases has demonstrated, there is evidence that significant numbers of asbestos claims filed in Chapter 11 proceedings are not valid, and that there are significant factors such as product exposure history that may materially impact the estimation of the asserted claims. Accordingly, adequate disclosure is necessary to ensure the validity of the estimation.

15. The United States has an interest in ensuring that debtor assets are preserved to the maximum extent possible to pay the claims of the most seriously injured individuals, and that assets of the debtor are not dissipated through payments to persons (1) asserting fraudulent claims or (2) who otherwise would not have had viable claims in the tort system or under the bankruptcy code. Critical to the estimation process is assessing how other potential sources of asbestos exposure will affect the valuation of particular claims in the Chapter 11 proceedings. As the *Garlock* court noted, a claimant who can credibly demonstrate that the debtor was the sole cause of his injury may be entitled to a larger judgment than a plaintiff for whom the debtor was just one of many sources of exposure. 504 B.R. at 82. Likewise, it is important to gather sufficient information to ascertain whether the claims are valid at all, including whether there is evidence demonstrating that claimants were in fact exposed to the debtor's products.

16. Finally, where, as here, claimants seek to use past tort settlements as a basis for estimation, it is important to assess the reliability of that historical data in light of the evidence uncovered in *Garlock* that tort plaintiffs may have withheld exposure data or later submitted conflicting claims to asbestos trusts or other sources. Discovery of asbestos trusts can be helpful

not only in assessing the validity of asserted claims, but also in assessing the reliability of using historical settlement values in estimating asbestos claims filed in this Chapter 11 proceeding.

### **I. Recognition of the Need For Disclosure And Transparency**

17. Recognizing the problems that have been identified with respect to the compensation of asbestos claims, courts and legislatures have implemented a number of mechanisms to increase transparency and allow for more appropriate compensation of claims. There is a growing recognition that such procedures are critical in order to ensure appropriate allocation of scarce resources and ensure transparency in asbestos compensation.

18. **Asbestos Claims Transparency Legislation.** In recent years, many state legislatures, responding to the evidence of inconsistent allegations of exposure to asbestos products, have passed legislation requiring initial disclosures of basic information in asbestos cases filed in the state court system.<sup>4</sup> These laws require plaintiffs to make initial disclosures of the trust claims and lawsuits they have filed regarding their exposure to asbestos products and provide documentation showing the range of products to which they were exposed.

19. Many of these states have based their statutes on model legislation developed by the American Legislative Exchange Council, a nonpartisan voluntary membership organization of state legislators. That model legislation notes that the “lack of transparency” in the system “raises a strong potential for fraud and abuse, as plaintiffs may allege facts intended to maximize

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<sup>4</sup> See, e.g., Ariz. Rev. Stat. § 12-782; Ga. Code Ann. § 51-14; Iowa Code Ann. §§ 686A.1-9, 686B.1-9; Kan. Stat. Ann. §§ 60-4912-4918; Mich. Code. Ann. § 600.3010-3016; Miss. Code §§ 11-67-1 to -15; N.C. Gen. Stat. Ann. Sess. § 1A-1, Rule 26(b); N.D. Cent. Code §§ 32-46.1-01 to -05; Ohio Rev. Code Ann. §§ 2307.951-954; Okla. Stat. tit. 76, §§ 81-89; S.D. Codified Laws §§ 21-66-1 to -11; Tenn. Code §§ 29-34-601 to -609; Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-058; Utah Code §§ 78B-6-2001 to -2010; W. Va. Code §§ 55-7F-1 to -11; Wis. Stat. § 802.025.

recoveries against trusts created through the bankruptcy system and differing or even conflicting facts to maximize recoveries against tort system defendants.” American Legislative Exchange Council, Asbestos Claims Transparency Act § 2(A)(5), <https://www.alec.org/model-policy/asbestos-claims-transparency-act/>. It further concludes that “[i]t is in the interest of justice that there be transparency with respect to claims made in the bankruptcy system and in civil asbestos litigation to address the potential for fraud and duplicate payments (whether by trusts or solvent companies).” *Id.* § 2(A)(6). In addition, “[p]resentation of inconsistent or fraudulent claims data may deprive injured claimants of compensation in favor of those who have not been injured by asbestos products.” *Id.* § 2(A)(7).

20. To address these concerns, the model legislation imposes certain initial disclosure requirements designed “[t]o provide transparency of claims made against asbestos-related bankruptcy trusts and in the tort system,” “[t]o assure that courts and litigants have available to them information as to payments an asbestos claimant has or may receive from asbestos-related bankruptcy trusts,” “[t]o facilitate faire and appropriate compensation to claimants with a rational allocation of responsibility to all persons whether current defendants or not,” and “[t]o preserve the resources of both defendants and asbestos-related bankruptcy trusts to help promote adequate recoveries for deserving claimants.” *Id.* § 2(B)(1)-(4).

21. Specifically, within 30 days of commencing an asbestos action, the legislation requires that “a claimant shall provide to all parties a statement of any and all existing or anticipated claims against Asbestos Trusts.” *Id.* § 4(A). This legislation requires “under penalty of perjury an attestation by the claimant that the statement is based on a good faith investigation of all potential claims against Asbestos Trusts” along with a duty of supplementation as additional information becomes available. *Id.* The legislation contains documentation requirements,

including the production of “final executed proofs of claim together with any supporting materials used to support such claim against asbestos Products.” *Id.* § 4(A)(1). “A claimant must also produce all documents or information relevant or related to such claims asserted against the Asbestos Trusts, including, but not limited to work histories, affidavits, depositions and trial testimony of the claimant and others as well as all medical documentation (including but not limited to X-rays, test results, doctors’ reports and pathology results.” *Id.* These initial disclosure requirements do not supplant any further discovery defendants may take in the normal course of the litigation. *See id.* § 4(D). Nonetheless, they provide a basis upon which defendants may assess the range of defendants that may be liable for the claim as well as the recoveries the claimant has or may receive. In addition, if there are instances where a claimant has made inconsistent assertions regarding product exposure, such assertions may be uncovered through such initial disclosure requirements. Noncompliance may lead to sanctions, including dismissal of the asbestos action with prejudice. *Id.* § 4(F).

22. **Asbestos Trust Distribution Procedures.** Courts in Chapter 11 proceedings have similarly adopted procedures designed to address these issues in assessing claims filed with post-confirmation trusts, and the United States has actively supported these measures by weighing in on proposed plans and trust distribution procedures in asbestos bankruptcy proceedings. *See supra* note 2.

23. For example, informed by discovery regarding submitted claims as part of its estimation proceedings, the court in *Garlock* adopted claims resolution procedures that sought to better screen out invalid or fraudulent claims submitted to the post-confirmation trust. *See* Settlement Facility Claims Resolution Procedures, *In re Garlock*, No. 3:17-cv-000275, Dkt. No. 13-1, at Ex. B (W.D. N.C.). Among other things, the procedures required certain claimants to

identify all other asbestos-related claims that the claimant had asserted and to provide copies of supporting documents submitted to, or served upon, any entity containing information regarding claimants' exposure to asbestos or asbestos-containing products, including claim forms previously submitted to asbestos trusts, ballots submitted in other bankruptcy cases and discovery responses in cases in the tort system. *Id.* at 27. Those claimants also were required to certify that the claimants did not know of any other entity that could be responsible for the alleged injuries that are the basis for the claims. *Id.* at 28. Finally, the procedures required execution of a release for information from all asbestos bankruptcy trusts against which such claimant had filed a claim and to release all information submitted to these other trusts along with the status of the claim and the amount and date of payment. *Id.* at 28. These procedures were designed to ensure transparency and prevent the sort of manipulation of representations regarding exposure information that had been uncovered during the estimation process; similar procedures have been adopted in other bankruptcy proceedings. *See, e.g.,* Maremont Asbestos Personal Injury Trust Distribution Procedures, *In re Maremont Corp.*, No. 19-bk-10118, Dkt. No. 222-2 (Bankr. D. Del.).

## **II. Disclosure Requirements and Estimation Procedures Adopted in Other Mass Tort And Asbestos Bankruptcies**

24. Transparency and disclosure are equally important to the estimation of asbestos claims in this Chapter 11 proceeding. Indeed, as the above examples illustrate, there is a growing recognition that there is a compelling need for transparency and disclosure with respect to the resolution and valuation of asbestos claims, whether in the tort system or in bankruptcy proceedings. As Debtor notes, this recognition has led multiple courts presiding over asbestos Chapter 11 proceedings to adopt disclosure requirements to collect basic information in a streamlined manner similar to those requested by Debtor here. Indeed, adoption of such

procedures is a best practice that has been applied to ensure an accurate estimation of mass tort claims in many Chapter 11 proceedings.

25. In particular, other mass tort and asbestos bankruptcies have effectively and efficiently used questionnaires and procedures similar to those requested by Bestwall to ensure transparent and accurate evaluation of claims.

26. One of the early successful mass tort bankruptcies was the *A.H. Robins* proceeding, which resolved tens of thousands of tort claims involving the debtor's Dalkon Shield intrauterine device. The *A.H. Robins* bankruptcy established a trust to pay the asserted claims and funded it with an adequate amount to pay those claims with money to spare. *See generally* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 655-56 (1992); *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 698-700 (4th Cir. 1989).

27. In the *A.H. Robins* proceeding, the court utilized questionnaires to collect basic information regarding the asserted tort claims, such as "the claimant's use of the Dalkon shield, including dates of insertion and removal, the type of injury alleged and the names of physicians or clinics visited by the claimant." *In re A.H. Robins Co.*, 862 F.2d 1092, 1093 (4th Cir. 1988); *see also A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986). The information collected on the questionnaires allowed the parties and the court to identify claims in which claimants lacked proof that the claimant was implanted with an A.H. Robins device. As a result, the court was able to conduct the estimation in a reliable and efficient manner, resolving thousands of tort claims through the use of streamlined bankruptcy procedures.

28. Such procedures have also been adopted in the context of mass tort bankruptcies involving asbestos. Indeed, as courts have gained experience with such proceedings, they have

increasingly recognized the critical nature of such disclosure to the estimation process. In the *USG* bankruptcy, for example, the court collected basic information that allowed it to “reject unsubstantiated claims, bogus medical evidence and fanciful theories of causation” and identify claimants who were “truly harmed.” *In re USG Corp.*, 290 B.R. 223 (Bankr. D. Del. 2003). In the *G-I Holdings* bankruptcy, the court similarly ordered initial disclosures as part of the estimation proceeding that allowed the debtor to object to claims it believed were “illegitimate or dispensable as a matter of law.” *In re G-I Holdings Corp.*, 323 B.R. 583, 622-23 (Bankr. D.N.J. 2005). Finally, as noted, in the *Garlock* Chapter 11 proceeding, the court ordered initial disclosure of basic information along with more extensive discovery regarding certain claims, which uncovered significant evidence of fraud and had a significant impact on the court’s estimation of the debtor’s liability. *See Garlock*, 504 B.R. at 94. The information collected through these streamlined disclosure procedures was used to perform an estimation that took into consideration “causation, limited exposure and the contribution of exposures to other products.” *Id.* at 73, 94-95.

29. The principles informing these other proceedings apply equally to this Chapter 11 proceeding. Basic requests for information such as the injured party’s occupation, sites of exposure, exposure to Debtor’s products and other manufacturers’ asbestos-containing products, conditions of exposure, and prior claims and recoveries from other entities like those contained in Debtor’s questionnaire are fundamental to conducting a reliable estimation and ensuring transparency in the compensation of asbestos claims.

30. Moreover, such disclosures can also have a beneficial impact in other proceedings and may generally further transparency in asbestos claims resolution. Because (as demonstrated above) plaintiffs in the tort system frequently withhold or make inconsistent claims regarding exposure evidence, there is significant misallocation of compensation for asserted asbestos claims.

In addition, because all proceedings are interrelated, with the same plaintiffs filing suit in the tort system while also filing claims against multiple asbestos trusts, the need for transparency is even greater. Disclosure in one proceeding can have a beneficial effect on other proceedings by avoiding the phenomenon of over-claiming that can deplete funds available to compensate deserving claimants. Indeed, as Debtor notes, the public disclosure of evidence in the *Garlock* proceeding allowed it to determine that inconsistent evidence was used by claimants asserting claims at issue in this Chapter 11 proceeding. *See* Dkt. 1237, at 13-16. Accordingly, once disclosed, information collected in one bankruptcy proceeding may have a beneficial effect in terms of improving the fairness and transparency of compensation decisions made in other proceedings.

### **III. Disclosure and Transparency in Asbestos Trust Operations**

31. The United States also supports Debtor's request for examination of other asbestos trusts because it will provide information to allow for a more accurate estimation of claims. Dkt. 1237. The current and future claimants propose estimating the value of claims using tort settlements of Bestwall and its predecessor, the former Georgia-Pacific LLC. *See* Dkt. 1449. To determine the reliability of using past tort settlement payments to estimate current and future claims, Bestwall seeks information from asbestos trusts regarding the parties with which it settled. Discovery from asbestos trusts is an important safeguard to help ensure that the evidence regarding other potential sources of compensation used in estimating asbestos claims is as accurate as possible. Moreover, where, as here, claimants seek to rely on historical settlement values in conducting their own estimation, such information may prove critical to assessing the reliability of that historical data.



32. Here, once again, *Garlock* is instructive. In *Garlock* the bankruptcy court ordered the production of asbestos claims data relating to claimants who previously settled with Garlock. *In re Garlock*, No. 10-31607 (W.D.N.C. Bankr. Aug. 7, 2020) (Dkt. 2430). As noted above, using this and other data, the *Garlock* court looked at a sample of these cases and found that in every single one there were “demonstrable misrepresentations” showing a “pattern” that “appears to have been sufficiently widespread to have a significant impact on Garlock’s settlement practices and results.” *In re Garlock*, 504 B.R. at 85. Garlock used its discovery from asbestos trusts to identify for the court cases where “the plaintiffs’ discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases.” *In re Garlock*, 504 B.R. at 85-86. As a result, the court concluded that Garlock’s “settlement history [is] an unreliable predictor of its true liability.” *Id.* at 86; *see also id.* at 94 (“the settlement history data does not accurately reflect fair settlements because exposure evidence was withheld”).

33. Here, as in *Garlock*, the information sought by the debtor will allow the court to evaluate the reliability of the proposed estimations of the asbestos claims. Moreover, such disclosure will further the important goal of transparency in asbestos compensation decisions in this and other asbestos Chapter 11 proceedings.

## CONCLUSION

34. For the foregoing reasons, the United States respectfully requests that the Court implement procedures that will ensure the accuracy and transparency of estimation of the asbestos claims in this Chapter 11 proceeding and grant Debtor's motions seeking personal injury questionnaires and an examination of asbestos trusts.

Respectfully submitted,

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December 28, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on December 28, 2020, I electronically filed the foregoing statement of interest using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: December 28, 2020

/s/ Gill P. Beck