UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In Re:	)	Chapter 11
GARLOCK SEALING TECHNOLOGIES LLC, et al.	)	Case No. 10-31607
Debtors.	)	Jointly Administered

INFORMATION BRIEF OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS

HAMILTON MOON STEPHENS STEELE & MARTIN, PLLC

Travis W. Moon (Bar No. 3067)
T. Jonathan Adams (Bar No. 21890)
201 South College Street
Charlotte Plaza, Suite 2020
Charlotte, NC 28244-2020
Telephone: (704) 344-1117

Co-Counsel for the Official Committee of Asbestos Personal Injury Claimants

CAPLIN & DRYSDALE, CHARTERED

Elihu Inselbuch
375 Park Avenue, 35th Floor
New York, NY 10152-3500
Telephone: (212) 319-7125

Trevor W. Swett III
Nathan D. Finch
Leslie M. Kelleher
Jeanna Rickards Koski
One Thomas Circle, N.W.
Suite 1100
Washington, D.C. 20005
Telephone: (202) 862-5000

Co-Counsel for the Official Committee of Asbestos Personal Injury Claimants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

For several decades, the Debtor Garlock Sealing Technologies, Inc. and its Debtor subsidiaries (collectively, with their predecessors in interest, "Garlock") manufactured and distributed asbestos-containing products, namely gaskets used to seal connections between pipes, and valve packing materials used to seal and prevent leakage from valves. Despite knowing of the dangers posed by its asbestos-containing products since at least the 1950's, Garlock continued to produce and sell those products, without adequate warnings to end-users, until 2000. Garlock's products were used, and workers were exposed to the asbestos they contained, in a wide range of occupational settings, such as shipyards and ships, steel plants, steam plants, and petrochemical facilities, to name a few. Many of the workers in those facilities fell ill, or will fall ill in the future, as a result of exposure to asbestos fibers, including asbestos emitted from Garlock's products. Many have died. And many of the injured, or their estates, have named or will name Garlock as a defendant in lawsuits to recover for their injuries.

Like dozens of other former manufacturers and distributors of asbestos-containing products, Garlock has found itself overwhelmed by the costs of resolving the present and future claims for asbestos-related injuries caused by its products. After defending cases at its insurers' expense for decades and paying out in excess of one billion dollars, and restructuring itself at least twice in an attempt to separate corporate assets from its asbestos liabilities, Garlock finally accepted the inevitable. On June 5, 2010, Garlock filed a petition to reorganize under Chapter 11.

On June 7, 2010, Garlock filed the Information Brief of Garlock Sealing Technologies LLC ("**Garlock Info. Br.**").[1] Despite its title, that brief is nothing more than *dis*information — a propaganda piece cynically intended to prejudice the Court against the claimants in this case, and to depict Garlock — rather than the tens of thousands of workers injured by its products — as the victim here. Despite having suffered (by its own admission) numerous "ruinous" verdicts against it,[2] and settling tens of thousands more claims in the tort system, Garlock now contends that its asbestos-containing products were harmless, that "few, if any" of the claims against it have any merit,[3] and thus that its "true responsibility" for the asbestos-related illnesses of the workers who were exposed to its products is minimal.[4]

By order dated June 16, 2010, this Court appointed the Official Committee of Asbestos Personal Injury Claimants (the "**Asbestos Claimants Committee**" or "**ACC**"), which is comprised of twelve individuals who hold asbestos personal injury claims against Garlock[5] and represents the interests of all persons currently holding such claims.[6] The Asbestos Claimants Committee now respectfully submits this Information Brief, which responds, in part, to Garlock's submission.

This Information Brief serves three main purposes. The first is to demonstrate that the elaborate "allowance-then-estimation" procedure proposed by Garlock is impractical and

---

1 Dkt. No. 24.

2 S*ee* Garlock Info. Br. at 57, 79.

3 *Id.* at 1.

4 *Id.* at 5.

5 Each individual member of the ACC is represented in the affairs of that committee by his or her tort counsel; the ACC as a whole is represented in this bankruptcy case by the undersigned counsel.

6 *See* Dkt. No. 101.

unnecessary, runs counter to the Bankruptcy Code's goals of efficiency and fairness, and implicates the due process rights of the individual claimants. Asbestos claims simply are too numerous for allowance proceedings, and would tie up the district court (where the jury trials to which the claimants are entitled would have to be held) for many years. As a practical matter, Garlock's proposed manner of proceeding can serve no purpose other than to delay indefinitely resolution of the claims and reorganization of the Debtors, all at enormous cost to the estate.

The second purpose of this Information Brief is to place this bankruptcy case in the context in which it should be viewed, by providing the Court with (a) an overview of the history of asbestos exposure and the diseases it causes, (b) a summary of the history of asbestos litigation, (c) a discussion of the difficulties presented by future claims in asbestos-driven bankruptcies, (d) an overview of the enactment and use of Bankruptcy Code § 524(g), (e) an explanation of why no other procedural avenues are available for resolution of future claims, and (f) a brief summary of the Debtors' pre-bankruptcy corporate transfers and restructurings, which merit further examination to determine whether they disadvantaged Garlock's creditors in favor of its owners and affiliates.

The third purpose of this Information Brief is to demonstrate to the Court why Garlock's attempts to subvert the bankruptcy process in order to rewrite history, law and medicine, and escape its 30-year history in the tort system, must be rejected. The asbestos claims asserted against Garlock are not specious, as Garlock contends, and Garlock's defenses to those claims have been rejected by the scientific and medical community, as well as by judges and juries in the tort system. Likewise, this Court should reject Garlock's claim that plaintiffs' law firms — and the trust distribution procedures approved by the courts in numerous bankruptcy cases — have somehow prevented Garlock from discovering whether other manufacturers' products have

contributed to plaintiffs' injuries, and forced Garlock to pay more than its fair share of liability. As shown below, this assertion is not only wholly unsupported by evidence, it defies logic and common sense.

Garlock has stated its intention of reorganizing within the framework of Section 524(g) of the Bankruptcy Code, a provision enacted by Congress specifically to deal with the complex and unique issues raised by asbestos-driven bankruptcies. If a Section 524(g) plan is confirmed, present and future asbestos claims against Garlock will be channeled to a post-confirmation trust, which will consider and resolve the claims pursuant to settlement criteria to be approved by the Court as part of a plan of reorganization. In return for being freed of such claims, Garlock will fund the trust, and the asbestos claimants will have recourse to the assets of the trust.

As Garlock points out, consensual Section 524(g) plans have been negotiated by the relevant parties in the vast majority of asbestos bankruptcies in the past. The ACC hopes that a consensual plan will be possible in this case as well. In its Motion For Scheduling Order For Plan Formulation Purposes (the "**Motion**"), filed concurrently with this Information Brief, the ACC provides a blueprint that will set this case on a path to that goal.

There are two main issues in these bankruptcy cases: the value of Garlock's asbestos liabilities and the value of the assets available to meet those liabilities (including assets in the estates and transferred assets that should be returned to the estates). The claims data accumulated over Garlock's thirty years in the tort system provides the best — indeed, the only — source of information from which a realistic evaluation of Garlock's aggregate liability for pending and future claims may be derived. The parties and their experts will be able to evaluate fully and fairly the extent of Garlock's aggregate present and future asbestos liabilities by reference to Garlock's historical claims resolution database, and Garlock's own knowledge of

how it behaved in the tort system and why it did so. The parties should be permitted discovery on those issues. The ACC believes that, after the parties have established their respective views on the extent of the assets and liabilities of the estates, the Debtors will be in a position to negotiate a plan with the ACC and a legal representative to be appointed by the Court for unknown future asbestos claimants, or "demand" holders (to use the terminology of Section 524(g)) (the "**Future Claims Representative**" or "**FCR**"). The ACC's and FCR's respective constituents — the holders of present claims for asbestos-related personal injury and wrongful deaths, and the holders of future demands for such wrongs — account for the only substantial liabilities of the estates; the amount of pre-petition commercial debt involved in this case is not significant. Under the ACC's proposed schedule, the necessary valuation work and plan negotiations should be concluded before Garlock's exclusive right to propose a plan, as extended, expires on April 1, 2011. If, ultimately, the parties cannot agree, one or more plans of reorganization will be proposed, and the Court will then need to structure a contested confirmation hearing.

In its Information Brief, Garlock has made clear its intention to use the bankruptcy process to try to avoid its 30-year litigation history. It wants to rewrite applicable state tort law and ignore the teachings of medical science, in an attempt to convince the Court that Garlock's "true responsibility" for asbestos claims is somehow less than it would be if it had remained in the tort system. Garlock hopes to thereby minimize the amount contributed to a Section 524(g) trust and preserve value for its parent company, Coltec Industries ("**Coltec**"), at the expense of its tort victims. The ACC respectfully submits that this Court should instead be instructed by the 28-year history of asbestos bankruptcies since the Johns-Manville Corporation filed in 1982, and the lessons learned in dozens of other Section 524(g) cases. It should not permit Garlock to

waste this Court's time — and the limited assets available to pay Garlock's tort victims — by warring in bankruptcy against the asbestos liability that it could not defeat over the course of more than thirty years of litigation in the tort system.

I. GARLOCK'S PROPOSED MASSIVE DISCOVERY AND ALLOWANCE PROCEEDINGS WOULD RESULT IN UNNECESSARY DELAY AND EXPENSE; THE ACC'S PROPOSED SCHEDULING ORDER PROVIDES THE BLUEPRINT FOR SECTION 524(G) PLAN CONFIRMATION

Garlock views these bankruptcy cases as an alternative to the tort system, and seeks to create a gauntlet through which asbestos claimants would be run, after which "few, if any" would be compensated. Garlock Info. Br. at 2. Garlock has indicated that it intends to ask this Court to approve a plan of reorganization that will include a Section 524(g) injunction channeling all of Garlock's pending and future asbestos personal injury claims to a trust.[7] Before doing so, however, Garlock would impose an elaborate allowance process, during which it would conduct extensive discovery with respect to tens of thousands of asbestos claims, and then seek to disallow most, if not all, of those claims. *See* Garlock Info. Br. at 75-76.

In the allowance proceedings it envisions, Garlock would seek to consolidate large numbers of claims under Federal Rule of Civil Procedure 42 and then subject those groups of claims to summary adjudication. Garlock argues that the adverse verdicts it suffered in the tort

[7] *See* Garlock Info. Br. at 75-76, 79 & 84. Garlock suggests, however, that the Court can enter a channeling injunction and discharge future claims pursuant to the Court's general equitable powers under Section 105, without requiring that the plan comply with the requirements of Section 524(g). *See* Garlock Info. Br. at 74, 84 n.199. This suggestion is far-fetched at best, given that Congress enacted Section 524(g) expressly to deal with asbestos-driven bankruptcies, and given that all confirmed plans in asbestos-driven bankruptcies since the enactment of Section 524(g) have been required to comply with it. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 233-34, 237 (3d Cir. 2004) (Section 105(a) cannot be "employed to extend a channeling injunction to non-debtors in an asbestos case where the requirements of § 524(g) are not otherwise met . . . [T]he general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g).").

system, and its extensive settlement history, should be ignored, and that, during the allowance proceedings, legal principles and evidentiary rules concocted by Garlock (far more favorable to Garlock than those applied by state and federal courts in the tort system) should be applied. Under Garlock's rules, tens of thousands of claims for which it would have been liable in the absence of bankruptcy would be disallowed (or so it hopes), at which point Garlock would estimate its aggregate liability for the few remaining present asbestos claims, and generate a tamped-down forecast of future claims, producing a total estimate of aggregate liability far lower than would result from an estimate that relied on reasonable extrapolation from Garlock's actual experience in the tort system. Indeed, according to Garlock, so many claims would be disallowed that it could pay all remaining claims in full, with equity left over for its parent company, Coltec. *See* Garlock Info. Br. at 83-84.

Asbestos debtors have suggested such schemes before, but no court has ever agreed to the procedure,[8] for reasons both legal and practical. Asbestos personal injury cases cannot be adjudicated *en masse* by way of consolidated summary dispositions under Rule 56. They are complex, fact-intensive proceedings. Notably, many claimants were exposed to a variety of asbestos-containing products made by many different manufacturers. *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 746 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) ("**Manville I**"). Disease may result from cumulative exposure to multiple sources of asbestos fibers. *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973). In addition, "[t]he illnesses may be difficult to detect, diagnoses may be disputed among experts and the injuries may be associated with several

[8] Variations of the Garlock proposal have been proposed by debtors in the Babcock & Wilcox, USG, W.R. Grace, and G-I Holdings ("**GAF**") bankruptcies. In none of these cases has the scheme actually been adopted.

causes." *Manville I*, 129 B.R. at 746 (citation omitted). Defendants such as Garlock often question whether a plaintiff has been exposed to their specific products, whether the claimed illness is actually caused by the defendant's asbestos or instead by exposure to other companies' products, and the extent of responsibility the defendant bears for the claim. By their very nature, such defenses almost always turn on disputed facts, and are specific to each case, which usually will prevent summary dispositions.

In any event, the asbestos claims against Garlock are too numerous to be individually adjudicated during these bankruptcy cases. If that were attempted, 28 U.S.C. § 157(b), Bankruptcy Code § 502(b), Bankruptcy Rule 3007, constitutional due process considerations, and the parties' rights to jury trials, would require the district court to conduct the proceedings. The effort would tie up the district court for years, and ultimately would collapse under its own weight. Garlock itself has acknowledged that the proposed process would delay its reorganization for years. In a telephonic investor presentation conference held on June 7, 2010, a spokesman for Garlock predicted that if it is permitted the discovery it desires, the bankruptcy cases would take five to seven years to complete.[9] In truth, seven years would not be enough. In *W.R. Grace*, for example, the debtor abandoned a similar program after having already conducted extensive discovery for almost three years, complaining that it would take many more years just to code into a database the information that was provided when W.R. Grace served discovery on individual claimants.[10]

---

[9] Garlock Asbestos Claims Resolution Process Conference Call Tr. 16, June 7, 2010 (excerpt attached as Ex. 1).

[10] *See* n.17, *infra*, and accompanying text.

There are significant legal and constitutional impediments to Garlock's proposed procedure. First, the Bankruptcy Court lacks jurisdiction to determine the distributable amounts of individual asbestos claims; under 28 U.S.C. § 157(b)(2)(B), "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11" are not core proceedings that may be decided by a bankruptcy court.[11] Thus, the district court would have to be the decision-maker in the allowance proceedings Garlock envisages.

Second, individual claims cannot be allowed or disallowed without providing notice and an opportunity to be heard to each claimant, as to do so would violate both constitutional due process and the procedural rights guaranteed to personal injury creditors in bankruptcy under Section 502(b) and Bankruptcy Rule 3007. *See, e.g.*, *In re La Rouche Indus., Inc.*, 307 B.R. 774, 781 (D. Del. 2004); *In re Waterman S.S. Corp.*, 157 B.R. 220, 221 (S.D.N.Y. 1993); *In re Roman Catholic Archbishop*, 339 B.R. 215, 223 (Bankr. D. Or. 2006) (holding that where estimation is in effect for purposes of distribution, due process requires individualized estimation).[12] *See also* *In re Federal-Mogul Global Inc.*, 330 B.R. 133, 154 (D. Del. 2005) (Rodriguez, J.) (noting that

[11] Indeed, Garlock acknowledges that this Court could not conduct allowance and estimation proceedings for individual personal injury and wrongful death claims, and has stated its intention to "propose an appropriate division of oversight of such issues between this Court and the district court." Garlock Info. Br. at 83. Garlock's plan clearly is not a blueprint for a speedy resolution to this bankruptcy case.

[12] If it proves to be necessary in these cases, the Bankruptcy Court may estimate asbestos personal injury and wrongful death claims *in the aggregate* for the purpose of *plan formulation and confirmation*. An aggregate estimation for plan formulation or plan confirmation would not require or permit the court to make decisions on the merits of any particular claim or groups of claims. *In re Federal-Mogul Global Inc.*, 330 B.R. 133, 154-55 (D. Del. 2005) (Rodriguez, J.) ("estimation of asbestos liability for the limited purposes of plan formulation is a fruitful endeavor because it promotes the speed and efficiency goals of the Bankruptcy Code, while not implicating the procedural rights of the individual claimants"). Such an estimation proceeding would take place pursuant to 11 U.S.C. §§ 1129 and 524(g), and would not involve claim allowance at all.

determination of "the merits of individual or class of individuals claims. . . . would require that each claimant be afforded the procedural protections of the due process clause of the Fifth Amendment, thereby requiring cases that presented disputed issues of fact a trial by jury").

Finally, each individual asbestos personal injury claimant retains the constitutional right to a jury trial, which is preserved by statute notwithstanding Garlock's bankruptcy. *See* 28 U.S.C. § 1411(a) ("this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim"). Congress has also mandated that such a trial be conducted in the district court that presides over the bankruptcy or, if that court so orders, in the district where the claim arose. 28 U.S.C. §§ 157(b)(5) & 1411(a).

Any attempt by Garlock to impose a program of individual allowance or disallowance of asbestos claims, whether singly or in categories under Rule 42, will trigger all of the procedural rights noted above with respect to any potentially-affected claimholder. *E.g.*, *In re Federal-Mogul*, 330 B.R. at 154 (determining "merits of individual [claim] or class of individuals claims . . . would require that each claimant be afforded the procedural protections of the due process clause of the Fifth Amendment, thereby requiring cases that presented disputed issues of fact a trial by jury"). Individual claimants would have to be brought before the Court, and each would be entitled to challenge the validity of Garlock's theories, to engage in discovery, and to gather testimony and other evidence. Such a process would be tantamount to full-blown litigation of tens of thousands of claims. Plan formulation and confirmation would be delayed indefinitely, and the costs in time and money would be enormous.

Thus, allowance proceedings for asbestos claims are simply not feasible. Nor are they legally required. Under a Section 524(g) plan, a trust and claims-processing facility — not the

bankruptcy court or the district court — will administer the evaluation and payment of the asbestos claims. That is one of the great virtues of a Section 524(g) channeling injunction: it permits individualized claim resolution without inundating the courts. The trust and channeling injunction provisions of Section 524(g) are designed to obviate in-court allowance proceedings for asbestos claims, making it possible to resolve an asbestos bankruptcy, discharging the debtor of pending claims, and insulating it, on fair terms, from future demands, all without the imponderable burdens, delays, and costs that tens of thousands of in-court individual claim determinations would entail.

Under Section 524(g), discovery aimed at the particulars of individual claims is neither necessary nor appropriate. The material issue for plan formulation purposes is what Garlock would have to pay to resolve all pending and future asbestos claims outside of bankruptcy — in other words, its aggregate liability. The key source of information on that issue is Garlock's historical claims resolution database. Indeed, Garlock's history in the tort system provides the only reliable data from which the parties and their experts (and the Court, if necessary) can make a reasonably accurate estimate of the value of Garlock's aggregate liability for claims now pending against it, as well as claims that will arise in the future. *See, e.g.*, *In re Federal-Mogul*, 330 B.R. at 155; *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)*, 322 B.R. 719, 722 (D. Del. 2005) (Fullam, J.); *In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006) (Robreno, J.). As set out in the ACC's Motion for Scheduling Order, once Garlock's claims database is provided to the ACC and FCR, discovery should focus on the processes Garlock followed in deciding whether to settle or try asbestos cases, because their processes and decisions are what determined the claims values reflected in the database.

Experience in other asbestos bankruptcies teaches that if discovery and trial for the liability estimate are permitted to stray into individual claims litigation, the only result is fruitless delays and enormous costs. The *W.R. Grace* bankruptcy case, to which Garlock points as a model (*see* Garlock Info. Br. at 79-80, nn.185 & 189), provides an example. There, the debtor sought extensive discovery from numerous sources, including several trusts established pursuant to Section 524(g). In 2005, the *W.R. Grace* bankruptcy court ordered all claimants with current claims against W.R. Grace to answer a detailed, multi-page questionnaire about their claims, disclosing medical and exposure information.[13] Claimants submitted more than 100,000 responses to the questionnaires, with voluminous corroborating documentary evidence attached, all at enormous cost to that constituency.[14] The court was forced to extend the discovery deadlines and the estimation hearing 11 different times.[15] The process gave rise to numerous

---

[13] *See In re W.R. Grace & Co.*, Case. No. 01-01139 (Bankr. D. Del. Aug. 29, 2005) (Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 9301] (Ex. 2).

[14] Grace also attempted to subpoena information from various existing asbestos bankruptcy trusts, such as the Manville and Celotex Trusts, which predictably led to even more third party discovery disputes.

[15] *See In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Dec. 21, 2005) (Order Modifying the Case Management Order for the Estimation of Asbestos Personal Injury Liabilities Regarding the Extension of Time for Claimants to Respond to Questionnaires and to Designate Non-Expert Witnesses) [Dkt. No. 11403]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Jan. 10, 2006) (Revised Order Modifying the Case Management Order for the Estimation of Asbestos Personal Injury Liabilities Regarding the Extension of Time for Claimants to Respond to Questionnaires and to Designate Non-Expert Witnesses) [Dkt. No. 11515]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Jan. 31, 2006) (Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 11697]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Feb. 21, 2006) (Order Modifying the Case Management Order for the Estimation of Asbestos Personal Injury Liabilities Regarding the Extension of Time for Claimants to Respond to Questionnaires) [Dkt. No. 11885]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Aug. 27, 2006) (Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 12151]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. April 27, 2006) (Order Modifying the Case Management Order for the Estimation of Asbestos Personal Injury *(Footnote continued on next page.)*

motions. The process proved so time-consuming that Judge Fitzgerald declared that she "had this questionnaire until the cows come home" and "would never do this again" because it was a "nightmare."[16] Even after this extreme delay and expense, the debtor never used more than a small fraction of the information it had gathered. Instead, almost three years into its individual claims discovery program, the debtor complained that simply *coding* the information into a database would take another *eight years*.[17]

The *W.R. Grace* court finally scheduled an estimation hearing to be held over the course of approximately 18 hearing days between January and April of 2008.[18] During the hearing, the

---

(Footnote continued from previous page.)
Liabilities Regarding the Extension of Time for Claimants to Respond to Questionnaires) [Dkt. No. 12314]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. July 24, 2006) (Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 12858]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Dec. 19, 2006) (Order Regarding Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 14079]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Dec. 19, 2006) (Order Regarding Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 15078]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. June 1, 2007) (Newly Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 15923]; *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. July 9, 2007) (Modified Second Newly Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 16260] (orders collectively attached as Ex. 3).

[16] *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Sept. 25, 2006) (Hearing Transcript) at 197, 200 (excerpt attached as Ex. 4).

[17] *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Mar. 26, 2007) (W.R Grace & Co.'s Response to Emergency Motion of The Official Committee of Asbestos Claimants and David T. Austern the Court Appointed Legal Representative for Future Asbestos Personal Injury Claimants to Compel Production of Complete Navigable Database) [Dkt. No. 14973] at 9 (Ex. 5).

[18] *See In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. July 9, 2007) (Modified Second Newly Amended Case Management Order for the Estimation of Asbestos Personal Injury Liabilities) [Dkt. No. 16260] (Ex. 6).

court decided to set aside even more time for the estimation proceeding.[19] Ultimately, W.R. Grace abandoned its scheme for a mass evaluation of the entire claimant population, and the parties settled before the estimation proceeding was completed, with Grace agreeing to pay approximately three billion dollars into a Section 524(g) trust to fund its asbestos liabilities.

Likewise, the debtors in the Babcock & Wilcox bankruptcy proposed a summary judgment scheme similar to that proposed here by Garlock, with proceedings consolidated under Rule 42. An exchange between counsel for the debtor and District Judge Sarah Vance about the tens of thousands of motions the district court would have been required to adjudicate reveals the absurdity of the proposal:

> THE COURT: Tell me how long this first 95,000 is going to take to dispose of.
>
> MR BERNICK: That, I think, could be done in three months. Again, because –
>
> THE COURT: Who is doing what? Your part or my part?
>
> MR. BERNICK: It depends on how fast you read the papers. Your Honor I think is justifiably and understandably – I'll use the word I think it's –
>
> THE COURT: Try awe-struck.[20]

As the excerpt suggests, the district court in *Babcock & Wilcox* did not find the debtor's proposal to submit thousands of summary judgment motions, albeit clustered around alleged "common issues," to be a feasible program, and the project was abandoned. The case settled shortly thereafter.

---

[19] *See In re W.R. Grace & Co.*, Case No. 01-1139 (Bankr. D. Del. April 1, 2008) (Hearing Transcript) at 167-72 (excerpt attached as Ex. 7).

[20] *In re Babcock & Wilcox Co.*, Case No. 00-cv-558 (E.D. La. Jan. 25, 2002) (Hearing Transcript) at 14 (excerpt attached as Ex. 8).

Here, as outlined in the accompanying Motion for Scheduling Order, the parties can fully and fairly develop their respective estimations of Garlock's aggregate liability by reference to Garlock's claims resolution history and through limited discovery aimed at uncovering how the Debtors managed asbestos claims in the tort system, their own economic decisions underlying the settlement history, and the reasons why those decisions served their own interests. Such discovery will serve as the foundation for testimony by qualified experts. Appropriately focused, the process of estimating Garlock's overall asbestos liability, for plan formulation purposes, should be efficient and expeditious. *See, e.g.*, *In re Federal-Mogul*, 330 B.R. at 155; *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)*, 322 B.R. 719, 722 (D. Del. 2005) (Fullam, J.); *In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006) (Robreno, J.).

II. GARLOCK'S BANKRUPTCY IN CONTEXT: ASBESTOS TORT LITIGATION; THE "FUTURES PROBLEM" IN ASBESTOS-DRIVEN BANKRUPTCIES; THE SECTION 524(G) SOLUTION; AND GARLOCK'S PRE-FILING CORPORATE RESTRUCTURINGS

"Asbestos" is the name given to a group of six different fibrous minerals that occur naturally in the environment.[21] Asbestos minerals fall into two main categories: chrysotile (*a.k.a.* white, or serpentine asbestos), and amphibole (comprising amosite (brown asbestos), actinolite, anthophullite, crocidolite (blue asbestos), and tremolite). Chrysotile was the most widely-used type of asbestos in North America and world-wide, accounting for "95% of all the asbestos ever used."[22] Because of its tensile strength, flexibility, durability, and acid- and fire-

[21] Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, Asbestos Fact Sheet 1 (2001) ("**ATSDR Fact Sheet**").

[22] Tim K. Takaro et al., *Letters, Scientists Appeal to Québec Premier to Stop Exporting Asbestos to the Developing World*, 16(2) International Journal of Occupational and Environmental Health 241, 242 (2010) ("**2010 Letter to Québec Premier Charest**") (Ex. 9). *See also Manville I*, 129 B.R. at 734 ("Chrysotile is the only serpentine mineral that contains

(Footnote continued on next page.)

resistant capacities, asbestos was used extensively in industrial settings and in a wide range of manufactured goods, "mostly in building materials (roofing shingles, ceiling and floor tiles, paper products, and asbestos cement products), friction products (automobile clutch, brake, and transmission parts), heat-resistant fabrics, packaging, gaskets, and coatings."[23]

Asbestos is inherently dangerous. Whenever materials containing asbestos are "damaged or disturbed by repair, remodeling or demolition activities, microscopic fibers become airborne and can be inhaled into the lungs, where they can cause significant health problems."[24] Although manufacturers — but not workers — were for decades well aware of the significant health hazards posed by asbestos, production and distribution of new asbestos-containing products continued virtually unabated until the 1970's. *See Manville I*, 129 B.R. at 737-38. As discussed in Part III below, Garlock itself knew since at least the 1950's that asbestos causes cancer, yet continued to manufacture and distribute asbestos-containing gaskets until 2000.

A. The Pervasive Use of Asbestos in American Industry Has Given Rise to an Epidemic of Asbestos-Related Diseases that is Expected to Continue for Decades

As a result of the pervasive use of asbestos in American industry, "[m]illions of American workers have been exposed to asbestos, some for long periods of time and/or at high levels."[25] A leading and oft-quoted epidemiological study by Drs. William Nicholson, Irving Selikoff and colleagues (the "**1982 Nicholson Study**") estimated that more than 27 million

---

(Footnote continued from previous page.)
asbestos, but more than 90% of the asbestos production in the United States and worldwide utilized this asbestos fiber.").

[23] ATSDR Fact Sheet at 1 (n.21, *supra*).

[24] EPA, Definition of Asbestos, http://www.epa.gov/asbestos (last visited August 30, 2010).

[25] Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* 11 (2005) ("**RAND Asbestos Litigation Study**"). *See also Manville I*, 129 B.R. at 726.

people were occupationally exposed to asbestos in this country between 1940 and 1979.[26] Tens of millions more may have been exposed in para-occupational,[27] domestic and environmental settings.[28]

Historically, asbestos "has been the largest single cause of occupational cancer in the United States and a significant cause of disease and disability from nonmalignant disease."[29] Because asbestos-related diseases have long latency periods, epidemiologists anticipate that thousands more people each year for decades to come will fall ill as a result of their long-ago exposures to asbestos.[30] As the American Thoracic Society has put it, the "widespread use of asbestos in industry and in the built environment in the first seven decades of the twentieth

---

[26] *See* William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*, 3 American Journal of Industrial Medicine 259, 259 (1982) ("**1982 Nicholson Study**") (Ex. 10). *See also* American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 American Review of Respiratory Disease 363, 363 (1986) ("**1986 ATS Statement**") (Ex. 11) (noting that at least 27 million people were occupationally exposed to asbestos).

[27] "Para-occupational" exposure, also referred to as "secondary" exposure, includes exposure to asbestos fibers carried home on the work clothing, hair or skin of an asbestos worker.

[28] *See* Annals New York Academy of Sciences, *The Third Wave of Asbestos Disease: Exposure to Asbestos in Place*, Public Health Control, xvi and 81 (Philip J. Landrigan & Homayoun Kazemi, eds. 1991).

[29] American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 American Journal of Respiratory and Critical Care Medicine 691, 691 (2004) ("**2004 ATS Statement**") (Ex. 12); World Health Organization, Elimination of Asbestos-Related Diseases at 1-2 (2006) ("**WHO 2006**") (Ex. 13).

[30] *See* 1982 Nicholson Study at 259, 300 & 302-08 (n.26, *supra*) (Ex. 10). The Nicholson Study predicted the incidence of mesothelioma and asbestos-related lung cancer in the United States from 1980 through 2027. It has proven to be remarkably accurate over time, and is often cited by courts. *See, e.g.*, *In re Federal-Mogul*, 330 B.R. at 147; *In re Armstrong*, 348 B.R. at 113.

century has resulted in an epidemic of asbestos-related illness that now continues into the twenty-first century, despite decline in global production and use."[31]

B. The Nature of Diseases Caused by Asbestos Exposure

There are four primary types of diseases caused by inhaling asbestos fibers, two of which — mesothelioma and lung cancer — are malignant, and two of which — asbestosis and pleural diseases — are non-malignant.[32] All types of asbestos cause all of these diseases. As renowned asbestos expert Laura Welch, M.D. has stated, in a paper co-signed by 51 other medical, industrial hygiene, epidemiology, and toxicology experts from around the world: "There is general agreement among scientists and health agencies" that "[e]xposure to any asbestos type (*i.e.*, serpentine [chrysotile] or amphibole) can increase the likelihood of lung cancer, mesothelioma, and nonmalignant lung and pleural disorders."[33]

---

[31] 2004 ATS Statement at 693 (n.29, *supra*) (Ex. 12).

[32] *See* WHO 2006 at 1-2 (n.29, *supra*) (Ex. 13); 2004 ATS Statement at 1 (n.29, *supra*) (Ex. 12) at 693; 1986 ATS Statement (n.26, *supra*) (Ex. 11). The International Agency for Research on Cancer ("**IARC**") has also concluded that certain other cancers (*e.g.*, laryngeal cancer) in addition to mesothelioma and lung cancer are also caused by asbestos exposure. Because claims for "other cancers" make up such a tiny portion of any company's asbestos liability (typically less than 1%), they are not discussed in this brief.

[33] Laura Welch et al., *Asbestos Exposure Causes Mesothelioma, But Not This Asbestos Exposure: An Amicus Brief to the Michigan Supreme Court*, 13 International Journal of Occupational & Environmental Health 318, 318 (2007) ("**2007 Welch Paper**") (Ex. 14). As the authors note, "[m]any other reviews support this conclusion, such as those from the American Conference of Governmental Industrial Hygienists, the American Thoracic Society, the Environmental Protection Agency, the International Agency for Research on Cancer, the National Toxicology Program, the Occupational Safety and Health Administration, the Consumer Products Safety Commission (CPSC), the World Health Organization, and the World Trade Organization. This scientific consensus is also reflected in the Consensus Report of the 1997 Helsinki Conference, and publications from the American Cancer Society and the National Cancer Institute of the National Institutes of Health." *Id.* (citations omitted).

See also WHO 2006 at 2 (n.29, *supra*) (Ex. 13) ("Mesotheliomas have been observed after occupational exposure to crocidolite, amosite, tremolite and chrysotile, as well as among the general population living in the neighbourhood of asbestos factories and mines and in people *(Footnote continued on next page.)*

All asbestos-related diseases have long latency periods, during which they develop undetected at the cellular level in the human body. Typically, they do not become manifest for ten to 50 years, or even longer, after exposure.[34] The latency period for development of any asbestos-related disease is largely dependent on the frequency and intensity of the dose of asbestos exposure; the higher the dose, the shorter the latency period.[35]

1. Mesothelioma[36]

Mesothelioma is "a rare form of cancer in which malignant (cancerous) cells are found in the mesothelium, a protective sac that covers most of the body's internal organs."[37] Unlike many other cancers, for which there are multiple, well-documented causal factors, mesothelioma is

---

(Footnote continued from previous page.)
living with asbestos workers. . . . No threshold has been identified for the carcinogenic risk of chrysotile."); 2004 ATS Statement at 692 (n.29, *supra*) (Ex. 12) ("Just as all forms of asbestos, by the definition and classification above, appear to cause malignancy, all may cause the non-malignant diseases described"); Antti Tossavainen et al., *Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution*, 23 Scandinavian Journal of Work Environment & Health 311, 313 (1997) ("**Helsinki Criteria**") (Ex. 15).

[34] Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 British Journal of Industrial Medicine 261, 265 (1965) ("**1965 Newhouse and Thompson Paper**") (latency period can be as long as 55 years); C. Bianchi et al., *Latency Periods In Asbestos-Related Mesothelioma of the Pleura*, 6 European Journal of Cancer Prevention 162, 162 (1997) ("**1997 Bianchi Paper**") (the latency period in one case was 72 years).

[35] *See* 1997 Bianchi Paper at 162 (n.34, *supra*).

[36] Since mesothelioma claims now account for the bulk of Garlock's asbestos liability (*see* Garlock Info. Br. at 25, 58), this brief will focus in large part on those claims.

[37] National Cancer Institute, Fact Sheet -- Mesothelioma: Questions and Answers, http://www.cancer.gov/cancertopics/factsheet/Sites-Types/mesothelioma (last visited August 3, 2010) ("**NCI Fact Sheet - Mesothelioma**").

overwhelmingly caused by asbestos. Indeed, asbestos exposure is the only generally-accepted cause of mesothelioma in North America.[38]

Not surprisingly, "most people who develop mesothelioma have worked on jobs where they inhaled asbestos particles."[39] Mesotheliomas have also been "observed among . . . the general population living in the neighbourhood of asbestos factories and mines and in people living with asbestos workers."[40] According to the authoritative Helsinki Criteria for the diagnosis and attribution of asbestos-related diseases,[41] any "history of significant occupational, domestic, or environmental exposure to asbestos will suffice for attribution," and "[a]n occupational history of brief or low-level exposure should be considered sufficient for mesothelioma to be designated as occupationally related."[42] The Helsinki Criteria were developed by a panel of 19 experts who collectively had published more than 1,000 articles on

---

[38] *See* Institute of Medicine of the National Academies, *Asbestos: Selected Cancers*, 83 (2006). Some mesotheliomas cannot be linked to asbestos exposure in the individual because many individuals do not know that they have been exposed to asbestos or die before being interviewed regarding potential exposures. The scientific community has sometimes defined these cases as "idiopathic" because information regarding asbestos exposure is unavailable, not because, as Garlock asserts, the mesothelioma is "spontaneous" and unrelated to asbestos exposure. *See* Garlock Info. Br. at 26. To the contrary, a large study of numerous sources of information failed to demonstrate the existence of any evidentiary support for "spontaneous" mesotheliomas. *See* Eugene J. Mark & Toyoharu Yokoi, *Absence of Evidence for a Significant Background Incidence of Diffuse Malignant Mesothelioma apart from Asbestos Exposure*, 643 Annals New York Academy of Sciences 196, 201 (1991). Worldwide acceptance in the medical community that mesothelioma is an asbestos-related cancer began with a case series published by Wagner in 1960. *See* J.C. Wagner et al., *Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province*, 17 British Journal of Industrial Medicine 260, 17 (1960) ("**1960 Wagner Paper**").

[39] NCI Fact Sheet – Mesothelioma at 1 (n.37, *supra*).

[40] WHO 2006 at 2 (n.29, *supra*) (Ex. 13).

[41] *See* Helsinki Criteria (n.33, *supra*) (Ex. 15).

[42] *Id.* at 313.

asbestos and associated disorders, and has been described by the American Thoracic Society as "represent[ing] substantial consensus worldwide."[43]

The latency period for mesothelioma is particularly long: "A minimum of 10 years from the first exposure is required to attribute the mesothelioma to asbestos exposure, though in most cases the latency interval is longer (*e.g.*, on the order of 30 to 40 years)."[44] Indeed, this insidious disease can remain latent for as long as 70 or more years.[45] Mesothelioma is inevitably fatal, "often within a few months of diagnosis."[46]

2. Lung Cancer

After mesothelioma, the malignant disease most often attributed to asbestos exposure is lung cancer. There is general agreement in the medical and scientific communities that exposure to any type of asbestos fibers can cause all major types of lung cancer.[47] Numerous studies have concluded that there is a direct correlation between the length and amount of asbestos exposure and the risk of lung cancer.[48] There is "a strong synergistic effect" between smoking and

---

[43] *See* 2004 ATS Statement at 711 (n.29, *supra*) (Ex. 12).

[44] Helsinki Criteria at 313 (n.33, *supra*) (Ex. 15).

[45] *See* 1997 Bianchi Paper at 162 (n.34, *supra*) (documenting latency period of 72 years).

[46] Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, Toxicological Profile for Asbestos 6 (2001) ("**2001 ATSDR Toxicological Profile**").

[47] *See* Helsinki Criteria at 313 (n.33, *supra*) (Ex. 15) ("All 4 major histological types [of lung cancer] (squamous, adeno-, large-cell and small-cell carcinoma) can be related to asbestos."); WHO 2006 at 1-2 (n.29, *supra*) (Ex. 13) ("All types of asbestos cause cancer in humans . . . No threshold has been identified for the carcinogenic risk of chrysotile."). *See also* 2004 ATS Statement at 692 (n.29, *supra*) (Ex. 12).

[48] *See, e.g.*, A. Reid et al., *The Effect of Asbestosis on Lung Cancer Risk Beyond the Dose Related Effect of Asbestosis Alone*, 62 Occupational & Environmental Medicine 885, 885-86 (2005); Douglas W. Henderson et al., *After Helsinki: A Multidisciplinary Review of the Relationship Between Asbestos Exposure and Lung Cancer, With Emphasis on Studies Published During 1997-2004*, 36(6) Pathology 517, 526-28 (2004).

asbestos exposure, each of which amplifies the risk of cancer created by the other.[49] A large study of asbestos insulation workers in North America found that: (1) non-smoking asbestos workers were five times more likely than the general population to die from lung cancer; (2) smokers not exposed to asbestos were approximately 10 times more likely to die from lung cancer; and (3) asbestos workers who smoked were more than 50 times more likely to die from lung cancer.[50]

The latency period of asbestos-related lung cancer is only slightly shorter than that of mesothelioma. As with mesothelioma, "[a] minimum lag-time of 10 years from the first asbestos exposure is required to attribute the lung cancer to asbestos."[51] Notwithstanding recent advances in treatment, the mortality rate for lung cancer remains high.

3. Asbestosis and Pleural Disease

The non-malignant diseases attributed to asbestos exposure include asbestosis and pleural diseases. Asbestosis is a chronic lung disease, specifically, "interstitial pneumonitis and fibrosis" of the parenchymal tissue of the lung that is, by definition, "caused by inhalation of asbestos fibers."[52] Although asbestosis is "commonly associated with prolonged exposure, usually over 10 to 20 years," it has been established that "short, intense exposures to asbestos, lasting from several months to 1 [one] year or more, can be sufficient to cause asbestosis."[53] As

---

49 *See* E. Cuyler Hammond et al., *Asbestos Exposure, Cigarette Smoking and Death Rates*, 330 Annals New York Academy of Sciences 473, 488 (1979) ("**1979 Hammond Paper**").

50 *See id.* at 486-87 & Table 8.

51 Helsinki Criteria at 314 (n.33, *supra*) (Ex. 15).

52 2004 ATS Statement at 697 (n.29, *supra*) (Ex. 12).

53 *Id.* at 695.

with lung cancer and mesothelioma, asbestosis "becomes evident only after an appreciable latent period" following exposure.[54]

Asbestos-related pleural diseases include pleural thickening or fibrosis (plaques or diffuse pleural thickening), and pleural effusion.[55] Pleural thickening and pleural fibrosis are scarring of the two-layer membranes, or pleura, that line the inside of the chest wall and cover the outside of the lungs. Pleural effusion occurs when excess fluid accumulates in the space between the layers of pleura.

Non-malignant asbestos diseases can cause reduction in lung capacity. Severe asbestosis, which is commonly associated with high levels of exposure, can be fatal.[56] Even less severe cases, far more common, can significantly limit a victim's daily activities.[57] Moreover, until the disease has progressed substantially, it can be difficult to detect radiographically, *i.e.*, a person suffering from pulmonary function abnormalities associated with an asbestos-related disease may have a normal x-ray.[58]

---

54 *Id.* at 697.

55 *Id.* at 702-07.

56 2001 ATSDR Toxicological Profile at 5 (n.46, *supra*).

57 *See* Helsinki Criteria at 700 ("Asbestosis is usually associated with dyspnea [labored or difficult breathing], bibasilar rales, and changes in pulmonary function: a restrictive pattern, mixed restrictive–obstructive pattern, and/or decreased diffusing capacity.").

58 *See* 1986 ATS Statement at 366 (n.26, *supra*) (Ex. 11) ("There is convincing evidence that an asbestos related pulmonary abnormality can occur in the absence of definite radiological change . . . . Likewise, exposure response relationships for certain pulmonary function abnormalities (including reduced lung compliance and impaired flow at low lung volumes) have been demonstrated in asbestos-exposed subjects without radiologic abnormalities or reduction in vital capacity, and their occurrence subsequently confirmed in large animal models with biopsy confirmation of the associated pathological changes. The impairment associated with such abnormality is usually modest.") (internal citation omitted). *See also* M.M. Kipen et al., *Pulmonary Fibrosis in Asbestos Insulation Workers With Lung Cancer: A Radiological and Histopathological Evaluation*, 44 British Journal of Medicine 96-100, 96 (1987) (18% of people with pathologically confirmed asbestosis had normal x-rays).

C. A Brief History of Asbestos Litigation

1. The Early Years

Asbestos has been used for centuries. "The earliest uses capitalized on the unique fire-resistant qualities of asbestos, as in lamps with incombustible wicks made by the Greeks about 430 B.C. The Romans had asbestos-containing cremation cloths. The writings of Pliny the Elder, Dioscorides, Plutarch, Marco Polo and Charlemagne indicate that asbestos was woven into garments to shield against fire." *Manville I*, 129 B.R. at 735. "The wicks of the oil lamps of the vestal virgins were asbestos. It was used in Finland as a pottery cement 4,500 years ago. It was used in 28 B.C. by a Greek doctor for acoustic insulation."[59] Modern industrial usage began in the 1860's, and multiplied as "[t]he rapid expansion of the use of steam power at higher and higher temperatures in the 1870's increased the need for efficient insulation materials." *Manville I,* 129 B.R. at 735. The use of asbestos increased a "thousand times" during the industrial age because of the mineral's heat-resistant properties. *Id.*

By the beginning of the 20th century, medical scientists and researchers had uncovered "persuasive evidence of the health hazards associated with asbestos." *Manville I*, 129 B.R. at 737. In 1918, a Prudential Insurance Company report revealed excess deaths from pulmonary disease among asbestos workers, and noted that life insurance companies generally declined to cover asbestos workers because of the "assumed health-injurious conditions of the industry."[60] For decades, asbestos manufacturers were well aware of the dangers of asbestos, but did not

---

[59] William N. Rom & Philip E.S. Palmer, *The Spectrum of Asbestos-Related Disease*, 121 Western Journal of Medicine 10, 10 (1974).

[60] Barry I. Castleman, *Asbestos: Medical and Legal Aspects*, 5-6 (Aspen Pub. 5th ed. 2005). *See also Manville I*, 129 B.R. at 737.

protect their workers or the end-users of their products. In a thorough discussion of the history of asbestos use and litigation in the United States, Judge Weinstein noted:

> Reports concerning the occupational risks of asbestos, including the incidence of asbestosis and lung cancer among exposed workers, have been substantial in number and publicly available in medical, engineering, legal and general information publications since the early 1930s. There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public.

Manville I, 129 B.R. at 737-38 (internal citation omitted). *See also id.* at 739 (noting that reports of mesothelioma among asbestos workers had emerged in journals of industrial medicine and hygiene in the late-1940's).

Despite mounting evidence of the inherent danger asbestos posed to workers, the use of asbestos increased. "US asbestos use in the Depression year 1932 was 197 million pounds annually. By 1937, it was 633 million. During the World War II years it averaged 783 million pounds. During the early Cold War rearmament it exceeded 1,400 million pounds, which did not decrease until the middle 1970s. In 1990 it was 90 million pounds."[61] Asbestos was particularly widely used in the shipbuilding and construction industries, especially between the 1940's and 1970's, because of its fire-resistant properties. The shipbuilding industry, for example, used asbestos to insulate boilers, steam pipes, hot water pipes, and incinerators, and as a component in gaskets and valve-packing materials, including those manufactured by Garlock. During World War II, and up through the 1970's, many workers employed in shipyards and on ships were heavily exposed to asbestos. The health consequences of shipyard asbestos exposure have been enormous. Mesothelioma, lung cancer and asbestosis were "widely reported" and "identified in

[61] John Hedley-Whyte & Debra R Milamed, *Asbestos and Ship-Building: Fatal Consequences*, 77(3) Ulster Medical Journal, 191–200 (2008) (citing Rachel Maines, *Asbestos and Fire: Technological Trade-offs and the Body at Risk* 19 (2005)).

shipyard workers." [62] One medical study followed a group of workers with 20 or more years of employment in ship repair work, and found that 86% developed asbestos–related lung disease or lung cancer. [63]

A slow trickle of lawsuits by workers injured by asbestos began in the late 1920's. But the "thousands upon thousands of workers who became disabled" by asbestos-related diseases generally were forced to seek compensation under the Byzantine workers'-compensation laws of their respective states, most of which were enacted in the 1930's and 1940's.[64] These laws were "almost always enacted as an exclusive remedy that deprived workers of the right to sue their employers for negligence under the common law, and thus eliminated the possibility of large court awards."[65] While the first decision upholding a workers'-compensation disability claim for asbestosis was made in 1927,[66] few claimants alleging asbestos-related personal injuries received any compensation at all prior to 1955.[67] Asbestos-related workers'-compensation claims were filed against Garlock. In 1948, for example, Garlock was found liable for a workers'-compensation claim for their employee Vera Clemons,[68] who died "of a pneumothorax associated with pulmonary fibrosis and asbestosis."[69] In 1958, a workers'-compensation award

---

62 Irving Selikoff et al., *Radiological Evidence of Asbestos Disease Among Ship Repair Workers.*, 1 American Journal of Industrial Medicine 9, 9-22 (1980) ("**1980 Selikoff Paper**").

63 *See id.*

64 *See* Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 14 (1985) ("**Outrageous Misconduct**").

65 *Id.* at 23-24.

66 *Id.*

67 *Id.* at 24.

68 *See* Workers' Compensation Board, State of New York, file for Vera Smith Clemons (1944-1954) ("**Clemon's Workers' Compensation File**") (Ex. 16).

69 *Id.*

was issued against Garlock in favor of the estate of Grace Baylord, who had died of her asbestos-related illness while her claim was pending.[70]

In 1965, the American Law Institute published the second edition of the *Restatement of the Law of Torts*, a "comprehensive redefinition of tort law."[71] The *Restatement* provided a "special new rule of strict liability" that applied to the sellers of unreasonably dangerous products that were expected to reach the "ultimate user or consumer."[72] A product would not be considered unreasonably dangerous under the *Restatement* if an adequate and appropriate warning was provided.[73] The *Restatement* was a momentous event in the law of torts, and paved the way for asbestos claimants to seek redress from the courts under theories of strict liability and negligence/failure to warn. Starting in 1966, claimants with asbestos-related injuries began to assert those theories in filing tort and wrongful death claims against the manufacturers of the asbestos-containing products that had caused their injuries.[74]

As Judge Weinstein explained in *Manville I*, "[d]uring the early litigation stages plaintiffs had little success, but as they developed evidence, legal theories and expertise, there was a sudden explosion of asbestos litigation." 129 B.R. at 745 (citations omitted). Of particular importance was evidence uncovered by plaintiffs' attorneys — "[t]hrough persistence, vigorous discovery and creative efforts" — establishing that "manufacturers . . . knew that asbestos posed potentially life-threatening hazards and chose to keep that information from workers and others

---

70 *See* Workers' Compensation Board, State of New York, file for Grace Baylord (1957-58) ("**Baylord Workers' Compensation File**") (Ex. 17).

71 *Outrageous Misconduct* at 27 (n.64, *supra*).

72 *Id.* at 27-28 (citing *Restatement (Second) of Torts* § 402A).

73 *Id.*

74 *Id.* at 31-32.

who might be exposed." *Id.* at 743 (citing *Outrageous Misconduct* (n.64, *supra*)). Angered by evidence that information about the dangers of asbestos had been suppressed, juries began awarding large punitive damages. *Id.* at 745-46. As of result of the plaintiffs' success in asbestos suits in the tort system, and the overwhelming number of claims, the point was reached long ago where most workers who fall ill from exposure to asbestos "recover substantial sums through settlement or jury awards." *Id.* at 749.

2. The Borel *Decision (1973)*

Asbestos personal injury litigation began in earnest in 1973 after the Fifth Circuit's decision in the benchmark case of *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1095 (5th Cir. 1973). *Borel* established that manufacturers and distributors of asbestos products are liable to persons injured as a result of using their products because of their failure to warn regarding the danger of those products. *See* 493 F.2d at 1089. Recognizing that many persons have been exposed to a variety of asbestos products made by a large number of manufacturers, under circumstances that make it impossible to ascribe resulting disease to one particular product or exposure, the *Borel* court found that each and every exposure to asbestos could constitute a substantial contributing factor in causing asbestos diseases, and that each and every defendant who contributed to the plaintiff's aggregate asbestos exposure is legally responsible for the plaintiff's asbestos-related injuries. *See id.* at 1095. The overwhelming majority of courts throughout the country have accepted the legal principles set out in *Borel*.[75]

The *Borel* decision "triggered the greatest avalanche of toxic-tort litigation in the history of American Jurisprudence."[76] Some twenty-five thousand lawsuits were commenced in the next

---

[75] *See* n.152, *infra*.

[76] *Outrageous Misconduct* at 73 (n.64, *supra*).

decade, threatening to overwhelm the court system.[77] In 1991, Judge Weinstein observed that: "the complexity of asbestos cases makes them expensive to litigate; costs are exacerbated when each individual has to prove his or her claim *de novo*; high transaction costs reduce the recovery available to successful plaintiffs; and the sheer number of asbestos cases pending nationwide threatens to deny justice and compensation to many deserving claimants if each claim is handled individually. The backlog is eroding a fundamental aspiration of our judicial system — to provide equality of treatment for similarly situated persons." *See Manville I,* 129 B.R. at 750-51.

D. The Origin of Section 524(g)

For decades, parties to the asbestos litigation "struggled to create mechanisms to contain the asbestos litigation that has swamped the legal system — with varying degrees of success." *In re Armstrong*, 348 B.R. at 115. Thousands of people each year for decades to come will fall ill as a result of asbestos exposures. Many of those who become ill will seek redress from the manufacturers of asbestos products that caused their injuries. Attempts to achieve global settlements that would provide for the treatment and payment of these future claims are hampered by what has been called the "futures problem," namely, the difficulty of ensuring that any such settlement agreements would, "in fact, provide for all future claimants who come forward, so that all who are eligible for compensation are properly compensated and all who are required to pay compensation have taken into account this responsibility in their business planning."[78] The overwhelming volume of asbestos claims and the intractability of the "futures problem" has led dozens of asbestos manufacturers to conclude that bankruptcy is their only viable option for dealing with future claims.

---

[77] *Id.*

[78] RAND Asbestos Litigation Study at 46 (n.25, *supra*).

To establish a bankruptcy plan that is feasible, and to ensure that the reorganized debtor will not be forced back into bankruptcy,[79] the plan in an asbestos-driven bankruptcy must, of course, deal with future claims.[80] Even if such claims were "contingent" claims within the meaning of Section 101(5) of the Bankruptcy Code — an issue that, as Garlock points out, has not been conclusively resolved (*see* Garlock Info. Br. at 72-73) — any attempt to discharge them would raise significant due process concerns, because unknown future claimants, whose injuries have not yet manifested, cannot be identified or given adequate notice.[81]

1. **Johns-Manville** *(1982): The First Major Asbestos-Driven Bankruptcy, and the Limits of Section 105*

The first major asbestos-driven bankruptcy was that of the Johns-Manville Corporation, the largest manufacturer and distributor of asbestos products, which filed its Chapter 11 petition

---

[79] *See* Bankruptcy Code § 1129(a)(11) (A reorganization plan may only be confirmed if it "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan"). *See also In re Johns-Manville Corp.*, 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984) (noting the need to address future claims in order for reorganization to occur).

[80] *See In re UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) ("If future claims cannot be discharged before they ripen, UNR may not be able to emerge from bankruptcy with reasonable prospect for continued existence as a going concern.").

[81] *See In re Johns-Manville Corp.*, 600 F.3d 135, 158 (2d Cir. 2010) (finding that a 1986 order enjoining policy claims against Travelers Indemnity Company and other insurers that had insured Manville, and channeling such claims to the Manville Trust, did not preclude Chubb Indemnity Insurance Co. from asserting indemnity and contribution claims against Travelers, as Chubb had not received notice of, and its future claims against Travelers had not been contemplated during, the proceedings that led up to the 1986 Order, and Chubb's interests had not been represented during the proceedings). *See also In re Waterman S.S. Corp.*, 141 B.R. 552, 559 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (Bankr. S.D.N.Y. 1993), *remanded to* 200 B.R. 770 (Bankr. S.D.N.Y. 1996) ("[N]o future Asbestosis Claimant who, by definition, had yet to manifest any detectible injury prior to confirmation, could be deemed to have relinquished substantive rights when, even if that individual had read the 'notice,' those individuals would have remained completely unaware that their substantive rights were affected.").

for reorganization in August of 1982.[82] To resolve the conundrum presented by future claims, the Manville plan pioneered the use of a trust dedicated to resolution and payment of asbestos claims. The Manville Trust assumed the debtors' present and future asbestos liabilities, and all asbestos claims against the debtors were directed to the Trust by a channeling injunction — a "cornerstone" of the plan[83] — which was issued pursuant to the Court's general equitable powers under Section 105.[84] Although the future claims were not discharged, the debtors benefited from what was, from their perspective, the functional equivalent of a discharge of those claims, as future claimants were enjoined from seeking recovery from the reorganized company, and were required to seek recovery only from the Trust.

The validity of the channeling injunction was never challenged on appeal in the *Manville* case, as the Second Circuit found, essentially, that there were no future claimants with standing to contest the plan of reorganization.[85] This created uncertainty that depressed the value of Manville securities, because there was concern that the company could once again be deluged with asbestos claims by claimants contending that they had not received constitutionally adequate notice that their rights were affected by the plan. As the Trust had been funded in part by the Manville shares, the decrease in share value meant that less money was available to claimants. In addition, it soon became apparent that the number and value of future claims had been seriously underestimated, and that the Trust did not have in place an adequate mechanism to ensure that present and future claims would be treated the same. *See Manville I*, 129 B.R. at

---

82 *See In re Johns-Manville Corp.*, 68 B.R. 618, 620 (Bankr. S.D.N.Y. 1986), *aff'd,* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988).

83 *See id.* at 624.

84 *See id*.

85 *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 645 (2d Cir. 1988).

752-55. The Trust's already depleted funds rapidly dwindled as claims were paid in full when they were filed and resolved. Within a year and nine months after it began operating, the Manville Trust was, effectively, out of funds. *Id.* at 762. Subsequently, the Trust was restructured by order of the district court, with additional funds from the reorganized debtor, and new procedures for the distribution of Trust funds designed to ensure that present and future claimants would be treated in substantially the same manner. *Id.*

In the meantime, asbestos claims were rising, undermining the economic viability of an increasing number of companies. For those facing bankruptcy, the *Manville* case was the obvious model for a plan of reorganization. But it was apparent that a legislative solution was required to remedy the issues that had arisen in that case, and to avoid similar problems in the future. Congress did not act immediately, however, and parties to asbestos litigation searched for other solutions, the most promising of which seemed to be class actions fashioned for the purposes of global settlement. Ultimately, though, the Supreme Court's decisions in *Amchem* and *Ortiz*[86] made clear that Rule 23's class action mechanisms could not be used to resolve the

---

[86] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem* the Court found that the proposed settlement class did not meet the requirement of commonality of issues of fact and law and adequacy of representation. *Id.* at 626. The Court concluded that the settlement would result in "global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 627. "For the currently injured," the Court noted, "the critical goal is generous immediate payments," but "[t]hat goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 595. The Court observed that "[i]mpediments to the provision of adequate notice . . . rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement . . . . Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* at 628. The Court declined to resolve this due process issue in light of its holding that the proposed class could not satisfy Rule 23, but recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.*

(Footnote continued on next page.)

"futures problem." Increasingly, bankruptcy became the most viable solution for defendants overwhelmed by asbestos liabilities.

2. Congress Enacts Section 524(g) to Deal With Asbestos-Driven Bankruptcies

To alleviate concerns about the validity of the *Manville* model, and to foster reorganization of asbestos debtors, Congress in 1994 enacted Section 524(g), which incorporates the trust and channeling injunction mechanisms pioneered in the *Manville* case.[87] Section 524(g) obviates due process concerns with respect to future claimants by providing for appointment of a legal representative to protect their interests. *See* 11 U.S.C. § 524(g)(4)(B)(i). The statute gives the debtor the right to propose and have confirmed a plan that will create a trust to which all of the debtor's present and future asbestos personal injury liabilities will be transferred, or channeled, for post-confirmation claims evaluation and settlement (or, if necessary, trial). The debtor is freed of asbestos claims, in return for funding the trust, and present and future asbestos claimants have recourse to the assets of the trust.

(Footnote continued from previous page.)

In *Ortiz*, the Court found that the mandatory class provision of Rule 23(b)(1)(B) was not properly applied in that case. The Court also noted that by holding Rule 23 inapplicable, it avoided having to address a number of "serious constitutional concerns" that could arise if Rule 23(b)(1)(B) were applied to aggregate unliquidated tort claims in a mandatory class. 527 U.S. at 864. Absent class members, the Court noted, would be deprived of their Seventh Amendment jury trial rights without their consent, and with no option to opt out, and would be bound by a judgment *in personam* in a litigation in which they had not been designated as parties or made parties by service of process. *Id.* at 846.

[87] *See, e.g.*, *In re Combustion Eng'g, Inc.,* 391 F.3d at 235 n.47. *See also* H.R. Rep. No. 834, 103rd Cong., 2nd Sess. 8-12 (Oct. 4, 1994); H.R. Rep. No. 835, 103rd Cong., 2nd Sess. 3348-49 (Oct. 4, 1994) (explaining that Section 524(g) is intended to emulate the "creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor's] insurers" devised in the *Manville* case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in *Manville* is deemed retroactively to comply with Section 524(g), and thus is valid.

Certain requirements must be satisfied before the court will issue a channeling injunction directing all future asbestos claims to a Section 524(g) trust. Among other things, the court must find that the debtor is "likely to be subject to substantial future demands" from parties injured by asbestos-containing products, and that "the actual amount, numbers and timing of such future demands" are uncertain. 11 U.S.C. § 524(g)(2)(B)(ii)(I) and(II). The plan must provide that the trust will (1) assume the liabilities of the debtor for current and future claims; (2) be funded at least in part by the securities of the debtor; (2) either own, or be entitled to own upon the occurrence of specified contingencies, the majority of the voting shares of the debtor, its parent, or its subsidiary; and (3) use its assets to pay future claims. 11 U.S.C. §§ 524(g)(2)(B)(i)(I)-(IV), (ii)(V)).

Many of Section 524(g)'s requirements "are specifically tailored to protect the due process rights of future claimants." *In re Combustion Eng'g*, 391 F.3d at 234. First and foremost, the court must appoint a Future Claims Representative to represent the interests of the future claimants. *See* 11 U.S.C. § 524(g)(4)(B)(i). [88] The court must determine that the benefits provided to the debtor and any other parties protected by a Section 524(g) channeling injunction are "fair and equitable" to future claimants, in light of the contributions to the trust by or on behalf of the debtor and such other protected parties. 11 U.S.C. § 524(g)(4)(B)(ii).[89] Importantly, the court must also determine that "the trust will operate through mechanisms that provide reasonable assurance that the trust will value, and be in a financial position to pay,

[88] The Future Claims Representative does not vote on the plan. Rather, the statute requires that, to be confirmed, a Section 524(g) plan must win the acceptance of a 75% super-majority of votes cast by those claimants whose claims are to be addressed by the trust, representing at least two-thirds of the value of such claims. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb)).

[89] If the requirements of Section 524(g) are met and contributions to the trust are adequate, the debtor's current and former parents and affiliates may be eligible for the protection of the channeling injunction, along with the debtor itself. *See* 11 U.S.C. § 524(g)(4)(A)(ii).

present claims and future demands that involve similar claims in substantially the same manner." 11 U.S.C. § 524(g)(2)(B)(ii)(V).

E. Garlock's Pre-Bankruptcy Corporate Maneuvering

Corporate restructuring and asset transfers having the purpose or effect of shielding assets from asbestos liabilities have led to avoidance claims in a number of asbestos bankruptcies. During the past 15 years, Garlock and its affiliates have engaged in a series of transfers and restructurings in the face of enormous asbestos liabilities. An obvious and important question is whether these transactions defrauded the Debtors' asbestos creditors. Along with the valuation of the Debtors' aggregate liability for asbestos torts, these bankruptcy cases will focus on the related question of what assets should be available to respond to those liabilities and whether certain pre-petition transfers are avoidable as fraudulent conveyances, or otherwise create derivative liability on the part of Garlock's parent companies and transferees. The Debtors have stated that they will seek to extend to affiliates and successors the protections of a Section 524(g) "channeling" injunction. *See* Garlock Info. Br. at 47-48. This Court will therefore be called upon to determine whether such protections would be fair and equitable in relation to the potential exposure of such affiliates and successors to liability for the Debtors' asbestos torts and whatever contributions to a settlement trust may be made by or on behalf of those entities. For these reasons, the ACC seeks leave to investigate the prepetition restructurings pursuant to Bankruptcy Rule 2004, as requested in the accompanying Motion for Scheduling Order.

The relevant corporate history begins in the mid-1970's when Colt Industries, now known as Coltec, acquired Garlock.[90] Garlock had been manufacturing asbestos-containing

[90] *See Coltec Indus., Inc. v. United States*, 62 Fed. Cl. 716, 721 (2004), *vacated and remanded to* 454 F.3d 1340 (Fed. Cir. 2006).

products for many years, and would continue to do so for years to come. In 1987, Garlock acquired The Anchor Packing Company ("**Anchor**") as a wholly-owned subsidiary. Like Garlock, Anchor manufactured and distributed asbestos-containing materials. In 1993, Garlock decided to discontinue Anchor's business operations. By 1996, Anchor was a dormant subsidiary, whose assets consisted of nearly depleted insurance coverage and a small building in Louisiana.

1. The 1996 Corporate Restructuring

To address the mounting asbestos liabilities of its two subsidiaries, Garlock and Anchor, Coltec embarked on an elaborate restructuring in 1996.[91] The restructuring involved a series of complex transactions,[92] which need not be detailed here. Importantly for present purposes, Coltec claimed that those transactions generated a $378.7 million loss, which was reported on Coltec's consolidated tax return for 1996.[93]

The IRS disallowed the loss, and refund litigation ensued. In the course of that litigation, Coltec insisted that the restructuring had the *bona fide* business purpose of addressing the asbestos liabilities of Garlock and Anchor, thereby making Coltec more attractive to the investment community as an acquisition target.[94] Significantly, at the time of the restructuring — a time during which, it now maintains, Garlock was merely a "peripheral defendant" with "minimal" asbestos liability — Coltec estimated Garlock's and Anchor's net future asbestos

---

91 *See Coltec Indus., Inc. v. United States*, 454 F.3d 1340 (Fed. Cir. 2006).

92 One of the transactions resulted in the creation of Garrison Litigation Management Group, Ltd. ("**Garrison**"), the litigation management company created to manage Garlock and Anchor's asbestos-related claims).

93 *See Coltec Indus., Inc.,* 454 F.3d at 1345.

94 *See id*. at 1358; *Coltec Indus., Inc.*, 62 Fed. Cl. at 743.

liabilities to be $375 million.[95] That is, Coltec forecasted the asbestos liabilities facing Garlock and Anchor (including anticipated settlements, judgments, and defense costs) would exceed the sum of their assets and insurance. Coltec was thus asserting that Garlock and Anchor were *insolvent* by several hundreds of millions of dollars. Garlock had roughly $1 billion of insurance coverage around this time,[96] so its own estimate of its aggregate asbestos liability in 1996 must have been close to $1.3 billion.[97] It appears that Coltec's response to Garlock's burgeoning asbestos liabilities and apparent insolvency was to engineer a series of transactions and corporate maneuvers that extracted assets from Garlock while purporting to distance its affiliates ever further from Garlock's mass-tort legacy.

2. The Goodrich Acquisition and EnPro Spin-Off

Coltec's efforts in 1996 to become a more attractive target for acquisition appear to have been successful. In July 1999, BF Goodrich Corporation ("**Goodrich**") acquired Coltec and its subsidiaries. Less than three years later — for reasons that are not yet clear but, given the timing, are clearly suspicious[98] — Goodrich created a new holding company called EnPro

---

95 *See Coltec Indus., Inc.*, 454 F.3d at 1344-45.

96 *See* Garlock Info. Br. at 2, 40, 43.

97 Corporate estimates of aggregate asbestos liability are often too low. *Compare, e.g.*, Armstrong World Indus., Inc. Form 10 K filed 3/29/2001 at 13 (excerpt attached as Ex. 18) (estimating Armstrong's aggregate asbestos-related liability at $758.8 to $1,363.5 million), *with In re Armstrong*, 348 B.R. at 123 (estimating the debtor's aggregate asbestos-related liability as at least $3.1 billion); *compare* Federal-Mogul Form 10K filed 3/28/2002 at 59 (excerpt attached as Ex. 19) (estimating Federal-Mogul's aggregate asbestos-related liability at $1.6 billion), *with In re Federal-Mogul*, 330 B.R. at 164 (estimating the debtor's asbestos-related liability in the United States as $9 billion).

98 At least eight major asbestos defendants went into bankruptcy between February 2000 and October 2001: Babcock & Wilcox (February 2000), Pittsburgh Corning (April 2000), Owens Corning (October 2000), Armstrong (December 2000), GAF (January 2001), W.R Grace & Co. (April 2001), U.S. Gypsum (June 2001), and Federal-Mogul (October 2001). *See* Garlock Info. Br. at 47-48, Figure 11. The trend cannot have been lost on Goodrich.

Industries ("**EnPro**"), to which Goodrich transferred its Coltec stock. Goodrich then distributed all of its EnPro stock to Goodrich's shareholders. Before Goodrich divested itself of the Coltec group, it transferred Coltec's profitable aerospace business to itself.[99] Garlock, Anchor, and Garrison (which managed Garlock's and Anchor's asbestos-related claims), were among the companies divested by Goodrich.

3. The 2004-2005 Transfers of Garlock Subsidiaries and Their Assets

Until 2005, Garlock owned a company known as GGB LLC ("**GGB**"), which produced bearing products, and another subsidiary called Coltec Industrial Products LLC (**"CIP**"), which also had a bearing business. Garlock transferred assets relating to its bearing business to GGB, and then, in March 2005, sold all of its membership interests in GGB and CIP to Coltec, in exchange for a subordinated promissory note from Coltec in the original principal amount of $73,381,000. On information and belief, the Coltec note remains outstanding.[100] Although Garlock gained a subordinated promissory note as a result of this transaction, Garlock lost two subsidiaries with operating businesses, which it transferred to the parent company, Coltec, and thus placed beyond the reach of Garlock's own creditors.

A similar, but more complex, series of transactions occurred in 2004-2005 with respect to Stemco LLC ("**Stemco**"), a wholly-owned Garlock subsidiary in the business of making equipment for trucks and other heavy vehicles. In 2004, through a series of transactions, Garlock transferred 99% of its ownership stake in Stemco to an indirect subsidiary of Coltec. The

---

[99] The aerospace business consisted of six companies, which in 1998, the last year of available financial data, had net sales of $724.8 million and operating income of $90.1 million.

[100] On information and belief, this promissory note remains outstanding. *See* Garlock's Schedule B – Personal Property, filed July 7, 2010 [Dkt. No. 249-1] at 3 (Garlock's Schedule Amended and Restated Promissory Note due Jan. 1, 2017, dated Jan. 1, 2010, from Coltec Industries Inc., in the amount of $76,808,795).

transaction had the net result of moving Stemco assets beyond the reach of Garlock's creditors in exchange for a subordinated promissory note in the original amount of $153,865,000.[101] A valuation analysis will be needed to determine whether this promissory note was reasonably equivalent in value to the assets transferred.

4. The Debtors Reincorporate in North Carolina Just Months Before Bankruptcy

The Debtors' connection with North Carolina is of recent origin. Although the ultimate parent company, Coltec, moved its headquarters to Charlotte, North Carolina in or around 1996, Garlock has been headquartered in upstate New York for decades, and Garrison has been headquartered in New York for more than a dozen years. Garlock made most of its asbestos-containing products in Palmyra, New York, and in other manufacturing facilities outside of North Carolina.

On December 29, 2009, six months before the bankruptcy filing, Anchor was reincorporated under North Carolina law, and on March 3, 2010, just three months before the filing, Garlock was converted into a North Carolina limited liability company.[102] The Debtors have offered no explanation for their recent conversions into North Carolina entities.

III. GARLOCK CANNOT ESCAPE ITS ASBESTOS LIABILITIES BY ABUSING THE BANKRUPTCY PROCESS, OR BY MISREPRESENTING HISTORY, LAW AND MEDICINE

Unhappy with the results it has achieved litigating in the tort system, which Garlock claims has "failed to provide a rational means for adjudicating asbestos-related liabilities," and has had a "fundamental breakdown [in] integrity," (Garlock Info. Br. at 2), Garlock asserts that

---

[101] *See* Enpro Industries, Inc. Form 10 K, filed 3/14/2005, at Exhibit 10.20, 2 (excerpt attached as Ex. 20).

[102] Garrison became a North Carolina corporation at the same time.

this Court "is ideally suited to resolve Garlock's responsibility, and in fact provides the only forum where Garlock's responsibility for asbestos claims can be fairly adjudicated." Garlock Info. Br. at 71. Thus, Garlock has announced, it will seek to adjudicate the individual merits of tens of thousands of claims in allowance proceedings in these bankruptcy cases. *See* Garlock Info. Br. at 75, 81-82.

Garlock has made clear its intention to subvert the bankruptcy process in an attempt to achieve a kind of "tort reform," by having this Court (and the district court, where any allowance proceedings in this case would have to be held) disregard substantive tort law, treat Garlock's 30-year verdict and settlement history as an aberration, and determine the validity of individual claims according to legal principles invented by Garlock (which would be far more favorable to Garlock than the applicable non-bankruptcy laws). Garlock will seek to have disallowed most, if not all, of the claims against it, regardless of whether they would be enforceable and of real value in the tort system, and then to have this Court estimate Garlock's aggregate liability to be far lower than it would be in the tort system in the absence of bankruptcy.

As discussed in Part I, above, Garlock's elaborate "allowance-then-estimation" procedure is impractical; the merits of 100,000 claims against Garlock simply cannot be adjudicated in these bankruptcy cases in any reasonable amount of time. Nor is it necessary. Rather, the parties should each establish their respective views of the Debtors' aggregate asbestos liability, using the data available, and attempt to negotiate a consensual plan. In making such determinations of aggregate liability, applicable non-bankruptcy law cannot be ignored. Asbestos personal injury tort and wrongful death claims are creatures of applicable non-bankruptcy law. Thus state law and, for maritime claims, admiralty law, rather than bankruptcy law, governs the validity and

value of the claims.[103] Despite Garlock's suggestion to the contrary, there is no doctrine of federal procedural law that could legitimately change the aggregate valuation of the claims against Garlock from what adherence to non-bankruptcy law would produce.

Garlock asserts that the various judges and juries in tort system who during the past three decades have found that Garlock's asbestos-containing products caused (or contributed to causing) asbestos-related diseases in plaintiffs exposed to those products were wrong, and that those verdicts — and the settlements Garlock paid, in the exercise of its business judgment — should be ignored. Garlock objects to the causation doctrines applied by courts in the tort system as unfair, and tries to portray itself as victimized by laws that provide for joint and several liability which, according to Garlock, have saddled Garlock with more than its fair share of liability. *See* Garlock Info. Br. at 36-38. Garlock also argues that its verdict and settlement values were inflated because of previous bankruptcies of "top-tier" defendants who, according to Garlock, were the real culprits, and whose absence from the tort system left Garlock holding the check. *See* Garlock Info. Br. at 49-69. (Garlock does not mention that it can — and does — seek contribution against other tortfeasors and/or Section 524(g) trusts when appropriate. *See* Part III.D.2, below).

Garlock has not been treated unfairly in the tort system. During these bankruptcy cases, if and when appropriate, the ACC will demonstrate conclusively that Garlock's products are not harmless, and that judges and juries have been justified in finding that Garlock has real and substantial liability for its asbestos claimants' injuries. There is ample scientific and medical evidence that Garlock's asbestos-containing products caused harm, and that Garlock was aware

[103] *See In re Owens Corning*, 322 B.R. at 721. *See also Raleigh v. Ill. Dep't of Revenue,* 530 U.S. 15, 20 (2000); *Bittner v. Borne Chem. Co., Inc.*, 691 F.2d 134, 135 (3d Cir. 1982).

of the dangers its products posed to workers, yet failed to warn of those dangers, and failed to ensure that the workers took adequate precautions. That evidence has repeatedly been admitted by judges and accepted by juries in cases against Garlock and similarly-situated asbestos defendants. Garlock's products were a substantial contributing factor to the injuries suffered by its asbestos claimants. The law is clear that Garlock is not exonerated just because other manufacturers' products also contributed to those injuries.

A. There is No Basis for Garlock's Assertions That it Overpaid to Resolve Claims in the Tort System

Garlock argues that it has substantially overpaid for asbestos claims, rehashing arguments and defenses that have failed in the tort system. Garlock argues that its asbestos-containing products did not cause harm — and that this Court should ignore the verdicts of judges and juries who found that they did — because, according to Garlock: (1) the asbestos in its products was encapsulated rather than friable; (2) chrysotile asbestos does not cause illness; (3) any injury to persons working with Garlock's products should be attributed to exposure to other manufacturers' products; (4) Garlock's products allegedly comply with OSHA regulations regarding exposure limits for workers; and (5) plaintiffs are required to prove they were exposed to a "doubling dose" of asbestos from Garlock's products (*i.e.*, an exposure level that increased their risk of illness two-fold) in order to establish general or specific causation.

It is not the Court's role in these bankruptcy cases to adjudicate such issues. Nor could the Court determine the validity of individual claims without violating the claimants' constitutional rights to jury trial. *See* Part I above. In any event, as discussed in Part III.C below, Garlock's defenses have no scientific support, and have properly been rejected by judges and juries in the tort system for the last 30 years. Further, the standard of proof of causation

Garlock argues should be applied to asbestos claims has no basis in either science or law, and is nothing more than wishful thinking on Garlock's part.

Despite the diligent efforts of its highly-resourceful counsel, Garlock suffered numerous large jury verdicts in the tort system in those cases Garlock chose to try to verdict rather than settle. Garlock has characterized those verdicts as "ruinous." Garlock Info. Br. at 57. Garlock admits that it and its insurers have paid well over a billion dollars to pay those verdicts and to settle tens of thousands of other claims. *See* Garlock Info. Br. at 1. The idea that Garlock and dozens of highly sophisticated insurance companies would pay over a billion dollars to resolve claims that had no merit defies belief.

Garlock's argument that it has paid more than its fair share in the tort system should be met with an equal measure of skepticism. In tort litigation, the claimants' damages remain unliquidated unless and until a final judgment is entered on a jury verdict. Only at that point can the amount to which the claimant is entitled be determined, and only then does the trial court mold a judgment based on the verdict, taking into account any adjustments due. All jurisdictions provide some formulation for set-offs against verdicts to reflect amounts recovered by plaintiffs from previously-settled defendants, and provide for contribution claims by defendants who paid the jury verdict against other culpable parties who did not pay. In this context, the Section 524(g) trusts established by bankrupt tortfeasors are no different from any other defendant in the tort system. When courts mold verdicts under local formulations, they take account of any amounts that the plaintiff may have received by way of settlement from co-defendants or other parties, including Section 524(g) trusts. All such trusts have provisions in their governing

documents empowering verdict-paying defendants to step into the shoes of the plaintiff and recover whatever the plaintiff might otherwise have recovered from the trust.[104]

Unless and until there is a final judgment after a jury verdict, there is no number that can be placed on an individual tort claim from which the so-called fair share of a particular defendant can be calculated. Rather, the amounts that defendants, including Garlock, pay in settlement in the tort system reflect their analyses of the strengths and weaknesses of the particular case and expectation of how it might come out both with respect to the level of damages and with respect to their own and other defendants' culpability. Garlock and its insurers participated in this system for decades, and the settlements they arrived at were the product of their own rational self-interest in minimizing the liability costs of Garlock's injurious products.

B. Garlock's False Description of the Medical and Exposure Realities

For decades, Garlock used asbestos in the manufacture of its gaskets and valve packing materials. A gasket is used to form a seal between two non-moving surfaces to prevent liquid or gas from leaking. Valve packing material forms a seal between a moving surface (such as a valve stem or pump shaft) and a stationary surface. Asbestos fibers are usually not released from the gaskets and valve packing when they remain in place and undisturbed. However, anyone removing or replacing a gasket or valve packing materials manufactured by Garlock is exposed to asbestos fibers. Garlock has long claimed such exposures are "negligible" because the asbestos in its products is encapsulated, and that chrysotile asbestos in its products is harmless. But in reality, Garlock, which was well-aware of the dangers of asbestos fibers, tried to conceal

[104] *See, e.g.*, United States Gypsum Asbestos Personal Injury Settlement Trust, Trust Distribution Procedures (updated Mar. 29, 2010) § 5.6 ("**USG TDP**") (available online at http://www.usgasbestostrust.com/files/ USGTDP.pdf).

those dangers from the general public,[105] and chose not to conduct studies to determine how much asbestos was emitted by its products when used under real-world conditions, preferring to remain ignorant.[106] Elsewhere, however, Garlock has admitted, and independent industrial hygiene studies demonstrate, that high levels of asbestos fibers are released into the air when a gasket is cut, scraped or abraded while being created, fitted or removed. Moreover, Garlock's assertion that chrysotile asbestos is harmless is contradicted by Garlock's own statements elsewhere, and has been completely discredited by the scientific and medical community: there is no "safe" type of asbestos, and no "safe" level of exposure. *See* Part III.B.3, *infra.*

1. Encapsulation Does Not Prevent Exposure; When Gaskets or Valve Packing Materials are Disturbed, Asbestos Fibers are Released

Garlock asserts that its products could not have caused mesothelioma or other asbestos-related diseases because the asbestos in its gaskets is "encapsulated," rather than "friable" (*i.e.*, easily crumbled by hand pressure). *See* Garlock Info. Br. at 10, 12. But "encapsulation" means only that it the asbestos is bound with or coated by plastic or other material; it does not mean that it is impossible for asbestos fibers to be released. As Garlock itself has acknowledged elsewhere, if the encapsulated asbestos is disturbed, by shearing, cutting, punching, tearing,

---

[105] For example, in 1973, representatives from Garlock attended a meeting of the Asbestos Textile Institute ("**ATI**") where the Executive Secretary of ATI stated that "despite all the negative" articles and studies regarding the dangers of asbestos, the "good news" is that "very few people have been paying attention." Asbestos Textile Institute ("**ATI**") General Meeting Minutes, attached presentation by Matthew M. Swetonic at 8 (June 7, 1973) (Ex. 21).

[106] *See In re Asbestos Litig. Cases Filed by Baron & Budd* (Madison Cnty. Cir. Ct. June 9, 1998) (Deposition Transcript of G. Ellwood Houghton) at 24-27 ("**Houghton Deposition**") (excerpt attached as Ex. 22) (Mr. Houghton, a former long-term Garlock employee, who attended ATI meetings on behalf of Garlock, testified that that he was not aware of any studies done in workplaces). *See also* ATI Air Hygiene Committee Meeting Minutes at 1 (Mar. 7, 1957) (Ex. 23) (a proposal to study lung cancer in asbestos workers is voted down because the committee believes it "would stir up a hornet's nest and put the whole industry under suspicion".).

sanding, scraping, brushing, abrading or grinding as the gaskets and valve packing materials are cut and installed, or as they are removed and replaced, asbestos fibers will be emitted into the air, where they can be inhaled and cause injury.[107]

Many of Garlock's mesothelioma and other asbestos-disease victims worked with asbestos gaskets and valve packing in a wide variety of occupational settings, including petrochemical facilities, shipyards and ships, steel plants and public utility steam plants. Most exposure to asbestos from Garlock's products occurred when workers were involved in replacing gaskets used on piping, which ranged from two to sixty inches in diameter. Plaintiffs who sued Garlock in the tort system testified that the replacement process consisted of unbolting a flange between two pipes that was sealed with an asbestos-containing gasket.[108] After the flange was separated, the old gasket had to be removed and a new gasket fitted, as a compressed gasket cannot be reused.[109] In almost all cases, the old gasket would be dried out and firmly stuck to the

---

[107] Garlock, Inc.'s Material Safety Data Sheet 10/03/1991 for Compressed Asbestos Sheets 1 ("**Garlock's 1991 MSDS**") (Ex. 24) ("Haz[ard] would arise only if prod[uct]s were subjected to mech[anical] actions that would cause asbestos fibers to be rel[eased] from elastomer compound matrix. Inhal[ation] of such airborne fibers can cause well-known long term ef[fect]s of asbestosis, lung cancer & mesothelioma.").

[108] *See Rixse v. Able Supply Co.*, Cause No. 26,653 (Milam Cnty. Dist. Ct. Dec. 10, 1999) (Deposition Transcript of Jimmy Gene Ward) ("**Ward Deposition**") at 29, 30-31 (Ex. 25); *Rixse v. Able Supply Co.*, Cause No. 26,653 (Milam Cnty. Dist. Ct. Mar. 15, 2000) (Deposition Transcript of Harry Joe Hyder) ("**Hyder Deposition**") at 176-77 (Ex. 26); *Hill v. ACandS*, *Inc.*, Cause No. 2001-CI-06058 (Bexar Cnty. Dist. Ct. May 24, 2001) (Deposition Transcript of Robert Hill) ("**Hill Deposition**") at 28-31 (Ex. 27); *Cichocki v. ACandS*, *Inc.*, Cause No. 18-262 (Nolan Cnty. Dist. Ct. July 17, 2001) (Deposition Transcript of Theodore Cichocki) ("**Cichocki Deposition**") at 23-24, 31-33 (Ex. 28); *Gilcrease v. ACandS, Inc.*, Cause No. 99-CI-07037 (Bexar Cnty. Dist. Ct. June 1, 2000) (Deposition Transcript of Ronald Isaacs) ("**Isaacs Deposition**") at 85-87 (Ex. 29).

[109] *See* Ward Deposition at 29 (n.108, *supra*) (Ex. 25). *See also* The Bureau of Naval Personnel, Navy Training Course Boilerman 3 & 2 Manual 406 (1st ed. rev. 1968) ("**Boilerman Manual**") (excerpt attached as Ex. 30). The Boilerman Manual provides training guidelines for work on Navy vessels.

seating areas of the flange, such that removal required cleaning with a power-driven wire brush, as well as scraping with a variety of tools.[110] It was essential that all of the old gasket material be removed to ensure a good seal when the pipes were reconnected.[111] The removal process produced considerable asbestos-laden dust, particularly during wire-brushing.[112] Gasket removal was often done in confined quarters or with the pipes overhead. It could take up to a full workday to remove the gaskets from a large pipe.

Re-assembling the flange involved preparing a new gasket. In most cases, the worker cut the new gasket from rolls of sheet gasket material. The worker cut the sheet and placed it against the flange to mark the bolt holes and flange openings. Bolt holes were cut out with punches and knives were used to cut out the flange openings. This process also would produce substantial amounts of asbestos-laden dust.

Many of Garlock's victims also worked with valve packing. They described the packing as asbestos fibers impregnated with a graphite-like material.[113] They used a packing hook to remove the old packing from around the valve stem. Frequently, the valve packing was dried out and crumbled into powder, generating significant amounts of asbestos-laden dust. They replaced

---

[110] *See* Hyder Deposition at 27-28 & 187 (n.108, *supra*) (Ex. 26); Hill Deposition at 29-30 (n.108, *supra*) (Ex. 27); Cichocki Deposition at 10-13 (n.108, *supra*) (Ex. 28); Isaacs Deposition at 144 (n.108, *supra*) (Ex. 29); Boilerman Manual at 406 (n.109, *supra*) (Ex. 30).

[111] *See* Boilerman Manual at 406 (n.109, *supra*) (Ex. 30).

[112] *See* Ward Deposition at 107-08 (n.108, *supra*) (Ex. 25); Hyder Deposition at 27-28 (n.108, *supra*) (Ex. 26); Hill Deposition at 29-30 (n.108, *supra*) (Ex. 27); Cichochki Deposition at 15 (n.108, *supra*) (Ex. 28). Indeed, the training guidelines for work on Navy vessels provide that "[p]ower-driven wire brushes are best for cleaning the seating surfaces. Scraper-type tools should be used only when wire brushes are not sufficient to clean the surface." Boilerman Manual at 406 (n.109, *supra*) (Ex. 30).

[113] *See* Hill Deposition at 33-35, 113 (n.108, *supra*) (Ex. 27).

the packing by wrapping new packing around the valve stem and replacing and tightening a nut on the top of the valve.[114]

2. Industrial Hygiene Studies Establish that Substantial and Dangerous Amounts of Asbestos Fibers are Released by Asbestos-Containing Gaskets and Valve Packing When They are Scraped, Cut or Abraded

An industrial hygiene study conducted by the U.S. Navy, in which 14 air samples were collected in the breathing zone of workers during the removal of asbestos gaskets using a hand scraper, found exposure levels ranging from less than 0.06 fibers per cubic centimeter ("**f/cc**") to 0.39 f/cc, with an average of 0.13 f/cc.[115] Another published study by industrial hygienists from Chevron Corporation found exposures ranging from 0.11 f/cc to 0.33 f/cc when removing sheet gaskets using dry scraping and brushing.[116] Additional studies found that when gasket material was removed with a hand-held or power-driven wire brush — as was common practice — much higher levels of respirable asbestos-laden dust could be created.[117] One study, for example,

---

[114] *See id.*, at 35-36, 121-22 (n.108, *supra*) (Ex. 27).

[115] *See* L.R. Liukonen et al., Naval Regional Medical Center, Occupational & Environmental Health Services, *Asbestos Exposure from Gasket Operations*, 41 (1978).

[116] *See* Robert T. Cheng & Henry J. McDermott, *Exposure to Asbestos from Asbestos Gaskets*, 6(7) Applied Occupational & Environmental Hygiene 588, 590 (1991).

[117] *See* J.R. Millette & M.D. Mount, *Asbestos-Containing Sheet Gaskets and Packing*, found in 12 Sourcebook on Asbestos Diseases, Asbestos Health Risks, 165 (G.A. Peters & B.J. Peters eds., 1996); William E. Longo et al., *Fiber Released During the Removal of Asbestos-Containing Gaskets: A Work Practice Simulation*, 17(1) Applied Occupational & Environmental Hygiene 55, 57-58, 60 (2002) ("**2002 Longo Paper**") (Ex. 31). Although Garlock notes one occasion where a court did not permit Dr. Longo to testify (*see* Garlock Info. Br. at 51, n.34), he is usually permitted to do so. *See, e.g.*, *Caffey v. Foster Wheeler Energy Corp.*, No. 01-C-753 (Order Denying the Motion of Garlock to Strike the Testimony of Dr. William Longo) (Cass. Cnty. Dist. Ct. June 19, 2003) (Ex. 32) (finding that Dr. Longo is qualified as an expert to testify, and that his testimony is reliable and will assist the trier of fact).

found concentrations of asbestos fibers released from removal of gaskets of 2.1 f/cc to 31.0 f/cc, with an eight hour time-weighted average ("**TWA**") of 2.3 f/cc.[118]

A worker experiences one "fiber-year" of exposure when he or she breathes air containing one asbestos fiber per cubic centimeter (1 f/cc) eight hours a day for 250 days. Exposure level reaches 0.15 fiber-years (the level at which case-controlled epidemiological studies have seen an almost eight-fold increased risk for the development of mesothelioma)[119] at an average exposure level of 1 f/cc in just 37.5 days. At an average exposure level of 2 f/cc (the low end of the range of exposure levels when an electric wire brush is used to remove old gaskets),[120] the cumulative level of exposure would reach 0.15 fiber-years in less than 20 days.[121]

Thus, there is ample evidence that substantial levels of respirable asbestos-containing dust are produced when asbestos-containing gaskets and valve packing materials such as Garlock's are fitted or removed, particularly when a scraper or wire brush is used. Not

---

[118] 2002 Longo Paper at 58 (n.117, *supra*) (Ex. 31). An eight hour TWA is an average value of exposure over the course of an 8 hour work shift.

[119] *See* Klaus Rodelsperger et al., *Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results from a German Hospital-Based Case-Control Study*, 39 American Journal of Industrial Medicine 262, 269 (2001) ("**2001 Rodelsperger Paper**") (Ex. 33).

[120] *See* 2002 Longo Paper at 58 (n.117, *supra*) (Ex. 31).

[121] By contrast, the average level of asbestos fibers in the ambient air (often referred to as the "background level") has been measured at .00001 f/cc (*see* Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, *Toxicological Profile for Asbestos, 3 (2001)*), up to .00003 f/cc (the high end of the range). *See also* Gary N. Greenberg & Dennis J. Darcey, *Occupational and Environmental Exposure to Asbestos*, found in Pathology of Asbestos-Associated Diseases 19, 28: Table 2-1 (Victor L. Roggli et al. eds., 2nd ed. 2003) ("**2003 Roggli Paper**") (finding background levels of asbestos ranging from 0.00005 f/cc to 0.00023 f/cc). It would take several thousand years of continuous exposure at this level to reach 0.15 "fiber-years" of exposure.

surprisingly, the fact that the asbestos in Garlock's products is "encapsulated" has not been accepted by judges and juries in the tort system as a defense to liability.[122]

3. There is No "Safe" Type of Asbestos, and No "Safe" Level of Asbestos Exposure

Garlock has expressly acknowledged elsewhere that "chrysotile asbestos [is] a known human carcinogen."[123] But in litigation, including in these bankruptcy cases, Garlock asserts that its products cannot have contributed to asbestos-related illnesses because, for the most part, they are made with chrysotile asbestos, which Garlock asserts is harmless. *See* Garlock Info. Br. at 28-30. But "[w]hile this is indeed the position of the asbestos industry, it is not the position of independent experts."[124] Rather, Garlock's statement outside of litigation, that chrysotile is a carcinogen, is generally accepted by the independent scientific and medical community. *All* types of asbestos — including chrysotile — cause mesothelioma and other asbestos-related diseases.[125] Recently, the highly-esteemed and authoritative International Agency for Research

---

[122] *See, e.g.*, *Hicks v. Dana Cos.*, 984 A.2d 943, 956-57 (Pa. Super Ct. 2009) (affirming a jury verdict in a gasket exposure case where the jury rejected the encapsulation defense); *Junge v. Garlock Inc.*, 629 A.2d 1027 (Pa. Super. Ct. 1993) (reversing grant of summary judgment for Garlock and holding that whether exposure to its encapsulated products caused asbestosis is a jury question).

[123] Garlock's 1991 MSDS at 4 (n.107, *supra*) (Ex. 24).

[124] 2010 Letter to Québec Premier Charest at 242 (n.22, *supra*) (Ex. 9).

[125] WHO 2006 at 1-2 (n.29, *supra*) (Ex. 13); 2007 Welch Paper at 318 (n.33, *supra*) (Ex. 14); William J. Nicholson & Philip J. Landrigan, *The Carcinogenicity of Chrysotile Asbestos*, found in 22 Advances in Modern Environmental Toxicology, *The Identification and Control of Environmental and Occupational Disease: Asbestos and Cancers* 407, 420 (Myron A. Mehlman & Arthur Upton eds., Princeton Scientific Publishing Co. 1994) ("**1994 Nicholson Paper**") (Ex. 34); International Agency on Research for Cancer, Special Report: Policy, *A Review of Human Carcinogens – Part C: Metals, Arsenic, Dust, and Fibres*, 10 The Lancet 453, 454 (2009) ("**2009 IARC Paper**") (Ex. 35); Richard A. Lemen, *Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model*, 10 International Journal of Occupational & Environmental Health 233, 233-39 (2004) ("**2004 Lemen Paper**") (discussing several of the major published and peer reviewed epidemiology studies that support the conclusion that *(Footnote continued on next page.)*

on Cancer ("**IARC**") completed a comprehensive review of asbestos research, and reaffirmed its long-held position that chrysotile by itself causes mesothelioma, as do other forms of asbestos.[126] And the medical literature is filled with articles describing both pleural and peritoneal mesothelioma arising in almost all populations of asbestos-exposed workers studied, including those exposed only to chrysotile asbestos.[127]

Even in litigation, Garlock does not dispute that amphiboles, such as crocidolite and tremolite, cause mesothelioma. It should be noted that, while the majority of Garlock's gaskets

---

(Footnote continued from previous page.)
chrysotile by itself causes mesothelioma); Lu Li et al., *Cohort Studies on Cancer Mortality Among Workers Exposed Only to Chrysotile Asbestos: a Meta-analysis*, 17(4) Biomedical & Environmental Sciences 459, 459, 466 (2004) ("**2004 Li Paper**") (Ex. 36); Leslie T. Stayner et al., *Occupational Exposure to Chrysotile Asbestos and Cancer Risk: A Review of the Amphibole Hypothesis*, 86(2) American Journal of Public Health 179, 184 (1996) ("**1996 Stayner Paper**"); *see also* British Thoracic Society, *Statement on Malignant Mesothelioma in the United Kingdom*, 56 Thorax 250, 252 (2001) ("**2001 British Thoracic Society Paper**") ("All types of asbestos can cause mesothelioma."); EPA, Airborne Asbestos Health Assessment Update 93, 95, 173-74 (1986) ("**1986 EPA Airborne Asbestos Health Assessment**").

[126] *See* 2009 IARC Paper at 454 (n.125, *supra*) (Ex. 35) ("Epidemiological evidence has increasingly shown an association of all forms of asbestos (chrysotile, crocidolite, amosite, tremolite, actinolite, and anthophyllite) with an increased risk of lung cancer and mesothelioma.").

[127] *See* 2004 Li Paper at 459, 466 (n.125, *supra*) (Ex. 36) (*see also* the underlying studies); Dana Loomis et al., *Lung Cancer Mortality and Fiber Exposures among North Carolina Asbestos Textile Workers*, Journal of Occupational & Environmental Medicine 1, 2, 9 & 14-16 (2009) ("**2009 Loomis Paper**") (Ex. 37); Dario Mirabelli et al., *Excess of Mesotheliomas After Exposure to Chrysotile in Balangero*, Occupational & Environmental Medicine 1, 2, 4 (2008); M. T. Madkour et al., *Environmental Exposure to Asbestos and the Exposure-Response Relationship with Mesothelioma*, 15(1) Eastern Mediterranean Health Journal 25, 27, 33-37 (2009) ("**2009 Madkour Paper**") (Ex. 38). S*ee also* Helsinki Criteria at 313 (n.33, *supra*) (Ex. 15) (discussing several of the major published and peer reviewed epidemiology studies that support the conclusion that chrysotile by itself causes mesothelioma). The few studies finding no mesothelioma in persons exposed only to chrysotile are not determinative; any interpretations of the data from those studies must be tempered by the inherent limitation of epidemiology to detect rare diseases, and the long latency between asbestos exposure and diagnosis, as well as the rarity and difficulty of diagnosing mesothelioma. *See* 2007 Welch Paper at 321 (n.33, *supra*) (Ex. 14).

and valve packing material were made with chrysotile (white) asbestos, Garlock admits that a percentage of its gaskets were made with crocidolite (blue) asbestos.[128] Moreover, many of Garlock's gaskets supposedly made with chrysotile contained some amount of crocidolite.[129] In any event, almost all "chrysotile" asbestos products are contaminated with the amphibole tremolite. [130]

There is no scientific evidence that chrysotile is a significantly less potent carcinogen than amphibole asbestos. The epidemiological data is sufficient to permit quantification of the risk of contracting various diseases from exposure to asbestos in general. However, efforts to determine whether some types of asbestos fibers are more likely to cause mesothelioma or lung cancer have been severely hampered by lack of historical exposure data. Although some studies have found that crocidolite (an amphibole) may be more potent than chrysotile on a fiber-by-fiber basis, the available data is simply not sufficient to quantify the relative potency of fiber types, or to determine whether some fiber types are significantly less potent than others. For that reason, after an exhaustive analysis of the issue, the EPA stated in 2008 that it would adhere to

---

[128] *See In re All Asbestos-Related Personal Injury or Death Cases Filed in or to be Filed in Harris County, Texas*, Cause No. 2004-03964 (Harris Cnty. Dist. Ct. Sep. 8, 2008) (Defendant Garlock's Third Amended Responses to Plaintiff's Interrogatories and Requests for Production) at Answer to Interrogatory No. 10 & Ex. H ("**Garlock's Asbestos-Containing Product List**") (Ex. 40); United States Department of Labor, Occupational Health and Safety Administration, Material Safety Data Sheet, Garlock, Inc. (Feb. 2, 1982). *See also* Garlock Info. Br. at 34.

[129] In May of this year, a former Garlock employee who worked in its Palmyra, New York facility, the principal place where Garlock made asbestos-containing gaskets, testified that Garlock mixed white chrysotile and blue crocidolite asbestos together in a variety of industrial processes used when gaskets were created. *See* Affidavit of Richard Slate (Wayne Cnty. Dist. Ct. May 5, 2010) (Ex. 40).

[130] As Doll & Peto have stated, "It is not practicable to remove tremolite from chrysotile for commercial purposes and any distinction between the effects of chrysotile and tremolite may, therefore, be considered academic, unless supplies of chrysotile can be obtained in which little or no tremolite is present." Richard Doll & Julian Peto, Health & Safety Commission, *Effects on Health of Exposure to Asbestos*, 17 (London: Her Majesty's Stationary Office 1985).

standards that treat all asbestos fiber types as having equal mesothelioma and lung cancer potency. [131]

It is also the consensus of the scientific community that there is no "safe" level of asbestos exposure. Epidemiological studies have demonstrated that asbestos exposures at levels as low as 0.15 fiber-years, and even as low as 0.07 fiber-years, significantly increase the risk of mesothelioma.[132] Garlock has been aware of this consensus since at least 1969. Indeed, no

---

[131] Garlock relies on the work of D.W. Berman and K.S. Crump to support its assertion that chrysotile is a less potent carcinogen than amphiboles on a fiber-by-fiber basis. *See* Garlock Info. Br. at 29, n.78, citing D.W. Berman & K.S. Crump, *A Meta-Analysis of Asbestos-Related Cancer Risk That Addresses Fiber Size and Mineral Type,* 38 Critical Res. Toxicology 49, 49 (2008). But the Berman & Crump analysis and methodology have been thoroughly discredited. For example, the EPA and other governmental organizations (including a National Science Advisory Board ("**SAB**") charged with reviewing the issue) have on several occasions over the past 30 years — most recently in 2008 — considered all of the available scientific literature relevant to whether some types of asbestos varieties are a more potent cause of mesothelioma or lung cancer on a fiber-per-fiber basis than others. On each occasion, the EPA has concluded there is simply not enough evidence to quantify the relative potencies of different fiber types. Thus, the EPA has adhered to standards that assume that all asbestos fiber types have equal mesothelioma and lung cancer potency, and that the threshold exposure level for the induction of cancer is so low that it cannot be measured. *See* 1986 EPA Airborne Asbestos Health Assessment at 93, 95 & 173-74 (n.125, *supra*). The chronology of the government's involvement with the various attempts to quantify asbestos fiber potency by fiber type or length is comprehensively and compellingly reported in Michael A. Silverstein et al., *Historical Perspective, Developments in Asbestos Cancer Risk Assessment*, American Journal of Industrial Medicine 1, 1-9 (2009). *See also* Letter from Dr. Agnes Kane, Chair of the Asbestos Committee Science Advisory Board, to the Honorable Stephen L. Johnson, the Administrator of the EPA (November 14, 2008) (Ex. 41) (stating that the EPA continues to use the method approved in 1986); Letter from the Honorable Stephen L. Johnson, the Administrator of the EPA, to Dr. Agnes Kane, Chair of the Asbestos Committee Science Advisory Board (December 29, 2008) (Ex. 42) (noting that in light of the SAB's concerns about the quality of available exposure data, the EPA would not adopt the Berman & Crump 2008 analysis).

[132] *See* 2001 Rodelsperger Paper at 269 (n.119, *supra*) (Ex. 31) (7.9 times increased risk of mesothelioma for individuals with cumulative asbestos exposures up to 0.15 f/cc-years); P. Rolland et al., *Risk of pleural mesothelioma: A French population based case-control study (1998-2002) Abstract of Presentation*, Epidemiology I-II Oral Session (2006) ("**2006 Rolland Paper**") (2.8 times increased risk of mesothelioma at cumulative exposures of 0.07 f/yr); Y. Iwatsubo et al., *Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-Based Case-Control Study*, 148(2) American Journal of

(Footnote continued on next page.)

amount of exposure to asbestos above the background levels present in ambient air has been demonstrated to be too low to induce mesothelioma. As the British Thoracic Society states: "[t]here is no evidence for a threshold dose of asbestos below which there is no risk."[133] And as a group of more than 100 scientists noted in a January 2010 open letter imploring the government of Quebec to stop the exportation of asbestos to developing countries, the "WHO, the Canadian Cancer Society, the US Surgeon General, and the fifty countries who have banned chrysotile asbestos state that there is no safe exposure level for chrysotile asbestos."[134] A recent study, for example, showed that even the relatively low exposures from air pollution created by a chrysotile asbestos manufacturing facility more than a mile away greatly increased the risk of mesothelioma.[135] Any attempts to postulate "safe" thresholds for asbestos exposure should be dismissed as "logical nonsense."[136]

(Footnote continued from previous page.)
Epidemiology 133, 139 (1998) ("**1998 Iwatsubo Paper**") (Ex. 43) (4 times risk of mesothelioma for exposures of 0.5-0.99 f/yr).

[133] 2001 British Thoracic Society Paper (n.125, *supra*). *See also* 2007 Welch Paper at 319 (n.33, *supra*) (Ex. 14); WHO 2006 at 2 (n.29, *supra*) (Ex. 13) ("no threshold has been identified for the carcinogenic risk of chrysotile."); National Cancer Institute, Fact Sheet, Asbestos Exposure and Cancer Risk, 1 (2009).

[134] 2010 Letter to Québec Premier Charest at 242 (n.22, *supra*) (Ex. 9).

[135] *See* 2009 Madkour Paper at 32-35 (n.127, *supra*) (Ex. 38) (83 mesotheliomas representing a 26-fold excess risk of pleural mesothelioma due to environmental exposure found when examining the incidence of mesothelioma in six Egyptian neighborhoods surrounding a plant that used chrysotile asbestos). The cases documented in the 2009 Madkour Paper occurred at various distances from the plant: 17 of the cases occurred in neighborhoods a half a mile away (where airborne asbestos was measured at 0.04 f/cc) and 27 came from neighborhoods between 1 and 2.5 kilometers away (dust measurements of 0.025 f/cc or less). *Id*. at 35, Table 9.

[136] John T. Hodgson & Andrew Darnton, *The Quantitative Risks of Mesothelioma & Lung Cancer in Relation to Asbestos Exposure*, 44(8) American Occupational Hygiene 565, 583 (2000).

Not surprisingly, the medical literature contains numerous case reports of mesotheliomas caused by as little as a few months, weeks, or even days of asbestos exposure.[137]

C. Garlock's Misrepresentation of Tort Law

Garlock devotes a large portion of its Information Brief to arguments that it has strong defenses to the asbestos claims against it. Even if those defenses had merit, they are irrelevant to the issues in this bankruptcy case, because the merits of individual claims will not be decided in this forum. What is relevant is that these defenses regularly were rejected by judges and juries in the tort system, and Garlock was found liable for the injuries caused by the asbestos in its products. In any event, as discussed below, Garlock has misrepresented both the facts and the defenses available to it under substantive state tort law. First, compliance with OSHA regulations is not a defense to liability for negligence or failure to warn, and, in any event, the

[137] *See, e.g.*, K. Browne & W.J. Smither, *Asbestos-related Mesothelioma: Factors Discriminating between Pleural and Peritoneal Sites*, 40 British Journal of Industrial Medicine 145, 147 (1983) (in a study of 143 cases of mesothelioma, 32 cases were exposed for under one year, of whom 21 had no more than six months of exposure and 9 had no more than three months); Morris Greenberg & T.A. Lloyd Davies, *Mesothelioma Register 1967-68*, 31 British Journal of Industrial Medicine 91, 96, 103 (1974) (Ex. 44) (documenting mesothelioma following an asbestos exposure of 3 weeks in one case and 1 day in another); 1965 Newhouse and Thompson Paper at 267 (n.34, *supra*) (documenting 2 cases of mesothelioma with 2 months or less exposure to asbestos); Maxwell Borow et al., *Critical Review, Mesothelioma following Exposure to Asbestos: A review of 72 Cases*, 64(5) Chest 641, 642 (1973) (documenting mesotheliomas in stock clerks who worked in areas "not heavily contaminated with asbestos" for 10 months and 18 months respectively). *See also* National Institute for Occupational Safety & Health, U.S. Department of Health & Human Services, *Workplace Exposure to Asbestos, Review and Recommendations*, Publication No. 81-103, 3 (1980) ("[A]ll levels of asbestos exposure studied to date have demonstrated asbestos-related disease, and a linear relationship appears to best describe the shape of the dose-response curve. These considerations led the committee to conclude that there is no level of exposure below which clinical effects do not occur. Third, the absence of a threshold is further indicated by the dramatic evidence of asbestos-related disease in members of asbestos-worker households and in persons living near asbestos-contaminated areas. These household and community contacts involved low level and/or intermittent casual exposure to asbestos. Studies of duration of exposure suggest that even at very short exposure periods (1 day to 3 months) significant disease can occur.").

asbestos emitted from Garlock's products often exceeds the exposure limits set out by OSHA. *See* Part III.C.1, below. Second, Garlock's argument that its victims were exposed to asbestos from other manufacturers' products is no defense, as the risk of harm from asbestos increases with each and every exposure. *See* Part III.C.2, below. And third, contrary to Garlock's contentions, neither medical science nor substantive state tort law require that Garlock's victims prove they were exposed to a specific quantity of asbestos from Garlock's products in order to establish causation. *See* Part III.C.3-5, below.

1. Compliance With OSHA Regulations is Not a Defense

Garlock insists that its products are not dangerous, because, according to Garlock, they emit fewer fibers than the "permissible exposure limit" ("**PEL**") of 0.1 f/cc set out in federal Occupational Safety and Health Administration ("**OSHA**") standards. [138] *See* Garlock Info. Br. at 19-20. But, as discussed in Part III.C.2, above, installation and removal of asbestos-containing gaskets such as Garlock's creates much higher levels of respirable asbestos fibers than the 0.1 f/cc PEL set out by OSHA.

In any event, as Garlock knows, the OSHA PEL standard — which does not concern the relationship between end-users and manufacturers such as Garlock but, rather, governs the employer-employee relationship[139] — was never intended to, and does not purport to, set an

---

[138] *See* Occupational Safety & Health Administration, Occupational Exposure to Asbestos, 59 Fed. Reg. 40,964-41,162 (Aug. 10, 1994) (amending 29 C.F.R. pts. 1910, 1915, & 1926).

[139] "OSHA regulations generally 'pertain only to employers' conduct,' and do not purport to define the obligations of manufacturers." *Young v. Pollock Eng'g Group, Inc.*, 428 F.3d 786, 791 (8th Cir. 2005). *See also Minichello v. U.S. Indus., Inc.*, 756 F.2d 26, 28-30 (6th Cir. 1985) (admission of manufacturer's compliance with OSHA standards to establish whether its product is unreasonably dangerous was improper and reversible error because the regulations pertain only to the employer's conduct); *Bailey v. V & O Press Co.*, 770 F.2d 601, 607-09 (6th Cir. *(Footnote continued on next page.)*

exposure limit that will protect workers from cancer. Rather, the PEL was intended to define practical requirements for employers — upon balancing risk, benefit, and cost — to reduce the risk of asbestosis, which typically develops only after exposures that are much higher than those that cause mesothelioma and other malignancies. Indeed, the OSHA regulations explicitly recognize that the PEL will not protect against cancer: the preamble to the 1994 revision to the OSHA regulation, which established the current PEL of 0.1 f/cc, explicitly recognizes that exposure at this level will lead to 3.4 excess asbestos-related cancer deaths per 1000 workers.[140] Accordingly, in many jurisdictions, compliance with the OSHA PEL is not even admissible on the issue of negligence,[141] and it is not an absolute defense to liability in any jurisdiction.[142]

(Footnote continued from previous page.)
1985) (district court's refusal to admit a manufacturer's compliance with OSHA regulations as probative on the issue of strict liability was proper).

[140] *See* Preliminary Statement. *See also* National Institute for Occupational Safety & Health, U.S. Department of Health, Education & Welfare, Revised Recommended Asbestos Standard, Publication No. 77-169, 1 (1976) ("This standard [2.0 f/cc at that time] was recommended with the stated belief that it would 'prevent' asbestosis and *with the open recognition that it would not 'prevent' asbestos-induced neoplasms*.") (emphasis added); 20 U.S.C. § 4011 (congressional finding that "medical science has not established any minimum level of exposure to asbestos fibers which is considered to be safe to individuals exposed to the fibers").

[141] *See, e.g.*, *Buell-Wilson v. Ford Motor Co.*, 46 Cal. App. 3d. 147, 177-78 (Ct. App. 2006).

[142] Compliance with a government regulation will not relieve a party of its common law tort liability for negligence and failure to warn. *See*, *e.g.*, *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1458 (10th Cir. 1985) (rejecting "Kerr-McGee's argument that substantial compliance with federal nuclear regulations rendered it immune to tort liability" under Oklahoma law); *Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218, 224 (Mo. Ct. App. 1985) (noting that "compliance with statutory requirements by Mallinckrodt does not relieve a party from responsibility for negligence"); *Transport Indem. Co. v. Page*, 406 P.2d 980, 985 (Okla. 1963) (noting that "mere compliance with statutory requirements does not relieve a party from responsibility for negligence as a matter of law"). Normally, an alleged tortfeasor is given immunity vis-à-vis regulatory compliance only if the regulatory scheme specifically preempts common law. *See generally Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-19 (1992). But
(Footnote continued on next page.)

Garlock was well aware of the dangers of the asbestos in its products for decades. Garlock, which was a member of the Asbestos Textile Institute, knew since at least the 1940's that asbestosis was caused by exposure to asbestos fibers.[143] Moreover, Garlock was found liable under workers'-compensation laws for claims by workers who had developed asbestos-related disease working in Garlock's plants.[144]

Garlock also knew, since at least 1956, that exposure to asbestos causes cancer. In March of that year, George Houghton, Garlock's representative at the Asbestos Textile Institute, attended a meeting at which the members were informed that, the Chief of the Environmental Cancer Section of the National Cancer Institute at the National Institute of Health had stated in published research that "Asbestosis Cancer" (lung cancer) can be found after exposure to asbestos for periods as short as 6 months. Garlock was also told that all workers in its industry are susceptible to lung cancer, and that levels of exposure to asbestos dramatically lower than the existing industry standards caused lung cancer.[145] In 1969, Garlock was informed by the U.S. Public Health Service that "[the] asbestos hazard can be controlled [through proper dust reduction] *except for mesothelioma*."[146] Yet Garlock continued

---

(Footnote continued from previous page.)
the plain text of the current federal hazard warning standards do not purport to preempt a plaintiff's failure to warn claims. *See*, *e.g.*, *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 682 (N.D. Ohio 2005) (holding that "plaintiffs' failure-to-warn claims in this MDL are not pre-empted by the OSH Act or related federal regulations").

[143] *See* Houghton Deposition at 17 (n.106, *supra*) (Ex. 22). In1946, Garlock advertised in the Southern Power and Industry Magazine.

[144] *See, e.g.*, Baylord Workers' Compensation File (n.70, *supra*) (Ex. 17), Clemon's Workers' Compensation File (n.68, *supra*) (Ex. 16).

[145] *See* ATI Air Hygiene Committee Meeting Minutes at 1 (Mar. 7, 1956) (Ex. 45).

[146] ATI Board of Governor's Meeting Minutes at 3 (Oct. 9, 1969) (Ex. 46) (emphasis added).

to sell asbestos-containing products up through 2000, without adequate warnings or design changes, and without ensuring that precautions were taken to protect the workers or other people who were nearby when gaskets and valve packing materials were removed or installed.

In holding Garlock liable for asbestos-related torts, judges and juries have found that Garlock's products caused harm and that Garlock failed to adequately warn end-users exposed to the asbestos in gaskets and packing of the dangers posed by the asbestos in those products. Given Garlock's knowledge of the hazards posed by asbestos, it is not surprising that juries have repeatedly rejected Garlock's "OSHA-compliant" defense.

2. It Is No Defense That Garlock's Victims Were Also Exposed to Asbestos From Other Manufacturers' Products; Every Exposure to Asbestos — Including Chrysotile — Can Cause or Contribute to Causing Mesothelioma

Asbestos-related diseases are dose-responsive. That is, the higher the dose of asbestos to which a person is exposed, the greater the likelihood that person will develop an asbestos-related disease. Asbestosis typically requires a year or more of exposure to develop.[147] Mesothelioma, by contrast, can and often does develop after short or minimal exposures. That said, mesothelioma is more likely to develop, and will have a shorter latency period, at higher levels of exposure.[148]

Garlock contends that any workers who developed asbestos-related illnesses did not fall ill because of exposure to Garlock's products, but because of other manufacturers' products, such as asbestos insulation on pipes. *See* Garlock Info. Br. at 14-15. This defense has no scientific basis, and has consistently been rejected by courts in the tort system. From a scientific

---

147 *See* 2004 ATS Statement (n.29, *supra*) (Ex. 12).

148 1997 Bianchi Paper at 162 (n.34, *supra*).

and biological point of view, each and every exposure to asbestos experienced by an individual with an asbestos-related disease contributed to the risk of development of the disease. As the Environmental Protection Agency ("**EPA**") has stated, "[i]f inhaled, asbestos fibers can easily penetrate body tissues, and may be deposited and retained in the airways and lung tissue. Because asbestos fibers remain in the body, each exposure increases the likelihood of developing an asbestos-related disease."[149] And as Dr. Victor Roggli, a pathologist at Duke University who was one of the Helsinki Criteria panelists, testified in a 2005 case:

> Very low levels of exposure above background, however, have been demonstrated to cause mesothelioma. It is also my opinion that it is the total dose of asbestos, regardless of fiber type, that the patient experiences that causes the disease. It is further my opinion that each and every exposure to asbestos that an individual with mesothelioma experienced in excess of a background level is a substantial contributing factor in the development of the disease.[150]

The consensus of the scientific community is that any occupational or para-occupational exposure to asbestos — even "brief or low-level exposures" — must be considered causal in an individual with mesothelioma.[151] Courts have consistently recognized that each and every exposure to asbestos above background levels contributes to the aggregate dose that increases the risk of mesothelioma and lung cancer, and thus can be a substantial contributing factor to causing the disease. *See, e.g.*, *Rutherford v. Owens-Illinois, Inc*., 941 P.2d 1203, 1214 (Cal. 1997) (plaintiff may meet the burden of proving exposure to defendant's product caused lung cancer by showing that in reasonable medical probability it was a substantial factor contributing to the

---

[149] *See* EPA, A Guide for Ship Scrappers: Tips for Regulatory Compliance, 2-6 (2000).

[150] *Behringer v. Alcoa, Inc*., Cause No. 2004-23251 (Harris Cnty. Dist. Ct. May 20, 2005) (Affidavit of Victor Roggli, M.D.) at 2 ("**Roggli Aff.**") (Ex. 47).

[151] 2007 Welch Paper at 321 (n.33, *supra*) (Ex. 14). *See also* Helsinki Criteria at 313 (n.33, *supra*) (Ex. 15).

plaintiff's or decedent's risk of developing cancer).[152] As the Fifth Circuit explained in *Borel*, "it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury" to the plaintiff. 493 F.2d at 1094. "[E]xposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury." *Id.* Thus, as the Maryland Court of Appeals has explained: "In products liability cases involving asbestos, where the plaintiff has sufficiently demonstrated both lung disease resulting from exposure to asbestos and that the exposure was to the asbestos products of many different, but identified, suppliers, no supplier enjoys a causation defense solely on the ground that the

[152] *See also Jones v. John Crane, Inc.*, 350 Cal. Rptr. 3d 144, 151 (Ct. App. 2005) ("The testimony of the experts provided substantial evidence that Jones's lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury."); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 523 (Md. Ct. Spec. App. 2010) ("We conclude that lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels), was sufficient to create a jury question [as to whether the plaintiff's mesothelioma was caused by defendant's asbestos-containing products]."); *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 532 (Ga. Ct. App. 1997) ("Expert testimony showed that it is universally agreed that asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful"); *Blancha v. Keene Corp.*, Civ. A. No. 87-6443, 1991 WL 224573, at *6 (E.D. Pa. Oct. 24, 1991) (*every* occupational exposure to asbestos "is a substantial factor in bringing about mesothelioma"); *Held v. Avondale Indus., Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996) (medical evidence showed "no known level of asbestos [exposure] which would be considered safe . . . any [asbestos] exposure, even slight exposures, to asbestos . . . [found to be] a significant contributing cause of the [decedent's] malignant pleural mesothelioma."); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684 (Wash. Ct. App. 1997) (any exposure to asbestos above background contributes to development of mesothelioma); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 766 (N.J. Super. Ct. App. Div. 1997) ("Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury."); *ACandS, Inc. v. Abate*, 710 A.2d 944, 989 (Md. Ct. Spec. App. 1998) (expert medical witness testified that "each and every [asbestos] exposure that [the decedent] had was a substantial contributing factor in the causation of his disease."); *Caruolo v. ACandS, Inc.*, No. 93 Civ. 37529, 1999 WL 147740, at *9 (S.D.N.Y. Mar. 18, 1999) (expert medical witness testimony that "There is no way one can say [each asbestos exposure] didn't contribute. To the contrary. All of his exposures contributed to his mesothelioma, including this one.").

plaintiff would probably have suffered the same disease from inhaling fibers originating from the products of other suppliers." *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 459 (Md. 1992) (footnote omitted). *See also Spaur v. Owens-Corning Fiber Glass Corp.*, 510 N.W.2d 854, 861 (Iowa 1994) ("it is not necessary and indeed may be impossible to establish exactly how much one party's asbestos product contributed to the resulting injury. From the medical evidence presented, the jury could infer that [the defendant's product] was a contributing cause of [plaintiff's] disease.").

3. Medical Science Does Not Require a "Doubling Dose" of Asbestos to Establish Causation

Garlock contends that individual asbestos claimants must prove that their diseases were caused by Garlock's products by showing that they were exposed to asbestos from those products in an amount sufficient to double their risk of developing an asbestos-related disease ("doubling dose"). *See* Garlock Info. Br. at 21-24. Garlock contends that claimants cannot do so, because "there are no 2.0 studies demonstrating that pure chrysotile fibers cause mesothelioma" (*id.* at 29), and "no 2.0 studies exist showing exposure to Garlock's asbestos-containing products caused or had the potential to cause asbestos disease." *Id.* at 24. But plaintiffs in the tort system are not required to produce epidemiological studies showing a doubling of the relative risk[153] to prove either general or specific causation in asbestos personal injury cases.

[153] Relative risk is the ratio of the risk of disease or death among people exposed to an agent to the risk among the unexposed. *See* Federal Judicial Center, *Reference Manual on Scientific Evidence*, 395 (2d ed. 2000) ("***Reference Manual on Scientific Evidence***") (excerpts attached as Ex. 48).

A plaintiff alleging that a toxic agent caused injury must prove both general and specific causation.[154] General causation concerns whether a toxic agent has the capacity to cause the disease.[155] Specific causation concerns whether the toxic agent in question caused an injury in a particular individual.[156]

As stated in the Federal Judicial Center's *Reference Manual on Scientific Evidence*, "epidemiology addresses whether an agent can cause a disease, not whether an agent did cause a specific plaintiff's disease."[157] Thus, while epidemiological studies that evaluate the relative risk of populations exposed to a particular toxic agent may be relevant to a general causation inquiry, such studies do not "address the question of the cause of an individual's disease. This question, sometimes referred to as specific causation, is beyond the domain of the science of epidemiology." *Reference Manual on Scientific Evidence* at 381 (Ex. 48). *See also Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 589 (D.N.J. 2002), *aff'd*, 68 Fed. Appx. 356 (3d Cir. 2003) ("[t]he focus of epidemiology is on general causation (*i.e.*, is the agent in question capable of causing disease?) and not specific causation (*i.e.*, did the agent cause a disease in a particular individual?)").[158]

---

154 *See In re Hanford Nuclear Reserv. Litig.*, 292 F.3d 1124, 1133-34 (9th Cir. 2002).

155 *See id.* at 1133.

156 *Id.*

157 *Reference Manual on Scientific Evidence* at 382 (n.153, *supra*) (Ex. 48).

158 Indeed, several of the cases on which Garlock itself relies (*see* Garlock Info. Br. at 21-22), expressly acknowledge that epidemiology is relevant only to general causation. *See, e.g.*, *Magistrini*, 180 F. Supp. 2d at 589 (epidemiology is relevant to the inquiry of general causation, and not specific causation); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) (same); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1224 (D. Colo. 1998) (same); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142 (E.D. Wash. 2009) (same).

General causation is well-established in asbestos cases. As discussed above, it is the general consensus of the scientific community that both amphibole (such as crocidolite) and chrysotile asbestos cause all asbestos-related diseases, including mesothelioma.[159] Garlock is simply wrong when it asserts that "there are no 2.0 studies demonstrating that pure chrysotile fibers cause mesothelioma." Garlock Info. Br. at 29. There are several such studies. For example, in a 2009 cohort epidemiological study of North Carolina workers exposed to chrysotile asbestos, Drs. Dement and Loomis documented almost 11 times excess risk due to exposure to chrysotile.[160] Also in 2009, a study by Dr. Madkour documented a 26-fold excess risk of pleural mesothelioma due to environmental exposure to chrysotile asbestos.[161]

Moreover, there are numerous case-control epidemiology studies documenting much more than a doubling of the risk of mesothelioma at exposures to unspecified fiber types as low as 0.07 fiber years.[162] As Dr. Welch and her co-authors explain, these studies are relevant to chrysotile exposures.[163]

More importantly, the medical and scientific community does not require a quantitative estimate of a patient's asbestos "dose" exceeding some level specified in an epidemiological

---

[159] *See* 2007 Welch Paper at 318 (n.33, *supra*) (Ex. 14); 2009 IARC Paper at 454 (n.125, *supra*) (Ex. 35).

[160] 2009 Loomis Paper at 8 (n.127, *supra*) (Ex. 37). A "cohort study" is a longitudinal study in which a particular outcome, such as death from cancer, is compared in groups of people who are alike in most ways but differ by a certain characteristic, such as asbestos exposure.

[161] 2009 Madkour Paper at 32-35 (n.127, *supra*) (Ex. 38).

[162] *See* n.132, *infra*. A "case-control study" compares two groups of people: those with the disease or condition under study (cases) and a similar group of people who do not have the disease or condition (controls). Researchers study the medical and lifestyle histories of the people in each group to learn what factors may be associated with the disease or condition. For example, one group may have been exposed to a particular substance, such as asbestos, that the other was not.

[163] *See, generally*, 2007 Welch Paper (n.33, *supra*) (Ex. 14).

study in order to attribute mesothelioma to asbestos exposure. Rather, for a doctor to conclude that a patient's mesothelioma is asbestos-related, all that is required is some evidence (such as lay testimony) that the patient breathed asbestos fibers in an occupational, para-occupational, domestic, or other setting, and thus was exposed to asbestos beyond the minute amounts of fibers that exist in the ambient air.[164] Thus, asbestos personal-injury claimants rely upon differential diagnosis and pathology, as well as the consensus of the expert medical community that "[m]alignant mesothelioma affecting any serosal membrane may be induced by asbestos inhalation," and that "a history of significant occupational, domestic, or environmental exposure to asbestos will suffice for attribution."[165]

Indeed, mesothelioma is so closely connected with asbestos exposure that it is widely considered a "signature" or "sentinel" disease for asbestos exposure, and its occurrence is considered an indication of an occupational hazard.[166] As explained in the Federal Judicial

---

[164] *See* Helsinki Criteria at 313 (n.33, *supra*) (Ex. 15). *See also Anderson v. Alfa Laval, Inc.*, Case No. 760CL06006790-00 (Va. Cir. Ct. Mar. 5, 2010) (Affidavit and Supplemental Report of John C. Maddox, MD) at 2 n.1 (Ex. 49) ("It has been generally accepted by the medical and scientific community for the past 47 years that a history of asbestos exposure is the most reliable evidence upon which to base a causation determination."). *See also* Roggli Aff. at 2 (n.150 *supra*) (Ex. 45).

[165] *See* Helsinki Criteria at 313 (n.33, *supra*) (Ex. 15).

[166] *See, e.g.*, *Research Methods in Occupational Epidemiology* (Harvey Checkoway et al., eds. 2d ed., Oxford University Press 2004) at 248 ("**Checkoway**") (Ex. 50) ("Certain conditions, known as 'sentinel' health events, are so closely associated with occupational exposures that the occurrence of any cases serves as an indication of an occupational hazard (Rutstein et al., 1983). Malignant mesothelioma (which is nearly always attributable to asbestos exposure), silicosis, and adult lead poisoning, fit this description."). *See also* Kay Teschke et al., *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88(3) Canadian Journal of Public Health 163, 167 (1997) ("Mesothelioma is a rare cancer with one major etiologic exposure, therefore surveillance using each case as a sentinel event might seem more reasonable for this disease than for cancers with multifactoral causation."); David D. Rutstein et al., *Sentinel Health Events (Occupational): A Basis for Physician Recognition and Public Health Surveillance*, 73(9) American Journal of Public Health 1054, 1055 (1983) (listing mesothelioma as a Sentinel Health Event for exposure to asbestos).

Center's *Reference Manual on Scientific Evidence*, when a disease is a "sentinel" disease, "the toxic agent is a necessary cause for the disease . . . [and] the existence of the disease necessarily implies the causal role of the agent."[167] Thus, the occurrence of mesothelioma is, in itself, *prima facie* evidence that exposure to asbestos caused the mesothelioma.[168] "Because of the rarity of the disease and the specificity of the causal association, all cases occurring among asbestos exposed workers are attributed to this exposure."[169]

Courts in the tort system have consistently recognized that mesothelioma is a unique disease that can be caused by even short or minimal exposures to asbestos.[170] Indeed, the relationship between mesothelioma and asbestos exposure has been so firmly established that the Federal Judicial Center's *Reference Manual on Scientific Evidence* uses it as an example of a

---

[167] *Reference Manual on Scientific Evidence* at 381 n.128 (n.153 *supra*) (Ex. 46).

[168] Checkoway at 60, 78 & 248 (n.166, *supra*) (Ex. 48).

[169] P. Boffetta, *Health Effects of Asbestos Exposure in Humans: A Quantitative Assessment*, 89(6) Med Lav 471, 476 (1998).

[170] *See, e.g.*, *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 4 (Mich. 1987) (mesothelioma can result from "minimal exposure to asbestos"); *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856, 916 (N.Y. 1989), aff'd, 565 N.Y. S. 2d 357 (N.Y. 1991) (mesothelioma can result from a "short exposure" to asbestos); *80 S. Eighth St. Ltd. P'ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 398 (Minn. 1992) ("It is generally accepted that mesothelioma is not dose related but can be caused by a single exposure to asbestos."); *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443, 456 (Ala. 1992) ("[e]xposure to asbestos for as little as one day can significantly contribute to, cause, and/or aggravate asbestos-related lung diseases. The injurious effect of ingesting asbestos fibers into the lungs is cumulative."); *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992) (mesothelioma can develop after "only minor exposure to asbestos fibers"); *Harashe v. Flintkote Co.*, 848 S.W.2d 506, 508 (Mo. Ct. App. 1993) (noting that even defense expert conceded that mesothelioma could result from a "single heavy exposure" to asbestos). *See also McAskill v. Am. Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009) (holding that "brief exposures to asbestos have caused mesothelioma" and "every non-trivial exposure to asbestos contributes to and constitutes a cause of mesothelioma"); *Georgia-Pacific Corp. v. Pransky*, 800 A.2d 722, 725 (Md. 2002) (holding that there was sufficient evidence establishing causation to uphold a jury verdict in a mesothelioma case where the plaintiff's only asbestos exposure occurred as a child when she was in the room when her father was sanding Georgia-Pacific Joint Compound).

matter that is "not disputed or not disputable." Thus, according to the Federal Judicial Center, experts should *not be permitted* to opine that an exposure to asbestos is not capable of causing lung cancer or mesothelioma.[171]

4. The Relevant Case Law Does Not Require Asbestos Claimants to Demonstrate a Doubling of Risk to Establish Causation

None of the authorities Garlock cites stand for the proposition that 2.0 epidemiological studies are necessary to prove either general or specific causation. *See* Garlock Info. Br. at 21-22, nn.42-48 (citing cases). Garlock cites two cases where the courts *permitted* plaintiffs to use epidemiological studies showing relative risks of 2.0 or higher to establish specific causation, finding that the studies would be "useful to the jury" and were "probative."[172] In neither of these two cases, however, did the court even suggest that a 2.0 study was *required* to establish specific causation. The remainder of Garlock's authorities are simply inapposite, as none even involves an asbestos-related personal injury claim,[173] and they each concern general, rather than specific,

---

[171] *See Reference Manual on Scientific Evidence* at 47-48 (n.153, *supra*) (Ex. 48) ("[T]he issue-narrowing process may disclose that areas otherwise appropriate for expert testimony are not disputed or not disputable, such as whether exposure to asbestos is capable of causing lung cancer and mesothelioma (*i.e.*, general causation). Expert evidence should not be permitted on issues that are not disputed or not disputable.")).

[172] *See, e.g.*, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp. 2d 879, 893 (C.D. Cal. 2004) ("When statistical analyses or probabilistic results of epidemiological studies are offered to prove *specific* causation, however, under California law those analyses must show a relative risk greater than 2.0 to be 'useful' to the jury."); *Henricksen*, 605 F. Supp. 2d at 1158 (noting that although "epidemiology studies are probative of *general causation*: a relative risk greater than 1.0 means the product has the capacity to cause the disease;" in the "Ninth Circuit, such studies can also be probative of *specific causation*, but only if the study shows the relative risk is greater than 2.0, that is, the product more than doubles the risk of getting the disease."). As discussed further below, Garlock's contention that these cases establish that an epidemiological study demonstrating a doubling of the relative risk is a prerequisite to specific causation (*see* Garlock Info. Br. at 21-22, nn.42-48) is, at best, a gross mischaracterization.

[173] *In re W.R. Grace & Co.*, 355 B.R. 462 (Bankr. D. Del. 2006) is the only case cited by Garlock that even involves asbestos (*see* Garlock Info. Br. at 22, n.44), and it involved claims for

(Footnote continued on next page.)

causation.[174] The *Reference Manual on Scientific Evidence*, on which Garlock relies (*see* Garlock Info. Br. at 21-22, nn.39, 45), specifically recognizes that plaintiffs alleging asbestos-related diseases have the benefit of relying upon the fact that the causation relationship between mesothelioma and asbestos exposure has been firmly established. *See* Part III.C.3, above.

(Footnote continued from previous page.)
property damage, rather than asbestos *personal injury* claims. In *W.R. Grace*, the bankruptcy court denied a summary judgment motion brought by property damage claimants on the ground that the presence of asbestos-containing vermiculate in their attics caused an unreasonable risk of harm.

The *W.R. Grace* decision was appealed by the property damage claimants, *see In re W.R. Grace & Co.*, No. 07-MC-005, 01-01139, 2007 WL 1074094, at *2 (D. Del. Mar. 26, 2007), but the district court refused to exercise its discretion to review an interlocutory order. *Id.* Eventually, the property damage claimants' cases were settled in connection with the debtor's bankruptcy proceedings. In the context of *personal injury* cases, the Missouri Court of Appeals determined that exposure to asbestos from the same vermiculate attic insulation product at issue in *W.R. Grace* was sufficient to cause mesothelioma and affirmed a $2.5 million jury verdict in favor of the plaintiff. *Harashe v. Flintkote Company* (including *W.R. Grace & Co-Conn.*), 848 S.W.2d 506 (Mo. 1993).

In the *Grace* bankruptcy proceedings involving personal injury claims, the bankruptcy court in *W.R. Grace* never rendered a decision about any contested issue over whether any of Grace's asbestos containing products caused any claimant's disease. Instead, after seven years of litigation with personal injury claimants, Grace and its former affiliates ultimately agreed to fund a Section 524(g) Trust with assets worth approximately 3 billion dollars.

[174] *See* Garlock Info. Br. at 21-22, nn.42-44 & 48 (citing cases). *See, e.g.*, *Magistrini*, 180 F. Supp. 2d at 589 (noting that epidemiology is relevant to the inquiry of general causation, and not specific causation); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d at 712 (noting that although epidemiological studies can be used to establish general causation, "commentators in this area uniformly acknowledge that epidemiological studies cannot establish that a given individual contracted a disease or condition due to exposure to a particular drug or agent"); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1313-14 (9th Cir. 1995) (holding epidemiological studies regarding Bendectin were inadequate to prove general causation); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 780-82 (E.D.N.Y. 1984) (noting that claimants would have to show an increase of the relative risk to establish general causation); *In re Breast Implant Litig.*, 11 F. Supp. 2d at 1224 (explaining the difference between general and specific causation, and noting that epidemiology is relevant to the question of general causation); *Henricksen*, 605 F. Supp. 2d at 1142 (noting that epidemiology is generally relevant to the issue of general causation).

Garlock also points to "recent appellate opinions in Texas" as illustrating "the use of epidemiology in asbestos litigation." Garlock Info. Br. at 23. Not surprisingly, Texas law is an outlier on this issue: no other jurisdiction has adopted a requirement that a plaintiff demonstrate that he or she inhaled an amount of asbestos that exceeds a limit established in "qualifying epidemiological studies" in order to prove causation. Quite the opposite: for more than 20 years, courts across the country have recognized that mesothelioma is a unique disease that can be caused by small amounts of asbestos.[175] After all, how would Garlock's victims obtain proof of quantitative exposure at a worksite years or decades earlier, when Garlock itself was not even measuring the asbestos fibers emitted from its products in order to determine if there was a risk?

Given the overwhelming scientific consensus on causation, courts outside of Texas have uniformly adopted the following standard in mesothelioma cases:

> [I]t is not essential to establish with any precision the quantity, duration, or percentage of the occupational exposure to asbestos for which any or each particular manufacturer or supplier is responsible in order to establish proximate cause and, therefore, liability. *Every* such exposure is a substantial factor in bringing about mesothelioma, and may be so found when the latency period is consistent.[176]

No court outside of Texas has required dose quantification in a mesothelioma case. In *John Crane, Inc. v. Linkus*, the most recent reported case addressing these issues, the Court of Special Appeals of Maryland held that "lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels), was sufficient to create a jury question." 988 A.2d at 523. In *Linkus*, the defendant appealed a

---

[175] *See* n.170, *infra*.

[176] *Blancha*, 1991 WL 224573, at *6 (emphasis added) (holding after a bench trial that the plaintiff did not need to prove exposure at a certain level in order to establish causation). *See also Spaur*, 510 N.W.2d at 861.

plaintiff's verdict that was based upon lay testimony that observable dust was emitted from the defendants' asbestos-containing rope and wicking products, coupled with testimony from plaintiff's medical experts that his mesothelioma was caused by each and every exposure to asbestos that he sustained over the course of his life. On appeal, the defense argued that "generalized expert opinions declaring that any exposure to asbestos, however minimal, is a substantial factor in the development of asbestos disease, are insufficient to establish causation," *John Crane, Inc. v. Linkus*, 988 A.2d at 522, and that "expert testimony was required to establish that [defendant's] rope and wicking emitted respirable asbestos fibers in sufficient quantities to cause mesothelioma." *Id*. at 521. The court disagreed with the defendants' arguments, and affirmed the verdict.

Courts that are familiar with asbestos issues have expressly rejected the argument that an epidemiological study specific to a product type or occupation is required to show specific causation, *i.e.*, that the defendant's product caused the plaintiff's injury. *See, e.g.*, *Berger v. Amchem Prods.*, 818 N.Y.S.2d 754, 759-52 (N.Y. Sup. Ct. 2006). In *Berger*, Judge Freedman, who at the time oversaw the asbestos docket for New York, rejected the defendant's challenge to the admissibility of plaintiffs' expert testimony that chrysotile from brakes caused mesothelioma:

> For the reasons stated by the majority of judges who have dealt with this specific issue and based on what appears to be clear direction from the First Department in *Brown v. A.C. & S.*, *supra*, *Lustenring v. AC&S*, *supra*, and *Wiegman v. A C & S*, *supra*, a *Frye* hearing to establish causation or lack thereof for all cases in the *New York City Asbestos Litigation*, or for these particular plaintiffs is not appropriate. *See also Gayle v. Port Authority of New York and New Jersey*, 6 A.D.3d 183, 775 N.Y.S.2d 2 (1st Dept. 2004) rejecting defendant's post-trial request for a *Frye* hearing where novel science was not involved. As the First Department has stated, it is not novel science that exposure to asbestos causes mesothelioma.
>
> Moreover, defendants have not shown that it is not generally accepted by a significant number of well credentialed scientists and physicians that exposure to friction products can be a cause or contributing factor to the development of mesothelioma or other signature asbestos related diseases.

. . .

> Scientists and physicians use various means to establish causation in particular situations, not the least of which are toxicological and pathological studies and documented case studies. While epidemiology may be the "gold" standard, it cannot be the only standard in an area where causation is both particularistic and well established. Federal courts have also held that epidemiological evidence is not necessary to establish causation. *See In re Phenylpropanolamine (PPA) Products Liability Litigation*, 289 F.Supp.2d 1230 (W.D. Wash. 2003); *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362 (5th Cir. 1990).
>
> This court also agrees with Judge Kane who stated, "I agree with Judge Colombo's observation that: It is not really important to have an epidemiological study to determine whether the risk of cancer is increased by asbestos exposure in every occupation'." Where, as here, extensive epidemiological evidence has been adduced that Chrysotile fibers cause mesothelioma and other asbestos diseases, and where it is undisputed that defendant's products were made up of as much as 50% chrysotile, even though they were embedded in resin and most but not all were shorter than five microns, and where the plaintiffs developed mesothelioma, there is sufficient empiric evidence to allow the jury to consider causation.

Berger, 818 N.Y.S.2d at 761-62. *See also Landrigan v. Celotex Corp.*, 605 A.2d 1079, 1087 (N.J. 1992) (relative risk in excess of 2.0 is not required to prove specific causation of colon cancer in individual); *In re Hanford Nuclear Reserv. Litig.*, 292 F.3d at 1135-37 (once general causation is established, relative risk analysis cannot be applied at a specific causation level to require a "doubling dose.").

Indeed, plaintiffs who allege their mesothelioma was caused by asbestos exposure resulting from contact with asbestos-containing products, including gaskets, regularly prevail at trial without an epidemiological study that demonstrates a doubling of the risk. For example, in *Hicks v. Dana Cos.*, 984 A.2d 943 (Pa. Super. 2009), the court upheld a jury verdict in favor of a plaintiff who alleged his mesothelioma was caused by exposure to defendants' asbestos-containing gaskets and packing, and denied the defendants' argument that the plaintiff's causation evidence was insufficient to sustain a verdict. *Id.* at 951. The court found that "sufficient evidence was presented that [defendants'] products were causally connected to [the

plaintiff's] injury," noting that the plaintiff's causation expert testified that "each and every exposure to asbestos is significant in the causation of mesothelioma because each and every exposure adds to the asbestos burden," and that the plaintiff "further presented evidence that this cumulative exposure, even if only at low-dose levels each time, was a substantial contributing factor in his development of malignant mesothelioma." *Id.* at 951-59. *See also John Crane, Inc. v. Linkus*, 988 A.2d at 523, discussed above.

5. To Prove Specific Causation, Plaintiffs Need Only Prove That Exposure to Defendant's Product Was a "Substantial Contributing Factor" to His or Her Illness, Which is Generally a Question of Fact for the Jury

Specific causation in an asbestos case may be established by proof of any significant exposure to asbestos dust generated by the defendant's products, as an individual asbestos personal injury plaintiff typically need show only that his or her exposure to defendant's asbestos-containing products was a "substantial contributing factor" to his or her illness or injury.[177] The Fifth Circuit applied the substantial factor test for the first time in the asbestos

[177] *See, e.g.*, *Rutherford*, 941 P.2d at 1207, 1214 (plaintiff may meet the burden of proving exposure to defendant's product caused illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer; a plaintiff "is free to further establish that his particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' that contributed to his risk of injury.") (citation omitted). *See also Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005) (plaintiff survived summary judgment on the issue of whether his exposure to defendant's product was a "substantial factor" contributing to his having contracted asbestosis by providing expert testimony providing that every encounter with an asbestos product contributes significantly to the contracting of asbestosis); *Roehling v. Nat'l Gypsum Co.*, 786 F.2d 1225, 1228 (4th Cir. 1986) (circumstantial evidence of six months' exposure to defendant's product was sufficient to allow decedent's widow to get to the jury on causation); *Blancha*, 1991 WL 224573, at *3-6 ("Very small amounts of and short periods of exposure to asbestos dust and fibers can cause mesothelioma . . . Mesothelioma . . . may be caused by a very small amount of exposure both as to time period and concentration. . . . Thus, it is not essential to establish with any precision the quantity, duration, or percentage of the occupational exposure to asbestos for which any or each particular manufacturer or supplier is responsible in order to establish proximate cause and, therefore, liability."); *Eagle-Picher Indus., Inc. v. Balbos*, 578 A.2d 228, *(Footnote continued on next page.)*

personal injury context in *Borel*, 493 F.2d at 1094. The plaintiff, Mr. Borel, had demonstrated exposure to each of the defendants' asbestos-containing products during his work history as an industrial insulation worker, and a jury verdict was entered in his favor. *Id*. at 1081. On appeal from the district court's denial of the defendants' motions for a directed verdict and a judgment notwithstanding the verdict, the Fifth Circuit held that because the effect of exposure to asbestos is cumulative, such that each exposure causes additional injury, the evidence of exposure to each of the defendants' products was sufficient evidence for the jury to find that "each defendant was the cause in fact of some injury" to the plaintiff. *Id.* at 1094. Thus, joint and several liability for the entire injury could be imposed upon each of the defendants. *Id*. at 1095-96.

Subsequent cases have emphasized that the substantial contributing factor test must be interpreted and applied practically in toxic tort cases, including asbestos personal injury cases, in view of the scientific and medical reality that it is impossible to prove what precise level of exposure the plaintiff experienced, what precise level of exposure will cause injury, and which specific product (or specific asbestos fibers) caused the illness. For example, in *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999), a toxic tort case, the Fourth Circuit rejected the defendant's argument that the plaintiff's expert's testimony should not be admitted because the expert could not prove "the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure." *Westberry*, 178 F.3d at 263. The court noted that:

(Footnote continued from previous page.)
243 (Md. Ct. Spec. App. 1990), *aff'd in part and rev'd in part on other grounds*, 604 A.2d (Md. 1992) (finding that "all of Knuckles's exposures to asbestos were 'significant contributing causal factor[s] to the mesothelioma.'"). *See also In re Patenaude*, 210 F.3d 135, 138 (3d Cir. 2000) (noting that "asbestos exposure is the only known cause" "for the "invariably fatal cancer mesothelioma").

> Only rarely are humans exposed to chemicals in a manner that permits a quantitative determination of adverse outcomes. . . . Human exposure occurs most frequently in occupational settings where workers are exposed to industrial chemicals like lead or asbestos; however, even under these circumstances, it is usually difficult, if not impossible, to quantify the amount of exposure.

Id. at 264 (quoting the *Reference Manual on Scientific Evidence* at 187 (n.153, *supra*) (Ex. 48). The court further explained that "precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining to the plaintiff's exposure . . . is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert's opinion on causation." *Id.* (citing *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 157 (3d Cir. 1999) ("even absent hard evidence of the level of exposure to the chemical in question, a medical expert could offer an opinion that the chemical caused plaintiff's illness.")).

As California's highest state court put it:

> [P]laintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in *reasonable medical probability* was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, *without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth*.

Rutherford, 941 P.2d at 1219 (emphasis added).

Moreover, once the plaintiff has demonstrated the existence of an asbestos-related disease and exposure to the defendant's asbestos-containing product, whether that exposure has been a substantial factor in causing the plaintiff's injury generally is a question of fact left for the jury.

Thus, courts uniformly have expressed extreme reluctance to grant summary judgment motions on specific causation.[178]

D. There Is No Basis For Garlock's Assertions That Bankruptcy Filings by Other Manufacturers Have Improperly Increased Garlock's Asbestos Liabilities in the Tort System

Garlock readily acknowledges that it was named as a defendant in tens of thousands of asbestos-related lawsuits between 1975 and the petition-filing date, and has paid out enormous sums of money to settle its asbestos-related claims. But it repeatedly claims that it was traditionally a "peripheral" defendant, and has been unfairly forced to the position of a "target" defendant in recent years after several major asbestos defendants removed themselves from the tort system by filing for chapter 11 protection. *See* Garlock Info. Br. at 56-62. According to Garlock, its verdict and settlement values were "inflated" as a result. *Id.* at 4.

Garlock further asserts that it should have been relieved of much of its liability, and its verdict and settlement values should have returned to pre-2000 levels, when the "top-tier" defendants reorganized and established Section 524(g) trusts to pay claimants. *Id.* at 62-63. Garlock claims, however, that the reason its liability in the tort system did not return to pre-2000 levels was that the plaintiffs' bar somehow managed to structure the trusts and trust distribution procedures (which were approved by the bankruptcy courts in each case) in such a manner that

---

[178] *See, e.g.*, *Perry v. Novartis Pharms. Corp.*, 564 F. Supp. 2d 452, 463-64 (E.D. Pa. 2008) (noting that in toxic tort cases, the issue of specific causation is ultimately for the jury); *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 486-87 (Utah Ct. App. 1991), *aff'd*, 862 P.2d 1342 (Utah 1993) (observing that because the question of proximate causation is "is generally reserved for the jury," summary judgment is appropriate only if "(1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation"). *See also Restatement (Second) of Torts* § 434(1)(a) (1965) ("It is the function of the court to determine (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff").

plaintiffs could recover "double payment for the same injury," both from the trusts and from Garlock in the tort system. *Id.* at 65. According to Garlock, it was unable to determine what payments its victims have received from the trusts, and thus it has been paying more than its fair share of the total liability to those victims. *Id.* at 64-66.

These bold assertions are unsupported by any evidence, are contrary to fact and defy common sense. Garlock's claims of "double-dipping" by plaintiffs are unsupported and not credible, and Garlock has in no way been prejudiced by the structure of the various Section 524(g) trusts. While it was in the tort system, Garlock had available to it and used a full array of discovery devices that allowed it to identify other asbestos manufacturers whose products contributed to plaintiffs' injuries — including those in bankruptcy, and those who had reorganized and established Section 524(g) trusts. Indeed, because the Section 524(g) trusts' settlement grids and payment percentages are publicly available, Garlock was able to obtain information about the amount of payments its victims received from those trusts. It could not obtain equivalent information about confidential settlements made by solvent defendants in the tort system. *See* Part III.D.2, below.

As a manufacturer of asbestos-containing products, Garlock has been a defendant in asbestos litigation almost since it began. The number of claims, and the portions of those claims, that Garlock has paid have been reasonable and appropriate, given the trends in the tort system. Ultimately, Garlock is complaining that its share of responsibility for the asbestos-related diseases of persons it exposed to asbestos has not diminished over time. But given the doctrine of substantial contributing factor in state law causation analysis, and the manner in which fault is attributed in the tort system, there is no reason that Garlock's share should have diminished.

1. As the Resources of Traditional Defendants Have Waned, Self-Styled "Peripheral" Defendants Appropriately Have Become Increasingly Prominent in the Litigation

Since Section 524(g) was enacted in 1994, numerous defendants have sought to take advantage of the relief available under that provision. Among those reorganizing under chapter 11 were those defendants that had been most heavily involved in the asbestos litigation, including Armstrong World Industries, Babcock & Wilcox, Combustion Engineering, G-I Holdings, Federal-Mogul, Owens Corning/Fibreboard, Pittsburgh Corning, W.R. Grace Co., and United States Gypsum.[179]

When an asbestos defendant petitions for reorganization, all claims against that defendant are enjoined while the bankruptcy is pending.[180] If, after emerging, the reorganized debtor establishes a trust to resolve its asbestos claims under Section 524(g), each claimant is generally paid only a percentage of the total value of their claim.[181] Persons with asbestos-related diseases are thus motivated to seek and name solvent defendants that made real and significant contributions to causing their asbestos-related diseases, as each such defendant is (in most jurisdictions) jointly and severally liable for the plaintiff's injury. Because of the pervasive use

---

[179] *See* 8 Mark D. Plevin, Esq. et al., *Where Are They Now, Part Five: An Update on Developments in Asbestos-Related Bankruptcy Cases*, Mealey's Asbestos Bankruptcy Report 8, at 1-37 (Mar. 2009).

[180] *See* Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 Tex. L. Rev. 1899, 1918 (2002).

[181] *E.g.*, as reported in their annual reports, the Owens Corning/Fibreboard Asbestos Personal Injury Trust's payment percentage is 10-11%. *See In re Owens-Corning*, Case No. 00-03837 (Bankr. W.D. Pa.) (Notice of Service Notice of Filing Annual Report and Claims Summary Filed by Owens Corning/Fibreboard Asbestos Personal Injury Trust) [Dkt No. 20888] at Exhibit 1, 12-13 (excerpt attached as Ex. 51). The ACandS Asbestos Personal Injury Trust's payment percentage is 5.78%. *See* ACandS Trust Distribution Procedures, available at http://www.acandsasbestostrust.com/Files/ACandS_TDP_Conformed_Copy_amended_8_19_08.PDF (last visited August 30, 2010).

of asbestos in American industry, there are many defendants that made or distributed asbestos-containing products that exposed hundreds of thousands of people to asbestos. Many of those defendants were not targeted heavily in the initial stages of the asbestos litigation, because the focus was on the largest and most visible manufacturers of asbestos products. As a result of the major asbestos defendants filing for bankruptcy, other asbestos manufacturers — such as Garlock — that initially had played smaller roles in the asbestos litigation became, naturally and appropriately, more prominent in the litigation. As discussed in Part III.D, below, these defendants, including Garlock, can and do seek contribution from the trusts and other parties who share responsibility for the plaintiffs' injuries.

Over more than 30 years, tens of thousands of individuals injured by Garlock's asbestos-containing products commenced lawsuits against the company.[182] While Garlock settled most of these cases, it did take cases to trial. There, juries often awarded significant verdicts against Garlock — verdicts that Garlock itself has characterized as "ruinous."[183] For example, in 2004, a 60-year-old former Navy machinist who had overhauled and repaired equipment with Garlock products, and who had developed mesothelioma and had suffered multiple rounds of radical surgery and chemotherapy, won a $36 million jury verdict against Garlock and another manufacturer, with Garlock's share of the verdict determined to be 40%.[184] Verdicts like these were a frequent occurrence. From 2007 through 2009, Garlock took 17 cases to trial and suffered an adverse verdict a little more than a third of the time, with Garlock's share of the

[182] Garlock Info. Br. at 39.

[183] *Id.* at 57, 79.

[184] *See Treggett v. Garlock Sealing Techs. Inc.*, No. BC307058, 2004 WL 2609979 (Cal. Super. Ct. Oct. 20, 2004).

liability averaging more than $350,000.[185] This demonstrates that Garlock was well able to select those claims where it believed it had a defense, try those cases, and win many of them. The Garlock settlement history reflects this reality of the tort system.

Most often, however, Garlock chose to settle the claims against it, as sound business judgment and rational self interest required. Throughout its history in the asbestos litigation, Garlock's share of the total liability for the injuries of its victims has been only a minute portion of their total claims. Indeed, in its Informational Brief, Garlock admits that from 1992 through 2009, the average payment it made per mesothelioma claim was never more than $80,000. *See* Garlock Info. Br. at 3. The average mesothelioma claim verdict was upwards of $6 million in 2001.[186] Thus Garlock was paying, on average, only a small portion of the typical verdict of a mesothelioma claim. Garlock's claim that it was paying more than its fair share for the injuries suffered by its victims is nothing more than self-serving revisionist history belied by Garlock's own statements, and should be ignored by this Court.

2. There is No Basis For Garlock's Claim That its Verdict and Settlement Values in the Tort System Were Inflated Because Evidence of Plaintiffs' Exposure to Other Products Was Suppressed

Garlock contends that plaintiffs who sued Garlock in the tort system have prevented Garlock from discovering evidence of exposure to asbestos-containing products made by bankrupt defendants, with the result that Garlock has had to shoulder more than its fair share of

---

[185] Enpro Industries Inc. 10-K (Mar. 3, 2010) at 93 (excerpt attached as Ex. 52).

[186] *See* RAND Asbestos Litigation Study at 54 (n.25, *supra*); *see also In re Armstrong World Indus.*, Case No. 00-CV-4471 (D. Del. May 23, 2006 Hearing Transcript) at 19-25 (Ex. 53) (Daniel Myer, outside claims negotiator for Armstrong, USG, Union Carbide, Federal-Mogul, and GAF, among others, testifying that the total "all-in" value of a mesothelioma claim in 2006 generally was between $5 to 8 million).

responsibility for its victims' injuries.[187] That contention is unsupported, and runs counter to logic and common sense.

While in the tort system, Garlock had every incentive to determine whether any other asbestos manufacturer had also contributed to plaintiffs' injuries, as Garlock's proportionate liability would be reduced if the responsibility were shared. As does any other litigant, Garlock had the discovery tools available in the tort system to unearth evidence of its claimants' exposure to other manufacturers' asbestos-containing materials, such as interrogatories, requests for production, and depositions of plaintiffs, co-workers, and family members. According to one of Garlock's principal defense attorneys, John Turlik, Garlock used those discovery tools extensively.[188]

Mr. Turlik explained that Garlock had access to files of coworker and site information developed through its years of litigating asbestos personal injury cases, including databases of worker depositions detailing the products present at particular sites, and through which Garlock often discovered that plaintiffs had been exposed to other manufacturers' products:

> Q. So you have, for example, coworker depositions --
>
> A. Correct.
>
> Q. -- at hand regarding particular sites where people were exposed to asbestos?
>
> A. Correct.
>
> Q. So you would have, apart from any discovery you do in a particular case, access to depositions from coworkers at a Bethlehem steel plant?
>
> A. That would be one [for which] we have a lot of depositions.

---

[187] *See* Garlock Info. Br. at 49-56; *see also id*. at 52 n.138 (noting "how closely the court guarded" the Rule 2019 statements in *Pittsburgh Corning*, and complaining that the court in that case denied Garlock's motion to obtain access to the statements in that case).

[188] *In re Pittsburgh Corning Corp.*, Case No. 00-22876 (Bankr. W.D. Pa. May 9, 2010) (Deposition of John Turlik, Esq.) at 79-80 ("**Turlik Deposition**") (excerpts attached at Ex. 54).

> Q. And when you are defending a case, do you consult those databases?
>
> A. Yes. Database of those depositions, yes.
>
> Q. You consult those deposition files?
>
> A. Yes.
>
> Q. And what are you looking for in those?
>
> A. Two things primarily. We're looking for shares. So we're looking for other culpable defendants that are actual defendants or defendants to join into the case. The second thing we're looking for is exposures. So it doesn't have to be a viable defendant's exposure. I'm looking for exposure to bankrupt defendants. I'm looking for generic exposures to product types. That would be a mesothelioma case, exposures, all viable exposures.
>
> Q. And do you find information in those depositions?
>
> A. Often.[189]

Garlock's counsel also routinely directed broad subpoenas to asbestos bankruptcy trusts, seeking all records and filings:

> Q. So you, in your litigation capacity, have issued discovery to asbestos personal injury trusts or overseen subpoenas?
>
> A. Subpoenas, right.
>
> Q. And when you subpoena an asbestos personal injury trust, what are you asking for?
>
> A. All of the records. All the filings.
>
> Q. And how often have you done that?
>
> A. My people know to do that on their own. There's times where I'll be involved in a case and realize that it wasn't done and ask them to do that. So me personally, many times, but I know that it's happened more times than I'm actually directing. But it's based on my direction.[190]

Mr. Turlik testified that the asbestos trusts responded to Garlock's discovery requests. Indeed, Mr. Turlik could recall only a single instance in which an asbestos trust did not produce material in response to a subpoena, and in that instance Garlock settled the case prior to any

---

189 Turlik Deposition at 80-81 (n.188, *supra*) (Ex. 54).

190 *Id.* at 54.

attempt to enforce the subpoena.[191] On a practical level, therefore, Garlock's suggestion that plaintiffs' counsel, the trusts, and the bankruptcy courts somehow prevented Garlock from developing information about plaintiffs' exposures to products manufactured by bankrupt and reorganized entities is belied by Garlock's actual experience in the tort system.

Garlock complains that the trust distribution procedures ("**TDPs**") for the various Section 524(g) trusts contain confidentiality provisions that, according to Garlock, make it impossible for Garlock to determine whether claimants have asserted claims against the trusts. *See* Garlock Info. Br. at 65. But, as noted above, Garlock had, and used, several mechanisms to discover whether plaintiffs had been exposed to other manufacturers' asbestos products. Further, the confidentiality provisions of the TDPs generally subject the trusts to ordinary discovery rules and obligate them to respond to properly-issued subpoenas.[192] The trusts do not "conceal" information any more than do ordinary defendants in the tort system. To the contrary, while some settlement materials may be kept confidential by Section 524(g) trusts — just as defendants in the tort system may keep settlement discussions confidential — the trusts are actually more transparent than defendants in the tort system in many respects. For example, the standard settlement amounts offered by various trusts typically are posted on the trusts' websites, or otherwise are easily located in their publicly available documents.[193] Tort system participants, including Garlock prior to its filing, therefore know how much an asbestos claimant could collect from various trusts, on average, and can use that information in their own settlement efforts.

---

[191] *See id.* at 57-58.

[192] *See, e.g.*, USG TDP § 6.5.

[193] *See, e.g.*, USG settlement values (available online at http://www.usgasbestostrust.com).

Garlock's claim that it and its insurers spent more than a billion dollars litigating and settling claims against it without discovering that plaintiffs were exposed to other manufacturers' asbestos products is simply implausible. Garlock's settlement values in mesothelioma cases — $80,000 in cases in which plaintiffs routinely are awarded millions of dollars each — reflect the significant and successful efforts Garlock made to identify additional manufacturers who would share in the liability to the plaintiffs. That Garlock typically paid such a small portion of the total value of a claim shows that it took full advantage of the discovery tools at its disposal.

Equally implausible is Garlock's claim that plaintiffs "double-dip," or recover both in the tort system and from the trusts. It is common for an individual injured by asbestos-containing products to have been exposed to asbestos from numerous manufacturers, and thus make claims against several of those manufacturers. If any of those manufacturers declared bankruptcy and set up a Section 524(g) trust, the individual will make a claim to the trust. In the 15 years since Section 524(g) was enacted, dozens of manufacturers have set up such trusts. Therefore, in addition to bringing claims against multiple asbestos manufacturers in the tort system, a claimant may also make claims against multiple Section 524(g) trusts. Making a claim against multiple defendants and trusts, each of whom contributed to the plaintiff's injuries, is not "double dipping." It is the way the tort system works.

Each trust pays only a portion of its several share of liability for any claimant's asbestos injuries.[194] As a matter of administrative efficiency, most asbestos trusts set up an "expedited review process" through which a claimant, upon making certain exposure and medical showings, can obtain a standard settlement amount, an amount typically based on the disease the claimant is

[194] There are dozens of asbestos trusts in existence, and the claims procedures, operational documents, and other particulars vary to some degree. This is intended as a discussion of typical trust operations, not an evaluation of each and every trust in existence.

suffering. Each trust typically pays only a fraction of the settlement value of each claim, determined by the application of a "payment percentage" that is calculated by reference to the assets available in the trust and the number of persons expected to assert claims against the trust in the future. The payment percentage is the central mechanism used by the trust to "provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner," as required by Section 524(g). 11 U.S.C. § 524(g)(2)(B)(ii)(V). That a claimant receives only a portion of the settlement value of his or her claim from each trust means that, as a practical matter, it is virtually impossible for a claimant to "double dip" and obtain more than full recovery from all liable trusts and solvent defendants combined.

Moreover, in any case in which Garlock believes that it has paid more than its fair share because other manufacturers were reorganized and thus not named in the lawsuit, Garlock can seek contribution from the relevant Section 524(g) trust.[195] Garlock has made such "indirect claims" numerous times, claiming hundreds of thousands of dollars in contribution payments from other asbestos personal injury trusts.[196] In light of Garlock's demonstrated ability to obtain contribution from asbestos personal injury trusts, its argument that plaintiffs regularly "double dip" is not only unsubstantiated but is demonstrably incorrect.

---

[195] *See, e.g.,* USG TDP § 5.6.

[196] For example, Garlock sought and obtained contribution from the Armstrong World Industries Asbestos Personal Injury Trust, the USG Asbestos Personal Injury trust, the Owens Corning and Fibreboard Trusts, and the Babcock & Wilcox Trust, in connection with three judgments it suffered in the Baltimore, Maryland Circuit Court. *See* Ex. 5 to the Turlik Deposition (attached as Ex. 55). Contribution payments to Garlock for these three cases alone exceeded $600,000 as of July 31, 2009, and as of that same date, Garlock had "several pending Indirect Claims" against the trusts. *Id.*

3. There is No Basis For Garlock's Claim that Plaintiffs in the Tort System Suppressed Evidence of Their Filings in Pittsburgh Corning

Garlock claims that during the *Pittsburgh Corning* bankruptcy, it discovered a "large scale inconsistency" (Garlock Info. Br. at 55) that "strongly suggest[s]" plaintiffs "prevent evidence regarding exposure to products made by bankrupt top tier defendants from appearing in tort system cases, in order to inflate the trial risk and resolution values of peripheral defendants such as Garlock." *Id.* at 56. This bold assertion is made without any evidentiary support, and has no apparent purpose other than prejudicing the Court improperly against the asbestos claimants in this case. Garlock has made similar claims in the *Pittsburgh Corning* bankruptcy case but, as here, those claims were not supported by the evidence. Indeed, Garlock has never adduced any evidence that plaintiffs have deliberately concealed their exposure to products manufactured by bankrupt defendants in order to inflate Garlock's share of responsibility for their injuries. [197]

Garlock's participation in the *Pittsburgh Corning* case was limited. After ignoring the case for the better part of a decade and avoiding scheduled discovery, Garlock appeared just before the final confirmation proceedings and filed a skeletal and perfunctory objection. Out of the hundreds of companies that had been co-defendants with Pittsburgh Corning in asbestos litigation, only Garlock objected to the plan. At the confirmation hearing in June of this year,

[197] Garlock also refers to a memorandum by a plaintiffs' firm regarding deposition preparation to support its claim that plaintiffs did not identify exposure to products manufactured by other defendants. *See* Garlock Info Br. at 41-42, 49. But the memo provides no such proof, and this story, more than a decade old, has nothing to do with Garlock's settlement history, or the issues in these bankruptcy cases. That the memo proves nothing is demonstrated by the fact that, despite the memo's having been bandied about in Section 524(g) bankruptcy cases since 1997, the highly-motivated adversaries have negotiated consensual plans in virtually every one of those cases. As in those cases, there can be no serious question here that Garlock's asbestos-containing products caused serious injuries and death. Garlock's attempt here to minimize those injuries, and to portray itself as a victim of the tort system, should be rejected by this Court.

and after Garlock filed its Information Brief in this case, Garlock attempted to introduce as evidence 275 documents it had not previously disclosed in discovery. It claimed that the documents were discovery responses by plaintiffs in cases in which Garlock was involved.[198] Garlock argued that the documents contained representations about exposure to non-Garlock products that were inconsistent with representations made in ballots in the *Pittsburgh Corning* bankruptcy.

Judge Fitzgerald ultimately admitted only 11 of those 275 proposed exhibits, and those only provisionally, subject to later exclusion. The 11 provisionally-admitted documents were responses to requests for admission from several Massachusetts state court actions. Garlock's explanation of exactly what those 11 documents were supposed to prove was unclear. During argument, counsel for Garlock first indicated that they were a kind of propensity evidence, intended to show that plaintiffs were likely to improperly conceal exposure evidence in the tort system in the future.[199] Garlock later expressly admitted, however, that the 11 responses were offered "not as anything representative."[200] In addition, contrary to its representation in this case that the documents were a "random sample" of discovery responses (*see* Garlock Info. Br. at 5), Garlock conceded in *Pittsburgh Corning* that it had no way to prove, nor could it argue, that these 11 discovery responses represented a "random sample."[201] In the end, then, Garlock could not explain how these documents were supposed to prove anything.

---

[198] *See In re Pittsburgh Corning Corp.*, Case No. 00-22876 (Bankr. W. D. Pa. June 9, 2010) (Hearing Transcript) at 43 ("**6/9/10 PC Hr'g Tr.**") (excerpts attached as Ex. 56). It appears that the 275 documents Garlock sought to introduce in *Pittsburgh Corning* included the discovery material that Garlock refers to in its Information Brief in this case.

[199] *Id.* at 74 (Statement of Garland Cassada) (Ex. 56).

[200] *Id.* at 191 (Statement of Richard Worf) (Ex. 56).

[201] *Id.* at 193 (Ex. 56).

The 11 discovery responses themselves did not demonstrate any "inconsistencies" with filings in the *Pittsburgh Corning* case. Each response made clear that it did not purport to be a complete list of all products to which the plaintiffs were exposed. Rather, the responses incorporated objections, including objections noting that the responses concerning exposures to asbestos-containing products were incomplete because discovery was still ongoing. (That plaintiffs in the tort system often could not provide a full list of products to which they were exposed without discovery is hardly surprising. They lacked personal knowledge or recollection. Understandably so: their exposure typically occurred in the workplace decades earlier, and they often had to rely on the depositions of co-workers, and an examination of their employers' records, among other things, to determine the brand-names of the asbestos-containing products that were present at that time.) Garlock offered no testimony about whether, in each underlying case, the plaintiffs' objections were challenged, withdrawn, or ruled upon by the supervising court, or whether the responses have since been updated.

The discovery responses also referred to and incorporated other discovery documents, including disclosure forms, interrogatory responses, deposition testimony, and document productions, from which exposure information could be gleaned. Garlock offered no testimony about what these other discovery documents said, or whether any referred to Pittsburgh Corning products. Further, even if one of these 11 discovery responses had actually been inconsistent with a representation made in connection with balloting in the *Pittsburgh Corning* case — and Garlock did not demonstrate that any were inconsistent — Garlock did not offer any evidence about how or why such an inconsistency occurred, or whether any such inconsistency was anything more than an administrative error.

Indeed, an examination of the 275 exhibits Garlock attempted to introduce in the *Pittsburgh Corning* case, taken as a whole, belies Garlock's assertion that plaintiffs and their attorneys regularly conceal exposure to bankrupt entities. The 275 exhibits included discovery responses from 130 different individuals involved in asbestos personal injury lawsuits. Of those 130 individuals, 104 — some 80% — in one or more responses specifically identified at least one bankrupt entity that manufactured products to which the plaintiff had been exposed. Garlock's documents, therefore, suggest the opposite conclusion to the one it asserts:[202] Plaintiffs in the tort system routinely disclose exposure to other manufacturers' products, including those of bankrupt entities. Garlock's own documents show that they do so.

CONCLUSION

After defending itself vigorously in the tort system for more than 30 years, Garlock has found itself overwhelmed by its asbestos liabilities. It has filed under Chapter 11, seeking relief from those liabilities through the trust/channeling injunction mechanism of a Section 524(g) plan. Garlock's argument that its claims resolution history in the tort system should be ignored by this Court because it "failed to provide a rational means for adjudicating asbestos-related liabilities" (Garlock Info. Br. at 2) must be rejected. Garlock's proposal for discovery and allowance is unrealistic on its face and would cause this Court (and the district court) to spend the next decade or more mired in allowance proceedings for thousands of claims.

Garlock's proposed discovery and allowance procedure would be, as Judge Fitzgerald put it, a "nightmare" for the Court. It would be a multi-year fiasco that would produce nothing but headaches, expense and delay, and will never lead to a confirmable plan of reorganization. If

[202] *See, e.g.*, Garlock's Pittsburgh Corning Exhibits bates-stamped Garlock 143 and 184 (Ex. 57).

Garlock is permitted to conduct discovery with respect to thousands or tens of thousands of claims, it would take years to review and use that information, and will waste enormous sums of money that would otherwise be available to Garlock's many tort victims or their estates. This Court should not entertain such a wasteful and futile proposal. Rather, this Court should enter the scheduling order proposed in the accompanying Motion, which will enable the parties to determine, in an expeditious manner, their respective views of the assets in the estates, as well as the Debtors' aggregate asbestos liabilities. At that point, the parties will be in the best position to negotiate a consensual plan, as ultimately has been the result in the vast majority of asbestos-driven bankruptcies to date. If the parties are unable to reach agreement during the exclusivity period, the ACC will file its own plan, premised on Garlock's insolvency, and the stage will be set for a contested confirmation hearing.

Respectfully submitted,

Date: August 30, 2010

HAMILTON MOON STEPHENS STEELE & MARTIN, PLLC

By: /s/ Travis W. Moon
Travis W. Moon (Bar No. 1067)
T. Jonathan Adams (Bar No. 21890)
201 South College Street
Charlotte Plaza, Suite 2020
Charlotte, NC 28244-2020
Telephone: (704) 344-1117

CAPLIN & DRYSDALE, CHARTERED

Elihu Inselbuch (EI-2843)
(ei@capdale.com)
375 Park Avenue, 35th Floor
New York, NY 10152-3500

Trevor W. Swett III
(tws@capdale.com)
Nathan D. Finch
(ndf@capdale.com)
Leslie M. Kelleher
(lmk@capdale.com)
Jeanna Rickards Koski
(jmr@capdale.com)
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

Attorneys for the Official Committee of Asbestos Personal Injury Claimants