

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

In re:) Chapter 11
)
) Case No. 16-31602 (JCW)
KAISER GYPSUM COMPANY, INC., <i>et al.</i> ,)
) Jointly Administered
Debtors.)
)
)

**STATEMENT OF INTEREST ON BEHALF OF THE UNITED STATES OF AMERICA
REGARDING PLANS OF REORGANIZATION FOR KAISER GYPSUM COMPANY,
INC. AND HANSON PERMANENTE CEMENT, INC.**

The United States respectfully submits this statement of interest under 11 U.S.C. § 1109(b) and 28 U.S.C. § 517 to address plans of reorganization that have been or may be filed in the above-captioned bankruptcy of debtors Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. (collectively, the “Debtors”).¹

The two plans currently on file both provide for the creation of a trust under 11 U.S.C. § 524(g) to resolve certain present and future asbestos claims, and the United States expects that any future plans likely will seek to create a section 524(g) trust to address asbestos claims (the “Trust”). In many cases, payment of personal injury claims by the Trust will trigger reimbursement obligations to the United States under the Medicare Secondary Payer Statute (“MSP Statute”), 42 U.S.C. § 1395y(b)(2). *See Taransky v. Sec’y of Health and Human Servs.*, 760 F.3d 307, 309–310 (3d Cir. 2014). The United States has a strong interest in ensuring that the Trust operates in a transparent manner and complies with its obligations under the MSP Statute; that claimants are informed of their potential obligation to reimburse the Medicare

¹ On July 27, 2018, the Debtors, along with other parties, filed a proposed Joint Plan of Reorganization (the “Debtors’ plan”), which provides for the creation of a trust under 11 U.S.C. § 524(g) to resolve present and future asbestos claims. Dkt. No. 1085. Similarly, Truck Insurance Exchange filed a proposed Plan of Reorganization on April 13, 2018 (the “Creditor’s plan”), which likewise proposes the creation of a section 524(g) trust. Dkt. No. 887.

program; that the Trust's assets are preserved to the greatest extent possible to pay the claims of legitimate asbestos victims; and that Trust assets are not dissipated through payment of fraudulent claims, excessive professional fees, or mismanagement.

The United States is filing this statement of interest to address and forestall objectionable plan provisions relating to the Trust. Although the parties have had nearly two years in which to formulate plans, the Debtors' plan is missing exhibits that will control critical terms of the reorganization, including how asbestos claims will be evaluated, paid, and reported. That plan also lacks sufficient safeguards to prevent fraud, abuse, or mismanagement and to ensure that the interests of the United States will be protected. Absent specific safeguards, the final plan may allow the Trust to review, negotiate, and liquidate potentially millions of dollars of personal injury claims, with little continuing supervision by this Court and with little ability for interested parties to prevent—or even detect—fraud, abuse, or mismanagement. Although the Creditor's plan contains some safeguards, neither it nor the Debtors' plan properly addresses the claimants' reimbursement obligations under the MSP Statute. The United States believes that any final plan (and accompanying disclosure statement) must address reimbursement and reporting obligations.

Because any Trust created pursuant to a plan must comply with applicable federal law, the United States urges all parties to craft Trust provisions that will take into account the United States' rights under the MSP Statute and that will include safeguards against fraud and waste in the payment of asbestos claims. The United States is submitting this statement of interest now to provide greater time for the parties to address these concerns, including prior to the Debtors' filing a disclosure statement, and to avoid the need for the filing of objections.

STANDING AND INTERESTS OF THE UNITED STATES

1. The United States may be heard on this matter because, as discussed in detail

below, any proposed plan may contain provisions that could adversely affect the United States' ability to recover amounts due to it under the MSP Statute. The United States has an interest in ensuring that any Trust created as part of these bankruptcy cases operates in a transparent and accountable manner. The Trust will have the responsibility for millions of dollars of claims under the terms of the Trust, including claims of future asbestos victims. It is essential that Trust beneficiaries, the Court, and other interested parties—including the United States—have a reasonable opportunity to monitor operations of the Trust.

2. In addition, the United States submits this statement to advise the Court of its concern that payments to legitimate asbestos claimants could be diluted through fraud, mismanagement, or abuse. The United States has a strong interest in ensuring that the processes of this Court are not used to facilitate fraud and abuse in other asbestos-related proceedings.

3. The United States is an interested party in these cases with standing to appear and be heard on the approval of any disclosure statement or plan filed in these cases. *See* 11 U.S.C. § 1109(b) (party in interest “may appear and be heard on any issue” in a bankruptcy case); *In re Thorpe Insulation Co.*, 677 F.3d 869, 887 (9th Cir. 2012) (holding that parties whose rights would potentially be “substantially affected” by asbestos-related bankruptcy plan had party-in-interest standing in bankruptcy case); *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 215 (3d Cir. 2011) (en banc) (same). As the Third Circuit has observed, the standing of parties adversely affected by the plan is particularly appropriate where the potential objections “implicate the integrity of the bankruptcy process.” *Id.* The United States is also authorized to submit this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in

a federal court.² This Statement of Interest is without prejudice to any objections or arguments that may be raised by the United States in its capacity as a party in interest with respect to any disclosure statement, plan, or other contested matter.

BACKGROUND

A. Medicare Reimbursement Obligations under the MSP Statute.

4. Medicare is a federal entitlement program, administered by the Centers for Medicare and Medicaid Services (“CMS”), that provides health benefits to qualified elderly and disabled individuals. 42 U.S.C. § 1395y. Under the MSP Statute, Medicare is a “secondary payer” of benefits and does not pay expenses for which payment could be expected from another source. 42 U.S.C. § 1395y(b)(2)(A). If the other source, or “primary plan,” fails to make prompt payment at the time that medical services are needed, Medicare will make conditional payments that must be reimbursed as soon as payment becomes available from the primary plan. 42 U.S.C. § 1395y(b)(2)(B). Both the primary plan and any entities that received payment from the primary plan are obligated to reimburse Medicare within 60 days of such payments. 42 U.S.C. § 1395y(b)(2)(B)(ii)–(iii); 42 C.F.R. §§ 411.22(a), 411.24(h).

5. For purposes of the MSP Statute, the term “primary plan” includes self-insured tortfeasors, and a reimbursement obligation may be triggered by a payment that is conditioned on a compromise or release of claims against the tortfeasor or its insurer. 42 U.S.C. § 1395y(b)(2)(B)(ii); 42 C.F.R. § 411.22(b)(2); *Taransky*, 760 F.3d 313–314 (holding that tort

² The United States filed Proofs of Claim against the Debtors for CERCLA past and future response costs and claims for Natural Resource Damages associated with the Lower Duwamish Waterway Site. Claims Register Nos. 6-11 (Mar. 31, 2017); 648-653 (Oct. 12, 2017). Those claims are being handled by the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section (EES). The Arguments made herein are without prejudice to any arguments EES may make with respect to any matter in these cases. As stated above, this statement of interest is also without prejudice to any objections or arguments that may be raised by the United States, including those not related to environmental claims, with respect to any disclosure statement, plan, or other matter.

defendant that paid insurance settlement to Medicare beneficiary was a “primary plan” within the meaning of the MSP Statute). “The fact of settlement alone, if it releases a tortfeasor from claims for medical expenses, is sufficient to demonstrate the beneficiary’s obligation to reimburse Medicare.” *Taransky*, 760 F.3d at 315 (citing *Hadden v. United States*, 661 F.3d 298, 301–02 (6th Cir. 2011)); *Brown v. Thompson*, 374 F.3d 253, 262 (4th Cir. 2004) (“We, therefore, hold that the Medicare Secondary Payer provisions do entitle the Secretary to reimbursement from Brown’s settlement proceeds for the Medicare payments previously paid to Brown.”). The primary plan must report all payments made to Medicare beneficiaries. 42 U.S.C. § 1395y(b)(7), (b)(8). The primary plan, as well as anyone else who receives payment from the primary plan, including the Trust and the Medicare beneficiary, must reimburse Medicare for medical expenses paid on behalf of the beneficiary. 42 U.S.C. § 1395y(b)(2)(B)(ii). In some situations, the amount due to Medicare may be reduced by “procurement costs,” including attorneys’ fees, but only to the extent that the tort claim was disputed and the procurement costs were borne by the party against which CMS seeks to recover. 42 C.F.R. § 411.37(a)(1)(i).

6. The identities of the persons who will eventually seek payment from the Trust are presently unknown to the United States. Because the Debtors’ asbestos liabilities involve products that were manufactured many decades ago and because of the often-debilitating nature of asbestos illnesses, many beneficiaries of the Trust will be elderly, disabled, or both, and many of those persons may therefore also have received medical care paid for by Medicare. For this reason, the United States has a strong interest in ensuring that the provisions of the Trust are consistent with the parties’ reporting and reimbursement obligations under the MSP Statute. More broadly, because Medicare will only be reimbursed if Trust funds remain available to pay legitimate asbestos claimants, the United States has a strong interest in ensuring that the Trust

maintains adequate safeguards so that it does not become depleted through fraud or mismanagement.

B. Patterns of Abuse in the Operation of Section 524(g) Asbestos Trusts.

7. In 1994, Congress enacted 11 U.S.C. § 524(g), which created a comprehensive mechanism for addressing both existing and future injuries caused by asbestos. Under the terms of most section 524(g) plans, asbestos-related claims against the debtor are not liquidated or paid during the bankruptcy case but are instead channeled to a special trust created under the plan of reorganization, which then assumes responsibility for both the defense and payment of those claims. These trusts are managed by trustees, who often must secure support for major decisions from a “trust advisory committee” (TAC), whose members are often the same attorneys who represented asbestos claimants during the bankruptcy. *See generally* Dixon, McGovern, and Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice, 2010 (the “RAND Report”). Since 1994, more than 60 such trusts have been established by chapter 11 debtors with asbestos-related liabilities.

8. In recent years, both courts and researchers have noted a growing number of concerns with the operations of many of these trusts, particularly as they relate to fraudulent claims filed both within and outside the bankruptcy system. In 2010, the RAND Corporation conducted a comprehensive study of the 26 largest asbestos trusts then in operation, which at the time accounted for approximately 99 percent of all asbestos trust payments. *See* RAND Report at xi. Among other findings, the RAND Report found that, over the study period, persons who did not have malignant conditions accounted for 86 percent of all claims made to the trusts and 37 percent of all trust payments, notwithstanding that these claimants usually would not have

been compensated at all for those injuries in the tort system. *Id.* at xiv. The RAND Report also noted a troubling lack of transparency in trust operations. *Id.* at xv–xvi. In addition to RAND’s inability to obtain even such basic data as how often individuals disclosed claims to multiple trusts, it observed that trusts generally do not coordinate with each other to verify whether the exposure evidence submitted by claimants is consistent from case to case. *Id.* at 19.

9. Subsequently, this Court identified a substantial pattern of fraud when, as part of a contested estimation proceeding, it authorized discovery into a sample of prepetition asbestos claims. *See In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). Among other findings, the Court found that plaintiffs withheld exposure evidence (which would have mitigated Garlock’s own liability) in each and every one of the fifteen sample civil asbestos cases that it examined, which had been settled by the debtor prepetition, usually for large sums. *Garlock*, 504 B.R. at 84. In addition, in three specific instances discussed by the court, plaintiffs were permitted to file claims against trusts for other asbestos defendants even after representing to a court of law in a different proceeding that they had never been exposed to those defendants’ products. *Id.* at 85.

10. Although the *Garlock* decision directly addressed only the issue of whether the debtors’ historic liability in the state tort system was tainted by fraud, its findings also raise troubling concerns about the lack of oversight and operation of the trusts themselves. Most notably, *Garlock* suggests that an unknown, but significant, amount of trust funds has been paid over the years to persons who had already disclaimed having any such claim against that particular trust in another court proceeding. Moreover, as a subsequent study of certain trust claims unsealed as part of the *Garlock* litigation concluded, many of the claim forms submitted by the same claimants and law firms to different trusts contradicted each other or contained

factually inconsistent allegations about the claimants' work histories or sources of exposure. U.S. Chamber Institute for Legal Reform, *Insights & Inconsistencies: Lessons from the Garlock Trust Claims* (February 2016). A common factor in many of these abuses has been the secrecy with which many trust claims are submitted, allowed, and paid, which has made it nearly impossible to detect when plaintiffs are seeking recovery based on factual representations that may be incompatible with other representations previously made in other litigation or before other trusts. *See, e.g., Kananian v. Lorillard Tobacco Co.*, No. CV-442750, 2007 WL 4913164 (Ohio Ct. Comm. Pl. Cuyahoga Cty., Jan. 18, 2007) (finding that plaintiff's attorney had deliberately misrepresented existence of claims against asbestos trust, and also noting that the discovery that revealed the fraud had been vigorously resisted by the trusts themselves).

C. Applicable Bankruptcy Code Provisions.

11. To be approved, any chapter 11 plan must be preceded by a disclosure statement that meets the requirement of the Bankruptcy Code that it provide creditors, and particularly those creditors who will be beneficiaries of the Trust, with "adequate information." 11 U.S.C. § 1125(a), (b). As explained below, this means that any plan (or any approved disclosure statement) must advise claimants of their potential obligation to reimburse Medicare for conditional payments and must contain the key provisions that will govern how the Trust will be administered and how claims will be reviewed, valued, and paid. *See* 11 U.S.C. § 1129(a)(1) (plans must comply with "applicable provisions of this title").

12. A chapter 11 plan may only be confirmed if the "plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). In turn, section 1123(a)(5) mandates that "a plan shall—(5) provide adequate means for the plan's implementation." 11 U.S.C. § 1123. As explained below, any plan that does not contain

adequate safeguards to facilitate compliance with the MSP Statute and to prevent the payment of fraudulent claims, including both claims submitted to the Trust and claims in other proceedings, would potentially lack an adequate means for implementation. When enacting section 524(g) of the Code, Congress contemplated the payment of legitimate asbestos claims. *See* H.R. Rep. 103-835, 41, 1994 U.S.C.C.A.N. 3340, 3349 (stating that section 524(g) is designed to carry “high standards with respect to regard for the rights of claimants”). Paying legitimate claims—and legitimate claims only—advances one of chapter 11’s fundamental purposes: “the creditors’ interest in maximizing the value of the bankruptcy estate.” *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008).

13. Also, to be confirmed, any plan must disclose the identities and affiliations of the persons who will be acting as trustees and TAC members for the Trust because 11 U.S.C. § 1129(a)(5)(A) provides that a plan cannot be confirmed unless the proponent “has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan.” Even if these individuals were disclosed, a plan may also not be confirmable unless the appointment of those individuals is “consistent with the interests of creditors and equity security holders and with public policy.” 11 U.S.C. § 1129(a)(5)(A)(ii). To the extent these positions are filled by persons subject to material fiduciary conflicts, that requirement also cannot be met.

D. Status of Proposed Plans.

14. Two proposed plans of reorganization have been filed in these cases. The Creditor’s plan was filed on April 13, 2018 (Dkt. No. 887). It was accompanied by a disclosure statement as well as a plan supplement describing the terms of the proposed Trust, but no hearing

on the disclosure statement has been scheduled. The Debtors' plan (Dkt. No. 1085) was filed on July 27, 2018. The Debtors' plan was not accompanied by a disclosure statement or by a plan supplement, and the Debtors have not filed any document setting forth the terms of the Trust. The United States understands that negotiations and mediation are ongoing with respect to both plans, and that both may be subject to further amendment or supplementation.

15. Through the various plan supplement documents filed along with the Creditor's plan, the Creditor has provided information about the terms under which the proposed settlement facility will operate, the reporting of Medicare information, and the settlement facility's procedures for reviewing claims and safeguards for preventing fraud and abuse.

16. By contrast, the Debtors' proposed plan appears to be a typical section 524(g) asbestos plan in many respects, in that a number of critical reorganization terms are not found in the plan at all, but rather in various documents not yet filed, including the Asbestos Personal Injury Trust Agreement (Exhibit I.A.17) (the "Trust Agreement") and a set of Asbestos Personal Injury Trust Distribution Procedures (Exhibit I.A.19) (the "Trust Distribution Procedures"). *See, e.g.*, Debtors' Plan ¶¶ I.10 (asbestos claims shall be channeled to the Trust "as set forth in" the Trust Agreement and the Trust Distribution Procedures); III.B.4 (asbestos claims "shall be resolved pursuant to the terms of" the Trust Agreement and the Trust Distribution Procedures); IV.I (appointment of members of TAC to be disclosed in Trust Agreement); IV.O (asbestos claims to be liquidated and paid "in accordance with the terms, provisions and procedures" of the Trust Agreement and the Trust Distribution Procedures).

17. The Debtors' plan does not give a detailed description of the provisions of the anticipated Trust Agreement or the Trust Distribution Procedures. Rather, the Debtors' Plan contains placeholders for the Trust Agreement, the Trust Distribution Procedures, and numerous

other plan-related documents, along with a statement that those documents “shall be Filed and made available for review . . . no later than 10 days before the deadline to object to confirmation of the Plan.” Debtors’ plan at p.8 n.1. Further, the plan states that the Debtors “reserve the right to modify, amend, supplement, restate or withdraw any of the Exhibits after they are filed.” *Id.*³

STATEMENT OF INTEREST

18. The United States files this statement of interest to advise the court and the parties of the necessity of ensuring that any final plan in this case contains sufficient safeguards to prevent the fraud and abuse that may have occurred in certain earlier section 524(g) asbestos trusts, as demonstrated in *Garlock*. Fraud and abuse in the payment of asbestos claims will prejudice both legitimate asbestos victims as well as the United States because, like most asbestos trusts, the Trust in this case is likely to be a closed fund: the amount paid into the Trust will essentially be fixed at confirmation, and individual claimants will receive a greater or lesser distribution from that fund based on the number of other claims that are paid. Payment of a fraudulent claim will harm all legitimate claimants, whose own distributions from the Trust may be diluted as a result. Unfairly diluted recoveries will also harm the United States to the extent that claimants with legitimate claims receive funds insufficient to reimburse Medicare for its conditional payments. The United States further notes that it may have an interest in particular provisions of the plan or Trust, as follows:

Medicare-Related Provisions and Disclosure

19. Although it is likely that many of the claims to be paid by the Trust will implicate

³ Pursuant to a Plan Term Sheet between the Debtors and the Asbestos Claimants’ Committee (the “Committee”) filed March 6, 2018, responsibility for drafting all Trust documents has been delegated to the Committee and the Future Claimants’ Representative. Dkt. 854 at E.1. Based on this, it is expected that the eventual Trust Distribution Procedures to be incorporated in the Debtors’ plan will closely resemble those that have been proposed or negotiated by asbestos committees in previous asbestos cases.

MSP Statute reimbursement issues, the Debtors' plan currently lacks any provisions to ensure that the Trust complies with its obligations to the United States. This is in contrast to the plan in *Garlock*, the most recent asbestos-related plan confirmed in this district, which contains specific safeguards to ensure compliance with the MSP Statute.⁴ In any final plan, the Trust procedures should clearly identify the parties who will be responsible for MSP Statute reporting as well as ensure that those parties have access to information sufficient to accurately report payments to CMS. *See In re Garlock Sealing Technologies*, Case No. 3:17-cv-00275-GCM, Dkt. 13, Exh. A at 25-30 (June 9, 2017) (detailing obligations of various parties to ensure Medicare reporting compliance).

Claim Transparency

20. In order to monitor whether parties have complied with their reporting obligations under the MSP Statute, the terms of the Trust should permit the United States to monitor when particular individuals have filed claims with or received payment from the Trust. The Debtors' plan does not describe the circumstances under which claim and payment information can be disclosed by the Trust under the eventual Trust Distribution Procedures. The United States may object to any proposed Trust procedures that would permit claimants to file claims and receive payments in complete anonymity and in a manner that may prevent any meaningful audit of Trust claims and payments, as has been true of certain other asbestos trusts. *See RAND Report* at 19.

21. The terms of the Trust should also permit liability insurers to access information about individual claims, which they need to comply with their obligations under the MSP Statute. Those parties are "primary plans" with reporting obligations under the MSP Statute and

⁴ Although the Creditor's plan has safeguards that the Debtors' plan does not, neither the Creditor's plan nor its accompanying disclosure statement advises claimants of their reimbursement obligations under the MSP Statute.

therefore need access to information necessary to comply with federal law. In addition to the harm to the insurers that might result therefrom, claim secrecy will directly prejudice the United States because it creates a risk that CMS may receive reports based on incomplete or inaccurate information, which could hinder CMS's ability to ensure compliance with the MSP Statute. Moreover, claim secrecy will limit appropriate judicial oversight of the Trust.

22. Although personally identifiable information and medical information are protected under federal law, the assertion of a tort claim in court is a public act, and claims filed with a judicially established trust pursuant to 11 U.S.C. § 524(g) should be a matter of public record—as would be the case if those claims were pursued in a state court or litigated through the bankruptcy claims process. To the extent that the Debtors propose to prohibit any disclosure of claims information, as certain other asbestos trusts have done, this would be a blunt tool that frustrates the government's visibility into compliance with the MSP Statute and Congress's oversight of the effects of section 524(g). Certain information about claims filed with trusts can be appropriately disclosed while still complying with data privacy obligations. The ability to file claims in secret would also stand in contrast to the obligations of creditors in other chapter 11 cases, where claims become part of the public claims register and evidentiary submissions may be sealed only if such relief is specifically granted by the court pursuant to a legally supported motion under 11 U.S.C. § 107.

Failure to Advise Claimants of Potential Reimbursement Obligations

23. Nothing in either proposed plan or in the disclosure statement submitted with the Creditor's plan indicates that claimants will be advised that their recoveries from the Trust may be subject to a potential Medicare reimbursement obligation. If claimants are not educated about potential Medicare reimbursement obligations, claimants with Medicare debts may be unable to

fully plan for how they will use the funds received from the trust, and, as a result, the United States is more likely to be under-reimbursed.

Administrative Costs and Attorney Fees

24. The United States may object to any proposed Trust provisions that impose excessive administrative costs or that permit attorneys to collect excessive contingency fees. In both cases, the allowance of excessive fees or costs may prejudice the United States because it will effectively reduce the amount paid to claimants, which in turn will dilute the value of potential Medicare reimbursement obligations. This concern will be particularly heightened to the extent that a Trust offers a “settlement” option, in which claimants can elect to receive non-discretionary, fixed payments without the risk of litigation. To the extent that the Trust does not cap attorney fees in this circumstance (as certain other asbestos trusts have done), attorneys may be paid compensation that is grossly disproportionate to the work they have actually done. The Debtors’ plan does not disclose whether the Trust will impose a cap on the amount of attorney fees that may be charged in connection with claims paid through the Trust, and it is unclear if the attorneys filing those claims could be entitled to charge the same contingency fee in these uncontested matters that they would have received from a contested verdict in a civil trial. Furthermore, claimants who are Medicare beneficiaries should be advised of the risk that excessive legal fees may not qualify as a “procurement cost” within the meaning of 42 C.F.R. § 411.37(a)(1)(i), which may affect the amount of their reimbursement obligations.

Trust Governance Information

25. The identity of any fiduciaries who will administer the Trust after confirmation should be fully and timely disclosed. The Debtors’ plan does not currently do so. The selection of the Trust fiduciaries should be subject to the same vigorous conflicts review and

disinterestedness standards applicable to estate fiduciaries, and the fiduciaries should be approved in accordance with 11 U.S.C. § 1129(a)(5). This requirement is critical because, as the RAND Report found, the same individuals and firms often serve in fiduciary capacities in multiple asbestos trusts (which trusts might have conflicting interests in the case of overlapping claims), and the persons appointed to TACs have traditionally been the same attorneys who represent claimants against the trusts. *See* RAND Report at xvi. The United States and other parties should be permitted to evaluate whether there exist any conflicts arising from these relationships that would prevent trustees and TAC members from exercising their fiduciary duties to Trust beneficiaries. Trust operations tainted by conflicts of interest can result in dilution of funds flowing to claimants and under-reimbursement to the Medicare Trust Fund.

Payment of Non-Meritorious Claims

26. The United States has an interest in ensuring that assets of the Trust are preserved to the maximum extent possible to pay the claims of the most seriously injured individuals, and that Trust assets are not dissipated through payments to persons (1) asserting fraudulent claims or (2) who otherwise would not have had viable claims in the tort system or under the bankruptcy code, *see, e.g.*, 11 U.S.C. § 502(c) (providing mechanism for bankruptcy courts to estimate contingent and unliquidated claims). The Debtors' plan does not make any provision for how the existence of other potential sources of asbestos exposure will affect the valuation of particular claims under the Trust Distribution Procedures. The United States may object to any plan provisions that would prevent the Trust from asserting defenses that would have been available to a defendant in the tort system.

27. In particular, the United States may object to any Trust provision that proposes to make distributions to claimants who cannot credibly demonstrate significant exposure to the

Debtors' products. The weight given to different types of exposure evidence may have a potentially significant effect on the distribution of Trust assets among claimants, as well as the expected distributions to individual claimants. As *Garlock* noted, in a non-trust proceeding, a claimant who could credibly demonstrate that the Debtors were the sole cause of his injury would be entitled to a far larger judgment than a plaintiff for whom the Debtors were just one of many sources of exposure. *Garlock*, 504 B.R. at 82. To the extent the Trust will not consider evidence of other exposure, the plan would treat two disparate classes of plaintiffs equally. Apart from the general problem of paying claims that would likely be of minimal value in the tort system, this decision could also have serious distributional consequences: claimants with strong and high value claims against one tortfeasor could be forced to share on an equal basis with claimants whose ability to recover in the tort system is at best questionable.

28. The United States may also object to any Trust provisions that appear to shelter claimants from the consequences of misconduct in other proceedings. To the extent that any claimant has previously denied exposure to the Debtors' products in order to increase his or her recovery against another defendant, such claimant should not be permitted to take a different position here. The claimants should be advised of the effect of prior inconsistent statements made in other asbestos proceedings and any previous denial of any exposure to products for which the Debtors are legally liable. Finally, the United States may object to any Trust provisions that appear to facilitate fraud in other proceedings, such as provisions which unreasonably restrict the Trust from cooperating in discovery or which permit claimants to strategically withdraw and refile Trust claims.

29. Furthermore, excluding the effect of any tolling that has occurred due to the filing of the bankruptcy cases, the Trust should not be permitted to make payment to claimants whose

claims would be time barred in the tort system. Creditors should be advised of the extent to which the Trust will be permitted to assert other defenses that might have been available against claimants in the tort system, including a statute of limitations against claimants who strategically withdrew and refiled their claims against the Trust.

Comparison of Plans

30. There are substantial, material differences between the Debtors' and Creditor's plans. Whereas, as noted above, the Debtors' plan is missing many terms that the United States considers essential, the Creditor's plan includes a full set of supporting documents. Among other things, the Creditor's plan advises creditors of how that plan will address fraud and abuse. Specifically, its exhibits contain provisions addressing the following key topics that are missing from the Debtors' plan:

- The trustee's obligations regarding Medicare reporting (Creditor's plan Annex II at ¶ 8.1);
- The formulas and medical criteria that the trust will use in calculating the specific distribution to be awarded to different types of asbestos claimants (*Id.* Appendix I-II);
- The degree of medical and causation evidence that will be necessary to establish eligibility for payment (*Id.* ¶ 4.5);
- The disclosure obligations of claimants regarding claims they have made against other defendants (*Id.* ¶ 4.6(b));
- Provisions dealing with the release of information to other trusts (*Id.* ¶ 4.6(c));
- Provisions directing the trustee to maintain methods for auditing claims

(*Id.* ¶ 4.8);

- Provisions detailing the procedures that the trust will maintain to deter fraud and the consequences if fraud is detected (*Id.* ¶ 4.8(b));
- An identification of parties who will be entitled to indemnification by the Settlement Facility (Creditor’s plan Annex I at ¶ 3.5);
- Provisions for the appointment, qualification, supervision, compensation, and replacement of trust fiduciaries (*Id.* at ¶ 5).

CONCLUSION

31. For the foregoing reasons, the United States may object to any plan filed in these cases that does not contain reasonable safeguards against fraud and abuse or which permits the Trust to operate with insufficient transparency or oversight. In particular, the plan should not contain provisions that prevent parties with a legitimate interest from auditing or accessing Trust claim information, that permit excessive attorney fees to be charged to claimants, that allow payments to claimants who have engaged in fraudulent conduct in other asbestos litigation, or that permit the Trust to be managed by persons with material fiduciary conflicts. The United States reserves all rights in these cases, including without limitation all arguments and objections that may be raised in connection with any disclosure statement, plan of reorganization, or other contested matter.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

/s/ R. Andrew Murray
R. ANDREW MURRAY
United States Attorney

GILL P. BECK

JAMES M. SULLIVAN
Assistant United States Attorneys
Carillon Building, Suite 1650
227 West Trade Street
Charlotte, NC 28202
Tel: 704-344-6222
Fax: 704-344-6629
E-mail: James.Sullivan2@usdoj.gov

RUTH A. HARVEY
J. TAYLOR MCCONKIE
JONATHAN E. JACOBSON
Attorneys
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Phone: (202) 353-7971
E-mail: jonathan.e.jacobson@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on the 13th day of September, 2018, a copy of the Statement of Interest was submitted to the Court for electronic filing via the ECF system which will serve the interested parties.

s/James M. Sullivan
Assistant United States Attorney