UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	Chapter 11
DBMP LLC,[1] Debtor.	Case No. 20-30080 (JCW)

DEBTOR'S OBJECTION TO ACC-FCR MOTION FOR TWO-STEP ESTIMATION PROTOCOL

DBMP LLC ("**DBMP**" or the "**Debtor**") objects to *The Official Committee of Asbestos Personal Injury Claimants' and the Future Claimants' Representative's Conditional Motion to Establish a Two-Step Protocol for Estimating the Debtor's Asbestos Liabilities* (Dkt. 1031) (the "**Motion**"). Through the Motion, the Official Committee of Asbestos Personal Injury Claimants (the "**ACC**") and the Future Claimants' Representative (the "**FCR**") seek an estimation protocol (the "**Protocol**") with an initial estimation (the "**First Estimation**") where the parties would be required to adopt the methodology favored by the ACC and the FCR (the "**Settlement Method**"). The Debtor would be prohibited from presenting its method (the "**Legal Liability Method**") until a second estimation (the "**Second Estimation**") to be conducted at an undefined future date under the vague condition that the First Estimation "does not prove helpful." Motion, Ex. A ¶ 3.

The Court should deny the Motion because it effectively seeks to have the Court prejudge the estimation of mesothelioma claims against the Debtor, before discovery and before the presentation of evidence. The Legal Liability Method is a well-recognized method for estimating

[1] The last four digits of the Debtor's taxpayer identification number are 8817. The Debtor's address is 20 Moores Road, Malvern, Pennsylvania 19355.

disputed personal injury claims in a bankruptcy case. It estimates claims directly, based on the factors relevant under state law, whereas the Settlement Method estimates claims indirectly, by assuming past settlements reflect current and future liability. Courts have routinely permitted debtors to pursue and present the Legal Liability Method. No court has ever precluded a debtor from presenting it, and in the only asbestos case where an estimation presenting such a method went to final judgment (Garlock), the court adopted it.

The First Estimation would deprive the Court of this potentially viable estimation method, resulting in a biased evidentiary presentation. Furthermore, a procedure with two serial estimations of the same question (the number and amount of current and future mesothelioma claims) has no foundation in the Bankruptcy Code or case law. To the Debtor's knowledge, no court has ever attempted it.

Finally, the Motion would not achieve its promised purpose of avoiding delay, expense, or litigation. The Motion would carry a significant risk of increased delay by requiring two sequential estimations rather than just one (and, the Debtor strongly believes that the Legal Liability Method will provide the most reliable estimate in this case). And although the Motion appears to contemplate that the Debtor would not be permitted to seek discovery from Trusts and from claimants through PIQs in connection with the Settlement Method, see Motion at 2, any fair application of the Settlement Method requires such discovery. Denying it would result in an unreliable estimation and would deny the Debtor due process. In fact, the Settlement Method presents far thornier discovery and litigation issues than the Legal Liability Method. Whereas the Legal Liability Method relies on objective facts concerning the actual claims to be estimated (such as exposure and damages), the Settlement Method opens up the complex issue of whether past settlements accurately reflect current and future liability—including whether past

settlements that would be the foundation of that methodology were tainted by claimants' failure to disclose material exposure evidence.

The Debtor does not propose at this stage to preclude the ACC and the FCR from pursuing the Settlement Method (so long as the Debtor is able to obtain the discovery necessary to meet it). But the ACC and the FCR should not be permitted to bar the Debtor's case based on assertions of simplicity that simply are not true.

Rather than pre-judge estimation before it has even begun, the Court should instead order estimation and adopt a case management order ("**CMO**") that will permit all parties to develop and present their estimation cases within a reasonable timeframe. This course will maximize the chances of settlement, as all parties simultaneously learn the strengths and weaknesses of their respective cases—not just the strengths and weaknesses of the Settlement Method. The CMO could even build in the opportunity for settlement discussions and/or formal mediation to facilitate this goal, either before or after discovery, perhaps with an exchange of preliminary expert reports among the parties, which may assist such negotiations and/or mediation.

For all these reasons, the Motion should be denied.

ARGUMENT

I. The First Estimation Proposed By the ACC and FCR Would Deprive the Court of a Reliable and Well-Recognized Method for Estimating Disputed Personal Injury Claims

The Motion proceeds from the premise that the Settlement Method is the "standard methodology" and is the "traditional estimation approach used in asbestos bankruptcies." Motion at 7-8. But in fact, courts have repeatedly permitted debtors to present the Legal Liability Method as a viable alternative to the Settlement Method, and the only court in an asbestos case

that had the opportunity to rule on the competing approaches (in *Garlock*) accepted the Legal Liability Method and rejected the Settlement Method.

A. The Legal Liability Method Is Well-Established

The Debtor has sought an estimation of current and future mesothelioma claims against it pursuant to Bankruptcy Code section 502(c) for purposes of formulating and confirming a plan of reorganization. *Motion of the Debtor for Estimation of Current and Future Mesothelioma Claims* (Dkt. 948) ¶¶ 5, 7, 28, 31. Substantive state law governs the validity and value of personal injury claims in bankruptcy. See Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (estimation is "bound by the legal rules which may govern the ultimate value of the claim" so that "when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law"). Claims that are unenforceable under state law should not receive value, and the value of enforceable claims should be determined under applicable state law. See 11 U.S.C. § 502(b)(1); In re Farley, Inc., 146 B.R. 748, 752-56 (Bankr. N.D. Ill. 1992) (estimating group of personal injury claims pursuant to section 502(c) according to their merit under state tort law, and estimating by determining claimants had "about a one-in-four chance of winning" in any jury trial on key factual issue); In re Garlock Sealing Techs. LLC, 504 B.R. 71, 94 (Bankr. W.D.N.C. 2014) (estimation must aim to determine the debtor's "*liability* to claimants" under state law, not "simply its claims resolution history"—and that resolution history is useful "only if it reliably reflects the debtor's liability") (emphasis in original).

The Legal Liability Method simply assesses directly the factors that matter to the number and value of asbestos claims under state law, including the number of claimants with exposure to a product for which the Debtor is responsible, claimants' damages, and the other parties who

may have contributed to the injury or made payments to the claimant. See Garlock, 504 B.R. at 95-96 (summarizing method). Courts routinely and without controversy estimate non-asbestos personal injury claims using similar direct methods. See In re Continental Airlines Corp., 64 B.R. 858 (Bankr. S.D. Tex. 1986) (estimating claims by determining likelihood of success under applicable state law); In re Farley, Inc., 146 B.R. at 753-56 (estimating personal injury claims by determining claimants' likelihood of success on key disputed issue under Illinois law); In re Corey, 892 F.2d 829, 834 (9th Cir. 1989) (upholding estimation at zero of "highly speculative" tort claims for emotional distress); In re Aquaslide 'N' Dive Corp., 85 B.R. 545, 548-49 (B.A.P. 9th Cir. 1987) (upholding estimation of personal injury claim at zero based on failure in key element of claimant's proof).

In mass tort bankruptcy cases, courts also have repeatedly recognized that debtors have the right to present the Legal Liability Method, with no court (to the Debtor's knowledge) accepting a request to limit the evidence presented at estimation. See, e.g., In re USG Corp., 290 B.R. 223, 223-27 (Bankr. Del. 2003) (holding that at the estimation trial, "debtors will be permitted to present their defenses"); In re G-I Holdings, Inc., 323 B.R. 583, 623 (Bankr. D.N.J. 2005) (holding that the debtor "should be afforded an opportunity to review the claims against the estate and object to those claims that it believes are illegitimate or dispensable as a matter of law"); *Grace's Memorandum in Opposition to Claimants' Motions to Exclude Expert Testimony* at 32-42, In re W.R. Grace & Co., et al., No. 01-1139 (Bankr. D. Del. Dec. 21, 2007) (Dkt. 17695) (excerpts attached as **Ex. A**) (discussing debtor's Legal Liability Method developed with assistance of more than 100,000 PIQs); Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880

F.2d 694, 699 (4th Cir. 1989) (upholding estimation of intrauterine device personal injury claims using Legal Liability Method that relied on questionnaires and facts about merits of claims).[2]

The asbestos cases summarized above settled before the courts rendered estimates. But in Garlock, the court heard evidence with respect to both estimation methods, after holding early in the case "that the two approaches to estimation are not matters of law, but rather matters of evidence" and that the court would "hear such evidence as is appropriate relating to each approach and will make its decision based upon which is the more persuasive." *Order for Estimation of Mesothelioma Claims* ¶ 19, In re Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. Apr. 13, 2012) (Dkt. 2102) (attached as **Ex. B**). After the Garlock estimation trial, the court rejected the Settlement Method estimate advocated by the ACC/FCR in that case (of more than $1 billion) and accepted the debtor's Legal Liability Method estimate (amounting to $125 million). Garlock, 504 B.R. at 95.

Most recently, the Bestwall ACC and FCR likewise sought to limit the parties to using the Settlement Method, and foreclose use of the Legal Liability Method. The court held there was "no basis for the Court" to grant the motion "or make any determination about the validity or merit of either the debtor's legal liability methodology or the ACC's settlement methodology at this point." 3/4/21 H'rg Tr. at 16, In re Bestwall LLC, No. 17-31795 (Bankr. W.D.N.C.) (excerpts attached as **Ex. C**). The court elaborated that "no court, to my knowledge, has ruled at this early stage of estimation that it would be appropriate to prevent one side or the other from

[2] The courts in USG and G-I Holdings also rejected the efforts of claimant representatives to preclude the debtors from obtaining discovery of core importance to their estimation methods. See In re G-I Holdings, Inc., 2006 WL 2403531, at *23 (Bankr. D.N.J. Aug. 12, 2006) (holding that "[t]he Court believes that each party is entitled to make its case"); id. at *23 n.38 (quoting Transcript of Hearing in In re USG Corp., No. 01-2094 (D. Del. Sept. 19, 2005)) ("I've already told you that if the debtor is going to proceed with an estimation theory, they're going to be allowed to get evidence that they feel is necessary to make their claim in this case. I'm not going to cut them off at the pass, which is what you want to do. You want me to look at the historical information.").

presenting their theory for estimating a debtor's asbestos liability in the case," and agreed with the Garlock court's reasoning in this regard. Id. at 16-17.[3]

B. The Protocol Would Preclude Use of the Legal Liability Method Without Authority in the Bankruptcy Code or Cases, and Without Evidence Showing the Settlement Method Is Superior

The ACC/FCR Motion simply ignores the extensive history of courts entertaining the Legal Liability Method. Instead, it seeks to require all parties to use a method that, contrary to universal practice in other litigation, uses settlements as proxies for liability. See Fed. R. Evid. 408 (excluding use of settlements to "prove or disprove the validity or amount of a disputed claim"); Advisory Committee Notes, Fed. R. Evid. 408 (explaining that settlements or offers to settle are "irrelevant" to liability "since the offer may be motivated by a desire for peace rather than from any concession of weakness of position.").

The Motion cites no authority in the Bankruptcy Code for sequential estimations using different methods, nor a single case where a court has pursued such an approach. The cases the Motion cites did not hold that the Legal Liability Method was inadmissible. Those courts had no occasion to make such a finding because the parties only presented Settlement Method approaches. See In re Armstrong World Indus., Inc., 348 B.R. 111, 134 (D. Del. 2006); In re Federal-Mogul Global, Inc., 330 B.R. 133, 144-45 (D. Del. 2005); In re Eagle-Picher Indus.,

[3] The Bestwall court also found persuasive that in the Specialty Products case, the court rejected a similar effort by the ACC to restrict the debtor's methodology or present certain kinds of medical or science evidence, finding that any such limitation was premature "until [the debtor's] methodology is actually known, and stated in a report, and then you can challenge the specifics of what was done, as opposed to a hypothetical of what may be done." 2/14/11 H'rg Tr. at 31-32, In re Specialty Prods. Holding Corp., et al., No. 10-11780 (Bankr. D. Del.) (Dkt. 899) (excerpt attached as **Ex. D**); see also 7/16/12 H'rg Tr. at 37-38, In re Specialty Prods. Holding Corp., et al., No. 10-11780 (Bankr. D. Del.) (excerpt attached as **Ex. E**) (refusing to preclude introduction of medical and science evidence). The ACC in that case withdrew both motions. See *Order Withdrawing Motion of the Official Committee of Asbestos Personal Injury Claimants to Establish Estimation Methodology Without Prejudice*, In re Specialty Prods. Holding Corp., et al., No. 10-11780 (Bankr. D. Del. March 17, 2011) (Dkt. 1056); *Order Withdrawing Without Prejudice the Official Committee of Asbestos Personal Injury Claimants' Motion to Limit the Use of Medical Science Testimony in Estimation Proceedings*, In re Specialty Prods. Holding Corp., et al., No. 10-11780 (Bankr. D. Del. July 19, 2012) (Dkt. 2708).

Inc., 189 B.R. 681, 690 (Bankr. S.D. Ohio 1995). In some of them the debtor appears not to have disputed liability. Armstrong, 348 B.R. at 125; Federal-Mogul, 330 B.R. at 135 n.2.[4]

The Motion's only authority for the proposition that the Settlement Method is "traditional" dates from 2005 (before a number of the Legal Liability Method cases had occurred, including Garlock). And in fact, a portion of that source not quoted in the Motion recognizes that settlements cannot be blindly equated with liability:

> If . . . current and future claims are significantly different from prebankruptcy claims or if the amount the debtor previously paid to settle claims does not accurately reflect their actual value, then an estimate of the debtor's present and future tort liability should not be based exclusively on those historical values. A debtor or the tort claimants' committee should have the opportunity prior to a judicial estimation to establish the invalidity of past settlement values as a basis for valuing present and future claims.

S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES, at 97 (Fed. Jud. Ctr. 2005).

Finally, the Motion offers no evidence that DBMP's settlements represent its liability—the Motion simply asserts it, incorrectly. Motion at 7-8. The ACC and the FCR present no declarations from their experts. The only evidence offered on this topic to date is in Dr. Bates's declaration, where he says, "It is a well-established fact in the Law and Economics literature that the amount that a defendant pays and a plaintiff accepts to settle a lawsuit is not a direct measure of the defendant's liability." Declaration of Charles E. Bates, PhD ¶ 6 (Exhibit D to Estimation Motion).[5] There is currently no basis to conclude that the Settlement Method will be superior to

[4] The Motion states, without citation, that "claims in bankruptcy must be given the value they would have in the tort system," Motion at 7, as if estimation must seek to replicate settlement values from past cases. To the contrary, it is *state law*, not "the tort system," that governs the validity and value of claims in bankruptcy—as all the cases cited by the ACC and the FCR recognized. See, e.g., In re Federal-Mogul Global, Inc., 330 B.R. 133, 155 (D. Del. 2005) ("[T]he estimating court is bound by the legal rules which may govern the ultimate value of the claim.").

[5] The Motion states that Bates White has utilized historical settlement values "in the past . . . [f]or financial reporting purposes" and claims that Bates White "undoubtedly[] is in a position to estimate the Debtor's asbestos-related liabilities based on CertainTeed's historical settlement values." But Dr. Bates' testimony, which the Motion cites, distinguishes financial forecasting from the estimation of legal liability, which requires additional information. See

the Legal Liability Method in rendering an estimate of the Debtor's liability for mesothelioma claims.

The Protocol would thus in a very real sense prejudge the estimation. It would prefer one approach—the Settlement Method—before any evidence has been developed or presented. It would deprive the parties and the Court at the outset of evidence and argument supporting a Legal Liability Method that the Debtor believes is superior to the Settlement Method.

II. Bifurcating the Estimation Process Will Increase Delay, Expense, and Litigation and Will Not Assist the Parties in Resolving This Case

The ACC and the FCR justify their Estimation Protocol by arguing that a First Estimation restricted to the Settlement Method would be "of limited duration and avoid the time-consuming and costly discovery implicated by the Estimation Motion." Motion at 2. In fact, if conducted fairly, it would do nothing of the kind. It would front-load a relatively complex estimation proceeding while carrying the admitted prospect of a second estimation down the road. It would disserve judicial economy and would undermine the expeditious resolution of this case.

A. The Settlement Method Requires More Discovery Than the Legal Liability Method

Contrary to the contentions in the Motion, the Settlement Method requires *more* discovery than the Legal Liability Method. The Settlement Method—not the Legal Liability Method—focuses on the Debtor's decades-long settlement history. It necessitates the discovery the Debtor seeks through its Trust discovery motion, which will, among other purposes, determine whether past settlements were tainted by a failure to disclose material exposure evidence. The Debtor also expects that if the ACC and the FCR are permitted to pursue their method, they will seek discovery concerning the Debtor's settlement practices over a long period

Motion Ex. B; see also Deposition of Charles E. Bates PhD (Apr. 16, 2021) at 62:3-65:18 (excerpt attached as **Ex. F**) (distinguishing financial liability from legal standard of liability).

of time. The ACC and the FCR appear to contemplate that this discovery could be dispensed with, Motion at 2, but the Debtor will show at the long-awaited hearing on its Trust discovery motion in late October that any fair application of the Settlement Method requires this discovery. See also Garlock, 504 B.R. at 83-87 (using similar discovery to find that settlements were "unreliable as a predictor of [Garlock's] true liability").

The Legal Liability Method requires none of this.[6] It instead focuses on the most basic information about the claims that are actually being estimated, including how many are actually being asserted, how many can identify exposure to a Debtor product, their damages, and their other exposures and sources of recovery. The relevant facts are collected through the Questionnaire, which can be issued and returned in a four-month period. See 3/4/21 H'rg Tr. at 12, In re Bestwall LLC, No. 17-31795 (Bankr. W.D.N.C. Mar. 4, 2021) (ordering four-month return period for Bestwall Questionnaire and finding that consistent with previous cases).

Nor would the relief sought in the Motion avoid the Questionnaire discovery (again, if the Settlement Method is fairly applied). To be applied reliably, the Settlement Method *also* needs to know how many current claimants are actually asserting claims and have evidence of DBMP exposure. In Garlock, the court faulted the experts who applied the Settlement Method because they had "fresh data available to them" collected through the Questionnaire process in that case, "but did not use it in any way for their estimates." Garlock, 504 B.R. at 95. The Settlement Method also requires the parties to understand the facts of the current claims to determine whether they are more or less valuable than past claims. If, for example, current claimants are older on average than past claimants, then (to the extent settlements relate to

[6] The Motion makes the puzzling assertion that the Legal Liability Method imagines "an alternative reality based on accusations of malfeasance by the claimants and their counsel." Motion at 4. To the contrary, the Legal Liability Method *avoids* inquiry into those topics by focusing on the merit of claims under state law, not past settlements.

liability), they would expect lower settlements than past claimants because damages decrease with age.

The Motion thus rests on a false promise. The Protocol would eliminate no discovery or litigation if conducted fairly, but would only deprive the Court and parties of a reliable estimation methodology.[7]

Far from streamlining estimation, the Estimation Protocol would carry a significant risk of prolonging it and delaying resolution of this case. Rather than developing and litigating the Settlement Method and Legal Liability Method simultaneously, on the basis of common discovery, the Estimation Protocol would forecast a second estimation "should the initial estimation proceeding not prove helpful." Motion, Ex. A ¶ 3. The proposal does not define when that condition would be met, but it clearly carries the prospect of *sequential* estimation proceedings, which would take far more time than a single estimation. In the meantime, the Court and parties would not have the Legal Liability Method available, and would not know whether it presents a more reliable picture of the Debtor's liability than the Settlement Method—all hindering resolution of the case. Nor does the Motion explain how the Court as a practical matter could hear a Second Estimation addressing exactly the same question as the First Estimation (the Debtor's liability for current and future mesothelioma claims), having already heard evidence and *actually rendered a decision* in the First Estimation.

[7] The Motion cites the Bestwall case as a cautionary example, claiming that the parties continue to "litigate the Bankruptcy Rule 2004 motions" and the "scope and breadth of the estimation process" after the court allegedly ordered a "*Garlock*-style estimation." Motion at 5, 8. But the Bestwall Questionnaire continues to be "litigated" only in the sense that certain firms decided to disobey the court's order and collaterally attack it in Illinois or refuse to answer that Questionnaire as they were ordered to do. See *Order on Debtor's Emergency Motion to Enforce PIQ Order and Automatic Stay and Order to Show Cause*, In re Bestwall LLC, No. 17-31795 (Bankr. W.D.N.C. Aug. 18, 2021) (Dkt. 1996); *Motion to Enforce PIQ Order With Respect to Non-Compliant Claimants*, In re Bestwall LLC, No. 17-31795 (Bankr. W.D.N.C. Sept. 8, 2021) (Dkt. 2065). The discovery relevant to the Settlement Method (including the discovery taken by the Bestwall ACC and FCR relating to Bestwall's settlement history as well as the Bestwall Trust discovery) has been more complex (though necessary), but it is not expected to delay the estimation proceeding unduly.

B. The Legal Liability Method Provides a Sound Basis for Resolving the Case and Establishing a Section 524(g) Trust

The ACC and the FCR also claim an estimate produced using the Legal Liability Method will not be useful in resolving the case or establishing a section 524(g) Trust to pay current and future claims. Motion at 5, 7, 8-9. But the Debtor expects to show that the Legal Liability Method provides the best and most reliable way to fund a section 524(g) Trust that will have sufficient assets to pay current and future claimants equally for decades. Any Trust will have to pay *current and future claims*—not the past claims that have already been resolved. The Trust (and claimants who will be paid by such a Trust) should thus be intensely interested in the facts about those claims that are relevant to value under state law—including the number of such claims and their exposure profiles. Claimants and any Trust established in this case cannot simply assume that the current and future claims will appear in numbers and amounts exactly like the past claims.[8]

The Garlock case also shows the utility of the Legal Liability Method in resolving an asbestos bankruptcy case. After the court rendered its estimate, within less than a year the debtor had negotiated a plan of reorganization supported by the Garlock FCR.[9] A global agreement with the Garlock ACC and FCR followed about a year after that.[10] The Trust was funded with much less than half of the Garlock ACC's (unreliable) estimate of mesothelioma claims alone (which did not even include costs of administration or claims based on other diseases).[11] Yet the Trust

[8] In addition, to the extent the past settlements were inflated by a failure to disclose material exposure evidence, the Settlement Method would overstate the value of current and future claims. Any Trust approved in this case will have anti-fraud provisions like those adopted in the Garlock and Kaiser Gypsum cases preventing such conduct in the future. Artificially inflated past values would therefore not be a reliable guide to current and future values.

[9] *Disclosure Statement for Modified Joint Plan of Reorganization of Garlock Sealing Technologies LLC, et al., and OldCo, LLC, Proposed Successor by Merger to Coltec Industries Inc.* at 41.

[10] Id. at 43.

[11] Id. at ii (Trust funding of $480 million). In addition, some of the $480 million was for claims against co-debtor OldCo, LLC (successor to Coltec Industries Inc) rather than Garlock.

was so well-funded that its value currently exceeds the initial funding by over $30 million, more than four years after the effective date.[12] The Legal Liability Method can lead to a similarly positive result here.[13]

III. Rather Than Order a One-Sided First Estimation, the Court Should Adopt a Reasonable CMO With Opportunities for Settlement Negotiations Built In

Instead of ordering a bifurcated process starting with a one-sided First Estimation, the Court should conduct a single estimation, with each side permitted to conduct reasonable discovery and present their cases, and with the Court deciding which case is more persuasive after hearing the evidence. The Court should ensure the estimation happens reasonably soon, not by unfairly limiting the cases the parties can present but instead by adopting a reasonable CMO that results in the expeditious development of the parties' evidence and a timely estimation trial.

The First Estimation proposed by the ACC and the FCR in many ways resembles a kind of mediation. But the estimation CMO can build in the opportunity for settlement negotiations and/or formal mediation based on the evidence developed to that point. Both sides could present their cases to each other (and any mediator), and hopefully an agreement could emerge. Such negotiations and/or mediation would have all the benefits of the Protocol but none of the drawbacks.

To this point, the ACC and the FCR have refused to engage with the Debtor on settlement negotiations, despite repeated offers from the Debtor to do so. By ordering estimation and providing for settlement negotiations or formal mediation, the Court can promote resolution

[12] See GST Settlement Facility's Notice of Filing of Annual Report for the Year Ended December 31, 2020, In re Garlock Sealing Techs. LLC, No. 10-31607 (Bankr. W.D.N.C.) (Dkt. 6322), Ex. 1.A at 4 (net assets available for payment of claims over $514 million as of December 31, 2020).

[13] Nor will use of the Legal Liability Method result in a discount on the Debtor's liability, as the Motion claims. Motion at 4. To the contrary, the Debtor expects to offer a Legal Liability Method estimate that will provide the Court and parties with a conservative upper bound on its liability under applicable law.

of the case. But in the event the parties cannot agree before an estimation, the Court should render its estimate after hearing evidence from all parties on their respective estimation methods.

CONCLUSION

For all of these reasons, the Debtor respectfully requests that the Court deny the Motion and instead direct the parties to negotiate a reasonable CMO for a single estimation proceeding.

Dated: September 24, 2021
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
W.R. Grace & Co., *et al.*,	)	Case No. 01-1139 (JKF)
	)	
Debtors.	)	(Jointly Administered)

GRACE'S MEMORANDUM IN OPPOSITION TO
CLAIMANTS' MOTIONS TO EXCLUDE EXPERT TESTIMONY

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December 21, 2007

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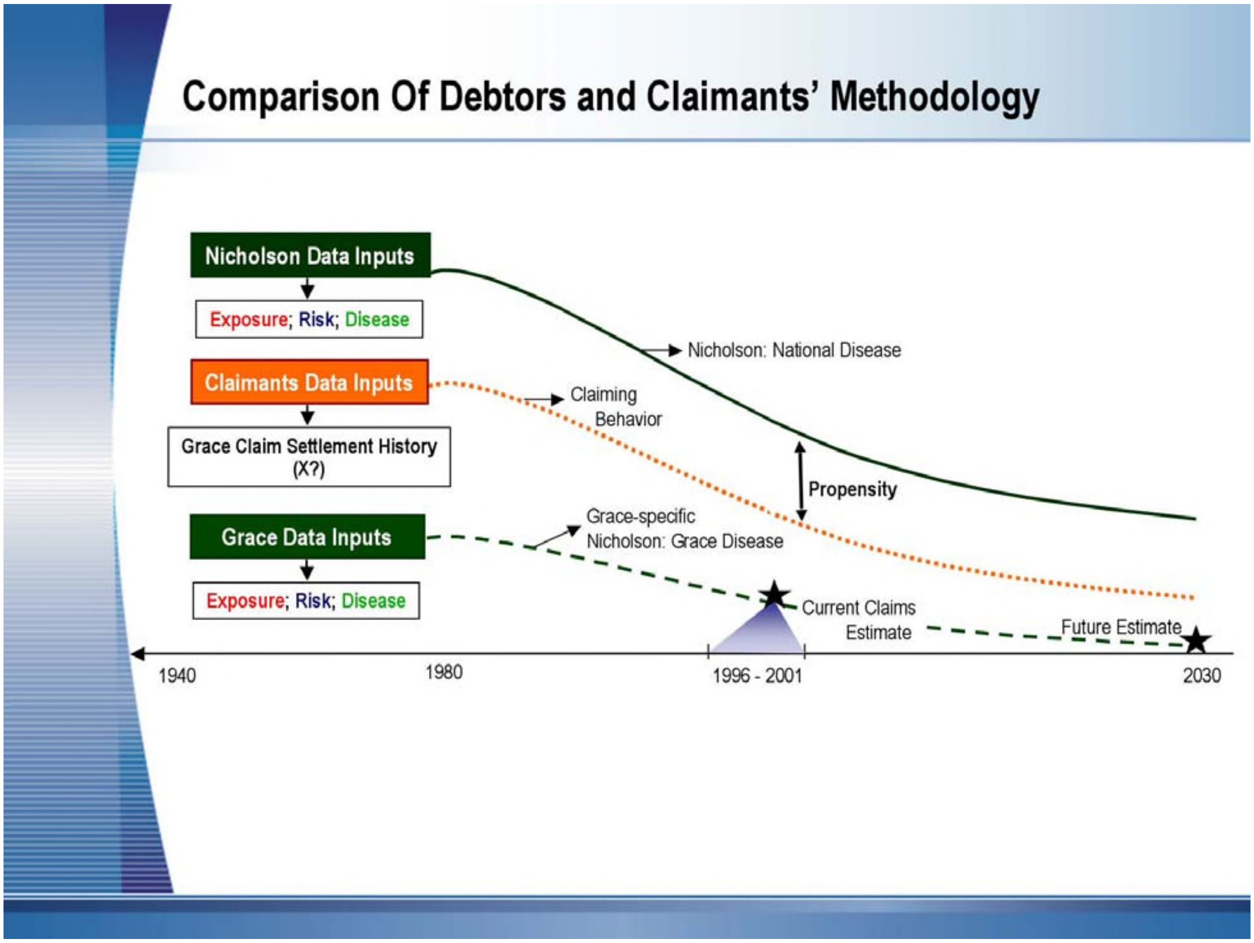
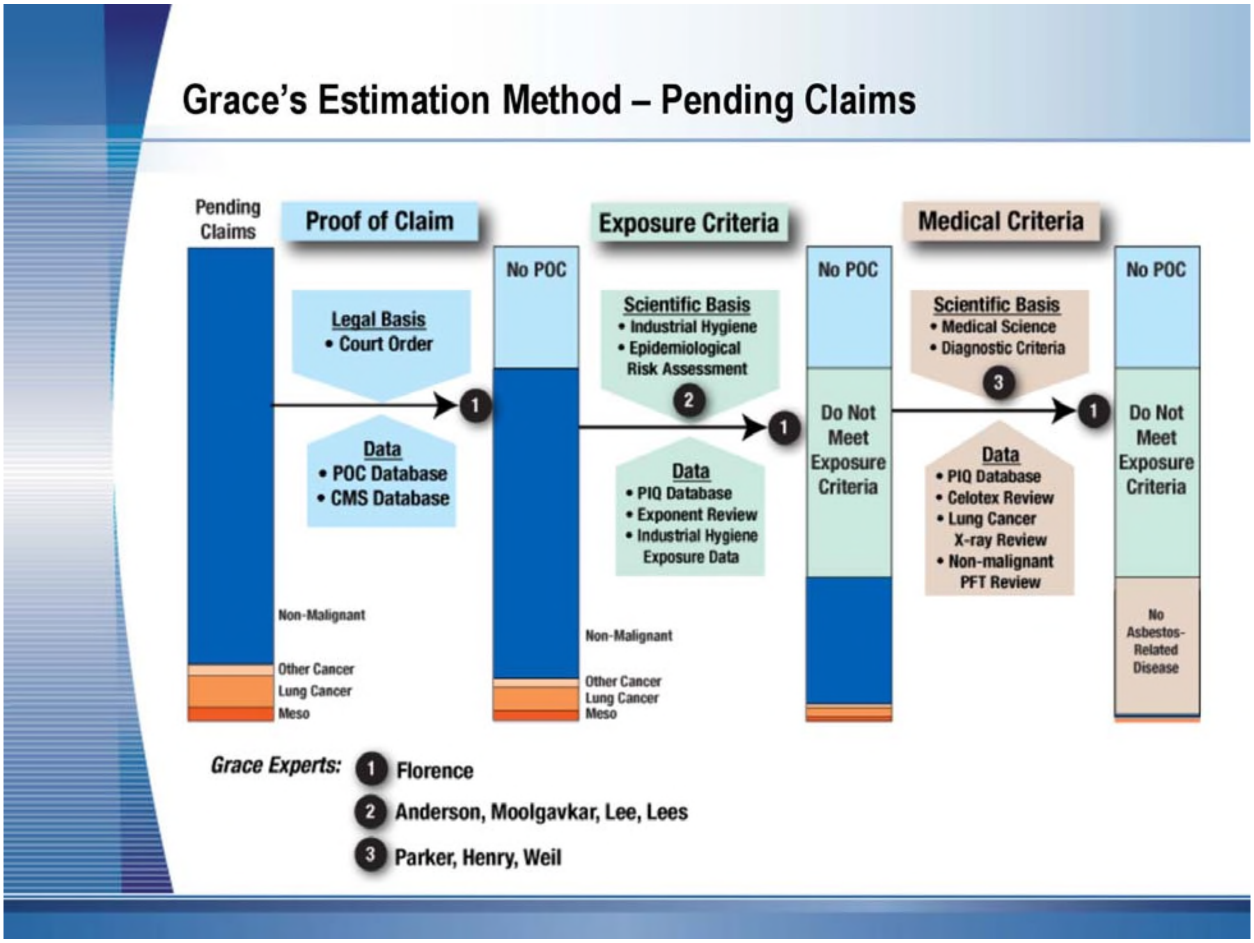
And it can also been seen in the following comparison of all ***three*** curves: Nicholson's ***national*** disease curve, Peterson's claims-driven curve, and the Grace-specific disease curve:



C. Grace's Estimation Constructs a Classic Toxic-Tort Causation Analysis and Epidemiological Forecast.

Deployment of an epidemiologically based estimate has several steps, each driven by distinct and established scientific disciplines. Put most simply, a classic toxic tort analysis (industrial hygiene, risk assessment, etc.) must be done to determine the Grace-caused disease reflected in current claims. Epidemiology then forecasts Grace-caused future disease. This chart should assist the Court in following the specific steps described below and in Section III.

Figure 1



1. **<u>Step 1</u>: Determining who is a current claimant of those who had claims pending as of the filing of Grace's bankruptcy petition.**

After determining the total number of existing claims against Grace for personal injuries allegedly caused by exposure to Grace asbestos-containing products (112,690), Grace expert Dr. Florence first undertook to determine the number of the total claims for which there had been filed a Proof of Claim. (*See* Fig. 1) To do this, Florence matched the POCs to Grace's historical claims database, and excluded from further analysis the historical claims for which there was no possible POC match, leaving 83,767 claims of a total of 112,690 historical claims. (Florence Rpt. at 8-9) This criterion was designed to determine the number of historical pending claims that would actually be pursued by claimants. (Florence Dep. at 291-92) A similar process was

used in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986). *See In re A.H. Robins Co.*, 880 F.2d 694, 694-99 (4th Cir. 1989)

This simple test – one would think an inarguably appropriate test – reduced the number of total claims by approximately 25% (to 83,767), with some slight variation depending on the type of claim asserted. (*See* Fig. 2) Claimants offer only the briefest of challenges to this aspect of Grace's experts' work – with the FCR devoting about a page of its brief (FCR Mot. 27-28) to the issue. This objection (and all other specific objections to this work) are discussed below in Section III.

2. <u>Step 2</u>: Requiring proof of exposure and causation.

The next step determines the extent to which the existing claims are supported by evidence of sufficient exposure to Grace asbestos-containing products to have caused an asbestos-related disease.

Grace expert Dr. Lees, an industrial hygienist, analyzed the composition and uses of Grace's asbestos (and vermiculite) containing products, as well as the types of exposures that individuals could have to such products. He further gathered and evaluated all available industrial hygiene data on Grace product exposure, then subjected it to standard data quality criteria. Using well-established techniques for exposure assessment, he created a job exposure matrix for which he calculated the eight-hour average exposure for individuals interacting with various Grace products. These exposures were broken down both by product type and by the ways in which the individuals interacted with the product (*i.e.*, mixer, sprayer, remover, bystander).

Grace expert Dr. Moolgavkar, an epidemiologist, analyzed published epidemiological articles and reports regarding the dose-response relationship for asbestosis, mesothelioma, and lung cancer. Dr. Moolgavkar's analysis determined what can be reliably asserted about

responses at various doses ("benchmarks"). These exposure benchmarks describe the dose-response relationship – using standard parameters of epidemiology – for specific application to the use of Grace products. These parameters address the following issues: (1) whether there is data to support an association between asbestos and a certain type of disease; (2) how strong the association is between asbestos and disease; and (3) at what levels of exposure that association exists.

Grace expert Dr. Anderson, a risk-assessment expert, then applied her experience to the types of exposures in this case. Dr. Anderson used conservative estimates of duration and frequency of exposure, as well as the data and job exposure matrix constructed by industrial hygienist Dr. Lees, in order to estimate the cumulative exposures associated with uses of Grace products. Dr. Anderson then used these cumulative exposures and the benchmarks inherent in the epidemiologic literature that Dr. Moolgavkar's analysis identified and concluded what can be reliably said about the risks pertaining to the various exposure levels.

Dr. Lees' exposure matrix, Dr. Moolgavkar's exposure benchmarks, and Dr. Anderson's risk assessments, allowed Grace expert Dr. Florence, a statistician, to take these analytical criteria and use them to sort the claims at issue in this case based on the information submitted by the claimants via the court-approved PIQ process.

The PIQs specifically asked each pending claimant to characterize the claimant's "Nature of Exposure" as: personally mixing Grace asbestos-containing products, personally installing Grace asbestos-containing products, or being in the proximity of Grace products. (Florence Rpt. at 9) Because many claimants did not provide exposure information on the PIQs themselves, an analysis was done of the back-up data provided as attachments to the PIQs. (*Id.*) By utilizing

these two sources of data, Florence took into account both the PIQs and their attachments concerning the existing claims.

It then remained for Florence to take the scientific exposure and causation measures developed by the experts in those fields and apply them to sort the universe of identified claims using his expertise as an analyzer of data. Based on the exposure criteria, Florence concluded a total of 10,956 claims met minimum-exposure requirements pursuant to method one, and 23,843 claims pursuant to method two. (Florence Supp. Rpt. at 10) Using the median of these two methods, of the 83,767 claims that had a POC, 17,400 met the established scientific criteria for establishing exposure sufficient to cause disease. The results of this work are shown in the transition from the second to the third column in Figure 1. Depending on the condition claimed, this left between 5 to 15 percent of the total claims as viable.

3. <u>Step 3</u>: Requiring Proof of Disease.

The next step is to determine those claimants who have scientifically viable proof of actually having the disease they allege was caused by Grace.

Grace expert Dr. Daniel Henry, a radiologist, conducted a study of the claimants x-rays, which the Court had ordered produced to Grace. (*See generally* Henry X-ray Rpt.; *see also* Henry Supp. X-ray Rpt. at 1-2) Dr. Henry looked at a proportional sample of x-rays related to 800 lung and other cancer claimants. The purpose of the study was twofold: (1) to see if claimants actually had evidence of significant asbestos exposure, and (2) to determine the reliability of the claimants' doctors' B-reads.

Dr. Henry conducted a classically designed double-blind study, comporting also with published ILO standards. First, Dr. Henry drew a proportional sample of 507 claimants from the 2,857 cancer claimants who produced original or certified x-rays. (*Id.* at 2-4) Dr. Henry then selected an overlapping sample of 471 claimants whose x-rays had accompanying ILO reads by

the claimants' doctors. (Henry X-ray Rpt. at 4-5) The x-rays were read by an independent panel of 3 blinded B-readers, consistent with the ILO standard, which requires replication. The B-readers were not told who was hiring them, who the claimants were, or what the study related to. (Henry X-ray Rpt. at 5) The panel also read 47 control films (22 positive, 25 negative). Analysis of those control films shows moderate to substantial agreement between the readers and the control films, demonstrating accuracy in the panel's reads. (*Id.* at 8) Moreover, the control film reads demonstrate that the panel was not biased to over-read or under-read the films. (*Id.*) The results of this x-ray study demonstrate that only 7% of the claimants were found to have profusion of 1/0 or greater by 2/3 or more of the panel. (*Id.* at 6) In contrast, claimants' doctors read 80% of the claimants' x-rays as 1/0 or greater. (*Id*)

Grace expert Dr. Weill, a pulmonologist, conducted a further study that analyzed a random sample of 150 pulmonary function tests of PFTs of nonmalignant claims, again in accordance with published PFT standards. (*Id.* at 34-35) In general, claimants are required to show impairment in order to recover for impaired asbestosis or severe asbestosis, and impairment is measured by lung function testing or PFT. The American Thoracic Society ("ATS") has issued authoritative standards governing such testing. (Weill at 31-34) Weill reviewed the PFT results to determine compliance with ATS standards. Dr. Weill found numerous errors in the testing and reporting of the testing data for the 150 claimants. In fact, none of the PFT tests reviewed complied with all ATS requirements for lung function testing and only 20 complied with the ATS standards for either FVC or TLC. (*Id.* at 38-40) Dr. Weill concluded: "[O]f the random sample of pulmonary function tests, evaluated for the 150 claimants and submitted by all 69 Law Firms, all 150 (100%) failed to comply with all ATS testing criteria." (*Id.* at 39) Accordingly, Dr. Weill concluded that these PFT results "[c]annot

be used in support of the submitted claim, since they represent inaccurate and incomplete tests[.]" (*Id.* at 40)

Finally, Grace experts Drs. Parker and Haber, pulmonologists, reviewed the practices of 24 doctors and at least 6 screening companies underlying non-malignant claims. In his June report, Dr. Haber identified and discussed accepted medical and scientific methodologies and standards that apply to all physicians. These standards, rules and guidelines govern the physician's practice and provide a paradigm to evaluate a doctor's methodology and behavior. Haber discussed individual doctors who provided supporting medical diagnoses for Grace claims and their practices in light of the standards. (*See generally* Haber Rpt.) In critiquing Claimants' expert Welch and endorsing Dr. Haber's report, Dr. Jack Parker opined that medical evidence generated for litigation and medical screening in a litigation context are neither reliable nor medically sound. (Parker Rpt. at 10-13) Both experts found these screening doctors' and screening companies' diagnostic practices to be unreliable.

As he did with the exposure data, Grace expert Florence took the input provided by those with expertise in the relevant disciplines and used their conclusions to review the data of record in this case. For the lung cancer claimants, Dr. Florence excluded claimants alleging asbestos-related lung cancer as evidenced by radiographic evidence who neither submitted a certified copy of an x-ray nor certified that the x-ray was held by a third party or destroyed. (Florence Supp. Rpt. 10) Dr. Florence then calculated the percentage of those claimants in Dr. Henry's sample who were found to have profusion of 1/0 or greater by 2/3 or more of the panel and applied that percentage to the remaining lung cancer population. (*Id.* at 10-11) Based on an expert exposure review of the claimants who met the 1/0 profusion criteria, Dr. Florence estimated the number of lung cancer claimants who could satisfy both exposure and medical

criteria for lung cancer. (*Id*. at 11) Dr. Florence estimated that, only 23 satisfied both exposure and causation requirements, and assuming the same proportion for those not providing data, 59 satisfied both. (*Id.*) Using the median of these methods, of the 5510 lung cancer claims that has a POC, only 41 met the medical causation and exposure criteria.

For "other cancer claims," (non-pulmonary cancers), Dr. Florence assigned value only to laryngeal cancer and excluded all claims alleging other types of non-pulmonary cancer. In 2006, the National Academy of Sciences, Institute of Medicine was "charged with evaluating the evidence relevant to the causation of cancers of the pharynx, larynx, esophagus, stomach, colon, and rectum by asbestos and with judging whether the evidence is sufficient to infer a causal association." *Asbestos: Selected Cancers* at 1 (2006). The Institute found that there was "not sufficient" evidence "to infer a causal relationship between asbestos exposure" and pharyngeal, stomach, and colorectal cancer. (*Id.* at 6, 9, 10) The Institute further found that "the evidence is inadequate to infer the presence or absence of a causal relationship between asbestos exposure and esophageal cancer." (*Id.* at 8) Only in the case of laryngeal cancer did the Institute find that the evidence was "sufficient to infer a causal relationship" between it and asbestos exposure. *Id.* at 7; *see* generally Weill Rpt. Accordingly, Dr. Florence assigned value only to "other cancer claimants" alleging laryngeal cancer.

Florence also excluded those "other cancer claimants" alleging laryngeal cancer who did not have sufficient exposure to asbestos to support their claim. To have sufficient exposure to Grace asbestos to cause disease, a claimant, in his or her questionnaire, had to indicate that he or she (1) personally mixed Grace asbestos-containing products, or (2) personally installed Grace asbestos-containing products. (Florence Rpt. at 9) Dr. Florence estimated that 33 claimants met the POC, medical (laryngeal cancer only), and exposure requirements necessary to support a

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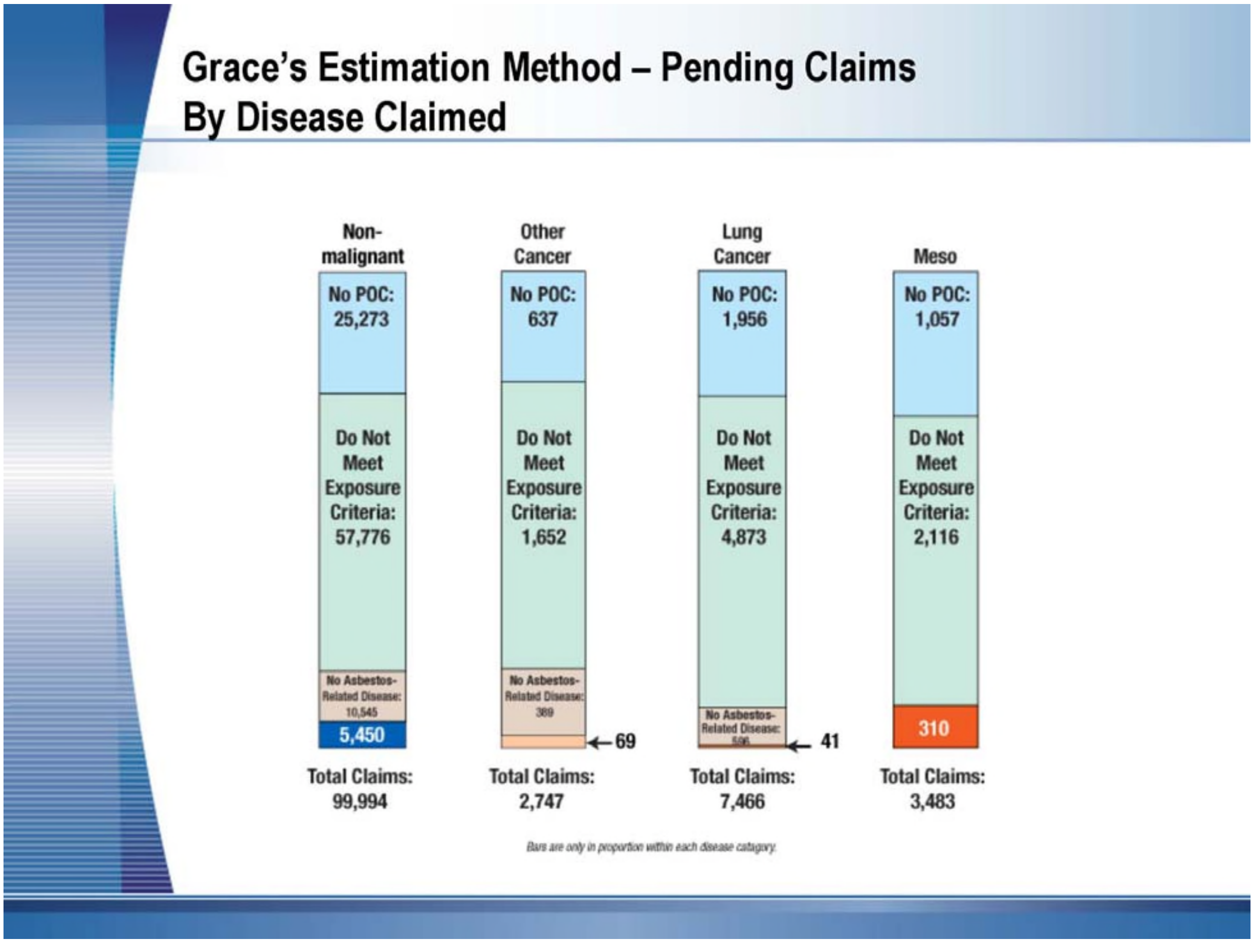
claim for "other cancer," specifically laryngeal cancer. (*Id.*) Dr. Florence also estimated that, assuming the same proportion s for those not providing data, there were 105 "other cancer claimants" who may have met both the medical and exposure data sufficient to support a claim against Grace. (*Id.*)

Using the median of these two methods, of the 2,110 other cancer claims that had a POC, only 69 met the medical and exposure criteria. Florence also categorized the nonmalignant claims into three categories (severe asbestosis, asbestosis, and unimpaired asbestosis). Dr. Florence estimated the number of non-malignant claims based on diagnoses not from underlying medical doctors found to be unreliable under Dr. Haber and Parkers' analysis and the claims that met the minimum profusion criteria of 1/0 for asbestosis. (Florence Supp. Rpt. at 12-13) Dr. Florence also used the analysis of Dr. Weill to calculate the percentage of non-malignant claimants who met the standard for severe asbestosis, asbestosis and unimpaired asbestosis based on PFT results that complied with ATS standards. (Florence Rpt. at 13-14) Dr. Florence then applied these percentages to the population of non-malignant claims. (*Id*.) After also applying the POC and exposure criteria, Dr. Florence estimated that only 7 should be classified as severe asbestosis, 160 as asbestosis, and 2,557 as unimpaired asbestosis. Assuming the same proportions for those not providing data, 22 were classified as severe asbestosis, 480 as asbestosis, and 7,672 as unimpaired asbestosis. (*Id.* at 14) Using the median of these two methods, of the 73,731 non-malignant claims that had a POC, only 5,450 met these criteria.

The final result of this step was that, using the overall median, out of the 17,400 claims that met the exposure criteria, only 5,869 met the relevant medical criteria as well. (*See* Fig. 1 (column three to column four)) This factor affects different types of claims differently (Florence excludes no mesothelioma claims on a medical basis, for example).

4. **Step 4: The final group of valid, Grace-caused disease claims as of April 2, 2001.**

Figure 2



After applying the criteria summarized above to the existing claims, Florence was left with 5,450 non-malignant claims, 69 other cancer claims, 41 lung cancer claims, and 310 mesothelioma claims. (Fig. 2) This group represented those cases of Grace-caused disease that satisfied a classic toxic-tort causation analysis. This aggregation of claims was then ready to serve as a basis for the final plotting of the Grace curve and provided a reliable basis for the next step in the analysis: projecting the number and nature of Grace-caused future cases of disease, according to the epidemiological principles established by Nicholson.

5. Step 5: Projecting the number and nature of future Grace-caused disease claims.

To estimate the amount of future mesothelioma and lung cancer cases that would arise, Dr. Florence relied on two epidemiological methods: Nicholson, Perkel, and Selikoff (1982) and Peto, Henderson, and Pike (1981) (Nicholson, *Occupation, Exposure to Asbestos*; *Julian Peto, Brian E. Henderson, and Malcolm C. Pike, Trends in Mesothelioma Incidence in the United States and the Forecast Epidemic Due to Asbestos Exposure During World War II* (1981)*;* Florence Supp. Rpt. at 18). To estimate the amount of Grace-caused other cancer and nonmalignancy claims, he used an "index series" to compare those disease trends to lung cancer and applied regression models. (Florence Supp. Rpt. at 19) He then calculated a median forecast based on 32 individual forecasts, incorporating two methods for calculating claims that would meet minimum criteria, two mesothelioma and lung cancer forecasting methods, four calibration periods, and two other cancer and nonmalignant forecasting methods. (*Id.*)

6. Step 6: Determining aggregate value.

Finally, Florence determined the potential aggregate value of the existing and future claims by ascertaining settlement averages for those past claims that met the scientific criteria discussed above and applied them to the projected cases of Grace-caused disease. (*See generally id.* at 15 *et seq.*) Combining pending and future claim estimates, Florence estimated Grace liability to range from $200 million to $989 million through 2049, with a median of $468 million. (*Id.* at 23)

III. CLAIMANTS HAVE NOT SHOWN (AND CANNOT SHOW) THAT GRACE'S ESTIMATION USES UNRELIABLE DATA OR UNRELIABLE METHODOLOGY.

Claimants' criticisms of particular aspects of Grace's experts' opinions can best be addressed by examining each under the foregoing legal and scientific framework. The

EXHIBIT B

George R. Hodges
United States Bankruptcy Judge

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

In re:	)	Case No. 10-31607
GARLOCK SEALING TECHNOLOGIES, LLC., et al.,	)	
Debtors.[1]	)	Chapter 11

ORDER FOR ESTIMATION OF MESOTHELIOMA CLAIMS

This matter is before the court on the debtors' "Motion For Estimation Of Asbestos Claims Under Section 502(c) And For Entry Of Case Management Order For Estimation Of Mesothelioma Claims" together with the objections of the Official Committee of

[1] The debtors include Garlock Sealing Technologies, LLC, Garrison Litigation Management Group, Ltd. and The Anchor Packing Company.

Asbestos Personal Injury Claimants and the Future Asbestos Claimants' Representative.[2]

The court also requested and the parties briefed the issue of the scope and purpose of the estimation proceeding. By this Order, the court has concluded (1) to order an estimation proceeding; (2) to estimate the total amount of allowed mesothelioma claims in order to determine plan feasibility; (3) to consider properly supported evidence based upon the "settlement" approach and the "legal liability" approach; (4) not to require filing of claims or establish a bar date at this time; and (5) to set a hearing for the estimation proceeding in December 2012.

Background

1. Garlock is subject to roughly 5,000 mesothelioma claims that were pending in state courts on the date it filed this Chapter 11 case. It is also potentially subject to many more similar claims in the future.

2. Garlock has proposed a Plan of Reorganization and seeks an estimate of aggregate asbestos claims based on mesothelioma in order to determine the feasibility of its Plan. The ACC and FCR have announced their intention to file a competing plan, and estimation would be necessary for

[2] This Order will refer to the parties as "Garlock," "ACC," "FCR" and the ACC and FCR together as "claimants."

consideration of it when appropriate. Further, the ACC and FCR have suggested that estimation would demonstrate that Garlock is insolvent.

Estimation

3. All parties agree that estimation is necessary. They disagree on the authority to conduct the estimation, its purpose and the method for determining the estimate. The court agrees that an estimation proceeding is necessary and will grant Garlock's motion in that regard.

Authority and Purpose

4. There appear to be a number of sources of authority for estimation. Foremost among them is section 502(c) of the Bankruptcy Code, which Garlock contends is the only true authority. It provides that:

> There shall be estimated for purposes of allowance under this section – (1) any contingent or unliquidated claim, the fixing of which, as the case may be, would unduly delay the administration of the case; ....

11 U.S.C. § 502(c).

5. That provision has not limited courts from using estimation in other contexts, such as post-petition administrative claims, In re Dennis Ponte, Inc., 61 B.R. 296 (B.A.P. 9th Cir. 1986); In re Adelphia Bus. Solutions, Inc., 296 B.R. 656 (Bankr. S.D.N.Y. 2003); In re MacDonald, 128 B.R. 161 (Bankr. W.D. Tex. 1991); post-petition claims, In re Pizza of

Hawaii, Inc., 761 F.2d 1374 (9th Cir. 1985); voting purposes, Bittner v. Borne Chem. Co., 691 F.2d 134 (3d Cir. 1982); and for feasibility only, In re Nova Real Estate Inv. Trust, 23 B.R. 62 (Bankr. E.D. Va. 1982).

6. Several courts have estimated asbestos liability for purposes other than allowance. In re Armstrong World Indus., Inc., 348 B.R. 111 (D. Del. 2006); Owens Corning v. Credit Suisse First Boston, 322 B.R. 719 (D. Del. 2005); In re Federal-Mogul Global, Inc., 330 B.R. 133 (D. Del. 2005). In each of these cases the debtor and personal injury claimants had reached an agreement on the asbestos liability and the dispute was with another creditor.

7. Section 105(a) authorizes the court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Using estimation to further the provisions of sections 1129 and 524(g) appears consistent with that broad authority.

8. While section 502(c) requires that certain claims shall be estimated, it does not purport to be exclusive or to limit the circumstances in which claims may be estimated. A common attribute of all the "authorities" cited above is that the primary concern was the practical necessity of solving a valuation problem through estimation – without a great deal of concern over the source of the authority for the exercise. So,

it appears that estimation has been deemed appropriate "by main strength and awkwardness" in any circumstance where it promotes and expedites the purposes of the Code.

9. All that having been said, it appears proper here to estimate Garlock's mesothelioma asbestos liability for allowance purposes pursuant to section 502(c).

10. The court anticipates hearing appropriate evidence for the purpose of making a reliable and reasonable estimate of the aggregate amount of money that Garlock will require to satisfy present and future mesothelioma claims. Whether those claims are satisfied through Garlock's Plan or that anticipated by the ACC and FCR; whether they are satisfied through litigation, settlement or a 524(g) Trust; or whether some as yet unanticipated process is necessary – in all those events, an estimate of the aggregate liability is necessary in order to determine the feasibility of whatever plan emerges. It may be useful for other purposes as well.

11. The court does not anticipate considering or determining any individual claims or any group of claims (other than the entire group). The court does not expect to "allow" any individual or group of claims. Rather, it proposes to estimate the aggregate amount necessary to satisfy present and future claims that may be allowed at some later point in the case.

12. The ACC suggested in its briefs that estimation was necessary to determine whether the debtors are insolvent. The debtors' estimated mesothelioma liability may become the subtrahend of such a calculation at some point. But, for the purposes of this estimation proceeding, the court will not address the solvency issue.

Method of Estimation

13. The goal of an estimation hearing is to arrive at a reasonable and reliable estimate of the amount of Garlock's liability for present and future mesothelioma claims. The parties differ on how that should be accomplished.

14. The ACC and FCR propose to use a "settlement" approach to estimation by way of statistical extrapolation from Garlock's history of resolution of mesothelioma claims. Fundamental to this approach is an appraisal of what would have been a fair resolution of claims in the absence of bankruptcy. Owens Corning, 322 B.R. at 722; Federal-Mogul, 330 B.R. at 158. The focus of this approach is on Garlock's "historical claims-handling practices and expert testimony on trends in the asbestos tort system." Federal-Mogul, 330 B.R. at 155–56.

15. This methodology has been used by a number of courts in estimation of asbestos liability: In re Armstrong World Indus., Inc., 348 B.R. 111 (D. Del. 2006); Owens Corning v. Credit Suisse Boston, 322 B.R. 719 (D. Del. 2005); In re

Federal-Mogul, 330 B.R. 133 (D. Del. 2005); In re Eagle-Picher Indus., Inc., 189 B.R. 681 (Bankr. S.D. Ohio 1995). In each of these cases, however, the estimation was not contested by the debtor. Rather, the debtor and claimants had agreed on the estimate, and it was being challenged by other creditors.

16. Garlock contends that the settlement approach overstates its liability because it (a) includes settlements (even of invalid claims) motivated by defense costs; and (b) was inflated by the exit from the tort system of a number of large asbestos defendants.

17. Garlock proposes to offer instead a "legal liability" approach to estimation that focuses on the merits of claims. It forecasts an estimation calculated by projecting the number of claimants based upon occupation groups and predicting the likelihood of recovery for separate groups to reach an aggregate damage amount, and then reducing that by other sources of recovery. Cases supporting a merits-based approach include: In re USG Corp., 290 B.R. 223 (D. Del. 2003); In re W. R. Grace & Co., 355 B.R. 462 (Bankr. D. Del. 2006); In re G-I Holdings, 323 B.R. 583 (Bankr. D.N.J. 2005).

18. The claimants assert, inter alia, that Garlock's approach would involve a "virtual" trial of individual personal injury claims in violation of the claimants' constitutional

rights; that it would involve an inappropriate "science" determination; and that it is not supported by case law.

19. The court has concluded that the two approaches to estimation are not matters of law, but rather matters of evidence. The court will hear such evidence as is appropriate relating to each approach and will make its decision based upon which is the more persuasive.

Rule 408

20. Garlock has asserted that Rule 408 of the Federal Rules of Evidence prohibits the use of its historical settlement data for estimation. The court disagrees and will allow admission into evidence of such data and evidence properly based on it.

21. Rule 408 provides as follows:

> (a) **Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) Furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) Conduct or statement made during compromise negotiations about the claim ....

Fed. R. Evid. 408.

22. The claimants do not propose to use Garlock's settlement data to "prove or disprove the validity or amount of a disputed claim." They propose to use the data to project the aggregate amount of different sets of claims. So, by its terms, Rule 408 does not apply in this circumstance.

23. Further, in the context of a mass-tort case, the court in In re A.H. Robins Co. stated that Rule 408 applied to individual lawsuits between particular parties. 197 B.R. 568, 572 (E.D. Va. 1994). And, the Fourth Circuit has held that Rule 408 does not prohibit the use of a prior settlement when the party "does not seek to show the validity or invalidity of the compromised claim." Wyatt v. Sec. Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir. 1987).

24. In the context of Chapter 11 asbestos cases, many courts have admitted evidence of the debtor's settlement history of resolving past claims for the purpose of estimating liability for unresolved pending and future claims. See Armstrong, 348 B.R. at 123-24; Owens Corning, 322 B.R. at 721-25; In re Babcock & Wilcox Co., 274 B.R. 230, 256-57 (Bankr. E.D. La. 2002); Federal-Mogul, 330 B.R. at 157; Eagle-Picher, 189 B.R. at 686. In fact, the court in Babcock & Wilcox rejected the argument made here by Garlock on the basis that Rule 408 applied only when evidence of settlement was offered respecting the claim

that was the subject of the compromise and not when it is part of another dispute. 274 B.R. at 256.

25. Consequently, the court will permit the use of Garlock's settlement history data in the estimation proceeding.

Bar Date

26. Garlock has sought the establishment of a bar date for the filing of claims (or at least for the filing of questionnaire responses). Because the estimation envisioned by the court does not involve a determination of any individual claim, the court does not believe that a bar date is necessary at this point in the case – for claims or for questionnaire responses. Consequently, the court declines to establish a bar date.

Hearing Schedule

27. The court will set the hearing to determine estimation of pending and future mesothelioma claims to begin December 3, 2012, and conclude December 14, 2012. The court will not attempt to dictate how each party presents its case, but will give each side five days to do it. Additional time will be granted only if necessary and if the first allotment has been efficiently utilized.

28. As movant, Garlock is entitled to proceed first on December 3 and conclude by December 7. The ACC and FCR will begin on December 10 and conclude by December 14.

29. The court has asked the parties to discuss intermediate deadlines that may need to be established. Once that is resolved, the court will issue a formal scheduling order.

It is, therefore, **ORDERED** that:

1. Garlock's Motion for Estimation is granted to the extent set forth above;

2. Garlock's Motion for Case Management Order and bar date are denied; and

3. A hearing for estimation of the aggregate amount of mesothelioma claims is set to begin December 3, 2012.

This Order has been signed electronically. The Judge's signature and Court's seal appear at the top of the Order.

United States Bankruptcy Court

EXHIBIT C

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 17-31795-LTB
BESTWALL LLC,	:	Chapter 11
Debtor,	:	Charlotte, North Carolina Thursday, March 4, 2021
	:	9:34 a.m.

: :

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LAURA TURNER BEYER,
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES (via ZoomGov):

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

motions being raised through Daubert motions or motions *in limine*. Admittedly, it is appealing to grant the shaping motions to the extent it would help ensure that we reach an estimation hearing in the first quarter of 2022, but the ACC and the FCR have not said anything to convince me that we can't reach that goal without granting their motion and that remains my intention.

So with respect to the motion to establish a methodology for estimating the debtor's joint compound liabilities, there's no basis for the Court to grant the ACC's methodology motion or make any determination about the validity or merit of either the debtor's legal liability methodology or the ACC's settlement methodology at this point. While the ACC cited cases where courts have concluded that the settlement methodology is more reliable and made an estimation decision accordingly, no court, to my knowledge, has ruled at this early stage of estimation that it would be appropriate to prevent one side or the other from presenting their theory for estimating a debtor's asbestos liability in the case.

It was most telling to me to learn that when the ACC filed a similar motion in the Specialty Products case, that they withdrew the motion before it came on for hearing based on Judge Fitzgerald's comments about the motion. As Judge Hodges said in granting the debtor's estimation motion in the Garlock case -- and I am loath to quote Judge Hodges for fear one side

or the other will draw conclusions from that, which I strongly suggest you shouldn't -- but I think he was dead on in Garlock when he said that the settlement approach and the legal liability approach to estimation are not matters of law, but, rather, matters of evidence. The Court will hear such evidence as is appropriate relating to each approach and will make its decision upon which is more persuasive. He also noted that, "No court has held that the analysis of the debtor's claims resolution history is the exclusive means to estimate liability. In fact, courts in prior cases have analyzed the merits of claims at estimation." Similarly, in the G-1 Holdings case Judge Gambardella determined that it was appropriate to allow both sides to make their case.

I agree with those courts and conclude for the same reasons I should deny the ACC's methodology motion without prejudice to that motion being raised as a pre-trial motion.

With respect to the motion to exclude the use of medical science evidence in the estimation proceeding, in reviewing the transcript and the arguments made regarding this motion it underscored for me that there was some confusion surrounding the exact relief being sought by the ACC in that motion. Ms. Ramsey clarified on the record that the motion seeks to prohibit the debtor from presenting evidence regarding the chrysotile defense. The debtor argued that this relief is unprecedented and that medical science evidence has been

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
SPECIALTY PRODUCTS HOLDING CORP., *et al.*,	.	Case No. 10-11780(JFK)
	.	(Jointly Administered)
	.	
	.	February 14, 2011
	.	9:30 a.m.
Debtors.	.	(Wilmington)
	.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors:	Gregory M. Gordon, Esq. Dan B. Prieto, Esq. Jones Day Zachary I. Shapiro, Esq Richards, Layton & Finger, P.A.
For Allstate:	Michael P. Migliore, Esq. Smith Katzenstein Jenkins, LLP
For USM PI Trust:	Scott J. Leonhardt, Esq. The Rosner Law Group, LLC
For Wachovia:	Leigh-Anne M. Raport, Esq. Ashby & Geddes, P.A.
For CE Trust/Lummus Trust:	Peter C. D'Apice, Esq. Stutzman, Bromberg, Esserman & Plifka, P.C.
For the Claimants:	Robert W. Phillips, Esq. Simmons, Browder, Gianaris, Angelides & Barnerd, LLC

there's a, a methodology here that's going to be employed by their estimation expert that is, that requires this information and will utilize it, we would like the opportunity, and would press our motion to establish an estimation methodology, because we believe that that methodology should be exposed to a Daubert Challenge. And so we have left it pending because we were protective of that position. If, on the other hand, the Court is going to rule on the four matters that have been fully briefed, that are outstanding, without getting into a debate over methodology that Bates Whites intends to employ, then we would withdraw the motion without prejudice at this point, because it would not be necessary, in our view, to go forward with it. Our concern is primarily, and it was after the Debtors' first brief, that the Debtor has spent about half of its brief talking about the Bates Whites methodology. And it is our opinion that that methodology is not based on scientific grounds, and if, to the extent that that's a methodology that's justifying this discovery, we would like an opportunity to challenge it.

THE COURT: Well, here's the problem that I have. I can understand that challenge in the Daubert context, but I'm a little unclear as to how it will be challenged without first knowing what the expert actually did. I mean, I can see the Daubert challenge after you have a report and you see

what was done, but how do you challenge it in advance saying this isn't what you can do? Because the discovery of the information itself may change what the expert decides to do with the information and how it's handled.

MS. RAMSEY: Your Honor, I think that the expert has articulated the methodology, very clearly, in the papers that have been filed in his declarations. That he would intend to employ, he would intend to gather data and use it in very specific ways to make very specific conclusions. And as far as we can tell, while the Court is certainly right, I guess, things could change, based upon what the proposal is right now, we think that it would subject it currently to a Daubert type challenge.

THE COURT: But that's the problem. I mean, if I say, Okay, you can't use piece of information A in context X, that doesn't mean you can't use it in context Y. So I'm not sure that I'm not essentially giving - - I mean they may not be advisory opinions. It may force the methodology into a specific direction. But I don't think it ends what the Committee's concern is. I don't think there's a way to address the Committee's concern until the methodology is actually known, and stated in a report, and then you can challenge the specifics of what was done, as opposed to a hypothetical of what may be done.

MS. RAMSEY: Your Honor, if I can just respond to

EXHIBIT E

(BY ORDER OF THE COURT, PORTIONS OF THIS HEARING ARE UNDER SEAL)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
SPECIALTY PRODUCTS HOLDING CORP., *et al.*,	.	Case No. 10-11780(JKF) (Jointly Administered)
	.	July 16, 2012(9:03 a.m.)
Debtors.	.	(Wilmington)
SPECIALTY PRODUCTS HOLDING CORP., BONDEX INTERNATIONAL, INC.,	.	
Plaintiffs,	.	
v.	.	Adv.Pro.No. 10-51085(JKF)
THOSE PARTIES LISTED ON EXHIBIT A TO COMPLAINT and JOHN AND JANE DOES 1-1000,	.	
Defendants.	.	
SPECIALTY PRODUCTS HOLDING CORP., and BONDEX INTERNATIONAL, INC.,	.	
Plaintiffs,	.	
v.	.	Adv.Pro.No. 12-50755(JKF)
THOSE PARTIES LISTED ON SCHEDULE A TO THE COMPLAINT,	.	
Defendants.	.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

Appearances:

For the Debtors: Daniel J. DeFranceschi, Esq.
Richards, Layton & Finger
Gregory M. Gordon, Esq.
Daniel B. Prieto, Esq.
Jones Day
Gus Kallergis, Esq.
Calfee, Halter & Griswold, LLP
Edward Houff, Esq.
Evert Weathersby & Houff

can't testify based on the hypothetical assertion that an expert may say, Look, claim A wasn't exposed, claim B wasn't exposed, claim C wasn't exposed as opposed to saying, We've got aggregate evidence that shows XYZ. I can't do that, Mr. Sheppard. I don't have an expert report that tells me that that's the process by which anybody's going forward now.

MR. SHEPPARD: Well, I guess, Your Honor, then perhaps the way to do this, and again what we were hoping to do was avoid having to conduct discovery but perhaps we can revisit this motion after we see their expert reports on August 15th. I mean, that might make some more sense, but, Your Honor, I do believe the case law allows the Court to engage in a discussion with regard to methodology. That's exactly what is going on in the other cases, the cases that we cite Armstrong, et cetera, the cases they cite, USG and G-1 Holdings, and I think this goes back to the same debate that we had back during the 2004 fights on the PIQ, and that is, you know, What is the methodology going to look like here? I think the debtors are taking this Court down that slippery slope and what we're trying to avoid, Your Honor, is having to pay for it as we slide down that slope.

THE COURT: Mr. Sheppard, I don't know how to avoid it. You can lead a horse to water, when it gets to water, that's a different - what happens at the point where you hit the water, that's a different issue. I don't think we're at

the water yet. I don't have anything. I have no proposal from the debtor that I'm aware of as to how this estimation process is going to go. I have no expert reports from anybody. I don't even know what your experts intend to say except that they've testified in cases before. So, assuming that they follow the same track, I have some understanding of what they've done in the past, but that doesn't necessarily mean they're going to do the same thing here. So, at this point you're asking me to cut off discovery for purposes which I don't understand. I mean, obviously, there's science involved in estimating asbestos claims. So to say that there is no science, I'm not going to make a ruling like that, of course there's science.

MR. SHEPPARD: No, Your Honor, that's not what we're suggesting. I think to the extent that these experts would be proposed to provide context, to provide evidence with regard to trends in the law, evidence in connection with the trends in the science we believe that's entirely appropriate, however again, if you look closely, and I agree with my co-counsel, Mr. Finch, perhaps it's better to address this not in a vacuum but with regard to the specifics of the expert reports, but, Your Honor, the point is, is that we were hoping to avoid that expense. We're $17 million plus into this process and, you know, we're continuing to rack up these fees, which I think everybody recognizes here for the most part, ultimately come

EXHIBIT F

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

In re Chapter 11

DBMP LLC, Case No. 20-30080 (JCW)

Debtor.

DBMP LLC,

Plaintiff,

vs. Adv. Pro. No. 20-03004
20-03004 (JCW)

THOSE PARTIES LISTED
ON APPENDIX A TO COMPLAINT
and JOHN AND JANE DOES
1-100,

Defendants.

** CONFIDENTIAL **

REMOTELY CONDUCTED

VIDEOTAPED DEPOSITION OF CHARLES E. BATES, PhD

San Diego, California (Witness's location)

Friday, April 16, 2021

Stenographically reported by:
LORRIE L. MARCHANT, RMR, CRR, CCRR, CRC
California CSR No. 10523
Washington CSR No. 3318
Oregon CSR No. 19-0458
Texas CSR No. 11318

Job No. 192223

of that model that are germane to what we're talking about here. But there's more recent stuff.

Q. You mention that the amount of the settlement is not a direct measure of the defendant's liability.

What do you mean by "the defendant's liability"?

A. Well, so we can think of liability as -- in several different definitions. So I think it makes sense to make that clear here.

There is probably a notion of the intrinsic liability, which is, if all facts were well known and uncertainty was removed, what does the law define as what a company owes if the fact of an injury has occurred and the fact that the responsibility is known, what that would be -- what would a plaintiff owe, and that would sort of be the intrinsic liability.

Then there is the notion more of in the world of tort liability, which is in the face of the uncertainty that we face in knowing those things what would a jury determine and what would a judicial process determine ultimately that a company owed, which is -- has considerable volatility and uncertainty around what those numbers are. But the

risk of that is something that a company takes account of in a practical sense.

But that is sort of -- at its core has the intrinsic liability, and then there's the uncertainty around what we know about the case and how the particular jury will -- judicial process will determine that.

And then there is a financial liability which relates to what does a company spend from the standpoint of resolving its asbestos cases for the purposes of its own finances and understanding what its expenditures are associated with that, which is made up of the money that it spends to defend the cases; the money that it spends to resolve the cases and payments to the plaintiffs; the amount of money, time, and effort and budget that it has internal to defend the cases, which have a financial impact of the company.

So there's a financial notion of liability, which is liability in a financial sense. There's a tort risk motion of it, which is known as tort liability. And then there's the intrinsic liability, which is the abstract legal notion of what it would be if all the uncertainty was -- there was no uncertainty and it was -- all of the cases

were resolved.

So when we say that something is not a direct measure of a defendant's liability, what we're referring there to is any one of those concepts that here in particular from a liability from the standpoint of the legal definition of it. Just simply knowing how much a company paid to settle a case doesn't tell you what its intrinsic liability or even what its tort liability is. It's obviously an expenditure. So it relates to financial -- financial notion of that.

But by simply knowing what that amount of a settlement, it doesn't tell you what a company would have its intrinsic liability. That is, most notably a defendant in many cases will set a lawsuit for -- just to avoid the cost associated with defending the case, even in the cases where it believes that it has no actual legal liability. But the process is costly and onerous; so it pays to get out from under that and move on.

Q. And would you agree also sometimes a plaintiff will settle a case because they're in dire need of money and they can't afford to wait for their case to be adjudicated through the court system?

A. There are circumstances where that would occur, though that's -- I don't think that's the dominant effect here in asbestos cases, but that can occur. There are cases where it can go either way. It all depends on the circumstances of the particular litigation.

Q. Now, when you use the term in paragraph 6 "defendants' liability," I gather from what you said you do not mean financial liability. Is that correct?

A. Correct. I mean, I think that -- yes, that's correct. What the literature is talking about, the economic literature is talking about, is liability as defined from the legal standard.

Q. So, again, when you use the term "defendant's liability," you mean something other than financial liability; correct?

A. In this context, yes.

Q. Okay. Now, do you mean -- when you use the term "defendant's liability," do you mean intrinsic liability or tort risk liability?

A. Well, in this case it can be either one. Much of the literature that I'm talking about is abstracting from the uncertainty of it in terms of the discussion of it. So it's starting from that