UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
	:	
BESTWALL LLC,[1]	:	Case No. 17-31795
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Debtor.	:	
	:	
	:	

INFORMATIONAL BRIEF OF BESTWALL LLC

Gregory M. Gordon
Dan B. Prieto
Amanda Rush
JONES DAY
2727 N. Harwood Street
Suite 500
Dallas, Texas 75201

Garland S. Cassada
Jonathan C. Krisko
Richard C. Worf, Jr.
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246

Jeffrey B. Ellman
Brad B. Erens
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309

Cary Ira Schachter
Raymond P. Harris, Jr.
Erin A. Therrian
SCHACHTER HARRIS, LLP
909 Lake Carolyn Parkway, Suite 1775
Irving, Texas 75039

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[1] The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, GA 30303.

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Debtor Bestwall LLC (the "Debtor" or "Bestwall")[2] has commenced this proceeding under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") to resolve current and future asbestos-related claims permanently and equitably. In this proceeding, Bestwall will seek to establish a section 524(g) trust for the benefit of current and future asbestos claimants to pay fully asbestos claims in accordance with trust distribution procedures approved by this Court.

Prior to 1978, Bestwall and its predecessors manufactured a joint compound product that contained minimal amounts (typically 3-5% by weight) of chrysotile asbestos.[3] As was the case in In re Garlock Sealing Technologies LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014), the manufacture and sale of this product exposed only a limited population to small amounts of chrysotile asbestos, a form of asbestos the Garlock court found to be less potent than other types of asbestos.

Despite these facts, Bestwall and its predecessors have been burdened with asbestos litigation for nearly 40 years, and Bestwall projects that it will be the target of asbestos claims through at least 2050. Over the four-decade span of this litigation, involving hundreds of thousands of cases, the financial burden has escalated exponentially, particularly in the last decade. As numerous defendants filed for bankruptcy, reorganized and established bankruptcy trusts, including virtually all of Bestwall's primary competitors, increasing numbers of plaintiffs began to recall purported exposures to Bestwall's old joint compound product, and Bestwall thus found itself increasingly targeted in place of the companies that had filed for bankruptcy and

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2 Bestwall LLC is formerly known as Georgia-Pacific, LLC, a North Carolina limited liability company.

3 Joint compound is used to fill the seams between sheets of drywall and comes in two forms: (i) a powder that would be mixed with water to form a paste; and (ii) a premixed product applied directly from the container.

exited the tort system. This targeting escalated notwithstanding the successful reorganizations of the large majority of these companies and the creation of dozens of trusts that hold, have paid and are continuing to pay tens of billions of dollars to the plaintiffs. As the Court found in Garlock, the asbestos exposures attributable to defendants who have filed for bankruptcy are not being appropriately taken into account in pending litigation against the defendants remaining in the tort system. Id. at 84.

Chapter 11 is the only mechanism available that provides all stakeholders with the ability to achieve a permanent, global resolution of asbestos-related claims that is fair and equitable to Bestwall, as well as present and future claimants. It does so through a specialized process, section 524(g) of the Bankruptcy Code, that provides for the participation of representatives of current and future claimants and, ultimately, the approval of at least 75% of current claimants and two federal courts. With this Court's assistance, and through negotiations with these representatives, Bestwall is committed to achieving as soon as possible a fair and permanent resolution of these claims through a confirmed chapter 11 plan of reorganization.

This brief will describe:

- the history of Bestwall's manufacture and sale decades ago of joint compound products that contained limited amounts of chrysotile asbestos;
- the medical and scientific evidence that establishes the low potency of chrysotile, the low exposure levels for Bestwall's products and the significant differences between chrysotile and amphibole forms of asbestos;
- the history of Bestwall's asbestos litigation, including the disproportionate naming of Bestwall based on questionable product identification and the disproportionate size of settlement payments based on, among other things, the withholding of evidence of exposure to other companies' asbestos products;
- the substantial costs and burdens of the asbestos litigation; and

- Bestwall's objectives in this proceeding.[4]

I. Introduction

Bestwall traces its history to the Bestwall gypsum business acquired by Georgia-Pacific Corporation in 1965. Bestwall Gypsum Company ("Bestwall Gypsum"), a spin-off of Certain-Teed Products Company in 1956, manufactured wallboard (which did not contain asbestos) and joint compound products. Bestwall Gypsum's joint compound consisted primarily of gypsum or limestone that, when mixed with water, created a "mud" used to seal the joint between two pieces of drywall and cover the heads of nails and screws to create a smooth, seamless surface and appearance. Bestwall Gypsum (and its business) was merged into and became part of Georgia-Pacific Corporation, which was later converted into and renamed Georgia-Pacific LLC ("Old GP"). Bestwall Gypsum used asbestos in its joint compound products, but Old GP stopped using asbestos in these products in 1977. As a result of the 2017 Corporate Restructuring described herein, the Debtor is the successor to Old GP's asbestos liabilities from the Bestwall Gypsum business.[5]

From 1965, when it was acquired by Georgia Pacific Corporation, until 1977, the year Bestwall completed its program of finding substitutes for asbestos in its products, Bestwall manufactured a limited number of asbestos-containing products, principally joint compound. The asbestos content of those products generally was only 3-5% by weight and consisted of only chrysotile asbestos. There are disputes in the scientific and medical community regarding whether chrysotile can cause mesothelioma, but there is no valid dispute that, if chrysotile causes

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[4] Additional information on certain of these topics can be found in the *Declaration of Tyler L. Woolson* (the "First Day Declaration") in support of the Debtor's chapter 11 filing and certain first-day relief sought from the Court, which was filed concurrently with this Brief.

[5] When discussing historical matters preceding the 2017 Corporate Restructuring (as defined below), the term "Debtor" and "Bestwall" refer to the Debtor herein and the historical joint compound business when it was part of Old GP or Bestwall Gypsum.

mesothelioma (a deadly form of cancer responsible for the bulk of the large-dollar asbestos-related litigation claims), its potency is substantially lower than the potency of amphibole asbestos.[6] Further, joint compound represented only about 1.5% of all asbestos-containing products manufactured and sold in the United States. Joint compound was dwarfed by asbestos-containing insulation and various other construction materials that contained much more toxic amphibole asbestos.[7] Like the asbestos-containing products sold by Garlock, Bestwall's joint compound "resulted in a relatively low exposure to asbestos to a limited population…."[8]

Until the late 1990s, companies that produced large amounts of amphibole asbestos products paid, as expected given the proven toxicity and highly friable nature of their products, the overwhelming majority of asbestos-related claims. In contrast, Bestwall was a relatively insignificant defendant that paid on average only about $6 million per year in defense and indemnity (settlements and judgments) costs during that period. But, as these primary defendants exited the tort system by filing for bankruptcy protection in the late 1990s and early 2000s, plaintiffs increasingly turned, and since then have continued to turn, to Bestwall and other manufacturers to pay their claims. Contemporaneously, plaintiffs began to claim that their diseases were not caused by exposure to the products of the defendants they had driven into bankruptcy, and began to assert instead claims of exposure to the products of companies that had not filed for protection. They did this and are continuing to do this even though the large majority of these former defendants have established trusts under section 524(g) of the

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6 In contrast, there is medical and scientific evidence establishing that amphibole asbestos — such as the asbestos that historically was used in insulation — causes asbestos-related disease. Bestwall did not purchase amphibole asbestos to use in its products.

7 Johns Manville, A Confidential Report on Asbestos Fiber Prepared for the J.M. Legal Department, p. 26.

8 In re Garlock, 504 B.R. at 73, 75.

Bankruptcy Code that have funded and are continuing to fund the asbestos liabilities of these companies.

As a result, the asbestos claims and associated costs of defense against Bestwall and other solvent defendants that remained in the tort system skyrocketed, with Bestwall and the other solvent defendants being named in a disproportionately high percentage of the filed claims, paying ever-increasing settlement amounts and incurring substantially higher defense costs. For instance, although joint compound represented only about 1.5% of all asbestos-containing products sold in the United States, Bestwall estimates that from 2012 to 2016 it was named in approximately 70 to 80 percent of all mesothelioma cases filed in the country. Bestwall's total defense and indemnity costs during these years averaged approximately $160 million. Those payments reached approximately $184 million in 2015, $174 in million 2016, and $200 million in 2017 as of the petition date, reflecting the fact that Bestwall is being forced to settle cases that now have simply become too numerous and expensive to try to conclusion.[9] The breadth and magnitude of the asbestos litigation pending against Bestwall are wildly disproportionate to any legal liability Bestwall could possibly have, taking into account the type and limited amount of asbestos fibers used in Bestwall's products and the fact that its products represented only a small percentage of the asbestos-containing products on the market.

The massive increase in the number of claims against, and the size of the plaintiffs' settlement demands to, Bestwall have been driven by various interrelated shortcomings of and abuses in the tort system. Two warrant particular mention. First, inexplicably large numbers of

[9] Most defense costs are incurred to litigate claims to the point where they can be settled. Some cases are settled early to save the costs of defense nearly entirely, including group settlements negotiated with plaintiff law firms for groups of clients. Few of the thousands of asbestos cases filed against Bestwall ultimately proceed to trial and fewer still are tried to a verdict. For example, in 2016, Bestwall spent approximately $130 million in indemnity payments (of which approximately $119 million was in mesothelioma cases) and approximately $44 million in defense costs, but no cases were tried to verdict.

plaintiffs and their counsel have identified exposures to Bestwall's products as substantial contributing factors to their disease – far more than ever did before the bankruptcies of the insulation manufacturers, and far more than ever could in view of the low exposures to chrysotile and the limited population that were subject to those exposures.

Second, significant numbers of plaintiffs and their law firms have failed to identify exposures to other products for which asbestos trusts are now responsible, even though they would submit claims to these trusts based on the very same exposures. Each of these practices substantially impacted the cases against Bestwall, requiring it to defend cases in which it never should have been identified, and impairing its defense by depriving it of evidence that plaintiffs were exposed to other companies' products, including products containing highly potent amphiboles. Indeed, the Court in Garlock found numerous examples of plaintiffs' failures to disclose exposures in trust claims and bankruptcy ballots, and Bestwall was a settling defendant in many of the same lawsuits specifically identified by the Court. As discussed later herein, Bestwall already has identified from the Garlock estimation trial record numerous examples of cases in which it was the subject of, and was harmed by, these same practices.

These problems are compounded for a defendant like Bestwall, which faces tens of thousands of pending claims and thousands of new claims annually, many of which increasingly assert non-occupational exposure. Overall, Bestwall and its predecessors have spent approximately $2.9[10] billion over the last 40 years defending more than 430,000 asbestos-related personal injury lawsuits, approximately $2.8 billion of which has been spent in just the last 18 years (compared to approximately $100 million in the first 20 years Bestwall was an asbestos

[10] Approximately 30% of this amount was covered by insurance before such insurance was almost entirely exhausted in 2013.

defendant). As of September 30, 2017, Bestwall had approximately 64,000 pending claims against it in nearly every state and certain territories of the United States, including approximately 22,000 that are being actively litigated and approximately 13,300 claims pending on inactive dockets in various jurisdictions.[11] Bestwall expects that thousands of additional claims will be filed or asserted against it every year for decades to come.[12]

Administering this tidal wave of cases is a monumental task and has forced Bestwall to settle as many cases as possible to minimize litigation costs, regardless of whether it has any real responsibility for the claim at issue.[13] Given the onslaught of claims that is expected to continue for decades, the financial burden this litigation has put on Bestwall is substantial. Standing alone, the Bestwall Gypsum business would have failed long ago, as the costs of defending asbestos claims dwarfed the revenues and earnings of that business. The business remained viable only because of financial contributions made by Old GP's other businesses, whose cash flow was drained as a result thereof.

On July 31, 2017, Old GP underwent a corporate restructuring (the "2017 Corporate Restructuring"). As a result of the 2017 Corporate Restructuring, Old GP no longer exists and two new companies were formed:

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11 "Claims" refers to parties alleging injury and not lawsuits. Some asbestos claimants have more than one lawsuit pending against Bestwall or Old GP at any given time. In addition to the open and inactive claims, Bestwall has approximately 28,700 claims that have been resolved or dismissed but for which those resolutions or dismissals have not been finalized.

12 Other cases before this Court have involved similarly overwhelming asbestos litigation. In Garlock, the debtors had over 100,000 asbestos claims pending at the time of filing. The Garlock debtors had faced approximately 700,000 total asbestos claims and had paid over $1.6 billion (including defense costs) prior to its chapter 11 filing. In the case of In re Kaiser Gypsum Company, Inc., Case No. 16-31602, the debtors faced approximately 14,000 asbestos lawsuits at the time of filing and had been named in more than 38,000 such suits.

13 See In re Garlock, 504 B.R. at 73 ("The estimates of Garlock's aggregate liability that are based on its historic settlement values are not reliable because those values are infected with the impropriety of some law firms and inflated by the cost of defense.").

- Bestwall, which succeeded to certain assets and liabilities of Old GP, including in particular certain assets of the historical Bestwall Gypsum business and Old GP's asbestos liability; and

- Georgia-Pacific LLC, a Delaware limited liability company ("New GP"), which succeeded to the other assets and liabilities of Old GP, including numerous businesses unrelated to the historical Bestwall Gypsum business.

As further described in the First Day Declaration, the combination of assets owned by Bestwall and a funding agreement that is in place with New GP ensures that the Debtor has the same financial resources and ability to satisfy asbestos claims as Old GP had prior to the 2017 Corporate Restructuring. The purpose of the 2017 Corporate Restructuring was twofold: it better aligned the defense of Bestwall's asbestos claims with the individuals primarily responsible for their management, and also provided Bestwall with the option to seek a resolution of the asbestos claims in this Court under section 524(g) of the Bankruptcy Code, without subjecting the entire Old GP enterprise (and its unrelated businesses) to a chapter 11 reorganization. Ultimately, Bestwall determined to pursue the option of a restructuring utilizing section 524(g) of the Bankruptcy Code.

Bestwall has commenced this chapter 11 case to both (a) rationally, permanently and fairly address current and future asbestos-related claims against it; and (b) treat all claimants fairly and equitably. Neither result is achievable in the tort system. As specifically envisioned by Congress, Bestwall intends to use the bankruptcy process to negotiate a fair and permanent resolution of the asbestos claims with representatives of current and future claimants and to establish a trust pursuant to section 524(g) of the Bankruptcy Code to pay in full any approved claims in accordance with trust distribution procedures to be established by this Court. Ultimately, the Debtor expects to adopt streamlined procedures formulated in cooperation with the claimants' representatives to permit claims to be evaluated and, where appropriate, allowed and paid without the burden, risks and costs of litigation.

Bestwall has sufficient resources to fully fund a section 524(g) trust and is committed to reorganizing as soon as possible. To that end, Bestwall is prepared to commence plan negotiations with the asbestos claimants' committee and the future claimants' representative as soon as they are appointed and ready to discuss a section 524(g) resolution of current and future asbestos claims against Bestwall.

II. The History of Bestwall's Manufacture of Joint Compound Containing a Minimal Amount of Chrysotile Asbestos

A. The Source of Asbestos-Related Claims Against Bestwall

Old GP was founded in 1927 as a hardwood lumber wholesaler. In 1965, Old GP acquired Bestwall Gypsum Co. of Paoli, Pennsylvania (i.e., Bestwall Gypsum) and merged that company into itself. Bestwall Gypsum manufactured gypsum wallboard and joint compound as its primary products, as well as various texture products, industrial plasters and other plaster products. Bestwall wallboard products and nearly all of Bestwall's plaster products never contained asbestos.[14] Old GP remained primarily a paper and lumber company after the Bestwall Gypsum acquisition and operated the Bestwall Gypsum businesses as its "Gypsum Division." By the mid-1970s, that division had five facilities manufacturing joint compounds. Other producers of joint compounds at that time included National Gypsum Company; United States Gypsum Company; Kaiser Gypsum Company, Inc.; Celotex Corporation; Bondex International, Inc.; United Gilsonite Laboratories; Hamilton Materials; Dowman and The Flintkote Company. Significantly, each of these companies has since filed for bankruptcy.

Before 1978, Bestwall manufactured joint compounds containing small amounts (generally 3-5% by weight) of chrysotile asbestos. In drywall installations, seams between

[14] Although some of Bestwall's texture and plaster products contained chrysotile asbestos, these products account for very few of the asbestos claims filed against Bestwall today.

drywall panels must be filled and other imperfections must be patched using joint compound. Joint compounds were supplied as either a dry powder to be mixed with water or as premixed products applied directly from the container. The Bestwall joint compound came in both forms. Chrysotile was added to the joint compound as a water retention and bulking agent which contributed to the workability of the product, giving it a consistency that was easy to apply yet thick enough to adhere to the wallboard's surface without running or dripping. Dust containing low levels of asbestos fibers could be generated when workers mixed dry product, sanded dry or ready-mix product after application or swept up after use.

Bestwall's Gypsum Division accounted for less than 5% of the revenue of the corporation and, within the Gypsum Division itself, asbestos-containing products accounted for only about 10% of sales (at peak) when those products were manufactured. Accordingly, Bestwall asbestos-containing products accounted for less than 1% of Old GP's overall sales.

B. The Removal of Asbestos From Bestwall's Products

By 1970, asbestos had been widely used in many types of construction materials as well as industrial and consumer products given its favorable physical and chemical properties. Although studies of populations in heavy amphibole exposure settings raised concerns about mesothelioma in end users of thermal insulation products, there was no evidence that Bestwall's chrysotile-containing products were dangerous. Nevertheless, beginning in 1970, in response to the growing general concerns about asbestos, Old GP initiated efforts to develop asbestos-free formulations for its products. It did so even though replacing asbestos in joint compound products was particularly challenging.

By 1973, Bestwall was placing increasing focus and effort on reformulating its products to remove asbestos, with a particular emphasis on the one-gallon container formulas used by general consumers. The same year, Bestwall began placing warning labels that complied with

the rules of the Occupational Safety and Health Administration ("OSHA") on its dry joint compound products. In 1974, Bestwall placed warning labels on its premixed joint compound products, adding a recommendation to use a respirator when sanding the joint compound (which went beyond what was required by OSHA).

In 1975, the first study of joint compound exposure appeared in the scientific literature.[15] It focused on measuring the levels of exposure and did not report any cases of mesothelioma.[16] Although the 1975 study recommended labels be added to the products and the removal of asbestos, the article's analysis was based on the precautionary assumption, later disproven, that chrysotile products were as potent as amphibole products. In any event, Bestwall had already begun taking those steps five years before the study was published and completed them before the next joint compound study appeared in the peer-reviewed literature.[17] In fact, Bestwall advertised its first full line of asbestos-free joint compound products in 1974. By 1975, substantially all of Bestwall's powdered joint compounds were manufactured without asbestos, and it was continuing to work on removing asbestos from all remaining joint compound products.

In April 1977, the Consumer Product Safety Commission ("CPSC") granted a petition to ban spackling compounds containing asbestos, determining to phase out these products using a notice and comment rulemaking process.[18] In May 1977, Bestwall manufactured its last

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15 A.N Rohl, A. M. Langer, I. J. Selikoff, and W. J. Nicholson, *Exposure to asbestos in the use of consumer spackling, patching, and taping compounds*, 189 Science 553 (1975).

16 Alf Fischbein, et al., *Drywall construction and asbestos exposure*, 40 AM. IND. HYG. ASSOC. J. 402 (1979); Dave K. Verma & Charles G. Middleton, *Occupational exposure to asbestos in the drywall taping process*, 41(4) AM. IND. HYG. ASSOC. J. 264, 265 (1980).

17 By the time of the second study in 1980, Bestwall's joint compound products had been asbestos-free for several years.

18 Consumer Product Safety Commission, CPSC Bans Use of Asbestos in Certain Consumer Products (April 28, 1977).

asbestos-containing joint compound product[19] over a year before the CPSC's ban went into effect on June 12, 1978.[20]

It is important to note that the CPSC's ban on asbestos-containing joint compounds was based on precautionary public health risk modeling using conservative assumptions. As the Garlock court found, agency actions like these and the models on which they are based do not establish that the products actually caused disease.[21]

III. Bestwall's Joint Compound Exposed a Limited Number of People to Only Chrysotile Asbestos

A. The Difference Between Chrysotile and Other Asbestos Fiber Types

To understand the asbestos litigation against Bestwall, it is necessary to understand the different varieties of asbestos fibers and their different relationships to disease. There are several types of mineral substances within the asbestos family. The most common asbestos minerals are chrysotile, amosite and crocidolite. Chrysotile is in the serpentine family of minerals. Amosite and crocidolite are in the amphibole family of minerals. Tremolite, another amphibole, is also relevant in asbestos litigation because it was present in some commercially significant asbestos deposits.

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19 Bestwall had removed asbestos as an ingredient in its texture and plaster products earlier.

20 CPSC. 1977b. Ban on Consumer Patching Compounds Containing Respirable Free-Form Asbestos. 16 C.F.R § 1304.4 (Dec. 15, 1977).

21 In re Garlock, 504 B.R. at 81-82 ("[Agency policies and regulations] cannot be probative on the issue of causation because of the differences in the way courts and regulatory authorities assess risk. Regulatory authorities use 'precautionary principles' to carry out their mandates and use linear projections into a zone of inference of theoretical risk that are not appropriate for judicial determinations, including causation. Consequently, agency statements, policies and regulations—and company warnings required by them—are simply not relevant to estimation of Garlock's aggregate asbestos liability."). As explained in Wannall v. Honeywell Int'l, Inc., 292 F.R.D. 26, 41 (D.D.C. 2013), these models are not helpful because they "address[] *risk, not cause*, and there is a significant distinction between those two concepts" (emphasis in original).

Chrysotile is distinctly different in microscopic appearance and chemical composition from the amphibole family minerals. Chrysotile is classified as a serpentine mineral because its fibers have a curvy shape, as shown in Figure 1.[22] Individual amphibole fibers are thin and needle- or spear-like. Figures 2 and 3 are photomicrographs of crocidolite and amosite fibers, respectively, and tremolite fibers appear in Figure 4.

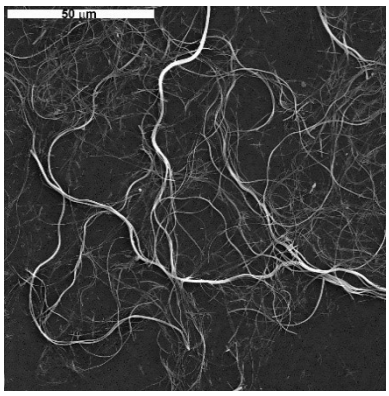

Fig. 1 Chrysotile

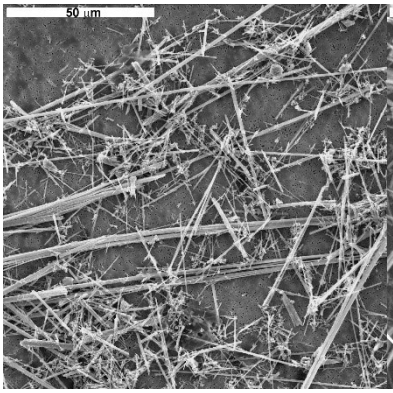

Fig. 2 Crocidolite

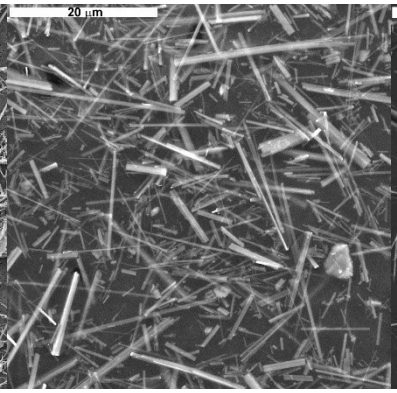

Fig. 3 Amosite

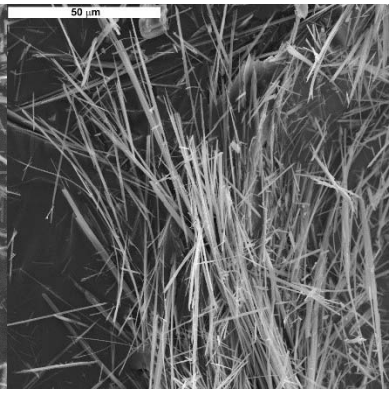

Fig. 4 Tremolite

Chrysotile was the only fiber type purchased by Bestwall and its predecessors for use in its joint compounds. Chrysotile "tends to accumulate to only a very limited extent in lung tissue despite continuous exposure, whereas continuous exposure to amphiboles leads to a continuous increase in the amphibole fiber concentration in the lung."[23] Although the body breaks down

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22 Photomicrographs in Figures 1-4 were obtained from the U.S.G.S. Denver Microbeam Laboratory's online image gallery, at https://usgsprobe.cr.usgs.gov/picts2.html (accessed Oct. 25, 2017) (*see* images for UICC Asbestos Chrysotile 'B' standard; UICC Asbestos Crocidolite standard; UICC Asbestos Amosite standard; and Asbestiform tremolite, El Dorado County, California).

23 THURLBECK'S PATHOLOGY OF THE LUNG, at 811 (Andrew M. Churg, *et al.* eds., 3d ed. 2005) (hereafter "THURLBECK'S").

chrysotile into short particles that clear from the body in hours, days or weeks, long amosite and crocidolite fibers are not broken into shorter fibers and persist for decades.[24]

There is no valid dispute that, if chrysotile causes mesothelioma at all, its potency is substantially lower than the potency of amphiboles. In 2015, a World Health Organization monograph (authored by a group of scientists that includes pathologists who testify for plaintiffs in the tort system) stated that chrysotile is 100 to 1,000 times less potent than amphiboles.[25] Even long-time plaintiffs' expert Dr. Arnold Brody testified he does not dispute that the amphiboles are 500 times more potent mesothelioma-causing agents than chrysotile.[26] In short, as the Court held in Garlock, "it is clear under any scenario that chrysotile is far less toxic than other forms of asbestos."[27]

B. Mesothelioma Is the Primary Asbestos-Related Disease Driving Litigation Costs

Virtually everyone in the United States has been exposed to low levels of asbestos. Through the process of natural erosion from wind and weather, and as a result of urban development, asbestos is in the air and water, even today.[28] However, as with many dusts, it is only when asbestos exposures are high enough to overwhelm the body's defenses that asbestos-related disease occurs. An estimated 13 to 21 million workers through the 1970s experienced heavy exposure to asbestos because they applied, installed or used certain fiber

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24 T.A. SPORN, THE MINERALOGY OF ASBESTOS, IN PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 7 (Tim D. Oury *et al.* eds., 3d ed. 2014).

25 WORLD HEALTH ORGANIZATION, WHO CLASSIFICATION OF TUMOURS OF THE LUNG, PLEURA, THYMUS AND HEART 156 (William D. Travis *et al.*, eds., 4th ed. 2015) (hereinafter, "WHO 2015") (noting a difference of "2-3 orders of magnitude").

26 Deposition of Dr. Arnold Brody in In re Garlock, on May 31, 2013 at 75:22-76:16.

27 In re Garlock, 504 B.R. at 75.

28 THURLBECK'S, *supra* note 23, at 811-13.

releasing asbestos-containing products, or worked in proximity to other workers who did.[29] In particular, workers in some trades, including insulators, construction workers, factory workers, shipyard workers, boilermakers, pipefitters, welders and laggers, were exposed to large amounts of airborne asbestos fibers released by products like asbestos insulation, cement pipes and fireproofing.[30]

Several diseases have been the basis for asbestos-related personal injury claims by these individuals over the years. Yet, as Garlock recognized, pleural mesothelioma is the disease that has been the focus of the asbestos litigation in recent years.[31] Thus, mesothelioma claims will be the most significant to the resolution of this proceeding.

Mesothelioma is a cancerous tumor in the lining of the lung.[32] Mesothelioma is rare, but excess incidence of mesothelioma has been documented in association with certain occupations, such as those manufacturing amphibole products or working in settings with high exposures to amphibole-containing insulation.[33] Yet, the association of mesothelioma with amphibole asbestos exposure does not mean that asbestos exposure is required to cause mesothelioma. Other naturally-occurring substances have been implicated as mesothelioma-causing agents, and there is general consensus that certain kinds of therapeutic radiation can cause mesothelioma.[34]

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29 See *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 6-7 (1991).

30 THURLBECK'S, *supra* note 23, at 812.

31 In re Garlock, 504 B.R. at 73, 83.

32 This lining is referred to medically as the pleura and is composed of mesothelial cells. By definition, any tumor that originates in mesothelial cells is termed "mesothelioma."

33 See, e.g., Herbert Seidman, *et al.*, *Mortality Experience of Amosite Asbestos Factory Workers: Dose-Response Relationships 5 to 40 Years After Onset of Short-Term Work Exposure*, 10 AM. J. INDUS. MED. 479 (1986); G. Berry, *et al.*, *Mortality from all cancers of asbestos factory workers in east London 1933-80*, 57 OCCUP. ENVIRON. MED. 782 (2000).

34 WHO 2015, *supra* note 25, at 156; Eugene J. Mark & Richard L. Kradin, *Pathological recognition of diffuse malignant mesothelioma of the pleura: the significance of the historical perspective as regards this signal tumor*, 23 SEM. DIAG. PATH. 25, 26 (2006).

Moreover, like nearly all cancers, mesothelioma can occur for reasons unrelated to asbestos exposure. A background rate of mesothelioma exists, and cases will occur in the absence of significant exposure to proven mesothelioma-causing agents. Estimates of the rate of mesothelioma not caused by asbestos exposure vary.[35] For example, it has been estimated that at least 70-80% of female mesotheliomas are not caused by asbestos exposure.[36]

C. Chrysotile Containing Joint Compound and Asbestos Disease

Broad consensus has long existed that mesothelioma can be caused by exposure to products made from the amphiboles crocidolite and amosite, such as the thermal insulation products that were the focus of the first decades of asbestos litigation. Study after study, however, has failed to find mesothelioma incidence attributable to chrysotile. For instance, while early public health warnings were issued about mesothelioma risk for chrysotile miners, subsequent studies concluded that this observed increase in mesothelioma risk actually was caused by veins of tremolite or other amphiboles (or amphibole-like minerals) that sometimes occur in chrysotile mines.[37] In fact, there is an absence of reliable studies reporting an increased

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[35] A recent analysis of U.S. population data reports that the spontaneous or background mesothelioma rate is at least 27%. Bertram Price & Adam Ware, *Time Trend of Mesothelioma Incidence in the United States and Projection of Future Cases: an Update Based on SEER Data for 1973 Through 2005*, 39(7) CRIT. REV. TOXICOL. 576, 587 (2009).

[36] Michele Carbone, *et al.*, *Malignant Mesothelioma: Facts, Myths and Hypotheses*, 227(1) J. CELL. PHYSIOL. 44, 44 (2012). Notably, Bestwall has faced a disproportionately large and growing number of female mesothelioma cases in recent years. From 2005 to 2016, the annual number of mesothelioma cases filed by female plaintiffs against Bestwall doubled. Because recent studies show that the vast majority of female mesotheliomas are idiopathic (i.e. not connected to any particular cause or exposure), these cases are far less likely to represent any valid claims that can be attributed to Bestwall. Moreover, women during and prior to the mid-1970s (when Bestwall's asbestos-containing products were last sold) were unlikely to have had occupational exposures in heavy industries and shipping. These cases often involve questionable product identification and exposure claims premised on household do-it-yourself projects. These dated, private, at-home exposure scenarios are particularly susceptible to questionable product-naming claims.

[37] See, e.g., THURLBECK'S, *supra* note 23, at 1006; Alison D. McDonald et al., *Mesothelioma in Quebec Chrysotile Miners and Millers: Epidemiology and Aetiology*, 41(6) ANN. OCCUP. HYG. 707 (1997) (amphibole contamination was likely the cause of the mesothelioma cases of chrysotile miners, as they tended to occur in mines more heavily contaminated with tremolite).

incidence of mesothelioma in populations exposed to chrysotile fibers unless there was also substantial exposure to other suspected mesothelioma-causing minerals. To the contrary, many studies of groups primarily exposed to chrysotile in mining, manufacturing and use of end products report no increased incidence of mesothelioma. In the few situations where mesothelioma is reported in connection with a massive exposure to commercial chrysotile or chrysotile ore from the sources used by Bestwall, another causative agent such as amphibole contamination is likely.[38]

In any case, exposures of chrysotile miners to tremolite-contaminated chrysotile simply are not comparable to the exposures experienced by end users of chrysotile-containing joint compound. For one thing, the chrysotile fibers primarily purchased by Bestwall to make joint compound did not come from mines known to have unusually high tremolite contamination.[39] Further, due to the nature of their work, miners experienced exposures many orders of magnitude higher than professional drywall finishers, the occupation that would have had the most contact with chrysotile joint compound.[40] There are no studies pertaining to chrysotile sources used by Bestwall showing an increased incidence of mesothelioma at the levels of exposure typically alleged by Bestwall claimants with the most contact with Bestwall's products. Moreover, until 2012 there were not even reports of individual cases allegedly attributable to joint compound

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38 See, e.g., THURLBECK'S, *supra* note 23, at 1006.

39 And in any case, "chrysotile significantly 'contaminated' with tremolite appears to be uncommon in manufactured products." *Asbestos and Its Diseases* 23, 192 (John E. Craighead & Allen R. Gibbs eds., 2008).

40 For instance, Canadian chrysotile miners at risk for mesothelioma experienced an average cumulative exposure of 600 "fiber-years" to tremolite-contaminated ores. See John T. Hodgson & Andrew Darnton, *The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure*, 44(8) ANN. OCCUP. HYG. 565, 565 (2000).

exposure in the literature.[41] In 2012, Plaintiff expert James Dahlgren purported to publish the first case reports involving three drywall workers (the "Dahlgren Article").[42] Plaintiffs repeatedly used the Dahlgren Article against Bestwall for the next several years but, as discussed herein, his claim that the workers in the study were only exposed to joint compound is not accurate.

Notably, the kinds of claimants who have begun to dominate the claims asserted against Bestwall experienced exposures orders of magnitude lower than the exposures experienced by professional drywall finishers. Many of Bestwall's claims now come from claimants who allege they (a) only used joint compound occasionally on the job, (b) used joint compound once or a handful of times on home projects, (c) were bystanders to joint compound work on construction sites or home projects or (d) were exposed when workers brought home fibers on their clothing. Like Garlock's products, Bestwall's products "resulted in a relatively low exposure to asbestos to a limited population," "of a relatively less potent chrysotile asbestos."[43]

IV. The History of Asbestos Litigation Against Bestwall

Bestwall has been an asbestos defendant since at least 1979, and for the first 20 or more years, it remained a minor one. For the better part of those two decades, Bestwall was sued in relatively few mesothelioma lawsuits, paid very few claims and paid comparatively small amounts to settle them. That would all change in the early 2000s.

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41 A "modest number of case reports . . . is not what would be expected if there was a significant increased risk." Hollander v. Sandoz Pharms. Corp., 289 F.3d 1193, 1211 (10th Cir. 2002) (quoting Siharath v. Sandoz Pharms Corp., 131 F. Supp. 2d 1347, 1361 (N.D. Ga. 2001)).

42 Dahlgren & Peckham, *Mesothelioma associated with use of drywall joint compound: a case series and review of literature*, INT'L J. OF OCC. AND ENV. HEALTH (2012).

43 In re Garlock, 504 B.R. at 73, 75.

A. The Bankruptcy Wave Forever Altered Asbestos Litigation

During 2000 and 2001, the most prominent defendants in the asbestos litigation sought bankruptcy protection. Ten years earlier, the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist already had described the asbestos litigation as "a disaster of major proportions to both the victims and the producers of asbestos products" and concluded that civil courts were "ill-equipped" to handle the avalanche of claims.[44] And whether that "disaster" was wrought by "abuses involving mass screenings of potential claimants and bogus diagnoses of the disease" or otherwise,[45] the most-sued defendants began taking their leave of the tort system in 2000 and establishing trusts under section 524(g) of the Bankruptcy Code.

These top-tier defendants included well-known names like Babcock & Wilcox Co., Pittsburgh Corning Corporation, Owens Corning Fiberglas, Fibreboard, Armstrong World Industries, W.R. Grace & Co., USG Corp., Federal Mogul and GAF. Many manufactured the amphibole-containing insulation products that actually caused asbestos-related mesotheliomas. Some were part of a defense consortium known as the Center for Claims Resolution, which to that point, and together with the top tier defendants, had made most of the payments to mesothelioma plaintiffs.[46]

These bankruptcies precipitated dozens of other bankruptcies. Indeed, almost all of the top tier defendants eventually filed for bankruptcy protection. The resulting wave of filings is shown below:

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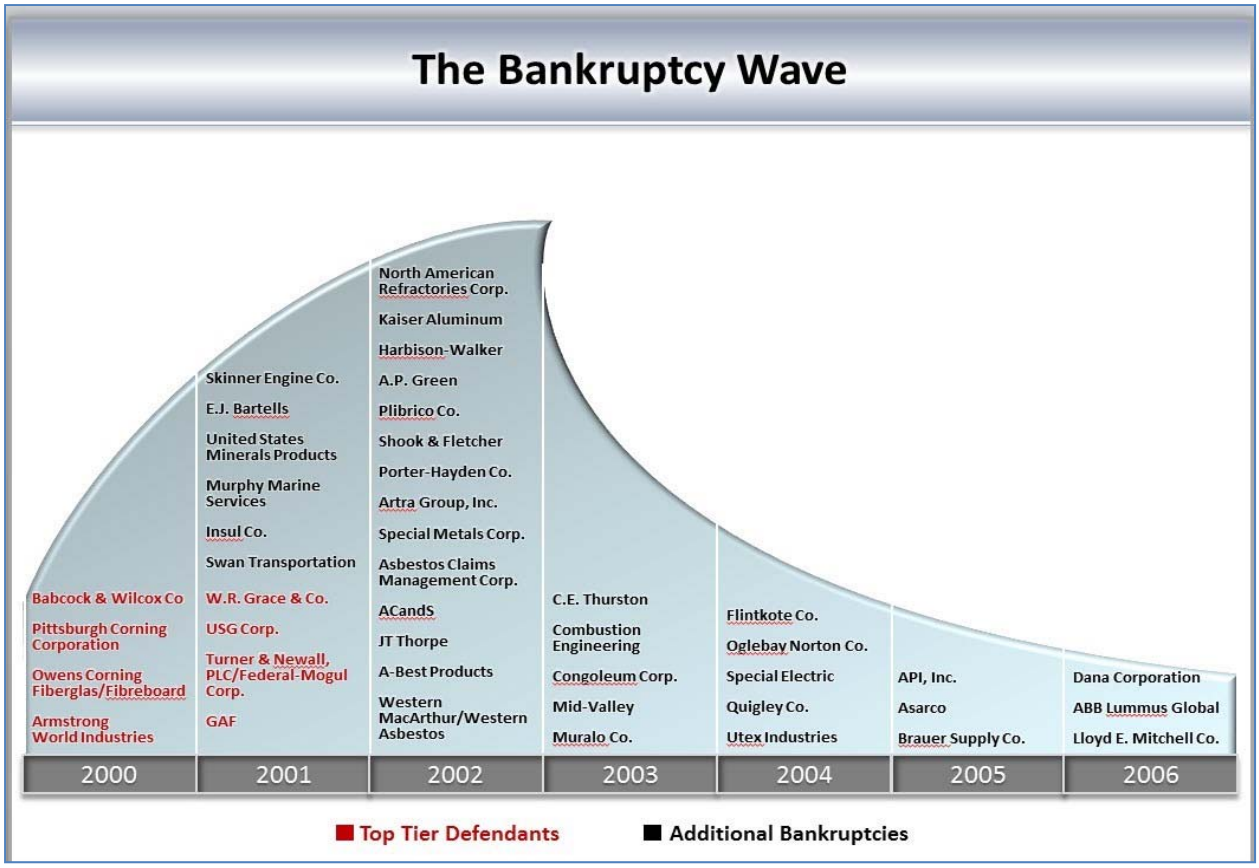
44 *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 2 (1991).

45 In re Garlock, 504 B.R. at 83.

46 See id. at 83 ("The combination of the bankruptcies of the remaining 'big dusties' and the dissolution of the Center for Claims Resolution removed from the system most of the funding for liability payments.").



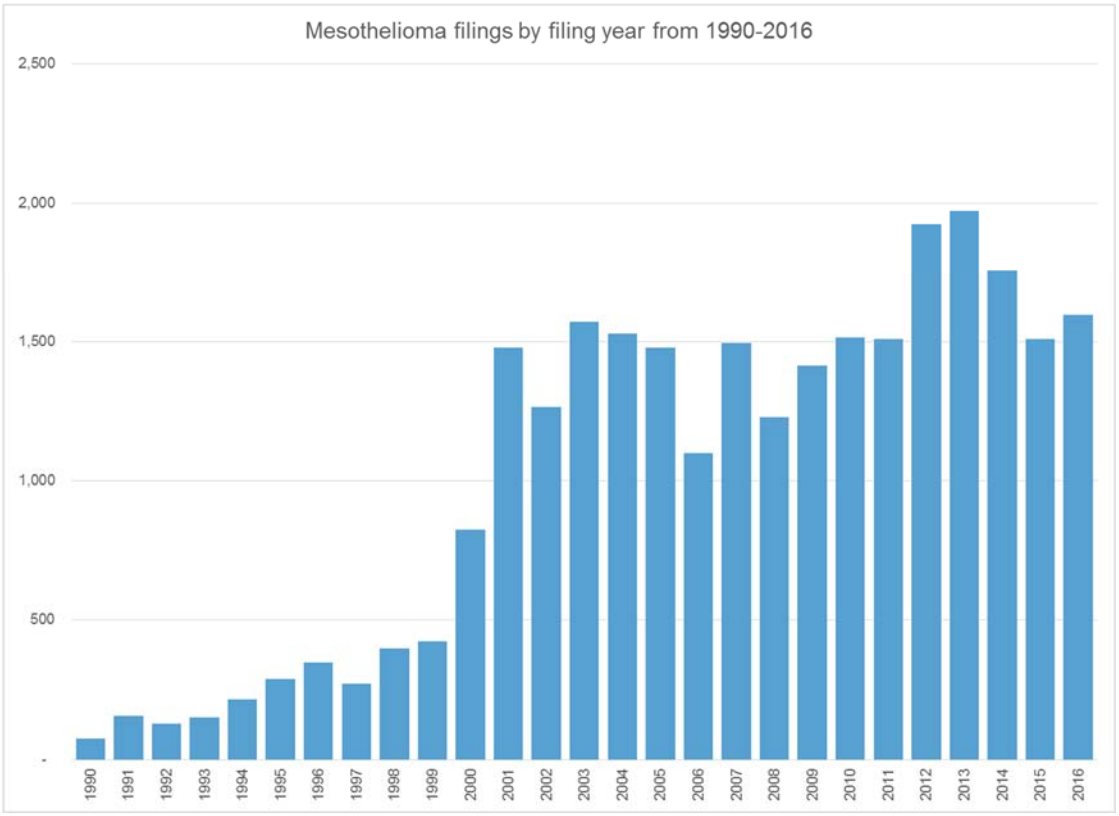
With these companies in bankruptcy, others became targets. As described below, there is compelling evidence that asbestos plaintiffs, at a minimum, inconsistently and selectively disclosed exposure evidence to support or strengthen their cases against non-bankrupt companies.[47] They targeted non-bankrupt companies even though the companies participating in the bankruptcy wave eventually emerged from bankruptcy under reorganization plans that provided for the creation of asbestos trusts funded with assets valued at over $30 billion. Plaintiffs and their lawyers named the non-bankrupt defendants in civil cases and pursued trust recoveries, too. To avoid discovery of conflicting product identification and exposure claims, plaintiffs' lawyers in many cases (1) delayed filing trust claims until after resolving their claims

47 See id. at 84.

against tort system defendants[48] or (2) relied on confidentiality provisions in Trust Distribution Procedures ("TDPs"), which govern how claims may be brought against those trusts. A fuller discussion of these tactics will follow; the bottom line is that, as a result, Bestwall experienced an immediate, substantial and unmistakable jump in case filings and related defense and indemnity costs.

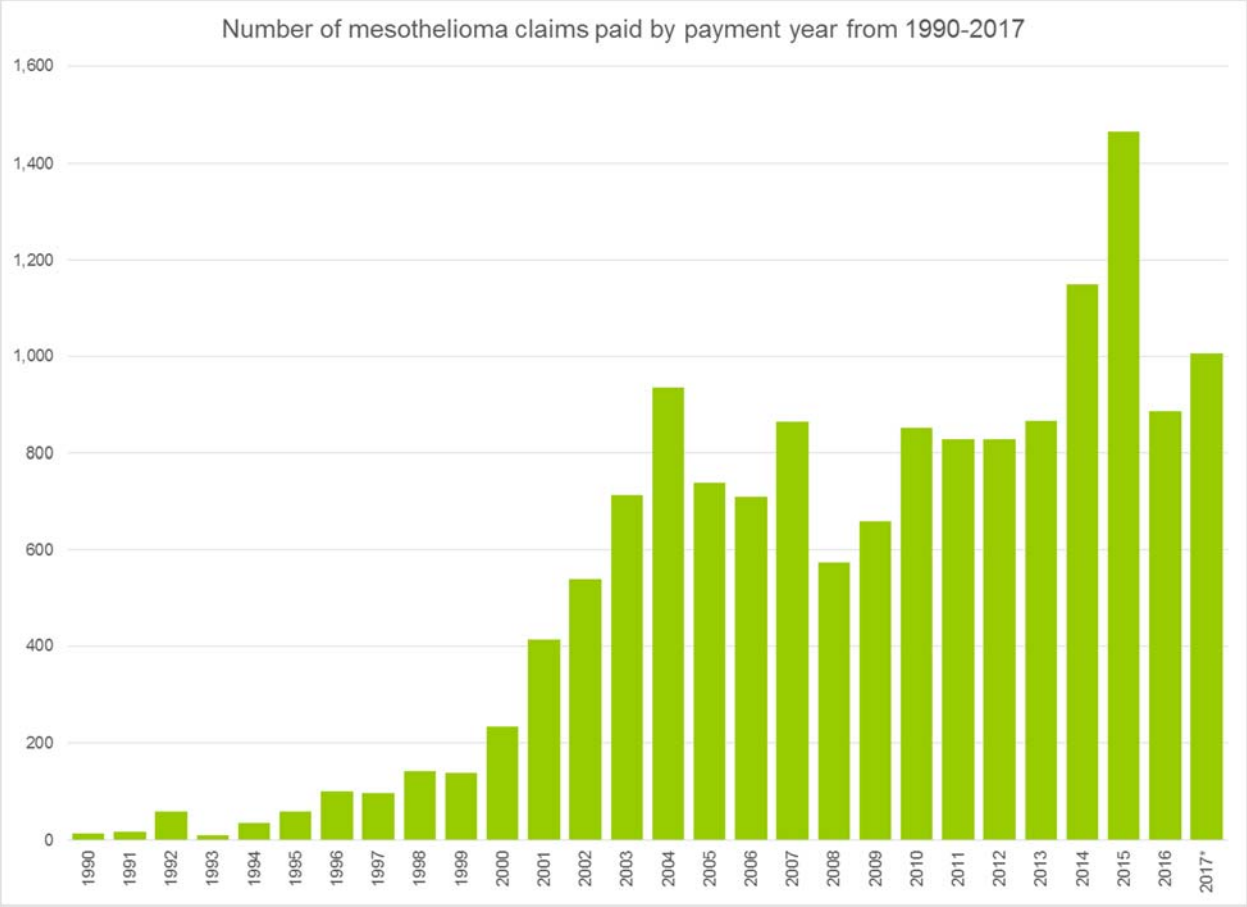
B. Bestwall's Mesothelioma Claims Experience Post-Bankruptcy Wave Is Telling

Bestwall's mesothelioma filings nearly *doubled* from 1999 to 2000, increasing from more than 400 in 1999 to more than 800 in 2000. By 2003, mesothelioma filings were almost 1,600 — nearly *quadrupling* from 1999. In 2013, mesothelioma filings reached an all-time high of almost 2,000, nearly *five times* the level in 1999.



48 See id.

The number of cases in which plaintiffs claimed to have been exposed to Bestwall products — as indicated by the number of cases in which Bestwall made a payment — also multiplied. The number of claims Bestwall paid increased from approximately 140 in 1999 to more than 400 in 2001 and over 900 in 2004. Between 2013 and 2016, Bestwall paid an average of over 1,000 mesothelioma claims per year—almost an eight-fold increase from the late 1990s.

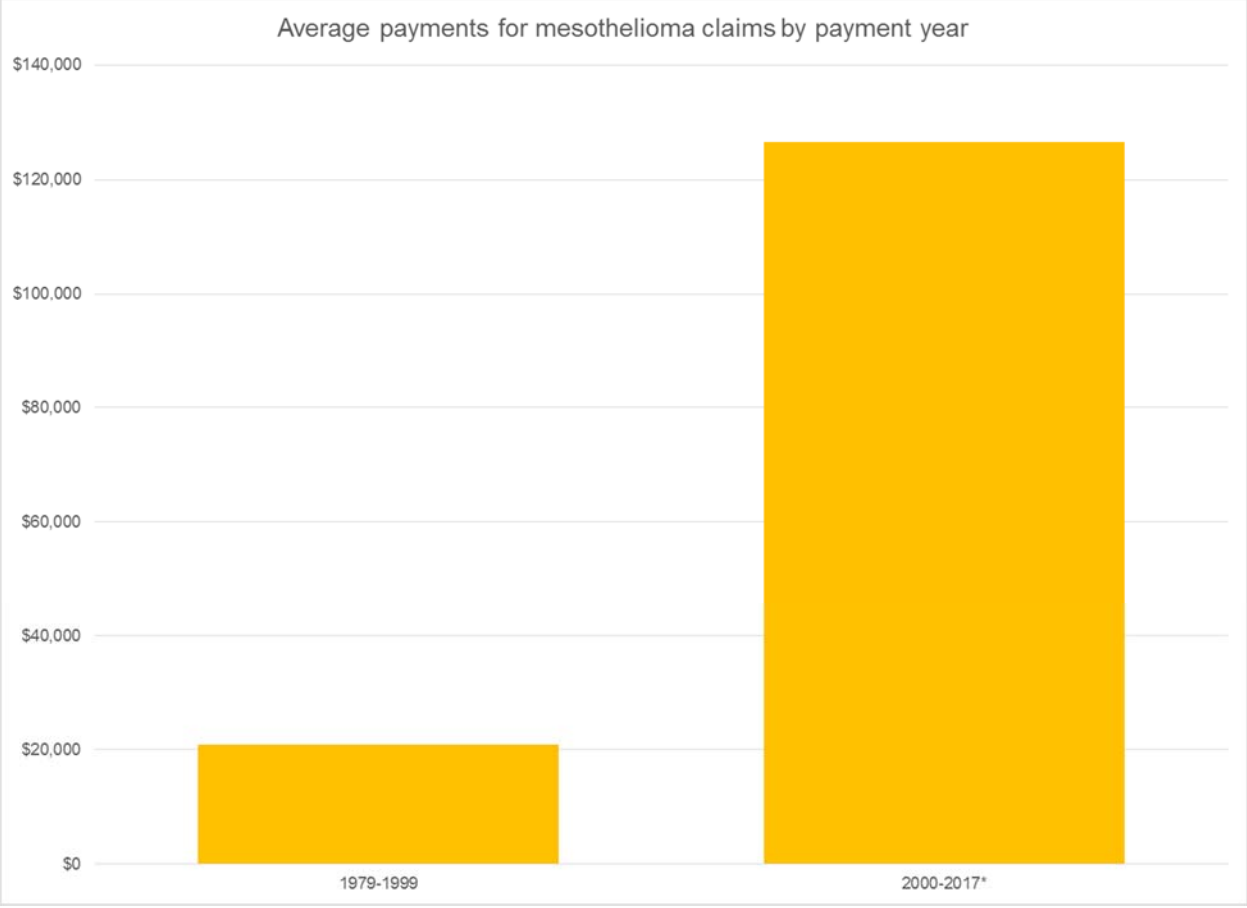


*2017 numbers for the partial year through October 31, 2017

The abrupt increase in both suits against Bestwall and the identification of Bestwall products had no basis in science or reality. The number of mesothelioma plaintiffs who historically had been exposed to Bestwall products did not change between 1999 and 2001. Mesothelioma has a long latency period. Whether the disease manifested and the claimant sued in 1999 or a few years later, the alleged exposures had to have taken place decades earlier. There

is not, and never has been, any evidence of any historical exposure spike. With the major payers now in bankruptcy, however, increasing numbers of plaintiffs began to claim that they remembered using Bestwall products decades earlier.

These abrupt changes in recall forced Bestwall to defend a significantly higher number of cases and to pay substantially more in settlements. Whereas Bestwall's average payment for claims paid prior to 2000 was about $21,000, the average payment for such claims in the 2000-2017 period was about $125,000.



* 2017 numbers for the partial year through October 31, 2017

Revised or suspect recollections and the sudden serial absence of alternative exposure evidence, especially of amphibole exposure, drove this increase. For a chrysotile defendant like Bestwall,

"[e]vidence of the plaintiffs' exposure to other co-defendants products was essential to its defense and its negotiating position."[49] But in many cases, this alternative exposure evidence was hidden away in the bankruptcy trust system. With these factors creating a greater risk of loss at trial, Bestwall was forced to pay higher settlements.[50]

C. The Court in Garlock and Other Courts Expose Inappropriate Conduct in the Tort System

In time, a number of courts began exposing plaintiffs' efforts to unfairly increase the value of their tort claims against Bestwall and other tort system defendants by failing to disclose their exposures to asbestos-containing products manufactured by bankrupt defendants.[51] The 2014 opinion estimating Garlock's liability for mesothelioma claims directly addresses this issue. There, the Court found that "the last ten years of [Garlock's] participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers," which manipulation "had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated."[52]

The Court in Garlock also noted that "[o]ne of the leading plaintiffs law firms with a national practice published a 23-page set of directions for instructing their clients on how to

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49 See In re Garlock, 504 B.R. at 83.

50 In the many jurisdictions that recognize some form of several liability, the failure to disclose alternative exposures also subjected Bestwall to more jury verdict risk. It deprived Bestwall of the ability to allocate shares of liability to codefendants or other responsible parties whose products actually caused disease.

51 See, e.g., Barnes & Crisafi v. Ga.-Pac., Case No. MID-L-5018-08 (AS) (N.J. Super. Ct. June 12, 2012) (describing the "major problem" of failure to produce trust claim forms that conflicted with plaintiff's story in tort case); Brassfield v. Alcoa, Inc., Case No. 2005-61841 (Tex. Dist. Ct. Harris Cnty. Nov. 22, 2006) (trial continued after defendants discovered undisclosed trust claims); Stoeckler v. Am. Oil Co., Case No. 23451 (Tex. Dist. Ct. Angelina Cnty. Jan. 28, 2004) (when trust claims were disclosed for the first time during trial, the court held a chambers conference after which case quickly resolved); Dunford v. Honeywell Corp., Case No. CL-25113 (Va. Cir. Ct. Loudoun Cnty. Dec. 10, 2003) (judge described as "worst deception" he had seen in 22 years a case where plaintiff alleged his illness was due solely to friction product exposure, but had made trust claims against many additional defendants).

52 In re Garlock, 504 B.R. at 82.

testify in discovery." Id. at 84. The memo gave plaintiffs a script for depositions, including ten pages of detailed product descriptions for plaintiffs to memorize. It explained to clients that "[h]ow well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement."[53]

The Court in Garlock found that after the bankruptcy wave of the early 2000s, "often the evidence of exposure to . . . insulation companies' products also 'disappeared.' This occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[54]

The Court found that in 15 settled cases where the Court allowed full discovery of the case records, "Garlock demonstrated that exposure evidence was withheld in *each and every one* of them."[55] The evidence showed repeated and wide-ranging inconsistencies between the story plaintiffs told Garlock and trial courts in tort cases and the story they (confidentially) told trusts and the bankruptcy courts that established them to pay the bankrupts' liabilities. The Court found that "Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases." Id. at 85-86. Bestwall has been the subject of these same tactics.

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53 Copy of Baron & Budd Memo, attached to Judiciary Committee Report on the Fairness In Asbestos Injury Resolution Act of 2003, Senate Rpt. 108-118, at 109 ("Baron & Budd Memo"). Reportedly, members of the firm separately encouraged clients to avoid identifying the products of bankrupt defendants. Christine Biederman, Thomas Korosec & Julie Lyons, *Toxic Justice*, DALLAS OBSERVER (Aug. 13, 1998) (former Baron & Budd paralegal describing discouragement of identification of Johns-Manville exposure).

54 In re Garlock, 504 B.R. at 84. The Court further observed that an asbestos plaintiff's lawyer "stated his practice as seemingly some perverted ethical duty: 'My duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies.'" Id.

55 Id. (emphasis in original).

D. This Inappropriate Conduct Appears to Have Occurred in Cases Against Bestwall

The Garlock record itself shows that plaintiffs denied or failed to disclose evidence of exposures to amphibole asbestos in their tort cases against Bestwall in the same way they did against Garlock. Although many plaintiffs alleged and testified in their tort cases that they had been exposed exclusively to joint compound or chrysotile asbestos products, in their confidential submissions to bankruptcy courts and trusts, the same plaintiffs attested to exposures to dangerous amphibole-containing products.

Joint compound manufacturers like Bestwall are especially vulnerable to these practices. Industrial products like those manufactured by Garlock generally were used only on ships or in industrial settings. In these settings, records or other evidence of product use during specific time periods and at specific job sites were more often available, and only workers were likely to be present. Thus, most defendants had the ability to assert a product-identification defense based on product-use records and records of a particular plaintiff's employment at specified industrial work sites. Joint compound products, however, were used in commercial construction, residential construction and do-it-yourself home projects for which records of product sales, product use and the presence of the plaintiff during specific timeframes do not exist.

Thus, to pursue a claim against Bestwall, a plaintiff need only claim to recall working with or being around the product, either on the job or at home, and, unlike many other defendants, Bestwall often had no records with which to counter product identification. Baron & Budd provided detailed instructions to its clients about how to construct convincing testimony of joint compound exposure:

> **JOINT COMPOUND:** Joint compound was white or off-white and came in two different forms. Sometimes it was a powder which came in 5 to 25 lb cardboard boxes or in heavy paper bags. It also came in paste form, in small cans or in 5

> gallon buckets or pails. *Either way, remember to say you saw the NAMES on the BAGS, BOXES or PAILS. . . . .*
>
> *[J]oint compound was dusty TWICE, when it was mixed (if it came in powdered form) and again when it was sanded!*
>
> *Remember, the names you recall are NOT the only names there were. There were other names too. These are JUST the names that YOU remember seeing on your jobsites*.[56]

Query why people who actually used a joint compound product would need these instructions. The memo also told plaintiffs "Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another. . . . [Y]ou were probably exposed equally to ALL the brands. You NEVER want to give specific quantities or percentages of any product names. . . . All the manufacturers sued in your case should share the blame equally!"[57]

The bankruptcy wave flooded Bestwall with claims by plaintiffs who now claimed they were exposed to Bestwall's products. These claims included not only plaintiffs who alleged occupational exposure to the products, but also claims from "occasional exposure" or "secondary exposure" plaintiffs, including, for example:

- Maintenance workers or laborers who did not use joint compound routinely, but may have done drywall work for brief periods decades ago;
- Plumbers, electricians and other trades people who did not work with joint compound at all, but claimed bystander exposure from the use by others at the job site;
- Persons claiming non-occupational exposure ("do-it-yourself") during home remodeling or repair; and
- Family members of any of those mentioned above who claimed "take-home" and/or "secondary" exposure.

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[56] Baron & Budd Memo at 117-18 (emphasis added).

[57] Id. at 126. The Baron & Budd Memo also instructed the plaintiff that he would always have the upper hand: "Keep in mind that these [defense] attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO RECORDS to tell them what products were used on a particular job, even if they act like they do. Id. at 123 (emphasis in original).

When the Garlock estimation record was unsealed in 2014, it made public for the first time trust claims and bankruptcy submissions made by many plaintiffs, including some who filed claims against Bestwall. The ability to cross reference the Garlock record to plaintiffs suing Bestwall is limited because, among other things, claimants against both defendants are not co-extensive and the Garlock record only includes cases in which disease was diagnosed in 2010 or earlier. However, that record nonetheless contains numerous examples of highly questionable claiming practices in Bestwall cases, demonstrating that Bestwall was plagued by the same conduct that injured Garlock after the bankruptcy wave. More extensively available information presumably would produce many more examples. A few illustrative, claimant-specific examples from the limited information that Bestwall has obtained to date are summarized below:[58]

1. Plaintiff No. 1

Plaintiff No. 1 sued Bestwall in Philadelphia in 2009. He testified in deposition that he used Georgia-Pacific Ready Mix joint compound, as well as joint compounds manufactured by Kaiser Gypsum and United Gilsonite Laboratories ("UGL") during home repairs and renovations. Kaiser Gypsum and UGL were not in bankruptcy at the time but would file thereafter. Plaintiff No. 1 claimed to use those three joint compounds "equally." In his testimony, he specifically denied working with products manufactured by then-bankrupts National Gypsum and U.S. Gypsum even though they were prominent manufacturers of asbestos-containing joint compound. He identified no exposures to amphibole products. Plaintiff No. 1 testified that he had no occupational exposure to asbestos whatsoever, including

[58] All references to claimant testimony or interrogatory responses represent statements made by each such claimant in Bestwall tort litigation.

during his four years in the U.S. Navy, despite time spent aboard destroyers and in shipyards. Bestwall settled his case in June 2011.[59]

But in asbestos trust and bankruptcy filings, Plaintiff No. 1 told an entirely different story:

- He submitted no fewer than 17 asbestos trust claims, all based on exposures not disclosed in his tort case, including claims against the National Gypsum and U.S. Gypsum trusts and trusts responsible for amphibole insulation, including Johns-Manville and Owens Corning;
- Even before his deposition, his attorneys filed ballots in two bankruptcy cases based on undisclosed exposures, including in the case of Pittsburgh Corning, which was responsible for the amphibole insulation Unibestos; and
- Less than five months after Bestwall's settlement, his attorneys submitted a Garlock personal injury questionnaire ("PIQ") on his behalf, certifying that he cut and removed Garlock gaskets and packing in the Navy from 1965 to 1969, which would have occasioned still further exposure to amphibole insulation found in the vicinity of the Garlock products.[60]

When describing similar facts in cases against Garlock, the Court there found that, "while it is not suppression of evidence for a plaintiff to be unable to identify exposures, it *is* suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims."[61]

2. Plaintiff No. 2

Plaintiff No. 2 sued Bestwall in Madison County, Illinois in 2005. He testified that he used Georgia-Pacific and Bondex joint compound during childhood work at his father's construction company during the 1960s and elsewhere during the 1970s. The only other product

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59 Because Bestwall's settlements were subject to mutual confidentiality agreements, the terms of settlement are not disclosed in this brief.

60 See In re Garlock, 504 B.R. at 77 (emphasis in original).

61 Id. at 86.

manufacturers he identified were defendants in the lawsuit. Bestwall settled with Plaintiff No. 2 in April 2006. Like Plaintiff No. 1, his story would change, as well.

Plaintiff No. 2 submitted trust claims or bankruptcy filings claiming exposure to products from 28 separate companies never identified in his Madison County case against Bestwall:

- He submitted a claim to the U.S. Gypsum Trust in which he asserted exposure to U.S. Gypsum asbestos products, including Ready Mix Joint Compound, Perf-A-Tape Joint Compound and other products, claiming this exposure occurred at the very childhood construction site where he had previously testified only Georgia-Pacific and Bondex joint compounds were used;

- He submitted 21 trust claims in all based on other exposures and products not disclosed in his tort case, including to Babcock & Wilcox rope packing; Carey Insulation, CareyTemp Pipe Covering and Thermotex Asbestos Cement; Kaiser Aluminum's Vee Block, Plastic K-N, Super D and Vee-Block Mix; and Plisulate Insulating Cement #101 & #102;

- His lawyers filed ballots for him in 9 bankruptcy cases (AC&S, Flintkote, Fibreboard, GIT, NARCO, Pittsburgh Corning, Owens Corning, Quigley and W.R. Grace), swearing in each that he was exposed to asbestos in the products of each company; and

- He filed a Garlock PIQ alleging exposure to Garlock gaskets, despite never disclosing such exposure in his tort case.

3. Plaintiff No. 3

Plaintiff No. 3 sued Bestwall in Los Angeles in 2006. The only asbestos exposures he identified in his case against Bestwall were six joint compounds he used in the course of installing kitchen cabinets (Georgia-Pacific, Bondex, Kaiser Gypsum, Hamilton Materials, Dowman and Paco Quikset). None were bankrupt at the time. He claimed he used all the brands equally. In his deposition and interrogatory answers, Plaintiff No. 3 swore he had no other asbestos exposures, including in Cuba, where he lived until age 38. He made this assertion despite the pervasive use of asbestos on the island. Bestwall settled the case in 2007.

Plaintiff No. 3, like the others, would later tell a very different story when making claims against bankrupt companies:

- His law firm filed a ballot for him in the Pittsburgh Corning bankruptcy case in 2009, certifying that he was exposed to Unibestos — an amosite-containing insulation — or another product for which Pittsburgh Corning was responsible.

- In 2009, a separate law firm cast a ballot for him in the Flintkote bankruptcy case certifying that he was exposed to a product for which Flintkote had responsibility. Plaintiff No. 3 had specifically denied knowledge of Flintkote joint compound in his deposition in his Bestwall case.

Plaintiff No. 3's case has import beyond any proceedings involving him. Bestwall recently determined that he was one of the three individuals featured in the Dahlgren Article published in 2012 purporting to present "three cases of mesothelioma in which the only known exposure to asbestos was from joint compound." The Dahlgren Article does not identify the three individuals whose cases are reported, but the match is definitive: "Case 1" in the Dahlgren Article had the same birth date as Plaintiff No. 3, the same diagnosis year, the same medical details, the same alleged year of first exposure and the same occupations. Moreover, the principal author of the article was a plaintiff's expert in Plaintiff No. 3's case.

Bestwall has recently confirmed, through matches of birth date, diagnosis year, occupation, exposure history, medical details, exposure years and death date, that Cases 2 and 3 cited in the Dahlgren Article also were not exposed solely to joint compound or chrysotile products. Like Plaintiff No. 3 above, each of them filed ballots in bankruptcy cases of manufacturers of amphibole products, and one lost his trial (in which the principal author of the Dahlgren Article testified as his expert witness) against Kaiser Gypsum after the jury heard a defense expert's testimony that he was exposed to amphibole products in the Navy. Significantly, the ballots in Cases 2 and 3 were filed, and the trials occurred, before the Dahlgren Article was published.

The Dahlgren Article, which claims to identify "the first case reports of mesothelioma associated with exposure to asbestos-containing drywall finishing products," has been cited by

plaintiff experts in countless Bestwall cases since 2012 for the proposition that joint compound causes mesothelioma. Needless to say, those citations should cease.

4. Plaintiff No. 4

Plaintiff No. 4 sued Bestwall in Los Angeles in 2006. She testified that she was exposed to asbestos through her husband's work clothes. The six brands of joint compound her husband identified (Georgia-Pacific, Bondex, Kaiser Gypsum, Paco, Dowman and Hamilton Materials) were all manufactured by defendants not then in bankruptcy.[62] Plaintiff No. 4 and her attorneys denied she was exposed to any other asbestos-containing products. Bestwall settled Plaintiff No. 4's claim in January 2007 shortly before trial was set to begin. Bestwall now knows that:

- A few months after Bestwall settled, a different law firm filed a new lawsuit for Plaintiff No. 4 in Madison County, Illinois. In this lawsuit, she alleged her disease was caused by asbestos-containing products manufactured by more than two dozen defendants that did not make joint compound and were never mentioned in the California suit, including defendants whose products commonly would have been found in industrial settings near amphibole-containing insulation.
- In the Madison County lawsuit, Plaintiff No. 4 disclosed that she had filed trust claims, even though she had not identified any trust claims or exposures to bankrupts' products in her California case against Bestwall.

Plaintiff No. 4's attorneys filed ballots for her in the ASARCO, Flintkote, Pittsburgh Corning, Quigley and W.R. Grace bankruptcy cases. None of these defendants' products were identified in Plaintiff No. 4's California case, and Pittsburgh Corning manufactured amphibole-containing Unibestos insulation.

[62] Bondex, Kaiser Gypsum, Dowman and Hamilton Materials have each now filed for bankruptcy.

5. Plaintiff No. 5

Plaintiff No. 5 sued Bestwall in Alameda County, California in 2009. She claimed direct and take-home exposure to Bestwall and Georgia-Pacific joint compound from her father's work as a contractor and owner/landlord of rental homes. In her deposition, Plaintiff No. 5 testified that she handled packages of Bestwall, Georgia-Pacific, Dowman, Paco and Kaiser Gypsum joint compounds. When questioned by defense attorneys, she also remembered U.S. Gypsum joint compound, but said it was not as familiar as the other brands, and she testified she did not recognize the name National Gypsum.

Plaintiff No. 5's father also worked as an insulator at shipyards during World War II, including the Kaiser Shipyard. She admitted in her first deposition that her father brought his work clothes from the shipyards to where she lived for laundering in a river. She then recanted that testimony in a later deposition, and testified she did not have personal knowledge of her father's shipyard exposure. Bestwall reached a settlement with Plaintiff No. 5 in June 2010.

- Mere days after her trial date, Plaintiff No. 5 executed an affidavit to support trust claims where she attested she "saw that my father used USG and Gold Bond joint compound on a regular basis" and "handled sacks of USG and Gold Bond joint compound on a regular basis." She had not identified Gold Bond joint compound in her tort case and had disclaimed knowledge of its manufacturer, National Gypsum. In addition, she had testified to limited familiarity with U.S. Gypsum, not "regular" use. This affidavit did not mention Georgia-Pacific, Bestwall or the other joint compounds manufactured by defendants in her tort case.

- Contrary to her deposition testimony, the affidavit stated that Plaintiff No. 5 had personal knowledge of her father's work as an insulator at the Kaiser Shipyard, and stated she was "very close with my father," "always hugged him when he returned from work," and "helped my mother launder his clothing."

- Plaintiff No. 5 relied on that shipyard exposure in at least three trust claims. Her attorneys also submitted a PIQ in the Garlock bankruptcy case attesting to exposure to Garlock packing through contact with her father's clothes upon his returning home from the shipyards.

- Plaintiff No. 5 would go on to file 12 trust claims based on exposures never identified in her tort case.

Bestwall has uncovered numerous other examples, despite the limited nature of the information available for Bestwall cases in the Garlock record. Even worse for Bestwall, two more of Bestwall's longtime joint compound co-defendants filed bankruptcy in 2010 (Bondex) and 2016 (Kaiser Gypsum, in this Court). Those bankruptcies now have left Bestwall even more exposed and vulnerable to the product naming and non-naming practices described above.

V. The Enormous Costs and Burdens of the Asbestos Litigation

A combination of factors has placed, and will continue to place, a tremendous and growing financial strain on the Bestwall business and the business of its affiliates: the relentless filing of asbestos lawsuits over 40 years, the departure of other defendants (including all major joint compound defendants) from the tort system, continuing unfair practices in the tort system and the projection of decades more of the same or worse. This burden manifests itself in the enormous costs and resources that are devoted to asbestos litigation. The nine-digit annual price tag for asbestos defense and indemnity costs aggregates to approximately $2.9 billion to date.

Despite longstanding (and successful) efforts to cut costs, improve efficiencies and resolve cases, the overall costs of the litigation are not improving. All costs savings to date have been swallowed by the increasing total costs of litigation as measured by defense plus indemnity spending. In the last two complete years, total costs were the highest in over a decade — approximately $184 million in 2015 and $174 million in 2016 — and, through October 31, Bestwall's total costs in 2017 are even higher at approximately $200 million.

Bestwall manages roughly 50 outside defense firms around the country, including approximately 35 local counsel and 15 special counsel and trial counsel. From 2012 to 2016, an average of approximately 660 attorneys, paralegals and other time keepers at these firms billed

Bestwall approximately 150,000 hours each year to defend Bestwall's asbestos lawsuits. That is in addition to the time of nearly 40 experts and various data management and discovery vendors. Despite consistent efforts to negotiate the most favorable rates for its professionals and manage cases efficiently, the costs of defending asbestos lawsuits in 2016 exceeded $40 million.

Ultimately, Bestwall cannot try the tens of thousands of cases it faces and will face. That literally would cost billions of dollars in defense fees. Bestwall realistically cannot fully devote sufficient resources to adequately assess, through discovery or otherwise, the full nature of each individual lawsuit against it. That would still involve defense costs in the billions of dollars. As a result, for a long time, Bestwall has been settling claims against it to save defense costs and to avoid the risks of trial imposed as a result of unfair tort system practices. The Court recognized this problem in the Garlock case, where it ruled, as a result, that Garlock's settlement history bore no relationship to its legal liability.

It is very expensive to try cases to verdict and deal with the various issues that arise post-verdict. From filing to final resolution, cases that go to trial and verdict typically cost hundreds of thousands of dollars and can exceed $1 million. Accordingly, there is significant pressure to settle cases to save money even where actual litigation risk otherwise appears remote. Bestwall has routinely entered into group settlements with plaintiff law firms to settle inventories of cases for a single upfront payment or for a series of payments based on an overall cost calculus and not based on the potential trial risk of each particular case. These arrangements with individual firms have ranged from a few dozen cases to over 1,500 cases at a time. From 2012 to 2016, nearly a third of all of Bestwall's indemnity payments were made under group settlements.

If Bestwall remained in the tort system, it would expect its financial costs to not only continue but to increase significantly as more and more potential co-defendants seek the

resolution of asbestos liabilities in bankruptcy. Every other major joint compound defendant has utilized bankruptcy, but other major asbestos defendants could yet file bankruptcy cases. Thus, the prospect that Bestwall could face significant future increases in its settlement and defense costs as it did after the bankruptcy wave in the early 2000s is very real. Such increases would not be because of Bestwall's actual liability, but because it would be pursued more frequently and face increasingly higher settlement demands as plaintiffs seek sources of recovery among the fewer defendants remaining in the tort system.

The only solution to Bestwall's intractable asbestos problem is section 524(g) — a solution used by all of its primary competitors and specifically enacted by Congress as a means to fairly and appropriately address mass asbestos tort liabilities. After 40 years of litigation — litigation that has no end in sight — Bestwall now needs the help of this Court and section 524(g) to address a massive, unrelenting burden and obtain a complete and permanent resolution of its asbestos litigation that, with the input and approval of the plaintiffs, will treat Bestwall, as well as current and future asbestos claimants, fairly and equitably.

VI. Bestwall's Objectives in the Chapter 11 Case

A. Section 524(g) Provides Bestwall with the Opportunity to Permanently Resolve Current and Future Asbestos Claims in a Manner That Is Fair and Equitable

The Supreme Court recognized many years ago that the tort system is not equipped to fairly address mass asbestos claims, either on a case-by-case basis or through global settlements under federal class action rules.[63] As a consequence, in 1997, it urged Congress to act on the asbestos litigation problem.[64] Congress has never been able to pass legislation that would have

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[63] See Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[64] Amchem, 521 U.S. at 628–29 ("[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure . . . ."); Ortiz, 527 U.S.

created a separate mechanism or process for reviewing and resolving asbestos claims in the tort system in response to the Supreme Court's urging, although earlier, in 1994, it enacted section 524(g) of the Bankruptcy Code. It did so specifically to provide a path forward for companies, like Bestwall, to seek a permanent resolution of an increasing flood of current and future asbestos personal injury claims.

This provision was modeled on the plan of reorganization ultimately approved in the Johns-Manville bankruptcy case. In that case, the court confirmed a plan that permanently enjoined all present and future tort claims against the debtor and channeled them to a post-confirmation trust for processing and payment. Section 524(g) has created a statutory safe harbor that enables companies to achieve the same result, i.e., the establishment of a trust for the payment of current and future asbestos claims and the entry of a permanent injunction that enjoins such claimants from filing or continuing to prosecute lawsuits against the debtor, channeling them instead to the trust for review and, if appropriate, compensation.

In order for this safe harbor to be fully available, a number of conditions must be satisfied. They include the following:

- A legal representative must have been appointed to represent the interests of future claimants.
- 75 percent or more of current asbestos claimants must have voted to accept the treatment of asbestos claims proposed under the plan.
- The plan must have been approved by a bankruptcy court and a federal district court.
- The asbestos trust to be established under the plan must, among other things:

at 865 (Rehnquist, C.J., concurring) (observing that asbestos litigation "cries out for a legislative resolution").

- Be funded in whole or in part by the securities of one or more debtors involved in the plan and by the obligation of such debtor or debtors to make future payments, including dividends; and

- Own, or by the exercise of rights granted under the plan be entitled to own if specified contingencies occur, a majority of the voting shares of each such debtor, the parent corporation of each such debtor or a subsidiary of each such debtor that is also a debtor.

Section 524(g)'s complete protection requires the active participation of representatives of current and future asbestos claimants. It requires substantial funding and other commitments by the debtor. It ultimately requires the approval of a super-majority of current claimants, and no plan of reorganization seeking to utilize section 524(g) can be implemented without the imprimatur of two federal courts. Further, section 524(g) contemplates, and chapter 11 requires, that the company seeking to avail itself of this statutory safe harbor must bear the costs of all the professionals employed by these representatives to ensure that the interests of the claimants are fully and zealously represented.

Chapter 11 provides the only option for companies, like Bestwall, that are burdened by massive numbers of asbestos claims and will continue to shoulder that unceasing burden for decades more, to pursue a fair and equitable resolution of those claims. It provides the only forum where claims can be consolidated and resolved on a global basis and where the interests of future claimants can be considered and protected.

B. Bestwall's Proposed Course of Action in the Chapter 11 Case

Bestwall seeks the establishment of a trust that fairly resolves claims for any injuries allegedly caused by asbestos-containing products Bestwall manufactured and sold. To achieve this objective, Bestwall expects to pursue the following courses of action in this chapter 11 case:

1. Extension or Application of the Automatic Stay

As has been done in numerous prior asbestos chapter 11 cases, Bestwall will immediately request the entry of an order determining that the automatic stay should be extended or applies to actions against certain of Bestwall's non-debtor affiliates, which actions seek recoveries on Bestwall asbestos claims. The purpose of the Debtor's bankruptcy filing would be utterly defeated if the automatic stay were not extended or applied to all actions that seek recoveries on Bestwall asbestos claims, including actions that seek to do so from non-debtors on a derivative basis. Courts, including this Court, have consistently granted such injunctions to ensure that, among other things, the entirety of the asbestos liability is addressed in the chapter 11 case and the potential for a section 524(g) global resolution is preserved.[65]

2. Appointments of Asbestos Claimants' Committee and Future Claimants' Representative

One of the initial, necessary steps in this chapter 11 case is the appointment of an official asbestos claimants' committee (the "ACC"). The Debtor is prepared to assist the Bankruptcy Administrator and the Court with the identification of claimants to serve on the ACC. In that regard, Bestwall has extensive information on its current claimants' counsel that should be helpful to the Bankruptcy Administrator and the Court in forming the ACC.

After the appointment of the ACC, the Debtor is prepared to quickly commence discussions with the committee regarding the selection of a future claimants' representative

[65] In re Kaiser Gypsum Co., Inc., Case No. 16-31602, Adv. No. 16-03313 (Bankr. W.D.N.C. Oct. 7, 2016); In re Garlock Sealing Techs. LLC, Case No. 10-31607, Adv. No. 10-3145 (Bankr. W.D.N.C. June 7, 2010); In re Leslie Controls, Inc., Case No. 10-12199 (CSS), Adv. Proc. No. 10-51394 (Bankr. D. Del. July 14, 2010); In re Specialty Prods. Holding Corp., Case No. 10-11780 (PJW), Adv. Proc. No. 10 51085 (Bankr. D. Del. June 4, 2010); In re Quigley Co., Inc., Case No. 04-15739 (Bankr. S.D.N.Y. Dec. 17, 2004); In re Combustion Engineering, Inc., Case No. 03-10495 (Bankr. D. Del. March 7, 2003); In re Harbison-Walker Refractories Co., Case No. 02-2080 (Bankr. W.D. Pa. Feb. 14, 2002); In re W.R. Grace & Co., Case No. 01-01139 (Bankr. D. Del. May 3, 2001); In re Pittsburgh Corning Corp., Case No. 00-22876 (Bankr. W.D. Pa. April 16, 2000 and April 22, 2003).

(the "FCR") to represent future asbestos claimants. Bestwall already has identified candidates that it believes could effectively serve in that role, and intends to share those candidates with the ACC with the goal of reaching agreement with the ACC on a candidate, from that list or otherwise, who is acceptable to the parties and the Court. Once the ACC and the FCR have been appointed and retained their respective professionals, the Debtor plans to move into the next stage of the case described below.

3. Diligence and Discovery

Bestwall is committed to reorganizing as soon as possible and is prepared to commence plan negotiations with the ACC and the FCR as soon as reasonably practicable. Bestwall recognizes, however, that it and the claimants' representatives need substantial information to prepare for meaningful negotiations. Accordingly, Bestwall anticipates that the initial phase of the case will involve substantial exchanges of information in response to both formal discovery requests and informal information requests. To expedite this process, Bestwall already has established a virtual data room that includes a substantial amount of information that the ACC and the FCR are expected to request. Bestwall is prepared to make that information available to the ACC and the FCR at the appropriate time without the need for formal discovery but subject to an agreed-upon protective order.

Bestwall likewise requires information to prepare for plan negotiations. Among other things, it expects to seek court authorization for the dissemination of personal injury questionnaires to current claimants. The court in Garlock approved the use of these questionnaires. Further, Bestwall anticipates filing motions under Bankruptcy Rule 2004 to seek information from asbestos trusts established in other cases and may file motions under Bankruptcy Rule 2004 seeking other relevant information from additional sources. Notwithstanding the potential significant need for all parties to exchange information, whether

formally or informally, Bestwall is open to the idea of conducting plan negotiations with the ACC and the FCR without waiting for the completion of the process of exchanging information.

4. Plan Negotiations

Unless a settlement has been reached earlier, once the diligence and discovery phase of the case is completed, the Debtor will promptly work with the ACC and the FCR to set a schedule and process for negotiating a plan. In that regard, Bestwall would be willing to consider mediation if the parties are otherwise unable to reach an agreement. The Debtor is committed to negotiating a consensual plan of reorganization with the ACC and the FCR as soon as reasonably practicable and is prepared to devote the resources and time to that process necessary to maximize the prospects for reaching a settlement.

5. Estimation

If those settlement efforts fail to achieve a resolution, the Debtor will ask this Court to estimate the aggregate amount of current and future asbestos liability for plan purposes. As in Garlock, it will seek an estimation of its actual legal liability in respect of asbestos-related claims, as opposed to an estimate of settlement payments it might likely make if it remained in the tort system. As the Court determined in Garlock, the Debtor's liability should not be determined by simplistic projections of historical settlement payments Bestwall was forced to make in the tort system. Instead, its trust funding commitment should be determined based on an assessment of its actual legal liability, *i.e.*, the extent to which the chrysotile asbestos in Bestwall's products substantially contributed, if at all, to a claimant's disease. The best evidence of Bestwall's liability for asbestos claims "takes into consideration causation, limited exposure

and the contribution of exposures to other products,"[66] and, if necessary, an estimation procedure that fully and appropriately considers all these elements.

If an estimation becomes necessary, the Debtor will work cooperatively with the ACC and the FCR on a pretrial order that, upon approval of the Court, will govern the estimation litigation. The Debtor anticipates that the order would provide for additional discovery, exchanges of expert reports and expert depositions and pretrial motions, including Daubert motions and dispositive motions. If an estimation trial becomes necessary, Bestwall is committed to working with the ACC and the FCR to manage the litigation as efficiently and cost-effectively as possible. Notwithstanding any asbestos estimation litigation, at all appropriate times Bestwall will continue to explore settlement opportunities with the ACC and FCR.

6. Plan of Reorganization

Whether with or without an estimation of asbestos liability by this Court, the Debtor's objective is to negotiate and ultimately develop a confirmable plan of reorganization that is both acceptable to the ACC and the FCR and that resolves both current and future asbestos claims. The centerpiece of the plan would be the creation of a section 524(g) asbestos trust funded by Bestwall. The trust would adopt distribution procedures acceptable to the claimants' representatives that would set forth a streamlined process for claimants who meet agreed upon criteria to promptly receive compensation. Claimants would no longer be required to commence litigation, with its attendant costs, risks and uncertainties, to resolve their claims against Bestwall. In addition, Bestwall would no longer have to pay hundreds of millions of dollars for defense costs.

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66 In re Garlock, 504 B.R. at 73.

Conclusion

The Debtor has sought bankruptcy protection to fairly, finally and equitably resolve present and future asbestos claims against it. Although the Debtor has resolved asbestos claims in the tort system for over 40 years, the burden of the litigation only worsens — and no end is in sight. Despite its limited use decades ago of chrysotile asbestos, Bestwall continues to be overwhelmed by claims.

While Bestwall has remained in the tort system, other defendants, including all of its primary competitors, have filed for bankruptcy, established section 524(g) trusts and received permanent protection from current and future claims. In the meantime, Bestwall has been forced to effectively pick up the liability of these former defendants — liability for which it has no legal responsibility. To deal with the barrage of thousands of cases, Bestwall has been compelled to settle claims to avoid the substantial costs of litigation and the risks caused by the documented abusive conduct in the tort system.

Chapter 11 provides Bestwall the only option for permanently and globally resolving asbestos claims in a manner that is fair and equitable to Bestwall as well as all present and future claimants. With this Court's assistance, and through negotiations with the ACC and the FCR, the Debtor will endeavor to achieve as soon as possible a fair resolution that finally resolves the asbestos claims through a confirmed chapter 11 plan of reorganization.

Dated: November 2, 2017
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

Garland S. Cassada
N.C. Bar No. 12352
Jonathan C. Krisko
N.C. Bar No. 28625
Richard C. Worf, Jr.
N.C. BAR NO. 37143
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
E-mail: gcassada@robinsonbradshaw.com
jkrisko@robinsonbradshaw.com
rworf@robinsonbradshaw.com

Gregory M. Gordon (TX 08435300)
Dan B. Prieto (TX 24048744)
Amanda Rush (TX 24079422)
JONES DAY
2727 N. Harwood Street
Suite 500
Dallas, Texas 75201
Telephone: (214) 220-3939
Facsimile: (214) 969-5100
E-mail: gmgordon@jonesday.com
dbprieto@jonesday.com
asrush@jonesday.com
(Admissions *pro hac* pending)

Jeffrey B. Ellman (GA 141828)
Brad B. Erens (IL 620664)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309
Telephone: (404) 521-3939
Facsimile: (404) 581-8330
E-mail: jbellman@jonesday.com
bberens@jonesday.com
(Admissions *pro hac* pending)

Cary Ira Schachter (TX 17719900)
Raymond P. Harris, Jr. (TX 09088050)
Erin A. Therrian (TX 24072524)
SCHACHTER HARRIS, LLP
909 Lake Carolyn Parkway, Suite 1775
Irving, Texas 75039
Telephone: (214) 999-5700
E-mail: cschachter@shtriallaw.com
rharris@shtriallaw.com
etherrian@shtriallaw.com

PROPOSED ATTORNEYS FOR THE DEBTOR