

## IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

*Consolidated Cases*

Cause No. AC 17-0694

MOTION AND RATIONALE  
FOR APPROVAL OF  
TRUST DISTRIBUTION PROCEDURES  
(Robinson Insulation/ Grogan Robinson  
Receivership)

Come now Nancy Gibson, Receiver, Kent Saxby, Trustee for the Insured Claims Settlement Trust, and the Libby Plaintiffs represented by McGarvey Law and Odegaard, Kovacich, Snipes, and move the Court to Approve the Trust Distribution Procedures (TDP) for the settled insurance proceeds held in the Insured Claims Settlement Trust.

This motion is made on the following grounds:

1. The Court has established the Insured Claims Settlement Trust (QSFT) for the stated purpose of (a) receiving and holding proceeds of Settled Insurance under the Court approved settlements between the Receiver and various insurers and (b) distributing the proceeds “in a manner consistent with the terms and conditions described in the Settlement

- Agreement to Insured Claimants<sup>1</sup> so as to resolve the personal injury claims to the extent of such liability insurance coverage.”
2. No objection was presented when the Court established the QSFT for this stated purpose.
  3. The use of Trust distribution procedures is the customary and expected manner to assure that claims of asbestos claimants can be fairly and equitably resolved.
  4. The proposed TDP are modeled on, and substantively similar to, the TDP approved in the W.R. Grace bankruptcy for asbestos claimants, which claimants include nearly all of the Insured Claimants under the QSFT.
  5. The TDP terms appropriately impose prerequisite qualifications, including criteria for (a) exposure to asbestos in Libby or otherwise attributable to Robinson’s vermiculite and vermiculite products, (b) incurred asbestos exposure during a period covered by the settled insurance, (c) presumptive medical criteria for various disease forms and levels, all of which criteria reflect the valuations under tort system and coverage analyses, and all of which criteria must be satisfied through a claim form and supporting medical documentation.

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<sup>1</sup> “Insured Claimants” is defined in the QSFT as an individual with a personal injury claim against Robinson Insulation Company and/or Grogan Robinson Lumber Company which claim alleges an occurrence within period of insurance coverages beginning December 20, 1971, and ending May 28, 1986.

6. The TDP provides for scheduled values corresponding to disease levels and types, as well as procedures for exceptional claims.
7. The TDP provides for payment and payment percentage procedures designed to assure prompt resolution of current claims and continued sufficiency of funds for up to 40 years from the last covered exposure (May 28, 2026). The TDP utilizes a well-recognized method for efficient and fair apportionment of a limited fund of assets among asbestos claimants, and will fulfill the purposes of the Receivership.
8. Notice of this motion has been provided to all known “Insured Claimants” defined in the QSFT, notice has been published in Lincoln, Cascade and Flathead Counties and no Insured Claimant or potential Insured Claimant has presented any objection.

Submitted with this Motion are:

- A. The Proposed Trust Distribution Procedures
- B. The TDP Claim Form
- C. Published Notice Form

### **RATIONALE**

#### I, In a Receivership Action, the Court has Broad Powers to Effect An Equitable Outcome

From the beginning of statehood, Montana has provided for the equitable proceeding of a receivership, which is now codified in Section 27–20–102, MCA.

*Crowley v. Valley W. Water Co.*, 267 Mont. 144, 150, 882 P.2d 1022, 1026 (1994); (“equitable remedy is adequate to prevent a manifest risk of imminent or irreparable harm or loss”); *Gottlob v. DesRosier*, 2020 MT 212, ¶ 10, 470 P.3d 194, 199. Like with other forms by which the equity jurisdiction of the court is invoked, this Court has broad discretion to fashion a result bounded only by the demands of fairness and due process. For example, in *Kellogg v. Dearborn Info. Servs., LLC*, 2005 MT 188, 328 Mont. 83, 119 P.3d 20, a district court was held to have properly invoked equity in a partition action to impose adjustments and servitudes on partitioned property:

In all cases the court has power to make compensatory adjustment between the respective parties according to the ordinary principles of equity.”

...

“ordinary principles of equity” have included the power to impose servitudes. For example, ... the Virginia Supreme Court of Appeals squarely held: “ ‘Where lands are incapable of exact or fair division, the court has power to compensate by a charge upon the land by way of rent, servitude, or easement.’ ” [citations]. Given this expansive understanding of a court's equitable powers, and given that § 70–29–209(2), MCA, grants such powers to the district court, we conclude that it is within the court's powers to impose a servitude such as a “no build” zone.

*Id.* at ¶¶ 12-13.

In short, “courts sitting in equity are empowered to determine all the questions involved in the case and to do complete justice; this includes the power to fashion an equitable result.” *Blaine Bank of Montana v. Haugen*, 260 Mont. 29,

35, 858 P.2d 14, 18 (1993)(emphasis added); *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, 50, 36 P.3d 408, 411.

The essential concern of this receivership is to manage the insurance liability assets of the dissolved companies for the benefit of the receivership estate and the third party “Insured Claimants” covered by such insurance, and to assure that the resulting limited fund of insurance proceeds are equitably distributed among those third party claimants. The following sections will explain why the proposed TDP achieves a reasonable, well-precedented, and fair system to apportion the limited fund of Robinson insurance proceeds in conformance with the terms of the Receiver’s settlement agreements with the insurers and the requirements of the Trust holding the limited funds.

## II. The TDP Fulfills the Purposes of the QSFT and the Court-Approved Agreements Creating The Settled Insurance.

Upon motion of the Receiver, this Court approved the settlements which liquidated the Receivership estates’ liability insurance with ACE Fire Underwriters Company, ACE Property & Casualty Insurance Company, Motorists Commercial Mutual Insurance Company, American States Insurance Company, and Home Insurance Company (in liquidation). At the same hearing and without objection from the represented Libby Plaintiffs or asbestos Defendants appearing at the hearing, this Court created the QSFT

into which the settlement proceeds would be paid for distribution to the individual asbestos claimants. Specifically, that QSFT provides for distribution to asbestos personal injury claimants pursuant to the terms of a distribution procedure to be approved by the Court:

**1. Name and Purpose of the Trust**

The Trustee shall receive and distribute the Contributions referenced in Paragraph 2 below in a manner consistent with the terms and conditions described in the Settlement Agreement (as defined herein and attached hereto as Exhibit 1 and incorporated herein by this reference) to Insured Claimants (as defined herein<sup>2</sup>) so as to resolve the personal injury claims to the extent of such liability insurance coverage.

**4. Dispositive Provisions. ...**

...

**B. Trust Distribution Procedures.**

Payments on Insured Claims shall be made pursuant to the terms of a Court-approved Trust Distribution Procedure created to afford equitable claim resolution of Insured Claims in a manner consistent with claim values in the tort system.

Pursuant to these requirements of the QSFT, the Receiver, Trustee and Libby Plaintiffs have presented a proposed TDP which fulfills the stated purpose and dispositive provisions of the trust. Specifically, the TDP presents a system for payment of all trust funds to Insured Claimants, using qualifying criteria assuring

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<sup>2</sup> Section 12.B. of the QSFT provides: “Insured Claimant” shall mean an individual with a personal injury claim against Robinson Insulation Company and/or Grogan Robinson Lumber Company which claim alleges an occurrence within period of insurance coverages beginning December 20, 1971, and ending May 28, 1986.”

that each claimant had exposures which (a) are within the period covered by the settled insurance, and (b) are alleged to be attributable to Robinson. The TDP further provides for levels of payment corresponding to disease levels, and a mechanism for payment for all existing and anticipated claimants for a period of up to 40 years after covered exposures ceased.

### III. The TDP is Modeled on Similar Distribution Procedures for Similar Asbestos Claimant Trusts in Bankruptcies.

The use of the equitable system of claim payment to asbestos claimants in cases of limited funds is not unusual. Scores of Asbestos PI Claimant's Trusts have been established in bankruptcies of companies with large asbestos liabilities. The proposed TDP is modeled on the trust distribution procedures used in such bankruptcies, including the TDP for the Asbestos PI Claimants Trust created in the W.R. Grace Bankruptcy. See <http://www.wrgraceasbestostrust.com/wp-content/uploads/2014/02/WRG-TDP.pdf>

The proposed TDP is the combined work product of the Receiver, the Trustee, and, importantly, counsel for over 2000 Insured Claimants with various forms of asbestos disease. Counsel for the Libby Plaintiffs have designed the "Presumptive Medical Criteria," the disease "Levels," and the corresponding Liquidated Values in a manner calculated to (a) proportionately conform to historical recoveries for different disease levels in the tort system, and (b) assure fairness comparable to the fairness in the TDP for the WR Grace PI Trust. Further,

these counsel have secured authority from their clients to present this TDP proposal.

Of necessity, the TDP has drawn lines of pulmonary impairment and a limited number of recovery categories. These lines and categories, while relatively inflexible, reflect the historic levels of recovery and the medical manifestation of disease found among Libby asbestos claimants.

#### IV. The TDP Provides for Efficient and Fair Distribution of a Limited Fund to All Insured Claimants.

A key feature of the proposed TDP is that it provides an efficient system for verifying claims (a) which is adequate to identify claims and their level of value in the tort system, (b) the detail of which is proportional to and justified by the modest amount of recoveries on the claims, and (c) assures efficient and inexpensive claim processing which will minimize claim administration expense and maximize total payments to Insured Claimants.

Nearly all of the qualifying data and required medical documentation is already a part of the data and documentation for claims presented by these same Libby Plaintiffs in their claims under the WR Grace PI Trust, assuring consistency and efficiency. It is expected, therefore, that all known existing claims can be presented to the Trustee within 60 days of the Court's approval.

Because these initial claims is expected to represent 85% or more of all anticipated claims, the data derivable from them together with other data relating to expected claims will inform the Trustee's determination of an appropriate "Payment Percentage" with a high degree of confidence both that (a) the "Payment Percentage" will allow initial distributions which closely approximate the ultimate entitlement for the initial claims, and (b) that sufficient funds are retained by the Trust for reasonably anticipated future claims.

V. The TDP Assures Timely Payment to Existing Claimants and Retention of Funds for Reasonably Anticipated Future Claimants.

The concerns of equity may encompass individuals who, though having experienced Robinson-sourced vermiculite exposure, have not appeared to protect their interests in these proceedings. To address this concern, the TDP has procedures for the Trustee to calculate a payment percentage and make distributions which preserve adequate funds for anticipated future claims.

Though the over 2,000 current claimants who will qualify as Insured Claimants constitute the vast majority of anticipated claimants, the Libby Plaintiffs through their Counsel have built into the TDP an assurance that at least 15% of the Trust funds will be held so as to reasonably address the concern that perhaps several hundred additional claimants may present claims in the future. Specifically, in addition to providing for an initial valuation and distribution, the TDP gives the Trustee the ability to adjust payment percentage, and to retain funds sufficient to

reasonably address future claims of non-appearing (exposure only) claimants up to May 28, 2026, which is 40 years after the last possible exposure date. These procedures recognize the latent nature of asbestos disease, and balance the protection of projected future claims against the need to resolve existing claims in a fair and timely manner in view of the equitable considerations of clean hands and unjust enrichment.

Libby Plaintiffs believe that the TDP's procedures are more than adequate to reasonably protect any individuals who, though they have sustained known exposures, have declined the opportunity to appear in these proceedings. Of course, the only way to guarantee that recoveries can continue to be available to any such non-appearing claimant is to retain a disproportionate amount of funds for the indefinite future. To do so would be inequitable for four reasons.

First, it would deprive the current claimants, who have waited years for recoveries from Robinson and who are the great majority of anticipated injured individuals, of the compensation that they are immediately due under any reasonable projection analysis. Second, non-appearing individuals with known exposures<sup>3</sup> to Robinson-sourced vermiculite have not acted with diligence to protect their own interests. Third, non-appearing individuals have not participated

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<sup>3</sup> Such future claimants have not appeared in this proceeding notwithstanding that they necessarily would know of their exposures which, by definition, occurred at least 35 years ago.

in the lengthy and expensive litigation efforts that have finally resulted in the creation of the QSFT funding. This small minority should not be unjustly enriched by a distribution system that favored their *potential* interests over timely payment of the thousands of claimants whose litigation efforts created the QSFT fund at considerable expense. Fourth, the latency period and data of the declining incidence of diagnoses and serious disease demonstrate that the anticipated future claims will be small in comparison to the number who now have qualifying claims which have accrued in the nearly 50 years since the first covered Robinson exposures in December, 1971.

In short, the balance of equities calls for no more than a reasonable system that is calculated to preserve the QSFT fund for a relatively small number of future claimants based on currently available data. The TDP provides just such a reasonable system.

The TDP allow the Trustee to analyze effect of latency given (a) the last insured exposure date of May 28, 1986 (40 years before the end of the Claim period) and (b) the efficiency of publicly funded screening at the CARD clinic to timely identify individuals with medical evidence of asbestos disease. The Trustee's projections will be supported using a large amount of data supplied by Libby Plaintiffs' counsel supporting reasonable assumptions, including data demonstrating:

- the increasingly declining rate of diagnosed asbestos conditions,
- the increasingly declining rate of retention of counsel and presentation of claims,
- the relative disease level in recently diagnosed claimants
- age-related attrition

To reasonably address the latency issue, the TDP uses a future claim window through May 28, 2026, resulting in total claim period of **more than 55 years** from first insurance-covered Robinson exposures (December 20, 1971 to May 28, 2026), and **forty years** from the date of last covered exposure to the close of the Claim presentation period. While it is possible that claims could first arise thereafter, a cutoff is necessary to reasonable accommodation of future claims and four to five-plus decades period should be sufficient to assure that all or nearly all future claimants can participate in view of the latency of asbestos disease. In addition, the Trustee is able to adjust the payment percentage based on a large body of data derivable at the Initial Evaluation Date. This data, together with presumed efficacy of the government funded diagnostic screening program, and the natural attrition of the potential universe of claimants (using the average age of 32 years for exposed individuals in 1977, the average age of the corresponding claimants in 2026 would be 81 years), will give the Trustee a sound basis to

reasonably provide what are projected to be the actual future claims - even though those claimants did not appear or participate in the cost of creating this fund.

VI. Due Process is Satisfied by Actual Notice to All Known Insured Claimants, and Fairness is Assured by Reason of Those Claimants' Participation in the Development of the TDP's Qualification Criteria and Liquidated Value Schedule.

The standard for notice comporting with due process is “the best notice practicable under the circumstances,” including actual notice to all known individuals (e.g. by mailing to last known address). *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 313-19 (1950). Where identification of potentially interested parties, and actual notice thereto is not possible, notice by publication is ordinarily the accepted, expected and best practicable means for achieving notice. *Id.*

In the instant matter, all known claimants with asbestos claims against Robinson entities in the courts of Montana are represented by the attorneys moving for approval of this TDP. In addition, notice of the this motion for approval of distribution procedures will be published in the Great Falls Tribune, Kalispell Daily Interlake and the Western News in Lincoln County, which notice gives exposed individuals the opportunity to appear in this Court, to raise any objection to the fairness of the TDP, and to present any covered claim.

In addition to satisfying notice requirements, the fairness of the TDP is assured by the participation of counsel for thousands of Insured Claimants who, collectively, make up the vast majority of potential Insured Claimants and thus can effectively present the fairness concerns presented by this motion.

The Libby Plaintiffs urge the Court to find that the TDP includes a reasonable and equitable “best notice practicable under the circumstances” (*Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306,313-19 (1950)), and accommodation for claimants who have not appeared despite their knowledge of exposure, given the system for data-supported quantification of anticipatable claims.

A proposed order is submitted with this motion.

Dated this 16<sup>th</sup> day of October, 2020.

/s/ Allan M. McGarvey

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