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**TO:** Members of the Senate Committee on Judiciary & Labor

**FROM:** Representative André Jacque

**DATE:** April 11, 2013

**RE:** Senate Bill 13 – Personal Injury Trust Claims Transparency

Mr. Chairman and members of the committee, thank you for allowing me the opportunity to testify on Senate Bill 13, dealing with personal injury trust claims.

The purpose of SB 13 is to provide transparency and prevent fraud within Wisconsin's court system as it relates to personal injury settlement trusts, creating certain discovery requirements during litigation and ensuring just compensation is available to those for whom the trusts were established. These trusts have been created by certain defendant companies through the federal bankruptcy code and state law to ensure that injured people can be properly compensated.

While most personal injury settlement trusts deal with asbestos, they can also cover many other types of personal injury cases. SB 13 is drafted to reflect all such personal injury settlement trusts that have been created under the bankruptcy code.

Most of what you will hear in today's testimony will likely discuss asbestos trust claims since they are the most prevalent. More than 60 bankrupt companies have created such trusts to compensate present and future asbestos claimants for alleged injuries. Nearly all of the companies most responsible for asbestos injuries – the miners and manufacturers of asbestos – have established such trusts. Many of the companies being sued today had only peripheral involvement in the asbestos business, and are being targeted in large part because they are solvent and provide an additional opportunity to double or triple dip for plaintiffs' attorneys seeking multiple recoveries without having to provide any transparency regarding related litigation.

By filing personal injury trust claims after their lawsuits have concluded, as has become their standard practice, and otherwise hindering access to the exposure information presented to trusts, the plaintiffs' bar is denying businesses an opportunity to fully and fairly defend themselves. This legislation also promotes active filing of trust claims, which often can proceed much quicker than claims through litigation.

I have long been interested in ways for Wisconsin to improve its business climate through tort reform, and have attached to my testimony a *Forbes* magazine article from when I first began researching this issue which discusses the lack of transparency and potential for fraud with personal injury trusts, as highlighted in a Government Accountability Office report. Since I began the drafting process, the lack of transparency associated with these trusts has gained even more prominence.

Just recently, the *Wall Street Journal* published an in-depth article highlighting the rise of asbestos claims with trusts set up by companies, and the potential for abuse due to the lack of transparency. Specifically, the investigative report found significant anomalies with claims filed with the trusts and lawsuits filed against solvent companies. For example, the article found that in many situations plaintiffs filed claims with the bankruptcy trusts, while at the same time sued solvent companies for the same alleged injury.

This issue has also gained attention at the federal level, where the "Furthering Asbestos Claim Transparency (FACT) Act," or H.R. 982, has been introduced to address the lack of transparency related to the trusts.

Under current Wisconsin law, there is no clear way to require a plaintiff who is suing a solvent company to disclose that he or she has filed, or could file, a claim with a personal injury trust. SB 13 ensures that defendants have access to the exposure information contained in the plaintiff's personal injury trust claims and requires plaintiffs in lawsuits to file their trust claims before proceeding to trial. At the same time, the legislation maintains the plaintiffs' rights and remedies as well as judicial discretion regarding evidentiary rules. There is also an amendment we are bringing forward (already introduced in the Assembly) to ensure our original intent that a trial date may be scheduled as soon as the bill's disclosure and trust claims requirements are met, and allows for expedient depositions of plaintiffs and witnesses due to declining health and other emergencies in order to preserve evidence.

This legislation requires that a plaintiff filing a tort action to disclose whether he or she has filed or anticipates filing a claim against a personal injury trust, and allows the defendant to identify a trust not named by the plaintiff, but against whom the defendant believes the plaintiff has a legitimate claim, as well as requires the plaintiff to provide all parties with all documents, records, discovery materials, etc., that are relevant against the trust.

Thank you for the opportunity to testify today on this important reform.

Submitted by Rep. Jacq...

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## THE WALL STREET JOURNAL

WSJ.com

BUSINESS | Updated March 11, 2013, 5:55 a.m. ET

# As Asbestos Claims Rise, So Do Worries About Fraud

By DIONNE SEARCEY and ROB BARRY

Three decades after Manville Corp. collapsed under an avalanche of asbestos litigation, personal-injury claims continue to pile up at a rate of 85 per day.

They find their way to a small office building in suburban Virginia, where processors evaluate the paperwork of pipe fitters and welders and shipbuilders who say they contracted debilitating lung diseases from the company's insulation products. By last March, a Manville bankruptcy trust had already paid out nearly \$4.3 billion.



Dave Ryan/The Beaumont Enterprise

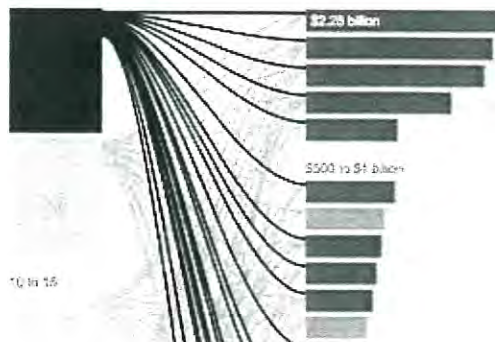
A client of Brent Coon, above, who runs a Texas law firm, got a higher payout by claiming mesothelioma when in fact he died from lung cancer.

So when a beneficiary of one David E. Knight came to the trust saying the former seaman had succumbed to the deadly cancer mesothelioma, the administrators didn't blink. Within five weeks, the claimant received a check for \$26,250.

The only problem: There was no such Mr. Knight. Police say the claim was phony, filed by an employee of a law office specializing in extracting payouts from asbestos bankruptcy trusts. California prosecutors are investigating.

### A Matter of Trust

Highlight the connections between law firms and bankruptcy trusts.



The apparently bogus claim is a footnote in the history of the multibillion-dollar asbestos-litigation industry, but it illustrates a troubling

## Asbestos Through the Years

Asbestos was used for decades in the U.S. starting in the mid-1800s before regulators took action to rein in the mineral that produces cancer-causing fibers.



[More photos and interactive graphics](#)

underside of the nation's longest-running tort. With dozens of asbestos-related manufacturers forced into bankruptcy, a burgeoning swath of the legal action has shifted out of the courtroom and into a nebulous world of trusts that evaluate claims and authorize payouts with little outside scrutiny.

By design, many are guided by teams of plaintiffs' lawyers—the very group that seeks money for clients and has earned billions of dollars in fees on payouts through the years. Fraud allegations have periodically dogged the trusts. And, even though the worst asbestos-related diseases are finally starting to taper off, there is growing concern that the trusts will run out of money before America runs out of asbestos victims.

"Right now there are a lot of suggestions that fraud and abuse are present," says House Judiciary Chairman Bob Goodlatte, a Republican from Virginia, who has scheduled a hearing Wednesday on a bill requiring trusts to publish detailed claims reports to help ensure money goes only to legitimate victims.

In recent months, judges across the country who handle asbestos cases involving still-viable companies have granted defense requests to subpoena bankruptcy trusts to sniff out potentially false and conflicting evidence. Many defendants believe such data could help expose fraudulent or inflated claims that could potentially save them hundreds of millions of dollars in jury verdicts.

As part of an investigation into the state of asbestos litigation, The Wall Street Journal reviewed trust claims and court cases of roughly 850,000 people filed since the late 1980s until as recently as 2012.

The analysis found numerous apparent anomalies: More than 2,000 applicants to the Manville trust said they were exposed to asbestos working in industrial jobs before they were 12 years old.

Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases.

The Manville trust declined to comment on individual cases, citing privacy concerns. The trust's general counsel, David Austern, said the trust tightened its oversight after a 2005 claims scandal, adding: "We audit periodically and haven't found any fraud."

Joseph Rice, of the South Carolina-based Motley Rice law firm that has handled asbestos cases for 30 years, argues that thorough fraud prevention systems would be too costly and would leave less money to pay claims. Mr. Rice, whose firm holds advisory positions on a dozen trusts, including Manville, adds that because the trusts process such a huge volume of claims, "there are going to be errors, and errors are not fraud."

Now numbering more than 40, the trusts represent the assets set aside by insulation makers, cement manufacturers and mining companies. As a group, the trusts set up by the bankrupt firms had at the end of 2010 paid about 3.3 million claims valued at \$17.5 billion, according to a 2011 U.S. Government Accountability Office report. Roughly \$18 billion was left to pay claims as of the end of 2011, trust filings show.

Yet even those huge numbers may not be enough to satisfy the growing throng of people alleging asbestos injury. The number of claims paid by Manville, one of the biggest trusts and generally considered a bellwether, has tripled since 2007.

So fast are assets being depleted that nearly half of the trusts have reduced payments to new victims at least once since 2010. The median payout percentage has dipped to 15% of what the trusts initially determined would be full value, as trusts attempt to preserve assets for future victims. That is the lowest level since 2003, according to economic consultant Bates White, which has defense firms and insurers among its clients for asbestos-related work.

One puzzling complication: Asbestos-related claims continue to rise even though mesothelioma, the most severe asbestos-related disease and one that can take years to emerge in a patient, is waning. According to the National Cancer Institute, the incidence of mesothelioma in the U.S. fell 22% between 1992 and 2009, to 0.96 new cases per 100,000 from 1.23.

Before the U.S. government began regulating asbestos in the late 1980s, it was widely used as a fire retardant and insulator. Manville Corp., North America's largest producer of asbestos-containing products, advertised its materials as "a barrier against weather, time and fire." In fact, when asbestos dust is released in the air, tiny, jagged fibers can lodge in lungs. Cancer and other diseases from breathing in the harmful fibers sometimes don't show up for as long as 20 years or more.

During Manville's bankruptcy proceedings, federal judge [Jack Weinstein](#) noted, "There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public."

In 2001, the company's successor, now called Johns Manville, was purchased by [Warren Buffett's Berkshire Hathaway](#) Inc. According to its website, it makes "formaldehyde-free" insulation that creates a "healthier living environment."

In the wake of Manville's collapse, federal bankruptcy laws were amended to allow the companies to shed asbestos liabilities and keep operating after they set up trusts to pay eligible victims who can prove exposure to their asbestos products.

Top authorities at the trusts, called trustees, are typically appointed by the federal judge overseeing the bankruptcy. Many are retired judges or lawyers with bankruptcy experience. Most are paid an annual salary. Daily operations are usually handled by professional staff.

In most trusts a handful of plaintiffs' attorneys, selected because they represented numerous clients suing the bankrupt company, sit on advisory committees. Most receive no salary, just reimbursements for expenses. But they hold considerable sway, according to trust documents, helping to design general payment policies and, in some cases, signing off on auditing procedures.

Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally

Now—unruly power has a ring in its nose!

WITHIN the mass of pipes, joints, valves and valves, which you may have seen in a great plant, or vast structure of energy, consisting of many divisions.

The power, so essential to production, is now being used to drive through every joint in the system which you have devised for safety.

The power is now being the function of making to produce such results.

These principles and general rules which through science is known of today—through—through a single rule of justice which holds true!

Great stress and more pressure, while the steel that gives back and forward!

But until John Manville introduced the patented Best Ring Rolling, the heavy pressure which comes and every joint would be exposed only to great stress for the long years of the life of the plant and its production.

—more and less and less of stress.

Be sure to see our new—this is the only one available to the man.

It is impossible to estimate how much and what kind of equipment has been damaged by the introduction of the Best Ring—has saved a great deal. Thousands of horsepower, which would have been lost in a moment, are now used to drive the machinery.

The John Manville Best Ring is a product of the John Manville Best Ring, in keeping with the company's name.

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Everett Collection

A 1920s ad from Manville Corp., which has varied its name over the years.



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Q&A: What's the Asbestos Risk Today?

require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.

Solvent companies are still being sued in court, and a single asbestos verdict or settlement can still net millions of dollars for asbestos victims and their attorneys, who collect fees of up to 40%. A California jury in June awarded \$48 million to the family of a mesothelioma patient who said he inhaled asbestos fibers working as a contractor.

Meanwhile, the bankrupt companies' trusts pay liquidated claims for pennies on the dollar of what they would be worth in court, so a single claim against a single trust isn't especially valuable. But there is no limit to how many trusts a person can tap. That is because it is impossible to trace asbestos fibers in lungs to a particular company. Numerous trusts offer on their websites lists of job site locations that will qualify claims if victims can offer credible evidence they worked there and were injured from asbestos exposure there. Some legal offices have mastered the various eligibility rules for each trust.

John Lynch, an employee of the California-based Asbestos Legal Center who police allege filed the phony mesothelioma claim to Manville, had worked in the past

at a company that processed claims for several other trusts. In this previous job, he ensured that attorneys provided proper proof their clients spent time toiling on qualifying Naval ships or in shipyards during periods when the trusts' asbestos products were in use.

The Legal Center's founder, Michael Mandelbrot, said he hired Mr. Lynch in 2010 to join his small office so he could tap into that expertise.

Mr. Mandelbrot called police when he learned about the allegedly false claim, which he said Mr. Lynch filed on his own. Mr. Lynch is no longer employed at the law office.

Petaluma, Calif., police and Sonoma County prosecutors are investigating. Mr. Lynch hasn't been charged. He and his public defender didn't respond to requests for comment.

Several trusts have raised broader questions about Mr. Mandelbrot's operation. In federal bankruptcy court filings, lawyers for three trusts—Western Asbestos Settlement Trust, the J.T. Thorpe Settlement Trust and the Thorpe Insulation Settlement Trust—say they suspect Mr. Mandelbrot's law office has submitted unreliable information about numerous clients' asbestos exposure and has withheld evidence that could scuttle or reduce the value of their claims.

According to court filings, the claims include those from nurses who say they were exposed to asbestos on the job when they chipped paint from boilers—which the trusts allege is incongruous work for that occupation. They also say Mr. Mandelbrot's office has filed claims from distant

relatives of dead people who are able to assemble meticulous, decades-old lists of job sites where the victims worked that qualify them for a payout.

Mr. Mandelbrot denies his law office engaged in any misconduct.

"For an office that has built itself up on helping these victims and always having checks and balances in place, to be accused of these things...it really is a tragedy, what's happening," Mr. Mandelbrot said.

Mr. Mandelbrot, whose office has filed more than 3,000 claims to dozens of trusts, said the Manville trust offers the simplest route to getting his clients' claims paid. "They admit their products were everywhere," he said. "It's very easy. You don't have to really produce much."

Manville and most other trusts consider claims to be legal settlements that contain personal health information and refuse to provide detailed information about them. The opportunity for abuse flourishes as a result, say some politicians, judges and defense lawyers.

William Warfield's estate sued Union Carbide and several other solvent companies in Circuit Court for Baltimore City blaming them for the mesothelioma that eventually killed him in 2007. In a deposition, Mr. Warfield said he had been exposed to asbestos products only between 1965 and 1985 when he worked in a federal government job as a carpenter. But his claims to nine bankruptcy trusts, including Manville, said he was exposed between 1947 and 1991, according to court records.

Circuit Judge John M. Glynn noted the differences and in a 2010 hearing called them "dramatically inconsistent exposure allegations," and suggested the dates may have been changed to skirt a state law that would have hurt the value of his case. Had Mr. Warfield claimed in his court case he was exposed to asbestos after 1985, he would have been subject to certain Maryland laws that cap damage awards.

According to court records, the judge later described the case by saying, "the truth was jettisoned on a wholesale basis in pursuit of money."

The attorney for Mr. Warfield's beneficiaries, Edward Monaghan from the Law Offices of Peter G. Angelos, declined to comment on the case, which is still pending. The Angelos firm later noted in a written statement that Mr. Monaghan had told the judge evidence standards for trust claims are different than those for trial.

In an interview, Judge Glynn, who presides over one of the largest asbestos dockets in the nation with about 500 active cases a year involving solvent defendants, said trust claimants "make these rather thin allegations, and they don't require any real proof."

He added: "It comes across as the plaintiffs' lawyers see this as free money."

In its analysis, the Journal found 2,689 Manville applicants through 2005 who claimed to be working in various labor-intensive occupations while under the age of 12. Among them were 753 people who claimed their exposure to asbestos began while working in construction before turning 12; 356 people who said they were metal workers; and 184 chemical workers.

It is possible that some claim dates were recorded erroneously or the occupation listed on the claim may actually be that of an adult family member who tracked the asbestos dust home on their clothing, according to people familiar with Manville's claims processing.

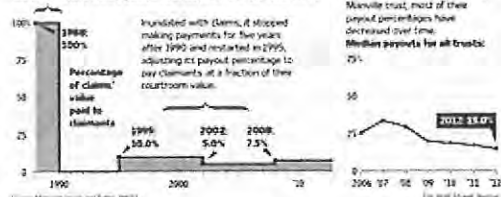
Meanwhile, at least 312 people submitted mesothelioma claims to Manville while describing the disease as lung cancer in filings to public court dockets or other bankruptcy trusts.

Manville assigns the highest value of payment to mesothelioma, a cancer of the lining of the lungs or other organs, because it is fatal, generally progresses rapidly and causes much suffering.

One law firm that made disparate filings was Brent Coon and Associates of Beaumont, Texas. Mr. Coon, who plays guitar in a rock band and is known for Christmas parties featuring performers such as Foreigner, represented Richard Baker, a Nevada electrician and smoker whose death certificate and pathology reports say he died of lung cancer in 2005. His claim forms to at least seven trusts say he died of lung cancer, as did his sweeping lawsuit against 42 solvent companies filed in state court in Harris County, Texas. The suit, stuck in a gummed up asbestos docket, is still pending.

#### Paying Down Claims

The Manville Personal Injury Settlement Trust was one of the first asbestos trusts. It initially paid claims at 100% of their courtroom value.



But to the Manville trust, Mr. Coon's firm said that its client had mesothelioma—despite pathology reports submitted to the trust that listed Mr. Baker's disease as lung cancer, a distinctly different diagnosis. In December 2004, the trust accepted Mr. Baker's mesothelioma claim and offered him the standard value it assigns to that disease, a payout of about \$17,500. Had his disease been listed as lung cancer the value would have been \$4,750.

When contacted for comment, Mr. Baker's beneficiary, Carol Bellman, referred calls to Mr. Coon's firm. Mr. Coon said his files for the case were likely tucked away in storage.

"What we try to do with our clients is get them what we can, where we can," said Mr. Coon, who sits on the advisory committee overseeing the roughly \$1 billion in the trust set up by Combusting Engineering Inc. "Since we have thousands and thousands of these cases, we get work histories and their medical histories, and I'm sure there are errors made from time to time."

Mr. Coon said his clients "are victims of the worst corporate mass genocide in history, one that has taken the lives of millions of industrial workers and their innocent families...and they get off making token payments for what they have done to these people."

The trust has faced problems before. In 2005, a federal judge's ruling in Texas led to the determination that doctors were fraudulently diagnosing numerous plaintiffs with asbestos-related diseases. The judge, Janis Graham Jack of Houston, discovered that in mass screenings a handful of doctors were diagnosing silica dust-related diseases in the same patients already diagnosed with asbestos-related diseases at improbably high rates. Concerned some claims could be fraudulent, Manville and others banned payments to people who included reports from several doctors and X-ray screening companies. Tens of thousands of claims to Manville had relied on them.

Immediately following the scandal, payouts by the Manville trust dropped dramatically. They began to rise again in 2007 and have since climbed at a steady annual pace.

Manville's longtime managing trustee, Robert Falise, a former executive vice president of Irving Bank Corp., said: "We're paying out over \$100 million in claims [annually] so it doesn't take much mathematics to figure out that won't go on forever."



Draining the fund are claims such as one from Gail Garner, who in 2000 filed a claim on behalf of her father, Angelo Palermo. Ms. Garner obtained a diagnosis of a type of mesothelioma for him 37 years after he died.

Mr. Palermo's April 1966 death certificate lists his cause of death at age 51 as "acute liver failure due to metastasis cancer due to primary stomach (place of origin)." Ms. Garner said he once worked for Manville.

Armed with the death certificate, a blurry torso X-ray and brief medical notations, Ms. Garner asked pulmonologist William Beckett to offer a second opinion. Dr. Beckett, who was working in Rochester, N.Y., at the time, concluded that given Mr. Palermo's job history at asbestos work sites it was "quite possible" he suffered from mesothelioma of the stomach, a condition that medical experts believe is caused by asbestos exposure.

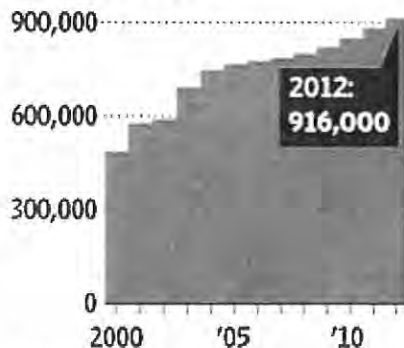
In an interview, Dr. Beckett, who now practices in Massachusetts, stood by his diagnosis. He said he came to his conclusion "given [Mr. Palermo's] exposure history and everything I could find out from his daughter and his medical records, which were pretty sparse."

The Manville trust reviewed Dr. Beckett's conclusion and eventually awarded her father's estate the highest possible payout. Ms. Garner, in an interview, wouldn't confirm the award but given Manville's payout percentages during the time frame her claim was processed she received as little as \$37,500 or as much as \$75,000.

"The panel finds this decision to be a particularly difficult one," Manville counsel Mr. Austern wrote on June 6, 2003, explaining the award to Ms. Garner.

## Toxic Heap

Cumulative number of claims received by Manville asbestos trust since 1998



Source: Manville trust annual reports  
The Wall Street Journal

"On the one hand, the deceased claimant has been able to produce very little by way of medical evidence to challenge the diagnosis/death decision that was made 34 years ago. On the other hand, there was extensive pain and suffering in this case, and early death, and abundant and apparent exposure to asbestos. In the totality of the circumstances, the Panel believes this claim deserves extraordinary consideration."

At least three other trusts paid Ms. Garner's claim, but she sued two others, including the DII Industries LLC Asbestos PI Trust, in federal court when they did not.

"From the trust perspective there really was never any diagnosis," said Beth Petronio, a K&L Gates attorney for the DII trust. The trust eventually settled the case after Ms. Garner lost and then appealed, because "at some point, litigation is costly," Ms. Petronio said.

Ms. Garner said in an interview she pursued the claims "because of the love of my father and how he died in a horrible and tragic, suffering death, how we had to grow up with my father not in my life."

Ms. Garner said she plans to write a how-to book on successfully filing claims to asbestos trusts.

—James Oberman contributed to this article.

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## TESTIMONY OF TREVOR J. WILL TO THE SENATE JUDICIARY COMMITTEE REGARDING SB13/AB19

April 11, 2013

My name is Trevor J. Will. Thank you for allowing me to testify on Assembly Bill 19/Senate Bill 13. I am a partner in Foley & Lardner LLP in the firm's Milwaukee, Wisconsin office. I was admitted to the Wisconsin bar in 1978 and have practiced here continuously since then. I began handling asbestos litigation in 1984 and have been engaged in asbestos litigation ever since. Over that time I have represented various companies that made or sold asbestos-containing materials, including a number of companies that filed for bankruptcy and established trusts (although I did not represent any of them in their bankruptcy proceedings). I have not represented individuals claiming to have contracted an asbestos-related condition or disease. I am appearing at the request of the Wisconsin Civil Justice Council, Inc. My testimony represents my views, and not the views of any of my clients.

My testimony will address three areas:

1. Why this bill is needed.
2. Why this bill will not – as its opponents charge – delay the progress of asbestos cases, deny individuals with asbestos disease a day in court, or deprive individuals with asbestos-related conditions of fair compensation for their injuries.
3. Why this legislation is consistent with Wisconsin's traditional approach to evaluating and assessing fault for personal injuries.

### **I. THIS LEGISLATION IS NEED TO PREVENT DOUBLE DIPPING AND ASSURE THAT DEFENDANTS PAY ONLY THEIR FAIR SHARE OF ANY DAMAGES THEY CAUSED.**

Virtually every plaintiff who brings a claim for asbestos-related injuries also has a right to file claims with one or more of the trusts created under the bankruptcy laws by companies that made and sold asbestos-containing products. Those trusts were established under the supervision of the bankruptcy courts to provide appropriate compensation to individuals harmed by the bankrupt companies' asbestos-containing products. This gives plaintiffs two ways in which to pursue recovery for asbestos injuries – the courtroom and the bankruptcy trusts claim process.

In litigation the plaintiffs (and co-worker witnesses) testify about their claimed exposure to asbestos-containing products or materials made by the defendants. Often, the witnesses profess to have little or no recollection of exposure to asbestos-containing products made and sold by companies which previously filed bankruptcy and established trusts. Not infrequently, when the defendants seek to learn whether the plaintiffs have filed claims with any trusts (and if so, to get copies of the claims documents), the response is that no such claims have been filed yet. Then, after the lawsuit is resolved (or at least after discovery is concluded), plaintiff's counsel submits claim forms to multiple bankruptcy trusts asserting that the plaintiff in fact qualifies for compensation from the trusts because he was exposed to products for which those trusts are responsible. This type of "gamesmanship" is possible because the time limit for filing a claim with a bankruptcy trust from the diagnosis of an asbestos-related disease is considerably longer than the statute of limitations for filing a lawsuit.

Even in those instances in which plaintiffs have filed some bankruptcy trust claim forms while a lawsuit is pending, the problems are not eliminated. First, plaintiff's counsel will object to producing the trust claim documents to defendants on a variety of grounds. If production is ordered, the plaintiffs then take the position that the documents (and the claims made in them) are not admissible in evidence in the trial for a variety of reasons. Even if admissible, plaintiffs then argue that the documents are not relevant or sufficient to establish proof of exposure to the products for which the bankruptcy trust is responsible because the degree of proof necessary to support a jury finding is supposedly different than the proof required to qualify for payment by the trusts. Plaintiffs' counsel simply do not want the jury to be able to consider the plaintiff's exposure to the products of bankrupt companies because that consideration may result in the jury reducing the share of the fault (if any) assigned to the defendants.

The vast majority of asbestos cases are resolved by settlement and the settlement values of the case depend in significant part on counsel's assessment of how much fault the jury is likely to attribute to a particular defendant. By hiding the exposure to the bankrupt companies' products from the jury, plaintiffs' counsel seek to recover an unfair settlement (or verdict) from the defendants. Then, by later recovering from the bankruptcy trusts, the plaintiff's counsel can "double dip."

This problem is particularly significant because most of the defendants in asbestos litigation today are not companies that manufactured the asbestos products – such as thermal insulation materials – that were responsible for most of the asbestos exposure experienced by American workers. By and large, those companies (such as Johns-Manville, Owens-Corning, Eagle-Picher, etc.) filed bankruptcy, reorganized, and established trusts. Many of the companies that are being sued today have a much more tangential involvement with asbestos. For example, Tecumseh, Kohler and Briggs & Stratton get sued in asbestos litigation because some of their small engines used asbestos-containing gasket material manufactured by other companies.

The companies making the gaskets selected the materials to use and the gaskets were simply incorporated into the engines by the manufacturers. Or, companies like Miller Brewing Company, Wisconsin Electric Power Company (and other utilities), Ladish, Harnischfeger and others get sued for having "unsafe premises" due to the fact that asbestos-containing thermal insulation products were installed in their facilities. These Wisconsin companies are not the companies that the

opponents of this legislation are talking about when they complain that asbestos manufacturers covered up the dangers of asbestos and failed to warn workers about the hazards of their products. But these are the companies that pay the price of not having access to the trust claim materials and/or not being able to use those materials at trial to show the complete picture of the plaintiff's exposure to asbestos. This bill would end the concealment of that information so that asbestos cases in Wisconsin can be settled or tried based on all of the relevant information.

## **II. THE BILL WOULD NOT RESULT IN THE PARADE OF HORRIBLES RAISED BY OPPONENTS OF THE LEGISLATION**

Opponents of the legislation have falsely claimed that it will have certain undesirable affects. Their claims are not accurate:

### **1. The bill will not delay resolution of asbestos cases.**

This bill was not designed or intended to slow the pace at which asbestos cases are resolved. It is intended only to make sure that when such cases are resolved, they are resolved based on the full disclosure of relevant information. The bill will not slow the progress of asbestos litigation as long as plaintiffs' counsel diligently file bankruptcy trust claims with the appropriate trusts. This is not an onerous requirement. As part of every asbestos case, plaintiffs' counsel (which typically specialize in handling asbestos litigation) must at the outset determine the work history of their clients and the products to which they claim exposure. Those companies not in bankruptcy that made, sold, or installed products to which exposure is claimed will be named as defendants in the complaint filed in court. For those companies that previously filed for bankruptcy that made, sold or installed products to which exposure is claimed, a trust claim needs to be filed. But the trust claim forms are not lengthy or onerous and counsel that handle asbestos litigation for plaintiffs have employees familiar with the forms who complete them as a regular part of their job. Indeed, these trust claim forms will eventually be completed and submitted, so the bill does not require any extra work. It just requires that the trust claims be made at the outset of the litigation instead of being held back until after the lawsuit is resolved.

### **2. This legislation will not cause plaintiffs to die before they have an opportunity to testify.**

This unfair claim is a variant on the delay claim. It stems from the fact that individuals diagnosed with a rare form of cancer associated with asbestos exposure called mesothelioma have relatively short (typically less than a year) life expectancies following diagnosis. The fact is that even under today's system, most of those individuals diagnosed with mesothelioma do not survive to the trial date. That does not mean, however, that they are denied an opportunity to testify. It is routine in asbestos cases to take the videotaped deposition of the plaintiff to make sure that his testimony (the vast majority of individuals with asbestos-related conditions are men) is preserved for trial. An amendment to the bill will expressly permit that type of discovery to preserve the testimony of the injured individual regardless of whether plaintiff's counsel has diligently submitted trust claim forms as required by the bill.

Thus, if plaintiffs' counsel are diligent about completing the claim forms, asbestos cases will take no longer than they do now and this bill will have no impact on whether plaintiffs are able to testify in their own cases. But even if plaintiffs' counsel is not diligent in completing the claim forms, the amendment to the bill will insure that every plaintiff will be able to testify in his (or her) case.

### **3. The bill will not deprive individuals injured by asbestos of fair compensation.**

Wisconsin law says that in most instances, companies or individuals are only responsible for their share of the total damages awarded by a jury. See, Wis. Stat. § 895.045. Our state's public policy, as expressed in its laws, is that defendants should not pay more than the share of the plaintiff's damages which they caused and should not, absent unusual circumstances, pay for the harm caused by others. The bill will not change that. Rather, it will make sure that the defendants in the lawsuit do not have to pay for damages caused by companies that filed bankruptcy and established settlement trusts. Distorting the jury's assessment of fault by concealing the information submitted in bankruptcy trust claim forms about a plaintiff's exposure to asbestos products of bankrupt companies improperly increases the liability of defendants and may unjustly force them into bankruptcy. Compensation is not "fair" if it is based on keeping from the jury relevant information that will be used in a different context to obtain additional compensation from the trusts. This bill does not limit the amount of compensation that a claimant can seek or recover, nor does it restrict the sources from which a claimant can seek recovery. It simply prevents a defendant from having to pay an unfair portion of that recovery – to pay for damages it did not cause.

### **III. THIS LEGISLATION IS CONSISTENT WITH WISCONSIN'S APPROACH TO ALLOCATING FAULT AMONG THOSE RESPONSIBLE FOR INJURIES**

Historically, Wisconsin has taken the position that the jury should consider the evidence regarding all of the individuals or entities whose actions contributed to cause the plaintiff's injury. This is true even though some of the actors who are at fault cannot be sued. For example, employers protected from suit by the workers' compensation laws, governmental bodies with statutorily limited liability, companies that have been discharged in bankruptcy, defendants that have settled the case, or foreign entities that are not subject to jurisdiction in a Wisconsin court all can – if there is appropriate evidence introduced at trial – be placed on the special verdict form so the jury can determine whether they were at fault and if so, what share of the damages they caused.

Wisconsin law permits this even though by allowing the jury to assign fault to entities that are not parties to the case and may not be collectible by the plaintiff, there is a risk that a certain portion of the damages awarded by a jury may not be recovered. This bill does not create that situation. It simply assures – consistent with long-standing Wisconsin law – that all of the evidence of the plaintiff's exposure to asbestos-containing materials is presented to the jury for the jury's evaluation. It seeks to prevent the plaintiff's counsel – through gamesmanship – from obtaining double recoveries from two different sources by refusing to disclose in the lawsuit the evidence relied upon to recover from the bankruptcy trusts.



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## Assembly Bill 19/Senate Bill 13 Personal Injury Trust Fund Transparency Legislation FAQ

- *What are asbestos bankruptcy trusts?*
  - Asbestos bankruptcy trusts (“trusts”) are personal injury settlement trusts created by defendant companies through federal bankruptcy law. The trusts are designed to address a defendant’s present and future asbestos-related liabilities.
  - The companies most directly responsible for asbestos injuries mined and supplied raw asbestos or manufactured products containing high levels of especially toxic forms of asbestos. A vast majority of these so-called “primary defendants” have filed for bankruptcy and established trusts.
  - A trust is created and funded at the conclusion of the bankruptcy process and assumes *all* of a bankrupt company’s asbestos liabilities. Put another way, a company that establishes a trust is effectively removed from the tort system. Because so many “primary defendants” have established trusts, nearly all present day asbestos litigation involves businesses that were only peripherally involved in the production of asbestos or asbestos-containing products.
- *How many companies have gone through this process?*
  - Since the first trust was approved in 1986, more than of **60 companies** have created trusts to address their asbestos liabilities, and it is certain that more trusts will be established in future.
- *How much money is in the trusts?*
  - A recent government report revealed that the trusts control more than **\$36 billion**.
- *What is the average recovery from these trusts?*
  - Only the trial bar knows for sure, but respected economic analysis firm Bates White has estimated that a claimant with asbestosis will recover **\$400,000** from trusts, while a claimant with mesothelioma may recover more than **\$1.6 million**.
- *Why does this matter?*
  - Each person who files an asbestos-related tort claim in Wisconsin likely has claims against multiple trusts.
  - There is currently no statutory requirement for plaintiffs to disclose, and plaintiffs often fail to disclose, their trust claims and payments in the tort system. And, in many cases, plaintiffs will wait to file their trust claims until *after* resolution of their court case.

- By failing to disclose or delaying the filing of their trust claims, plaintiffs ensure they have nothing to disclose to solvent defendants in court. This also positions them to **double dip** by recovering once from businesses and then again from the trusts.
- *Why is this unfair?*
  - In the trust claim filing, the claimants present **exposure information** and make affirmative claims as to cause of their injuries that is often highly relevant to court cases. Without access to this information, businesses can't fully and fairly defend themselves in court.
  - The unavailability of trust claims information in the tort system also **incentivizes contradictory claims about asbestos exposures**. For example, in a well-known Ohio case captioned *Kananian v. Lorillard Tobacco Company*, an asbestos claimant told a trust that he was exposed to its asbestos as a World War II shipyard worker. But in his tort suit he claimed he only passed through the shipyard while serving in the U.S. Army.
  - Contradictory filings of this nature are difficult, if not impossible, to discover when trust claims are filed after the resolution of tort suits.
  - Also, trust recoveries are not always factored into the resolution of court cases. This is especially true when trust claims are filed only after tort suits are finished. As a result of this **"double dipping"** defendants in Wisconsin are often required to pay more than their fair share of liability.
- *What are other states doing?*
  - Judges in West Virginia, California, and Massachusetts issued case management orders that require asbestos litigants to disclose trust-related information. A Pennsylvania judge issued an order that requires plaintiffs to file all available trust claims before trial and to provide defendants with copies of all filings.
  - Ohio recently enacted legislation that would require asbestos plaintiffs to timely file and disclose their trust claims. Similar legislation is being considered in Texas, Louisiana, Pennsylvania, and Oklahoma.
- *What can Wisconsin do to fix this problem?*
  - Enact legislation that would require plaintiffs in asbestos suits to file their trust claims before proceeding to trial, ensure that defendants have access to the exposure information contained in those claims, and effectively end inconsistent claiming and double dipping in Wisconsin.

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**THE WALL STREET JOURNAL**

WSJ.com

BUSINESS | Updated March 11, 2013, 5:55 a.m. ET

# As Asbestos Claims Rise, So Do Worries About Fraud

By DIONNE SEARCEY and ROB BARRY

Three decades after Manville Corp. collapsed under an avalanche of asbestos litigation, personal-injury claims continue to pile up at a rate of 85 per day.

They find their way to a small office building in suburban Virginia, where processors evaluate the paperwork of pipe fitters and welders and shipbuilders who say they contracted debilitating lung diseases from the company's insulation products. By last March, a Manville bankruptcy trust had already paid out nearly \$4.3 billion.



Dave Ryan/The Beaumont Enterprise

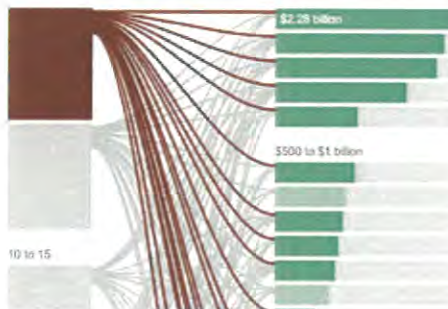
A client of Brent Coon, above, who runs a Texas law firm, got a higher payout by claiming mesothelioma when in fact he died from lung cancer.

So when a beneficiary of one David E. Knight came to the trust saying the former seaman had succumbed to the deadly cancer mesothelioma, the administrators didn't blink. Within five weeks, the claimant received a check for \$26,250.

The only problem: There was no such Mr. Knight. Police say the claim was phony, filed by an employee of a law office specializing in extracting payouts from asbestos bankruptcy trusts. California prosecutors are investigating.

### A Matter of Trust

Highlight the connections between law firms and bankruptcy trusts.



The apparently bogus claim is a footnote in the history of the multibillion-dollar asbestos-litigation industry, but it illustrates a troubling underside of the nation's

### Asbestos Through the Years

longest-running tort. With dozens of asbestos-related manufacturers forced into bankruptcy, a burgeoning

Asbestos was used for decades in the U.S. starting in the mid-1800s before regulators took action to rein in the mineral that produces cancer-causing fibers.



**More photos and interactive graphics**

swath of the legal action has shifted out of the courtroom and into a nebulous world of trusts that evaluate claims and authorize payouts with little outside scrutiny.

By design, many are guided by teams of plaintiffs' lawyers—the very group that seeks money for clients and has earned billions of dollars in fees on payouts through the years. Fraud allegations have periodically dogged the trusts. And, even though the worst asbestos-related diseases are finally starting to taper off, there is growing concern that the trusts will run out of money before America runs out of asbestos victims.

"Right now there are a lot of suggestions that fraud and abuse are present," says House Judiciary Chairman Bob

Goodlatte, a Republican from Virginia, who has scheduled a hearing Wednesday on a bill requiring trusts to publish detailed claims reports to help ensure money goes only to legitimate victims.

In recent months, judges across the country who handle asbestos cases involving still-viable companies have granted defense requests to subpoena bankruptcy trusts to sniff out potentially false and conflicting evidence. Many defendants believe such data could help expose fraudulent or inflated claims that could potentially save them hundreds of millions of dollars in jury verdicts.

As part of an investigation into the state of asbestos litigation, The Wall Street Journal reviewed trust claims and court cases of roughly 850,000 people filed since the late 1980s until as recently as 2012.

The analysis found numerous apparent anomalies: More than 2,000 applicants to the Manville trust said they were exposed to asbestos working in industrial jobs before they were 12 years old.

Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases.

The Manville trust declined to comment on individual cases, citing privacy concerns. The trust's general counsel, David Austern, said the trust tightened its oversight after a 2005 claims scandal, adding: "We audit periodically and haven't found any fraud."

Joseph Rice, of the South Carolina-based Motley Rice law firm that has handled asbestos cases for 30 years, argues that thorough fraud prevention systems would be too costly and would leave less money to pay claims. Mr. Rice, whose firm holds advisory positions on a dozen trusts, including Manville, adds that because the trusts process such a huge volume of claims, "there are going to be errors, and errors are not fraud."

Now numbering more than 40, the trusts represent the assets set aside by insulation makers, cement manufacturers and mining companies. As a group, the trusts set up by the bankrupt firms had at the end of 2010 paid about 3.3 million claims valued at \$17.5 billion, according to a 2011 U.S. Government Accountability Office report. Roughly \$18 billion was left to pay claims as of the end of 2011, trust filings show.

Yet even those huge numbers may not be enough to satisfy the growing throng of people alleging asbestos injury. The number of claims paid by Manville, one of the biggest trusts and generally considered a bellwether, has tripled since 2007.

So fast are assets being depleted that nearly half of the trusts have reduced payments to new victims at least once since 2010. The median payout percentage has dipped to 15% of what the trusts initially determined would be full value, as trusts attempt to preserve assets for future victims. That is the lowest level since 2003, according to economic consultant Bates White, which has defense firms and insurers among its clients for asbestos-related work.

One puzzling complication: Asbestos-related claims continue to rise even though mesothelioma, the most severe asbestos-related disease and one that can take years to emerge in a patient, is waning. According to the National Cancer Institute, the incidence of mesothelioma in the U.S. fell 22% between 1992 and 2009, to 0.96 new cases per 100,000 from 1.23.

Before the U.S. government began regulating asbestos in the late 1980s, it was widely used as a fire retardant and insulator. Manville Corp., North America's largest producer of asbestos-containing products, advertised its materials as "a barrier against weather, time and fire." In fact, when asbestos dust is released in the air, tiny, jagged fibers can lodge in lungs. Cancer and other diseases from breathing in the harmful fibers sometimes don't show up for as long as 20 years or more.

During Manville's bankruptcy proceedings, federal judge [Jack Weinstein](#) noted, "There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public."

In 2001, the company's successor, now called Johns Manville, was purchased by [Warren Buffett's Berkshire Hathaway](#) Inc. According to its website, it makes "formaldehyde-free" insulation that creates a "healthier living environment."

In the wake of Manville's collapse, federal bankruptcy laws were amended to allow the companies to shed asbestos liabilities and keep operating after they set up trusts to pay eligible victims who can prove exposure to their asbestos products.



Everett Collection

A 1920s ad from Manville Corp., which has varied its name over the years.

Top authorities at the trusts, called trustees, are typically appointed by the federal judge overseeing the bankruptcy. Many are retired judges or lawyers with bankruptcy experience. Most are paid an annual salary. Daily operations are usually handled by professional staff.

In most trusts a handful of plaintiffs' attorneys, selected because they represented numerous clients suing the bankrupt company, sit on advisory committees. Most receive no salary, just reimbursements for expenses. But they hold considerable sway, according to trust documents, helping to design general payment policies and, in some cases, signing off on auditing procedures.

Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.

**Read More****Q&A: What's the Asbestos Risk Today?**

Solvent companies are still being sued in court, and a single asbestos verdict or settlement can still net millions of dollars for asbestos victims and their attorneys, who collect fees of up to 40%. A California jury in June awarded \$48 million to the family of a mesothelioma patient who said he inhaled asbestos fibers working as a contractor.

Meanwhile, the bankrupt companies' trusts pay liquidated claims for pennies on the dollar of what they would be worth in court, so a single claim against a single trust isn't especially valuable. But there is no limit to how many trusts a person can tap. That is because it is impossible to trace asbestos fibers in lungs to a particular company. Numerous trusts offer on their websites lists of job site locations that will qualify claims if victims can offer credible evidence they worked there and were injured from asbestos exposure there. Some legal offices have mastered the various eligibility rules for each trust.

John Lynch, an employee of the California-based Asbestos Legal Center who police allege filed the phony mesothelioma claim to Manville, had worked in the past at a company that processed claims for several other trusts. In this previous job, he ensured that attorneys provided proper proof their clients spent time toiling on qualifying Naval ships or in shipyards during periods when the trusts' asbestos products were in use.

The Legal Center's founder, Michael Mandelbrot, said he hired Mr. Lynch in 2010 to join his small office so he could tap into that expertise.

Mr. Mandelbrot called police when he learned about the allegedly false claim, which he said Mr. Lynch filed on his own. Mr. Lynch is no longer employed at the law office.

Petaluma, Calif., police and Sonoma County prosecutors are investigating. Mr. Lynch hasn't been charged. He and his public defender didn't respond to requests for comment.

Several trusts have raised broader questions about Mr. Mandelbrot's operation. In federal bankruptcy court filings, lawyers for three trusts—Western Asbestos Settlement Trust, the J.T. Thorpe Settlement Trust and the Thorpe Insulation Settlement Trust—say they suspect Mr. Mandelbrot's law office has submitted unreliable information about numerous clients' asbestos exposure and has withheld evidence that could scuttle or reduce the value of their claims.

According to court filings, the claims include those from nurses who say they were exposed to asbestos on the job when they chipped paint from boilers—which the trusts allege is incongruous work for that occupation. They also say Mr. Mandelbrot's office has filed claims from distant relatives of dead people who are able to assemble meticulous, decades-old lists of job sites where the victims worked that qualify them for a payout.

Mr. Mandelbrot denies his law office engaged in any misconduct.

"For an office that has built itself up on helping these victims and always having checks and balances in place, to be accused of these things...it really is a tragedy, what's happening," Mr. Mandelbrot said.

Mr. Mandelbrot, whose office has filed more than 3,000 claims to dozens of trusts, said the Manville trust offers the simplest route to getting his clients' claims paid. "They admit their products were everywhere," he said. "It's very easy. You don't have to really produce much."

Manville and most other trusts consider claims to be legal settlements that contain personal health information and refuse to provide detailed information about them. The opportunity for abuse flourishes as a result, say some politicians, judges and defense lawyers.

William Warfield's estate sued Union Carbide and several other solvent companies in Circuit Court for Baltimore City blaming them for the mesothelioma that eventually killed him in 2007. In a deposition, Mr. Warfield said he had been exposed to asbestos products only between 1965 and 1985 when he worked in a federal government job as a carpenter. But his claims to nine bankruptcy trusts, including Manville, said he was exposed between 1947 and 1991, according to court records.

Circuit Judge John M. Glynn noted the differences in court. Had Mr. Warfield claimed in his court case he was exposed to asbestos after 1985, he would have been subject to certain Maryland laws that cap damage awards.

The attorney for Mr. Warfield's beneficiaries, Edward Monaghan from the Law Offices of Peter G. Angelos, declined to comment on the case, which is still pending. The Angelos firm later noted in a written statement that Mr. Monaghan had told the judge evidence standards for trust claims are different than those for trial.

In an interview, Judge Glynn, who presides over one of the largest asbestos dockets in the nation with about 500 active cases a year involving solvent defendants, said trust claimants "make these rather thin allegations, and they don't require any real proof."

He added: "It comes across as the plaintiffs' lawyers see this as free money."

In its analysis, the Journal found 2,689 Manville applicants through 2005 who claimed to be working in various labor-intensive occupations while under the age of 12. Among them were 753 people who claimed their exposure to asbestos began while working in construction before turning 12; 356 people who said they were metal workers; and 184 chemical workers.

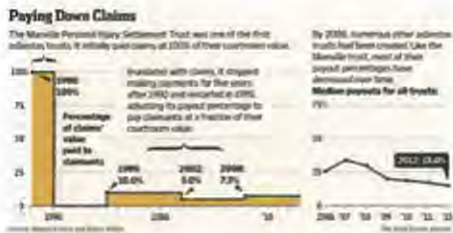
It is possible that some claim dates were recorded erroneously or the occupation listed on the claim may actually be that of an adult family member who tracked the asbestos dust home on their clothing, according to people familiar with Manville's claims processing.

Meanwhile, at least 312 people submitted mesothelioma claims to Manville while describing the disease as lung cancer in filings to public court dockets or other bankruptcy trusts.

Manville assigns the highest value of payment to mesothelioma, a cancer of the lining of the lungs or other organs, because it is fatal, generally progresses rapidly and causes much suffering.

One law firm that made disparate filings was Brent Coon and Associates of Beaumont, Texas. Mr. Coon, who plays guitar in a rock band and is known for Christmas parties featuring performers such as Foreigner, represented Richard Baker, a Nevada electrician and smoker whose death certificate and pathology reports say he died of lung cancer in 2005. His claim forms to at least seven trusts say he died of lung cancer, as did his sweeping lawsuit against 42 solvent companies filed in state court in Harris County, Texas. The suit, stuck in a gummed up asbestos docket, is still pending.

But to the Manville trust, Mr. Coon's firm said that its client had mesothelioma—despite pathology reports submitted to the trust that listed Mr. Baker's disease as lung cancer, a distinctly different diagnosis. In December 2004, the trust accepted Mr. Baker's mesothelioma claim and offered him the standard value it assigns to that



disease, a payout of about \$17,500. Had his disease been listed as lung cancer the value would have been \$4,750.

When contacted for comment, Mr. Baker's beneficiary, Carol Bellman, referred calls to Mr. Coon's firm. Mr. Coon said his files for the case were likely tucked away in storage.

"What we try to do with our clients is get them what we can, where we can," said Mr. Coon, who sits on the advisory committee overseeing the roughly \$1 billion in the trust set up by Combusting Engineering Inc. "Since we have thousands and thousands of these cases, we get work histories and their medical histories, and I'm sure there are errors made from time to time."

Mr. Coon said his clients "are victims of the worst corporate mass genocide in history, one that has taken the lives of millions of industrial workers and their innocent families...and they get off making token payments for what they have done to these people."

The trust has faced problems before. In 2005, a federal judge's ruling in Texas led to the determination that doctors were fraudulently diagnosing numerous plaintiffs with asbestos-related diseases. The judge, Janis Graham Jack of Houston, discovered that in mass screenings a handful of doctors were diagnosing silica dust-related diseases in the same patients already diagnosed with asbestos-related diseases at improbably high rates. Concerned some claims could be fraudulent, Manville and others banned payments to people who included reports from several doctors and X-ray screening companies. Tens of thousands of claims to Manville had relied on them.

Immediately following the scandal, payouts by the Manville trust dropped dramatically. They began to rise again in 2007 and have since climbed at a steady annual pace.

Manville's longtime managing trustee, Robert Falise, a former executive vice president of Irving Bank Corp., said: "We're paying out over \$100 million in claims [annually] so it doesn't take much mathematics to figure out that won't go on forever."

Draining the fund are claims such as one from Gail Garner, who in 2000 filed a claim on behalf of her father, Angelo Palermo. Ms. Garner obtained a diagnosis of a type of mesothelioma for him 37 years after he died.

Mr. Palermo's April 1966 death certificate lists his cause of death at age 51 as "acute liver failure due to metastasis cancer due to primary stomach (place of origin)." Ms. Garner said he once worked for Manville.

Armed with the death certificate, a blurry torso X-ray and brief medical notations, Ms. Garner asked pulmonologist William Beckett to offer a second opinion. Dr. Beckett, who was working in Rochester, N.Y., at the time, concluded that given Mr. Palermo's job history at asbestos work sites it was "quite possible" he suffered from mesothelioma of the stomach, a condition that medical experts believe is caused by asbestos exposure.

In an interview, Dr. Beckett, who now practices in Massachusetts, stood by his diagnosis. He said he came to his conclusion "given [Mr. Palermo's] exposure history and everything I could find out from his daughter and his medical records, which were pretty sparse."

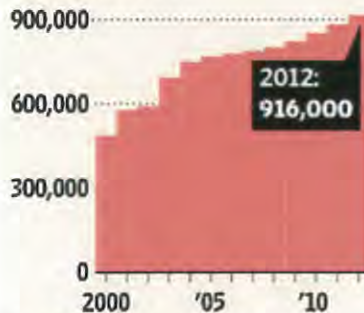
The Manville trust reviewed Dr. Beckett's conclusion and eventually awarded her father's estate the highest possible payout. Ms. Garner, in an interview, wouldn't confirm the award but given

Manville's payout percentages during the time frame her claim was processed she received as little as \$37,500 or as much as \$75,000.

"The panel finds this decision to be a particularly difficult one," Manville counsel Mr. Austern wrote on June 6, 2003, explaining the award to Ms. Garner.

### Toxic Heap

Cumulative number of claims received by Manville asbestos trust since 1998



Source: Manville trust annual reports  
The Wall Street Journal

"On the one hand, the deceased claimant has been able to produce very little by way of medical evidence to challenge the diagnosis/death decision that was made 34 years ago. On the other hand, there was extensive pain and suffering in this case, and early death, and abundant and apparent exposure to asbestos. In the totality of the circumstances, the Panel believes this claim deserves extraordinary consideration."

At least three other trusts paid Ms. Garner's claim, but she sued two others, including the DII Industries LLC Asbestos PI Trust, in federal court when they did not.

"From the trust perspective there really was never any diagnosis," said Beth Petronio, a K&L Gates attorney for the DII trust. The trust eventually settled the case after Ms. Garner lost and then appealed, because "at some point, litigation is costly," Ms. Petronio said.

Ms. Garner said in an interview she pursued the claims "because of the love of my father and how he died in a horrible and tragic, suffering death, how we had to grow up with my father not in my life."

Ms. Garner said she plans to write a how-to book on successfully filing claims to asbestos trusts.

—James Oberman contributed to this article.

### Corrections & Amplifications

Remarks on a court case described in an earlier version of this article about the continued increase in asbestos claims were incorrectly attributed to Judge John M. Glynn of the Circuit Court for Baltimore City. Those remarks came from an analysis by a person familiar with the case.

*A version of this article appeared March 11, 2013, on page A1 in the U.S. edition of The Wall Street Journal, with the headline: As Asbestos Claims Rise, So Do Worries About Fraud.*

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TO: Members of the Senate Judiciary & Labor Committee

FROM: Scott Manley  
Vice President of Government Relations  
Wisconsin Manufacturers & Commerce

DATE: April 11, 2013

RE: Support for Senate Bill 13

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Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to provide input on Senate Bill 13, which would increase transparency and reduce fraud in personal injury trust suits.

WMC is the state's largest business trade association, with over 3,500 members in the manufacturing, service, health care, retail, energy, banking and insurance sectors of our economy. WMC is dedicated to making Wisconsin the most competitive state in the nation to do business, and toward that end, we support legislation encouraging a legal environment that provides fairness under the law and the application of reasonable and clear standards. With those principles in mind, we respectfully request your support of Senate Bill 13.

A number of personal injury trusts have been formed under federal bankruptcy law to provide appropriate compensation for injured people. However, some claimants who have filed with these personal injury trusts also file a tort action against a solvent business for the same claim. These plaintiffs and their attorneys are filing for multiple recoveries without any transparency.

Senate Bill 13 would require, that when a trust may be responsible for compensating the injured, a plaintiff file a claim with a personal injury trust before pursuing the same claim at trial with a solvent business.

The bill requires a plaintiff to provide all parties to the suit documentation pertaining to a claim made against a personal injury trust.

If a solvent defendant is found liable for the plaintiff's injury, the court is to take into consideration payments made by a personal injury trust to the plaintiff.

Senate Bill 13 will prevent double dipping for the same claim from a solvent business after a plaintiff receives compensation from a personal injury trust.

Thank you for your thoughtful consideration of our support for Senate Bill 13.

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Judge Ableman joins the firm as Special Counsel in the Products Liability practice group. She brings more than twenty-nine years of experience as a state trial judge, first on the Delaware Family Court, and ultimately as a Judge on the Superior Court of the State of Delaware. At the time of her appointment to the Family Court, she was only the second woman to serve as a member of that state's judiciary. During her tenure on the Superior Court, Judge Ableman presided over the asbestos litigation docket for nearly two years, a docket comprised of more than 500 cases involving litigants from all over the world. She issued many detailed written opinions, in an area of the law where written decisions on commonly-recurring summary judgment issues had previously been the exception rather than the rule. She was frequently invited to speak at national asbestos litigation conferences. Judge Ableman has also authored hundreds, if not thousands, of judicial opinions addressing civil, criminal, and appellate matters and she has played a significant role in shaping Delaware law for the past three decades.

Before taking the Bench, Judge Ableman served as the first female Assistant United States Attorney for the District for Delaware from 1979 to 1983. In 1995, Judge Ableman was the first recipient of the Chief Justice's Award for Outstanding Judicial Service.

Judge Ableman is a past president of the Richard S. Rodney Inn of Court and she continues to serve on the Inn's Executive Committee. She is a past member of the Governor's Child

**PRACTICE**  
Product Liability

**EDUCATION**  
J.D., Emory University  
School of Law

B.A., Simmons  
College,  
*with distinction*

Notes and Comments  
Editor, *Emory Law  
Journal*

**BAR ADMISSIONS**  
Delaware  
Georgia

**MEMBERSHIPS & AFFILIATIONS**  
American Bar Association  
Bench-Bar-Media Committee of the Supreme Court  
Delaware Bar Association  
Governor's Child Protection Accountability Commission, Past President  
National Association of Women Judges  
Richard S. Rodney Inn of Court, Executive Committee

Protection Accountability Commission. She chaired and authored reports for two child death review investigations, one of which resulted in sweeping improvements to the child welfare system in Delaware. She is also a member of the Bench-Bar-Media Committee of the Supreme Court, and served as its chair in 2010 and 2011. Currently, Judge Ableman is an adjunct professor at the Villanova School of Law. She is a member of the National Association of Women Judges, the American Bar Association, and the Delaware Bar Association.

Judge Ableman received her B.A. with distinction from Simmons College in Boston, Massachusetts and her J.D. from the Emory University School of Law where she was Notes and Comments Editor of the *Emory Law Journal*. She was admitted the Delaware Bar in 1975.

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#### NEWS

- 03/14/13 Peggy Ableman Testifies in Asbestos Claims Case featured in Wall Street Journal, Bloomberg News, Law360 among others
- 02/26/13 Mike Kelly quoted in Thomson Reuters, "Ex-judge to do product liability, pharma work for McCarter & English"
- 02/25/13 Former Delaware Superior Court Judge, Peggy L. Ableman, Joins McCarter & English as Special Counsel

**Testimony of the Hon. Dean M. Trafelet (Ret.)**  
**Before the Senate Judiciary Committee**  
**April 11, 2013**

**Introduction**

My name is Judge Dean Trafelet and I have been appointed by the federal courts to serve as Trustee, and in some cases the Representative of all Future Claimants in numerous Qualified Settlement Trusts.<sup>1</sup> where I manage investment strategies, portfolio performance, liquidity projections and beneficiary distributions of various trusts. I am the Chairman of the Board of the Delaware Claims Processing Facility, Wilmington, Delaware, which reviewed and processed 2.25+ million beneficiary claims. From 1984-99 I served as a trial judge in the Circuit Court of Cook County, Illinois, where by special assignment, I presided over a special calendar of numerous complex tort, product liability and environmental matters. From 1989 – 90 by appointment of the federal courts, I served as a special federal mediator in the disposition of thousands of asbestos related Jones Act Claims arising out of asbestos exposure to seamen throughout the world while on board U. S. Flagged ships. From I am here today to provide the esteemed committee members with an overview of the way the trusts operate so that you may better understand the implications of the bill you are considering today.

**Overview**

Before I provide a detailed explanation of the trust process, I think it's crucial to our discussion today to take note of the following points: 1) The trust process is one in which victims have to submit a number of verifiable materials to prove that they have. Trusts do not pay every claim that is filed, but routinely reject those that are deficient; 2) Trust payments fluctuate over time and most trusts are not able to pay the full value of a victim's claim. Instead they only pay a small portion of the claim's value; and 3) The mere fact that a claimant sues a solvent defendant while filing claims against (and potentially receiving payment from) multiple trusts is not significant nor is it inappropriate. This is because most asbestos victims were exposed to asbestos-containing products from multiple defendants and each defendant or trust remains responsible for their contribution to a victim's injury.

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## **The Creation of the Asbestos Trust System**

Now let me back up and provide what I hope is a helpful explanation of how we got here today. Epidemiology makes clear that thousands of people each year will fall ill as a result of asbestos exposure, and experience teaches us that most will seek compensation from the manufacturers of the asbestos products that caused their injuries. Attempts to achieve settlements that would provide for the treatment and payment of these future claims are hampered by the difficulty of ensuring that any such settlement agreements would “provide for all future claimants who come forward, so that all who are eligible for compensation are properly compensated and all who are required to pay compensation have taken into account this responsibility in their business planning.”<sup>i</sup>

The overwhelming numbers of people who have been made sick and who are dead or dying from asbestos exposure and the large numbers of future claims have led dozens of asbestos manufacturers to choose bankruptcy to deal with these claims. Asbestos personal injury trusts were created during these bankruptcies to ensure that the tens of thousands of people who are currently sick and dying and the tens of thousands more who science tells us will sicken and die in the future as a result of their asbestos exposure can receive some compensation for their injuries.

### **Manville**

The creation of the asbestos trust system began with the reorganization of the Johns-Manville Corporation, the largest manufacturer and distributor of asbestos products in the twentieth century. Manville officers and directors knew of the dangers of asbestos since at least 1934, and kept this knowledge secret to prevent workers from learning that their exposure to asbestos could kill them. As evidence of Manville’s responsibility became known, it was faced with tens of thousands of lawsuits, and, to deal with this liability, filed its Chapter 11 petition for reorganization in August of 1982.<sup>ii</sup>

To solve the problem of future claims, the Manville plan of reorganization pioneered the use of a trust dedicated to the resolution and payment of asbestos claims. The Manville Trust assumed the debtors’ present and future asbestos liabilities, and all asbestos claims against the debtors (including those in the future) were directed to the Trust by an injunction — a “cornerstone” of the plan<sup>iii</sup> — channeling all asbestos claims from the reorganized Manville Corporation to the Manville Trust. The channeling injunction was issued pursuant to the bankruptcy court’s general equitable powers.<sup>iv</sup>

## **Congress Acts**

A substantial portion of the assets conveyed to the Manville Trust from which it would pay claims were equity and debt interests in the reorganized Manville Corporation, which, after it was rid of its asbestos liabilities, was a profitable company. However, public markets were skeptical of the channeling injunction's validity. To alleviate concerns of the markets, and to foster reorganization of other asbestos debtors, in 1994 Congress enacted Bankruptcy Code Section 524(g), which statutorily validates the trust and channeling injunction mechanisms pioneered in the *Manville* case.<sup>v</sup> This act of Congress now allows companies to go through the 524(g) process and shed all present and future asbestos liability through the creation of a trust.

There were not many other asbestos-driven bankruptcies of note in the 1990s. This changed in the next decade, however. In 2000, there were sixteen asbestos personal injury trusts; by 2011, there were nearly sixty, with trusts formed by many large asbestos defendants, including Armstrong World Industries, the Babcock & Wilcox Company, Halliburton (Dresser Industries), Owens Corning, and United States Gypsum.<sup>vi</sup>

For these and many other companies whose asbestos injured a great many people over decades, the trust system provides a mechanism for manufacturers and distributors of asbestos products to stay in business while allowing some measure of compensation to be paid to the victims of asbestos exposure.

## **Asbestos Trusts and Victim Compensation Today**

So how is the trust system compensating victims? Pursuant to the mandate of 11 U.S.C. § 524(g), an asbestos trust must treat all similar claimants in substantially the same manner.<sup>vii</sup> When it is formed, therefore, a trust will project the number of claims it expects to receive and determine the historic settlement value of those claims — what its predecessor would have paid to settle the claims had they been brought in the tort system.<sup>viii</sup> The trust has fixed assets that will be insufficient to pay the full historic settlement value of all claims; it therefore sets a payment percentage, and each present and future claimant is paid the liquidated value of his or her claim discounted by the payment percentage.<sup>ix</sup> The functioning of the trusts approximates the process through which lawsuits in the tort system are settled.

An asbestos trust is governed by its trust agreement and the trust agreement exhibits, which include a document containing a series of trust distribution procedures (“TDP”), approved by the bankruptcy court. The TDP also includes the settlement amounts that the trust will offer a claimant with an asbestos-related disease who meets the exposure and medical criteria set out in the TDP, and thus can presumptively establish the trust’s liability.<sup>x</sup> The trust is designed to value claims at the tort-system settlement share of its debtor — not the joint and several total value of the claim against all responsible parties that would be fixed by a jury.

For a claimant to recover from an asbestos trust, he or she must provide medical evidence demonstrating that the claimant has an asbestos-related disease, and evidence satisfactory to the trust that it has responsibility for the claimant’s injuries.<sup>xi</sup> The evidence required depends on the nature of the claimant’s disease. A claimant with mesothelioma, for example, must provide a diagnosis of that disease by a physician who physically examined the claimant, or a diagnosis by a board-certified pathologist or a pathology report prepared at or on behalf of an accredited hospital, as well as appropriate evidence of product identification as well as exposure and workplace history.<sup>xii</sup>

Given the fact that the trusts pay a percentage of the settlement value of a claim, the amounts being paid to claimants vary widely from trust to trust, but are low especially when compared to results in the tort system. Trusts do not have the funds to pay the full scheduled value to all present and future claimants, and most recoveries are quite small, which means that not only do victims have a legal right to file trust claims as well as claims against defendants in state court, but in many cases they must do so in order to recover any semblance of fair and just compensation for their injuries.

My hope is that with a full understanding of the trust process, together with an understanding of how current law operates to ensure that no defendant—trust or solvent defendant—is paying more than its share of the costs for the injuries it caused, the members of this committee will understand why the current system is functioning appropriately. I thank you for the opportunity to be heard on these matters and I welcome your questions.

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<sup>i</sup> Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* 46 (2005) (“RAND Asbestos Litigation Study”).

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

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<sup>iii</sup> See *id.* at 624.

<sup>iv</sup> See *id.*

<sup>v</sup> See, e.g., *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 235 n.47 (3d. Cir. 2004). See also H.R. Rep. No. 103-835 at 3 (1994) (explaining that Section 524(g) is intended to emulate the “creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor’s] insurers” devised in the *Manville* case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in *Manville* is deemed retroactively to comply with Section 524(g), and thus is valid.

<sup>vi</sup> U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 6 (September 23, 2011) (“GAO Report”).

<sup>vii</sup> See 11 U.S.C. § 524(g)(2)(B)(i)(III).

<sup>viii</sup> See, e.g., *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005); see also United States Gypsum Asbestos Personal Injury Settlement Trust, Trust Distribution Procedures §§ 2.3, 4.2 (revised Mar 29, 2010), <http://www.usgasbestostrust.com/files/USGTDP.pdf> (“USG TDP”).

<sup>ix</sup> See USG TDP §§ 2.3 and 4.2; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).

<sup>x</sup> See, e.g., USG TDP § 5.3(a).

<sup>xi</sup> See, e.g., *id.* §§ 5.3(a)(3); 5.7(a), (b).

<sup>xii</sup> See, e.g., *id.*



PENN

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E-MAIL: JRAKAUSKI@DUSTLAW.COM

LICENSED in IL and WI

April 11, 2013

## OPPOSITION TO SB-13

My name is Jill Rakauski, I am an attorney with Penn Rakauski in Racine, and I have been representing Wisconsin asbestos victims since 1998. I have represented asbestos victims all over the State of Wisconsin. Wisconsin asbestos victims built and worked in the industries which are and were the backbone of the state. From the breweries in Milwaukee, to the foundries in Neenah, Waukesha, Milwaukee Waupaca, to the paper mills in Northern and Central Wisconsin, building our courthouses and state buildings, and working in our shipyards in Door County, Manitowoc and Marinette among many other industries. A great percentage of these asbestos victims are also our veterans and were exposed in the Navy or other military exposures.

### "Transparency"

I find it ironic that the same corporations that for decades hid the dangers of asbestos exposure from their workers are now the same companies coming to the legislature and asking for so-called transparency in a one-sided bill that would only hurt asbestos victims.

This bill is unnecessary because there is already full disclosure in Wisconsin. In every lawsuit, defendants serve the asbestos victim's lawyer with requests for production. One of the requests is always all claims and documents the victim has filed with any bankruptcy trust. We as victims' attorneys always respond to these requests detailing all claims made and providing copies of any trust documents. The asbestos companies are aware of this fact. This bill's only true goal is to delay and deny compensation to asbestos victims.

From the asbestos victim's perspective, it is offensive for the asbestos industry, the largest supporters of this bill, to make false claims about a lack of transparency when this industry covered up the dangers of asbestos for decades, causing thousands of deaths and still to this day often refuse to produce important health and safety information regarding its asbestos containing products.



For instance, I have put forth three exhibits for the committee,

In 1935, two asbestos industry Company Presidents are corresponding the first states "I think the less said about asbestos the better off we are." (Sumner Simpson, October 1, 1935) while the second one responds "I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity." (Vandiver Brown, October 3, 1935)

In 1966, a US asbestos brake company executive wrote to an asbestos supplier about the media attention asbestos is receiving and said "My answer to the problem is: if you have enjoyed a good life while working with asbestos products why not die from it. There's got to be some cause." (Martin, E.A., September 12, 1966)

### **"Double Recovery"**

The proponents of the bill claim that asbestos victims are getting a double recovery by receiving compensation from trusts and litigation defendants. This notion is fundamentally false.

Most of the victims are exposed to a variety of products in the field. As such, like a victim who is mugged by five individuals who all will be prosecuted, an asbestos victim will prosecute a case against all products that he or she can show caused the disease. This may include trust defendants and defendants in state court. In order to recover from ANY defendant, the plaintiff must prove each defendant contributed to causing the disease.

Also even after the victim or victim's family shows that the defendant is responsible, according to current Wisconsin negligence law, no defendant ever pays more than its portion of the damages. The proponents of the bill fail to reveal that if there is evidence of exposure to a product, whether it is a company in bankruptcy, a defunct company or a defendant sitting at the court room table, all of those entities are assessed negligence in Wisconsin. Any negligence assessed to a bankrupt trust defendant is not recoverable by the plaintiff in Wisconsin. So a bankrupt trust defendant may be assessed 50% of the fault in Wisconsin and the only recovery to plaintiff could be the \$2000 he receives eventually through a trust payment rather than 50% of whatever the verdict may be. This amount is not recovered from any solvent party.

### **Victims Lose Rights with the Delays**

The bill requires a stay and the stay is not lifted until Plaintiff files all anticipated bankruptcy claims. There is no requirement in this bill that the asbestos defendants provide the asbestos victim with any documents that they may possess regarding asbestos at the victim's worksites to assist the plaintiff in this process. There is no requirement for any asbestos defendant to provide the asbestos plaintiff with any sworn testimony it may have regarding victim's worksites and the asbestos exposures at these worksites. The victim's case could be delayed for months if not years because some trusts have not even opened the claims process. During the stay there is no right for the plaintiff to seek records regarding asbestos exposures via subpoena, or to take depositions of persons with knowledge.

It is very common in asbestos cases that once these documents are received, the documents may reveal the existence of parties that manufactured, supplied, or sold asbestos that should be named as defendants. However, the stay and the delay may result in the plaintiff's statute of limitations expiring before this information is ever received by the plaintiff. As such, the delays may result in the victims losing the right to pursue a cause of action altogether.

### **Asbestos Corporations are the only Beneficiaries of the Provisions in SB-13**

Although not readily apparent, this bill is a direct attempt by asbestos corporations to shirk liabilities for causing disease in Wisconsin victims.

Take the case of Bob Petersdorf, who worked as a test engineer for Wisconsin Electric Power Company. Wisconsin Electric has several different power plants in Wisconsin. Bob Petersdorf, throughout his career, was in and out of most of these power plants performing tests and taking readings on the pressure, temperature of the steam and other items. One of the power plants he worked at was the Oak Creek Power Plant in Wisconsin. He did not work directly with asbestos.

One of the products used on one of the eight power generation units at the Oak Creek Power Plant was an insulation called Unibestos made by a company called UNARCO. The evidence shows that this UNARCO asbestos insulation was used to insulate a small percentage of the pipes, on this one particular unit at that one particular power plant. There was no testimony in the case that Mr. Petersdorf worked with or around that UNARCO asbestos insulation or even that he worked on that one particular unit.

If UNARCO was a viable solvent defendant, the plaintiff's case against the company may very likely have been dismissed for lack of evidence. However, in bankruptcy, for some trusts, the evidentiary standards are somewhat relaxed. As such, for this trust, if the claimant can show that he or she was present in a building where the asbestos product was present, (even though there may be no evidence of exposure), the claim may be approved.

Generally UNARCO has paid claims at a .82 payment percentage which resulted in a settlement of roughly \$1250. This is a small amount given the months and months of pain and suffering that Mr. Petersdorf endured.

In order to make this UNARCO claim, a claim form must be completed by the claimant, or the attorneys on his behalf. The claim form must list the "dates of exposure", "location where claimant has been exposed to any asbestos product" and "Exposure to the specific UNR Products" I have attached the UNARCO exposure claim form to my written testimony.

According to the proposed bill, if Mr. Petersdorf chooses not to make this UNARCO claim, pursuant to proposed section 802.025(5) a defendant may bring a motion to the court simply describing the evidence against UNARCO and asserting that if Mr. Petersdorf filed the claim, he would likely be successful. It is then Plaintiff's burden to show that he or she does not meet the UNARCO trust's

criteria. In this case, that will likely be a difficult burden and Mr. Petersdorf probably could not show his claim would be denied. So after a motion and a response, and a court hearing, if the Judge orders it, the plaintiff would be forced to file the claim and sign the statement of exposure in the claim form and eventually receive \$1250. Plaintiff must then provide a copy of this signed UNARCO exposure statement he was forced to make to the defendants in the case.

What will the asbestos defendants do with this exposure statement plaintiff was forced to sign?

According to Section (3) of the proposed bill, Defendants will now take the claim form which plaintiff was forced to sign and show this statement of exposure to the jury to prove alternate causation or to allocate liability. Because the client was forced to admit exposure to the UNARCO product and signed the form, UNARCO will be placed on the verdict form as an entity for the jury to allocate liability.

If the Senate makes the same amendment to the bill that the Assembly has already done and that becomes part of the bill, then any percentage allocated on the jury verdict to UNARCO will not be recoverable by the plaintiff. So if the plaintiff receives a verdict for \$1,000,000 for the loss of society and companionship and the pain and suffering and medical bills as a result of asbestos exposure, and UNARCO was assessed 10% of the fault, then that \$100,000 share would not be collectible. And remember, that is amount only to one trust. As such, the defendants, by forcing plaintiff to sign the statement of exposure, in my example would net \$100,000; the plaintiff would get a check for \$1250 from UNARCO, minus the \$100 non-refundable filing fee. I have attached a jury verdict form actually used in a Wisconsin asbestos case to illustrate that point. I note in Wisconsin that there are trust defendants on the jury verdict, as it has always been the case in Wisconsin that any party that can be shown to be a cause will be included on the verdict form. However, never has plaintiff been required to make exposure statements against their interest so that the asbestos defendants may use these statements to reduce the recovery of the asbestos victim.

Of course the jury would likely not be allowed to learn that victim was forced to complete this trust exposure document nor that the trust only resulted in a recovery of \$1150 to the plaintiff. Further, under existing Wisconsin law, Plaintiff could not inform the jury that any fault placed upon UNARCO means that Plaintiff will not recover that percentage of a jury verdict.

At the Assembly, a representative asked me if this bill created a cap on damages and limited damages to the plaintiff and I did not have an easy answer because it cannot be simply explained, but this scenario is exactly how this bill would serve as a payout to the asbestos companies at the expense of hurting the victims of asbestos disease.

Now, to further complicate this story, as of Tuesday, the UNARCO trust put a "moratorium" on asbestos claims while it reconsiders the payment percentage. The trust asked that plaintiffs do not make any claims until the moratorium has ended which could take "some months" according to the letter which I have attached for the record. So, again, if this bill was passed, Mr. Petersdorf's case would be stayed for several months until he could file this UNARCO claim valued less than \$1250. How, again, does this benefit the victims of asbestos disease?

I would also note that the testimony has focused on mesothelioma cases. However, this bill would also apply to victims of asbestosis. The trust payments are very low for asbestosis victims with some payments under \$100. If you look at the UNARCO letter I have attached, it acknowledges that the mandatory non-refundable filing fee \$100 is actually more than the payment for asbestosis cases. As a result, asbestosis victims would actually be forced to pay to trust \$10, and sign a statement admitting the exposure to the product to meet the requirements of this bill or face a delay.

Another problem not taken into account by the bill is that there are many times extended delays from the creation of a trust until the trust is ready to accept claim submissions. According to the bill, the plaintiff's cases in Wisconsin would be in a holding pattern until a bankruptcy trusts begins accepting claims which could be months-years.

### **CONCLUSION**

I respectfully encourage the members of this committee to see this bill for what it is: an attempt by the asbestos industry to avoid compensating the victims they've injured and killed. An examination of the way things currently work clearly shows that no information is being hidden and Wisconsin courts are fully capable of enforcing the law. What this bill does is create so many unnecessary hoops for victims to jump through that cases will be delayed and victims will die before seeing any possibility of compensation for their families. Accordingly, I urge you to oppose SB-13

Jill Rakauski

Penn Rakauski

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*W. H. H.*

PLAINTIFF'S  
EXHIBIT  
T-31

Bridgeport, Conn.  
Oct. 1, 1935

Mr. Vandiver Brown, Attorney,  
Johns-Manville Corp.,  
22 East 40th St.,  
New York City.

My dear Mr. Brown:

Enclosed is copy of a letter received from Miss Hossiter, of "Asbestos."

As I see it personally, we would be just as well off to say nothing about it until our survey is complete. I think the less said about asbestos, the better off we are, but at the same time, we cannot lose track of the fact that there have been a number of articles on asbestos dust control and asbestosis in the British trade magazines. The magazine "Asbestos" is in business to publish articles affecting the trade and they have been very decent about not re-printing the English articles.

I shall be pleased to have your opinion in the matter.

Very truly yours,

SG-G.

Enc.

President

005783 m22

R H 1257 Oct 1 1935

*Antone*

**— Johns-Manville —**

TWENTY-TWO EAST FORTIETH STREET  
NEW YORK, N.Y.



*Tuesday  
ny*



October 3, 1935

Mr. S. Simpson, President,  
Raybestos-Manhattan, Inc.,  
Bridgeport, Conn.

My dear Mr. Simpson:

I wish to acknowledge receipt of yours of October 1st enclosing copy of the September 25th letter from the editor of the magazine "ASBESTOS". I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity. Even if we should eventually decide to raise no objection to the publication of an article on asbestosis in the magazine in question, I think we should warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

I believe the question raised by Miss Kossiter might well be considered at the committee meeting scheduled for next Tuesday, at which I understand both you and Mr. Judd will be present.

Very truly yours,

*Vandiver Brown*  
Vandiver Brown  
Attorney.

*Antone*

VS:Z

*McLaughlin will see Jones & tell him he'd love to do publicity*  
*S. J. Jones*

PLANTIFF'S  
EXHIBIT  
T-32



September 12, 1966

Mr. Noel Hendry  
Canadian Johns Manville Co. Ltd.  
Asbestos, Quebec  
Canada

Dear Noel

Just to be sure you have a copy, an article that appeared in  
Chemical Week magazine is inclosed.

So that you'll know that Asbestos is not the only contaminat<sup>d</sup>,  
a second article from O.P. & D Reporter assesses a share of the  
blame on trees.

My answer to the problem is: if you have enjoyed a good life  
while working with asbestos products why not die from it. There's  
got to be some cause.

Director Of Purchases

E. A. Martin

EAM:MAC  
EAC:



Claims Processing Facility, Inc.

## **UNR Trust - Summary of Claim Filing Instructions**

When an individual believes he or she is suffering from an asbestos injury resulting from exposure to UNR asbestos-containing products, he or she can file a standardized claim form with the UNR Trust. The claim form is sent to the CPF in North Aurora, IL.

### **REQUIRED NON-REFUNDABLE FILING FEE**

**All claims must be accompanied by a \$100.00 non-refundable filing fee. Checks should be made payable to the UNR Asbestos-Disease Claims Trust.**

### **CLAIM FORM**

A claimant must complete the standardized claim form in its entirety and sign the certification attesting to the accuracy and completeness of the information contained therein. Valid medical documentation supporting the alleged injury must be attached and submitted with the completed claim form. Additionally, the claim form must be submitted to the CPF within the applicable statute of limitations to be considered for payment.

### **OPTION SELECTIONS**

- **OPTION 1: CASH PAYMENT**

- This option is currently suspended and not available.

- **OPTION 2: INDIVIDUALIZED RESOLUTION**

- Option 2 involves an in-depth review of the claim using tort



# UNR ASBESTOS-DISEASE CLAIMS TRUST

East-West Corporate Center, 1771 W. Diehl Rd., Suite 220, Naperville, IL 60563

## PROOF OF CLAIM FORM

Social Security No. of Person with Asbestos Disease: _____ - _____ - _____
---

**8. EXPOSURE TO ANY AND ALL ASBESTOS PRODUCTS:** *(If additional space is needed, attach list and specify as "additional asbestos exposure"):*

<i>Date(s) of Exposure(s)</i>	<i>Location (Specific - Shipyard, Company, Factory site, Government branch [Army, Navy, etc]. Please specify every location known where claimant has been exposed to any asbestos product of any manufacturer.</i>	<i>Trade or Job Classification – please be as descriptive of job duties as space will allow – add attachment if necessary</i>	<i>Products Exposed to. For UNR products, please be specific. Exposure to the products of other manufacturer's is assumed at any site listed, unless specifically explained. If no UNR products were at any of the sites listed, indicate products as "other"</i>
<i>From</i>	<i>To</i>		

**9. OPTION SELECTION**  
I select the following option:  Option 1 (if available)  Option 2  Option 3

**10. CLAIMANT'S SIGNATURE: (All claims must be signed by claimant or his/her representative.)**  
  
TO THE BEST OF MY KNOWLEDGE, THE INFORMATION CONTAINED IN THIS PROOF OF CLAIM IS TRUE AND COMPLETE, AND IS SUBMITTED TO THE UNR TRUST WITH A DECLARATION OF ITS ACCURACY UNDER PENALTY FOR PRESENTATION OF A FRAUDULENT CLAIM IN ACCORDANCE WITH TITLE 18 U.S.C., § 152.

\_\_\_\_\_  
Signature of Claimant or Attorney  
Representing Claimant

\_\_\_\_\_  
Name of Claimant or Attorney  
Representing Claimant

HELEN GOSZ,

Plaintiff,

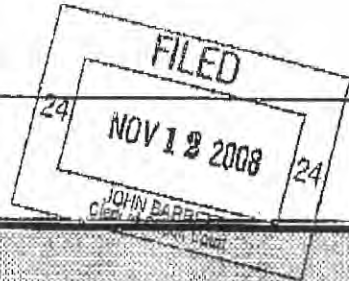
v.

Case No. 05-CV-9218

BUILDING SERVICE INDUSTRIAL SALES COMPANY,

Defendant.

VERDICT



**QUESTION 1: CAUSE OF DISEASE**

1. Was Clarence Gosz' malignant mesothelioma caused by significant occupational exposure to asbestos fibers?

Yes X No \_\_\_\_\_

*If you answered question 1 "no," go to question 6. If you answered question 1 "yes," then go to question 2.*

**QUESTIONS 2, 3 & 4: CELOTEX PRODUCTS**

2. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Celotex asbestos-containing pipe cover?

Yes X No \_\_\_\_\_

*If you answered question 2 "yes" go to question 3. If you answered "no," then go to question 5.*

3. If Clarence Gosz had significant occupational exposure to asbestos fibers from Celotex asbestos-containing pipe cover, was that product unreasonably dangerous and defective?

Yes X No \_\_\_\_\_

*If you answered question 3 "yes" then go to question 4. If you answered "no," then go to question 5.*

4. Was the defective and unreasonably dangerous condition of Celotex asbestos-containing pipe cover a cause of Clarence Gosz' malignant mesothelioma?

Yes X No \_\_\_\_\_

**QUESTIONS 5, 6 & 7: FOSTER WHEELER ASBESTOS-CONTAINING INSULATED BOILERS**

5. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Foster Wheeler asbestos-containing insulated boilers?

Yes  No

*If you answered question 5 "yes," go to question 6. If you answered "no," then go to question 8.*

6. If Clarence Gosz had significant occupational exposure to asbestos fibers from Foster Wheeler asbestos-containing insulated boilers, was that product unreasonably dangerous and defective?

Yes  No

*If you answered question 6 "yes" then go to question 7. If you answered "no", then go to question 8.*

7. Was the defective and unreasonably dangerous condition of Foster Wheeler asbestos-containing insulated boilers a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

**QUESTIONS 8, 9 & 10: COMBUSTION ENGINEERING ASBESTOS-CONTAINING INSULATED BOILERS**

8. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Combustion Engineering asbestos-containing insulated boilers?

Yes  No

*If you answered question 8 "yes," go to question 9. If you answered "no," then go to question 11.*

9. If Clarence Gosz had significant occupational exposure to asbestos fibers from Combustion Engineering asbestos-containing insulated boilers, was that product unreasonably dangerous and defective?

Yes  No

*If you answered question 9 "yes" then go to question 10. If you answered "no", then go to question 11.*

10. Was the defective and unreasonably dangerous condition of Combustion Engineering asbestos-containing insulated boilers a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

QUESTIONS 11, 12 & 13: JOHNS MANVILLE ASBESTOS-CONTAINING PIPE COVERS

11. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Johns Manville asbestos-containing pipecover?

Yes  No

If you answered question 11 "yes," go to question 12. If you answered "no," then go to question 14.

12. If Clarence Gosz had significant occupational exposure to asbestos fibers from Johns Manville asbestos-containing pipecover, was that product unreasonably dangerous and defective?

Yes  No

If you answered question 12 "yes" then go to question 13. If you answered "no," then go to question 14.

13. Was the defective and unreasonably dangerous condition of Johns Manville asbestos-containing pipecover a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

QUESTIONS 14, 15 & 16: PRODUCTS DISTRIBUTED BY BUILDING SERVICE INDUSTRIAL SALES (BSIS) INCLUDING ASBESTOS-CONTAINING CEMENT OR OWENS-CORNING FIBERGLASS, INC. KAYLO ASBESTOS-CONTAINING PIPECOVER

14. Did Clarence Gosz have significant occupational exposure to asbestos fibers from pipecover products distributed by Building Service Industrial Sales (BSIS), including cement or Owens-Corning Fiberglass, Inc. Kaylo?

Yes  No

If you answered question 14 "yes," go to question 15. If you answered "no," then go to question 17.

15. If Clarence Gosz had significant occupational exposure to asbestos fibers from pipecover distributed by Building Service Industrial Sales was that product unreasonably dangerous and defective?

Yes  No

If you answered question 15 "yes" then go to question 16. If you answered "no," then go to question 17.

16. Was the defective and unreasonably dangerous condition of pipecover products distributed by Building Service Industrial Sales a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

QUESTIONS 17 & 18: AMERICAN CAN COMPANY

17. Did American Can Company fail to provide Clarence Gosz with employment as safe as the nature of his employment would reasonably permit?

Yes  No

If you answered question 17 "yes," go to question 18. If you answered "no," then go to question 19.

18. Was the failure of American Can Company to provide a safe place of employment for Clarence Gosz a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

QUESTIONS 19 & 20: THILMANY PAPER COMPANY

19. Did Thilmany Paper Company fail to provide Clarence Gosz with employment as safe as the nature of his employment would reasonably permit?

Yes  No

If you answered question 19 "yes," go to question 20. If you answered "no," then go to question 21.

20. Was the failure of Thilmany Paper Company to provide a safe place of employment for Clarence Gosz a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

QUESTIONS 21 & 22: EMPLOYER P.G. MIRON

21. Did employer P.G. Miron fail to provide Clarence Gosz with employment as safe as the nature of his employment would reasonably permit?

Yes  No

If you answered question 21 "yes," go to question 22. If you answered "no," then go to question 23.

22. Was the failure of P.G. Miron to provide a safe place of employment for Clarence Gosz a cause of Clarence Gosz' malignant mesothelioma?

Yes  No

### QUESTION 23: COMPARISON OF FAULT

Now you must assign a percentage of the fault of each company which contributed to Mr. Gosz' disease.

Answer this question only for each company corresponding to any "yes" answers you gave to questions 4, 7, 10, 13, 16, 18, 20 or 22.

For all the to which you gave a "yes" answer on questions 4, 7, 10, 13, 16, 18, 20 or 22, assign a percentage of responsibility for the disease of Mr. Gosz. This question asks for the percentage of responsibility of each such company to reach a total of 100%. The total of your numbers must equal 100.

23. Taking 100% of the total, what percentage of the total cause of fault for Clarence Gosz' asbestos exposure do you attribute to each of the following?

A. Celotex asbestos-containing pipe cover

22% - Trust JAF

B. Foster Wheeler asbestos-containing insulated boilers

22%

C. Combustion Engineering asbestos-containing insulated boilers

22% - Trust JAF

D. Johns Manville asbestos-containing pipe covers

22% - Trust JAF

E. Products distributed by Building Service Industrial Sales, including asbestos-containing joint cement and Owens-Corning Fiberglass, Inc. Kaylo asbestos-containing pipecover

0

F. American Can Company

4%

G. Thilmany Paper Company

1%

H. P.G. Miran Company

1%

100%

**UNR ASBESTOS-DISEASE CLAIMS TRUST**

EAST-WEST TECH CENTER  
1771 WEST DIEHL ROAD, SUITE 220  
NAPERVILLE, IL 60563

DAVID E. MAXAM  
Executive Director

PHONE: (630) 281-6548  
FACSIMILE: (630) 281-6748

April 9, 2013

**RE: UNR CLAIMS PROCESSING MORATORIUM**

Dear Claimant Counsel:

As of April 9, 2013 the UNR Trust will begin a moratorium on claims processing. During the moratorium the UNR Trustees and the UNR TAC will examine the Trust's recent, material increase in malignancy claim filings and review Trust payment procedures. They then will confer with the Trust's actuarial expert on the impact these filings or any changes in payment procedures may have on the Payment Percentage. This work will be done as quickly as possible, but in all likelihood the moratorium will last for some months.

Claims received but not yet fully processed by the Trust as of April 9, 2013 will not be processed or further reviewed during the moratorium. The Trust will toll any applicable statute of limitations for the duration of the moratorium; therefore, please do not file claims until you receive notice from the Trust that the moratorium has ended. When the moratorium is ended, the Trust will advise on how claims currently filed will be handled.

Outstanding Offers and Releases; Second Installment Payments

The UNR Trust will honor all outstanding offers for which a signed release is received by the Trust by 180 days from the date of the offer, otherwise the offer will be considered abandoned and closed without payment. If the claimant elects the one-payment plan, payment will be made based on the current Payment Percentage of 0.82%. If claimant elects the two-payment plan, the first payment will be based on the current Payment Percentage of 0.82% and the second payment will be adjusted so that the total payment equals the Payment Percentage in effect at the time of the second payment, as the release itself provides.

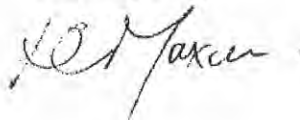
If a second payment is due during the Moratorium, the second payment will be based on the current Payment Percentage of 0.82%.

Living Mesothelioma Claims

During the Moratorium the UNR Trust will process and pay living mesothelioma claims on request by counsel. These claims will be paid at the current Payment Percentage of 0.82%. All processing procedures currently in effect will apply.

If you have any questions, please call me directly.

Yours very truly,





Shirley S. Abrahamson  
Chief Justice

# Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

16 East State Capitol  
Telephone 608-266-6828  
Fax 608-267-0980

A. John Voelker  
Director of State Courts

Testimony  
Of  
Nancy M. Rottier  
Legislative Liaison  
Director of State Courts

For Information Only

2013 Senate Bill 13

Senate Committee on Judiciary and Labor  
Senator Glenn Grothman, Chair  
April 11, 2013

Thank you, Chairperson Grothman and members of the Committee. I am Nancy M. Rottier, the Legislative Liaison for the Director of State Courts. I am appearing on behalf of the Legislative Committee of the Wisconsin Judicial Conference, for information only, to raise some questions about portions of 2013 Senate Bill 13 regarding personal injury trusts. My remarks are substantially similar to those I made last week to the Assembly Committee on Judiciary regarding the companion bill, AB 19.

The Wisconsin Judicial Conference is composed of all appellate and circuit court judges in Wisconsin. The Legislative Committee is the Judicial Conference's elected committee of judges who examine legislation to determine its impact on the court system.

The Legislative Committee has not taken a position to either support or oppose SB 13 but does want to raise several questions and areas of concern about the possible implications of SB 13. When considering this bill, the committee also sought input from other experienced trial court judges, who helped the committee identify these questions and concerns.

## Definitions

SB 13 appears to apply to all "personal injury or other tort" actions filed in circuit court. (See page 3, line 16). In 2012, there were 6,350 actions filed in circuit courts that were identified as involving personal injury or property damage. Do the detailed procedures of the new s. 802.025 apply to all of these cases? For instance, does a claim for property damage fit the definition of "personal injury claim" in the bill? The definition is very broad and includes "any claim for damages, loss, . . . that is related to bodily injury or another harm." We think a reasonable argument could be made that the new statute



would apply to a very broad range of actions, including property damage claims. If it was not the intent to have these new procedures apply to all personal injury or property damage actions, then we believe some clarification is needed to clarify the applicable limits.

### **Timing and Scheduling Issues**

The greatest area of concern we have about SB 13 is sub (4) of the new s. 802.025 created by the bill. (See page 4, lines 23-25) That section reads: “The court may not schedule a trial in a personal injury action until at least 180 days after the plaintiff makes the disclosures required under sub. (2).” Although the language could be interpreted to mean a trial cannot be held sooner than 180 days after disclosure, we believe when read in its context, it is better read to require that the court *may not schedule a trial* until at least 180 days after disclosure.

In most of Wisconsin’s circuit courts, judges hold scheduling conferences with the parties within about 90-120 days after the case is filed in order to lay out an orderly schedule of discovery, disclosure of witnesses, pretrial conferences and trial. Because of the way court calendars are handled, it is important for parties to have a firm date for a trial early in the process.

Under the terms of the bill, it appears the circuit court might not be able to hold a scheduling conference until seven or eight months after the case is filed. This will have the consequence of significantly increasing the time between filing and trial. The effect of the proposed language is to delay any trial being set no sooner than probably more than a year and a half after filing. This is well beyond the time frame most circuit courts customarily set.

Based on testimony given at last week’s public hearing on the companion bill, AB 19, it appears it was the intent to limit the applicability of this scheduling provision to only cases involving personal injury trusts. If this committee concurs with that assessment, then we would request that there be clarifying language to make the new s. 802.025(4) clearer.

Another timing issue is the requirement for disclosure by the plaintiff of any possible claims against a personal injury trust. The bill requires the court to order the plaintiff to file a statement within 30 days after the action is filed. (See page 3, lines 14-23) Ordinarily, the court would not enter an order in a case without notifying all the parties. In the first 30 days, however, it is unlikely the defendants have even filed an answer to the complaint. If the issue being addressed is early disclosure of a possible personal injury trust issue, then we would suggest the committee consider whether the disclosure could be contained in the complaint itself.

### **Relevancy of Documents**

The new s. 802.025(3)(a) relates to the relevance and authentication of personal injury trust documents. (See page 4, lines 12-17) We wonder about the placement of this provision in ch. 802 relating to pretrial procedures and within a paragraph that is titled

“Discovery; use of materials.” Would this provision as it relates to the relevance and authentication of personal injury trust documents be more properly placed in the evidence code, chapters 901-911 of the statutes?

This provision also seems to conflict with our current evidence code, in ch. 909, Stats. about the authentication of documents. Several judges have raised this question: What gives the documents involved in these cases any more inherent reliability than any other documents?

### **Judicial Notice**

Finally, we want to call your attention to the provision that “The court shall take judicial notice that the trust governance document specifies compensation amounts and shall establish an attributed value to the plaintiff’s personal injury trust claim.” (See page 6, lines 17-19) This compound sentence seems to be capable of more than one interpretation because of its structure.

This provision also seems to be contradictory to the current statute governing judicial notice, s. 902.01(2)(b), Stats. The current judicial notice statute provides that an adjudicative fact must be “a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” The value of a claim is often the main item disputed in a personal injury claim; it would appear to be outside the normal scope of the judicial notice statute. In addition, how can the court reasonably attribute any value to the claim without having heard it? We would request further consideration of whether this provision involving judicial notice is appropriate.

Thank you for your consideration. We would be very willing to work with the authors or this committee to help clarify some of these issues. I would be happy to answer any questions you may have. Thank you.



### Local #18 – Wisconsin AFL-CIO

2201 Springdale Road • Waukesha, WI 53186

Telephone: (262) 798-1818 • Toll Free (In United States): 800-242-5822 • Fax: (262) 798-1837

My name is Keith Kemper and I am a Business Representative for Sheet Metal Workers Local #18. I am here to speak on behalf of our 4200 members in Wisconsin. Our members work in our shops, on construction sites, remodeling projects in older buildings, and in industrial plants. Many of us have been exposed to a variety of different asbestos products during our working careers, Products used and installed by us, in addition to the products used by other trades on the jobsites.

To give you one example, not many years ago it was common for us to install ductwork pipe and siding that was made of transite, a material which was a combination of cement and asbestos fibers. The use of asbestos in transite was not phased out until the 1980's. This material was cut with saws that created a working environment laden with asbestos dust. Our own exposure was bad enough but we also brought the dust home on our clothing and exposed our families. All this was through no fault of our own, it was just the environment we had to work in. We didn't know we were being slowly sickened because the corporate executives of asbestos companies had kept the problems a secret. Problems from this exposure will continue to show up because quite often there is a latency period of 40 years until they develop.

Our international union tests our members every 5 years for asbestos related diseases. Asbestos testing is done in an effort to find problems as early as possible in order to get members the medical care they need. This data has been used for studies and was the basis for a 1994 paper in the American Journal of Industrial Medicine. This paper shows that 21% of sheet metal workers tested had pleural scarring, and for those with 40 years in our trade, 33% had pleural scarring, which is the prime indicator of an asbestos-related disease. In Wisconsin almost 400 of our members have had positive results on an asbestos test.

We are strongly opposed to this bill and ask that it be dropped. We feel that it just adds additional burdens to victims of this horrible disease, who are already suffering enough, while allowing the corporations that produced and distributed asbestos to avoid their responsibility.

A handwritten signature in dark ink, appearing to read "Keith Kemper".

Keith Kemper  
Business Representative/Recording Secretary  
Sheet Metal Workers Local 18



## THE AMERICAN LEGION DEPARTMENT OF WISCONSIN

April 10, 2013

To whom it may concern,

The American Legion, Department of Wisconsin has legitimate concerns with SB 13 and the accompanying AB 19. Many Wisconsin veterans were exposed to asbestos during their military service. Of those who suffer the effects of Mesothelioma, thirty per cent (30%) are veterans.

Although we believe the intentions of these two pieces of legislation were not to target veterans' personal injury claims for Mesothelioma, we believe that the effect they would have upon such claims would be an unnecessary delay for their rights in state courts. As an additional consequence of this legislation additional burdens of proof and discovery will be placed on veterans suffering the effects of Mesothelioma and their family members.

Our primary concern is that the potential consequences to veterans and their families are severe and unnecessary. In particular, delay for one of our comrades suffering from the fatal effects of Mesothelioma would be unacceptable to our membership - justice delayed is justice denied.

Consequently, we respectfully urge this committee and legislative leadership to give due consideration to the unintended consequences of SB 13 and AB 19.

Please table consideration of this matter in order that that we may further review the unintended consequences of SB 13 and AB 19 and participate in the development of appropriate legislation.

Respectfully,

A handwritten signature in cursive script that reads "Wayne W. Jensen".

Wayne W. Jensen  
Commander



THE AMERICAN LEGION  
DEPARTMENT OF WISCONSIN

April 10, 2013

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Respectfully,

A handwritten signature in black ink that reads "Wayne W. Jensen".

Wayne W. Jensen  
Commander



*Military Order of the Purple Heart  
Department of Wisconsin*



April 11, 2013

Senate Committee on Judiciary & Labor;

The Military Order of the Purple Heart, Department of Wisconsin, wishes to inform this committee, and your colleagues in the legislature of our opposition to SB 13/AB 19; relating to: torts and personal injury trusts.

With all due respect to the authors of this legislation, we believe that you may be unaware of the consequences of this legislation upon our members and the veterans' community in general. I wish to identify at this time our specific concerns with the legislation as written.

Regarding the requirement of the plaintiff to disclose within 30 days after he or she files action their intention to file a claim against a personal injury trust and if so, a stay is invoked on their proceedings in state court: Our veterans who suffer from Mesothelioma, if they are lucky enough to determine a specific defendant who may be liable, should not have their cause of action upon said defendant in state court delayed while they do or do not pursue a final executed proof of claim against any such personal injury trust. This places a great burden upon the veteran to identify all possible defendants before being able to take action against one. This may well result in their claim not being adjudicated in a timely manner or prior to the defendant's death or incapacity to participate on their own behalf.

Regarding the ability for a defendant to raise the claim to the court that "It wasn't me, it was someone else, who is part of a personal injury trust" and this claim, if made in good faith, a very low threshold, requires the court to stay the proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust that the defendant, not the court, identifies. One must ask themselves, what defendant would not espouse this claim to buy themselves more time, and possibly delay the veterans' claim to point of being unable to adjudicate it?

Regarding the requirement that the plaintiff must provide all parties to his or her immediate suit with all documents, records, trial or discovery materials, and "other information relevant to any claim against a personal injury trust": This requirement appears to place a very onerous and burdensome requirement upon the plaintiff to proactively produce documents that are already available to defendants via current Discovery procedures and statutes under Wisconsin law and thus are completely

unnecessary. In essence, this language would take the time and effort involved by a defendant's attorney to perform due diligence on behalf of their client, and place this additional time and effort upon the plaintiff, thus resulting again in a delay that would prevent their day in court as well as the extra fees and costs involved.

Finally, in regards to the requirement that if the immediate action proceeds to trial before the plaintiff's claim against a personal injury trust is resolved, the court must establish an attributed value to the plaintiff's claim against the personal injury trust and to afford the defendant a setoff in that amount: Forgive me, but unless the judge has a crystal ball, or the Federal Supremacy Clause of the US Constitution has been repealed, how is this fair, reasonable and legal?

I wish to end my statement with addressing the concerns of "double dipping" that has been raised by the proponents of this bill in regards to a plaintiff receiving damages from a personal injury trust, and then somehow being able to receive damages for the same cause of action from a different defendant in state court. From my understanding of how a legal case works, I believe that the courts and personal injury trusts already provide a mechanism for defendants to ascertain if a plaintiff has already made a claim at the federal level? And whether or not a few bad apples have been successful in doing so, to imply that our men and women who have shown great honor in uniform would attempt to do so is concerning. And if a few have, there are fraud statutes in place to address them the same as any plaintiff who makes any fraudulent claim in a court of law. Notwithstanding the implication that all plaintiffs, whether veterans or not, have been doing so on such a scale that this "problem" has to be remedied is not supported by any facts that I have been made aware of.

For all of these reasons, on behalf of the Military Order of the Purple Heart, Department of Wisconsin, I respectfully urge you to oppose SB 13 and remove it from the Tort Reform package that is being fast tracked through the legislature.

Thank you,

Erik Nykkanen

Commander  
MOPH Department of Wisconsin

## WISCONSIN LEGISLATIVE BOARD

April 11, 2013  
Page 1, SB-13



My Name is Andy Hauck , I am speaking on behalf of the Transportation Division of the “Sheet-Metal-Air-Rail-Transportation Union” (SMART)-. I represent over 2000 active and retired railroad workers and their families in Wisconsin.

Railroad workers are among many people who are at risk of exposure to **asbestos** in the course of doing their jobs. **Asbestos exposure** can cause disabling or fatal diseases such as asbestosis, lung cancer, gastrointestinal cancer and **mesothelioma**, a form of asbestos cancer that affects the membranes covering the lungs in its most common form (Pleural mesothelioma) and other body organs in more rare types. From 1990 to 1999, the fourth most frequently listed **industry** recorded on U.S. death certificates of asbestosis victims age 15 and older was railroads.

The term "railroad worker" encompasses a number of different occupations, including Engineers, Yardmasters, Car inspectors and repairmen, hostlers and conductors such as myself. It also includes the people who manufacture locomotives and railroad cars and those who work in rail yards loading and unloading freight cars. Job duties which may pose a risk of asbestos exposure are inspecting the mechanical condition of locomotives; driving engines within industrial plants, mines and quarries, and construction projects; coupling and uncoupling cars; installing, maintaining, and repairing the signals along the tracks and in yards; loading and unloading asbestos-containing freight; and adding and removing cars at railroad stations and assembling and disassembling trains in railroad yards.

Because of its well-known use as a fire-retardant and heat insulator, asbestos was used in the production of boiler and pipe insulation, high-temperature gaskets and brake and clutch linings. It was used to insulate both steam and diesel locomotives and asbestos-containing insulation was used around rail cars, refrigeration units, pipes, and steam and



## WISCONSIN LEGISLATIVE BOARD



Page 2 SB-13

hot water lines. It was also common in valve packing, rope, cement, and in heavy-duty floor tiles for passenger cars and buildings.

Railroad workers who installed, removed or inspected insulation were often heavily exposed to asbestos. During locomotive inspections, asbestos insulation was stripped off the boilers in a process that let asbestos dust become airborne in the shop. The same would happen when the asbestos was reapplied. Railroad mechanics were routinely exposed to asbestos when they inspected, repaired or replaced brake shoes and clutch linings. Because asbestos fibers are microscopic and extremely light, they can remain airborne for an extended period, which means that even railroad workers who did not handle asbestos products directly ran the risk of exposure.

Railroads exposed employees to asbestos and asbestos-containing materials during their railroad career, and did so without adequately informing them of the hazards. Railroads were found to have knowledge of asbestos dangers as well as the safety precautions that could have been used to protect employees and their families from exposure as early as 1930s. The link between asbestos and lung cancer was established in the early 1960's. They didn't take any measures to protect their employees, continuing to use asbestos products into the 1990s. This criminal negligence has been proven in the courts.

Diseases associated with asbestos exposure generally do not appear for 30-40 years after initial exposure, so even people who haven't worked in the railroad industry in many years may still be at risk for developing mesothelioma or another asbestos-related disease. Railroad workers have been urged to discuss their possible asbestos exposure with their doctor and to receive regular check-ups for any signs of asbestos-related disease.

Our members, your constituents that have developed asbestosis or other respiratory diseases have suffered and continue to suffer great pain and disability, genuine mental anguish and extreme fear as a result of reasonable

**WISCONSIN LEGISLATIVE BOARD**



Page 3 SB - 13

concern over the prospects of developing cancer caused by exposure to asbestos. The employees also unknowingly brought these asbestos fibers home on their clothing, exposing their families to this dangerous cancer causing material. Imagine the torment they feel with that fact.

Victims incur great expense in endeavoring to be cured of their illnesses and disease and have lost and will continue to lose large amounts of income because of the disabilities of their respiratory problems.

We must not allow legislation to be passed solely for Corporations to evade accountability. Adding more burdensome requirements and artificial milestones to simply insulate industry from their negligence is incomprehensible, if the Corporations want to be insulated, let it be with the asbestos that they told my predecessors was safe.

We are strongly opposed to SB-13 or any bill that is designed to delay and deny justice until asbestos victims die of their respiratory disease.

Thank you,

A handwritten signature in black ink that reads "Andy Hauck". The signature is written in a cursive style.

Andy Hauck

SMART – Transportation Division

April 13, 2013

Good Morning Committee Members;

My name is Renee Simpson, Senior Vice Commander of the VFW Department of Wisconsin, and am a veteran of our military action in Bosnia. In addition to appearing before you today to express opposition to SB 13 on behalf of the VFW Department of Wisconsin, I also wish to share with you my own personal story of the effects of Mesothelioma.

On September 21, 2012, at the age of 69, my father, Dennis, a fellow veteran, and Army soldier involved in the invasion of the Dominican Republic in 1964, was diagnosed with Mesothelioma. As you can imagine, this was a huge shock to my family and me. I followed in my Dad's footsteps to serve my country, and now the thought of losing him so quickly has motivated me to be here before you today.

My father was exposed to asbestos during his time in the military, via barracks insulation as well as extended time spent aboard Naval ships for transport. In addition, after his service, he was employed at three different foundries from 1965-75. In February of this year my father began civil action against the possible contributors to his asbestos exposure. He filed a claim with the personal injury trusts at the Federal level and is currently pursuing that claim. 2 of the 3 foundries he worked for are no longer solvent but one is. If SB 13 were to pass, his ability, and my family's ability to pursue any claims against the solvent company in Wisconsin State courts would be severely affected given the multiple additional requirements imposed upon him and my family to do so.

In September, after his diagnosis, the doctors told my family that dad could have 3 months or he could have 3 years. There is no way to determine, and there is certainly no cure. He was unable to appear before you with me today due to being too weak to travel. But if he were here, he would want me to tell you that ANY additional legal and procedural requirements that could result in delay of, or effectual prohibition of his receiving financial damages in order to take care of his medical bills now, and his family after he is gone, would be unconscionable.

Currently, my dad fluids....., deterioration of health, etc. Tell personal stories,  
I too was exposed to asbestos wrapped piping at barracks during my time in the military. Between that and my dad's coming home with asbestos dust on his clothes when I was a child, my entire family has been informed we could very well suffer the same fate of Mesothelioma. If that time comes, I too could not imagine trying to

*pain limit quality of life Treatment would only make him sicker and possible extend life to gain what months NS Care*

contend with the additional burdensome requirements upon my own claim that this bill would impose.

CONCLUSION: I ask you as a veteran, a family member of a veteran who suffers from Mesothelioma, and as a potential victim of Meso myself, to please oppose SB 13 as unnecessary, and prevent adding additional hurdles to what is already an excruciating and time intensive process by Mesothelioma victims to get their day in court and access to justice.

Renee Simpson

Senior Vice-Commander  
VFW Department of Wisconsin

Daughter of a Mesothelioma Victim



JEFFREY A. PITMAN  
PRESIDENT  
MILWAUKEE

CHRISTOPHER D. STOMBAUGH  
PRESIDENT-ELECT  
PLATTEVILLE

ANN S. JACOBS  
VICE-PRESIDENT  
MILWAUKEE

RUSSELL T. GOLLA  
SECRETARY  
STEVENS POINT

BENJAMIN S. WAGNER  
TREASURER  
MILWAUKEE

EDWARD J. VOPAL  
PAST PRESIDENT  
GREEN BAY

JANE E. GARROTT  
EXECUTIVE DIRECTOR

**Testimony of Jeffrey A. Pitman  
Wisconsin Association for Justice  
Before the Senate Judiciary and Labor Committee  
April 11, 2013  
Regarding  
2013 Senate Bill 13**

Members of the Committee, my name is Jeff Pitman. I am a partner with the Milwaukee law firm of Pitman, Kyle, Sicula & Dentice, S.C. and I serve as President of the Wisconsin Association for Justice (WAJ). Thank you for giving me the opportunity to speak against Senate Bill 13. SB-13 is an extreme bill that no other state in the country has passed.

While SB-13 deals with personal injury trusts, besides asbestos no other personal injury trusts have been identified that this legislation would apply to right now. That may not be true in 10 years.

We know the bill will apply to asbestos claims. Death and illness from asbestos have caused the longest-running public health epidemic in the world. The scope of the problem is huge. The World Health Organization estimates that more than 107,000 people die each year from asbestos-related lung cancer, mesothelioma and asbestosis resulting from exposure at work. Malignant mesothelioma is a fatal cancer primarily associated with exposure to asbestos.

In the United States the Center for Disease Control and Prevention (CDC) found a total of 18,068 deaths of persons with malignant mesothelioma were reported from 1999-2005. The Occupational Safety and Health Administration (OSHA) declared that they are "aware of no instances in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure."

From 1999 to 2005, Wisconsin ranked 14th in the nation in the number of mesothelioma and asbestos-related deaths, with a rate of 14.42 deaths per one million people per year or about 80 deaths per year.

Plain and simple, SB-13 is designed to make it more difficult for people, workers and veterans, that become ill from asbestos exposure to be compensated in a timely fashion for their disabling illness.

Having the benefit of hearing the testimony on the companion bill in the Assembly last week, the proponents of this legislation have not shown one iota of evidence that fraud or double-dipping is occurring in Wisconsin asbestos cases that necessitates this legislation.

**SB-13 adds more regulations and bureaucracy to all personal injury cases** by requiring individuals to undertake a convoluted and complex process for proceeding with a personal injury claim. If the goal is to have a less intrusive, less bureaucratic, smaller government, SB-13 does exactly the opposite. For asbestos victims in particular, dying individuals will be required to chase small and insignificant recoveries from asbestos trusts before they may pursue more substantial recoveries in court.

**The impact on all personal injury cases in Wisconsin would be great.**

Products Liability	95
Personal Injury, Auto	3,720
Medical Malpractice	117
Wrongful Death	83
Intentional Tort	279
Other Personal Injury	1,161
Asbestos	9
Property Damage	886
<b>Total</b>	<b>6,350</b>

If this process would apply to every personal injury case, that would be 6,350 cases affected in 2012. This would greatly increase the time required to handle personal injury cases and result in needless and unnecessary delay for trial courts.

If the issue is really about asbestos cases, there were only 9 asbestos cases filed in Wisconsin in 2012. Why are we creating this bureaucratic nightmare for people who are dying from a fatal disease? SB-13 would only increase the time from filing a case until it closes.

**SB-13 declares certain trust evidence to be “relevant.”** The rules of evidence, Wis. Stat. § 904.01 et seq., define relevant evidence. By law, courts must scrutinize the evidence on a case-by-case basis to assess admissibility. *State v. Walters*, 2004 WI 18. SB-13 would seem to invade the providence of the trial courts to determine what is relevant evidence.

**Bankruptcy courts are governed by federal law.** SB-13 requires a trial judge to determine a value for an unresolved claim. An asbestos trust established by a Bankruptcy Court would be under the jurisdiction of federal courts. Any state court valuation or determination of the rights of a person, which is under the jurisdiction of a bankruptcy court, would violate the Supremacy Clause of the U.S. Constitution.

**SB-13 is written to apply to pending cases, which will wreak havoc on the courts and violate the constitutional rights of injured citizens.** Retroactive legislation disrupts the constitutionally protected property rights of an injured person. SB-13 takes away the vested rights of an injured asbestos victim.

Over the past 25 years, the Wisconsin Legislature has attempted at various times to pass legislation that would retroactively apply to the rights of the citizens of this state. In each instance the Wisconsin Supreme Court has struck down the retroactive application of the legislation because the application was unfair.

- In *Martin v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70, 88 (1995), the Wisconsin Supreme Court held the retroactive application of the \$1 million cap on noneconomic damages in medical malpractice cases was unconstitutional (Legislation passed in 1986);
- In *Neiman v. American National Property and Casualty Co.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d, the Wisconsin Supreme Court held the increase in the wrongful death caps could not be retroactively applied; (Legislation passed in 1998)
- In *Matthies v. The Positive Safety Mfg.*, 2001 WI 82, 244 Wis. 2d 720, 628 N.W.2d 842, the Wisconsin Supreme Court held the retroactive application of the joint and several liability statute unconstitutional. (Legislation passed in 1995) and
- In *Society Insurance et al v. LIRC, et al*, 2010 WI 68, 326 Wis. 2d 344, 786 N.W. 2d 385. the Wisconsin Supreme Court held the retroactive application of changes to workers compensation benefits in Wis. Stat. §§ 102.17(4) and 102.66(1), unconstitutional. (Legislation passed in 2006)

Including this provision in the bill will cause additional expenses and delays, because everything will get stayed to determine the bankruptcy trust issues. Cases that are set for trial will have to be re-evaluated under the new law. This would also apply to a case where a trial has taken place and is on appeal. Such an application is an inefficient and ineffective use of

judicial resources and disrupts the vested property rights of the injured party. The provision should be removed from the bill and the legislation, like all legislation, should apply prospectively.

**SB-13 is just the latest effort in this campaign to delay or deny justice** to people with personal injury claims, particularly those who are injured or who die as a result of asbestos. The legislation is an attack on Wisconsin's sickest and weakest citizens, who through no fault of their own, have a deadly disease.

Wisconsin asbestos and personal injury victims should not be an outlier for the extreme agenda of asbestos manufacturers. WAJ urges you to defeat SB-13.



**STATE OF WISCONSIN**

*Senate*

**PUBLIC HEARING**

**Committee on Judiciary and Labor**

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**Senate Bill 13**

**TORT AND PERSONAL INJURY TRUSTS**

**Testimony of Marc Scarcella**

**Bates White, LLC**

**1300 Eye Street, NW**

**Suite 600**

**Washington, D.C. 2005**

Thursday, April 11, 2013

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## Introduction

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My name is Marc Scarcella, and I want to thank the committee for holding today's hearing on Senate Bill 13, and allowing me the opportunity to provide testimony in support of the proposed legislation. As an economist that has consulted on a variety of issues related to mass tort litigation, I believe the transparency between non-litigious, personal injury compensation trusts and related lawsuits in the civil tort system is critical for the proper allocation of fault and adjudication of cases. To support this conclusion, my testimony will focus on the current asbestos litigation environment, which represents a stark example of why trust and tort transparency is needed when compensating personal injury victims.

I currently work in the Environmental and Product Liability practice of Bates White, LLC where I consult on a variety of issues relating to mass tort litigation, including the estimation of litigation risk and economic damages associated with asbestos claims. My current clients include defendants and insurers actively litigating cases in the asbestos civil tort, but prior to joining Bates White in 2009 I spent nearly a decade as a consultant to asbestos claimant representatives in 524(g) bankruptcy proceedings, trustee boards of some of the largest asbestos bankruptcy trusts, and as an in-house statistician for the Johns-Manville Personal Injury Settlement Trust.<sup>1</sup> It is from this balanced experience of seeing the world from both the tort and trust systems, and working for both defendants and claimants, that I've gained a great deal of knowledge and unique perspective about how these two compensation systems interact with one another, or in many instances, fail to interact with one another.

The issue of asbestos bankruptcy trust transparency that sits at the heart of Senate Bill 13 has been the focus of academic, judicial, and legislative debates across the country in recent years. Even though asbestos bankruptcies and resulting bankruptcy trusts have been around for decades, it's only been in the past few years that the trust system as a whole has become a substantial, alternative source of compensation to what plaintiffs are already receiving in the tort system. As a result, tort defendants, state

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<sup>1</sup> See Exhibit A: Professional Background of Marc Scarcella

courts and legislators have been faced with the challenge of finding effective and efficient methods of integrating these dual compensation systems into one.

My testimony in support of the proposed legislation will focus on four key points;

- (i) The current trust system distributes billions of dollars in claim payments each year on behalf of the litigation's most culpable, primary defendants, and does so with little or no transparency with the civil tort, creating dual compensation systems.
- (ii) Given the lengthy statute of limitation provisions adopted by most asbestos trusts, there is little to no economic incentive for plaintiff counsel to actively pursue trust claims while the tort case is still pending, making the current trust discovery procedures in Wisconsin courts ineffective for promoting the necessary transparency between the dual compensation systems.
- (iii) As written, Senate Bill 13 would help provide this necessary transparency by allowing defendants to assume the burden of proving cases against Reorganized Defendants, and based on such evidence, courts can choose to compel plaintiff counsel to file and disclose related trust claims in a timely manner.
- (iv) As written, Senate Bill 13 would further promote the filing of trust claims without posing an undue burden on plaintiff counsel, resulting in expedited payments to asbestos victims well in advance of tort case resolution.

## **The dual compensation system**

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The “Bankruptcy Wave” that began in 2000 and ended with dozens of primary asbestos defendants filing for bankruptcy reorganization (“Reorganized Defendants”), marked a significant shift in the asbestos litigation.<sup>2</sup> Many of these Reorganized Defendants engaged in the manufacturing,

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<sup>2</sup> The companies that filed for Chapter 11 protection during the Bankruptcy Wave included AC&S, Armstrong World Industries, USG, Owens Corning/Fibreboard, Federal-Mogul, G-I Holdings, Combustion Engineering, etc... For a detailed list of all the Bankruptcy Wave debtors see Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 6:4 Mealey’s Asbestos Bankr. Rep. (Feb. 2007).

distribution, and installation of thermal insulation products, which most scientific literature concludes to have contributed the greatest risk to exposed workers.<sup>3</sup> Prior to the Bankruptcy Wave, asbestos lawsuits were largely predicated on alleged exposures to thermal insulation products and those responsible defendants. However, following the bankruptcies of those frontline defendants during the Bankruptcy Wave, plaintiff attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products.

As a result, these peripheral and new defendants experienced a dramatic increase in both the number of lawsuits in which they were named, the frequency in which their products and operations were identified as sources of asbestos exposure, and the overall settlement demands that plaintiff attorneys were seeking. Conversely, the Reorganized Defendants all but disappeared from the litigation and are rarely identified in cases today, even though a majority of plaintiffs still have exposures to traditional industrial settings where thermal insulation products were present.

In effect, two very distinct compensation systems have emerged. The current tort system is funded mainly by secondary or peripheral defendants that science would suggest are far less culpable than the dozens of primary thermal insulation defendants that have since filed for bankruptcy protection. Alternatively, the current trust system distributes billions of dollars in claim payments each year on behalf of the litigation's most culpable, Reorganized Defendants that have since emerged from bankruptcy and established asbestos compensation trusts.<sup>4</sup> The lack of integration and allocation of liability between these two compensation systems is at the core of why trust transparency legislation, such as Senate Bill

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<sup>3</sup> U.S. Environmental Protection Agency, <http://www.epa.gov/iris/subst/0371.htm>

<sup>4</sup> See Exhibit B: Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 11, no. 11 (2012).

The asbestos trusts established through 524(g) bankruptcy reorganization are intended to assume the legal responsibility of all current and future liabilities associated with asbestos-related products and operations of the debtor.

13, has been introduced in Wisconsin and other states. In fact, legislation similar to Senate Bill 13 was passed in Ohio late last year.<sup>5</sup>

## **The need for trust transparency**

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It is rare to find an asbestos victim whose injuries have been caused by the actions of just one defendant. Rather most asbestos lawsuits pursue compensation from dozens of defendants.<sup>6</sup> This places a great deal of importance on the allocation of fault and compensation shares across culpable parties, including those that have reorganized through bankruptcy. Over the past few years I have spent a considerable amount of time reviewing plaintiff deposition testimony and interrogatory responses for hundreds of mesothelioma lawsuits, and I have analyzed trends in plaintiff exposure allegations over time.<sup>7</sup> I found that in an overwhelming majority of recent cases, very few allegations of exposure to Reorganized Defendant products or operations are identified in lawsuit testimony, and the existence of trust claims are rarely disclosed in a timely manner, if at all.<sup>8</sup> In fact, it seems that trust claims are rarely, if ever filed in conjunction with the tort claim.<sup>9</sup>

To understand how or why this can occur, it's important to first understand the process in which defendant product and operations are generally identified in lawsuits. Many exposed workers may never have known what companies manufactured the asbestos products they were working with on a regular basis. For example, a pipefitter that had to cut down thermal pipe insulation in order to conduct his work

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<sup>5</sup> Ohio Rev. Code § 2307.95, December 20, 2012.

<sup>6</sup> Bates, Charles E., Charles H. Mullin, and A. Rachel Grinberg. "The Naming Game." Mealey's Litigation Report: Asbestos 24, no. 15 (September 2, 2009).

<sup>7</sup> See Exhibit C: Scarcella, Marc C., Peter R. Kelso, and Joseph Cagnoli, Jr. "The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010." Mealey's Asbestos Litigation Report 27, no. 19 (2012).

<sup>8</sup> Testimony of Judge Peggy L. Ableman (ret.), Hearing testimony on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013", U.S. House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law, March 2013

<sup>9</sup> Testimony of Richard D. Shuster, Hearing testimony on House Bill 380, Ohio State Senate Judiciary Committee, March 2012

may not know what company supplied the insulation. In other instances, exposed workers may not be able remember the product manufacturers considering that mesothelioma is a latent disease that takes decades to manifest after exposure. In practice, most product identification comes from the resources and experience of plaintiff law firms that include asbestos product databases, local construction records, invoices from major exposure sites, and decades of prior testimony by product identification witnesses.<sup>10</sup> This provides plaintiff attorneys with a great deal of strategic discretion as to when and which defendants they will pursue compensation.

Currently, there is little economic incentive for plaintiff attorneys to build tort cases against Reorganized Defendants because compensation from the related exposures are not litigated and settled through lawsuits. Following bankruptcy confirmation, the legal responsibility of indemnifying victims for asbestos claims against Reorganized Defendants is channeled to asbestos compensation trusts. Filing a claim and receiving payment from these trusts does not require litigation, so claims can be made and money can be received without being integrated into any corresponding lawsuit in the tort system. Furthermore, lengthy statute of limitation provisions adopted by most asbestos trusts allow claims to be filed up to three years after the date the victim was diagnosed with an asbestos-related disease. As a result, plaintiff attorneys have very little economic incentive to pursue trust claims until after the lawsuit in the civil tort has been resolved. This renders basic discovery procedures in Wisconsin courts ineffective, because plaintiff attorneys can not disclose trust claim forms that have not been made yet.

Strategically, plaintiff attorneys will choose to focus their clients on the products and operations of current tort defendants during the pendency of the civil lawsuit, and reserve their right to pursue trust claims once tort settlements have been reached.<sup>11</sup> I believe this practice ultimately creates an information asymmetry in the tort system, that withholds from defendants and the court, significant sources of plaintiff exposure and potential fault associated with Reorganized Defendants. This places defendants at

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<sup>10</sup> See Exhibit D, web site of Cascino Vaughn Law Offices, LTD

<sup>11</sup> Baron & Budd, P.C. *Preparing for Your Deposition*. Dallas: Baron & Budd, P.C.

a significant disadvantage when negotiating appropriate settlements in the tort system. If trust claims are not pursued in a timely manner, it conceals critical information regarding both sources of potential plaintiff compensation, as well as alternative exposures to the litigation's most culpable defendants that are no longer being named and identified in lawsuits because of their bankruptcies. As a result, the defendants and the court do not have the full information regarding the plaintiff's "true" exposure history to properly defend the case and correctly allocate liability, respectively.

Defense and plaintiff attorneys negotiate settlements based on litigation risk factors. For defendants, knowing if claims are being pursued against alternative sources of compensation based on exposures to other company products and operations greatly influences their assessment of what they will likely have to pay if the case goes to trial. In the absence of this information, defendants are put in a position of agreeing to higher than appropriate settlements because the uncertainty surrounding potential trust claims naturally increases their litigation risk. Cases that do reach verdict similarly put the court and jury in an uncertain position. Because information regarding exposure to bankruptcy products has been withheld or concealed from the court, a jury cannot properly allocate liability against those culpable parties.

Legislation that compels the filing of trust claims in a timely manner could go a long way towards creating a system where courts can properly allocate liability based on a plaintiff's full exposure and defendants pay closer to their fair share for an asbestos-related injury. Trust and tort transparency is not about determining how much money a victim of an asbestos-related injury should receive, it's about determining the appropriate amount that each culpable party should pay, including the bankruptcy trusts. As an economist I believe that by and large, more transparency regarding the exposure to the products of Reorganized Defendants will result in more appropriate and just outcomes. As written, I believe that legislative solutions such as Senate Bill 13 would help provide the necessary transparency to allow cases in Wisconsin courts to be properly adjudicated based on the complete set of evidence.

## **Senate Bill 13 will not present and undue burden on plaintiff counsel**

The primary purpose of asbestos bankruptcy trusts confirmed under 524(g) is to efficiently process and pay qualifying claims for individuals who suffer from asbestos related diseases. Trusts are designed to pay claims expeditiously and with minimal administrative and transactional costs. To accomplish this, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim qualifies for payment. The resolution procedures developed to govern this process are often standardized across trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. To further expedite the process of filing claims, many trusts and claim facilities have utilized electronic filing and processing systems that provide claimant law firms that ability to file thousands of claims *en masse*.<sup>12</sup>

The efficient manner in which trusts are able to receive, process, and pay claims has produced over \$14 billion in payments to hundreds of thousands of claimants between 2006 and 2011.<sup>13</sup> Not surprisingly, this level of compensation has incentivized some plaintiff law firms to hire attorneys and non-attorney professionals whose primary job duties are to file and pursue trust claims.<sup>14</sup> As a result, the resources plaintiff law firms may use to file trust claims are independent of the attorneys and professionals that are actively pursuing the related tort claim. In effect, requiring plaintiff counsel to proactively pursue trust claims in conjunction with the tort case should in no way detract from the quality of representation that the plaintiff receives.

It is also worth noting that for living mesothelioma plaintiffs, this administrative process of filing and resolving a trust claim can occur even faster. Many trusts offer an “Exigent Claim” status for living mesothelioma cases that find themselves in immediate need of financial assistance for expenses or loss of income as a result of their asbestos-related disease. This Exigent Claim status can accelerate the trust review and payment process. Given that many mesothelioma plaintiffs are living at the time their

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<sup>12</sup> See for example: Sample Excel file for Electronic Filing offered by Verus  
<http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip>

<sup>13</sup> *Supra* 4.

<sup>14</sup> See Exhibit E: web site of Goldberg Persky White, P.C.



attorney files a lawsuit in the tort system, any trust claims that are actively pursued would likely yield payment well before trial, even in jurisdictions that have *extremis mesothelioma* dockets.

This point illustrates that the trust filing and resolution process can provide compensation more quickly and efficiently than lawsuits in the civil tort system, and because the process is largely administrative these trust claims can be pursued without posing an undue burden on plaintiff law firms. In short, asbestos bankruptcy trust claims can easily be made concurrently with a pending tort case, and often provide plaintiffs with needed compensation while the tort claim is still being resolved. These payments can be critical for paying a plaintiff's medical bills and other potential financial strains stemming from any loss of income.

Part of the reason why trust and tort claims can be made concurrently with a great deal of efficiency is because there is overlap between the supporting evidence required in both processes. Much like the tort system, a mesothelioma trust claim can be supported by a physical exam or pathology report. The payment criteria for a mesothelioma trust claim typically require meaningful and credible exposure to asbestos-containing products and operations of the reorganized debtor.<sup>15</sup> This can be demonstrated by specific product identification or alleged exposure to operations supported by plaintiff testimony in the form of an affidavit or deposition. In the event that the plaintiff is no longer living, the supporting exposure testimony can be provided by family member or co-worker.

To further limit the discovery burden for plaintiff counsel, many trusts maintain Approved Site Lists compiled through corporate records and plaintiff testimony that include locations where the Reorganized Defendants' products or operations were present for a specified period of time.<sup>16</sup> The purpose of these Approved Site Lists is to expedite the review process by allowing plaintiff attorneys to easily leverage the institutional knowledge and testimony compiled over decades of litigation. Plaintiffs

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<sup>15</sup> *See for example* The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures, Section 5.7(b)(3), revised January 4, 2008

<sup>16</sup> *See for example* The United States Mineral Products Company Asbestos Personal Injury Settlement Trust, Protocol for Adding a Site to the Trust's List of Qualified USM Worksites <http://www.claimsres.com/documents/USM/USM%20Protocol%20for%20Adding%20a%20Site%20to%20the%20Trust%27s%20List%20of%20Qualified%20USM%20Worksites%20022510.pdf>

can establish product exposure by being at one of these locations at a time when the bankrupt entity's asbestos-containing products or operations were also believed to be present. As noted above, many experienced plaintiff law firms maintain and leverage similar site, product, testimony lists, and resources when developing cases against defendants in the tort system.<sup>17</sup>

The final step in trust claim resolution is the determination of the payment amount. Unlike settlements made with defendants in the tort system, this is not a negotiated or compromising process. Trusts typically provide a schedule of payment amounts for each asbestos-related injury, as well as an individual review and valuation procedure that values claims based on specific claimant characteristics. These valuation models are designed to yield payment amounts that mimic the reorganized company's settlement history prior to bankruptcy. Trusts that are unable to pay claimants 100% of the specified amount will establish a "Payment Percentage" that uniformly reduces the amounts by a fixed percentage. Thus, the actual payment received by each claimant is equal to the determined amount, multiplied by the Payment Percentage.

Trust Payment Percentages are subject to change over time based on projections of future claim obligations. If future liability expectations increase, then trusts will likely decrease individual claim payments in an attempt to maintain assets far enough into the future to be in a position to pay all claims in an equitable manner. Conversely, if future liability expectations decrease, then trusts will likely increase individual claim payments. Again, this is done in an attempt to maximize claim payments while ensuring that trust assets will be sufficient to pay all future claimants. For many trusts, when payments increase, prior claimants are given retroactive, or "True-Up" payments equal to the difference between what they previously received from the trust and what the trust is currently paying similarly situated claimants. As a result, there is no downside risk to pursuing payment from a trust as quickly as possible. Rather, there is only downside risk of waiting to pursue a trust claim as values may decrease over time. As written, I

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<sup>17</sup> *Supra* 10.

believe that legislative solutions such as Senate Bill 13 would further promote the expeditious filing of trust claims, which in my view, is in the best interests of the plaintiffs.

## **Conclusion**

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As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of claimant compensation. As written, Senate Bill 13 would help provide this necessary transparency by allowing defendants to assume the burden of proving cases against Reorganized Defendants, and based on such evidence, courts can choose to compel plaintiff counsel to file and disclose related trust claims in a timely manner. As a result, Senate Bill 13 would further promote the filing of trust claims without posing an undue burden on plaintiff counsel, resulting in expedited payments to asbestos victims well in advance of tort case resolution.

**EXHIBIT A**  
**PROFESSIONAL BACKGROUND OF MARC SCARCELLA**

## **Background**

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Currently, I am an economic consultant with the Environmental and Product Liability practice of Bates White, LLC. I've been with Bates White for nearly four years, and during that time I have been retained by defendants and insurers as an expert on the governance, procedures, processing systems, and compensation criteria of asbestos personal injury trusts established under section 524(g) of the U.S. Bankruptcy Code. Prior to joining Bates White, I spent seven years with Analysis Research Planning Corporation ("ARPC") as an asbestos liability estimation consultant for legal representatives and trustee boards associated with high profile 524(g) bankruptcy reorganizations and resulting bankruptcy trusts. Prior to that time, I was the data analyst and statistician for Claims Resolution Management Corporation ("CRMC"), a wholly owned subsidiary of the Manville Personal Injury Settlement Trust ("Manville") established to process and resolve asbestos claims against the trust.

### **Experience specific to asbestos bankruptcy trusts and claim processing systems<sup>1</sup>**

During my time with CRMC, the facility was in the process of developing an electronic claim filing system ("E-Claims™") to allow claim filers to not only submit individual claim forms electronically, but also to upload thousands of claim forms at one time. Similar technology has since been adopted by other claim processing facilities.<sup>2</sup> These technologies have been designed to be compatible with the electronic claim databases that claimant law firms may have developed for internal

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<sup>1</sup> The information in my testimony is based on: (i) publically available information and general experience gained during my employment at both Claims Resolution Management Corporation ("CRMC") and ARPC; and (ii) general industry knowledge with respect to the construction and functionality of electronic claim databases, and the ability to query and extract subsets of those databases. Information about the claims management and processing services provided by ARPC can be found at <http://arpc.com/solutions/product-liability-and-environmental-consulting/claims-management-processing>

<sup>2</sup> *See for example:* DCPF Requirements and Instructions for Bulk Upload Tool  
<http://www.armstrongworldasbestostrust.com/files/Trust%20Online%20Bulk%20Upload%20Tool.pdf>  
*See for example:* Verus Asbestos PI Trust Online Filing User's Guide  
[http://www.cetrust.org/docs/Online\\_Filing\\_User\\_Guide.pdf](http://www.cetrust.org/docs/Online_Filing_User_Guide.pdf)  
*See for example:* Western Asbestos Settlement Trust Claim Filing Instructions and Electronic Claim Template  
<http://wastrust.com/claims-packet>

use, thus minimizing the administrative cost and burden of transferring claim and claimant data to the facility.<sup>3</sup>

The system used by CRMC, as well as other similar systems are designed to not only receive and maintain an electronic database of claim and claimant information, but to also allow for the ability to efficiently extract and analyze data as needed. For example, during my time with the CRMC, I maintained a monthly data extract of individual claim filing, processing, and settlement data that was produced for internal analytical and claim management tasks. Additionally, upon third party requests for data, CRMC would provide a similar extract for minimal cost, including expansive medical and exposure data extracts.<sup>4</sup>

During my tenure with ARPC the firm was retained as advisor to a number of future claim representatives or trustee boards of asbestos personal injury and property damage trusts (“Trusts”), including all of the trusts currently processing and resolving claims at the Delaware Claims Processing Facility (“DCPF”) and its predecessor, the Celotex Asbestos Settlement Trust (“Celotex”), as well as certain Trusts currently processing and resolving claims at Verus Claims Services (“Verus”), the Claims Processing Facility, Inc. (“CPF”), Trust Services, Inc. (“TSI”), MFR Claims Processing (“MFR”), and the Western Asbestos Settlement Trust (“WAST”) facility.<sup>5</sup> In addition to the firm’s role as advisor to Trusts

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<sup>3</sup> See for example: Sample Excel file for Electronic Filing offered by Verus  
<http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip>

<sup>4</sup> Such an extract is still available today on a limited basis  
*Reference:* Distribution of Manville Trust Data for Use Solely by Other Trusts  
<http://www.claimsres.com/documents/MT/DataPolicy.pdf>  
*Reference:* Manville Trust Single Use Data License Agreement  
<http://www.claimsres.com/documents/MT/DataAgreement.pdf>

<sup>5</sup> In most cases, to the extent that any of these engagements were performed during the pending bankruptcy confirmation of a trust, any time records detailing the work performed by myself or other employees of ARPC would be publically available as fee applications in the bankruptcy case docket, along with any formal retention applications filed with the court.

In most cases, to the extent that any of these engagements were performed following the bankruptcy confirmation of a trust, the retention of ARPC and the general nature of the retention (e.g. Executive Director to the trust, claims administration consultant, liability estimation consultant, etc.) is disclosed in trust annual reports filed with the bankruptcy court and publically available on the case docket.

and future claim representatives, ARPC was also retained by Celotex, DCPF, CPF, and the WAST facilities to help develop new, or enhance existing, electronic claim processing systems.<sup>6</sup>

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To the extent that a particular client cited in my testimony is not publically disclosed in any of the above mentioned sources, each of the ARPC clients referenced in my testimony are also referenced in the “Application For Order Authorizing The Proposed Future Claimants' Representative To Retain And Employ Analysis, Research, And Planning Corporation As Claims Evaluation Consultants” filed on October 11, 2010 in re: Specialty Products Holding Corp., et al In The United States Bankruptcy Court For The District Of Delaware (case no. 10-11780). This document is available for public download from the bankruptcy court docket.

<sup>6</sup> See for example: First Annual Report And Accounting Of Western Asbestos Settlement Trust, filed May 16, 2005 with the United States Bankruptcy Court Northern District Of California Oakland Division (Case No. 02-46284-T), pg. 12, line 10:

*“Analysis Research Planning Corporation (“ARPC”): Consulting firm hired to help the Trust to develop a claims manual and claims processing procedures. Also hired to create a system to process claims after it was discovered that no existing vendor would be able to meet the requirements of the Matrix and TDP in a timely manner. Also offer ongoing advice concerning improvements to the system.”*

## **Marc Scarcella, MA**

### **Manager**

#### **Summary of experience**

Marc Scarcella has more than ten years of experience as an economic consultant for mass tort litigation, specializing in quantitative methods and their applications in dispute resolution and strategic litigation management. He has extensive experience estimating litigation risk and economic damages associated with latent personal injury claims due to environmental and product liability.

Mr. Scarcella has developed forecasting models used to evaluate the impact of litigation and legacy liability on corporate financial management, transactions, and restructuring. His work has been leveraged in corporate financial disclosures for SEC reporting, bankruptcy reorganization, and structured financial transactions. Mr. Scarcella has acted as consulting expert on a number of complex insurance coverage cases and has developed economic models for estimating potential insurance recoveries due to environmental and product liability claims. He has applied his expertise in forecasting future loss and litigation risk to the areas of asbestos, silica, pharmaceutical, water contamination, and tobacco litigation.

Prior to joining Bates White, Mr. Scarcella was Managing Director at Analysis Research Planning Corporation (ARPC), where he provided economic analyses and consultative services in 524(g) Chapter 11 bankruptcy reorganization in the areas of asbestos liability estimation and insurance allocation. This experience has made Mr. Scarcella a recognized expert on claim processing management and valuation for 524(g) asbestos personal injury and property damages bankruptcy trusts, and he has testified on matters of trust transparency and potential plaintiff recoveries at both the state and federal level. Mr. Scarcella has also consulted on issues of process and policy management for other Qualified Settlement Funds (QSF) established from non-asbestos product liability litigation.

#### **Areas of expertise**

- 524(g) asbestos claims valuation and trusts administration
- Applied Econometrics
- Financial analysis and risk modeling
- Liability estimation and forecasting
- Insurance allocation and valuation



- Litigation risk analysis
- Claim process management and system design

## **Selected experience**

### **Expert testimony**

Mr. Scarcella has testified on matters of 524(g) asbestos bankruptcy trust transparency and potential plaintiff recoveries at both the state and federal level.

- Hearing testimony on H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012", U.S. House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law, May 2012
- Hearing testimony on H.B. 380, Ohio Senate Judiciary Committee, March 2012
- Hearing testimony on H.B. 380, Ohio House Judiciary and Ethics Committee, November 2011
- Hearing testimony on H.B. 2034, Texas House Judiciary and Civil Jurisprudence Committee, March 2011
- Deposition testimony in *James Andrews and Mary Andrews v. A.W. Chesterton, Inc., et al.*, Third Judicial Circuit Court of Madison County, IL, September 2011
- Deposition testimony in *Phillip Christopher and Nancy Christopher v Armstrong International Inc., et al.*, Circuit Court of Limestone County, AL, April 2011
- Deposition testimony in *Sherrie Moore v. A.W. Chesterton, Inc., et al.*, Third Judicial Circuit Court of Madison County, IL, April 2010

### **Liability estimation and insurance allocation analysis**

- Estimated and simulated future asbestos-related expenses for both SEC financial reporting disclosures and bankruptcy reorganization
- Estimated insurance allocation of asbestos-related losses in coverage disputes, coverage-in-place negotiations, excess policy buy-outs, SEC financial reporting disclosures, and bankruptcy reorganization
- Long-term discounted cash flow modeling to measure liquidity and solvency risk for distressed companies and asbestos bankruptcy trusts
- Strategic analysis of litigation tactics and associated costs relating to mass torts
- Litigation budget analysis and defense cost projections relating to mass torts
- SEC financial reporting disclosures of asbestos litigation reserves

- Insurance recovery modeling
- Interest rate and discount rate risk analysis
- Contingent liability forecasting for environmental damages

### **Claims processing and settlement of 524(g) personal injury trusts**

- Procedures and policy development
- Reporting system development
- Claims valuation model development and analysis
- Exposure site list management
- Property damages claims administration
- Quality control management, including the development of a system of standards and auditing procedures

### **Professional experience**

Mr. Scarcella first began evaluating environmental and product liability claims in 2001 as the statistician and quantitative data analyst for the claims processing facility of the Johns-Manville Personal Injury Settlement Trust. Following his time with Manville, he joined ARPC, an economic consulting firm specializing in asbestos liability estimation for bankruptcy reorganization and qualified settlement funds. During his tenure with ARPC, Mr. Scarcella had the opportunity to estimate current and future asbestos liability and associated insurance recoveries in asbestos bankruptcy proceedings for multiple companies including, but not limited to, Armstrong World Industries, Babcock and Wilcox, Federal-Mogul Corporation, Halliburton Co., Honeywell International Inc., Owens Corning, and United States Gypsum.

- Bates White Economic Consulting, Washington, DC
  - Manager (June 2009 to present)
- Analysis Research Planning Corporation (ARPC), Washington, DC
  - Managing Director (January 2009–June 2009), Director (January 2005–December 2008), Sr. Consultant (January 2004–December 2004), Consultant (July 2002–December 2003)
- Claims Resolution Management Corporation (CRMC), Fairfax, VA
  - Quantitative Data Analyst (July 2001–June 2002)

## Education

- MA, Financial Economics, American University
- BA, Economics, American University
- BA, Public Affairs, American University

## Publications

- Scarcella, Marc C., Peter R. Kelso, and Joseph Cagnoli, Jr. "The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010." *Mealey's Asbestos Litigation Report* 27, no. 19 (2012)
- Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance." *Mealey's Asbestos Bankruptcy Report* 11, no. 11 (2012).
- Hartley, Kirk T., David C. Christian II, Marc C. Scarcella, and Peter R. Kelso. "Pre-Packaged Plan of Inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy." *Mealey's Asbestos Bankruptcy Report* 11, no. 4 (2011).
- Bates, Charles E., Charles H. Mullin, and Marc Scarcella. "The Claiming Game." *Mealey's Litigation Report: Asbestos* 25, no. 1 (2010).

## **EXHIBIT B**

**Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 11, no. 11 (2012).**

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# Asbestos Bankruptcy Report

## **Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance**

*by*  
*Marc C. Scarcella*  
*and*  
*Peter R. Kelso*

*Bates White Economic Consulting*  
*Washington, DC*

**A commentary article  
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Bankruptcy Report**



# Commentary

## Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance

By  
**Marc C. Scarcella**  
and  
**Peter R. Kelso**

*[Editor's Note: Marc C. Scarcella and Peter R. Kelso, Managers at the Washington, DC office of Bates White Economic Consulting. The views of the authors do not reflect the opinions of their respective firms, their clients, or Mealey's Publications. © 2012 by Marc C. Scarcella and Peter R. Kelso. Responses are welcome.]*

### Introduction

In the three decades since Johns Manville and UNR Industries filed the first asbestos bankruptcy cases, nearly 100 companies have filed for bankruptcy protection due, in part, to asbestos litigation.<sup>1</sup> The vast majority of these companies utilized section 524(g) of the U.S. bankruptcy code to reorganize and establish a bankruptcy trust to pay current and future asbestos claimants and channel claims away from the reorganized company. Today, many of these companies have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims. Since 2006 nearly 30 trusts have been created through bankruptcy reorganization, funding the trust system with an additional \$20 billion in assets. From 2007 through 2011 the entire trust system has paid out over \$13.5 billion to asbestos claimants, with remaining assets as of yearend totaling over \$18 billion.<sup>2</sup> In addition, there is \$11 to \$12 billion in proposed funding from bankruptcies still pending confirmation.<sup>3</sup>

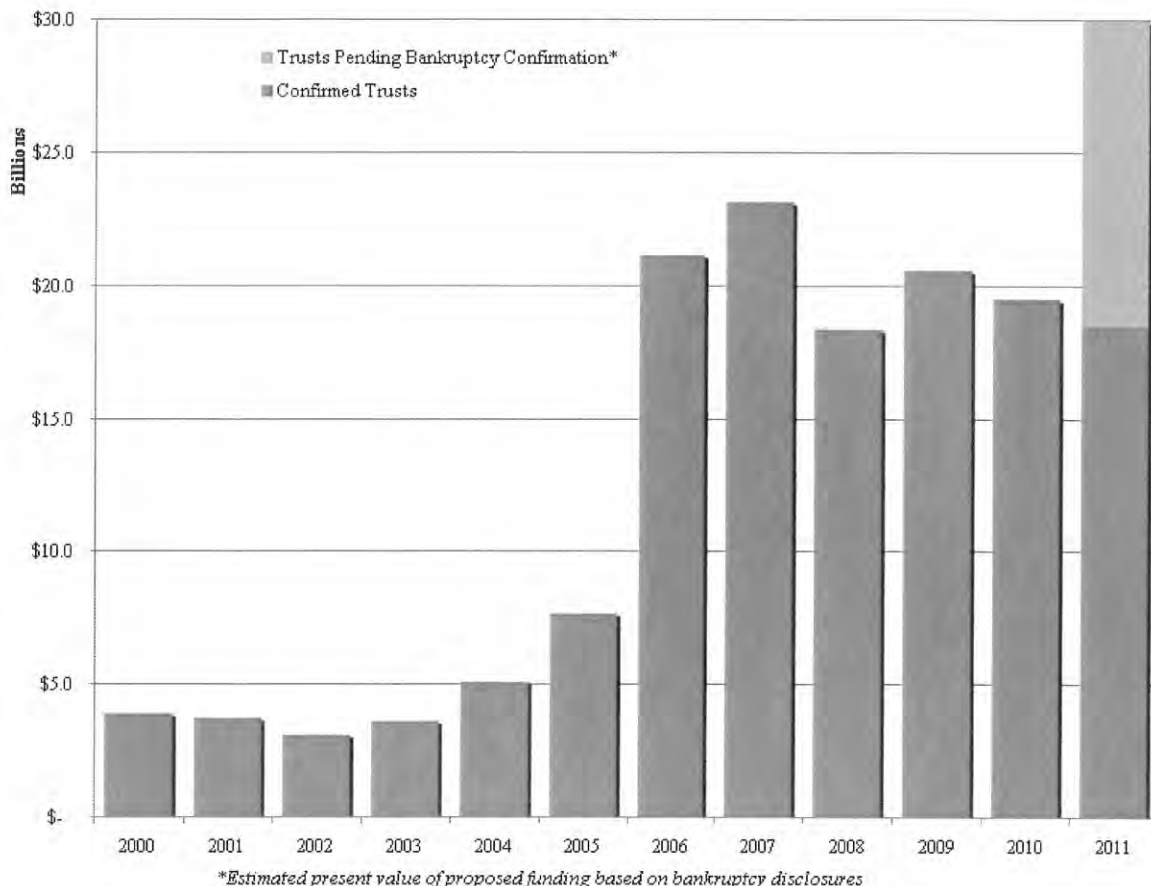
With that amount of money at stake, it is not surprising that there has been recent state and federal

legislative efforts as well as growing interest from academic researchers and the press aimed at examining the transparency of asbestos bankruptcy trusts and what is currently known about 524(g) bankruptcies. Courts in the civil justice system have recently echoed similar interest in asbestos trust transparency as those entities strive to properly allocate liability in the underlying tort litigation between both culpable solvent companies and bankruptcy trusts.

While detailed information about individual claims made to and payments made from asbestos trusts is limited, this paper intends to serve as a resource by providing a general overview of the information that is currently disclosed by the 524(g) asbestos trust compensation system. The paper will include an update on the latest financial and claim information provided by the trusts through their 2011 annual reports. It will also highlight the current governance of the asbestos trusts, changes in trust payments made to current and future asbestos claimants, the ratio of payments to malignant and non-malignant claimants, and amendments that have been approved and instituted into trust documents by the leadership of the trusts following confirmation of the plan by the bankruptcy and district courts.

Statistics and other information in this paper are derived from the publicly available documentation produced by various asbestos bankruptcy trusts established pursuant to Section 524(g) and the publicly

**Exhibit 1: Trust Yearend Assets**



available documentation produced during various Section 524(g) bankruptcy reorganizations.

**Bankruptcy trust assets**

Asbestos bankruptcy plans formed under section 524(g) of the U.S. Bankruptcy Code involve the creation of trusts designed to compensate similarly situated current and future asbestos plaintiffs in an equitable manner.<sup>4</sup> The trusts are often funded with cash, reorganized debtor stock, insurance, and other assets provided by the debtor company (or parent), and exist to expeditiously pay current and future claims. Beginning with the codification of section 524(g) in 1994 and predominantly during the years 2000-2003, nearly 70 companies filed for bankruptcy protection.<sup>5</sup> Today, over \$18 billion in assets currently reside in the trust system. Another \$11 to \$12 billion in additional assets is designated for trusts pending completion of the 524(g) bankruptcy reorganization process.<sup>6</sup> Exhibit 1 shows the growth of the trust system over time and the assets

earmarked for pending but not yet confirmed 524(g) reorganization plans.

Exhibit 2 shows how rapidly the trust compensation system has grown in recent years. As of yearend 2005, the entire trust system only had \$8 billion in assets. From 2006 through 2011, asbestos trusts were funded with an additional \$20 billion in assets.

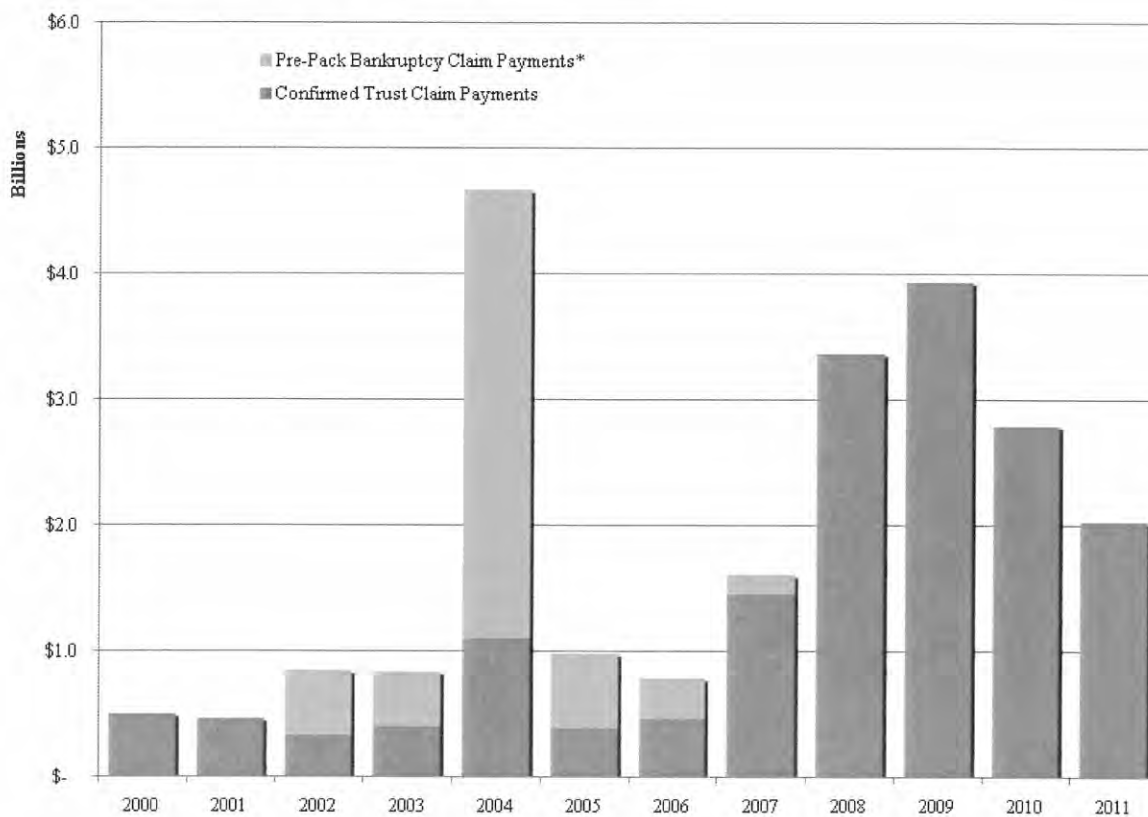
**Bankruptcy trust payments**

As the bankruptcy trusts assets have grown over time, so have payments to asbestos claimants. Beginning in 2006, dozens of trusts came “online” and distributed over \$14 billion in claim payments through 2011. This dramatic increase in claim payments was due, in part, to the resolution of substantial claim inventories that built up during the lengthy bankruptcy process, some of which dated back to the late 1990s and included tens of thousands of non-malignant claims. In the twelve years since the bankruptcy

**Exhibit 2: Confirmed Trust Annual Financial Activity** (dollars in millions)

Balance	2006	2007	2008	2009	2010	2011 <sup>7</sup>	Total
Beginning Assets	\$7,641	\$21,216	\$23,117	\$18,660	\$19,907	\$18,810	
Funding Received	\$12,081	\$2,944	\$1,055	\$3,078	\$640	\$535	\$20,333
Investment Gains/Income	\$897	\$670	(\$2,137)	\$2,363	\$1,306	\$763	\$3,861
Other Additions	\$1,223	(\$16)	\$97	\$25	(\$58)	(\$88)	\$1,183
Claim Payments	(\$463)	(\$1,450)	(\$3,360)	(\$3,927)	(\$2,779)	(\$2,036)	(\$14,015)
Trust Expenses	(\$95)	(\$132)	(\$156)	(\$147)	(\$180)	(\$173)	(\$883)
Taxes/Other Deductions	(\$68)	(\$115)	\$44	(\$145)	(\$26)	(\$78)	(\$388)
Ending Assets	\$21,216	\$23,117	\$18,660	\$19,907	\$18,810	\$17,731	
						Deferred funding and settlements <sup>8</sup>	\$740
						<b>Current Confirmed Trust Assets</b>	<b>\$18,467</b>

**Exhibit 3: Trust and Bankruptcy Pre-Pack Claim Payments**



\*Pre-pack settlement amounts for Combustion Engineering, NARCO, DII (Halliburton), Congoleum and Pfizer (Quigley). These amounts paid or committed outside of the 524(g) Trust funds total between \$5 and \$6 billion.



wave began, the trust system has paid out over \$17 billion to claimants with an additional \$5 to \$6 billion paid by certain debtors prior to confirmation as part of bankruptcy pre-packaged ("Pre-Pack") settlement negotiations. These Pre-Pack payments were not made through an operating trust. The largest contributor to Pre-Pack payments was Halliburton, which committed \$2.7 billion in Pre-Pack funds around 2004. It is more common today for Pre-Pack payments to be negotiated pre-confirmation but the assets sufficient to cover the cost of these settlements are funded to the trust post-confirmation for

immediate distribution. In these instances the Pre-Pack payments are reported on trust annual reports and accounted for in Exhibit 3 as part of Confirmed Trust Claim Payments.

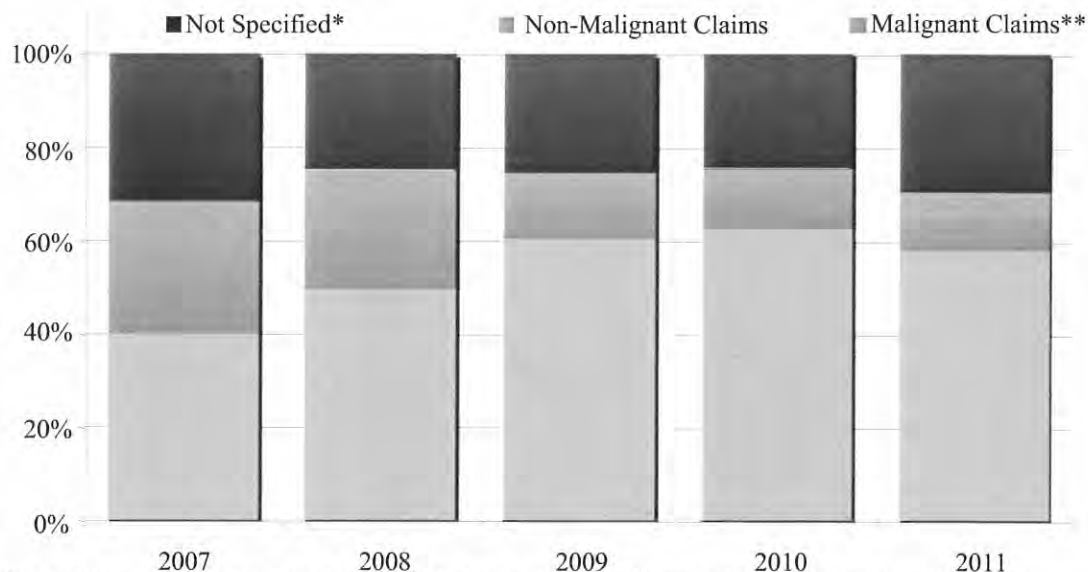
#### Trust payments to malignant and non-malignant claims

Of the \$18 billion in current confirmed trust assets, nearly \$16 billion is associated with twenty trusts that govern annual aggregate claim payments to malignant and non-malignant claim groups through the application of a Claims Payment Ratio. The Claims Payment

**Exhibit 4: Summary of Trust Claim Payment Ratios** (dollars in millions)

Trust	2011 YE Assets	Category A	Category B
AC&S Asbestos Settlement Trust	\$270	82.9%	17.1%
Armstrong World Industries Asbestos PI Settlement Trust	\$2,279	65.0%	35.0%
ARTRA 524(g) Asbestos Trust	\$26	65.0%	35.0%
ASARCO LLC Asbestos PI Settlement Trust	\$992	90.0%	10.0%
Babcock & Wilcox Company Asbestos PI Settlement Trust	\$683	62.0%	38.0%
Burns and Roe Asbestos PI Settlement Trust	\$170	60.0%	40.0%
Combustion Engineering 524(g) Asbestos PI Trust	\$1,025	87.0%	13.0%
DII Industries, LLC Asbestos PI Trust	\$2,094	60.0%	40.0%
Federal Mogul U.S. Asbestos PI Trust <sup>10</sup>	\$770*	62.8%	37.2%
G-I Asbestos Settlement Trust	\$746	85.0%	15.0%
J.T. Thorpe Settlement Trust	\$155	90.0%	10.0%
Kaiser Asbestos PI Trust	\$844	70.0%	30.0%
Leslie Controls, Inc. Asbestos PI Trust	\$78	80.0%	20.0%
Lummus 524(g) Asbestos PI Trust	\$30	80.0%	20.0%
Owens Corning Fibreboard Asbestos PI Trust	\$1,636	65.0%	35.0%
Plibrico Asbestos Trust	\$119	65.0%	35.0%
T H Agriculture & Nutrition Industries Asbestos PI Trust	\$524	80.0%	20.0%
Thorpe Insulation Company Asbestos PI Settlement Trust <sup>11</sup>	\$556*	84.0%	16.0%
U.S. Gypsum Asbestos PI Settlement Trust	\$2,008	85.0%	15.0%
Western MacArthur-Western Asbestos Trust <sup>12</sup>	\$793	82.5%	17.5%
<b>Total / Dollar Weighted Average</b>	<b>\$15,796</b>	<b>73.5%</b>	<b>26.5%</b>
	<b>Category A and B Funding</b>	<b>\$11,610</b>	<b>\$4,187</b>

\*Asset totals include deferred or outstanding payment commitments not currently included as part of net claimant equity on trust audited financials. See endnotes for more details.

**Exhibit 5: Trust Claim Payments by Disease Group as a Percent of Total Claim Payments<sup>13</sup>**

\*Pre-petition and Pre-confirmation settled claims are typically not reported by trusts at the disease category level.

\*\*Malignant claim category may include severely disabled asbestosis claims for certain Trusts.

Ratio mandates that a percentage of annual claim payments are made to either Category A or Category B claims as defined in the Trust Distribution Procedures.<sup>9</sup> In all cases, Category A claims include malignant disease categories, and in most cases also include severely disabling asbestosis claims. Conversely, Category B claims typically include less impaired or unimpaired non-malignant claims. For the group of twenty trusts, the Category A Claim Payment Ratio ranges from as low as 60% to as high as 90% with average of 73.5% when weighted by 2011 year end trust asset balances. At a minimum, this means that over \$4 billion in confirmed trust assets are earmarked for less impaired non-malignant asbestosis and pleural claims.

Exhibit 5 summarizes trust claim payments by disease groupings since 2007. Many trusts choose not to disclose disease or disease groups for claim payments made to pre-petition or Pre-Pack settlements that are distributed through the trust. As a result there are significant payments made to claims with no disease or disease group classification and are denoted as "Not Specified" in Exhibit 5. Absent payments made to the Not Specified group, Exhibit 5 suggests that at minimum \$2.5 billion in payments have been made since 2007 to non-malignant claims. Assuming that

the payments made to the Not Specified group were distributed at the same ratio as the malignant and non-malignant groups (~75%/25%) then the total amount paid to non-malignant claims during the period would be nearly \$3.5 billion. This number appears to be decreasing or steady as inventory claims pending litigation prior to and during bankruptcy reorganization continue to be paid down.

#### Payment percentages

Trusts that are unable to pay claimants 100% of the specified claim amount as prescribed in their Trust Distribution Procedures ("TDP") will establish a "Payment Percentage" that uniformly reduces the actual payment by a fixed percentage. Exhibit 6 summarizes the changes in Payment Percentages since 2008.

To quantify the impact these changes in Payment Percentages can have on net claim payments, Exhibit 7 summarizes the net claim payment for 6 large trusts (8 potential payments) that were processing and paying claims at the Delaware Claims Processing Facility ("DCPF") as of 2008. Significant decreases in Payment Percentages result in a decline of over 30% in net claim payments to a claimant collecting all 8 potential payments across the 6 trusts.

**Exhibit 6: Summary of Payment Percentage Changes as of Yearend**

Trust	Initial Pay%	12/31 2008	12/31 2009	12/31 2010	12/31 2011	6/15 2012
A-Best Asbestos Settlement Trust	3.6%	3.6%	17.4%	17.4%	17.4%	17.4%
API, Inc. Asbestos Settlement Trust	13.5%	13.5%	55.0%	55.0%	30.0%	30.0%
ARTRA 524(g) Asbestos Trust	7.5%	7.5%	7.5%	7.5%	0.5%	0.5%
Babcock & Wilcox Company Asbestos PI Settlement Trust	34.0%	34.0%	15.0%	15.0%	11.9%	11.9%
C. E. Thurston & Sons Asbestos Trust	40.0%	40.0%	40.0%	40.0%	80.0%	25.0%
Celotex Asbestos Settlement Trust <sup>14</sup>	12.0%	14.1%*	14.1%	9.4%	9.4%	9.4%
DII Industries, LLC Asbestos PI Trust <sup>15</sup>	100%	100%	52.5%*	52.5%	52.5%	52.5%
Eagle-Picher Industries PI Settlement Trust	31.9%	38.0%	38.0%	38.0%	31.0%	31.0%
G-I Asbestos Settlement Trust	8.6%	--	8.6%	8.6%	7.4%	7.4%
H. K. Porter Asbestos Trust	4.6%	4.6%	6.3%	6.3%	6.3%	6.3%
J.T. Thorpe Settlement Trust	50.0%	40.0%	40.0%	45.0%	45.0%	45.0%
JT Thorpe Company Successor Trust	18.5%	38.0%	57.0%	57.0%	57.0%	57.0%
Kaiser Asbestos PI Trust	39.5%	39.5%	39.5%	39.5%	35.0%	35.0%
Keene Creditors Trust	1.1%	1.1%	1.1%	0.8%	0.8%	0.8%
Lummus 524(g) Asbestos PI Trust	100%	100%	100%	100%	10.0%	10.0%
Manville PI Settlement Trust	10%	7.5%	7.5%	7.5%	7.5%	7.5%
NGC Bodily Injury Trust <sup>16</sup>	55.6%	55.6%	55.6%	55.6%	18.0%	18.0%
Owens Corning Fibreboard Asbestos PI Trust - FB Subfund	25.0%	25.0%	11.0%	11.0%	9.5%	9.5%
Owens Corning Fibreboard Asbestos PI Trust - OC Subfund	40.0%	40.0%	10.0%	10.0%	10.0%	10.0%
Plibrico Asbestos Trust	1.1%	8.5%	8.5%	8.5%	1.2%	1.2%
Raytech Corporation Asbestos PI Settlement Trust	2.0%	2.0%	2.0%	2.0%	0.8%	0.8%
Shook & Fletcher Asbestos Settlement Trust	65.0%	100%	100%	100%	100%	70.0%
T H Agriculture & Nutrition Industries Asbestos PI Trust	100%	--	100%	100%	30.0%	30.0%
U.S. Gypsum Asbestos PI Settlement Trust <sup>17</sup>	45.0%	45.0%	45.0%	30.0%	30.0%	30.0%
UNR Asbestos-Disease Claims Trust	18.6%	1.1%	1.1%	1.2%	0.8%	0.8%
Western MacArthur-Western Asbestos Trust	31.5%	40.0%	40.0%	44.0%	44.0%	44.0%

\*Amendments to TDP increasing gross payment values in conjunction with, or in lieu of a Payment Percentage change. See endnote for more detail.

**Claims processing facilities**

Bankruptcy trusts under 524(g) are designed to compensate claimants expeditiously and at a minimal cost. Many trusts seek to accomplish this at an administrative

level by contracting with existing asbestos claim facilities such as Verus, LLC ("Verus"), or by partnering with one another to establish a multiple trust processing facility like the DCPF. These facilities reduce administrative

**Exhibit 7: Net Mesothelioma Claim Payments from DCPF trusts (dollars in thousands)**

Trust	12/31 2008	12/31 2009	12/31 2010	12/31 2011
Armstrong World Industries Asbestos PI Settlement Trust	\$26	\$26	\$26	\$26
Babcock & Wilcox Company Asbestos PI Settlement Trust	\$41	\$18	\$18	\$14
Celotex Asbestos Settlement Trust	\$18	\$18	\$12	\$12
DII Industries, LLC Asbestos PI Trust - Halliburton	\$29	\$40	\$40	\$40
DII Industries, LLC Asbestos PI Trust - Harbison-Walker	\$68	\$96	\$96	\$96
Owens Corning Fibreboard Asbestos PI Trust - FB Subfund	\$45	\$20	\$20	\$17
Owens Corning Fibreboard Asbestos PI Trust - OC Subfund	\$108	\$27	\$27	\$27
United States Gypsum Asbestos PI Settlement Trust	\$101	\$101	\$68	\$68
<b>Total Net Payment</b>	<b>\$437</b>	<b>\$346</b>	<b>\$306</b>	<b>\$300</b>

and processing expenses by leveraging overhead and other fixed costs across multiple trusts. In doing so, these facilities create a “one-stop shop” allowing plaintiff attorneys to electronically file bulk claim submissions against multiple trusts. Verus and DCPF represent the two largest facilities both on number of trusts and total assets. In fact, as of year end 2011, of the \$18.3 billion in confirmed trust assets, \$14.7 billion is associated with one of these two facilities. The two facilities were responsible for over 80% of all trust claim payments in 2011. Exhibit 8 provides a summary of these figures.

#### Trust expenses and claim review

To further expedite the processing of claims, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim qualifies for payment. The resolution procedures developed to govern this process are often standardized across Trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. This is not a negotiated or compromising process. Our review of these procedures has shown that for

**Exhibit 8: Trust Assets and Claim Payments by Claims Administrator (dollars in millions)**

Claims Processing Administrator	No. of Trusts	2011 YE Assets	2011 Claim Payments
Delaware Claims Processing Facility	7	\$9,960	\$1,350
Verus Claims Services <sup>18</sup>	13	\$4,780	\$320
Western Asbestos Settlement Trust	3	\$1,500	\$60
Claims Resolution Management Corp. <sup>19</sup>	3	\$920	\$160
Claims Processing Facility <sup>20</sup>	4	\$470	\$40
Trust Services Inc.	3	\$330	\$80
MFR Claims Processing, Inc.	4	\$340	\$10
Other <sup>21</sup>	8	\$40	<\$5
<b>Total*</b>	<b>45</b>	<b>\$18,340</b>	<b>\$2,020</b>

\*Totals for 2011 YE Assets and Claim Payments are undervalued as a result of a few Trusts that have not made 2011 annual reports available. See endnotes 18-21 for list of Trusts and endnote 7 that provides detail on how estimates for these missing annual reports have been applied to figures in Exhibit 2 above.

**Exhibit 9: Trust expenses category as a percent of total Trust expenses<sup>22</sup>**

Trust Expenses Category	2006	2007	2008	2009	2010	2011
Trustee Fees and Expenses	9.7%	8.7%	7.6%	8.1%	7.1%	7.6%
TAC Fees and Expenses	3.0%	1.8%	1.6%	1.4%	1.7%	1.4%
FCR Fees and Expenses	1.8%	1.7%	1.3%	1.1%	2.0%	1.6%
Legal and Professional Fees	30.9%	26.7%	25.2%	26.9%	34.9%	30.2%
Investment Fees	8.1%	19.0%	19.0%	16.3%	16.5%	18.2%
Insurance Expense	6.4%	3.5%	2.5%	2.5%	2.2%	2.4%
General Administration Expense	14.5%	10.3%	9.3%	9.5%	7.3%	7.3%
Claim Processing Costs	21.1%	28.5%	33.9%	34.7%	27.0%	31.1%
Other Expenses <sup>23</sup>	4.6%	-0.1%	-0.4%	-0.5%	1.3%	0.1%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

mesothelioma claims the minimum medical and exposure criteria are virtually the same across many Trusts. As a result, trusts spend little on claim processing costs relative to claim payments. Exhibit 2 above shows that just under \$800 million has been spent since 2008 on trust expenses. The figures in Exhibit 9 below suggests that over this same period, approximately 31% of trust expenses were associated with claim processing costs, or roughly \$250 million. When compared to the \$13.5 billion in claim payments made over that same span, it suggests that the trusts are spending approximately 2 cents to review, process, and pay \$1.00 in claim payments.

**Trust governance**

The formation of a reorganization plan and resultant trust under section 524(g) involves negotiations with representatives of asbestos personal-injury claimants, the debtor, the FCR and other creditor constituencies

with standing in the bankruptcy. Subsequent to the establishment of the trust following plan confirmation, it is often the representatives of asbestos claimants who assume the leadership roles in advising the management of trust assets and distribution of claim payments over time. These representatives make up the Trust Advisory Committee ("TAC"). Exhibit 10 summarizes the law firms that have attorneys as TAC members on the highest frequency of trusts and the recent assets held and claim payments made collectively across those trusts.

The administration of the bankruptcy trust once it becomes operational is split between the trustees, the Trust Advisory Committee ("TAC") and the representative for future claimants (FCR). The trustees are the primary trust fiduciaries and handle reporting requirements, meeting with trust investment managers, and establish, supervise and administer the trust under the

**Exhibit 10: Summary of Trust Assets and Claim Payments by TAC Firm (dollars in millions)<sup>24</sup>**

TAC Member Firm / Affiliation	No. of Trusts	2011 YE Assets	2011 Claim Payments
Kazan, McClain, Lyons, Greenwood & Harley	17	\$13,530	\$1,700
Baron & Budd, P.C.	15	\$11,670	\$1,580
Motley Rice, LLC	10	\$11,400	\$1,540
Cooney & Conway	12	\$11,240	\$1,450
Weitz & Luxenburg	13	\$10,980	\$1,460

provisions of the TDP.<sup>25</sup> The trustees must receive the consent of the TAC and FCR to change the payment ratio, change the medical/exposure criteria, or change the payment percentage of the trust, among other things. The TAC members represent the fiduciary interest of current asbestos claimants and the FCR represents the interests of future demand holders.<sup>26</sup>

### Post-confirmation amendments to trust documents

As typically outlined in the Trust Agreements that are confirmed as part of the bankruptcy Plan of Reorganization, the trustees, TAC and FCR have the ability to amend trust operating procedures and policies post-confirmation.<sup>27</sup>

In recent years several trusts have amended their TDPs post-confirmation to include a “Confidentiality” provision and a “Sole Benefit” clause. The Confidentiality provision mandates that a claimant’s submission to a respective trust and all associated information is to be treated in the course of settlement negotiations and is afforded all the applicable confidentiality privileges and protections. The Sole Benefit

clause states that evidence submitted to a respective trust to establish proof of claim is for the sole benefit of the respective trust, not third parties or defendants in the tort system.

### Example of a Confidentiality provision:

*“Confidentiality of Claimants’ Submissions. All submissions to the Asbestos PI Trust by a holder of an Asbestos PI Claim or a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the Asbestos PI Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including, but not limited to, those directly applicable to settlement discussions. The Asbestos PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only (a) with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants pursuant to section 524(g) and/or section 105 of the Bankruptcy Code or other applicable law, (b) to such other persons as authorized by the holder, (c) in response to a valid subpoena of such materials issued by the Bankruptcy Court, (d) as provided in Section 2.2(c) above and (e) as provided in Section 1.4(f) of the Asbestos PI Trust*

**Exhibit 11: Summary of certain post-confirmation TDP amendments**

Trust	Bankruptcy Confirmation Year	Confidentiality language was originally included	Confidentiality language amended	Sole benefit language was originally included	Sole benefit language was amended
DII Industries, LLC Asbestos PI Trust	2004		YES		YES
Armstrong World Industries Asbestos PI Settlement Trust	2006		YES		YES
Babcock & Wilcox Company Asbestos PI Settlement Trust	2006	YES	YES		YES
Kaiser Asbestos PI Trust	2006		YES		YES
Owens Corning Fibreboard Asbestos PI Trust	2006	YES	YES		YES
Porter Hayden Bodily Injury Trust	2006		YES		YES
U.S. Gypsum Asbestos PI Settlement Trust	2006	YES	YES		YES
Federal Mogul U.S. Asbestos PI Trust	2007	YES	YES	YES	
AC&S Asbestos Settlement Trust	2008	YES	YES	YES	
ASARCO LLC Asbestos PI Settlement Trust	2009	YES		YES	

*Agreement. Furthermore, the Asbestos PI Trust shall provide counsel for the holder a copy of any subpoena referred to in (c) immediately upon being served. The Asbestos PI Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privilege before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto.*<sup>28</sup>

#### **Example of a Sole Benefit clause:**

*"Evidence submitted to establish proof of exposure to Kaiser products is for the sole benefit of the Asbestos PI Trust, not third parties or defendants in the tort system. The Asbestos PI Trust has no need for, and therefore claimants are not required to furnish the Asbestos PI Trust with evidence of exposure to specific asbestos products other than those for which Kaiser has legal responsibility, except to the extent such evidence is required elsewhere in the Asbestos TDP. Similarly, failure to identify Kaiser products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the Asbestos PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of the Asbestos TDP."*<sup>29</sup>

Exhibit 11 shows that for the sample of trusts reviewed, the more recent trusts are including the Confidentiality provision and Sole Benefit clause in the pre-confirmation TDPs, while earlier trusts are amending the TDPs post-confirmation.

#### **Conclusion**

It has been 30 years since Johns Manville filed for bankruptcy and 25 years since its trust began paying claimants. More than 800,000 claims later, the Manville trust continues to compensate asbestos victims and has been joined by dozens of other trusts who collectively hold over \$18 billion in current assets with an additional \$11 to \$12 billion pending bankruptcy confirmation. Efforts have been made recently by public-policy makers and other parties to integrate those trust assets into the overall asbestos compensation system and make available more detailed, "transparent" information about trust claiming and payments.

As the trust transparency issue continues to evolve and legislatures, courts, academics and other interested parties strive to learn more about the trust disclosures, we plan to update this paper going forward to provide the most current snapshot as possible of what is known about the asbestos bankruptcy trust compensation system.

#### **Endnotes**

1. "Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 11, No. 7 (February 2012).
2. Figures based on information gathered from Section 524(g) trust annual reports.
3. Estimated present value of proposed funding based on bankruptcy disclosures from W.R. Grace, Pittsburgh Corning, North American Refractories, Flintkote, Congoleum, Quigley, Plant Insulation, AP Green, and Durabla. There are other pending 524(g) bankruptcy reorganizations currently active but no estimates of proposed trust funding has been disclosed in publically available bankruptcy documents that we were able to find.
4. 11 U.S.C. Section 524(g)(2)(B)(i)(1); 11 U.S.C. Section 524(g)(2)(B)(ii)(V).
5. "Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 11, No. 7 (February 2012).
6. *Supra* 3.
7. 2011 annual reports were not available for H.K. Porter, Keene, U.S. Mineral, Rutland Fire, and M.H. Detrick Trusts. In order to estimate the aggregate balances for 2011 we applied the asset and liability flows from 2010 for these specific Trusts.
8. Deferred note payments and insurance settlements that are not included as part of net claimant equity on trust financials but are due in the future. For example, the Federal Mogul U.S. Asbestos Personal Injury Trust, T&N sub-fund has outstanding note payment due totaling \$340M that are reported in the notes of the trust annual report financial statements, but are not included in the trust accounting of Net Claimant Equity.
9. United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures, Section 2.5.
10. 2011 YE balance of \$430M, plus the outstanding principle on the Thornwood promissory note

- totaling \$340M as of 12/31/2011 per Note 3 of the 2011 of the trust audited financials. As of 12/31/2011, the portion of the \$430M from insurance settlements was approximately \$112M. Assuming these settlements represent the portion of trust funds associated with the FMP (Wagner) liability, then the asset weighted average Claim Payment Ratio for the T&N(60%) and FMP(79%) is 62.8% for Category A Claims and 37.2% for Category B Claims.
11. Page 10 of the Court of Appeals opinion by Judge Gould suggests that \$600M in insurance had been settled to fund the trust plus an additional \$1.75M in funding. To date, the trust has received \$198M, so for purposes of this paper we have added the difference of \$404M to the 2011 ending balance of \$152M to represent the current total of committed trust funding.
  12. Section 2.5 of the TDP allocates annual claim payments of 88.35% to Western Asbestos/Western MacArthur (CA) claims and the remaining balance for MacArthur claims from either MN or ND. The Category A Claims Payment Ratio for CA claims is 84%, and for MN and ND claims it is 71.5%, which when weighted by the 88.35%/11.65% split yields an average Category A Claims Payment Ratio for the entire trust of 82.5% with the balance of 17.5% for Category B Claims.
  13. Claim payments by disease category are sometimes reported by trusts on a payment basis as opposed to an accrual basis that is typically used in the trust financials. As a result, the claim payment commitments reported in Exhibit 2 and 3 from the trust financials may differ from claim summary level in Exhibit 4.
  14. In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice available on Celotex Trust website.
  15. In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
  16. NGC trust decreased its Payment Percentage twice in 2011 (First to 41% in July and then to 18% in November).
  17. United States Gypsum trust decreased its Payment Percentage twice in 2010 (First to 35% in April and then to 30% in November).
  18. The 2011 annual report for the H.K. Porter Asbestos Trust was not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  19. The 2011 annual report for the U.S. Mineral Products Trust was not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  20. The 2011 annual report for the Keene Creditors Trust was not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  21. The 2011 annual report for the M.H. Detrick and Rutland Fire Trusts were not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  22. Percentages based on approximately 40 Trusts that provided sufficient expense detail as part of the annual report.
  23. Other expenses may include refunds and other similar accounting entries that may create negative balances.
  24. *Supra* 18-21.
  25. United States Gypsum and Armstrong World Industries 2011 trust annual reports.
  26. *Ibid.*
  27. *See for example* Section 7.3 of the Armstrong World Industries, Inc. Asbestos PI Settlement Trust Agreement.
  28. *See for example* Section 6.5 of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures.
  29. *See for example* Section 5.7(b)(3) of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures. ■



### **EXHIBIT C**

**Scarcella, Marc C., Peter R. Kelso, and Joseph Cagnoli, Jr. "The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010." Mealey's Asbestos Litigation Report 27, no. 19 (2012).**

# Asbestos

## **The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes In Exposure Allegations From 1991-2010**

*by*  
*Marc C. Scarcella*  
*and*  
*Peter R. Kelso,*  
*Bates White Economic Consulting*

*and*

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*Segal McCambridge Singer & Mahoney, Ltd.*

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Report: Asbestos**



# Commentary

## The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes In Exposure Allegations From 1991-2010

By  
**Marc C. Scarcella**  
**Peter R. Kelso**  
and  
**Joseph Cagnoli, Jr.**

*[Editor's Note: Marc C. Scarcella and Peter R. Kelso, Managers at the Washington, DC office of Bates White Economic Consulting. Joseph Cagnoli, Jr., Shareholder in the Philadelphia office of Segal McCambridge Singer & Mahoney, Ltd. The views of the authors do not reflect the opinions of their respective firms, their clients, or Mealey's Publications. © 2012 by Marc C. Scarcella, Peter R. Kelso and Joseph Cagnoli, Jr. Responses are welcome.]*

### Introduction

Over the past two decades, asbestos litigation has undergone a succession of pivotal changes. Each change led to new claiming and settlement patterns that altered the legal and financial circumstances of asbestos plaintiffs and defendants. One of the most significant changes was the "Bankruptcy Wave" that began in 2000 and ended with dozens of primary asbestos defendants filing for bankruptcy reorganization ("Reorganized Defendants").<sup>1</sup> Since asbestos lawsuits are stayed during the reorganization process, a substantial source of plaintiff compensation associated with these primary defendants exited the tort system.<sup>2</sup> This marked a significant shift in asbestos litigation as plaintiff attorneys were faced with having to fill the void in compensation left behind by these Reorganized Defendants.

Prior to the Bankruptcy Wave, asbestos lawsuits were centered on the thermal insulation products and industrial settings that most scientific literature considered to present the highest excess exposure risk.<sup>3</sup> In turn, defendants responsible for the manufacturing and

distribution of such products were considered the most culpable sources of plaintiff compensation. Even after the largest manufacturer of asbestos-containing thermal insulation products, Johns-Manville, filed for bankruptcy protection in 1982, dozens of other thermal insulation defendants such as Owens-Corning, Fibreboard, and Pittsburgh Corning remained and continued to be primary sources of compensation.<sup>4</sup> However, following the bankruptcies of those front-line defendants during the Bankruptcy Wave, plaintiff attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products.

As a result, these peripheral and new defendants experienced a dramatic increase in both the number of lawsuits in which they were named, the frequency in which their products and operations were identified as sources of asbestos exposure, and the overall settlement demands that plaintiff attorneys were seeking. Conversely, the primary thermal insulation defendants that filed for bankruptcy reorganization all but disappeared from the litigation and rarely are identified in cases today. To study the extent of this shift in allegations from traditional defendants to peripheral defendants, we examined the Philadelphia Court of Common Pleas asbestos docket through a sample of mesothelioma cases from 1991 to 2010.<sup>5</sup>

**Replacing Primary Defendants With Peripheral And New Defendants**

The Bankruptcy Wave had a dramatic impact on the claiming behavior in asbestos lawsuits. Prior to the Bankruptcy Wave, the naming patterns, exposure allegations and compensation to plaintiffs were relatively consistent with defendant manufacturing and distribution market share of asbestos-containing products. After the Bankruptcy Wave, however, plaintiff attorneys refocused their litigation strategy on defendants who previously had only been peripheral sources of plaintiff compensation, in addition to developing exposure cases against a new group of defendants who were rarely, if ever, named prior to 2000. Typically, one would think that when a majority of defendants in a tort exit the litigation through bankruptcy reorganization the defendant pool is reduced and the number of defendants named in future lawsuits decreases. However following the Bankruptcy Wave in asbestos litigation, the opposite was true.

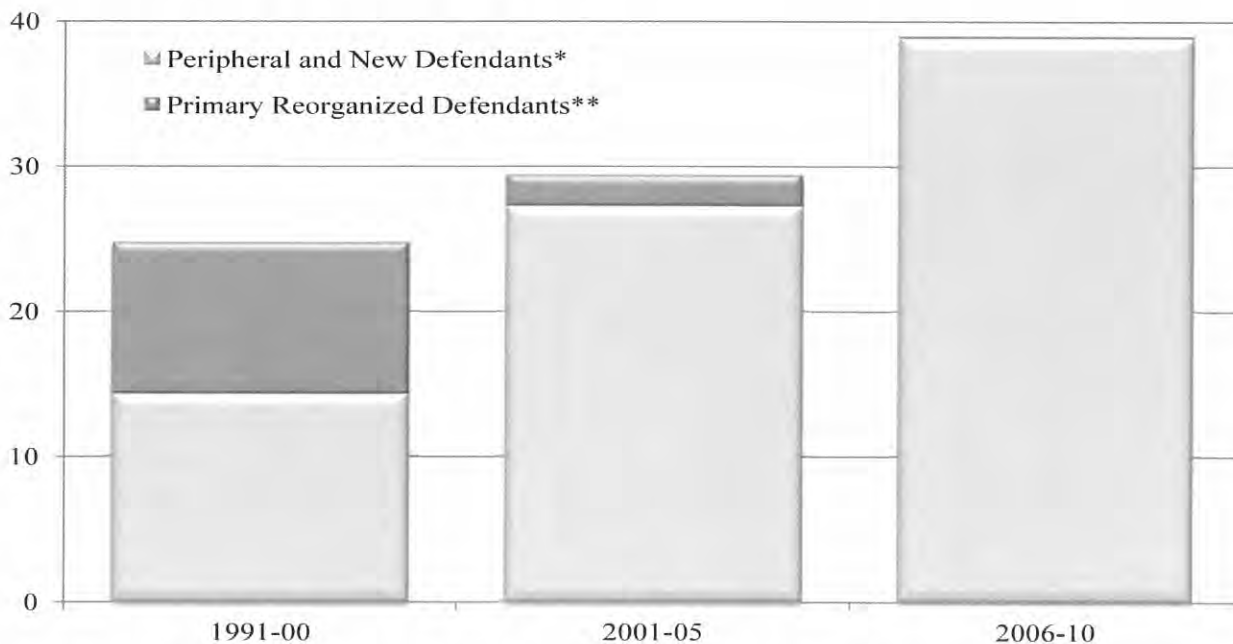
Exhibit 1 summarizes the naming patterns from our sample. On average, 25 defendants were named on a mesothelioma lawsuit filed between 1991 and 2000, 10 of which eventually filed for bankruptcy reorganization by 2004. Between 2006 and 2010, the average number

of defendants named on a complaint rose to nearly 40, with virtually no Reorganized Defendants being named. This suggests that plaintiff attorneys are pursuing cases against 2.5 peripheral or new defendants for every Reorganized Defendant they previously named.

The fact that plaintiff attorneys are no longer naming Reorganized Defendants on asbestos lawsuits is not surprising. When an asbestos defendant files for bankruptcy protection, they typically reorganize under section 524(g) of the bankruptcy code. In addition to placing a stay on claims against the defendant during the pendency of the reorganization process, all current and future asbestos claims are eventually channeled to a personal-injury trust following bankruptcy confirmation.<sup>6</sup> These trusts assume the legal responsibility of the Reorganized Defendant's asbestos-related liability and, in turn, are funded with assets intended to pay compensable claims.

Unlike the tort system, asbestos trusts are designed to process, qualify, and pay claims through an administrative process that does not require litigation. As a result, even the asbestos trusts that now stand in the shoes of those Reorganized Defendants will rarely, if ever, be named in a lawsuit. Effectively, the bankruptcy

**Exhibit 1: Lawsuit naming patterns**



\*Includes peripheral defendants that eventually filed for bankruptcy after 2004

\*\*Includes defendants that filed for bankruptcy reorganization by 2004

reorganization process has created a dual compensation system where plaintiffs may be independently compensated by both administrative trust payments and by tort-based settlements.

**The Dual Compensation System**

The discussion surrounding the asbestos trust compensation system and its lack of transparency to the tort system has been the focus of academic, judicial, and legislative debates across the country in recent years.<sup>7</sup> Even though asbestos bankruptcy reorganizations and resulting trust funds have been around for decades, it has only been in the past few years that the trust system as a whole has become a substantial source of plaintiff compensation. That is because the bankruptcy reorganization process itself can take several years to reach confirmation. Furthermore, establishing an operational trust to begin processing, reviewing, and paying claims has taken from six months to multiple years following confirmation. As a result, many trusts established to stand in the shoes of Reorganized Defendants did not start compensating claimants until the late 2000s. Exhibit 2 shows the growth of the trust system over time and the assets earmarked for pending but not yet confirmed 524(g) reorganization plans.

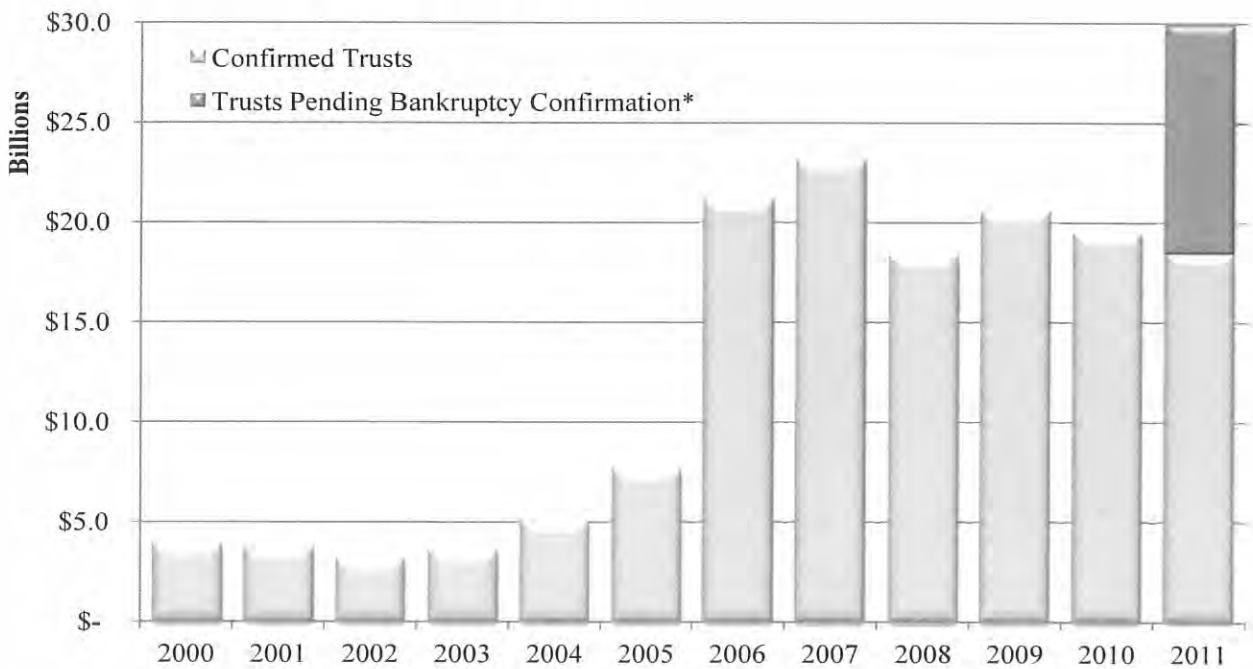
As asbestos trust assets have grown over time, so have payments to asbestos claimants. Between 2006 and 2011, the trust system distributed over \$14 billion in claim payments. As these trust payments have increased, so have questions regarding the lack of transparency between the trust and tort compensation systems.

1. At what rate are plaintiffs filing asbestos trust claims in addition to their tort claim?
2. For those trust claims that are being filed, are the exposure allegations and evidence submitted in support of the trust claims consistent with the allegations and disclosures in the tort claim?
3. Are the characteristics of a claimants' exposure profile predicated on the defendants that are currently in the tort system?

**Industrial Exposure Patterns**

To assess if the exposure profiles of plaintiffs today are similar to plaintiffs in the pre-Bankruptcy Wave period of the 1990s, we first looked to see what percentage of plaintiffs within our sample could allege exposures at

**Exhibit 2: Trust yearend assets<sup>8</sup>**



\*Estimated present value of proposed funding based on bankruptcy disclosures

**Exhibit 3: Percent of plaintiffs with industrial exposures**

Potential exposures	1991-00	2001-05	2006-10
<b>Total plaintiffs with potential exposures to industrial sites</b>	<b>77%</b>	<b>72%</b>	<b>72%</b>
- in high exposure occupations	46%	34%	51%
- in other occupations	31%	38%	21%

industrial work sites where thermal insulation products were likely to be present. The types of sites we considered include shipyards, ships, refineries, steel mills, and power plants. The sample data suggest that prior to the Bankruptcy Wave roughly 77% of all plaintiffs had some potential exposures linked to an industrial work site. Since the Bankruptcy Wave, this percentage has only dropped slightly to approximately 72% of plaintiffs.

Moreover, a majority of the plaintiffs that once worked at these industrial sites did so in a high-exposure occupation. In fact, the sample data between 2006 and 2010 suggest that the level of plaintiffs working in high-exposure occupations in industrial settings has actually increased slightly from the pre-Bankruptcy Wave period. The types of occupations we considered include insulators, boiler/firemen, pipefitters, machinists, iron workers, or general asbestos workers. Exhibit 3 summarizes these findings.

In addition to analyzing the location and nature of potential exposures to thermal insulation products, we also looked to see if the years of potential exposure have changed with more recent filings. Exhibit 4 shows that even as the plaintiff population has aged over time with an increasing level of exposure in the 1970s, a majority of exposures at these industrial sites still occur during the 1950s and 1960s. Prior to the Bankruptcy Wave, roughly 59% of the industrial exposures occurred between 1950 and 1969. More recently, for cases filed between 2006 and 2010, the percent of industrial exposures that occurred between 1950 and 1969 decreased only marginally to approximately 57%.

These findings are consistent with the epidemiological literature that commenced with the seminal work of Dr. William J. Nicholson in 1982.<sup>9</sup> Dr. Nicholson's epidemiological studies demonstrate that the exposure history of individuals diagnosed with mesothelioma will

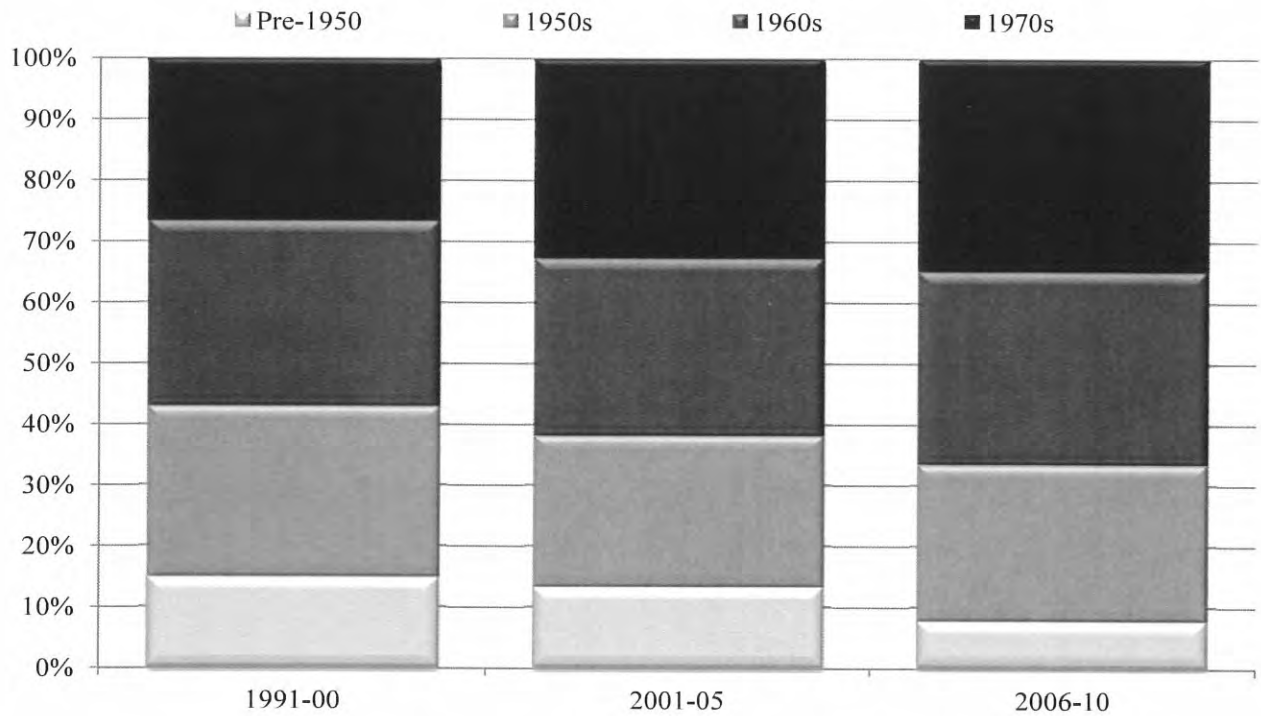
change, but that those changes will occur slowly over decades and remain strongly linked to industrial exposure. In essence, the asbestos exposure that workers received in the 1940s through the 1960s caused almost all occupationally induced mesothelioma. Conditional on their exposure history, if and when individual workers develop mesothelioma is a matter of chance. As a result, epidemiology demonstrates that the exposure history of individuals with occupationally induced mesothelioma today is essentially the same as the exposure history of individuals with occupationally induced mesothelioma in the 1990s.

**Shift In Alleged Product Exposure**

As primary thermal insulation defendants exited the tort system, the economic incentive for plaintiff attorneys and their clients to discuss them in lawsuits diminished. Our sample analysis indicates that the number of peripheral and new defendants positively identified during plaintiff deposition has increased significantly while the number of Reorganized Defendants identified has declined. Prior to the Bankruptcy Wave, deponents identified approximately 15 defendants on average, of which over 50% were primary thermal insulation or refractory defendants that eventually filed for bankruptcy reorganization. After the Bankruptcy Wave, deponents identified about 25 defendants of which only 15% are primary Reorganized Defendants. This suggests that three peripheral or new defendants are identified in deposition testimony today for every primary Reorganized Defendant identified prior to the Bankruptcy Wave. Exhibit 5 summarizes these trends.

This shift away from Reorganized Defendants has resulted in a dramatic decline in the number of times thermal insulation products are identified in deposition testimony or other case documents. Exhibit 6 shows how the identification of thermal insulation and refractory products has declined since the 1990s as the

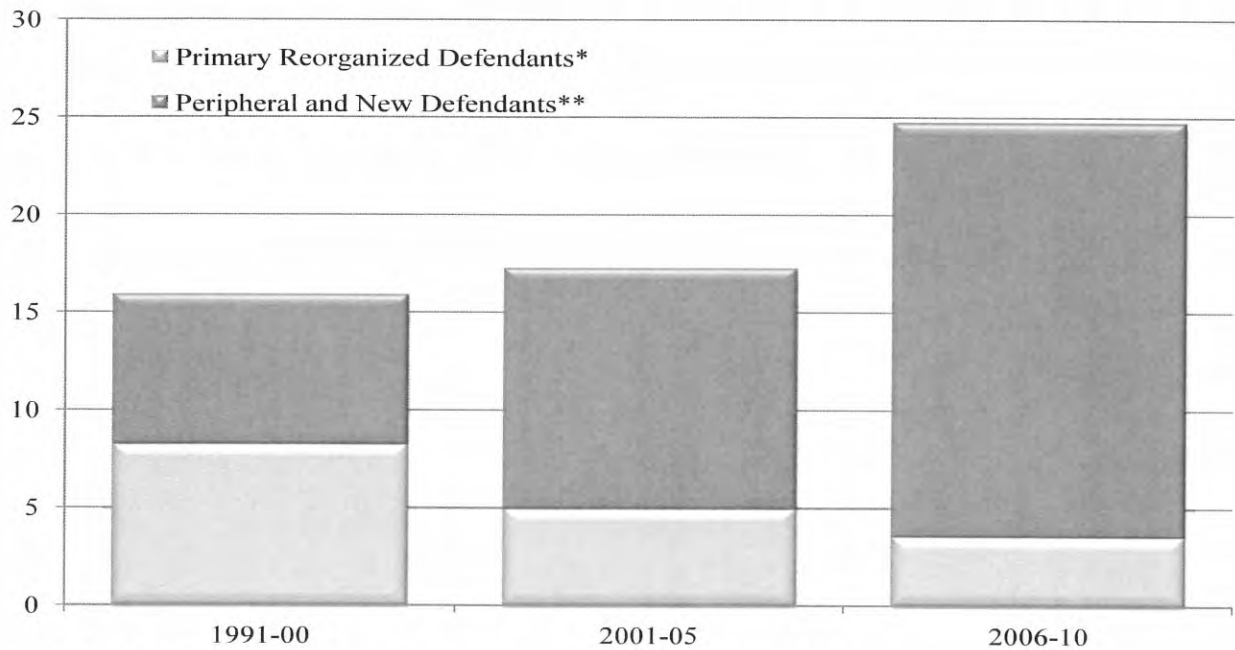
**Exhibit 4: Years of exposure from industrial work sites**



defendants responsible for a majority of the manufacturing and distribution of those products have filed for

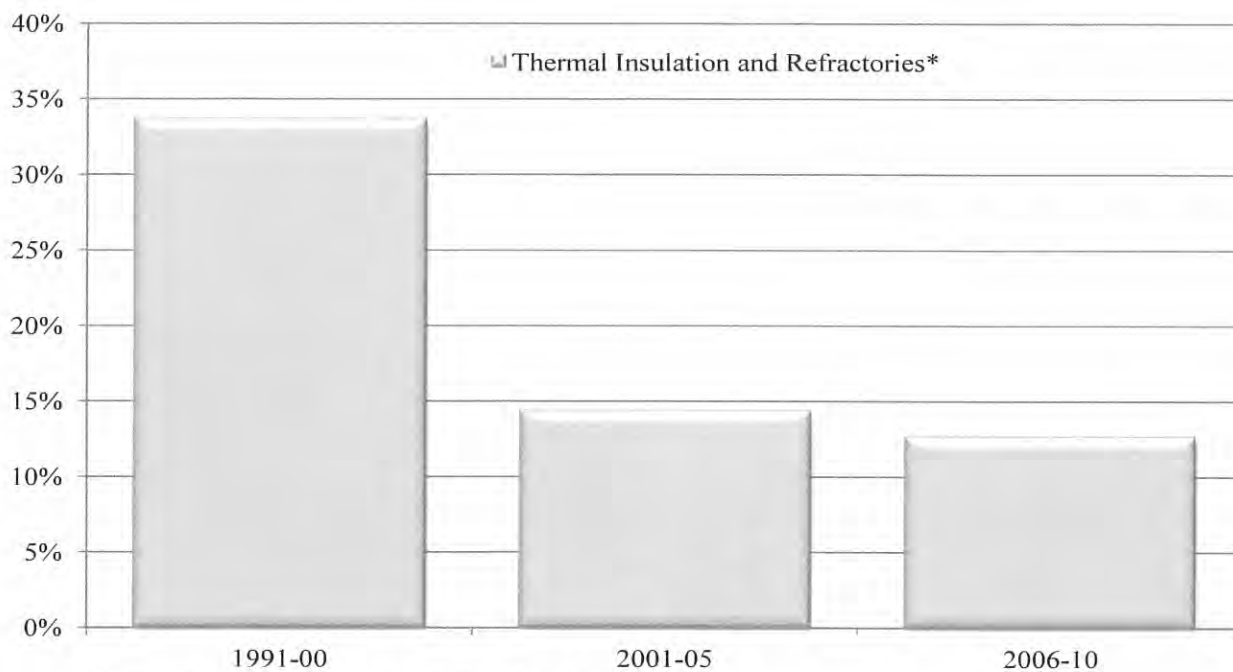
bankruptcy.<sup>10</sup> This is despite the fact that the plaintiff population has not experienced a decline in potential

**Exhibit 5: Product manufacturers and distributors identified in deposition testimony**



\*Includes defendants filing for bankruptcy reorganization by 2004

\*\*Includes peripheral defendants that filed for bankruptcy after 2004

**Exhibit 6: Alleged exposure to thermal insulation and refractory products**

\*Pipe, block, and spray insulation, brick, etc.

exposures in industrial settings where these products were present. Prior to the Bankruptcy Wave, over one-third of all products identified were thermal insulation or refractory products. That fell to less than 15% between 2006 and 2010.

**The Rise Of Alternative Alleged Exposures**

It is clear from the data that the identification of thermal insulation defendants declined substantially since the Bankruptcy Wave. As such, the litigation shifted away from the thermal insulation defendants and towards exposures related to the products of the peripheral and new defendants, even though the exposure history of the majority of plaintiffs in this later period was unchanged relative to earlier plaintiffs; they still worked at sites (frequently the same sites during the same time periods as earlier plaintiffs) where thermal insulation products were present.

A case study on a Philadelphia plaintiff who filed a non-malignant claim in 1981 and subsequently filed a malignant mesothelioma case in 2010 is a prime example of this overall shift in identification patterns. In 1981, the plaintiff alleged exposure to asbestos through his work as an insulator for 30 years at a

Philadelphia oil refinery and named 9 defendants in the complaint. Six of those defendants manufactured thermal insulation products and eventually filed for bankruptcy reorganization. The other three defendants were distributors who supplied insulation materials to the plaintiff's job site.<sup>11</sup> In addition to the thermal insulation defendants named in the complaint, the plaintiff also identified over 50 thermal insulation products manufactured by the now Reorganized Defendants and another 40 products that were distributed to the refinery by the insulation supplier defendants. In this case, the plaintiff clearly alleged that his three decades working with insulation products at the refinery caused his asbestos-related disease.

However, the 2010 case complaint and allegations of exposure look much different. In the new complaint, the plaintiff now names over 40 defendants and none of the original defendants on the 1981 complaint. The complaint and deposition testimony acknowledge the plaintiff's previous insulation work yet, despite no new alleged exposures since the original complaint was filed in 1981, the focus of the 2010 case now concentrated on the plaintiff's weekend automotive work and potential exposure to asbestos from home construction



products. In addition to the new defendants named, the new exposure allegations introduced no less than 12 products not previously identified and alleged exposure to an array of new, non-thermal insulation products such as brakes, gaskets, pumps, roofing, caulk and other construction products.

The sample data show that this particular example is more likely the rule rather than the exception. We found that plaintiff depositions today focus less on thermal insulation and more on alternative products such as pumps, valves, and gaskets that also would have been encountered in traditional industrial settings. In addition, alleged exposure has increased in the construction and automotive trades, as well as residential do-it-yourself ("DIY") home repair, remodeling, and shade-tree automotive maintenance. Exhibit 7 shows this increasing trend towards non-industrial alleged exposures that implicate a new group of defendants.

Much like the case study, a majority of these plaintiffs alleging an increased level of alternative exposures still worked in the same industrial setting during the same time periods as earlier plaintiffs. For example, Exhibit 8 summarizes the percent of plaintiffs in our sample that i) have potential industrial exposures, ii) allege

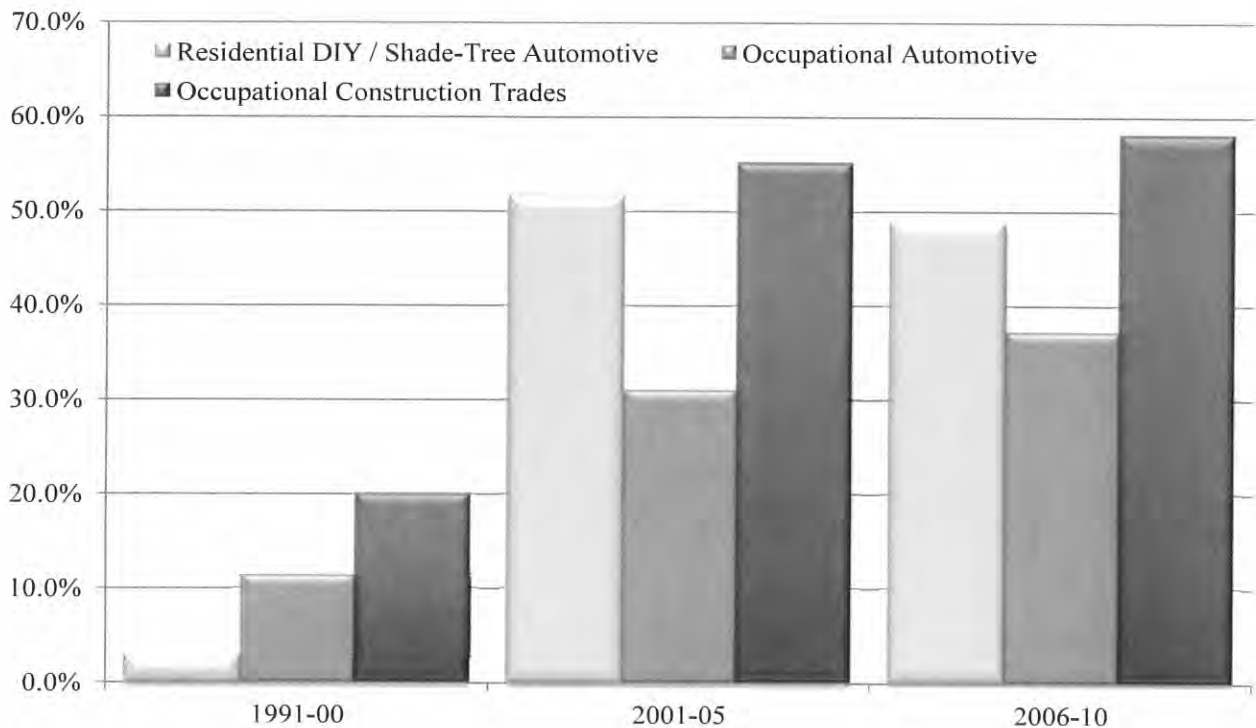
alternative residential DIY or shade tree automotive repair, or iii) allege both.

The sample analysis suggests that the mesothelioma plaintiff population in the Philadelphia Court of Common Pleas has maintained a consistent level of potential industrial exposures. However, the affirmative identification of thermal insulation products and those manufacturers and distributors associated with such products has declined significantly, as the focus of the litigation shifted to alternative exposures and defendants. For most plaintiff attorneys and their clients, there is little economic incentive to build cases against primary thermal insulation defendants since almost all of them have undergone bankruptcy reorganizations. Given the high rate of industrial exposures, however, it is likely that plaintiffs still collect significant payments from the asbestos trusts that have replaced these Reorganized Defendants.

**Industrial Exposures And Trust Claims**

Asbestos trusts are designed to pay claims expeditiously and with minimal administrative and transactional costs. To accomplish this, most trusts have established presumptive medical and exposure criteria to quickly

**Exhibit 7: Alleged alternative exposures**



**Exhibit 8: Percent of plaintiffs with industrial and non-occupational residential exposures**

Potential exposures	1991-00	2001-05	2006-10
Industrial sites	77%	72%	72%
Residential DIY / shade tree auto	3%	52%	49%
Both Industrial and residential DIY/ shade tree auto	3%	31%	35%

determine if a claim qualifies for payment. According to trust documents, claimants must demonstrate meaningful and credible exposure to asbestos-containing products manufactured, produced, distributed, sold, fabricated, installed, released, maintained, repaired, replaced, removed, or handled by the Reorganized Defendant. The trusts generally deem specific product identification through testimony by the plaintiff, plaintiff's family members, or plaintiff's co-workers sufficient to satisfy this requirement.

For many trusts, claimants can also support exposure allegations by working at a job site that appears on an Approved Site List. These Approved Site Lists are compiled through corporate records and plaintiff testimony and include locations where the Reorganized Defendant's products or operations were allegedly present for a specified period of time. In effect, these Approved Site Lists act as a proxy for co-worker testimony to further expedite the review process.

Plaintiffs can establish product exposure by being at one of these locations at a time when the predecessor company's asbestos-containing products or operations were also allegedly present. Not all trusts have Approved Site Lists, and those Approved Site Lists that do exist can have sites appended periodically. In addition to Approved Site Lists, certain trusts also provide an Approved Industry List of approved occupations and/or industries where the Reorganized Defendants' products or operations were presumed to be present.

To supplement the alleged product exposures in our sample, we compared the work histories of each plaintiff with a case filed after 2000 to the Approved Site Lists or Approved Industry Lists for those trusts that have one. Exhibit 9 summarizes the impact supplemental matches to trust Approved Sites and Industries can have on raising the profile of Reorganized Defendants in the absence of affirmative product identification in the tort case disclosures.

**Exhibit 9: Percent of 2006-2010 sample cases with links to select Reorganized Defendants**

Bankrupt Defendant	Percent of 2006-10 sample cases	
	With affirmative Product ID	Supplemented with Trust Approved Site / Industry Matches
Babcock & Wilcox	16%	72%
Fibreboard	5%	67%
Owens Corning	33%	65%
United States Gypsum	12%	60%
Armstrong World Industries	33%	53%
G-I	23%	53%
Combustion Engineering	5%	44%
<b>Average</b>	<b>18%</b>	<b>59%</b>

Exhibit 10 shows how consistent the results of the supplemental trust claim analysis are with pre-Bankruptcy Wave product identification patterns. Prior to the Bankruptcy Wave, the cases in our sample identified, on average, over eight thermal insulation or refractory defendants that eventually filed for bankruptcy reorganization by 2004. This number dropped between 2001 and 2005 to an average of five, and then to less than four between 2006 and 2010. However, when supplemented with Approved Site and Industry List matches, the plaintiffs in the cases filed post-2000 would qualify for compensation from 10 trusts on average.

**The Asbestos Trust Waiting Game**

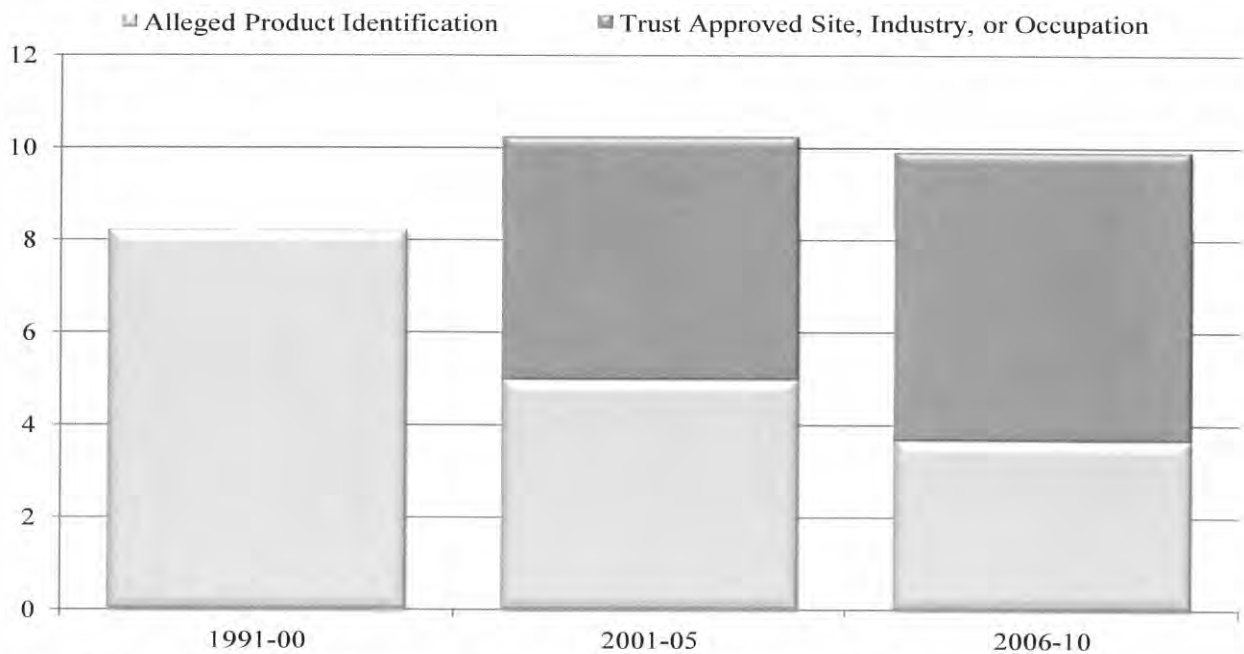
As evidenced in the sample data, there is a systemic shift away from Reorganized Defendant product identification. It is no longer in a plaintiff attorney's economic interest to build or concentrate a case against those Reorganized Defendants in the tort system. Rather, it is in the plaintiff attorney's economic interest to build a case in state court against the peripheral and new defendants and subsequently seek asbestos trust claim payments once they have reached settlement with a

number of tort defendants. The timing and lack of transparency in this dual claim and compensation system can affect the way liability is allocated among the remaining defendants. If exposures to Reorganized Defendant products are not being disclosed in the tort case, then the relative liability risk increases for peripheral and new defendants.

To date, traditional discovery has been difficult for defendants in Philadelphia to use as an effective tool to ascertain asbestos trust claim forms and allegations of exposure to those Reorganized Defendant products. This is due, in part, because most asbestos trusts have a three year statute of limitations from diagnosis to trust claim filing that allows a window for tort recovery prior to trust claim filing. So when discovery is conducted by defendants requesting disclosure of trust claim forms and the corresponding exposure allegations, no such evidence exists.

Exhibit 11 summarizes our findings from two cases in the sample where asbestos claim forms were produced that serve as prime examples of the delay that is occurring between tort filing and trust claim disclosures.

**Exhibit 10: Reorganized Defendant product ID when supplemented with Trust Approved Sites, Industries, and Occupations\***



\*Only includes those defendants that filed for bankruptcy prior to 2005

**Case Study 1**

The first case study represents a plaintiff with significant occupational exposure in industrial settings during years of heavy thermal insulation use. Consistent with our findings across the 2006-2010 sample, the case documents only identified two Reorganized Defendants even though the plaintiff worked in an occupational setting where thermal insulation product exposure would be expected. In this particular case, while exposures against Reorganized Defendants were not the focus of the product identification and exposure allegations, one could easily bridge the information gap and build a case to allocate liability to those parties through the use of trust Approved Sites and Industries. In fact, the exposure sites for the plaintiff would qualify for compensation from 20 trusts based upon Approved Site and Industry matches alone.

Eventually, evidence of asbestos trust claims were disclosed two-and-a-half years after the lawsuit was filed, and nearly a year-and-a-half after the claims were actually filed with the trusts. And when the trust filings were disclosed they included claim forms for only 6 of the 20 trusts for which the plaintiff was eligible. This supports the theory that the plaintiff attorney may have had little

economic incentive to actively pursue qualifying trust payments during the pendency of the lawsuit. If pursuing trust compensation was a priority, then 20 claims would have been pursued instead of just 6, and the plaintiff could have received over \$500,000 in trust payments.<sup>12</sup>

**Case Study 2**

The second case study represents a different and less common type of plaintiff, with only a mix of occupational and non-occupational residential construction and remodeling exposures that didn't begin until the mid to late 1970s, when many asbestos-containing products had already been phased out of the market. In this instance, the case documents did disclose the use of products from six Reorganized Defendants such as flooring, wallboards, and compounds. Despite not having any industrial exposures, it was eventually disclosed that 11 trust claim forms had been filed on behalf of the plaintiff.

Given the non-industrial nature of the exposures, none of the trust claim forms in the second case could be supported by matches to Approved Sites or Industries. Rather, the alleged exposures in these trust claim forms

**Exhibit 11: Case studies on trust filing lags**

Findings	Case Study 1	Case Study 2
Lawsuit filing date	February 2008	January 2009
Trial group	November 2010	November 2010
# of named defendants	54	39
General exposure history	Laborer and machine operator for 30 years (1950s-70s) at industrial sites ( <i>refineries, steel mills, power plants, shipyards</i> )	Residential construction / repair on personal and investment properties beginning in the mid to late 1970s
# of Bankrupt defendants identified*	2	6
# of Trust claims disclosed in discovery	6	11
Date trust claims were filed**	May - June 2009	October 2009 – March 2010
Date trust claims were disclosed	September 2010	September 2010
Lag from lawsuit to trust claim filing	15-16 months	10-15 months
Lag from lawsuit to trust claim disclosure	31 months	21 months
# of Potential trust claims not disclosed***	14	1

\* Defendants bankrupt by lawsuit filing date

\*\* Two of the six trust claim forms did not disclose the trust filing date for Case Study 1

\*\*\* Based on product ID testimony and matches to trust Approved Site and Industry Lists

were predicated on specific product identification that was not otherwise disclosed in earlier interrogatories or depositions. Prior to these trust claims being disclosed only two months before trial, the active defendants in the case had no way of assuming or establishing the potential exposures to these 11 Reorganized Defendants.

The significant delay in disclosing asbestos trust claim filings and corresponding exposure allegations until just before trial is an issue at the heart of a number of current state and federal legislative proposals aimed at increasing transparency between the trust and tort systems.<sup>13</sup> When trust claims are not pursued or disclosed until late in the tort proceedings, if at all, it creates an information asymmetry that places active defendants at a significant disadvantage when negotiating settlements in the tort system. If trust claims are not pursued in a timely manner, it conceals critical information regarding both sources of potential plaintiff compensation, as well as exposures to the products of the Reorganized Defendants that are no longer being named on the lawsuits because of their bankruptcies. As a result, the defendants and the court do not have the full information regarding the plaintiff's complete and unbiased exposure history, making it impossible to properly defend the case and allocate liability, respectively.

### **Establishing Liability To Reorganized Defendants In Philadelphia**

Defense and plaintiff attorneys negotiate settlements based on litigation risk factors. For defendants, knowing if claims are being pursued against alternative sources of compensation based on exposures to other company products and operations greatly influences their assessment of what they will likely have to pay if the case goes to trial. In the absence of this information, defendants are put in a position of agreeing to higher than appropriate settlements because the uncertainty surrounding potential trust claims naturally increases their litigation risk. Cases that do reach verdict similarly put the court and jury in an uncertain position. If information regarding exposure to Reorganized Defendant products has been withheld or concealed from the court, a jury cannot properly allocate liability against those culpable parties.

New legislation in Pennsylvania and changes to procedural rules in the Philadelphia Court has increased the economic incentive for current defendants to identify

the liability share of Reorganized Defendants. The elimination of involuntary bifurcation earlier this year and the passage of the Fair Share Act in 2011 changed the paradigm of how liability is allocated in Philadelphia asbestos cases.<sup>14</sup> The Fair Share Act transitions the state's traditional joint and several liability rules to a system more in line with proportional liability and raises the threshold to 60 %the amount of liability for any one defendant to be jointly and severally responsible for the full judgment.

Even with the current rules in place, however, defendants in Philadelphia still face challenges assigning liability to bankruptcy trusts and getting a plaintiff's exposure to Reorganized Defendants' products considered by a jury. While providing evidence of exposure to Reorganized Defendants' products under the Fair Share Act should limit the risk of active tort defendants being held jointly and several liable, those defendants are still absent the corresponding mechanism that would allow the jury to allocate liability to bankruptcy trusts.<sup>15</sup> In order for the jury to consider and allocate liability among the full complement of potentially responsible parties, the court would need to establish procedures to ensure that trust claim forms and corresponding exposure evidence are disclosed early in tort proceedings and have the ability to place the bankruptcy trusts of the Reorganized Defendants on the verdict form.<sup>16</sup> The sample data suggests that until such rules are instituted, the allocation of liability in the Philadelphia Court will be influenced by the disclosure, or lack thereof, of trust claim forms and the associated allegations of exposure to Reorganized Defendants.

### **Conclusion**

The results from the study of the Philadelphia asbestos docket indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of exposure to those products is greatly diminished compared to claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories. Despite tens of billions of dollars in asbestos trusts currently available to pay the several shares of liability for Reorganized Defendants, including \$14 billion in payments that have been made between 2006-2011, the current bankruptcy rules and lack of transparency in the asbestos trust system have prevented current defendants from discovering the extent of exposure plaintiffs received from

the products of Reorganized Defendants. As a result of this incomplete disclosure, current tort defendants overpay on numerous cases.

The dramatic decline of identification to the products of Reorganized Defendants since the Bankruptcy Wave is likely not unique to the Philadelphia Court. Given the widespread distribution of products by many of the Reorganized Defendants and the national scope of the current litigation, the economic incentives for plaintiff attorneys to concentrate on alternative asbestos products is the same in Philadelphia as it is in New York, Baltimore, San Francisco or any other docket that manages a substantial number of asbestos claims. It may fluctuate between jurisdictions but it would not be surprising if the decline in identification to Reorganized Defendants found in Philadelphia is just as pronounced or possibly even more dramatic in other asbestos dockets around the country.

The enormity of the recent asbestos liability transfer from traditional to peripheral defendant in a joint and several tort is unprecedented. As a result, the longest running mass tort in U.S. history has left an enormous legal and economic burden in its wake for many of the once-peripheral and new defendants that continue to litigate asbestos claims in the tort system. Recent state and federal legislative and judicial reforms have sought to create more transparency in the asbestos trust system so state courts such as the Philadelphia Court of Common Pleas will have the knowledge about a plaintiff's full exposure history during the pendency of the tort case and can allocate liability responsibly between tort and Reorganized Defendants.

## Endnotes

1. The companies that filed for Chapter 11 protection during the Bankruptcy Wave included AC&S, Armstrong World Industries, USG, Owens Corning/Fibreboard, Federal-Mogul, G-I Holdings, Combustion Engineering, etc. . . For a detailed list of all the Bankruptcy Wave debtors see Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 6:4 Mealey's Asbestos Bankr. Rep. (Feb. 2007).
2. William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J. Bankr. L. & Prac. 257 (2008); Expert testimony of Dr. Mark Peterson, November 13, 2003 in the matter *In re: Western Asbestos Company; Western MacArthur Company; and Mac Arthur Company*, Chapter 11 Bankruptcy No. 02-46284 through 02-46286 (United States Bankruptcy Court for the Northern District of California Oakland Division): pg. 745 ln. 11 – pg. 745 ln. 20.
3. U.S. Environmental Protection Agency, <http://www.epa.gov/iris/subst/0371.htm>.
4. <http://www.asbestos.com/products/construction/insulation.php>.
5. We collected information on nearly 250 mesothelioma cases filed in the Philadelphia Court of Common Pleas between 1991 and 2010. We limited the analysis sample to the 107 cases with deposition testimony, and product identification of at least 5 asbestos-containing products. This effectively removed from our analysis sample any cases where the only depositions available were for medical professionals or family members lacking extensive knowledge of the diagnosed party's product exposure history.
6. 11 U.S.C. Section 524(g)(2)(B)(i)(1); 11 U.S.C. Section 524(g)(2)(B)(ii)(V).
7. Furthering Asbestos Claim Transparency (FACT) Act of 2012, H.R. 4369, 112th Cong. § 2 (2012), Managers Package, September 21, 2012.
8. Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 11, no. 11 (2012), Exhibit 1.
9. Nicholson, William J., Perkel, George, Selikoff, Irving J. "Occupational exposure to asbestos: Population at risk and projected mortality – 1980-2030," *American Journal of Medicine*, Vol. 3, Issue 3, 1982.
10. Exhibit 7 only includes product identification that is accompanied by a product manufacturer distributor, or contractor.
11. In a cross-complaint by Johns-Manville, 3 other now-bankrupt thermal insulation defendants were brought into the suit.

12. Potential recoveries based on published trust average values or equivalent when available. If not available, the Scheduled Value or equivalent was used instead.
13. Ohio House Bill 380, 127th General Assembly; *Supra* 7.
14. The Pennsylvania legislature passed the Fair Share Act (Pa.C.S. § 7102) on June 28, 2011 — applies to asbestos cases filed after its enactment; Hon. John W. Herron issued General Court Regulation No. 2012-01 on Feb. 15, 2012.
15. Mark A. Behrens. "Pennsylvania Moves Forward with Considering Asbestos Trust Recoveries when Calculating Tort System Awards." *Mealeys Asbestos Litigation Report*, Vol. 26, Issue 15, Sept. 7, 2011.
16. The Montgomery County, Pennsylvania Court of Common Pleas and the Kanawha County Circuit Court in West Virginia passed Case Management Orders in 2010 mandating the disclosure of trust claim forms at least 120 days before trial; *Rose A. Thibeault, et al. v. Allis Chalmers Corp. Product Liability Trust*, No. 07-27545, (Pa. Comm. Pls., Montgomery Co.), Feb. 26, 2010; *In re Asbestos Personal Injury Litigation*, Civil Action No. 03-C-9600 (Cir. Ct. Kanawha County, W.V.), May 14, 2010. ■

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**Twenty two years of asbestos litigation experience in Illinois, Indiana, and Wisconsin.**

Cascino Vaughan Law Offices, Ltd. has six attorneys and over forty support staff. From our twenty-two years of experience in asbestos litigation, we have a familiarity with local judges, defendants, contractors and suppliers that will strengthen your case. We have also developed a wealth of resources that will help your case. They include:

- Asbestos product databases
- Local construction records
- Witnesses for major jobsites
- Invoices from major jobsites



**Testimony establishing product identification**

We will handle your case from start to finish and will make every effort to handle your claim with minimal inconvenience to you.

Once you retain our services, we will meet with you at your home. We will obtain your medical records and determine which companies may be responsible for your asbestos exposure. We will prepare a lawsuit as well as submit bankruptcy claims on your behalf. It is our experience that defendants often settle cases before trial.

We will do our best to make sure that this lawsuit is not a worry for you.

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## ASBESTOS

Although the manufacturing industry knew of the dangers of asbestos exposure as early as the 1920's, they kept this secret from the public in the name of the bottom line. As a result millions of people have faced life-changing, often fatal conditions including

mesothelioma, lung cancer, colon cancer and asbestosis. Many people were placed at risk by raw asbestos fibers, but many more workers were exposed through contact with the hundreds of manufactured products that contained asbestos. The fibers were mixed into floor and ceiling tiles, pipe coverings, paper, paint, bricks, cements and insulation. Those who worked on or in the vicinity of boilers, turbines, heating and steam pipes were also placed at risk of developing asbestos-related cancers. [Scroll down](#) to view a list of manufacturers of products that contained asbestos.

### Malignant Mesothelioma

Workers who have had prolonged exposure to airborne asbestos fibers are at risk of developing malignant mesothelioma. The disease usually starts in the lining of the lungs, heart or abdomen, and frequently spreads to other areas of the body. Asbestos exposure is far and away the leading cause of the disease. In some cases mesothelioma develops years after exposure, making diagnosis difficult.

### Lung Cancer

Although lung cancer has many causes, exposure to asbestos increases the percentage of people who suffer from the disease. Smokers who were exposed to raw asbestos or asbestos-containing products suffer an increased likelihood of developing lung cancer. As with mesothelioma, lung cancer may develop years after the exposure to asbestos.

### Other Diseases

Asbestos is a known cause of digestive tract cancers such as laryngeal, stomach and colon cancer. Asbestosis, a progressive scarring of the lungs, is also caused by exposure to asbestos fibers.

### The Present State of Asbestos Litigation

After years of facing justice in America's courts, many of the most prominent manufacturers and contractors who mined or manufactured asbestos products filed for Chapter 11 bankruptcy. While this process did not relieve these defendants of their liabilities, it did allow them to postpone compensation. Presently, however, many of these companies have emerged from bankruptcy and begun the process of accepting claims. With years of experience and expertise in the complex field of asbestos litigation, we will fight to ensure that you get the highest compensation possible from the Trusts.

These are just some of the defendants that we are currently working on claims against:

- |                        |                      |
|------------------------|----------------------|
| ABB Lummus             | Fibreboard (Pabco)   |
| AP Green               | Flexitallic          |
| Armstrong              | Halliburton          |
| Babcock & Willcox      | Harbison Walker      |
| Combustion Engineering | Kaiser               |
| Dresser Industries     | Owens Corning        |
| Federal Mogul          | United States Gypsum |

If you worked at any of the following sites you are at risk of developing an asbestos-

related disease. Call us today at (800) 783-0081 to learn about your rights.

Alcan – Terre Haute, IN  
AO Smith – Milwaukee, WI  
Appleton Paper Mill – Appleton, WI  
Bethlehem Steel – Burns Harbor, IN  
Blatz Brewery – Milwaukee, WI  
Braidwood Nuclear Power Station – Braidwood, IL  
Breed Power Station – Fairbanks,  
Briggs & Stratton – Milwaukee, WI  
Caterpillar – Joliet, IL  
Caterpillar – Peoria, IL  
Cayuga Power Station – Cayuga, IL  
Chrysler Corporation – Kokomo, IN  
Consolidated Paper – Wisconsin Rapids, WI  
Dresden Nuclear Power Station – Morris, IL  
Eli Lilly – Clinton, IN  
Eli Lilly – Indianapolis, IN  
Eli Lilly – Lafayette, IN  
Gary Works/US Steel – Gary, IN  
Havana Power Station – Havana,  
Indian Refinery/Texaco – Lawrenceville, IL  
Indianapolis Light & Power – Indianapolis, IN  
Inland Steel – East Chicago, IN  
J&L Steel – East Chicago, IN  
Joliet 9 Power Station – Joliet, IL  
LaSalle Nuclear Power Station – Seneca, IL  
Lauhoff Grain – Danville, IL  
Marathon Refinery – Robinson, IL  
Miller Brewery – Milwaukee, WI  
Milwaukee Valley Power Station – Milwaukee, WI  
Mobil Oil Refinery – Joliet, IL  
Nicolet Paper – DePere, WI  
Oak Creek Power Station – Oak Creek, WI  
Pabst Brewery – Milwaukee, WI  
Point Beach Nuclear Power Station – Kewanee, WI  
Port Washington Power Station – Port Washington, WI  
Powerton Power Station – Pekin, IL  
Schlitz Brewery – Milwaukee, WI  
South Works/US Steel – Chicago, IL  
St. Luke's Hospital – Milwaukee, WI  
Thilmany Pulp Mill – Kaukauna, WI  
University of Illinois – Champaign, IL  
University of Wisconsin – Madison, WI  
Wabash River Power Station – West Terre Haute, IN  
Weyerhaeuser – Marshfield, WI  
Whiting Refinery (AMOCO), Whiting, IN  
Youngstown Sheet & Tube – East Chicago, IN

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## Asbestos Bankruptcy Trusts

Some of the companies responsible for exposing workers to asbestos have filed for bankruptcy under Chapter 11 of the US Bankruptcy Code. This is a different kind of bankruptcy than is commonly thought of in the rest of the world; it is not a liquidation of assets where the company goes out of business, but is a reorganization of debts so that the company continues on in a modified form.

This is sometimes referred to as a reorganization bankruptcy. As required under Chapter 11, companies must submit plans outlining their reorganization to creditors and the courts; as part of this plan, most companies set up trusts to benefit asbestos victims harmed by their processes or products.

## Asbestos Bankruptcy Claims

These trusts are designed to provide payments for all present and future asbestos injury claims. Payments usually equal only a small portion of their true value. Because of our knowledge and experience, GPW's asbestos attorneys are able to efficiently and effectively establish the rights of our clients to the money that has been put into asbestos trusts for victims of [mesothelioma](#) and other asbestos related diseases. We fight for every dollar owed our clients by the asbestos trusts.

We are able to so effectively process asbestos bankruptcy claims because of our specialized knowledge and dedicated staff. Many of our [asbestos lawyers](#) volunteer on the committees that help manage these trusts, so we know exactly what needs to be done to maximize the payments to our clients. Assisting our attorneys is our large, dedicated asbestos bankruptcy department of more than 10 experienced staff members. As a result of our size, we can quickly and efficiently complete and file claims against the many companies that have filed for bankruptcy.

## When will my asbestos bankruptcy claims be paid?

The time it takes companies to plan, establish, and begin asbestos payouts from their trusts can be anywhere from several months to several years. While no firm can avoid these delays to payments, the hard work and experience of our dedicated asbestos attorneys and bankruptcy staff means that our clients receive their settlements as fast as possible.

Having filed **over 75,000 individual bankruptcy claims with twelve different bankruptcy trusts** means our staff is intimately familiar with the differing processes, requirements, and formats required by each trust. Our experience allows us to cut out delays caused by missing or incomplete information, delays not uncommon among others with less familiarity with asbestos bankruptcy trust procedures or lacking a dedicated asbestos bankruptcy department.

## Questions?

If you have questions regarding asbestos bankruptcy, asbestos injuries, or bankruptcy trust payments, please [contact us](#) today.

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## Do you qualify?

[Contact us and find out](#). If you have lung cancer, mesothelioma, or another asbestos-related injury, [contact us](#) and we can quickly determine if you are eligible for compensation from asbestos bankruptcy trust funds. There is no obligation or fee to find out. Don't delay, [contact us today!](#)

## Companies & Trusts Paying Claims

These asbestos companies and/or Bankruptcy Trusts are currently receiving and paying claims:

- Celotex,
- Eagle Picher,
- HK Porter,
- Babcock & Wilcox,
- Plibrico,
- Keene,
- Combustion Engineering,
- Kaiser,
- Harbison Walker,
- Halliburton,
- United States Gypsum,
- Armstrong World Industries,
- Fibreboard,
- Manville,
- Owens Corning Fiberglas, and
- National Gypsum

## No Trust Established

The following asbestos companies are presently "bankrupt" and Bankruptcy Trusts to pay claims have **not yet been created**:

- AC&S,
- W.R. Grace,
- Pittsburgh Corning Corporation,
- Federal Mogul,
- NARCO,
- AP Green Industries,
- Pfizer,
- Quigley,
- GAF,
- Hercules,
- and a few others.