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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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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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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

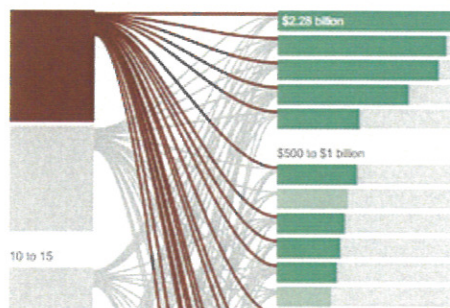
A client of Brent Coon, above, who runs a Texas law firm, got a higher payout by claiming mesothelioma when in fact he died from lung cancer.

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.

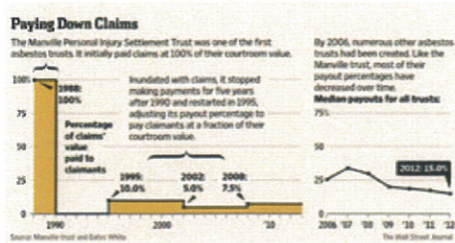
It is possible that some claim dates were recorded erroneously or the occupation listed on the claim may actually be that of an adult family member who tracked the asbestos dust home on their clothing, according to people familiar with Manville's claims processing.

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.

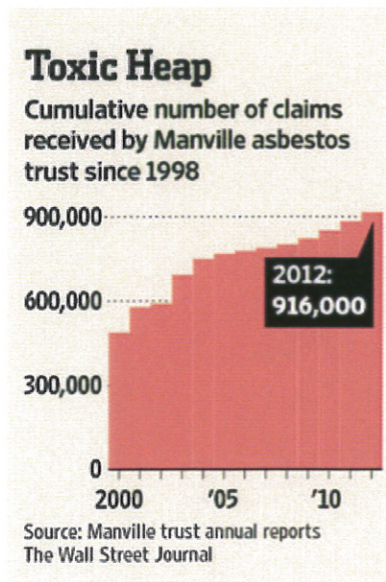
Armed with the death certificate, a blurry torso X-ray and brief medical notations, Ms. Garner asked pulmonologist William Beckett to offer a second opinion. Dr. Beckett, who was working in Rochester, N.Y., at the time, concluded that given Mr. Palermo's job history at asbestos work sites it was "quite 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.



"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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