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

April 4, 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. The 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.