

2021 HOUSE JUDICIARY

HB 1207

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1207

1/26/2021

Relating to liability of nonmanufacturing sellers; and to provide for application.
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Chairman Klemin called the hearing to order at 2:30 PM. Present: Representatives Klemin, Karls, Becker, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter. Absent Rep. Buffalo.

Discussion Topics:

- Civil Litigation for injured
- Medical criteria
- Asbestos victims

Rep. K. Koppelman: Introduced the bill. Testimony #3538 2:34

Mark Behrens, Shook, Hardy & Bacon LLP: Testimony #3507 2:40

Patrick Ward, Nationwide Insurance: testified in support 3:05

Jim Nelson, ND Veterans Legislative Director: Testimony #2209 3:06

Jaclyn Hall, ND Assoc. for Justice: Testimony #3439 3:17

Landis Larson, ND AFL-CIO: Testimony #3382

Vice Chairman Karls recessed the hearing at 3:27.

Additional Written Testimony: #3508

DeLores Shimek
Committee Clerk



NORTH DAKOTA HOUSE OF REPRESENTATIVES

#3538



STATE CAPITOL
600 EAST BOULEVARD
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Representative Kim Koppelman

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Speaker of the House

HB 1207 Testimony

Few areas have led to greater civil litigation than claims involving asbestos. While we all believe that those with legitimate injuries should be able to make claims for relief in our courts with actions against those who cause injury, we in North Dakota, like many other states, have taken steps, by passing tort reform legislation, to ensure that such claims are legitimate and not overreaching, thus ensuring fairness and common sense in the arena of civil litigation.

HB 1207 will build upon these good laws which we've already enacted in North Dakota.

HB 1207 addresses the following four important asbestos topics:

1. Over-naming

A plaintiff must provide a good faith basis for "each claim" against "each defendant" prior to filing an asbestos lawsuit. Asbestos plaintiffs/plaintiffs' lawyers often "over-name" defendants, leading to unnecessary defense expenses and burdens on the court system.

2. Medical Criteria

A plaintiff must actually be sick in order to sue.

3. Unfair Consolidation

In the absence of consent from all parties, a court may consolidate for trial only asbestos actions relating to the exposed individual and members of that individual's household.

4. Bare-Metal Defense

A manufacturer who delivers a product "bare metal" – that is without the insulation or other asbestos containing material – is not liable for injuries caused by asbestos in later-added materials.

Mr. Mark Behrens will walk the Committee through the details of the bill

**TESTIMONY OF MARK BEHRENS, ESQ.
SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR
LEGAL REFORM IN SUPPORT OF H.B. 1207**

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify in support of H.B. 1207 on behalf of the U.S. Chamber Institute for Legal Reform, a division of the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business organization representing companies of all sizes across every sector of the economy. Its members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading industry associations and large corporations. The U.S. Chamber is proud to count many North Dakota businesses among its broad membership.

H.B. 1207 contains a number of common sense reforms that find support in other states.

First, H.B. 1207 gives priority to asbestos plaintiffs who can demonstrate impairment according to objective criteria utilized by the medical community. In short, the legislation says an asbestos plaintiff needs to be sick in order to sue. This reform allows courts and defendant companies to focus their resources on the most severely injured while preserving the right of the presently uninjured to sue at a later time should a cancer develop.

This approach has been enacted in 10 states¹ and adopted by courts in major asbestos filing jurisdictions such as Chicago, New York City, Boston, and Baltimore. The approach also finds support in Shared State Legislation adopted by the Council of State Governments (2006); resolutions adopted by the National Conference of Insurance Commissioners and National Conference of Insurance Legislators (NCOIL); and an ABA resolution (2003) supporting the enactment of federal asbestos legislation to advance only those cases of individuals with demonstrated physical impairment. Lawyers who primarily represent cancer victims have spoken in support of such reforms in the past.

Second, H.B. 1207 also helps to ensure that plaintiffs with actual impairment are suing the proper defendants with an actual connection to the plaintiff. Iowa passed a similar law last year.

There has been a dramatic rise in the number of defendants named in asbestos personal injury or death lawsuits. Between 2010 and 2013, some North Dakota asbestos cases named between 160 and 180 unique defendants. More recently, the number has been as high as 75 (2019) and 94 (2017). According to KCIC consulting's national data, "it is believed that many defendants are named frequently with no proof of exposure."

Defendant companies can collectively spend many thousands of dollars in defense costs and loss of productivity to be released from individual cases in which there was never proof of exposure. In situations where defense costs are paid throughout insurance, higher premiums may result and there is potential erosion of policies that may be needed to pay future plaintiffs with legitimate claims.

The cost associated with improper naming of defendants in asbestos actions has contributed to employer bankruptcies. For example, in the January 2020 bankruptcy filing of DBMP LLC, the holding company for the legacy asbestos liabilities of CertainTeed, DBMP notes that more than half of

¹ Texas, Ohio, Iowa, Kansas, Tennessee, West Virginia, Oklahoma, Georgia, South Carolina, and Florida.

“claims filed against [CertainTeed] after 2001 were dismissed—usually because the plaintiff could provide no evidence of exposure to a [CertainTeed] asbestos containing product.” Additionally, according to ON Marine, another company that filed bankruptcy related to asbestos liabilities in 2020, 95% of the over 182,000 asbestos personal injury claims filed against it since 1983 were dismissed without payment to a plaintiff. The negative economic impacts of COVID-19 augment the need to help businesses avoid wasted expenditures.

H.B. 1207 creates a mechanism to ensure that there is an evidentiary basis for each claim against each defendant named in an asbestos personal injury or death action. It will cut down on unnecessary litigation and wasted defense costs, facilitate settlements, and focus judicial resources on claims with evidentiary support.

Third, H.B. 1207 will help ensure that asbestos trials both efficient and fair by allowing courts to consolidate for trial only asbestos actions relating to the exposed person and members of that person’s household.²

Fourth, H.B. 1207 codifies a legal doctrine called the “bare metal” defense, which holds that a manufacturer or seller of a product, such as a pump, is not liable for later-added external thermal insulation or replacement internal components, such as gaskets, made or sold by a third party. This is consistent with traditional North Dakota law holding that manufacturers are responsible for products they put in the stream of commerce but are not liable for injuries caused by copycat or other products made by competitors and other companies.³

Fifth, H.B. 1207 amends North Dakota’s existing innocent seller liability reform statute to permit a seller to obtain dismissal when the seller has simply been part of the chain of distribution of a product and has not itself acted negligently.

Conclusion

For these reasons, the U.S. Chamber of Commerce supports enactment of H.B. 1207.

² 6 states—Georgia, Iowa, Kansas, Tennessee, Texas, and West Virginia—have enacted laws generally precluding the joinder of asbestos cases for plaintiffs who are not members of the same household.

³ See, e.g., *Morrison v. Grand Forks Hous. Auth.*, 436 N.W.2d 221, 224 (N.D. 1989) (stating that, to recover in product liability, “the plaintiff must prove there was a ‘defect’ in the defendant’s product”); *Reagan v. Hi-Speed Checkweigher Co.*, 30 F.3d 947, 948 (8th Cir. 1994) (explaining that “a plaintiff must prove that there was a defect in the defendant’s product”); *In Re: Zantac (Ranitidine) Prods. Liab. Litig.*, 2020 WL 7866660, at *30 (S.D. Fla. Dec. 31, 2020) (predicting “North Dakota Supreme Court would hold that Plaintiffs’ claims against Defendants [for copycat product made by third party] fail for lack of product identification and for lack of a duty giving rise to liability under North Dakota law”).

HB 1207

The ND Veterans Legislative Council strongly opposes this bill,

Asbestos hardly needs an introduction anymore as by know we all should be aware of the dangers of disturbing and breathing asbestos fibers. At the least, asbestos is a breathing irritant. At worst asbestos can cause mesothelioma, a cancerous condition that can lead to serious health problems and even death. Asbestos can cause or has links to other cancers, such as lung cancer, laryngeal, ovarian, stomach, colon, and kidney to name a few.

Most of us have un-knowingly been exposed to asbestos. Most commonly from our homes and military service, especially the Navy.

Sailors who served in WWII, Korea, Vietnam, and many other conflicts served on ships that were full of asbestos. Thousands upon thousands of sailors and Marines were regularly and unknowingly exposed to asbestos. I served on one such ship. During my many deployments to Vietnam and in firing exercises afterwards would back to our berthing compartments or mess deck only to find our

racks(beds), the floor and everything else covered in a blanket of asbestos particles from all the piping just inches above our heads. We just shook our bedding creating a cloud of asbestos dust and went to sleep. I was on this ship 3 ½ years and went to Vietnam 4 times for at least a six-month long deployment each time. During our time in the combat zone, we constantly fired the large guns which shook the vessel with each firing. This would last for most of the day into the night for days and weeks on end. Our longest stretch was 28 days. I and my shipments were exposed to high levels of asbestos dust in a confined space for extended periods of time.

Asbestos fibers are the most dangerous when they are airborne and can be breathed in.

Research has shown a correlation between asbestos and COPD (Which I have been diagnosed as having. The research conducted by the Department of energy found that 18.9% of asbestos exposed workers had contracted COPD. In short it is very likely that asbestosis can cause COPD. disease if generally diagnosed after significant damage has been done to the lungs as a result of prolonged exposure to asbestos. I must point out that asbestos is not the only cause of COPD. Other causes include smoking, exposure to toxic fumes burning fuel to

name a few. Misdiagnosis is quite common among asbestos related individuals as the symptoms of asbestosis related lung diseases are almost similar to other lung disorders. Due to this similarity of signs and symptoms, serious illnesses such as mesothelioma and lung cancer in the initial stages is likely to be misdiagnosed. This is an unfavorable situation, meaning veterans and others may not qualify for a claim.

According to Asbestos Nation, which fights for asbestos victim's rights, well over 40,000 veterans may have died the years from asbestos related cancers. Unfortunately, today's veterans are still be exposed from the buildings in battle zones through the world.

The latency period of asbestos is 15-40 years from exposure.

We believe, in this point in time and with what we know about the dangers of asbestos rather than taking steps to make sure that veterans and other groups of people that they will no longer be exposed to asbestos, the asbestos industry instead is pushing forth legislation around the country that would strip victims of asbestos related cancers from the right to hold this industry accountable.

Veterans groups are pushing back against this legislation, not only in the Congress of the United States but also in a number of other state legislatures that would delay and deny compensation for sick and dying veterans and others by placing additional burdens on victims of asbestos related cancers.

The ND Veteran Legislative Council which as you know represents the veterans of ND were overwhelmed and deeply grateful for what the Legislature did for us in the last session.

The veterans of North Dakota hope that this body will vote no on this legislation and continue your support of veterans.

This bill only benefits the asbestos industry and its network of those that manufacture and sell asbestos contaminated products. It does the average North Dakotan no good at all.

Thank you



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OPPOSE HB 1207 **The Asbestos Industry Immunity Act**

Good afternoon Chairman Klemin and members of the House Judiciary Committee, my name is Jaci Hall and I am the Executive Director of the North Dakota Association for Justice. I am here today to urge a DO NOT PASS on HB 1207.

The asbestos industry wants you to believe HB 1207 is a combination of two bills meant to eliminate "over naming" and prioritize "sick" asbestos victims over "non-sick" claimants. Nothing could be further from the truth.

HB 1207 is an asbestos industry bailout bill. The asbestos industry made billions of dollars selling and installing a deadly product across America without warning workers and consumers of its consequences. Asbestos is still present in products all across America, yet the industry has failed to identify those products with asbestos publicly so that they can be handled with the care necessary to avoid injuring another generation of workers. Instead, they are building on their legacy of knowingly poisoning millions of Americans and killing thousands every year by pushing to strip victims of their constitutional rights. Why should an industry that has failed to correct its "mistakes" be afforded any protection—much less the unprecedented, unconstitutional protections included in this bill?

This bill strips workers of constitutional rights in a half dozen different ways. It creates a unique, arbitrary, and unconstitutionally pleading requirement specific only to an industry renowned for its widespread misconduct. It gives blanket immunity to defendants who incorporated asbestos products into their product design. It forces plaintiffs to beg their treating physician to work for free to produce a detailed medical report that is completely unnecessary. It artificially excludes painful, chronic, debilitating diseases caused exclusively by asbestos from a remedy—effectively shifting the cost of causing this harm onto the backs of the survivor or their family. It does even more than that too. The result is that the North Dakota citizens, families, and taxpayers will be forced to pay for the harms caused by the asbestos industry when they can no longer be held accountable.

HB 1207 has nothing to do with "over naming," it is solely drafted to rig the rules against asbestos plaintiffs to force them—and them alone—to meet an extreme pleading standard before pursuing a claim.

- North Dakota Rule 8 says that a claim for relief must include a "short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief sought." Under this existing rule, if a defendant is not adequately put on notice of a claim against them, then they may seek



North Dakota Association for Justice

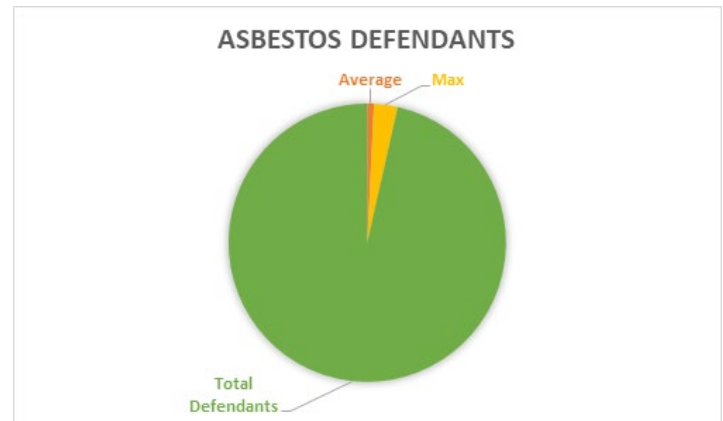
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dismissal—meaning they already have a way out of claims if they are “over named.” HB 1207 has nothing to do with “over naming” - it seeks to force plaintiffs to jump through unnecessary pleading requirements or be completely forced out of court before they can even begin to make their case.

Asbestos was used by *thousands* of companies and found in most industrial components manufactured for the better part of a century.

- [There are over 8,400 unique asbestos defendants](#). The average complaint against asbestos companies' names ~65 defendants and the highest ever noted named 290 defendants in a complaint. These complaints are not “over-naming” defendants they are targeted complaints in an industry where there was *widespread* use of a deadly and dangerous product.



HB 1207 strips both “sick” AND “nonsick” plaintiffs of constitutional rights.

- The proponents of this legislation say that it is about protecting “sick” plaintiffs by “prioritizing” them over the “nonsick.” Yet, this bill gives both explicit and implicit immunity to defendants who knowingly exposed hundreds or thousands of workers to deadly asbestos toxin. The only people this bill “protects” are asbestos and insurance company shareholders. Stripping dying asbestos plaintiffs of their constitutional right to a jury trial does nothing to help North Dakota citizens.

HB 1207 erects impossible barriers for sick plaintiffs before they can even get to court.

- Rather than streamline claims, this bill erects unjustified bureaucratic legal red-tape that sick and dying plaintiffs must navigate to bring an asbestos claim. It forces plaintiffs to pay out of pocket to undergo dozens of potentially unnecessary tests. It forces plaintiffs to beg (and pay) their local town doctor to write a detailed medical report and submit it under penalty of perjury to a court. The local doctor and their report is then subject to blistering attack by highly paid asbestos defendants experts. If a plaintiff succeeds in this, then they have finally clawed their way back to square one and can begin the already onerous and burdensome litigation process from the same place as every other plaintiff. There is no justification for imposing these pointless bureaucratic hurdles on citizens trying to enforce their constitutional rights.



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HB 1207 arbitrarily decides that dying from asbestosis is different than dying from mesothelioma.

- This legislation distinguishes asbestos cancers from non-cancers, making it harder (if not impossible) to bring a "non-malignant asbestos disease" claim. Asbestosis is a "non-malignant asbestos disease." Asbestosis is arguably worse than an asbestos cancer as it draws out the pain—breathing becomes excruciatingly painful and often leads to a slow death from lung or heart failure. There is no known cure for asbestosis. Asbestosis kills thousands of people annually across the country, [including 55 people between 1999 and 2013 in North Dakota](#). These citizens are entitled to the same constitutional rights as anyone else to hold the people who poisoned them accountable.

HB 1207 forces asbestos patients to pay thousands for medically unnecessary tests just so that they can get into court.

- No treating physician wants to be dragged into the middle of their patient's legal case, but this legislation forces them to be. Most will refuse, but even if they did choose to help, they will be forced to spend hours of their time and tens of thousands of dollars running tests that are medically unnecessary. This bill sets out dozens of criteria that victims must meet to bring a case. Further, it requires the patient to pay out of pocket for these expensive tests. Once the initial threshold showing is met, this report is thrown out and may not be entered as evidence at trial! The plaintiffs are forced to pay tens of thousands of dollars just to get back to square one. Why should asbestos corporations get to force plaintiffs to pay tens of thousands of dollars at the very end of their life for needless medical tests simply to exercise a constitutional right?

HB 1207 makes it impossible for victims exposed to more than one source of asbestos from ever bringing a claim.

- Victims of asbestos disease often worked with, and were exposed to, dozens, or hundreds, of different products containing asbestos. In section 32-4.2-04 and 32-46.3-05, the bill requires plaintiffs to make a "prima facie" showing as to *each defendant* - meaning the local town "qualified physician" must certify that *each defendant's* asbestos was a substantial contributing factor to the plaintiff's disease. The only purpose for this section is to prevent any claim from ever being brought—and exemplifies the entire purpose of this bill.

HB 1207 extends well beyond the contexts of legacy asbestos exposure claims into asbestos exposure claims that continue to happen daily.



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- Asbestos is still legal, and still everywhere in the United States. [Reporters have been writing for years about the "third wave" of asbestos exposure to millennials and generation X happening today.](#) These exposures are happening because the manufacturers AND sellers of asbestos products failed to warn that a product contains asbestos and that asbestos was dangerous. These industries have fought for years against federal legislation that would require them to publicly identify where asbestos products are being stored to protect workers who may be unknowingly working with them today.
- For example, this legislation would impact claims for property damage at a school where asbestos tiles were improperly pulverized, potentially exposing hundreds of workers and school children to asbestos diseases. This legislation would force families to bear the cost of this recklessness in the form of personal injury, medical monitoring costs, and the fear that such exposure causes. Similarly, it shuts down class actions where thousands of workers were unknowingly exposed to asbestos insulation when laying natural gas pipelines, *today*. Someone has to pay for their medical monitoring—this bill forces the workers themselves or the state through Medicaid to pay for this monitoring instead of the company that knowingly exposed them to this danger, *today—over a century after we first learned how deadly asbestos could be.*

HB 1207 does absolutely nothing for the victims of the asbestos public health crisis.

- Asbestos is responsible for up killing up to 15,000 people each year in the U.S., many of whom living and work in North Dakota. The asbestos industry hid the danger of asbestos exposure for decades. Many Americans might think it's been banned, but it has not. It's lethal, legal, and continues to pose serious risks to millions of American families. If the legislature does anything about asbestos disease, it should be to protect the North Dakota families that have been recklessly exposed to asbestos by an industry that hid the danger for decades.

We urge you to commit to a DO NOT PASS on this legislation. If you have any questions, or would like additional information I will be happy to answer any questions.

Thank you,

Jaclyn Hall
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**Testimony of Landis Larson, ND AFL-CIO President
In Opposition of HB 1207
January 26, 2021**

Representative Klemin and members of the House Judiciary Committee:

My name is Landis Larson, President of the North Dakota AFL-CIO. The North Dakota AFL-CIO is the federation of labor unions in North Dakota, representing the interests of all working people in our state.

I am testifying on behalf of the North Dakota AFL-CIO in opposition of House Bill 1207.

While I am no legal expert, it does seem to me that this bill puts many arbitrary roadblocks in the way of asbestos disease victims who, at no fault of their own, were exposed to a dangerous substance at work and are now seeking a remedy at the courthouse.

This bill really doesn't benefit anyone in North Dakota. The only ones who stand to benefit from this model legislation are those in the insurance industry, far from here. We know our membership has had substantial asbestos exposure over the years, and many non-union North Dakota workers have been exposed to asbestos as well. They deserve to have a fair hearing on their claims in court as they have since the 1980's.

I recommend a "Do Not Pass" on House Bill 1207.

Respectfully Submitted,
Landis Larson
North Dakota AFL-CIO President

**TESTIMONY OF DAVID CLARK THOMPSON BEFORE THE
NORTH DAKOTA HOUSE JUDICIARY COMMITTEE IN
OPPOSITION TO HOUSE BILL 1207 ON JANUARY 26, 2021**

Good afternoon, Mr. Chairman, my name is David Clark Thompson. I am a lawyer from Grand Forks who has been privileged to represent victims of asbestos disease here in North Dakota since June of the year 1984. I do thank the House Judiciary Committee for the opportunity to appear before it this morning, and my testimony is presented squarely in opposition to House Bill 1207 on a number of grounds.

I would like to pause here to parenthetically say this: House Bill 1207 is a purported “solution” – which is in search of a problem – a “problem” that actually does not exist here in North Dakota.

Over the course of the past three decades, there have been only two lawyers in this state who have represented asbestos disease victims in North Dakota state and federal courts – my former law partner Jeanette Boechler in Fargo -- and me. This is a specialized legal field, and Jean and I have a total of seventy-three (73) years of experience in helping asbestos disease victims and their families.

I can tell all of you – with certainty – that between Ms. Boechler and myself – that **there are a total of only fifteen (15) asbestos personal injury or asbestos wrongful death case files which are currently open and**

pending in North Dakota state or federal courts as of today.

I can also tell you – that if it is enacted into law -- House Bill 1207 will prevent many -- probably most -- victims of asbestos disease from bringing civil actions here in North Dakota to seek compensation for their serious asbestos-caused occupational diseases.

When I first read House Bill 1207 and saw that it proposed to impose highly restrictive conditions – indeed barriers – for asbestos disease victims to climb over as they would simply seek compensation for their asbestos injuries in court, I was truly mystified.

I thought: Why on earth do we now have House Bill 1207 seeking to all but prohibit future North Dakota asbestos disease victims from seeking compensation for their diseases in this Sixty-Seventh North Dakota Legislative Assembly in the year 2021?

The answer is that **there is no good reason.** With a total of only fifteen (15) currently pending cases, certainly there is no epidemic of asbestos disease litigation here in North Dakota. In fact, asbestos disease lawsuits have precipitously declined in North Dakota over the past five years.

So again - why do we have House Bill 1207 seeking to punish North Dakota's asbestos disease victims through the imposition of highly restrictive conditions upon these unfortunate people so as to make it

effectively impossible for these disease victims to bring a civil case to seek compensation from those entities which caused their diseases.

The reality here -- the real answer -- is that House Bill 1207 really has nothing to do with any actually existing problem which truly needs fixing here in North Dakota.

As some members of this Committee are aware, House Bill 1207 is a so-called "model bill" -- a bill which was developed and promoted over the past few years by an organization known as the American Legislative Exchange Council -- or "ALEC", for short.

The American Legislative Exchange Council describes itself as the largest "membership association of state legislators" in the United States, but over 98% of ALEC's revenue comes from sources other than legislative dues, primarily from corporations and corporate foundations -- including corporations which are defendants in asbestos personal injury and wrongful death cases here in North Dakota and in other jurisdictions throughout the United States.

https://www.sourcewatch.org/index.php/American_Legislative_Exchange_Council.

https://www.alecexposed.org/wiki/ALEC_Exposed

As I said at the outset of my remarks, this "model" ALEC bill would impose severe restrictions -- and cruel hardship -- upon

asbestos disease victims – and, if enacted into law, would all but slam shut North Dakota's courthouse doors to these victims' possibilities of obtaining reasonable compensation for their asbestos injuries.

A. House Bill 1207 - if enacted into law by the Legislative Assembly - would be violative of Article XI, § 26 and Article VI, § 3 of the North Dakota Constitution and thus the Doctrine of Separation of Powers as between the legislative and judicial branches of government.

- i. Section 1 of House Bill 1207 tramples upon the North Dakota Supreme Court's "ultimate authority" over matters of judicial procedure - including the entire discovery process, pretrial disclosure of information by a party to litigation, and the conduct of trials, governed by the Rules of Evidence.**

The North Dakota Supreme Court has emphasized on multiple occasions that the Doctrine of Separation of Powers - formalized by Article XI, § 26, of the North Dakota Constitution - provides that each branch of North Dakota's government is to be supreme in its own sphere. See, e.g., *State v. Hanson*, 558 N.W.2d 611, 614-616 (N.D. 1996), and the prior decisions of the North Dakota Supreme Court cited therein, as well as those decisions of the Supreme Court which have relied upon *State v. Hanson*. See, also, the article, "The North Dakota Supreme Court Invalidates a Discovery Statute that Conflicted with a Rule of Procedure", 74 North Dakota Law Review 775 (1998). See, also, e.g., *North Dakota Legislative Assembly v. Burgum*, 2018 ND 189, ¶40; 916 N.W.2d 83, 100

(N.D. 2018)[“The North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power. N.D. Const. art. III, § 1 (“[T]he legislative power of this state shall be vested in a legislative assembly”); N.D. Const. art. 17 V, § 1 (“The executive power is vested in the governor”); N.D. Const. art. VI, § 1 (“The judicial power of the state is vested in a unified judicial system”). By vesting each branch with a distinct form of power, the Constitution keeps those powers separate. The three branches are “coequal,” N.D. Const. art. XI, § 26, each “supreme in its own sphere.” *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987). Long before the express formalization of separation of powers in Article XI, § 26, this Court recognized that the Constitution’s apportionment of power among three branches implicitly excluded each branch from exercising the powers of the others. *State v. Hanson*, 558 N.W.2d 611, 614 (N.D. 1996) (citing *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902)); see also *Miller v. French*, 530 U.S. 327, 341 (2000) (explaining that separation of powers doctrine “prohibits one branch from encroaching on the central prerogatives of another”).”].

In *State v. Hanson*, the North Dakota Supreme Court explained as follows:

Article XI, § 26, North Dakota Constitution, states in part that “the legislative, executive, and judicial branches are co-equal

branches of government. This provision, approved June 8, 1982, appears to formalize a separation of powers, with each branch supreme in its own sphere. Long before this constitutional provision was adopted this court recognized that the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others. See, e.g., *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902) (holding statute unconstitutional because it vested legislative power in the courts).

Article VI, § 3, provides in part that "the supreme court shall have authority to promulgate rules of procedure ... to be followed by all the courts of this state. There can be no doubt, therefore, that enactment of procedural rules, such as Rule 16, N.D.R.Crim.P., is an exclusive function of this Court.

Thus the - recognition of the separate-but-equal concept embedded in the Constitution imposes 'a concomitant responsibility for each branch of government to, in Justice Levine's words, "exercise[] great restraint when requested to intervene in matters entrusted to the other branches of government."¹¹ Spaeth, 403 N.W.2d at 394. When, as here, the legislative branch, fails to exercise restraint and intervenes in a matter entrusted by the Constitution exclusively to the judicial branch, we have an obligation under the Constitution to say so.

Section 29-01-32, N.D.C.C., requires a defendant who has successfully requested information from the prosecuting attorney to reciprocate by disclosing to the prosecutor the names and addresses of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons. Rule 16, N.D.R.Crim.P., does not. The statute directly conflicts with Rule 16, which requires only limited pretrial disclosure of information, while allowing additional disclosure by order or agreement. (footnote omitted). Under Art. VI, § 3, N.D. Const., a procedural rule adopted by this court must prevail in a conflict with a statutory procedural rule. Section 29-01-32, N.D.C.C., is, therefore, invalid to the extent that it requires pretrial disclosure by a defendant of the names and addresses of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons.

The defense witness disclosure provisions of § 29-01-32, N.D.C.C., form the centerpiece of the statute. We conclude that

the legislature would not have enacted § 29-01-32 without those provisions. We, therefore, declare all of § 29-01-32, N.D.C.C., unconstitutional. See, *Arneson v. Olson*, 270 N.W.2d 125, 138 (N.D. 1978).

· *State v. Hanson, supra*, 558 N.W.2d at 614-616

House Bill 1207 contains precisely the type of statutorily-compelled civil action information disclosure, case management and trial procedure -- including evidentiary treatment -- which has been declared to be unconstitutional under the Separation of Powers Doctrine in *State v. Hanson, supra*, and the decisional law of the North Dakota Supreme Court dating back to at least the year 1902, and a consistent line decisions since *State v. Hanson*.

The North Dakota Supreme Court has specifically adopted court rules which govern the process of informational exchange between parties to civil and criminal litigation in North Dakota district courts. For example, Rules 26, 30, 33, 36, and 45 of the North Dakota Rules of Civil Procedure broadly govern the process of discovery, and Rule 37 of the North Dakota Rules of Civil Procedure provides for sanctions against parties for non-compliance with discovery requirements provided-for within Rules 26, 30, 33, 36, 37 and 45 of the North Dakota Rules of Civil Procedure.

At pages 5-6, proposing a new N.D.C.C. § 32-46.2-02, House Bill 1207 contains unconstitutional statutory rule making which presumes to impose

the requirement that a plaintiff "in an asbestos action" must file "within thirty days after any complaint is filed" a "sworn information form" setting forth essentially all evidence which a plaintiff under would now be permitted to acquire over the course of an asbestos action in discovery proceedings. House Bill 1207, if enacted into law, would not permit the asbestos disease victim to engage in any discovery to obtain information from asbestos manufacturer/seller defendants in the case before the victim would be required to file the "sworn information form".

This practice would represent a serious subversion of the North Dakota Supreme Court's procedural rules governing the initiation and progression of a civil action from the pleading requirements for a Complaint found in Rule 8 of the North Dakota Rules of Civil Procedure, through the discovery process governed by Rules 26, 30, 33, 36, 37, and 45 of the North Dakota Rules of Civil Procedure.

Furthermore, the North Dakota Rules of Evidence exclusively govern the introduction and treatment of evidence in all civil and criminal actions in North Dakota District Courts.

In addition, Rule 16 of the North Dakota Rules of Civil Procedure broadly provides for the manner in which civil actions are managed by district courts, and this rule grants wide and flexible discretionary power to

district court judges to manage the progression of civil actions before them - both procedurally and substantively.

Also, Rule 11 of the North Dakota Rules of Civil Procedure governs the pre-filing inquiry obligation which parties to civil litigation and their counsel are required to, and this rule provides for sanctions against parties which do not comply with that requirement

If enacted into law, House Bill 1207 would supersede Rule 11 N.D.R.Civ.P., governing a plaintiff party's pre-filing investigation and inquiry and the resulting inclusion of defendant parties in a civil action. See, e.g., page 5 of House Bill 1207, where the bill proposes a new Section 32-46.2-02 of the North Dakota Century Code. This provision represents nothing less than constitutionally-impermissible statutory procedural rule-making of specifically the type prohibited under the Separation of Powers analysis required by Article XI, § 26 and Article VI, § 3 of the North Dakota Constitution.

Put simply, House Bill 1207 clearly requires unconstitutional infringement upon the exclusive authority of the North Dakota District Courts to manage and litigate civil actions – exclusive authority granted by virtue of judicial branch power conferred upon them by the North Dakota Supreme Court's adoption of the aforementioned rules.

Beginning on page 9 of House Bill 1207, the bill proposes a new N.D.C.C. §32-46.2-05 which would require an asbestos disease victim to first present his or her case to a trial judge at a “trial within a trial” -- an “evidentiary hearing” -- after which the judge would be permitted to dismiss the victim’s case on medical/causation grounds for failing to present a “prima facie” showing of medical causation. If enacted into law, this feature of House Bill 1207 would do nothing less than eliminate an asbestos disease victim’s right to a trial by jury under Article I, § 13 of the North Dakota Constitution – where our constitution prescribed that, “(t)he right of trial by jury shall be secured to all, and remain inviolate.”

Reduced to the essentials, these provisions of House Bill 1207 effectively deprive a plaintiff of any opportunity to obtain information from a defendant through the discovery process, and eviscerate virtually the entire trial preparation process exclusively governed by North Dakota Supreme Court-adopted court rules, as it purports to supplant and superintend those rules.

B. House Bill 1207 places an asbestos disease patient and his or her North Dakota treating physician in improper and conflicted positions with one another.

On page 4 of House Bill 1207, in a proposed new N.D.C.C. § 32-46.2-01(25), places an asbestos disease patient and his or her treating physician in a difficult, conflicted and untenable position in relation to one another.

Traditionally, in pursuing asbestos personal injury and/or wrongful death claims on behalf of our clients here in North Dakota over the course of the past 30 years, we have not asked our clients' treating physicians to provide testimony in these cases - for a number of reasons.

House Bill 1207 -- if passed into law - would improperly place treating physicians in a difficult and otherwise unnecessary forensic role in their relationships with their patients. The following commentary has been provided to us, along these lines.

Regarding the so-called "Qualified Physicians" aspect to this bill, these are some important observations:

i. House Bill 107 will force asbestosis patients to rely on their treating physician to present their case.

- House Bill 1207 -- better named the "Asbestosis Immunity Act" - *requires* that the victim's treating physician agree to conduct at least three days' worth of tests documenting that a patient suffering from asbestosis meets a dozen or more different medical criteria simply to file a complaint with the court. In this regard, House Bill 1207 would require the treating physician for asbestosis patients to open their entire practice to civil and criminal scrutiny into how each physician spends his or her time and how much they are compensated. Even if an asbestosis patient could find a physician willing to undergo such scrutiny, this bill effectively forces pre-cancer patients to choose between fighting their disease and fighting the asbestos companies. These families deserve better.

ii. House Bill 1207 forces dying asbestos disease victims to pay thousands for medically unnecessary tests just so that they can get into court.

- No treating physician wants to be dragged into the middle of their patient's case, but if they did choose to help, they will be forced to spend hours of their time and thousands of dollars running tests that are medically unnecessary. This bill sets out dozens of criteria that victims must meet to bring a case - many of which may have nothing to do with diagnosing an underlying asbestos disease. Further, it requires the patient to pay out of pocket for these expensive tests. Why should asbestos corporate defendants get to force victims to undergo needless medical tests and spend their limited resources simply to exercise their constitutional right to hold such asbestos corporations responsible to those disease victims?

CONCLUSION

On the basis of the foregoing facts and legal authorities I have presented to you members of the House Judiciary Committee Senate Industry, Business and Labor Committee, I respectfully submit to you that House Bill 1207 has nothing whatsoever to do with any real problem which actually exists in asbestos disease litigation here in North Dakota.

As a so-called "model bill"-- developed by the American Legislative Exchange Council (ALEC) -- and promoted by ALEC, insurance companies and asbestos product manufacturers and sellers -- the real purpose and objective of House Bill 1207 is to stifle, delay and preclude legitimate asbestos personal injury and wrongful death claims.

If enacted into law, the net effect of House Bill 1207 will be asbestos

disease victims having been deprived of their ability to obtain compensation for their asbestos diseases from those asbestos product sellers and manufacturers who whose products caused the asbestos disease victims' injuries deaths.

I submit to you, members of the House Judiciary Committee, that House Bill 1207 serves no possible good for asbestos disease victims here in

North Dakota - and as a "solution looking for a problem" - where only fifteen (15) open asbestos personal injury and wrongful death cases are presently pending in North Dakota state and federal courts, there is no legitimate legislative "end" which is served by the Legislative "means" of House Bill 1207.

As such, House Bill 1207 - -if enacted into law - would be violative of federal and state constitutional substantive due process.

House Bill 1207 cruelly and unconstitutionally serves to punish North Dakota asbestos disease victims to the great pecuniary benefit of national asbestos manufacturer and insurance interests. That is simply wrong, and I ask you to give House Bill 1207 a "do not pass".

In the alternative, I respectfully submit that given House Bill 1207's substantial legal and constitutional defects under the North Dakota Supreme Court's "Separation of Powers Doctrine" analysis - as I have

identified those defects this afternoon today – I submit that it would be appropriate to convert House Bill 1207 into an interim study resolution calling for consideration of the issues addressed in the bill by a 2021-2022 Interim Legislative Committee.

Thank you, members of the House Judiciary Committee for the consideration and attention that you have given to my testimony this afternoon.

David Clark Thompson
Attorney at Law
Testimony Before the North Dakota
House Judiciary Committee
January 26, 2021

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1207

2/1/2021

Relating to liability of nonmanufacturing sellers; and to provide for application.
--

Chairman Klemin reopened the hearing at 10:00 AM.

Present: Representatives Klemin, Karls, Becker, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter. Absent Rep. Buffalo.

Discussion Topics:

- Asbestos disease victims
- Conditions for compensation

David Thompson, Attorney in Grand Forks, ND: Testimony #3508 10:00

Additional written testimony: #4270, #4278, #4470

Chairman Klemin closed the hearing at 10:32 AM.

DeLores D. Shimek
Committee Clerk

**TESTIMONY OF DAVID CLARK THOMPSON BEFORE THE
NORTH DAKOTA HOUSE JUDICIARY COMMITTEE IN
OPPOSITION TO HOUSE BILL 1207 ON JANUARY 26, 2021**

Good afternoon, Mr. Chairman, my name is David Clark Thompson. I am a lawyer from Grand Forks who has been privileged to represent victims of asbestos disease here in North Dakota since June of the year 1984. I do thank the House Judiciary Committee for the opportunity to appear before it this morning, and my testimony is presented squarely in opposition to House Bill 1207 on a number of grounds.

I would like to pause here to parenthetically say this: House Bill 1207 is a purported “solution” – which is in search of a problem – a “problem” that actually does not exist here in North Dakota.

Over the course of the past three decades, there have been only two lawyers in this state who have represented asbestos disease victims in North Dakota state and federal courts – my former law partner Jeanette Boechler in Fargo -- and me. This is a specialized legal field, and Jean and I have a total of seventy-three (73) years of experience in helping asbestos disease victims and their families.

I can tell all of you – with certainty – that between Ms. Boechler and myself – that **there are a total of only fifteen (15) asbestos personal injury or asbestos wrongful death case files which are currently open and**

pending in North Dakota state or federal courts as of today.

I can also tell you – that if it is enacted into law -- House Bill 1207 will prevent many -- probably most -- victims of asbestos disease from bringing civil actions here in North Dakota to seek compensation for their serious asbestos-caused occupational diseases.

When I first read House Bill 1207 and saw that it proposed to impose highly restrictive conditions – indeed barriers – for asbestos disease victims to climb over as they would simply seek compensation for their asbestos injuries in court, I was truly mystified.

I thought: Why on earth do we now have House Bill 1207 seeking to all but prohibit future North Dakota asbestos disease victims from seeking compensation for their diseases in this Sixty-Seventh North Dakota Legislative Assembly in the year 2021?

The answer is that **there is no good reason.** With a total of only fifteen (15) currently pending cases, certainly there is no epidemic of asbestos disease litigation here in North Dakota. In fact, asbestos disease lawsuits have precipitously declined in North Dakota over the past five years.

So again - why do we have House Bill 1207 seeking to punish North Dakota's asbestos disease victims through the imposition of highly restrictive conditions upon these unfortunate people so as to make it

effectively impossible for these disease victims to bring a civil case to seek compensation from those entities which caused their diseases.

The reality here -- the real answer -- is that House Bill 1207 really has nothing to do with any actually existing problem which truly needs fixing here in North Dakota.

As some members of this Committee are aware, House Bill 1207 is a so-called "model bill" -- a bill which was developed and promoted over the past few years by an organization known as the American Legislative Exchange Council -- or "ALEC", for short.

The American Legislative Exchange Council describes itself as the largest "membership association of state legislators" in the United States, but over 98% of ALEC's revenue comes from sources other than legislative dues, primarily from corporations and corporate foundations -- including corporations which are defendants in asbestos personal injury and wrongful death cases here in North Dakota and in other jurisdictions throughout the United States.

https://www.sourcewatch.org/index.php/American_Legislative_Exchange_Council.

https://www.alecexposed.org/wiki/ALEC_Exposed

As I said at the outset of my remarks, this "model" ALEC bill would impose severe restrictions -- and cruel hardship -- upon

asbestos disease victims – and, if enacted into law, would all but slam shut North Dakota's courthouse doors to these victims' possibilities of obtaining reasonable compensation for their asbestos injuries.

A. House Bill 1207 - if enacted into law by the Legislative Assembly - would be violative of Article XI, § 26 and Article VI, § 3 of the North Dakota Constitution and thus the Doctrine of Separation of Powers as between the legislative and judicial branches of government.

- i. Section 1 of House Bill 1207 tramples upon the North Dakota Supreme Court's "ultimate authority" over matters of judicial procedure - including the entire discovery process, pretrial disclosure of information by a party to litigation, and the conduct of trials, governed by the Rules of Evidence.**

The North Dakota Supreme Court has emphasized on multiple occasions that the Doctrine of Separation of Powers - formalized by Article XI, § 26, of the North Dakota Constitution - provides that each branch of North Dakota's government is to be supreme in its own sphere. See, e.g., *State v. Hanson*, 558 N.W.2d 611, 614-616 (N.D. 1996), and the prior decisions of the North Dakota Supreme Court cited therein, as well as those decisions of the Supreme Court which have relied upon *State v. Hanson*. See, also, the article, "The North Dakota Supreme Court Invalidates a Discovery Statute that Conflicted with a Rule of Procedure", 74 North Dakota Law Review 775 (1998). See, also, e.g., *North Dakota Legislative Assembly v. Burgum*, 2018 ND 189, ¶40; 916 N.W.2d 83, 100

(N.D. 2018)[“The North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power. N.D. Const. art. III, § 1 (“[T]he legislative power of this state shall be vested in a legislative assembly”); N.D. Const. art. 17 V, § 1 (“The executive power is vested in the governor”); N.D. Const. art. VI, § 1 (“The judicial power of the state is vested in a unified judicial system”). By vesting each branch with a distinct form of power, the Constitution keeps those powers separate. The three branches are “coequal,” N.D. Const. art. XI, § 26, each “supreme in its own sphere.” *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987). Long before the express formalization of separation of powers in Article XI, § 26, this Court recognized that the Constitution’s apportionment of power among three branches implicitly excluded each branch from exercising the powers of the others. *State v. Hanson*, 558 N.W.2d 611, 614 (N.D. 1996) (citing *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902)); see also *Miller v. French*, 530 U.S. 327, 341 (2000) (explaining that separation of powers doctrine “prohibits one branch from encroaching on the central prerogatives of another”).”].

In *State v. Hanson*, the North Dakota Supreme Court explained as follows:

Article XI, § 26, North Dakota Constitution, states in part that “the legislative, executive, and judicial branches are co-equal

branches of government. This provision, approved June 8, 1982, appears to formalize a separation of powers, with each branch supreme in its own sphere. Long before this constitutional provision was adopted this court recognized that the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others. See, e.g., *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902) (holding statute unconstitutional because it vested legislative power in the courts).

Article VI, § 3, provides in part that "the supreme court shall have authority to promulgate rules of procedure ... to be followed by all the courts of this state. There can be no doubt, therefore, that enactment of procedural rules, such as Rule 16, N.D.R.Crim.P., is an exclusive function of this Court.

Thus the - recognition of the separate-but-equal concept embedded in the Constitution imposes 'a concomitant responsibility for each branch of government to, in Justice Levine's words, "exercise[] great restraint when requested to intervene in matters entrusted to the other branches of government."¹¹ Spaeth, 403 N.W.2d at 394. When, as here, the legislative branch, fails to exercise restraint and intervenes in a matter entrusted by the Constitution exclusively to the judicial branch, we have an obligation under the Constitution to say so.

Section 29-01-32, N.D.C.C., requires a defendant who has successfully requested information from the prosecuting attorney to reciprocate by disclosing to the prosecutor the names and addresses of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons. Rule 16, N.D.R.Crim.P., does not. The statute directly conflicts with Rule 16, which requires only limited pretrial disclosure of information, while allowing additional disclosure by order or agreement. (footnote omitted). Under Art. VI, § 3, N.D. Const., a procedural rule adopted by this court must prevail in a conflict with a statutory procedural rule. Section 29-01-32, N.D.C.C., is, therefore, invalid to the extent that it requires pretrial disclosure by a defendant of the names and addresses of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons.

The defense witness disclosure provisions of § 29-01-32, N.D.C.C., form the centerpiece of the statute. We conclude that

the legislature would not have enacted § 29-01-32 without those provisions. We, therefore, declare all of § 29-01-32, N.D.C.C., unconstitutional. See, *Arneson v. Olson*, 270 N.W.2d 125, 138 (N.D. 1978).

· *State v. Hanson, supra*, 558 N.W.2d at 614-616

House Bill 1207 contains precisely the type of statutorily-compelled civil action information disclosure, case management and trial procedure -- including evidentiary treatment -- which has been was declared to be unconstitutional under the Separation of Powers Doctrine in *State v. Hanson, supra*, and the decisional law of the North Dakota Supreme Court dating back to at least the year 1902, and a consistent line decisions since *State v. Hanson*.

The North Dakota Supreme Court has specifically adopted court rules which govern the process of informational exchange between parties to civil and criminal litigation in North Dakota district courts. For example, Rules 26, 30, 33, 36, and 45 of the North Dakota Rules of Civil Procedure broadly govern the process of discovery, and Rule 37 of the North Dakota Rules of Civil Procedure provides for sanctions against parties for non-compliance with discovery requirements provided-for within Rules 26, 30, 33, 36, 37 and 45 of the North Dakota Rules of Civil Procedure.

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the requirement that a plaintiff "in an asbestos action" must file "within thirty days after any complaint is filed" a "sworn information form" setting forth essentially all evidence which a plaintiff under would now be permitted to acquire over the course of an asbestos action in discovery proceedings. House Bill 1207, if enacted into law, would not permit the asbestos disease victim to engage in any discovery to obtain information from asbestos manufacturer/seller defendants in the case before the victim would be required to file the "sworn information form".

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B. House Bill 1207 places an asbestos disease patient and his or her North Dakota treating physician in improper and conflicted positions with one another.

On page 4 of House Bill 1207, in a proposed new N.D.C.C. § 32-46.2-01(25), places an asbestos disease patient and his or her treating physician in a difficult, conflicted and untenable position in relation to one another.

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i. House Bill 107 will force asbestosis patients to rely on their treating physician to present their case.

- House Bill 1207 -- better named the "Asbestosis Immunity Act" - *requires* that the victim's treating physician agree to conduct at least three days' worth of tests documenting that a patient suffering from asbestosis meets a dozen or more different medical criteria simply to file a complaint with the court. In this regard, House Bill 1207 would require the treating physician for asbestosis patients to open their entire practice to civil and criminal scrutiny into how each physician spends his or her time and how much they are compensated. Even if an asbestosis patient could find a physician willing to undergo such scrutiny, this bill effectively forces pre-cancer patients to choose between fighting their disease and fighting the asbestos companies. These families deserve better.

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CONCLUSION

On the basis of the foregoing facts and legal authorities I have presented to you members of the House Judiciary Committee Senate Industry, Business and Labor Committee, I respectfully submit to you that House Bill 1207 has nothing whatsoever to do with any real problem which actually exists in asbestos disease litigation here in North Dakota.

As a so-called "model bill"-- developed by the American Legislative Exchange Council (ALEC) -- and promoted by ALEC, insurance companies and asbestos product manufacturers and sellers -- the real purpose and objective of House Bill 1207 is to stifle, delay and preclude legitimate asbestos personal injury and wrongful death claims.

If enacted into law, the net effect of House Bill 1207 will be asbestos

disease victims having been deprived of their ability to obtain compensation for their asbestos diseases from those asbestos product sellers and manufacturers who whose products caused the asbestos disease victims' injuries deaths.

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North Dakota - and as a "solution looking for a problem" - where only fifteen (15) open asbestos personal injury and wrongful death cases are presently pending in North Dakota state and federal courts, there is no legitimate legislative "end" which is served by the Legislative "means" of House Bill 1207.

As such, House Bill 1207 - -if enacted into law - would be violative of federal and state constitutional substantive due process.

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In the alternative, I respectfully submit that given House Bill 1207's substantial legal and constitutional defects under the North Dakota Supreme Court's "Separation of Powers Doctrine" analysis - as I have

identified those defects this afternoon today – I submit that it would be appropriate to convert House Bill 1207 into an interim study resolution calling for consideration of the issues addressed in the bill by a 2021-2022 Interim Legislative Committee.

Thank you, members of the House Judiciary Committee for the consideration and attention that you have given to my testimony this afternoon.

David Clark Thompson
Attorney at Law
Testimony Before the North Dakota
House Judiciary Committee
January 26, 2021

**TESTIMONY OF MARK BEHRENS, ESQ.
SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR
LEGAL REFORM IN SUPPORT OF H.B. 1207**

Mr. Chairman and Members of the Committee, I appreciated the opportunity to testify on January 26, 2021. I would like to appear on February 1 to answer any questions the Committee may have regarding H.B. 1207 as a result of the January 29 correspondence from Cass County District Court Judge John Irby or that may be raised at the February 1 hearing by plaintiff counsel David Thompson.

The reforms in H.B. 1207 have been enacted in other states and have not resulted in the type of motion practice that is a concern of Judge Irby. Rather, requiring plaintiffs to be sick to sue will reduce congestion on the court docket by setting aside (and preserving) claims filed by the non-sick. This will allow the court to focus its resources on claimants with asbestos-related cancer and other impairing conditions.

Further, addressing the issue of over-naming will help focus the North Dakota asbestos litigation on claims that have evidentiary support, making cases more manageable. As Judge Irby points out, “asbestos cases are cumbersome to manage given the large number of ‘players’ in the game” and “there are often upwards of 100 defendants” in North Dakota asbestos actions.

H.B. 1207 will speed settlements in addition to curbing the improper naming of defendants that have no action connection to a plaintiff. Defendants would receive earlier and better information to allow them to assess the merits of a case. And, to the extent cases are mediated, that process works better when it does not involve a vast number of defendants.

Conclusion

For these reasons, the U.S. Chamber of Commerce continues to support H.B. 1207.



January 29, 2021

Chairman Klemin and Members of the House Judiciary Committee

ND HB 1207

Asbestos Reform

The American Property Casualty Insurance Association (APCIA) is composed of over 1,200 member companies and 330 insurance groups and represents the broadest cross-section of home, auto, and business insurers of any national insurance trade association. In North Dakota, APCIA member insurers provide almost 69 percent of all the insurance purchased by the state's citizens and businesses.

We urge support for HB 1207.

HB 1207 contains several important asbestos law reforms:

This important legislation gives priority to asbestos plaintiffs who can demonstrate impairment according to objective criteria utilized by the medical community. This particular approach has been enacted in ten states to date and has also been adopted by specific courts in major asbestos filing jurisdictions such as Chicago, New York City, Boston, and Baltimore.

HB 1207 also helps to ensure that plaintiffs with actual impairment are suing the proper defendants with an actual connection to the plaintiff. Iowa passed a similar law last year.

HB 1207 will also help ensure that asbestos trials are both efficient and fair by allowing courts to consolidate for trial only asbestos actions relating to the exposed person and members of that person's household.

HB 1207 also enacts a legal doctrine called the "bare metal" defense, which holds that a manufacturer or seller of a product, such as a pump, is not liable for later-added external thermal insulation or replacement internal components, such as gaskets, made or sold by a third party.

Finally, this legislation changes North Dakota's existing innocent seller liability reform statute to permit a seller to obtain dismissal when the seller has simply been part of the chain of distribution of a product and has not itself acted negligently.

We urge your support of HB 1207.

Steve Schneider
Vice President, State Affairs
Midwest Region
APCIA
Steve.schneider@apci.org
312.782.7720



State of North Dakota

DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY COURTHOUSE
BOX 2806
FARGO, NORTH DAKOTA 58108
(701) 451-6940

Honorable John C. Irby
Presiding District Judge

Honorable Susan L. Bailey
District Judge

Honorable Reid A. Brady
District Judge

Honorable Steven L. Marquart
District Judge

Honorable Steven E. McCullough
District Judge

Honorable Thomas R. Olson
District Judge

Honorable Stephannie N. Stiel
District Judge

Honorable Tristan J. Van de Streek
District Judge

Honorable Wade L. Webb
District Judge

January 29, 2021

Lawrence Klemin, Chairman
House Judiciary Committee
State Capitol
600 E. Boulevard
Bismarck, ND 58505-0360

Re: HB 1207, Asbestos Litigation

Dear Chairman Klemin:

I am writing to you as the Presiding Judge of the East Central Judicial District. I was recently made aware of HB 1207, a Bill regarding substantive and procedural requirements for a plaintiff to bring a case for an asbestos injury or death. I write in regards only to how this legislation might affect the case flow in our district, and I am not intending to comment on any policy set forth by the Legislature. As the Presiding Judge, I am responsible for the timely movement of the cases commenced in our district, which is my concern with this Bill.

As you are no doubt aware, since 2013, all state court asbestos litigation is brought in Cass County of the East Central Judicial District. Odd as it may seem, Cass County is the only county in which these cases are now filed. I understand the reasons for this, but I also recognize that legislation directed at asbestos litigation will have a disproportionate effect on the East Central Judicial District. So, on behalf of the Judges of the East Central Judicial District, I feel compelled to comment on the effects of HB 1207 on our case flow.

As stated, I fully recognize that policy is the purview of the Legislature. From the Court's point of view, however, HB 1207 mandates specific and significant pre-trial requirements to bring forward an asbestos action. Through substantial effort, Plaintiffs must establish a *prima facie* case and clear significant hurdles to do so within a relatively short period of time. Each defendant in each case – and there are often upwards of 100 defendants – will be able to challenge the timeliness and the sufficiency of what the plaintiff has provided for its *prima facie* case. If you were to look at the requirements, especially in the context of some of the definitions, there would be ample opportunity for defendants to challenge the

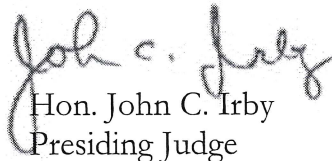
sufficiency of the plaintiff's compliance. Each defendant will be able to put the plaintiff to its proof on all of these requirements. This means, of course, that each defendant can bring a motion to dismiss, which must be heard by the Court. I can envision the substantial likelihood of significant pretrial litigation over these requirements. I can further envision plaintiffs bringing litigation in regards to the constitutionality of this legislation, contending that there has been an abrogation of the Court's rules in regard to litigation management.

As it stands now, asbestos cases are cumbersome to manage given the large number of "players" in the game and the number of filings. For example, I presided over the Judy Geier case, 09-2014-CV-1765. This case was litigated all the way to a jury verdict. According to the Odyssey case management system, 2,768 documents were filed; those documents consisted of 22,698 pages. The impact of HP 1207 on a similar case is not known. I would urge a "go slow" approach to this legislation so that the effects on court resources can be determined. Given the significant impact this legislation will have on asbestos case management, I believe that to be appropriate. I would even go so far as to say that it would be appropriate to refer this legislation for a study and bring it back for full consideration in the next session.

The Judges of the East Central Judicial District and administration would be more than willing to act as a resource and provide whatever information we can to assist.

Thank you very much for your attention to this.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Irby". The signature is fluid and cursive, with the first name "John" being the most prominent.

Hon. John C. Irby
Presiding Judge
East Central Judicial District

JCI:ke

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1207

2/10/2021

Relating to liability of nonmanufacturing sellers; and to provide for application.
--

Chairman Klemin reopened the meeting at 10:40 AM

Present: Representatives Klemin, Karls, Becker, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Satrom, and Vetter. Absent: Roers Jones

Discussion Topics:

- **Federal requirements**

Do Pass Motion Made by Rep. Satrom

Seconded by Rep. Becker

Roll Call Vote:

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	N
Rep. Cory	N
Rep T. Jones	N
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	N
Rep Roers Jones	A
Rep B. Satrom	Y
Rep Vetter	N
Rep Buffalo	N
Rep K. Hanson	N

7-6-1 **Carrier: Rep. Satrom**

Stopped at 10:48 AM

DeLores D. Shimek
Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1207: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO PASS** (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). HB 1207 was placed on the Eleventh order on the calendar.

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1207
2/16/2021

Relating to liability of nonmanufacturing sellers; and to provide for application

Chairman Klemin called the meeting to order at 11:49 AM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Satrom, and Vetter, and Roers Jones

Discussion Topics:

- Reconsideration
- Amendment

Rep. Satrom: Motion to reconsider

Rep. Magrum: Seconded

Roll call vote:

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	A
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	Y
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

13-0-1 Motion carried

Rep. Satrom: Moved proposed amendment 21.0434.02002

Rep. Magrum: Seconded

Voice vote carried

Rep. Satrom: Do Pass Motion as amended
Rep. Magrum: Seconded

Roll Call Vote:

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	N
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	N
Rep K. Hanson	N

11-3-0 Motion carried **Carrier: Rep. Satrom**

Additional Written Testimony: #6720

Stopped at 11:55

DeLores D. Shimek
Committee Clerk

February 16, 2021

af
2/16/21

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1207

Page 4, remove lines 23 through 26

Page 4, line 27, replace "d." with "c."

Page 5, line 1, replace "e." with "d."

Page 5, line 27, replace "thirty" with "forty-five"

Page 6, line 23, replace "thirty" with "forty-five"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1207: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1207 was placed on the Sixth order on the calendar.

Page 4, remove lines 23 through 26

Page 4, line 27, replace "d." with "c."

Page 5, line 1, replace "e." with "d."

Page 5, line 27, replace "thirty" with "forty-five"

Page 6, line 23, replace "thirty" with "forty-five"

Renumber accordingly

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1207

Page 4, remove lines 23-26

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Page 5, line 1, replace "e." with "d."

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Page 6, line 23, replace "thirty" with "forty-five"

Renumber accordingly

2021 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1207

2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Fort Union Room, State Capitol

HB 1207
3/17/2021

relating to liability of nonmanufacturing sellers

Chair Klein opened the hearing at 9:00 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

Discussion Topics:

- Insurance claims
- Reserving rights to file claims
- Business liability
- Asbestos

Representative Kim Koppleman introduced the bill and submitted testimony #9828 [9:00].

Mark Behrens, U.S. Chamber Institute for Legal Reform testified in favor and submitted testimony #9380 [9:05].

Matt Gardner, Greater North Dakota Chamber testified in favor [9:27].

Bill Colonic, ND Association of Plumbing and Heating Contractors testified in favor [9:30].

David Thompson, Lawyer from Grand Forks testified in opposition and submitted testimony #9644 [9:34].

Joe Hall, DAV Department of North Dakota testified in opposition and submitted testimony #9735, 9736, 9737 [10:25].

Jaci Hall, North Dakota Association for Justice testified in opposition and submitted testimony #9794 [10:43].

Additional written testimony: 9658, 9552, 9156, and 9122.

Chair Klein ended the hearing at 10:49 a.m.

Isabella Grotberg, Committee Clerk



STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative Kim Koppelman

District 13
513 First Avenue NW
West Fargo, ND 58078-1101
B: 701-492-7317
kkoppelman@nd.gov

Speaker of the House

HB 1207 Testimony

Few areas have led to greater civil litigation than claims involving asbestos. While we all believe that those with legitimate injuries should be able to make claims for relief in our courts with actions against those who cause injury, we in North Dakota, like many other states, have taken steps, by passing tort reform legislation, to ensure that such claims are legitimate and not overreaching, thus ensuring fairness and common sense in the arena of civil litigation.

HB 1207 will build upon these good laws which we've already enacted in North Dakota.

HB 1207 addresses the following four important asbestos topics:

1. Over-naming

A plaintiff must provide a good faith basis for "each claim" against "each defendant" prior to filing an asbestos lawsuit. Asbestos plaintiffs/plaintiffs' lawyers often "over-name" defendants, leading to unnecessary defense expenses and burdens on the court system.

2. Medical Criteria

A plaintiff must actually be sick in order to sue.

3. Unfair Consolidation

In the absence of consent from all parties, a court may consolidate for trial only asbestos actions relating to the exposed individual and members of that individual's household.

4. Bare-Metal Defense

A manufacturer who delivers a product "bare metal" – that is without the insulation or other asbestos containing material – is not liable for injuries caused by asbestos in later-added materials.

Mr. Mark Behrens will walk the Committee through the details of the bill

**TESTIMONY OF MARK BEHRENS, ESQ.
SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR
LEGAL REFORM IN SUPPORT OF H.B. 1207**

Thank you for the opportunity to testify in support of H.B. 1207 on behalf of the U.S. Chamber Institute for Legal Reform, a division of the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business organization representing companies of all sizes across every sector of the economy. The U.S. Chamber counts many North Dakota businesses among its broad membership.

H.B. 1207 contains a number of common sense reforms that find support in other states.

First, H.B. 1207 gives priority to asbestos plaintiffs who can demonstrate impairment according to objective criteria utilized by the medical community. In short, the legislation says that an asbestos plaintiff needs to be sick in order to sue.

This reform allows courts and defendant companies to focus their resources on the most severely injured while preserving the right of the presently uninjured to sue at a later time should an asbestos-related impairment develop.

This approach has been enacted in 10 states¹ and adopted by courts in major asbestos filing jurisdictions such as Chicago, New York City, Boston, and Baltimore. The approach also finds support in Shared State Legislation adopted by the Council of State Governments (2006); resolutions adopted by the National Conference of Insurance Commissioners and National Conference of Insurance Legislators (NCOIL); and an ABA resolution (2003) supporting the enactment of federal asbestos legislation to advance only those cases of individuals with demonstrated physical impairment. Lawyers who primarily represent cancer victims have spoken in support of such reforms in the past.

Further, the diagnosis of asbestos-related impairment must come from a treating physician who sees real patients, not a consultant who makes a living testifying as a hired gun in asbestos litigation.²

Researchers at Johns Hopkins University found that X-ray readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays they reviewed, while independent X-ray readers found abnormalities in only 4.5% of the same X-rays. One physician said that plaintiffs' X-ray readers see an inflated number of asbestos-related abnormalities on chest X-rays because "the chest X-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." The Johns Hopkins findings are consistent with findings by an American Bar Association Commission on Asbestos Litigation in the early 2000s.

North Dakota has a similar requirement for medical negligence cases. Under N.D.C.C. § 28-01-46, any action for medical negligence "must be dismissed without prejudice on motion unless the plaintiff serves upon the defendant an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action."

¹ Texas, Ohio, Iowa, Kansas, Tennessee, West Virginia, Oklahoma, Georgia, South Carolina, and Florida.

² See Iowa Code § 686B.2(22)(b) ("Qualified physician" means...The physician treated or is treating the exposed person, and has or had a doctor-patient relationship with the exposed person at the time of the physical examination....); see also Kan. Stat. Ann. § 60-4901(o)(2); Ohio Rev. Code § 2307.91(Z)(2); Fla. Stat. Ann. § 774.203(23)(a)(2); 76 Okla. Stat. Ann. § 94(A)(2)(b); S.C. Code § 44-135-50(A)(2)(b); W. Va. Code § 55-7G-3(25).

Second, H.B. 1207 helps to ensure that plaintiffs with asbestos-related impairment are suing defendants with an actual connection to the plaintiff. Iowa passed a similar law last year.

There are often a large number of defendants named in asbestos personal injury or death lawsuits. Between 2010-2013, some North Dakota asbestos cases named between 160 and 180 defendants. More recently, the number has been as high as 75 (2019) and 94 (2017).

Cass County (Fargo) District Court Judge John Irby, who manages virtually all North Dakota asbestos cases, told the House Judiciary Committee in a January 29, 2021, letter, “there are often upwards of 100 defendants” and “asbestos cases are cumbersome to manage given the large number of ‘players’ in the game and the number of filings.”

According to KCIC consulting’s national data, “it is believed that many defendants are named frequently with no proof of exposure.” Rather, as plaintiff lawyers cast a wider net to capture solvent defendants, they ensnare many innocent companies in the process—just like a fishing net for tuna ensnares dolphins as by-catch. This type of lawsuit abuse is known as over-naming.

One prominent insurer has said, “Very many defendants get dismissed 85-95% of the time from these lawsuits for zero dollars.” Consulting firm KCIC’s founder and president has said, “It is common for us to see mesothelioma dismissal rates above 90%.”

A North Dakota example is a case that was litigated all the way to a verdict—a rarity—the *Judy Geier* case. Data collected from defense interests indicates that 62% of the 79 defendants in the *Geier* case arguably *never* should have been named in the lawsuit: 20 defendants were dismissed without payment, 17 appeared with no further action taken, and a dozen never appeared in the case. Only 28 of 79 defendants actively participated in the case according to data from defendants.

The pattern of over-naming followed by eventual dismissal is not innocuous. Defendant companies can spend thousands of dollars in defense costs and loss of productivity to be released from cases in which there was never proof of exposure. Litigation costs start on day one and may continue for years until an erroneously named defendant is dismissed. As a commentator has explained:

To expand this point and state the obvious, every defendant that has been named on a complaint from which they are eventually dismissed still has to accept service of the complaint, have local and national counsel open files and defend the case, attend depositions, respond to discovery, etc. Even though they pay nothing in indemnity in such cases, they incur very real defense expenses. This is the tort system gone mad.

One analysis estimated that a “defendant that stays in a case through the summary judgment stage could easily have spent at least \$20,000 to defend the case in which they should never have been named in the first place.” In situations where defense costs are paid through insurance, higher premiums may result and there is potential erosion of policies that may be needed to pay future plaintiffs with legitimate claims.

The cost associated with improper naming of defendants in asbestos actions has contributed to employer bankruptcies. For example, in the 2020 bankruptcy filing of DBMP LLC, the holding company for the legacy asbestos liabilities of CertainTeed, DBMP notes that more than half of “claims filed against [CertainTeed] after 2001 were dismissed—usually because the plaintiff could provide no evidence of exposure to a [CertainTeed] asbestos containing product.” According to ON Marine, another company that filed bankruptcy related to asbestos liabilities in 2020, 95% of the over 182,000 asbestos personal injury claims filed against it since 1983 were dismissed without payment to a plaintiff. The negative economic impacts of COVID-19 augment the need to help businesses avoid wasted expenditures.

H.B. 1207 requires asbestos plaintiff to disclose the evidentiary basis for each claim against each defendant and provide supporting documentation. Meritless claims will be identified earlier. This will cut down on unnecessary litigation and wasted defense costs, facilitate settlements, and focus judicial resources on claims with evidentiary support. Judge Irby will find the litigation less “cumbersome to manage” and easier to resolve as a result of fewer “players’ in the game” that never should have been sued in the first place.

Third, H.B. 1207 will help ensure that asbestos trials are both efficient and fair by allowing courts to consolidate for trial only asbestos actions relating to the exposed person and members of that person’s household (e.g., a claim by a worker and a loss of consortium claim by that person’s spouse).³

Joinder of cases for trial that are not legally and factually similar causes substantial prejudice to defendants, may violate due process, and invites the filing of additional claims. The opportunity for prejudice is particularly troubling where a plaintiff who may expect close to a normal life span is paired for trial with someone suffering from terminal cancer. The jury may incorrectly assume that the minor non-malignant condition will progress to a terminal cancer. Also, when multiple plaintiffs allege injuries from the same product, jurors may incorrectly assume that the claims must have merit.

Empirical evidence shows that consolidated asbestos trials create biases that artificially inflate the frequency of plaintiff verdicts of abnormally large amounts. In short, plaintiffs win more often, and win bigger awards because of jury bias and prejudice to defendants. For example, a study of New York City asbestos litigation (NYCAL) data from 2010-2014 found that consolidated verdicts were 250% more per plaintiff than NYCAL awards in individual trial settings.

The clear national trend is to bar or sharply curtail multi-plaintiff asbestos trials.

Fourth, H.B. 1207 codifies a legal doctrine called the “bare metal” defense, which holds that a manufacturer or seller of a product, such as a pump, is not liable for later-added external thermal insulation or replacement internal components, such as gaskets, made or sold by a third party. This is consistent with traditional North Dakota law holding that manufacturers are responsible for products they put in the stream of commerce but are not liable for injuries caused by copycat or other products made by competitors and other companies.⁴

Fifth, H.B. 1207 amends North Dakota’s existing innocent seller liability reform statute to permit a seller to obtain dismissal when the seller has simply been part of the chain of distribution of a product and has not itself acted negligently.

Conclusion

For these reasons, the U.S. Chamber of Commerce supports enactment of H.B. 1207.

³ 6 states—Georgia, Iowa, Kansas, Tennessee, Texas, and West Virginia—have enacted laws generally precluding the joinder of asbestos cases for plaintiffs who are not members of the same household.

⁴ See, e.g., *Morrison v. Grand Forks Hous. Auth.*, 436 N.W.2d 221, 224 (N.D. 1989) (stating that, to recover in product liability, “the plaintiff must prove there was a ‘defect’ in the defendant’s product”); *Reagan v. Hi-Speed Checkweigher Co.*, 30 F.3d 947, 948 (8th Cir. 1994) (explaining that “a plaintiff must prove that there was a defect in the defendant’s product”); *In Re: Zantac (Ranitidine) Prods. Liab. Litig.*, 2020 WL 7866660, at *30 (S.D. Fla. Dec. 31, 2020) (predicting “North Dakota Supreme Court would hold that Plaintiffs’ claims against Defendants [for copycat product made by third party] fail for lack of product identification and for lack of a duty giving rise to liability under North Dakota law”).

March 15, 2021

RE: House Bill 1207 – Asbestos Litigation Reform Legislation

Dear Senators of Industry, Business & Labor Committee:

The North Dakota Association of Plumbing, Heating & Mechanical Contractors (our business has been a member since inception, with 5 family members serving as president) supports H.B. 1207 – an asbestos litigation reform bill that will give priority to deserving claimants with asbestos-related impairment and reduce wasteful litigation against innocent defendants.

As a company that has been engaged in our industry continuously for the past 113 years and having employed hundreds of tradesmen over those years we feel exceptionally at risk of asbestos litigation as we were involved in mechanical installations long before laws banned the use of asbestos. It was not until the early 1970's that the government banned the use of asbestos, we had already been doing mechanical installations for over 60 years, most building construction products up until that time (floor tile, ceiling tile, insulation, gaskets, pipe covering, etc.) contained asbestos. All these products were included in building, because they were the best products at the time, medical science had not yet made the connection with health risks and construction workers or building inhabitants. Having to hire legal counsel to defend ourselves against any potential future asbestos claim, whether real or frivolous, would cause severe financial distress.

Asbestos litigation continues to be a drag on North Dakota businesses, and it is estimated that the litigation could last several decades. The Legislative Assembly has taken important steps in the past to address particular abuses in this type of litigation. H.B. 1207 continues this work by addressing issues that are problematic in the litigation today. Specifically, the bill:

Gives priority to the truly sick by filtering out asbestos claims that are either premature (because the exposed person is not sick yet) or meritless (because they never will be).

By requiring plaintiffs to be sick in order to sue, the bill allows courts and defendant companies to focus their resources on the most severely injured. At the same time, the bill is fair to the non-sick by allowing them to sue in the future should a cancer develop.

Requires plaintiffs to disclose the evidentiary basis for the claims against each defendant named in a case.

This will allow claims to proceed that have evidentiary support, facilitate earlier dismissal of claims that do not, reduce wasteful litigation costs, and speed settlements.

Ensure that asbestos trials are efficient and fair by allowing courts to consolidate for trial only asbestos actions relating to the exposed person and members of that person's household.

CORPORATE OFFICE:

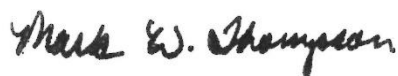
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FAX: (701) 223-1517

Codifies traditional North Dakota law holding that manufacturers are responsible for products they put in the stream of commerce but are not liable for injuries caused by copycat or other asbestos-containing products made by third parties.

Amends the state's innocent seller statute to permit a seller to obtain dismissal when the seller has simply been part of the stream of commerce and has not itself acted negligently.

For these reasons, I urge you to vote for H.B. 1207.

Sincerely,



Mark W. Thompson
President
H. A. Thompson & Sons

#9735

THE HIDDEN ENEMY: ASBESTOS' LONG, DEADLY TOLL ON U.S. VETERANS



A project of



2 EXECUTIVE SUMMARY

2 ASBESTOS EXPOSURE
MOST COMMON IN NAVY

3 AFTER SERVICE, ASBESTOS
THREATS LINGER

4 THE PUSH TO ROLL BACK
ASBESTOS VICTIMS' RIGHTS

5 ASBESTOS-CAUSED
DISEASES REMAIN THREAT
TO VETERANS

6 TOM BURKLE

7 SHANDI SPEEDY

8 DICKIE VAN NESS

Many of the nation's veterans who served in World War II, Korea, Vietnam and other conflicts were facing an enemy they could not see—a hidden threat that lurked in their own vessels, aircraft, vehicles and armaments: asbestos.

For most of the 20th century, the U.S. armed forces used asbestos extensively in the production and maintenance of ships, planes, tanks, trucks and other equipment.

Hundreds of thousands of sailors, soldiers, airmen and Marines were regularly and unknowingly exposed to the lethal material.

After serving their country, many of these Americans went on to work in shipyards and other places where they were likely exposed again to asbestos. **Some unwittingly carried asbestos fibers home on their clothing or work gear, exposing spouses and children through so-called deadly hugs.** To add insult to injury, asbestos has not been banned in the U.S. and importations continue, which means veterans and their families continue to be exposed to asbestos.

Veterans make up roughly 8 percent of the current U.S. population, but account for about 30 percent of the roughly 3,000 Americans who die each year from mesothelioma—a rare, incurable and almost always fatal cancer caused only by asbestos exposure. All told, some 12,000 to 15,000 Americans die annually from asbestos-triggered diseases, including mesothelioma, lung cancer and asbestosis.

The total estimate of U.S. asbestos victims over the last 50 years exceeds half a million people. The percentage of veterans in the population today is roughly 8 percent, but was much higher in previous decades, so it follows that, to date, well over 40,000 veterans may

have died from asbestos exposure. Because symptoms of asbestos-related diseases may not show up for decades after exposure, and because today's troops are still being exposed to asbestos in buildings in battle zones overseas, the death toll will continue to rise.

America owes it to these brave men and women, and their families, to make sure that asbestos is finally banned in the U.S. and that veterans who fall victim to asbestos-triggered diseases are able to hold the asbestos industry accountable.

ASBESTOS EXPOSURE MOST COMMON IN NAVY

Of all military veterans, those who served in the Navy are at the greatest risk of developing diseases caused by asbestos exposure. The Navy was the biggest user of asbestos and, beginning in the late 1930s, used it to line every vessel in its fleet. Tens of millions of Americans who served on Navy ships between 1938 and the early 1990s, before large-scale abatement procedures began, unwittingly risked contact with asbestos.

Navy personnel who served below deck in engine and boiler rooms, and in other areas involving the propulsion of ships, faced the greatest risk of inhaling asbestos fibers. Those who worked in the shipyards and dry docks, repairing and maintaining vessels, were also exposed.

Veterans who served in the Army, Air Force and Marines have also fallen ill and died from asbestos-related diseases at a higher rate than that of the general population.

Asbestos was widely used in land-based military installations, including in the floor and ceiling tiles of barracks at home and abroad. Materials containing asbestos, including brake pads and other components of vehicles used by the Army, Air Force and Marines, put many service members at risk.

MILITARY PROFESSIONS THAT PRESENT THE GREATEST RISKS OF ASBESTOS EXPOSURE

Navy: Gunner's mate, electrician's mate, boatswain's mate, hull maintenance technician, machinist, fire control, welder, pipefitter

Army: Infantry, vehicle and aircraft mechanic, artillery

Air Force: Airplane mechanic

Marines: Mechanic

RECENT MILITARY SERVICE

Many of the buildings and structures that were damaged or destroyed during the Iraq War contained asbestos, putting the more than 1.5 million Americans who served during the second Gulf War at risk of inhalation.

AFTER SERVICE, ASBESTOS THREATS LINGER

Many veterans use the skills and experience they gained during their time in uniform in professions that can re-expose them to asbestos.

FIREFIGHTERS

The National Institute for Occupational Safety and Health estimates that firefighters are twice as likely to die from mesothelioma than the general population. Firefighters regularly inhale asbestos fibers when responding to burning buildings. Their protective clothing, including jackets, helmets and boots, was once made with asbestos, too.

Up to 400,000 people, including veterans and first responders, were exposed to asbestos and other deadly toxins following

the collapse of the Twin Towers on Sept. 11, 2001. Roughly 2,000 tons of pulverized asbestos were released into the air, and swept through lower Manhattan and neighborhoods beyond. The latency period for asbestos-caused diseases is long, taking years before people become ill, which means a wave of future 9/11 victims will almost certainly arrive in the decades to come.

CONSTRUCTION WORKERS

Almost any home or building constructed before the early 1980s likely contains materials made with asbestos. As a result, those who demolish or renovate old structures will likely be exposed to large amounts of asbestos dust. Asbestos is still legal and it is used in the production of some roofing and flooring materials, putting construction workers at risk.

MANUFACTURING WORKERS

Asbestos was once used in a number of industries and trades, including automobile manufacturing, textiles, chemical production and shipbuilding, among others.

COMMUNICATIONS AND POWER PLANT WORKERS

The heat-and-fire resistant qualities of asbestos made it a widely used component in the production of the nation's power plant facilities and communications infrastructure.

MECHANICS

Auto mechanics are routinely exposed to asbestos when repairing both old and newer cars. Asbestos was used in virtually all brake pads and many other car parts for decades, and is still used in the production of some brake pads today.

THE PUSH TO ROLL BACK ASBESTOS VICTIMS' RIGHTS

Congress and state legislatures are pursuing efforts to restrict and roll back the rights of veterans who are sick and dying from asbestos diseases.

Rather than taking steps to ensure veterans are no longer exposed to asbestos, the asbestos industry is pushing legislation around the country that would strip veterans and their families of the right to hold the industry accountable. Legislation introduced in Congress and a number of state legislatures would delay and deny compensation to sick and dying veterans. The bills are being pushed by corporations that were responsible for manufacturing asbestos or exposing workers to it, along with their insurers. The legislation places additional burdens on asbestos victims who wish to file claims against the asbestos industry.

Veterans and many veterans' organizations have expressed strong opposition to these proposals:

"If you think that the bill is protecting the rights of victims, it is not. It is about protecting corporations," said Renee Simpson, state commander of the Wisconsin Veterans of Foreign Wars, speaking in opposition to Assembly Bill 19.

"Although many of our members recognize the great things the [Wisconsin] State Legislature and governor have done for veterans this legislative session, unfortunately, all of the goodwill now be overshadowed by the deaf ear to our pleas to stop this devastating legislation to our

veterans and their families who have been exposed to asbestos," said Jason Johns, a Purple Heart recipient for his service in Iraq, and a representative of the Military Order of the Purple Heart, which, along with the state's American Legion and the Veterans of Foreign Wars, opposed A.B. 19 in Wisconsin.

"The Military Order of the Purple Heart, Department of Pennsylvania, wishes to inform this committee, and your colleagues in the [Pennsylvania] legislature of our opposition to HB 1150, titled Fairness in Claims and Transparency Act. 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," said Michael Mescavage, Military Order of the Purple Heart, Department of Pennsylvania.

"Rhetorically showing support for our veterans in speeches, while voting against their interests and wellbeing is nothing short of a slap in the face to these brave men and women who often put their lives in harm's way serving their country," said a letter to Congressional leaders on H.R. 526, the so-called FACT Act.

The letter was signed by the following organizations: Air Force Sergeants Association; Air Force Women Officers Associated; American Veterans; Association of the United States Navy; Commissioned Officers Association of the U.S. Public Health Service; Fleet Reserve

Association; Jewish War Veterans of the USA; Marine Corps Reserve Association; Military Officers Association of America; Military Order of the Purple Heart; National Association for Uniformed Services; National Defense Council; Naval Enlisted Reserve Association; The Retired Enlisted Association; U.S. Coast Guard Chief Petty Officers Association; U.S. Army Warrant Officers Association; and Vietnam Veterans of America.

The FACT Act “is nothing but a way for the asbestos companies to attack those dying as a result of exposure to asbestos, and their families,” Rick Weidman, executive director of policy and government affairs for Vietnam Veterans of America, told the military newspaper Stars and Stripes.

ASBESTOS-CAUSED DISEASES REMAIN THREAT TO VETERANS

While asbestos use has dropped precipitously since the late 1970s, the number of Americans, including veterans, who become sick and die from asbestos-triggered diseases has not.

Today, up to 15,000 people in the U.S., including roughly 1,800 veterans, succumb to asbestos diseases every year, and that number will likely not decline for years—or even decades—to come.

Elected officials should advance policies that protect those who have sacrificed for our country, not push legislation that would deny them even a modicum of justice.

ASBESTO NATION



TOM BURKLE

Tom Burkle loved to work with his hands. In the age of automation, he said it was “a dying thing.”

He didn't know it would lead to his own death.

From 1966 to 1969, he was an Army mechanic, repairing trucks in West Germany. After his honorable discharge, he returned to his hometown of Indianapolis, becoming a pipefitter. He helped build schools, hospitals and the Hoosier Dome football stadium. When he retired in 2006, he started a handyman business called “Mr. Fix-It,” taking on small projects for his friends, family and the elderly in his community.

In 2014, his wife Joan retired from her nursing career so she and Burkle could travel the world together. But they were only able to take one trip to Italy before, in March 2015, while lifting weights, Tom felt a sharp pain in his back.

“At first we thought he’d just pulled a muscle,” said Joan, who was married to Burkle for 43 years. “But then the pain in his back moved around to the front, and he couldn’t lie on one side. It was such a surprise, because he’d always been so healthy. The July after that, he started having shortness of breath, so we went to the doctor.”

An X-ray showed he had fluid on his right lung, but an initial biopsy of the fluid found no cancer cells. After surgery to drain more than a gallon of fluid, doctors found what Joan described as “innumerable” tumors on his lung, sternum and ribs. **They diagnosed pleural mesothelioma, a rare and incurable cancer caused by inhalation of asbestos fibers.** Burkle could have been exposed through truck brakes or pipes, two common uses of asbestos until its deadly nature became widely known in the mid-1980s.

Doctors said Burkle might survive two years. Despite multiple radiation and chemotherapy treatments, and intense pain, he lived five months.

Burkle died Jan. 13, 2016, at age 69. Four hundred people, many of them Burkle’s customers whom Joan didn’t even know, came to his funeral.

Less than a month later, Joan learned about the so-called FACT Act, a proposed federal law that would make it harder for asbestos victims and their families to collect compensation from companies that made and used asbestos. She travelled to Washington, D.C., to urge her senators to oppose the bill.

“I’m not an angry type of person, but it’s a horrible injustice that these companies kept making and using asbestos products when they knew it could kill people,” Joan said. “Because mesothelioma was so rare, they valued the profit motive above the loss of life.”

Recently, Joan sold and moved out of the house she and Burkle called home.

“I would look in the corner and all I could see was the hospice bed where he suffered so much,” she said. **“I just kept thinking that this could not be true, it’s got to be a dream. It was a nightmare.”**



SHANDI SPEEDY

At age 22, Shandi Speedy asked herself what she was doing with her life.

Her father was a jet engine mechanic in the Air Force, a military lifer. Speedy had fond memories of waiting around the hangar at Forbes Field near Topeka, Kan., and giving him a big hug when he got off work. Her husband Billy was an Army medic who had previously served in the infantry. When she was working at a department store in Killeen, Texas, where Billy was stationed at Ft. Hood, she felt a call to do something “worth noting.”

“I wanted to be part of something bigger than myself,” she said.

In 2011 she joined the Air Force and two years later, she served a six-month deployment in the United Arab Emirates. On her return, she and Billy began trying to have a baby.

When she’d tried to get pregnant earlier, Speedy’s doctor found fluid in her stomach cavity, but it didn’t seem to be a problem. She later began taking fertility drugs and the amount of fluid increased. The doctor ran a biopsy on lesions found in her stomach cavity, and in October 2014, Speedy received devastating news: She had peritoneal mesothelioma, a rare and almost always fatal cancer caused only by exposure to asbestos.

She was 26, and her doctors said she had 14 months to live.

Her father had worked on old aircraft that had components containing asbestos. **Speedy was most likely exposed through contact with her father’s work clothing—what anti-asbestos activists call “deadly hugs.”** Her father, now 50 years old and still an Air Force mechanic, has shown no sign of asbestos-triggered disease, but he and the whole family know that symptoms often don’t surface until decades after exposure.

In January 2016, a month after she was medically retired from the Air Force, she had a nine-hour surgery to remove tumors in her stomach cavity. A week later doctors found that the cancer had spread to her lymph nodes. She had six rounds of chemotherapy.

Since then, there’s been no sign of disease, but she worries about the future.

“I feel very optimistic,” she said, “but it’s always in the back of my head: When is it going to come back?”

Speedy sued the companies that used asbestos to make airplane parts with which her father came into contact, and she’s settled most of her claims. **But she’s angered by proposals in Congress and some state legislatures that would make it harder for asbestos victims and their families to receive timely compensation.**

In a recent op-ed for the Fort Worth Star-Telegram, she wrote that such proposals are ***“an absurd plan, and it should be an embarrassment for the asbestos companies who are seeking to delay and deny what they owe.”***

“It’s so unfair,” she said. “How long ago did we find out that asbestos causes cancer and kills you? Asbestos is cheap and it works well, but at what cost? How many people do we have to lose?”



DICKIE VAN NESS

In 1968, Dickie Van Ness volunteered for the Navy and was assigned to the forward engine room of a World War II-era destroyer whose aging turbines required constant maintenance. Upon discharge, he returned to his hometown of Richmond, Va., and joined the plumbers and steamfitters union. Like the engine room, the factories he worked in contained asbestos, but he trusted that the protective gear and regular medical exams required by the union meant he would be safe.

"He was very fit," said his wife Judy, whom he married in 1987. "He hardly ever even had a cold."

In June 2011, he had a physical exam that found no problems. But, in late August, Van Ness experienced shortness of breath. When he went back to the doctor, his physician said he was like a six-cylinder car running on three cylinders.

After doctors took biopsy, Judy met with his thoracic surgeon to discuss the diagnosis privately.

"He showed me the X-rays and said it was pleural mesothelioma," a rare cancer caused by inhaling asbestos fibers, **"and [said] there was no cure,"** Judy recalled. "The cancer was so thick around Dickie's lung he'd probably had it for 40 years." That suggested

Van Ness had first been exposed to asbestos while in the Navy, but given his later work, he was likely continually exposed as a civilian.

Van Ness started chemotherapy in October 2011; the following spring, it briefly seemed as if he was responding to treatment, but then he began weakening. Dickie Van Ness died at home on Aug. 30, 2012. He was 62 years old.

The following March, Judy went to a conference in Washington, D.C., about the so-called **FACT Act, a proposed bill that would make it harder for asbestos victims and their families to receive compensation from the companies that made and used asbestos.**

"At the conference, I said that I had always supported the Republican Party, but this was not a Republican or a Democratic issue, but a victims' rights issue," she said.

"This was personal to me, and I wanted to explain it for people who didn't understand."

The Van Ness family had savings, good medical coverage and a long-term care insurance policy, and with the help of Sen. Jim Webb, D-Va., they received compensation from the Veterans Administration promptly.

"We were taken care of, but other people may not be so lucky," Judy said. **"When someone is diagnosed with mesothelioma, realistically they're not going to live very long. How dare they try to pass a bill to make it harder for veterans to get the help they're entitled to? This is not a partisan issue—it's about doing the right thing."**

PROTECT VETERANS & THEIR FAMILIES ***Veterans OPPOSE the Asbestos Industry's "Reform" Efforts***

Asbestos defendants have spent over a century putting forth misleading and inaccurate information about the dangers of asbestos and their culpability in the death and destruction it has wrought. The Asbestos Trust "Reform" Legislation being pushed by these large corporations is the latest attempt to deprive asbestos victims of justice for their injuries and loss of life. This legislation allows asbestos defendants to delay and deny asbestos claims until asbestos victims die from largely incurable diseases.

Veterans and their families are disproportionately impacted by this terrible assault on their rights. Veterans account for roughly thirty percent of Americans who contract mesothelioma – an extremely painful and almost always-fatal form of cancer that attacks the lining of the lungs, stomach and other organs that is only caused by asbestos. Mesothelioma works quickly, often leaving its victims with less than eighteen months to live. They have no time to lose if they want to see the corporations who poisoned them held accountable.

This is the reason veterans' groups across America oppose this legislative push by asbestos defendants. Organizations representing veterans in more than ten states have publicly opposed this legislative push—groups from the Pennsylvania War Veterans Council to United Veterans Committee of Colorado have sent letters or testified in opposition to this bill.

Shockingly, a spokesperson of some of the largest asbestos defendants in the nation, has been caught claiming that veterans actually *benefit* from this bill and claim that veterans' groups *support* this bill in other states. This is not true and has created confusion. While a few, isolated organizations have previously expressed support for a similar federal bill, **the clear majority of veteran and service member organizations strongly oppose both the federal and state versions of this legislation.**

- In fact, 17 national veteran and service member organizations have publicly, and urgently, **OPPOSED** these federal 'reform' efforts lobbied for by the asbestos defendants. This is why the American Legion Executive Committee's resolution actually **OPPOSED** the latest federal asbestos legislation, because it does not protect veterans.
- In fact, veterans' groups across the country have **opposed these asbestos "reforms,"** including veterans' organizations in **Pennsylvania, Wisconsin, Colorado, New York, Kansas, Missouri, North Dakota, South Dakota, Iowa, and North Carolina.** They oppose this reform because it delays their members ability to proceed to trial as quickly as possible.
- In Wisconsin, the letter was the clear minority position in the state where multiple veteran's groups vocally opposed the legislation. **The Wisconsin bill was opposed by the Wisconsin Military Order of the Purple Heart, Wisconsin Veterans of Foreign Wars, and the Wisconsin American Legion.**

- In South Dakota, the bill **was opposed in its initial form by the Dakota’s Military Order of the Purple Heart** and ultimately the legislature passed a vastly different bill than the one introduced here.
- The New York letter claims the bill is designed to protect the asbestos trusts, but that is patently untrue as it forces trusts to expend resources certifying documents and denying frivolous claims forcibly filed by asbestos defendants that should be given to deserving victims. **The New York bill is opposed by the Military Order of the Purple Heart.**
- The California letters were submitted by a lobbyist who was called out by the military paper Stars and Stripes for sending letters in opposition WITHOUT the commander’s knowledge, much less informed consent. **The lobbyist is quoted as saying “I have a request from the U.S. Chamber of Commerce for support on federal legislation from state-level organizations” and included “Talking points” drafted by the Chamber.**

The Chamber knows that this bill harms veterans and all Americans impacted by asbestos disease. This one-sided legislation began at the American Legislative Exchange Council (“ALEC”). This group is heavily funded by a number of major asbestos companies, including Koch Industries, Honeywell, and 3M. Similar legislation has been rejected in most other states, largely because of opposition by veterans’ groups. These companies knowingly sold dangerous products to the military and failed to warn or protect the soldiers, sailors, and airmen who are now dying from asbestos exposure. This legislation places unnecessary additional burdens on asbestos victims who wish to file claims against the asbestos industry and allows those companies to escape accountability for the harm they caused to our veterans and their families.



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,

Wayne W. Jensen
Commander



*Military Order of the Purple Heart
Department of Pennsylvania*



May 11, 2016

House Judiciary Committee Members;

The Military Order of the Purple Heart, Department of Pennsylvania, wishes to reiterate to this committee, and your colleagues in the legislature of our opposition to HB 1428, titled Fairness in Claims and Transparency Act.

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 no later than 90 days prior to trial of asbestos action, a statement listing all existing or potential claims the plaintiff has filed or has a reasonable basis to file against any asbestos trusts: 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 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 Pennsylvania 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.

For these reasons, on behalf of the Military Order of the Purple Heart, Department of Pennsylvania, I respectfully urge you to oppose HB 1428 and remove it from the House Judiciary Committee's docket.

Thank you,

Michael J. Mescavage

Commander
MOPH Department of Pennsylvania



*Military Order of the Purple Heart
Department of New York*



May 23, 2016

To the Members of the NYS Legislature.
Re: A5978 (Schimminger)

The Military Order of the Purple Heart, Department of New York, wishes to express to this committee, and your colleagues in the legislature, of our opposition to A 5978/S 5504 regarding asbestos actions.

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. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Many veterans and active service members were exposed to asbestos while actively serving their country. This legislation will significantly impede the ability of veterans in New York to receive justice and hold these companies accountable.

Veterans, who suffer from mesothelioma, if they are lucky enough to determine a specific defendant who may be liable, should be allowed to expeditiously proceed against any defendant responsible for their asbestos disease. Most veterans diagnosed with mesothelioma are told they have less than 18 months to live. Yet, instead of expediting the veteran's claim against those who harmed him and thus providing the needed financial resources to pay for medical bills and provide for their families after they are gone this legislation requires veterans to disclose a statement listing all existing or potential trust claims 30 days after filing and at least 180 days before any trial date. This places a great burden upon the veteran to identify all possible defendants before being able to take action against one. A burden that is already very difficult given the fact that the defendants possess all the employee personnel records of the veteran, as well as the dates and locations that the veteran was likely exposed to asbestos in the workplace. In addition, if a veteran was exposed to asbestos while in uniform they are barred from filing suit against the Department of Defense and without access to the military's internal and often sensitive documents they are also unable to show the nexus needed to receive medical care and treatment at a VA facility.

This burden is made unbearable by the provision giving an asbestos defendant the absolute power to force a plaintiff to file a trust claim, or defend their decision not to file a trust claim, at any time during the proceeding. There is no limit set in the statute on the number of times the asbestos defendant can force a plaintiff to do this. It is clear that this language will result in a New York veteran's claim being repeatedly delayed until the plaintiff's death or incapacity to participate on his or her own behalf.

In addition to delaying (and ultimately denying) access to the courts for our veterans prior to their death, this language also makes those delays unnecessarily burdensome by requiring the plaintiff to provide all parties with all documents and information "relevant or relating to pending or potential claims against asbestos trusts." This requirement appears to place a very onerous and burdensome requirement upon veterans during their last year or two of life to gather and produce documents that are *already available to asbestos defendants under current 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 and their family during their last years of life.

Finally, as some of you may know, I am a practicing attorney who is intimately familiar with the court system of New York. As such, I wish to state that the Military Order of the Purple Heart-Department of New York

clearly sees the detrimental effects A 5978/S 5504 would have on access to justice for our men and woman who have honorably served our country then suffer from these terrible diseases.

For these reasons, on behalf of the Military Order of the Purple Heart, Department of New York, I respectfully urge you to oppose A 5978/S 5504 and remove it from the Assembly Judiciary Committee's docket.

Thank you,

Mathew B. Tully, Esq.

Commander
Military Order of the Purple Heart- Department of New York



Military Order of the Purple Heart of the USA

John D. Dismar

Commander, Department of Missouri

3544 S. Weller Ave., Springfield, MO 65804-6444

Tel: (417) 848-1888

e-mail: jdismarjd@aol.com



Dear Chairman Lant and the Members of the Committee:

1. We would like to bring to your attention what we believe the unintended consequences of this legislation upon our members and the veterans' community in general. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, I wish to identify our specific concerns.

This legislation robs veterans of their constitutional rights by giving asbestos corporations the power to delay and deny a claim until a veteran dies. 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 delayed while they do or do not pursue claim against a personal injury trust. This places a great burden upon the veteran to identify all possible defendants before being able to act against one. This also forces veterans to wait indefinitely while their attorney files a claim with little, or no, chance for a meaningful recovery. This legislation may well result in a suit not being adjudicated prior to the veteran's death or incapacity to participate in their own trial.

The injustice this would be to our veterans is magnified by the fact that this legislation is unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information; in fact, victims are required to turn over any and all information a judge deems relevant to court proceeding. Accordingly, asbestos corporations already they have the tools they need to defend themselves.

Missouri House Bill 333 will make it much harder for veterans and their families to hold the asbestos companies accountable. For these reasons, I respectfully urge you not to oppose House Bill 333.

John D. Dismar

MOPH Department of Missouri State Commander



MILITARY ORDER OF THE PURPLE HEART
CHARTERED BY CONGRESS

DEPARTMENT OF IOWA

P.O. Box 572

Killduff, IA 50137

(641) 820-0773

Email: suespara@aol.com

Website: www.purpleheartiowa.com

21 February 2017

Dear Representative Rizer,

We would like to bring to your attention the unintended consequences H.S.B. 104 will have upon our members and the veterans' community in general. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, it is important that we address our specific concerns with you, as a fellow veteran.

This legislation robs veterans of their constitutional right to a trial by jury by giving asbestos corporations the power to run out the clock on sick and dying veterans. 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 delayed while they do or do not pursue claim against a personal injury trust. This places a great burden upon the veteran to identify all possible defendants before being able to act against one. This also forces veterans to wait indefinitely while their attorney files a claim with little, or no, chance for a meaningful recovery. This legislation may well result in a suit not being adjudicated prior to the veteran's death or incapacity to participate in their own trial.

The injustice this would be to our veterans is magnified by the fact that this legislation is unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information; in fact, victims are required to turn over any and all information a judge deems relevant to court proceeding. This is more than enough information for an asbestos defendant to implicate asbestos companies that were not included on a complaint at trial. Accordingly, asbestos corporations already they have the tools they need to defend themselves.

Further, this legislation also effectively takes away a veteran's rights to hold an asbestos company accountable for their asbestosis or silicosis diseases. This legislation would require a veteran's treating physician to draft a report stating that the veteran's asbestosis or silicosis disease meets some arbitrary thresholds established by the asbestos defendants before a veteran can bring a claim in court. Veterans, who often receive care from the overworked VA, are put at an even greater disadvantage as their physicians may be unable to perform the tests required to bring a claim on the veteran's behalf at all. If the veteran was forced to abandon their physician, or pay out of pocket for care, just to be able to bring a claim, this would effectively take away their constitutional right to a jury trial against the companies that caused them harm.

H.S.B 104 is unnecessary and will make it much harder for veterans and their families to hold the asbestos companies accountable. For these reasons, I respectfully urge you to oppose H.S.B. 104.

Yours in Patriotism,

Robert E. Suesakul

Commander

Department of Iowa

Military Order of the Purple Heart



MILITARY ORDER OF THE PURPLE HEART

Robert Callahan Commander

Department of Kansas

404 W. Walnut Salina Kansas 67401

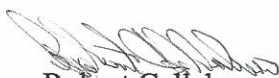
Dear Senate Judiciary Committee Chairman Rick Wilborn and members of the Senate Judiciary Committee,

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. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, I wish to identify our specific concerns.

This legislation robs veterans of their constitutional right to a trial by jury by giving asbestos corporations the power to run out the clock on sick and dying veterans. 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 delayed while they do or do not pursue claim against a personal injury trust. This places a great burden upon the veteran to identify all possible defendants before being able to act against one. This also forces veterans to wait indefinitely while their attorney files a claim with little, or no, chance for a meaningful recovery. This legislation may well result in a suit not being adjudicated prior to the veteran's death or incapacity to participate in their own trial.

The injustice this would be to our veterans is magnified by the fact that this legislation is unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information; in fact, victims are required to turn over any and all information a judge deems relevant to court proceeding. Accordingly, asbestos corporations already they have the tools they need to defend themselves.

Kansas Senate Bill 73 will make it much harder for veterans and their families to hold the asbestos companies accountable. For these reasons, the Military Order of the Purple Heart, Department of Kansas, respectfully urge you to not pass SB 73 out of committee.



Robert Callahan

Commander

Military Order of the Purple Heart, Department of Kansas



Military Order of the Purple Heart

Department of The Dakotas



February 7, 2017

House Judiciary Committee Rep. Kim Koppelman, Chair,

We would like to bring to your attention what we believe the unintended consequences of North Dakota House Bill 1197 upon our members and the veterans' community in general. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, I wish to identify our specific concerns.

This legislation robs veterans of their constitutional rights by giving asbestos corporations the power to delay and deny a claim until a veteran dies. 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 delayed while they do or do not pursue claim against a personal injury trust. This places a great burden upon the veteran to identify all possible defendants before being able to act against one. This also forces veterans to wait indefinitely while their attorney files a claim with little, or no, chance for a meaningful recovery. This legislation may well result in a suit not being adjudicated prior to the veteran's death or incapacity to participate in their own trial.

The injustice this would be to our veterans is magnified by the fact that this legislation is unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information; in fact, victims are required to turn over any and all information a judge deems relevant to court proceeding. Accordingly, asbestos corporations already they have the tools they need to defend themselves.

Finally, this legislation also effectively takes away a veteran's rights to hold an asbestos company accountable for an asbestosis or silicosis diseases. This legislation requires a veteran's treating physician to draft a report—for free—stating that the veteran's asbestosis or silicosis disease meet certain arbitrary thresholds established by the asbestos defendants before the veteran can exercise their constitutional rights. Veterans, who often receive care from overworked Veterans Administration physicians, are put at an even greater disadvantage as their physicians may be unable to perform the tests required or fill out the report necessary for the veteran to bring a claim at all. If the veteran was forced to abandon their physician, or pay out of pocket for care, this effectively takes

away their constitutional right to a jury trial against the companies that caused them harm.

North Dakota House Bill 1197 will make it much harder for veterans and their families to hold the asbestos companies accountable. For these reasons, I respectfully urge you to oppose North Dakota House Bill 1197.

Thank you,

Mark Williamson

Commander

Military Order of the Purple Heart-Department of The Dakotas



Military Order of the Purple Heart

Department of The Dakotas



February 7, 2017

Dear Senator Nelson,

We would like to bring to your attention what we believe the unintended consequences of Senate Bill 138 upon our members and the veterans' community in general. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, I wish to identify our specific concerns.

This legislation allows asbestos defendants to delay and deny compensation to veterans until they die. Those suffering from mesothelioma, on average, have 12 to 18 months to live. 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 delayed while they do or do not pursue claim against a personal injury trust. This legislation places a great burden upon a veteran to identify all possible defendants before being able to act against one. This also forces veterans to wait indefinitely for a trial date while their attorney is forced files claims with little, or no, chance for a meaningful recovery. This legislation may well result in a suit not being adjudicated prior to the veteran's death or incapacity to participate in their own trial.

The injustice this would be to our veterans is magnified by the fact that this legislation is unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information; in fact, victims are required to turn over any and all information a judge deems relevant to court proceeding. Accordingly, asbestos corporations already they have the tools they need to defend themselves in court.

Senate Bill 138 will make it much harder for veterans and their families to hold the asbestos companies to justice. There is absolutely nothing about this bill that would make it easier for veterans to recover for their injuries. For these reasons, we respectfully urge you to oppose Senate Bill 138.

Sincerely,

Mark Williamson

Commander

Military Order of the Purple Heart-Department of The Dakotas



Military Order of the Purple Heart

Department of North Carolina



May 22, 2017

Dear House Judiciary Committee Members,

The Military Order of the Purple Heart-Department of North Carolina, would like to bring to your attention what we believe the unintended consequences of SB 470 upon our members and the veterans' community in general. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, I wish to identify our specific concerns.

This legislation robs veterans of their constitutional right to a trial by jury by giving asbestos corporations the power to run out the clock on sick and dying veterans. 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 delayed while they do or do not pursue claim against a personal injury trust. This legislation places a great burden upon the veteran to identify all possible defendants before being able to act against one. This also forces veterans to wait indefinitely while their attorney files a claim with little, or no, chance for a meaningful recovery. This legislation may well result in a suit not being adjudicated prior to the veteran's death or incapacity to participate in their own trial.

This injustice to our veterans is magnified by the fact that this legislation is unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information; in fact, victims are required to turn over all information a judge deems relevant to court proceeding. Procedures are in place to ensure each asbestos defendant only pays its share of the harm it has caused. Accordingly, asbestos corporations already they have the tools they need to defend themselves. North Carolina Senate Bill 470 will make it much harder for veterans and their families to hold the asbestos companies accountable. For these reasons, I respectfully urge you to vote NO on SB 470.

Sincerely,

Leonard Lazzara
Commander
Military Order of the Purple Heart-Department of North Carolina



PENNSYLVANIA WAR VETERANS COUNCIL, INC.



PO Box 2324, Harrisburg, PA 17105-2324
717-730-9100

November 13, 2013

The Honorable Bryan Cutler
51A East Wing
PO Box 202100
Harrisburg, PA 17120-2100

Dear Representative Cutler,

The Pennsylvania War Veterans Council in a meeting held on October 3, 2013 voted (The PA American Legion abstained) to oppose HB 1150, an act providing for transparency of claims made against asbestos-related bankruptcy trusts for compensation and allocation of responsibility, for the preservation of resources and for the imposition of liabilities.

If you have any questions regarding this matter, please contact me at 717-730-9100.

Sincerely,

Kit D. Watson
Secretary
PA War Veterans Council

Cc: BG (Ret) Jerry Beck, DMVA
Col. Gilbert Durand



***Military Order of the Purple Heart
Department of Wisconsin***



For Immediate Release
April 22, 2013

Contact: Jason Johns
Phone: 608-209-0805

Veterans have Serious Reservations over Bill Delaying Justice to Asbestos Victims

Members of the Wisconsin Military Order of the Purple Heart are concerned that access to justice will be delayed or denied by harmful legislation in AB 19/SB 13 for veterans exposed to asbestos

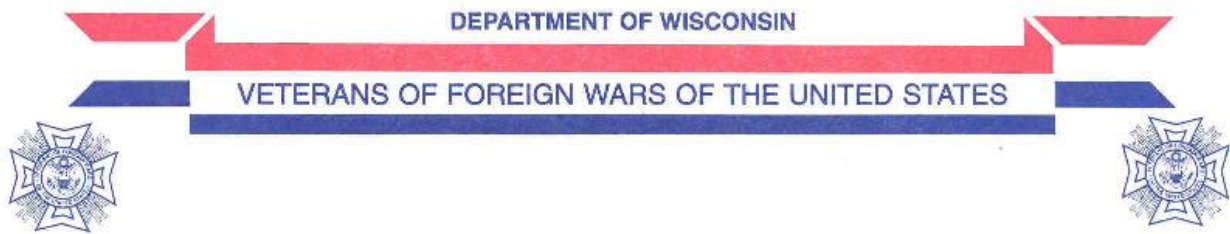
Madison, WI – Wisconsin members of the Military Order of the Purple Heart are expressing deep concern over SB 13/AB 19, bills which would shield corporations from being held accountable and delay justice for victims of asbestos-related diseases like mesothelioma. Many victims of asbestos illness are military veterans who were exposed to asbestos during their time in the military and in their civilian jobs in Wisconsin shipyards, plants, mills and factories. These bills create additional hurdles for asbestos victims seeking justice and fair compensation.

"It has not been past practice for the Military Order of the Purple Heart, Department of Wisconsin to take a position on legislation regarding changes to the Wisconsin judicial system, however, sometimes we simply need to take a stand on behalf of our members when a proposed law would detrimentally affect their constitutional right to a day in court," says Bill Hustad, former state commander and Vietnam Veteran.

Members of the Military of the Purple Heart are even more concerned over a substitute Amendment to AB 19, which is as bad if not worse, as it actually increases the likelihood of delay and denial of justice for veteran victims. They are calling on Wisconsin legislators to remove SB 13/AB 19 from the docket and consider alternatives that would not harm the veteran victims' claims through stays, forced filings and ultimate delay or denial of justice.

"We implore the Assembly and Senate Judiciary Committees to not move either of these bills forward," Hustad further adds. "Instead, we ask that they pause and consider legislation that would not hurt veterans and others suffering from asbestos diseases."

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For Immediate Release
September 24, 2013

Contact: Jason Johns
Phone: 608-209-0805

Wisconsin VFW to recognize National Mesothelioma Awareness Day on September 26, 2013

Madison, WI – The Wisconsin VFW will recognize National Mesothelioma Awareness Day on September 26, 2013. Mesothelioma Awareness Day was established to raise public awareness of the disease.

Mesothelioma is a horrible form of cancer that arises from exposure to asbestos. Many individuals were exposed to asbestos while serving our country. Although veterans represent 8% of the nation's population, they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Naval ships and military barracks were often insulated with asbestos products.

Renee Simpson, VFW Wisconsin Commander, experienced the devastating effects of Mesothelioma on her family. "During my father's time in the military, he was exposed to asbestos in the barracks and aboard naval ships. In September 2012, my father was diagnosed with Mesothelioma," said Simpson. "I watched as the disease transformed my father from a robust man full of life who would start spontaneous water fights with his grandchildren to a shell of his former self. Within months of his diagnosis, he was in so much pain and on so many medications that even everyday actions, like eating, were difficult. In May, the disease took my father's life," Simpson added.

In the Wisconsin Senate, a bill was introduced that would make it harder for veterans and other asbestos victims to seek justice. The Wisconsin VFW has officially opposed this legislation because it creates additional hurdles for veterans and their families. This bill, Senate Bill 13, would only serve to prolong an excruciating and time intensive process. Delay for even one veteran suffering from the fatal effects of mesothelioma is unacceptable – justice delayed is justice denied.

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***Military Order of the Purple Heart
Department of Wisconsin***



For Immediate Release
September 25, 2013

Contact: Jason Johns
Phone: 608-209-0805

The Wisconsin Military Order of the Purple Heart to Remember Veterans on National Mesothelioma Awareness Day

Madison, Wis. – The Wisconsin Military Order of the Purple Heart will recognize National Mesothelioma Awareness Day on Thursday, September 26. Mesothelioma, a deadly disease contracted from asbestos exposure, affects veterans at an astonishing rate, as they make up 30 percent of all known mesothelioma related deaths but only 8 percent of the population.

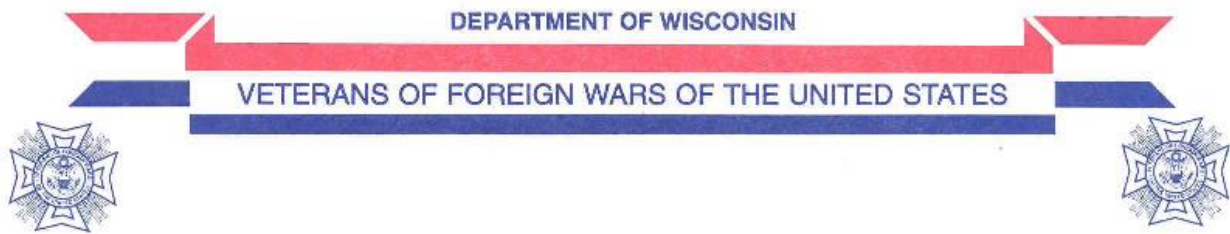
Servicemen and women were often exposed to asbestos while serving their country. Military barracks and naval ships were often insulated with asbestos products. After their service, many Wisconsin veterans worked in factories, mills and foundries where they were further exposed to asbestos.

Mesothelioma is a devastating disease. Victims are often times in excruciating pain, and everyday activities like eating and taking medication are painful. Mesothelioma will lay dormant for years; however, once a victim is diagnosed with the disease they often only have a few months to live.

“We have seen the devastating effects mesothelioma has had on veterans,” said Fuzz Spangler, World War II veteran and Commander of the Military Order of the Purple Heart, Department of Wisconsin. “It’s important we remember veterans who have been harmed by this terrible disease and we especially honor their service on National Mesothelioma Awareness Day.”

The Wisconsin Military Order of the Purple Heart has already opposed legislation that would delay and deny justice to veterans. Senate Bill 13 has been introduced in the Wisconsin Senate and would create additional hurdles for veterans and other asbestos victims seeking justice against asbestos corporations. Justice delayed for even one veteran is unacceptable.

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For Immediate Release
October 10, 2013

Contact: Jason Johns
Phone: 608-209-0805

Wisconsin VFW Disappointed in Senate Committee Asbestos Vote

Senate Judiciary Committee advances bill that would delay and deny justice for Wisconsin's veterans

Madison, Wis. – The Wisconsin VFW is disappointed in yesterday's Senate Judiciary Committee vote to advance Senate Bill 13. This bill would delay and deny justice for Wisconsin's veterans who are suffering from mesothelioma, the cancer caused by asbestos exposure. Veterans were unknowingly exposed to this deadly product while serving our country.

Renee Simpson, VFW Wisconsin Commander and daughter of a veteran who died from mesothelioma, said, "We sincerely hope that the Wisconsin Senate will stand up for veterans." Simpson added, "We trust that Majority Leader Fitzgerald, a fellow veteran, believes strongly that no piece of legislation should ever create hurdles for veterans and their families."

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For Immediate Release
May 8, 2013

Contact: Jason Johns
Phone: 608-209-0805

Wisconsin VFW Members Troubled by Assembly Vote to Pass Legislation Denying and Delaying Justice to Veterans

The Wisconsin Assembly approved AB 19, a bill which creates additional hurdles for veterans and other asbestos victims seeking deserved justice

Madison, WI – Today, the Wisconsin Assembly voted to pass legislation that would delay and deny justice to veterans suffering from asbestos-related diseases. Members of the Wisconsin Veterans of Foreign Wars are troubled by the outcome of this vote because mesothelioma affects veterans at an astonishing rate. According to a report on Military.com, veterans comprise 30% of all mesothelioma related deaths, but make up only 8% of the population. Assembly members sided with the asbestos corporations instead of the veterans, many of which were exposed to asbestos while actively serving their country.

Renee Simpson, Senior Vice Commander of the Wisconsin Veterans of Foreign Wars, was on the Assembly floor as the vote unfolded. "As the daughter of a veteran who has been diagnosed with mesothelioma, I am troubled that the legislature would even consider voting for AB 19, let alone voting to pass it," said Simpson. "This legislation would delay deserved justice for veterans suffering from diseases related to asbestos exposure. Many of these veterans were exposed to asbestos while actively and proudly serving their country."

Legislation proposed in these two bills would create additional hurdles for veterans and other victims with asbestos-related diseases seeking justice and fair compensation. Delay for one veteran suffering from the fatal effects of mesothelioma would be unacceptable – justice delayed is justice denied.

"Veterans, like my father, deserve justice and their day in court," Simpson continued. "We should not impede on their access to justice. They have made the ultimate sacrifice, and they deserve better."

XXX



*Military Order of the Purple Heart
Department of Wisconsin*



For Immediate Release
October 10, 2013

Contact: Jason Johns
Phone: 608-209-0805

Wisconsin Military Order of the Purple Heart Disappointed with Asbestos Vote

Wisconsin Senate Judiciary Committee voted to advance Senate Bill 13

Madison, Wis. – Yesterday, the Wisconsin Senate voted to advance Senate Bill 13 out of committee, a bill which would delay and deny justice to asbestos victims. This bill is especially troubling for veterans because mesothelioma, a deadly disease that is contracted from asbestos exposure, affects veterans at alarming rates. Veterans make up only 8 percent of the population but account for 30 percent of all known mesothelioma deaths.

“We implore the Wisconsin Senate to stand up for veterans and not against them,” said Fuzz Spangler, World War II veteran and Commander of the Military Order of the Purple Heart. “We ask Senate Majority Leader Fitzgerald to not allow this bill to move any further. Many veterans were unknowingly exposed to asbestos while serving their country. It would be wrong to impede on their right to justice.”

XXX

February 14, 2017

Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
Washington DC

Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington DC

Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives
Washington DC

Honorable Steny Hoyer
Minority Whip
U.S. House of Representatives
Washington DC

Honorable Bob Goodlatte
Chairman, House Judiciary Committee
U.S. House of Representatives
Washington DC

Honorable John Conyers
Ranking Member, House Judiciary
Committee
U.S. House of Representatives
Washington DC

**Re: Veterans Service Organization oppose the “Furthering Asbestos Claims
Transparency (FACT) Act”**

Dear Speaker Ryan, Leader McCarthy, Leader Pelosi, Whip Hoyer, Chairman Goodlatte, and
Ranking Member Conyers:

We, the undersigned Veterans Service Organizations oppose the “Furthering Asbestos Claims
Transparency (FACT) Act.” We have continuously expressed our united opposition to this
legislation via written testimony to the House Judiciary Committee, House Leadership, in-person
meetings and phone calls with members of Congress. It is extremely disappointing that even with
our combined opposition, the FACT Act will be marked up in the House Judiciary Committee
later this week.

Veterans across the country disproportionately make up those who are dying and afflicted with
mesothelioma and other asbestos related illnesses and injuries. Although veterans represent only
8% of the nation’s population, they comprise 30% of all known mesothelioma deaths.

When our veterans and their family members file claims with the asbestos bankruptcy trusts to
receive compensation for harm caused by asbestos companies, they submit personal, highly
sensitive information such as how and when they were exposed to the deadly product, sensitive
health information, and more. The FACT Act would require asbestos trusts to publish their
sensitive information on a public database, and include how much money they received for their
claim as well as other private information. Forcing our veterans to publicize their work histories,
medical conditions, majority of their social security numbers, and information about their
children and families is an offensive invasion of privacy to the men and women who have
honorably served, and it does nothing to assure their adequate compensation or to prevent future
asbestos exposures and deaths.

Additionally, the FACT Act helps asbestos companies add significant time and delay paying trust
claims to our veterans and their families by putting burdensome and costly reporting requirements
on trusts, including those that already exist. Trusts will instead spend valuable time and resources
complying with these additional and unnecessary requirements delaying desperately needed
compensation for our veterans and their families to cover medical bills and end of life care.

The FACT Act is a bill that its supporters claim will help asbestos victims, but the reality is that this bill only helps companies and manufacturers who knowingly exposed asbestos to our honorable men and women who have made sacrifices for our country.

We urgently ask on behalf of our members across the nation that you oppose the FACT Act.

Please contact Aleks Morosky, National Legislative Director, Military Order of the Purple Heart at (703) 642-5360) or “aleksmorosky@purpleheart.org” with any questions.

Signed:

Air Force Association

Air Force Sergeants Association

Air Force Women Officers Association

AMVETS

AMSUS, the Society of Federal Health Professionals

Association of the United States Navy

Commissioned Officers Association of the US Public Health Service, Inc.

Fleet Reserve Association

Jewish War Veterans of the USA

Military Officers Association of America

Military Order of the Purple Heart of the U.S.A.

National Defense Council

Naval Enlisted Reserve Association

Non Commissioned Officers Association of the United States of America

The Retired Enlisted Association

USCG Chief Petty Officers Association

US Army Warrant Officers Association

Vietnam Veterans of America

#9737

Senator Klein and members of the Senate Industry, Business and Labor Committee,

I write today to urge your opposition to House Bill 1207, which would erect unnecessary and unconscionable barriers for North Dakota veterans seeking to enforce their constitutional rights against asbestos companies who knowingly covered up the dangers of asbestos for decades. Veterans may only represent 8% of the nation's population, but they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country. Exposure to asbestos is the only known cause of mesothelioma. Given the disproportionate impact this legislation will have on the veteran's community, I wish to identify our specific concerns.

This legislation robs veterans of their constitutional rights by forcing them to jump through unnecessary bureaucratic hoops to bring a claim. The asbestos industry made billions of dollars poisoning veterans without warning them. Instead of making it right, they are building on their legacy of knowingly poisoning tens of thousands of American veterans by pushing to strip them of their constitutional rights. Why should an industry that has failed to correct its "mistakes" be afforded any protection—much less the unprecedented, unconstitutional protections included in this bill?

This bill strips veterans and their families of constitutional rights in a half dozen different ways. It creates a new process for bringing a claim that applies only to an industry renowned for its widespread misconduct. It gives blanket immunity to defendants who incorporated asbestos products into their product design regardless of how culpable they were in covering up the dangers of asbestos. It forces plaintiffs to beg their treating physician to work for free to produce a detailed medical report that is completely unnecessary. It artificially excludes painful, chronic, debilitating diseases caused exclusively by asbestos from a remedy—effectively shifting the cost of causing this harm onto the backs of the veterans and their family. In short, this bill would force North Dakota veterans to pay for the harms caused by the asbestos industry.

Veterans are particularly impacted by this bill when they receive care from the Veterans Administration. Overworked VA physicians may be unable to perform the tests required or fill out the report necessary for the veteran to bring a claim at all. If the veteran was forced to abandon their physician, or pay out of pocket for care, this effectively takes away their constitutional right to a jury trial against the companies that caused them harm. This legislation could also increase the burden on the veteran by adding

additional tests, lengthening the time before they can bring a claim forward. This is valuable time a veteran should be spending with their loved ones.

The injustice this would be to our veterans is magnified by the fact that this legislation is completely unnecessary. Under current law, injured victims are already required to disclose their complete work histories and exposure information to the defendant. Asbestos corporations already have the tools they need to defend themselves.

North Dakota House Bill 1207 will make it much harder for veterans and their families to hold the asbestos companies accountable. For these reasons, I respectfully request a DO NOT Pass on HB1207.

Thank you,

Joe Hall

Vice President, North Dakota Veteran's Legislative Council

Adjutant, DAV Dept of North Dakota

Legislative Chairperson, DAV Dept of North Dakota

JoeHall@davnd.org

(701)400-8122



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OPPOSE HB 1207 **The Asbestos Industry Immunity Act**

Good morning Chairman Klein and members of the Senate Industry, Business and Labor Committee, my name is Jaci Hall and I am the Executive Director of the North Dakota Association for Justice. I am here today to urge a DO NOT PASS on HB 1207.

The asbestos industry wants you to believe HB 1207 is a combination of two bills meant to eliminate "over naming" and prioritize "sick" asbestos victims over "non-sick" claimants. Nothing could be further from the truth.

HB 1207 is an asbestos industry bailout bill. The asbestos industry made billions of dollars selling and installing a deadly product across America without warning workers and consumers of its consequences. Asbestos is still present in products all across America, yet the industry has failed to identify those products with asbestos publicly so that they can be handled with the care necessary to avoid injuring another generation of workers. Instead, they are building on their legacy of knowingly poisoning millions of Americans and killing thousands every year by pushing to strip victims of their constitutional rights. Why should an industry that has failed to correct its "mistakes" be afforded any protection—much less the unprecedented, unconstitutional protections included in this bill?

This bill strips workers of constitutional rights in a half dozen different ways. It creates a unique, arbitrary, and unconstitutionally pleading requirement specific only to an industry renowned for its widespread misconduct. It gives blanket immunity to defendants who incorporated asbestos products into their product design. It forces plaintiffs to beg their treating physician to work for free to produce a detailed medical report that is completely unnecessary. It artificially excludes painful, chronic, debilitating diseases caused exclusively by asbestos from a remedy—effectively shifting the cost of causing this harm onto the backs of the survivor or their family. It does even more than that too. The result is that the North Dakota citizens, families, and taxpayers will be forced to pay for the harms caused by the asbestos industry when they can no longer be held accountable.

HB 1207 has nothing to do with "over naming," it is solely drafted to rig the rules against asbestos plaintiffs to force them—and them alone—to meet an extreme pleading standard before pursuing a claim.

- North Dakota Rule 8 says that a claim for relief must include a "short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief sought." Under this existing rule, if a defendant is not adequately put on notice of a claim against them, then they may seek



North Dakota Association for Justice

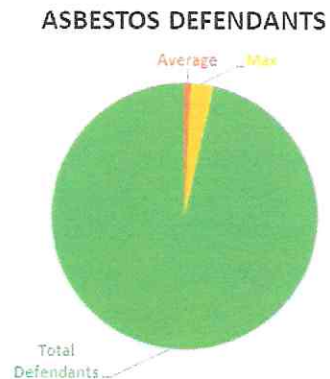
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dismissal—meaning they already have a way out of claims if they are “over named.” HB 1207 has nothing to do with “over naming” - it seeks to force plaintiffs to jump through unnecessary pleading requirements or be completely forced out of court before they can even begin to make their case.

Asbestos was used by *thousands* of companies and found in most industrial components manufactured for the better part of a century.

- There are over 8,400 unique asbestos defendants. The average complaint against asbestos companies' names ~65 defendants and the highest ever noted named 290 defendants in a complaint. These complaints are not “over-naming” defendants they are targeted complaints in an industry where there was *widespread* use of a deadly and dangerous product.



HB 1207 strips both “sick” AND “nonsick” plaintiffs of constitutional rights.

- The proponents of this legislation say that it is about protecting “sick” plaintiffs by “prioritizing” them over the “nonsick.” Yet, this bill gives both explicit and implicit immunity to defendants who knowingly exposed hundreds or thousands of workers to deadly asbestos toxin. The only people this bill “protects” are asbestos and insurance company shareholders. Stripping dying asbestos plaintiffs of their constitutional right to a jury trial does nothing to help North Dakota citizens. Each year, 12 - 15,000 people die because of asbestos exposure. To say that one disease is worse than the other is absurd.

HB 1207 erects impossible barriers for sick plaintiffs before they can even get to court.

- Rather than streamline claims, this bill erects unjustified bureaucratic legal red-tape that sick and dying plaintiffs must navigate to bring an asbestos claim. It forces plaintiffs to pay out of pocket to undergo dozens of potentially unnecessary tests. It forces plaintiffs to beg (and pay) their local town doctor to write a detailed medical report and submit it under penalty of perjury to a court. The local doctor and their report are then subject to blistering attack by highly paid asbestos defendants experts. If a plaintiff succeeds in this, then they have finally clawed their way back to square one and can begin the already onerous and burdensome litigation process from the same place as



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every other plaintiff. There is no justification for imposing these pointless bureaucratic hurdles on citizens trying to enforce their constitutional rights.

HB 1207 arbitrarily decides that dying from asbestosis is different than dying from mesothelioma.

- This legislation distinguishes asbestos cancers from non-cancers, making it harder (if not impossible) to bring a "non-malignant asbestos disease" claim. Asbestosis is a "non-malignant asbestos disease." Asbestosis is arguably worse than an asbestos cancer as it draws out the pain—breathing becomes excruciatingly painful and often leads to a slow death from lung or heart failure. There is no known cure for asbestosis. Asbestosis kills thousands of people annually across the country, [including 55 people between 1999 and 2013 in North Dakota](#). These citizens are entitled to the same constitutional rights as anyone else to hold the people who poisoned them accountable.

HB 1207 forces asbestos patients to pay thousands for medically unnecessary tests just so that they can get into court.

- No treating physician wants to be dragged into the middle of their patient's legal case, but this legislation forces them to be. Most will refuse, but even if they did choose to help, they will be forced to spend hours of their time and tens of thousands of dollars running tests that are medically unnecessary. This bill sets out dozens of criteria that victims must meet to bring a case. Further, it requires the patient to pay out of pocket for these expensive tests. Once the initial threshold showing is met, this report is thrown out and may not be entered as evidence at trial! The plaintiffs is forced to pay tens of thousands of dollars just to get back to square one. Why should asbestos corporations get to force plaintiffs to pay tens of thousands of dollars at the very end of their life for needless medical tests simply to exercise a constitutional right?

HB 1207 makes it impossible for victims exposed to more than one source of asbestos from ever bringing a claim.

- Victims of asbestos disease often worked with, and were exposed to, dozens, or hundreds, of different products containing asbestos. In section 32-4.2-04 and 32-46.3-05, the bill requires plaintiffs to make a "prima facie" showing as to *each defendant* - meaning the local town "qualified physician" must certify that *each defendant's* asbestos was a substantial contributing factor to the plaintiff's disease. The only purpose for this section is to prevent any claim from ever being brought—and exemplifies the entire purpose of this bill.



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HB 1207 extends well beyond the contexts of legacy asbestos exposure claims into asbestos exposure claims that continue to happen daily.

- Asbestos is still legal, and still everywhere in the United States. Reporters have been writing for years about the "third wave" of asbestos exposure to millennials and generation X happening today. These exposures are happening because the manufacturers AND sellers of asbestos products failed to warn that a product contains asbestos and that asbestos was dangerous. These industries have fought for years against federal legislation that would require them to publicly identify where asbestos products are being stored to protect workers who may be unknowingly working with them today.
- For example, this legislation would impact claims for property damage at a school where asbestos tiles were improperly pulverized, potentially exposing hundreds of workers and school children to asbestos diseases. This legislation would force families to bear the cost of this recklessness in the form of personal injury, medical monitoring costs, and the fear that such exposure causes. Similarly, it shuts down class actions where thousands of workers were unknowingly exposed to asbestos insulation when laying natural gas pipelines, *today*. Someone has to pay for their medical monitoring—this bill forces the workers themselves or the state through Medicaid to pay for this monitoring instead of the company that knowingly exposed them to this danger, *today—over a century after we first learned how deadly asbestos could be.*

HB 1207 does absolutely nothing for the victims of the asbestos public health crisis.

- Asbestos is responsible for up killing up to 15,000 people each year in the U.S., many of whom living and work in North Dakota. The asbestos industry hid the danger of asbestos exposure for decades. Many Americans might think it's been banned, but it has not. It's lethal, legal, and continues to pose serious risks to millions of American families. If the legislature does anything about asbestos disease, it should be to protect the North Dakota families that have been recklessly exposed to asbestos by an industry that hid the danger for decades.

During discussion in the House Judiciary Committee, Judge Irby urged the committee to transition this bill into a study. The reasons for the study were as follows:

- HB 1207 mandates specific and significant pre-trial requirements to bring forward an asbestos action. Through substantial effort, Plaintiffs must establish a *prima facie* case and clear significant hurdles to do so within a relatively short period of time. This increases the cost significantly prior to any trial and will extend the time before any plaintiff can seek justice.
- Each defendant in each case – and there are often upwards of 100 defendants – will



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be able to challenge the timeliness and the sufficiency of what the plaintiff has provided for prima facie case. Substantial litigation and time will be used in pretrial litigation over these requirements. This would cost the court hours and additional costs to preside over just one case.

- Given the significant impact this legislation will have on asbestos case management, a study on the impact to the court -both time and costs – is recommended prior to implementation of any changes

We urge you to commit to a DO NOT PASS on this legislation or amend the legislation to a study. As you have heard, the proponents of this legislation are Washington DC attorneys that are asking you to reform our laws like other states. North Dakota's asbestos laws are not flawed, but if changes are needed - we ask you to support Judge Irby's request of a study prior to implementation.

If you have any questions or would like additional information, I will be happy to answer any questions.

Thank you,

Jaclyn Hall
North Dakota Association for Justice



North Dakota AFL-CIO

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701-526-8787

Testimony of Landis Larson, ND AFL-CIO President

In support to HB 1442

March 17, 2021

Chairperson Klein and members of the Senate Industry, Business and Labor Committee:

My name is Landis Larson, President of the North Dakota AFL-CIO. The North Dakota AFL-CIO is the federation of labor unions in North Dakota, representing the interests of all working people in our state.

I am testifying on behalf of the North Dakota AFL-CIO in support of House Bill 1442.

Working people have sacrificed tremendously over the last year. Many have been laid off for a period of time or had to endure unpaid sick leave to care for themselves or their families. Many have had to quit their jobs or change jobs to accommodate the many changes thrown at them during the pandemic.

These economic stumbling blocks have been real obstacles for some working families to get their rent in on time, through no fault of their own, and we believe that there should be a cap on late fees to avoid sending these working families deeper and deeper into debt.

I recommend a "Do Pass" recommendation on House Bill 1442.

Respectfully Submitted,

Landis Larson

North Dakota AFL-CIO President

TESTIMONY OF DAVID CLARK THOMPSON BEFORE THE NORTH DAKOTA SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE IN OPPOSITION TO HOUSE BILL 1207 ON MARCH 17, 2021

Good morning, Mr. Chairman, my name is David Clark Thompson. I am a lawyer from Grand Forks who has been privileged to represent victims of asbestos disease here in North Dakota since June of the year 1984. I do thank the Senate Industry, Business and Labor Committee for the opportunity to appear before it this morning, and my testimony is presented squarely in opposition to House Bill 1207 on a number of grounds.

I would like to pause here to parenthetically say this: House Bill 1207 is a purported "solution" - which is in search of a problem - a "problem" that actually does not exist here in North Dakota.

Over the course of the past three decades, there have been only two lawyers in this state who have represented asbestos disease victims in North Dakota state and federal courts - my former law partner Jeanette Boechler in Fargo -- and me. This is a specialized legal field, and Jean and I have a total of seventy-three (73) years of experience in helping asbestos disease victims and their families.

I can tell all of you - with certainty - that between Ms. Boechler and myself - that there are a total of only fifteen (15) asbestos personal injury or asbestos wrongful death case files which are currently open and pending in North Dakota state or federal courts as of today.

I can also tell you – that if it is enacted into law -- House Bill 1207 will prevent many -- probably most -- victims of asbestos disease from bringing civil actions here in North Dakota to seek compensation for their serious asbestos-caused occupational diseases.

When I first read House Bill 1207 and saw that it proposed to impose highly restrictive conditions – indeed barriers – for asbestos disease victims to climb over as they would simply seek compensation for their asbestos injuries in court, I was truly mystified.

I thought: Why on earth do we now have House Bill 1207 seeking to all but prohibit future North Dakota asbestos disease victims from seeking compensation for their diseases in this Sixty-Seventh North Dakota Legislative Assembly in the year 2021?

The answer is that there is no good reason. With a total of only fifteen (15) currently pending cases, certainly there is no epidemic of asbestos disease litigation here in North Dakota. In fact, asbestos disease lawsuits have precipitously declined in North Dakota over the past five years.

So again - why do we have House Bill 1207 seeking to punish North Dakota's asbestos disease victims through the imposition of highly restrictive conditions upon these unfortunate people so as to make it effectively impossible

for these disease victims to bring a civil case to seek compensation from those entities which caused their diseases.

The reality here – the real answer -- is that House Bill 1207 really has nothing to do with any actually existing problem which truly needs fixing here in North Dakota.

As some members of this Committee are aware, House Bill 1207 is a so-called "model bill" -- a bill which was developed and promoted over the past few years by an organization known as the American Legislative Exchange Council -- or "ALEC", for short.

The American Legislative Exchange Council describes itself as the largest "membership association of state legislators" in the United States, but over 98% of ALEC's revenue comes from sources other than legislative dues, primarily from corporations and corporate foundations – including corporations which are defendants in asbestos personal injury and wrongful death cases here in North Dakota and in other jurisdictions throughout the United States.

https://www.sourcewatch.org/index.php/American_Legislative_Exchange_Council

https://www.alecexposed.org/wiki/ALEC_Exposed

As I said at the outset of my remarks, this "model" ALEC bill would impose severe restrictions -- and cruel hardship -- upon asbestos disease victims – and, if

enacted into law, would all but slam shut North Dakota's courthouse doors to these victims' possibilities of obtaining reasonable compensation for their asbestos injuries.

A. House Bill 1207 - if enacted into law by the Legislative Assembly - would be violative of Article XI, § 26 and Article VI, § 3 of the North Dakota Constitution and thus the Doctrine of Separation of Powers as between the legislative and judicial branches of government.

i. Section 1 of House Bill 1207 tramples upon the North Dakota Supreme Court's "ultimate authority" over matters of judicial procedure - including the entire discovery process, pretrial disclosure of information by a party to litigation, and the conduct of trials, governed by the Rules of Evidence.

The North Dakota Supreme Court has emphasized on multiple occasions that the Doctrine of Separation of Powers - formalized by Article XI, § 26, of the North Dakota Constitution - provides that each branch of North Dakota's government is to be supreme in its own sphere. See, e.g., *State v. Hanson*, 558 N.W.2d 611, 614-616 (N.D. 1996), and the prior decisions of the North Dakota Supreme Court cited therein, as well as those decisions of the Supreme Court which have relied upon *State v. Hanson*. See, also, the article, "*The North Dakota Supreme Court Invalidates a Discovery Statute that Conflicted with a Rule of Procedure*", 74 North Dakota Law Review 775 (1998). See, also, e.g., *North Dakota Legislative Assembly v. Burgum*, 2018 ND 189, ¶40; 916 N.W.2d 83, 100 (N.D. 2018) [**"The North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power. N.D. Const. art. III, § 1 ("[T]he legislative**

power of this state shall be vested in a legislative assembly"); N.D. Const. art. 17 V, § 1 ("The executive power is vested in the governor"); N.D. Const. art. VI, § 1 ("The judicial power of the state is vested in a unified judicial system"). By vesting each branch with a distinct form of power, the Constitution keeps those powers separate. The three branches are "coequal," N.D. Const. art. XI, § 26, each "supreme in its own sphere." *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987). Long before the express formalization of separation of powers in Article XI, § 26, this Court recognized that the Constitution's apportionment of power among three branches implicitly excluded each branch from exercising the powers of the others. *State v. Hanson*, 558 N.W.2d 611, 614 (N.D. 1996) (citing *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902)); see also *Miller v. French*, 530 U.S. 327, 341 (2000) (explaining that separation of powers doctrine "prohibits one branch from encroaching on the central prerogatives of another")."].

In *State v. Hanson*, the North Dakota Supreme Court explained as follows: Article XI, § 26, North Dakota Constitution, states in part that "the legislative, executive, and judicial branches are co-equal branches of government. This provision, approved June 8, 1982, appears to formalize a separation of powers, with each branch supreme in its own sphere. Long before this constitutional provision was adopted this court recognized that the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others. See, e.g., *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902) (holding statute unconstitutional because it vested legislative power in the courts). Article VI, § 3, provides in part that "the

supreme court shall have authority to promulgate rules of procedure ... to be followed by all the courts of this state. There can be no doubt, therefore, that enactment of procedural rules, such as Rule 16, N.D.R.Crim.P., is an exclusive function of this Court. Thus **the recognition of the separate-but-equal concept embedded in the Constitution imposes 'a concomitant responsibility for each branch of government to, in Justice Levine's words, "exercise[] great restraint when requested to intervene in matters entrusted to the other branches of government. *Spaeth*, 403 N.W.2d at 394. When, as here, the legislative branch, fails to exercise restraint and intervenes in a matter entrusted by the Constitution exclusively to the judicial branch, we have an obligation under the Constitution to say so.** Section 29-01-32, N.D.C.C., requires a defendant who has successfully requested information from the prosecuting attorney to reciprocate by disclosing to the prosecutor the names and addresses of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons. Rule 16, N.D.R.Crim.P., does not. The statute directly conflicts with Rule 16, which requires only limited pretrial disclosure of information, while allowing additional disclosure by order or agreement. (footnote omitted). **Under Art. VI, § 3, N.D. Const., a procedural rule adopted by this court must prevail in a conflict with a statutory procedural rule.** Section 29- 01-32, N.D.C.C., is, therefore, invalid to the extent that it requires pretrial disclosure by a defendant of the names and addresses of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons. The defense witness disclosure provisions of § 29-01-32, N.D.C.C., form the centerpiece of the statute. We conclude that the legislature would not have enacted § 29-01-32 without those provisions. We, therefore, declare all of § 29-01-32, N.D.C.C., unconstitutional. See, *Arneson v. Olson*, 270 N.W.2d 125, 138 (N.D. 1978). (*emphasis added*).

State v. Hanson, supra, 558 N.W.2d at 614-616

House Bill 1207 contains precisely the type of statutorily-compelled civil action information disclosure, case management and trial procedure – including evidentiary treatment -- which has been was declared to be unconstitutional under the Separation of Powers Doctrine in *State v. Hanson, supra*, and the decisional law

of the North Dakota Supreme Court dating back to at least the year 1902, and in a consistent line decisions since *State v. Hanson*. See, e.g., *Burgum v. Jaeger*, 2020 ND 251, ¶8, 951 N.W.2d 380, 383 (N.D. 2020)[**“Because our constitution provides for a separation of legislative, executive, and judicial powers, actions which tend to undermine this separation are of great public concern.”**]; and *North Dakota Legislative Assembly v. Burgum*, *supra*, 2018 ND 189 at ¶40; 916 N.W.2d at 100.

The North Dakota Supreme Court has specifically adopted court rules which govern the process of informational exchange between parties to civil and criminal litigation in North Dakota district courts. For example, Rules 26, 30, 33, 36, and 45 of the North Dakota Rules of Civil Procedure broadly govern the process of discovery, and Rule 37 of the North Dakota Rules of Civil Procedure provides for sanctions against parties for non-compliance with discovery requirements provided-for within Rules 26, 30, 33, 36, 37 and 45 of the North Dakota Rules of Civil Procedure.

At pages 5-6, proposing a new N.D.C.C. § 32-46.2-02, House Bill 1207 contains unconstitutional statutory rule making which presumes to impose the requirement that a plaintiff "in an asbestos action" must file "within thirty days after any complaint is filed" a "sworn information form" setting forth essentially all evidence which a plaintiff under would now be permitted to acquire over the course of an asbestos action in discovery proceedings. House Bill 1207, if enacted

into law, would not permit the asbestos disease victim to engage in any discovery to obtain information from asbestos manufacturer/seller defendants in the case before the victim would be required to file the “sworn information form”.

This practice would represent a serious subversion of the North Dakota Supreme Court's procedural rules governing the initiation and progression of a civil action from the pleading requirements for a Complaint found in Rule 8 of the North Dakota Rules of Civil Procedure, through the discovery process governed by Rules 26, 30, 33, 36, 37, and 45 of the North Dakota Rules of Civil Procedure.

Furthermore, the North Dakota Rules of Evidence exclusively govern the introduction and treatment of evidence in all civil and criminal actions in North Dakota District Courts.

In addition, Rule 16 of the North Dakota Rules of Civil Procedure broadly provides for the manner in which civil actions are managed by district courts, and this rule grants wide and flexible discretionary power to district court judges to manage the progression of civil actions before them - both procedurally and substantively.

Also, Rule 11 of the North Dakota Rules of Civil Procedure governs the pre-filing inquiry obligation which parties to civil litigation and their counsel are required to, and this rule provides for sanctions against parties which do not comply with that requirement

If enacted into law, House Bill 1207 would supersede Rule 11 N.D.R.Civ.P., governing a plaintiff party's pre-filing investigation and inquiry and the resulting inclusion of defendant parties in a civil action. See, e.g., pages 5-6 of House Bill 1207, where the bill proposes a new Section 32-46.2- 02 of the North Dakota Century Code. This provision represents nothing less than constitutionally impermissible statutory procedural rulemaking of specifically the type prohibited under the Separation of Powers analysis required by Article XI, § 26 and Article VI, § 3 of the North Dakota Constitution.

Put simply, House Bill 1207 clearly requires unconstitutional infringement upon the exclusive authority of the North Dakota District Courts to manage and litigate civil actions – exclusive authority granted by virtue of judicial branch power conferred upon them by the North Dakota Supreme Court's adoption of the aforementioned rules.

Beginning on page 9 of House Bill 1207, the bill proposes a new N.D.C.C. §32-46.2-05 which would require an asbestos disease victim to first present his or her case to a trial judge at a “trial within a trial” -- an “evidentiary hearing” -- after which the judge would be permitted to dismiss the victim's case on medical/causation grounds for failing to present a “prima facie” showing of medical causation. If enacted into law, this feature of House Bill 1207 would do nothing less than eliminate an asbestos disease victim's right to a trial by jury

under Article I, § 13 of the North Dakota Constitution – where our constitution prescribed that, “(t)he right of trial by jury shall be secured to all, and remain inviolate.”

Reduced to the essentials, these provisions of House Bill 1207 effectively deprive a plaintiff of any opportunity to obtain information from a defendant through the discovery process, and eviscerate virtually the entire trial preparation process exclusively governed by North Dakota Supreme Court-adopted court rules, as it purports to supplant and superintend those rules.

B. House Bill 1207 places an asbestos disease patient and his or her North Dakota treating physician in improper and conflicted positions with one another.

On page 4 of House Bill 1207, in a proposed new N.D.C.C. § 32-46.2- 01(25), places an asbestos disease patient and his or her treating physician in a difficult, conflicted and untenable position in relation to one another.

Traditionally, in pursuing asbestos personal injury and/or wrongful death claims on behalf of our clients here in North Dakota over the course of the past 30 years, we have not asked our clients' treating physicians to provide testimony in these cases - for a number of reasons.

House Bill 1207 -- if passed into law - would improperly place treating physicians in a difficult and otherwise unnecessary forensic role in their

relationships with their patients. The following commentary has been provided to us, along these lines.

Regarding the so-called "Qualified Physicians" aspect to this bill, these are some important observations:

i. House Bill 107 will force asbestosis patients to rely on their treating physician to present their case.

- House Bill 1207 -- better named the "Asbestosis Immunity Act"--requires that the victim's treating physician agree to conduct at least three days' worth of tests documenting that a patient suffering from asbestosis meets a dozen or more different medical criteria simply to file a complaint with the court. In this regard, House Bill 1207 would require the treating physician for asbestosis patients to open their entire practice to civil and criminal scrutiny into how each physician spends his or her time and how much they are compensated. Even if an asbestosis patient could find a physician willing to undergo such scrutiny, this bill effectively forces pre-cancer patients to choose between fighting their disease and fighting the asbestos companies. These families deserve better.

i. House Bill 1207 forces dying asbestos disease victims to pay thousands for medically unnecessary tests just so that they can get into court.

- No treating physician wants to be dragged into the middle of their patient's case, but if they did choose to help, they will be forced to spend hours of their time and thousands of dollars running tests that are medically unnecessary. This bill sets out dozens of criteria that victims must meet to bring a case - many of which may have nothing to do with diagnosing an underlying asbestos disease. Further, it requires the patient to pay out of pocket for these expensive tests. Why should asbestos corporate defendants get to force victims to undergo needless medical tests and spend their limited resources simply to exercise their constitutional right to hold such asbestos corporations responsible to those disease victims?

CONCLUSION

On the basis of the foregoing facts and legal authorities that I have presented to you, members of the Senate Industry, Business and Labor Committee, I

respectfully submit to you that House Bill 1207 has nothing whatsoever to do with any real problem which actually exists in asbestos disease litigation here in North
ffff

As a so-called "model bill"-- developed by the American Legislative Exchange Council (ALEC) -- and promoted by ALEC, insurance companies and asbestos product manufacturers and sellers -- the real purpose and objective of House Bill 1207 is to stifle, delay and preclude legitimate asbestos personal injury and wrongful death claims.

If enacted into law, the net effect of House Bill 1207 will be asbestos disease victims having been deprived of their ability to obtain compensation for their asbestos diseases from those asbestos product sellers and manufacturers who whose products caused the asbestos disease victims' injuries deaths.

I submit to you, members of the Senate Industry, Business and Labor Committee, that House Bill 1207 serves no possible good for asbestos disease victims here in North Dakota - and as a "solution looking for a problem" - where only fifteen (15) open asbestos personal injury and wrongful death cases are presently pending in North Dakota state and federal courts, there is no legitimate legislative "end" which is served by the Legislative "means" of House Bill 1207.

As such, House Bill 1207 - -if enacted into law - would be violative of federal and state constitutional substantive due process.

House Bill 1207 cruelly and unconstitutionally serves to punish North Dakota asbestos disease victims to the great pecuniary benefit of national asbestos manufacturer and insurance interests. That is simply wrong, and I ask you to give House Bill 1207 a "do not pass".

In the alternative, I respectfully submit that given House Bill 1207's substantial legal and constitutional defects under the North Dakota Supreme Court's "Separation of Powers Doctrine" analysis - as I have identified those defects this afternoon today - I submit that it would be appropriate to convert House Bill 1207 into an interim study resolution calling for consideration of the issues addressed in the bill by a 2021-2022 Interim Legislative Committee.

Thank you, members of the Senate Industry, Business and Labor Committee, for the consideration and attention that you have given to my testimony this afternoon.

David Clark Thompson
Attorney at Law
Testimony Before the North Dakota
Senate Industry, Business and Labor Committee
March 17, 2021



March 17, 2021

Chairman Klein and Members of the Senate Industry, Business and Labor Committee

ND HB 1207

Asbestos Reform

The American Property Casualty Insurance Association (APCIA) is composed of over 1,200 member companies and 330 insurance groups and represents the broadest cross-section of home, auto, and business insurers of any national insurance trade association. In North Dakota, APCIA member insurers provide almost 69 percent of all the insurance purchased by the state's citizens and businesses.

We urge support for HB 1207.

HB 1207 contains several important asbestos law reforms:

This important legislation gives priority to asbestos plaintiffs who can demonstrate impairment according to objective criteria utilized by the medical community. This particular approach has been enacted in ten states to date and has also been adopted by specific courts in major asbestos filing jurisdictions such as Chicago, New York City, Boston, and Baltimore.

HB 1207 also helps to ensure that plaintiffs with actual impairment are suing the proper defendants with an actual connection to the plaintiff. Iowa passed a similar law last year.

HB 1207 will also help ensure that asbestos trials are both efficient and fair by allowing courts to consolidate for trial only asbestos actions relating to the exposed person and members of that person's household.

HB 1207 also enacts a legal doctrine called the "bare metal" defense, which holds that a manufacturer or seller of a product, such as a pump, is not liable for later-added external thermal insulation or replacement internal components, such as gaskets, made or sold by a third party.

Finally, this legislation changes North Dakota's existing innocent seller liability reform statute to permit a seller to obtain dismissal when the seller has simply been part of the chain of distribution of a product and has not itself acted negligently.

We urge your support of HB 1207.

Steve Schneider
Vice President, State Affairs
Midwest Region
APCIA
Steve.schneider@apci.org
312.782.7720

HB 1207

The ND Veterans Legislative Council opposes this bill,

Asbestos hardly needs an introduction anymore as by know we all should be aware of the dangers of disturbing and breathing asbestos fibers. At the least, asbestos is a breathing irritant. At worst asbestos can cause mesothelioma, a cancerous condition that can lead to serious health problems and even death. Asbestos can cause or has links to other cancers, such as lung cancer, laryngeal, ovarian, stomach, colon, and kidney to name a few.

Most of us have un-knowingly been exposed to asbestos. Most commonly from our homes and military service, especially the Navy.

Sailors who served in WWII, Korea, Vietnam, and many other conflicts served on ships that were full of asbestos. Thousands upon thousands of sailors and Marines were regularly and unknowingly exposed to asbestos. I served on one such ship. During my many deployments to Vietnam and in firing exercises afterwards would back to our berthing compartments or mess deck only to find our racks, the floor and everything else covered in a blanket of asbestos particles from all the piping just inches above our heads. We just shook our bedding creating a cloud of asbestos dust and went to sleep. I was on this ship 3 ½ years and went to Vietnam 4 times for at least a six-month long deployment each time. During our time in the combat zone, we constantly fired the large guns which shook the vessel with each firing. This would last for most of the day into the night for days and weeks on end. Our longest stretch was 28 days. I and my shipments where exposed to high levels of asbestos dust in a confined space for extended periods of time.

Asbestos fibers are the most dangerous when they are airborne and can be breathed in.

Veterans comprise about 8% of our country's population. However, we account for 30 % of the nearly 3000 people who die each year from mesothelioma. This rare cancer is incurable and nearly always fatal. The only cause of this cancer is ASBESTOS!!! Many sailors, Marines, airmen and soldiers are also among the 12-15 thousand who die annual from not only mesothelioma but lung cancer and asbestosis.

According to Asbestos Nation, a 505 c 4 which fights for asbestos victim's rights, well over 40,000 veterans may have died the years from asbestos related cancers. Unfortunately, today's veterans are still be exposed from the buildings in battle zones through the world.

The latency period of asbestos is 15-40 years from exposure. This means that I am just coming into the time when symptoms are showing up and many people have some time to go.

We believe, in this point in time and with what we know about the dangers of asbestos rather than taking steps to make sure that veterans and other groups of people that they will no longer be exposed to asbestos, the asbestos industry is pushing forth legislation around the country that would strip victims of asbestos related cancers from the right to hold this industry accountable.

Veterans groups are pushing back against this legislation, not only in the Congress of the United States along with a number of other state legislatures that would delay and deny compensation for sick and dying veterans along with place additional burdens on victims of asbestos related cancers.

The ND Veteran Legislative Council which as you know represents the veterans of ND were overwhelmed and deeply grateful for what the Legislature did for us in the last session.

The veterans of North Dakota hope that this body will vote no on this legislation and continue your support of veterans.

This bill only benefits the asbestos industry and its network of those that manufacture and sell asbestos contaminated products. It does the average North Dakotan no good at all.

Thank you

2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee

Fort Union Room, State Capitol

HB 1207

3/22/2021

Senate Industry, Business & Labor Committee

AN ACT to create and enact chapter 32-46.2 of the North Dakota Century Code, relating to civil actions involving asbestos; to amend and reenact subsection 2 of section 28-01.3-04 of the North Dakota Century Code, relating to liability of nonmanufacturing sellers; and to provide for application.

Senator Klein called the meeting to order at 2:45 p.m.

Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais were present.

Discussion Topics:

- Drafting of Amendments
- Possible Concerns

Senator Klein adjourns the meeting at 2:46 p.m.

Isabella Grotberg, *Committee Clerk*

2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Fort Union Room, State Capitol

HB 1207
3/24/2021

relating to liability of nonmanufacturing sellers; and to provide for application

Chair Klein opened the meeting at 9:00 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

Discussion Topics:

- Retroactive application of bill

Pat Ward, Association of North Dakota Insurers introduced Amendment 21.0434.03001 testimony #10514 [9:04].

Blair Thoreson, former legislator testified to provide information [9:17].

Senator Larsen moved to adopt amendment 21.0434.03001 [9:21].

Senator Kreun seconded the motion [9:22].

[9:22]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	Y
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	Y
Senator Shawn Vedaa	Y

Motion passed: 6-0-0

Senator Kreun moved a DO PASS AS AMENDED [9:24].

Senator Burckhard seconded the motion [9:24].

[9:24]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	N
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	N
Senator Shawn Vedaa	Y

Motion passed: 4-2-0

Senator Klein will carry the bill [9:25].

Chair Klein ended the meeting at 9:25 a.m.

Isabella Grotberg, Committee Clerk

March 22, 2021

21
1201
3124

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1207

Page 6, line 18, remove "The plaintiff shall provide the sworn information form and supporting documentation to"

Page 6, remove lines 19 and 20

Page 6, line 21, remove "3."

Page 6, line 23, replace "4." with "3."

Page 6, line 25, replace "5." with "4."

Page 7, line 4, remove "The plaintiff shall provide a detailed narrative medical report and supporting test"

Page 7, remove lines 5 and 6

Page 7, line 7, remove "3."

Page 7, line 11, replace "4." with "3."

Page 10, line 22, remove ", and any claims pending on August 1, 2021, in which trial had not commenced"

Page 10, remove line 23

Page 10, line 24, remove "to be unconstitutional"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1207, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1207 was placed on the Sixth order on the calendar.

Page 6, line 18, remove "The plaintiff shall provide the sworn information form and supporting documentation to"

Page 6, remove lines 19 and 20

Page 6, line 21, remove "3."

Page 6, line 23, replace "4." with "3."

Page 6, line 25, replace "5." with "4."

Page 7, line 4, remove "The plaintiff shall provide a detailed narrative medical report and supporting test"

Page 7, remove lines 5 and 6

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Page 10, line 24, remove "to be unconstitutional"

Renumber accordingly

21.0434.03001
Title.

Prepared by the Legislative Council staff for
Senator Klein

March 22, 2021

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Renumber accordingly

Sixty-seventh
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1207

Introduced by

Representatives K. Koppelman, Jones, Magrum

Senators Dwyer, Larson

1 A BILL for an Act to create and enact chapter 32-46.2 of the North Dakota Century Code,
2 relating to civil actions involving asbestos; to amend and reenact subsection 2 of section
3 28-01.3-04 of the North Dakota Century Code, relating to liability of nonmanufacturing sellers;
4 and to provide for application.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Subsection 2 of section 28-01.3-04 of the North Dakota
7 Century Code is amended and reenacted as follows:

8 2. ~~After the plaintiff has filed a complaint against the manufacturer and the manufacturer-~~
9 ~~has or is required to have answered or otherwise pleaded, the~~The court shall order the
10 dismissal of the claim against the certifying seller, unless the plaintiff can show any of
11 the following:

12 a. That the certifying seller exercised some significant control over the design or
13 manufacture of the product, or provided instructions or warnings to the
14 manufacturer relative to the alleged defect in the product which caused the
15 personal injury, death, or damage to property.

16 b. That the certifying seller had actual knowledge of the defect in the product which
17 caused the personal injury, death, or damage to property.

18 c. That the certifying seller created the defect in the product which caused the
19 personal injury, death, or damage to property.

20 **SECTION 2.** Chapter 32-46.2 of the North Dakota Century Code is created and enacted as
21 follows:

22 **32-46.2-01. Definitions.**

23 In this chapter, unless the context otherwise requires:

1. "AMA guides" means the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment".
2. "Asbestos action" means the same as that term is defined in section 32-46.1-01.
3. "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.
4. "Board-certified in internal medicine" means a licensed physician who is certified by the American board of internal medicine or the American osteopathic board of internal medicine.
5. "Board-certified in occupational medicine" means a licensed physician who is certified in the specialty of occupational medicine by the American board of preventive medicine or the specialty of occupational/environmental medicine by the American osteopathic board of preventive medicine.
6. "Board-certified in oncology" means a licensed physician who is certified in the subspecialty of medical oncology by the American board of internal medicine or the American osteopathic board of internal medicine.
7. "Board-certified in pathology" means a licensed physician who holds primary certification in anatomic pathology or clinical pathology from the American board of pathology or the American osteopathic board of pathology and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical or postmortem specimens.
8. "Board-certified in pulmonary medicine" means a licensed physician who is certified in the specialty of pulmonary medicine by the American board of internal medicine or the American osteopathic board of internal medicine.
9. "Certified B-reader" means an individual who is certified as a national institute for occupational safety and health final or B-reader of x-rays under title 42, Code of Federal Regulations, part 37.51(b).
10. "Chest x-ray" means chest films taken in accordance with all applicable state and federal regulatory standards and taken in the posterior-anterior view.
11. "DLCO" means diffusing capacity of the lung for carbon monoxide, which is the measurement of carbon monoxide transfer from inspired gas to pulmonary capillary blood.

- 1 12. "Exposed individual" means an individual whose exposure to asbestos is the basis for
2 an asbestos action.
- 3 13. "FEV1" means forced expiratory volume in the first second, which is the maximal
4 volume of air expelled in one second during performance of simple spirometric tests.
- 5 14. "FEV1/FVC" means the ratio between the actual values for FEV1 over FVC.
- 6 15. "FVC" means forced vital capacity, which is the maximal volume of air expired with
7 maximum effort from a position of full inspiration.
- 8 16. "ILO system" and "ILO scale" mean the radiological ratings and system for the
9 classification of chest x-rays of the international labour office provided in "Guidelines
10 for the Use of ILO International Classification of Radiographs of Pneumoconioses"
11 (2011).
- 12 17. "Nonmalignant condition" means any condition that may be caused by asbestos other
13 than a diagnosed cancer.
- 14 18. "Official statements of the American thoracic society" means the lung function testing
15 standards set forth in the technical standards of the American thoracic society,
16 including "Standardization of Spirometry" (2019), "Standardisation of the
17 Measurement of Lung Volumes" (2005), "Standards for Single-breath Carbon
18 Monoxide Uptake in the Lung" (2017), and "Interpretive Strategies for Lung Function
19 Tests" (2005).
- 20 19. "Pathological evidence of asbestosis" means a statement by a board-certified
21 pathologist that more than one representative section of lung tissue uninvolved with
22 any other disease process demonstrates a pattern of peribronchiolar or parenchymal
23 scarring in the presence of characteristic asbestos bodies graded 1(B) or higher under
24 the criteria published in "Asbestos-Associated Diseases", 106 Archive of Pathology
25 and Laboratory Medicine 11, Appendix 3 (October 8, 1982).
- 26 20. "Plaintiff" means the same as that term is defined in section 32-46.1-01.
- 27 21. "Plethysmography" means the test for determining lung volume in which the exposed
28 individual is enclosed in a chamber equipped to measure pressure, flow, or volume
29 change.
- 30 22. "Predicted lower limit of normal" means the test value that is the calculated standard
31 convention lying at the fifth percentile, below the upper ninety-five percent of the

reference population, based on age, height, and gender, according to the recommendations by the American thoracic society and as referenced in the AMA Guides.

23. "Product liability action" means the same as defined in section 28-01.3-01.

24. "Pulmonary function test" means spirometry, lung volume testing, and diffusion capacity testing, including appropriate measurements, quality control data, and graphs, performed in accordance with the methods of calibration and techniques provided in the AMA Guides and all standards provided in the official statements of the American thoracic society.

25. "Qualified physician" means a licensed physician who is board-certified in internal medicine, pathology, pulmonary medicine, occupational medicine, or oncology, as may be appropriate to the diagnostic specialty in question, and who:

a. Conducted a physical examination of the exposed individual and has taken a detailed occupational, exposure, medical, smoking, and social history from the exposed individual, or if the exposed individual is deceased, has reviewed the pathology material and has taken a detailed history from the individual most knowledgeable about the information forming the basis of the asbestos action;

b. Treated or is treating the exposed individual, and has a doctor-patient relationship with the exposed individual at the time of the physical examination, or in the case of a board-certified pathologist, examined tissue samples or pathological slides of the exposed individual at the request of the treating physician;

c. Has not relied on any examinations, tests, radiographs, reports, or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, radiograph, or screening of the exposed individual in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which the examination, test, or screening was conducted; and

d. Prepared or directly supervised the preparation and final review of any medical report under this chapter.

26. "Radiological evidence of asbestosis" means a quality 1 chest x-ray under the ILO system, or a quality 2 chest x-ray in a death case when no pathology or quality 1

1 chest x-ray is available, showing bilateral small, irregular opacities (s, t, or u) occurring
2 primarily in the lower lung zones graded by a certified B-reader as at least 1/1 on the
3 ILO scale.

4 27. "Radiological evidence of diffuse bilateral pleural thickening" means a quality 1 chest
5 x-ray under the ILO system, or a quality 2 chest x-ray in a death case when no
6 pathology or quality 1 chest x-ray is available, showing diffuse bilateral pleural
7 thickening of at least b2 on the ILO scale and blunting of at least one costophrenic
8 angle as classified by a certified B-reader.

9 28. "Spirometry" means a test of air capacity of the lung through a spirometer to measure
10 the volume of air inspired and expired.

11 29. "Supporting test results" means B-reading and B-reader reports, reports of x-ray
12 examinations, diagnostic imaging of the chest, pathology reports, pulmonary function
13 tests, and all other tests reviewed by the diagnosing physician or a qualified physician
14 in reaching the physician's conclusions.

15 30. "Timed gas dilution" means a method for measuring total lung capacity in which the
16 subject breathes into a spirometer containing a known concentration of an inert and
17 insoluble gas for a specific time, and the concentration of that inert and insoluble gas
18 in the lung is compared to the concentration of that type of gas in the spirometer.

19 31. "Total lung capacity" means the volume of gas contained in the lungs at the end of a
20 maximal inspiration.

21 **32-46.2-02. Sworn information form requirement for asbestos action.**

22 1. In addition to any requirements for asbestos actions under chapter 32-46.1, a plaintiff
23 in an asbestos action shall file, within forty-five days after any complaint is filed in an
24 asbestos action, a sworn information form signed by the plaintiff and plaintiff's counsel
25 specifying the evidence that provides the basis for each claim against each defendant.

26 The sworn information form must include the following with specificity:

27 a. The name, address, date of birth, marital status, occupation, smoking history,
28 current and past worksites, and current and past employers of the exposed
29 individual, and any person through whom the exposed person was exposed to
30 asbestos;

- 1 b. Each individual through whom the exposed individual was exposed to asbestos
2 and the exposed individual's relationship to each individual;
- 3 c. Each asbestos-containing product to which the individual was exposed and each
4 physical location at which the exposed individual was exposed, or if the plaintiff
5 was exposed through another individual, to which that other individual was
6 exposed;
- 7 d. The specific location and manner of each exposure, including for any individual
8 through whom the exposed individual was exposed to asbestos;
- 9 e. The beginning and ending dates of each exposure, the frequency and length of
10 each exposure, and the proximity of the asbestos-containing product or its use to
11 the exposed person and any person through whom the exposed person was
12 exposed to asbestos;
- 13 f. The identity of the manufacturer or seller of the specific asbestos product for
14 each exposure;
- 15 g. The specific asbestos-related disease claimed to exist; and
- 16 h. Any supporting documentation relating to the information required under this
17 section.
- 18 2. ~~The plaintiff shall provide the sworn information form and supporting documentation to~~
19 ~~all parties within forty-five days after the effective date of this section for asbestos~~
20 ~~actions that are pending on the effective date.~~
- 21 ~~3.~~ The plaintiff has a continuing duty to supplement the information required to be
22 disclosed in subsection 1.
- 23 4.3. The court shall dismiss the asbestos action without prejudice as to any defendant
24 whose product or premises is not identified in the required disclosures in subsection 1.
- 25 5.4. The court shall dismiss the asbestos action without prejudice as to all defendants if the
26 plaintiff and plaintiff's counsel fail to comply with this section.
- 27 **32-46.2-03. Requirements for asbestos action.**
- 28 1. In addition to any requirements for asbestos actions under chapter 32-46.1 and the
29 required sworn information form required by section 32-46.2-02, a plaintiff in an
30 asbestos action shall include with any complaint a detailed narrative medical report,
31 signed by a qualified physician and accompanied by supporting test results, which

1 constitute prima facie evidence the exposed individual meets the requirements of this
2 chapter. The report may not be prepared by a lawyer or other individual working for or
3 on behalf of a lawyer or law firm.

4 ~~2. The plaintiff shall provide a detailed narrative medical report and supporting test~~
5 ~~results to all parties within thirty days after the effective date of this section for~~
6 ~~asbestos actions that are pending on the effective date.~~

7 ~~3.~~ A defendant shall have a reasonable opportunity to challenge the adequacy of the
8 prima facie evidence. The court shall dismiss the action without prejudice if the plaintiff
9 fails to comply with the requirements of this section or fails to make the prima facie
10 showing required by this section.

11 ~~4.3.~~ Until a court enters an order determining the exposed individual has established prima
12 facie evidence of impairment, an asbestos action is not subject to discovery, except
13 discovery related to establishing or challenging the prima facie evidence.

14 **32-46.2-04. Elements of proof for asbestos action involving nonmalignant conditions.**

15 An asbestos action related to an alleged nonmalignant asbestos-related condition may not
16 be brought or maintained in the absence of prima facie evidence the exposed individual has a
17 physical impairment for which asbestos exposure was a substantial contributing factor. The
18 prima facie showing must be made as to each defendant and include a detailed narrative
19 medical report signed by a qualified physician that includes the following:

20 1. Radiological or pathological evidence of asbestosis or radiological evidence of diffuse
21 bilateral pleural thickening or a high-resolution computed tomography scan showing
22 evidence of asbestosis or diffuse pleural thickening;

23 2. A detailed occupational and exposure history from the exposed individual or, if the
24 individual is deceased, from the individual most knowledgeable about the exposures
25 that form the basis of the action, including identification of all of the exposed
26 individual's places of employment and exposures to airborne contaminants and
27 whether each place of employment involved exposures to airborne contaminants,
28 including asbestos fibers or other disease-causing dusts, that may cause pulmonary
29 impairment, and the nature, duration, and level of any exposure;

- 1 3. A detailed medical, social, and smoking history from the exposed individual or, if the
2 individual is deceased, from the individual most knowledgeable, including a thorough
3 review of the past and present medical problems of the exposed individual;
- 4 4. Evidence verifying at least fifteen years have elapsed between the exposed
5 individual's date of first exposure to asbestos and the date of diagnosis;
- 6 5. Evidence from an individual medical examination and pulmonary function testing of the
7 exposed individual or, if the exposed individual is deceased, based upon the
8 individual's medical records, the exposed individual has or the deceased individual
9 had a permanent respiratory impairment rating of at least Class 2 as defined by the
10 AMA Guides or reported significant changes year to year in lung function for FVC,
11 FEV1, or DLCO as defined by the American thoracic society's "Interpretative
12 Strategies for Lung Function Tests", 26 European Respiratory Journal 948-68, 961-62,
13 table 12 (2005);
- 14 6. Evidence that asbestosis or diffuse bilateral pleural thickening, rather than chronic
15 obstructive pulmonary disease, is a substantial contributing factor to the exposed
16 individual's physical impairment, based on a determination the exposed individual has
17 any of the following:
 - 18 a. FVC below the predicted lower limit of normal and FEV1/FVC ratio (using twenty
19 actual values) at or above the predicted lower limit of normal;
 - 20 b. Total lung capacity, by plethysmography or timed gas dilution, below the
21 predicted lower limit of normal; or
 - 22 c. A chest x-ray showing bilateral small, irregular opacities (s, t, or u) graded by a
23 twenty-four certified B-reader as at least 2/1 on the ILO scale; and
- 24 7. A statement that the qualified physician signing the detailed narrative medical report
25 has concluded exposure to asbestos was a substantial contributing factor to the
26 exposed individual's physical impairment and not more probably the result of other
27 causes. An opinion that the medical findings and impairment are consistent with or
28 compatible with exposure to asbestos, or words to that effect, does not satisfy this
29 subsection.

32-46.2-05. Elements of proof for asbestos action involving malignant conditions.

1. An asbestos action related to an alleged asbestos-related malignant condition may not be brought or maintained in the absence of prima facie evidence that the exposed individual has a malignant condition for which asbestos exposure was a substantial contributing factor. The prima facie showing must be made as to each defendant and include a detailed narrative medical report signed by a qualified physician that includes all of the following:
 - a. A diagnosis that the exposed person has a malignant asbestos-related condition; and
 - b. A statement that exposure to asbestos was a substantial contributing factor to the exposed individual's malignant condition and not more probably the result of other causes, and a detailed explanation for that opinion. An opinion that the malignant condition is consistent with or compatible with exposure to asbestos, or words to that effect, does not satisfy this subdivision.
2. The court shall hold an evidentiary hearing and determine if the exposed person has established a prima facie showing of cancer to which exposure to asbestos was a substantial contributing factor.

32-46.2-06. Evidence of physical impairment - Procedures - Limitation.

1. Evidence relating to the prima facie showings required under this chapter does not create a presumption the exposed individual has an asbestos-related impairment and is not conclusive as to the liability of any defendant.
2. Evidence may not be offered at trial and the jury may not be informed of:
 - a. The grant or denial of a motion to dismiss an asbestos action under this chapter; or
 - b. The provisions of this chapter with respect to what constitutes a prima facie showing of asbestos impairment.
3. Evidence relating to physical impairment offered in an asbestos action governed by this chapter:
 - a. Must comply with the quality controls, equipment requirements, methods of calibration, and techniques set forth in the AMA Guides and all standards set forth in the official statements of the American thoracic society;

b. May not be obtained under the condition the plaintiff or exposed individual retains the legal services of an attorney or law firm.

4. In the absence of consent from all parties, a court may consolidate for trial only asbestos actions relating to the exposed individual and members of that individual's household.

5. A product liability defendant in an asbestos action may not be liable for exposures from a later-added asbestos-containing product made or sold by a third party.

32-46.2-07. Statute of limitations.

1. The period of limitations for an asbestos action that is not barred as of the effective date of this chapter may not accrue, nor may the running of limitations commence, before the earlier of the date:

a. The exposed individual received a medical diagnosis of an asbestos-related impairment;

b. The exposed individual discovered facts that would have led a reasonable individual to obtain a medical diagnosis with respect to the existence of an asbestos-related impairment; or

c. The date of death of the exposed individual having an asbestos-related impairment.

2. This section does not revive or extend limitations with respect to any claim for asbestos-related impairment that was time-barred on the effective date of this chapter.

SECTION 3. APPLICATION. This Act applies to all asbestos claims filed on or after

August 1, 2021, ~~and any claims pending on August 1, 2021, in which trial had not commenced as of that date, except the statute must be applied prospectively if retroactive application is held to be unconstitutional.~~