

**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.

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.

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