North Dakota Association for Justice
"The Trial Lawyers of North Dakota
PO Box 365
Mandan, ND 58554
www.ndaj.org

Jaclyn Hall, Executive Director
(701) 663-3916
jaclyn@ndaj.org

DO NOT PASS – HB 1175

Chairman Lefor and members of the House Industry, Business and Labor Committee, my name is Jaclyn Hall and I am the Executive Director of the North Dakota Association for Justice. I am here today to ask for a DO NOT PASS on HB 1175 as it is currently written.

House Bill 1175 provides immunity for things that have nothing to do with COVID-19.

- **Currently, there are NO LAWSUITS related to transmission of the coronavirus that have been filed in North Dakota.** This is because proving duty and causation in these cases can be impossible in many instances. However, this in no way justifies relieving businesses of their duty to act reasonably under the circumstances.
    - The *threat* of lawsuits keeps businesses in line and providing proper protections to their customers and patients. As bad as the disease was in North Dakota, if businesses had been allowed to act negligently it would have been a whole lot worse.
    - The cases that have been brought elsewhere illustrate this vividly. In some states with immunity, the virus wiped out whole nursing home facilities – in many states, over *half* of all deaths have come from long term care facilities who neglected the health and safety of their residents.
    - Letting businesses spread the virus by neglecting the health and safety of customers and residents will only prolong the pain caused by COVID-19, making it harder for us all to return to normal. It will keep COVID-19 on the front of everyone's mind longer then it needs to be.

- **There is no incentive to bring unwinnable cases.** Plaintiffs' lawyers work under a "no win, no fee" or contingent fee system, so there is no incentive for bringing unmeritorious claims. Health care providers, first responders, and all the workers in critical industries are heroes working through extraordinary conditions, and no lawyer would bring a claim against a health care provider treating a COVID-19 patient who is doing the best he or she can under the circumstances.
- **Nevertheless, companies need to know they have an obligation to act responsible.** If corporations prioritize profits over the health and safety of their workers and customers during this pandemic — particularly as many of these same corporations receive huge taxpayer bailouts — they should be held

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accountable for those actions. Bad actors must be shown there are consequences for their actions.

- **These cases are hard to bring.** Here are the five ways:
    - "**Reasonableness**": Under the law, businesses need only act "reasonably" under COVID-19. The law holds no one to a standard of perfection. By following the law and applying well-publicized safeguards that the community would consider reasonable, there can be no claim of negligence.
    - "**Causation**": To win a COVID-19 lawsuit, a claimant would have to prove that their COVID-19 exposure happened at a particular business. There is no signature tracer for this virus. Almost everyone – and certainly those who are venturing out to shop or dine – will have multiple potential exposure locations. Nailing down proof of which location was responsible for a claimant's exposure would be exceedingly difficult, which means the lawsuit will likely fail.
    - "**Damages**": According to the Johns Hopkins University Coronavirus Dashboard, with obviously sad and sometimes tragic exceptions, nearly everyone who gets coronavirus recovers. Typically, that recovery takes two to six weeks. To win money damages in a lawsuit, you have to prove enough harm that a court or jury will want to compensate for it. Without minimizing how difficult that recovery period can be for some, for most people the recovery will not merit a substantial damage award. And for those whose recovery is much longer or more difficult – and for those who die – there are usually other health factors that create uncertainty about whether COVID-19 is the culprit (see "causation" above).
    - "**Comparative fault" or "Assumption of Risk"**: State law requires that a claimant's conduct be factored in, too. Often called "comparative fault" or "assumption of risk" it allows the court and jury to consider whether a claimant's own conduct was reasonable. If a claimant ignores a business' safety protocols – refuses to keep 6-foot buffers from others while inside the business, for example – the claimant can be at fault and thus denied damages. Similarly, those in high-risk categories have a responsibility to protect themselves, which means avoiding places that, even with safety protocols in place, carry at least some risk of exposure.
    - "**Waiver**": As companies have started to reopen, they have often been requiring any patron to sign a waiver before being allowed into the establishment. These waivers often require the customer to attest that they do not have COVID-19 symptoms and have not visited a hot-spot recently. They then disavow responsibility for unintentional exposure to

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the virus on sight. The companies employing such tactics go from the local hair salon all the way to entering the state capitol this morning.

- **HB 1175 goes far beyond COVID-19 related claims.** The legislation would provide health care providers with total immunity from any litigation in a class of claims so expansive it protects providers who deliberately understaffed their facility and left patients to die from bedsores or other forms of neglect.
    - This provision is entirely unnecessary. The standard of care for health care providers adjusts with the circumstances on the ground *already*. Delaying surgery, practicing outside the premise of a health care facility, and other reasonable chances that needed to be made are *already* accounted for. This bill is unnecessary to address those.
    - Adhering to this new standard of care becomes more important in order to reduce the spread of (and death toll from) the COVID-19 outbreak. If professionals and facilities are excused for failing to meet the standard of care, they are effectively excused from following these important guidelines regarding how to act reasonably under the circumstances.
    - Long Term Care providers have had requirements in place for decades to protect individuals from respiratory illnesses that were in place long before COVID-19 hit. According to a May 20, 2020 U.S. Government Accounting Office report, there were widespread deficiencies among nursing homes prior to the COVID-19 outbreak.
    - An NPR story In North Carolina details how immunity laws have impacted nursing home clients. HB1175 will retroactively immune nursing homes from cases that are unrelated to or preceded the pandemic.
    - Instead, this bill offers indefinite immunity to health care providers for failing to treat patients as they deserve to be treated. We *have a standard of care* for treating COVID-19 and many facilities have the capacity to treat other patients as they would, and should, under any other circumstance. Relieving them of this requirement to treat each patient with the care they are due will only increase the death and misery that COVID-19 has already wrought.
    - Businesses who have received payment from insurance companies for business interruption insurance will be at risk of having to pay it back. With no immunity from COVID-19, businesses are at no risk when they shut down their businesses during the statewide mandate. This mandate was not law, so it was merely a suggestion. HB 1175 removes the ability for businesses to keep their doors open and receive payment from insurance premiums they paid for.

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- **HB 1175 rewrites the rules in the middle of the pandemic.** Everyone has an expectation that companies will treat them with reasonable care and not neglect their health and safety. This bedrock principle applies in nursing homes, retail establishments, and every other business across the state. If they fail to meet that obligation and cause the plaintiff harm, then they are responsible for paying for that harm. HB 1175 changes that rule—effectively pardoning businesses who neglected the health and safety of their customers—forcing *consumers* to pay for that harm caused by corporate neglect. In effect, the legislation would steal from the plaintiff who was hurt through no fault of their own to benefit the businesses who neglected them.
- **Retroactive application is an unfair betrayal of a citizen's reasonable expectations.** People have an expectation that the people and companies they deal with are required to act with reasonable care toward them. This foundational belief is capture by negligence law—where a person who acts unreasonably is responsible for paying for the harm their unreasonable actions cause. When people were hurt or killed by COVID-19, they had this expectation that the harm would be paid for by the people who acted unreasonably and caused the harm. HB1175 retroactively changes the rules to benefit the company who acted unreasonably. At a time when we see the fabric of society stretching to its limit, a retroactive change of the rules to benefit the largest companies in America would betray our social expectations and confirm that the legislature is rigging the rules against them.
- **Retroactive application is unconstitutional.** It is plainly unconstitutional for the legislature to retroactively go back and change the rules of the game after the fact. This isn't a controversial point. Companies demanding retroactive immunity today will fight tooth and nail against a law retroactively imposing liability on them in the future. The prohibition on retroactive application of the laws allows people to conduct business knowing that the rules won't change on them three months down the line.
- **ND Constitution guarantees meaningful access to the courts system.** HB1175 allows for a blanket immunity to both businesses and health care providers. This legislation goes against the ND constitution that guarantees the ability to defend life and liberty, pursuing and obtaining safety and Section 9 requires that all courts be open for an injury done. Section 13 of the ND Constitution allows for a trial by jury. The Legislature cannot strip the jury of its role by unilaterally deciding that a plaintiff must bear the full cost of the defendants tortious conduct.

- **Immunity actually *hurts* businesses acting reasonably.** This can happen in a number of ways:

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- **Direct Immunity:** Under the plan proposed by the Chamber of Commerce, one business that harms another business by acting unreasonably and spreading COVID-19 is immune for the harm that they cause. For example, a plumbing company may see all employees quarantined for weeks when they are exposed to the coronavirus after responding to a call at a negligent company. While normally the negligent company would be responsible for the harm they negligently cause, now that plumber bears the risk that negligence will put them out of businesses.
- **Causing a localized shutdown**: The LM Wind Power in Grand Forks caused a tremendous spike in cases This hotspot triggered public health crackdowns that have forced Grand Forks and surrounding communities into tighter restrictions and more fearful consumers. If this facility had been acting reasonably, then the community of businesses around them would have been spared the effects of the company's negligence. Under HB1175, you give LM Wind Power a pass for their negligence.
- **Letting bad actors spread fear.** When every barbershop's economic success is tied to the coffee shop implementing reasonable protections, it is irresponsible to let one, or the other, off the hook. If one can operate unreasonably, then people are less likely to visit *both*. Fear is the biggest impediment to economic revival and, until we all have access to the vaccine, fighting fear means acting responsibly to slow the spread of the virus.
- **HB1175** is being pushed as a narrow, temporary "safe harbor," however, upon examination of the language, it becomes clear that the only companies that would ever be held accountable in a court of law under the Chamber's proposal are companies that meet a standard comparable to how most states define second degree murder

In conclusion, HB 1175 provides the following:

- An unconstitutional blanket immunity that goes against the ND Constitution and the ability for your constituents to have a right to a trial by jury or the ability to seek access to the courts
- The inability for seniors to get recourse when the healthcare facility takes no precautions in their care
- The ability for businesses to be careless in how they take responsibility in the safety and security of their workers, consumers and the community they live in.

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We ask you to Recommend a DO NOT PASS on HB 1175 as written. As you take this bill into consideration, we ask that you consider the following amendments:

1. The removal of the emergency clause and the retroactivity of the law back to January 1, 2020. This retroactivity is unconstitutional and opens the doors for others to ask that their reckless behavior be circumvented.

2. A Sunset of the legislation to December 31, 2022. This will remove the legislation after no lawsuits have come forward. It will also deter businesses from careless practices they may become accustomed to. Finally, it will show insurance companies that they are unable to create lasting changes to business policies because they are not long lasting.

3. The addition of the following code under subsection 1 and Subsection 2:

> **Liability of health care providers and health care facilities.**
> 1. A health care provider or health care facility is immune from civil liability for any act or omission in response to COVID - 19 that causes or contributes, directly or indirectly, to the death or injury of an individual where the complained of injury or death was due to underlying Covid-19. A health care provider or health care facility claiming immunity from civil liability under this statute shall provide an affidavit containing an admissible expert opinion to support the defense within three months of service of the responsive pleading to the Complaint, or the defense is dismissed with prejudice. The expert's affidavit must identify the name and business address of the expert, indicate the expert's field of expertise, and contain a brief summary of the basis for the expert's opinion. The immunity provided under this subsection includes:
>
> The immunity provided under subsection 1 does not apply to an act or omission that constitutes:
> a. Willful and wanton misconduct;
> b. Reckless infliction of harm;
> c. Intentional infliction of harm; or
> d. Gross negligence.

This amendment relates to current statutes where expert opinions are required.

Thank you for the opportunity to provide testimony. We respectfully request to be included in further discussion on this bill and other COVID-19 related bills.

Sincerely,
Jaclyn Hall
NDAJ