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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 states[1] 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."

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[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.

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[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").