OHIO SENATE JUDICIARY COMMITTEE
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ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
SENATE BILL 252 PROPONENT TESTIMONY

Thank you for the opportunity to testify in support of S.B. 252, asbestos lawsuit disclosure legislation, on behalf of the U.S. Chamber Institute for Legal Reform (ILR), 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. Many Ohio businesses are members of the U.S. Chamber.

Ohio is a pioneering state with regard to the adoption of laws that provide sound rules for asbestos lawsuits. In 2004, Ohio was the first state to require asbestos claimants to demonstrate impairment to address filings by the non-sick that could deplete resources needed to pay future claimants with cancer and other serious conditions. In 2012, Ohio was the first state to enact disclosure legislation fix a disconnect between the tort and asbestos bankruptcy trust systems. Many other states have followed Ohio's lead on these issues. Now, additional legislation is needed to respond to a new era and new type of lawsuit abuse that is occurring in asbestos lawsuits.

There has been a consistent rise in the number of defendants named in asbestos lawsuits, including *erroneously* named defendants. *Many defendants named in asbestos complaints have no connection to or liability for plaintiffs' injuries*. S.B. 252 addresses this problem by requiring plaintiffs to disclose the evidentiary basis for each claim against each defendant and provide supporting documentation. These disclosures will curb speculative claims and ensure that plaintiffs can demonstrate a connection between their exposures to asbestos and the defendants named in a case.

Over-naming

The first asbestos lawsuit filed over a generation ago named less than a dozen defendant manufacturers of asbestos-containing thermal insulation products. This changed following a "bankruptcy wave" in the early 2000s that removed virtually the entire asbestos industry from the tort system. Asbestos litigation became an "endless search for a solvent bystander," according to one asbestos plaintiffs' attorney.

A recent study of asbestos cases filed between 2017 and 2020 in Cuyahoga County—home to virtually all of Ohio's asbestos cases—found that plaintiffs routinely sue 20 or more defendants in each case. The analysis also highlighted numerous cases in which more than 50 defendants, and sometimes nearly 100 defendants, were named in a single lawsuit. (Laura Kingsley Hong & Mary Margaret Gay, *Over-naming in Ohio Asbestos Litigation: A Legislative Solution is Needed*, Int'l Ass'n of Def. Counsel Newsl., Dec. 2020).

As plaintiff lawyers cast a wide net to capture solvent defendants, they ensnare many innocent companies in the process. According to one insurer, "Very many defendants get dismissed 85-95% of the time from these lawsuits for zero dollars." Consulting firm KCIC has said, "many defendants are named frequently with no proof of exposure." This type of lawsuit abuse is known as "over-naming."

High dismissal rates confirm the over-naming problem. The study of Ohio asbestos litigation found that "an estimated 15-20% of the named companies" in a recent year "were voluntarily dismissed after enduring at least two years of expensive litigation."

Litigation costs start on day one for defendants that are sued without proof of exposure and may continue for years—costing thousands of dollars—until dismissal is obtained. According to the Ohio study, a wrongfully named defendant "may incur legal costs ranging from a few thousand dollars to as much as $25,000" to secure a dismissal, and this is often repeated across cases.

Improper naming of asbestos defendants has contributed to bankruptcies. For example, in 2020, the holding company for the legacy asbestos liabilities of CertainTeed said that over half of the "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 in 2020, 95% of the over 182,000 asbestos claims filed against it since 1983 were dismissed without payment to a plaintiff. (Mark Behrens & Christopher Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform*, 36:4 Mealey's Litig. Rep.: Asbestos 1 (Mar. 24, 2021)).

In another recent bankruptcy, two companies with the same parent—Aldrich Pump and Murray Boiler—said that following the bankruptcy of most primary asbestos defendants in the early 2000s, the companies "routinely would be named in over 2,500 mesothelioma claims every year, equating to a new claim asserted against the [companies] essentially every working hour of every weekday, every week of the year." Court filings explain that complaints "indiscriminately named" the companies in the "vast majority of all mesothelioma claims asserted across the country, a percentage that could not plausibly be warranted given the nature" of the companies' operations. Aldrich and Murray successfully obtained dismissals in about two-thirds of their mesothelioma cases. Yet, they were "compelled to expend substantial defense costs to demonstrate the lack of merit of any claim relating to their products—effectively, to prove their innocence before the claimants have plead a valid claim…." (*Id.*)

The "file first and ask questions later" approach is not just bad for wrongfully named defendants that must incur "significant and unnecessary litigation costs, but also draws away the time and attention of defendants from potentially meritorious claims." A defense lawyer explains, "Simply put, available resources should be steered toward defending real claims, rather than wasted on legal fees and court costs to simply obtain dismissals." (Lisa Oberg, *Resolving Asbestos Suits Faster in the Pandemic and Beyond*, Law360, Nov. 9, 2021).

Iowa passed a first-of-its-kind disclosure law in 2020 to help ensure that there is an evidentiary basis for each claim against each defendant named in an asbestos action. (Iowa Code § 686B.3). Iowa's law requires asbestos plaintiffs to provide a sworn information form with the initial complaint providing detailed information as to the plaintiff's exposures and their connection to each defendant with supporting documentation. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

In 2021, West Virginia, Tennessee, and North Dakota enacted legislation that is substantially similar to Iowa's law. (W. Va. Code § 55-7G-4(d)-(g); Tenn. Code § 29-34-703(c)-(f); N.D. Century Code § 32-46.2-02).

This year, bipartisan legislation has passed out of the Arizona Senate (S.B. 1157). The Arizona Association for Justice did not oppose the bill as passed by the Senate. The Arizona bill is substantially similar to Ohio S.B. 252.

Ohio S.B. 252

S.B. 252 builds on Ohio's sound asbestos laws and the recent enactments in other states. The bill requires asbestos plaintiffs to disclose the evidentiary basis for each claim against each defendant and produce supporting documentation. This reform will cut down on wasteful litigation, focus judicial resources on claims with evidentiary support, and facilitate settlements of viable claims.

Ohio has a similar requirement for medical malpractice cases. Ohio Rev. Code § 2323.451)(B) requires medical malpractice claimants to submit an "affidavit of merit relative to each defendant named in the complaint…." Further, as mentioned, Ohio's asbestos medical criteria law requires the submission of an expert report verifying that the plaintiff has an impairing condition caused by exposure to asbestos. The report must include information such as "[a]ll of the exposed person's principal places of employment and exposures to airborne contaminants." (Ohio Rev. Code § 2307.92(B)).

The asbestos trust claim disclosure and medical criteria laws have been upheld against numerous constitutional challenges, including with respect to their retroactive application to cases that were pending at enactment. *See Blakely v. Goodyear Tire & Rubber Co*., 2015 WL 13284606 (Ohio Ct. Com. Pl. Summit County Aug. 13, 2015) (upholding asbestos trust transparency law's motion to stay provision); *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008) (upholding application of asbestos medical criteria law to cases pending on date of enactment); *Renfrow v. Norfolk S. Ry. Co. v. Bogle*, 18 N.E.3d 1173 (Ohio 2014) (upholding asbestos medical criteria law's requirement that claims must be supported by report from a "competent medical authority"); *Bland v. Ajax Magnethermic Corp*., 2011 WL 917707 (Ohio App. 8th Dist. Mar. 17, 2011) (upholding chest x-ray requirement of asbestos medical criteria); *Cook v. NL Indus., Inc.,* 2013 WL 6228275 (Ohio App. 8th Dist. Nov. 21, 2013) (upholding prima facie showing requirements of asbestos medical criteria law).

Conclusion

For these reasons, the U.S. Chamber of Commerce supports enactment of S.B. 252.