

Senate Judiciary Committee

Matthew Schelzi 271-3266

SB 26-FN, relative to asbestos actions.

Hearing Date: January 10, 2023

Members of the Committee Present: Senators Carson, Gannon, Abbas, Whitley and Chandley

Members of the Committee Absent : None

Bill Analysis: This bill provides asbestos defendants who have no connection to the plaintiff's claim a way to avoid being sued in an asbestos action or to have their cases dismissed earlier.

Sponsors:

Sen. Gannon
Rep. Piemonte

Sen. Fenton

Sen. Murphy

Who supports the bill: Mark Behrens (U.S. Chamber Institute for Legal Reform), Rep. John Potucek (Rockingham 13), Erin Voyik (Riverstone Claims Management), David Juvet (Business and Industry Association), Joan Pageau (NH Association of Insurance Agents), Bruce Berke (National Federation of Independent Business), Curtis J. Barry (NH Retail Lumber Association), Paula Minnehan (New Hampshire Hospital Association), Ginamarie Alvino (Riverstone Claims Management), Senator Keith Murphy (District 16), Rory Whelan (National Association of Mutual Insurance Companies), and Senator Donovan Fenton (District 10).

Who opposes the bill: Kevin Grady (State Veterans Advisory Committee), Anthony Carr (Shaheen and Gordon), Marissa Chase (NHAJ), Rep. Timothy Horrigan (Strafford 10), Brian Ryll (PFFNH), and Glenn Brackett (NH AFL-CIO).

Who is neutral on the bill: Richard Head (Judicial Branch)

Summary of testimony presented in support:

Senator Gannon introduced Senate Bill 26-FN. He said there was an asbestos bill five years ago that was like this legislation. He said sixteen states have passed similar legislation. Sen. Gannon said he doesn't want people to be sued frivolously, he wants a specific cause of action. He said there is a transparency aspect in this bill that allows the public to know that there is an asbestos trust fund. He noted the two main aspects that this bill deals with is over naming and transparency. He said it is imperative to prove that the people plaintiffs are suing are related to the wrong that was done to the victim. He said the people named in the suit need to

be proven to be bad actors. He said this bill will send a message to the rest of the country that New Hampshire is not a place to form shop. He said the Timber Association supports this bill.

Senator Whitley asked whether form shopping is really a problem we see in New Hampshire.

Sen. Gannon said Massachusetts, and New York have had cases, and New Hampshire could end up having those cases. He said this bill is to send a message that if you do come here the jury is aware there is an alternative revenue source.

Sen. Whitley asked if the existing civil procedure rules cover this issue. She also asked if a motion to dismiss would be able to solve this problem.

Sen. Gannon said he will defer to the lawyers.

Erin Voyik, said she is the VP of Asbestos Strategy and Claims Counsel at Riverstone Claims Management. She stated she supports this bill. She said the bill does certain commonsense things, like how the bill requires that the plaintiff lay out basic information about what the allegations are against each defendant. She said that it is different than the 2018 bill. She said big plaintiff law firms file lawsuits that are based on form complaints where they name hundreds of defendants. She noted many of the defendants are dismissed without payment and the dismissal is hard on the clients, as the money only goes to defense lawyers. She said the other piece her company supports is around trust transparency. She noted many companies have gone bankrupt because of asbestos legislation, with over naming being cited as why the companies are in bankruptcy. She said as a defense group they are asking for a basic level of fairness, that they know what the quantum of liability is for a particular defendant, so they can resolve those cases sooner.

Mark Behrens said he is testifying on behalf of the U.S. Chamber Institute for Legal Reform. He said the first asbestos lawsuits began in the early 1970's and these lawsuits will continue until at least 2050. He noted asbestos litigation has changed substantially, because by the early 2000's the asbestos industry, those who made insulation and were alleged to have not warned about the effects of their product, were forced into bankruptcy. He said 140 companies have gone bankrupt because of asbestos lawsuits. He said this bill isn't a bailout to the asbestos industry because the industry no longer exists. He said each company that goes through bankruptcy creates a trust that has proceeds from the companies' assets and insurance to pay people that were exposed to the companies' products. However, he noted asbestos litigation has morphed from being lawsuits against the deep pocketed asbestos industry to suing small and mid-sized companies all over America. He said 11,000 different companies have been sued in this country. He said asbestos litigation has moved from suing culpable deep pocket defendants to suing non-culpable small businesses. He noted lawsuits are now indiscriminately naming many companies without lawyers doing their due diligence. He stated we have mechanisms that deal with this indiscriminate naming, but we don't have a loser pay system. He said it makes it so small businesses run up legal fees in a case where they never belonged in the first place.

Mr. Behrens said the bill makes sure plaintiffs must show the facts that support the lawsuit they are filing. He believed you should have to tell the defendant why they are being sued. He noted this bill is about letting those that are innocent obtain a right to disqualify earlier. He said the goal of this bill is to take out the companies that don't belong on these lawsuits. Mr. Behrens said if this bill passes it will streamline litigation. He said this bill doesn't protect anyone engaged in wrongdoing. He noted these cases are brought by TV lawyers where they spend hundreds of millions of dollars a year in advertising to recruit these cases. He said the TV lawyers are the ones who are filing huge complaints without doing their due diligence. Mr.

Behrens said these over naming cases could come to New Hampshire. He noted this bill would make sure plaintiffs are suing the right companies and it would let juries get the full information to determine who is responsible.

Sen. Whitley asked if any New Hampshire business has been negatively impacted to the point where it would require a whole new set of requirements that are outlined in this bill.

Mr. Behrens said he doesn't know if the companies that have gone bankrupt over the last decades have had operations in New Hampshire, however he said they probably did have operations in this state, and that jobs have been impacted by this type of litigation.

Sen. Whitley stated that the disclosure will happen even without this bill.

Mr. Behrens said some of the information will come out about the plaintiffs' exposures. However, small businesses will only find this out after they have paid a lot of money in legal fees.

Sen. Whitley said she hasn't heard that these types of lawsuits are impacting our small businesses and stated that frivolous claims are going to impact small businesses in all types of litigation.

Mr. Behrens said that asbestos litigation is the only litigation where the lawyers are taught to sue everyone first and then go back to figure out who the actual defendants should be. He noted you don't see that happening in other types of litigation.

Sen. Gannon asked if there has been more than one asbestos lawsuit in this state.

Mr. Behrens said he believes there have been other asbestos lawsuits in New Hampshire.

Senator Abbas asked if plaintiffs were to pursue a frivolous claim wouldn't there be ways that the law firms could be held accountable.

Mr. Behrens said there are ways to hold these plaintiffs accountable, but it happens rarely because small businesses that are wrongly named in these cases don't want to spend more money on legal fees.

Sen. Abbas asked if the defense attorneys that are retained are by insurance companies or by private counsel from each of the businesses.

Mr. Behrens said that it is a mix between companies that pay out of pocket and those that pay through insurance but either way these companies are paying in a case where they never belonged.

Summary of testimony presented in opposition:

Kevin Grady said he represents the State Veterans Advisory Committee and said they have not taken a formal position on this bill. However, he said this bill looks like SB 335 from 2018 where they took a position in opposition. He noted seven to eight percent of Americans are veterans but make up thirty percent of mesothelioma cases. He said once you get mesothelioma you have nine months to a year to live, which is tough to get a decision by a court in that timeframe. He said a bill like this is designed to put as many obstacles as possible between people who want to go to court and state their case. He said according to the language

in this bill; 60 days prior to a court date the victims can see if they may get money from the trust, but it would stop the court proceedings. He said the insurance companies make money by managing risk, and the way they are managing risk is by running the clock out on mesothelioma patients. Mr. Grady said while the Veterans Advisory Committee has not taken a position on the bill at the time of the hearing, he believed the Veterans Advisory Committee will eventually oppose this bill.

Sen. Gannon asked if it would be fair to let the defendants know that there is a trust where they could get money.

Mr. Grady said the defense counsel can bring that up at trial, and it can be available in the discovery process. He said he doesn't believe that they should mandate defendants go to the trust fund first.

Anthony Carr said he is a partner with Shaheen & Gordan. He said he is knowledgeable about asbestos litigation in New Hampshire. Since 2018, 30,00 civil lawsuits have been filed in New Hampshire state and federal court. He believed only one has been related to asbestos personal injury. He said he wasn't aware of any real-life examples of this hypothetical concern happening in NH. He noted if it were to arise there are ways that the court would be able to deal with it. He noted the court could use a motion to dismiss, motions for summary judgement and rule 11 sanctions. He said he opposes this bill and it's a solution in search of a problem.

Senator Abbas asked if there is a procedure, for the defendants, to bring in a third party that is liable to the plaintiff.

Mr. Carr said that is what they can do, so the burden of proof shifts to the plaintiffs. He stated that New Hampshire is not known as a plaintiff friendly jurisdiction, and people are not going out of their way to file cases like this in New Hampshire.

Sen. Whitley asked if the treatment being proposed for defendants in this bill is unique or do we treat other defendants this way.

Mr. Carr said this would be a unique treatment of defendants. He noted the plaintiff's burden would increase, and it would tilt the odds in favor of defendants. The plaintiffs would have to produce materials that support their claims but also support defendants' defenses. He said there is no corresponding duty for the defendants to disclose materials.

Marissa Chase said she is the Executive Director for the New Hampshire Association of Justice. She said they are strongly opposed to this bill. She noted this problem is not happening in New Hampshire. She said they did a LexisNexis search and there has been one asbestos case in the whole history of New Hampshire case law. New Hampshire does not have punitive damages. She said she believes this bill is being used to pass New Hampshire as a test trial so it can go to states where this problem does happen. She noted trusts are managed by the federal government, so state law would not change that. She said this bill puts hurdles and burdens for one party in a case which the other party does not have to prove. Ms. Chase said this bill was introduced in six states in 2021-2022 where it was not enacted. She said 83% of all asbestos actions come from 15 jurisdiction in the country; none of which are in New Hampshire. She said the average trust payment is 41,000 dollars which does not cover the average 1.5 million dollars in medical expenses that an individual with mesothelioma is expected to pay.

Sen. Gannon noted that there is asbestos in New Hampshire and this litigation could come here.

Ms. Chase said if it hasn't come here yet, then it probably won't.

Senator Carson brought up Mr. Heads proposed amended changes. She wondered if the first amended change would be appropriate.

Ms. Chase said it won't change her position on this bill.

Neutral Information Presented:

Richard Head said he is the Government Affairs Coordinator for the Judicial Branch. He stated the Judicial Branch doesn't have a position on this bill, but he noted if the bill goes forward, he has three lines he would like to see amended. The three parts that he is asking to be amended take away the requirement that the documents be filed by the court and instead are filed by the defendant. He noted these changes would make the process like how it is done in discovery. He said the first change is on page 1 line 26 where instead of saying, "file all available asbestos trust claims," it would say "provide to the defendant all available asbestos trust claims." He then noted on the same line where it says, "produce all trust claim material and file a sworn statement." it would say "the sworn statement be provided to the defendant." He said the third change is on page 2 line 3 and instead of saying "filing a sworn information form," it would say to "provide the sworn information form to the defendant." He noted these changes would prevent the judicial branch with having to create and file these forms.

Sen. Whitley asked if the judicial branch believes there are current issues with our rules of discovery, and would this bill solve that problem.

Mr. Head said he does not know. He noted he doesn't have the data on asbestos cases, so he can't comment one way or the other.

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Date Hearing Report completed: January 17, 2023