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IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

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CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

JOSEPH M. VICKNAIR, *ET AL.*,
PLAINTIFFS-APPELLANTS,

v.

PHELPS DODGE INDUSTRIES, INC., *ET AL.*,
DEFENDANTS-APPELLEES.

Appeal from Amended Judgment Entered December 18, 2009 in the District Court, South Central Judicial District, Morton County

AMICI CURIAE BRIEF OF THE NORTH DAKOTA CHAMBER OF COMMERCE, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN INSURANCE ASSOCIATION, IN SUPPORT OF DEFENDANTS-APPELLEES AND REQUESTING THAT THIS COURT AFFIRM THE DECISION OF THE DISTRICT COURT BELOW

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QUESTION PRESENTED

Whether North Dakota's applicable statute of limitations applies to claims brought by nonresidents with no connection to North Dakota.[1]

STATEMENT OF THE CASE

Amici adopt Defendant-Appellee's statement of the case.

STATEMENT OF INTEREST

As organizations representing companies doing business in North Dakota and their insurers, *amici* have a substantial interest in ensuring that North Dakota law follows traditional legal principles and reflects sound public policy. *Amici*'s members would be adversely affected by a decision overturning the District Court and holding that North Dakota's applicable statute of limitations applies to claims that are time-barred in other states and that have no connection to North Dakota.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal involves claims started by thirteen plaintiffs alleging exposure to asbestos. None of the plaintiffs or their claims has any connection to North Dakota. The plaintiffs' attorney has admitted that all thirteen plaintiffs missed the statute-of-limitations, the period within which a lawsuit must be filed, in all other jurisdictions.

This Court previously found that the doctrine of *forum non conveniens* does not provide a basis for dismissal of these plaintiffs' claims, *see Vicknair v. Phelps Dodge Indus., Inc.*, 2009 ND 113, 767 N.W.2d 171 (N.D. 2009), but the Court correctly acknowledged that this "does not necessarily mean North Dakota's applicable statute of limitations will govern in this case." 2009 ND at ¶13, 767 N.W.2d at 180. Traditional

[1] *Amici*'s brief does not address whether the governing limitation period would be the three-year, asbestos-claim limitation period or the six-year, general torts limitation period.

choice-of-law principles require application of the statute of limitations of the states where plaintiffs lived and were exposed to asbestos because those states have the most significant connection to their claims. *See, e.g., McCann v. Foster Wheeler, LLC,* 225 P.3d 516 (Cal. 2010). (Oklahoma's statute of repose applied to bar the claim of a plaintiff who was exposed to asbestos in Oklahoma but later developed mesothelioma in California).

This *amicus* brief will show that North Dakota's general tort statute of limitations is among the longest in the nation and that traditional choice-of-law principles dictate applying the statute of limitations of the state or states in which the plaintiffs' claims allegedly arose. Next, the brief will demonstrate that the long history of the asbestos litigation has shown that claims will flow to states with the most favorable laws or procedures for plaintiffs. If this Court hangs out a "welcome" sign for expired (and often flimsy) claims from other states, North Dakota courts will be inundated with such claims because these plaintiffs have nowhere else to go. "If you build it, they will come"—potentially including claims generated through questionable attorney-sponsored litigation screenings performed in other states, that are then determined by the sponsoring lawyers to be time-barred and, as a result, subsequently referred (or "sold") to counsel in North Dakota.

North Dakota's legal system has an excellent reputation. *See* U.S. Chamber of Commerce's Institute for Legal Reform, Lawsuit Climate 2010, *available at* http://www.instituteforlegalreform.com/lawsuit-climate.html#/2010/north-dakota. There is simply no basis or reason for this Court to tarnish that image here by effectively

endorsing blatant forum shopping and saddling North Dakota courts, taxpayers, and jurors with the heavy burden of hosting out-of-state litigation "tourists."

ARGUMENT

I. NORTH DAKOTA HAS ONE OF THE NATION'S LONGEST TIME PERIODS FOR BRINGING PERSONAL INJURY CLAIMS

North Dakota law provides plaintiffs with perhaps the most lengthy general tort statute of limitations in the country. The vast majority of states—thirty-nine out of fifty—provide two years[2] or three years[3] to file a general tort claim from the date an action accrues. At least three states provide less time.[4] Four states provide a plaintiff with as long as four years.[5] Only one, Missouri, provides five years.[6]

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[2] *See* Ala. Code §§ 6-2-30, 6-2-38; Alaska Stat. § 09.10.070; Ariz. Stat. § 12-542; Cal. Code Civ. Proc. § 335.1; Conn. Gen. Stat. § 52-584; Del. Code tit. 10, § 8119; Ga. Code Ann. § 9-3-33; Haw. Rev. Stat. § 657-7; Idaho Code § 5-219(4); 735 Ill. Comp. Stat. 5/13-202; Ind. Code § 34-11-2-4; Iowa Code § 614.1(2); Kan. Stat. § 60-513; N.J. Stat. Ann. § 2A:14-2; Nev. Rev. Stat. § 11.190(4)(e); Ohio Rev. Code § 2305.10; Okla. Stat. Ann. tit. 12, § 95(3); Or. Rev. Stat. § 12.110; 42 Pa. Con. Stat. § 5524; Tex. Civ. Prac. & Rem. Code §§ 16.003, 16.0031; Va. Code Ann. § 8.01-243; W. Va. Code § 55-2-12.

[3] *See* Ark. Code Ann. § 16-56-105; D.C. Code § 12-301; Md. Cts. & Jud. Code Ann. § 5-101; Mass. Gen. Laws, Art. 260, §§ 2A, 4; Mich. Comp Laws § 600.5805(10); Miss. Code Ann. § 15-1-49; Mont. Code Ann. § 27-2-204; N.H. Rev. Stat. § 508:4; N.M. Stat. Ann. § 37-1-8; N.Y. Civ. Prac. R. § 214(5); N.C. Gen. Stat. § 1-52(16); R.I. Gen. Laws § 9-1-14(b); S.C. Code Ann. § 15-3-530(5); S.D. Comp. Laws Ann. § 15-2-14(3); Vt. Stat. Ann. tit. 12, § 512(4); Wash. Rev. Code Ann. § 4.16.080(2); Wis. Stat. § 893.54.

[4] *See* Ky. Code § 413.140 (one year); La. Civ. Code art. 3492 (one year); Tenn. Code § 28-3-104 (one year). Some states prescribe a specific period for asbestos claims of one year from when the plaintiff knew or should have known that he or she had a disability or from the plaintiff's death. *See, e.g.,* Cal. Code Civ. Proc. § 340.2; D.C. Code § 12-311; *see also* 42 Pa. Cons. Stat. § 5224.1(a) (earlier of two years of being informed of asbestos-related injury by a licensed physician or upon the date on which the person knew or should have known that the person had an injury which was caused by such exposure).

[5] *See* Fla. Stat. § 95.11(3)(a); Neb. Rev. Stat. § 25-207; Utah Code § 78-12-25.1; Wyo. Stat. Ann. § 1-3-105(iv)(c).

[6] *See* Mo. Stat. § 516.120(4).

North Dakota is outside the mainstream. N.D. Cent. Code § 28-01-16(5), the state's general tort statute of limitations, gives a plaintiff six years to file a claim—double or triple the amount of time provided by most other states. Maine and Minnesota are the only states with a comparable six-year statute of limitations for general tort claims.[7]

The length of a statute of limitations represents a legislative judgment. Statutes of limitations are important because some time limit is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts and defendants from stale or fraudulent claims. As time passes, witnesses become difficult to locate or pass away, records are lost or discarded, and memories fade.

There is no magic number as to what is a fair length of time to bring a lawsuit. Statutes of limitations are inherently arbitrary. Legislators must strike a difficult balance. On the one hand, legitimate potential plaintiffs should have an adequate opportunity to bring a claim. On the other hand, defendants and the courts must be protected from having to address cases in which the search for the truth may be seriously impaired by the loss of evidence, witnesses, and fading of memories. The reliability of the judicial process also benefits from shorter statutes of limitation, as the search for truth is aided when the recollections of witnesses and other evidence remain fresh. By striking this balance, statutes of limitations promote justice, discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims.

By providing a six-year period for general torts, the North Dakota legislature struck this balance heavily on the side of injured residents. Most other states have struck the balance differently, finding that shorter time limits still provide sufficient time for

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[7] *See* Me. Rev. Stat. Ann. tit. 14, ch. 205, § 752; Minn. Stat. § 541.07 subd. 1(5).

injured individuals to file suit while protecting the due process rights of defendants and better facilitating the truth-finding function of the courts. These public policy decisions of sister legislatures should be respected in North Dakota, just as states with shorter statutes of limitations should apply North Dakota's longer period when those who live or who are injured in North Dakota file suit in the courts of other states.

II. THE UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT BARS THESE CLAIMS

The National Conference of Commissioners on Uniform State Laws developed the Uniform Conflict of Laws-Limitations Act (hereinafter "Uniform Law") to prevent the very type of forum shopping present here. The Commissioners found that since states typically applied their own "procedural" laws to claims filed in state courts, and many states consider statute of limitations procedural in nature, "[f]orum shopping by delay-prone plaintiffs, or by their attorneys, with suits filed in states with long limitation periods, inevitably occurred." National Conference of Commissioners on Uniform State Laws, Uniform Conflict of Laws-Limitations Act, Commissioners' Prefatory Note, at 1 (1983), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/uclla82.pdf. For this reason, the Uniform Law "treats limitation periods as substantive, to be governed by the limitations law of a state whose law governs other substantive issues inherent in the claim." *Id.* § 2 cmt. The Uniform Law equally applies in situations where the limitation period of the law of the state where the action arose is longer or shorter than the statute of limitations of the forum state. *See id.*[8] North Dakota adopted the uniform law in 1985. *See* N.D. Cent. Code ch. 28-01.2.

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[8] Many states have adopted "borrowing statutes," some of which take a more stringent approach to expired nonresident claims. Rather than apply the statute of

Thus, the applicable statute of limitations is determined by considering which state substantive law applies. *See* N.D. Cent. Code § 28-01.2-02. North Dakota uses a two-pronged analysis for choice-of-law decisions. First, the court must consider all relevant contacts with the particular state that might logically influence the decision. Second, the court must consider Professor Leflar's choice influencing considerations to determine which state has the most significant interest in the issue. *See Daley v. American States Preferred Ins. Co.*, 1998 ND 225, ¶¶ 10-12, 587 N.W.2d 159 (N.D. 1998); *see also* Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461 (1983-84). Where, as here, the claims lack any nexus whatsoever to North Dakota, the choice-of-law inquiry should end and North Dakota law should not apply.

The "escape clause" provided by the Uniform Law and adopted in North Dakota, N.D. Cent. Code § 28-01.2-04, was meant to provide a court with discretion to avoid harsh results where a plaintiff did not have a "fair opportunity" to litigate his or her claim. *See id.* § 4 cmt. The Uniform Law provides that if the limitation period of another state applicable is "substantially different" from the limitation period of the forum state and "has not afforded a fair opportunity to sue upon, or imposes an unfair burden in

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limitations of the state whose substantive law applies, whether shorter or longer than the forum state, several states require the forum state to apply the *shorter* statutory time limit. *See, e.g.,* Del. Code tit. 10, § 8121; Mich. Comp. Laws § 600.5861; N.Y. C.P.L.R. 202; 42 Pa. Cons. Stat. § 5521(b); W. Va. Code § 55-2A-2; Wis. Stat. § 893.07. Other states do not permit nonresidents to bring claims that arose in another jurisdiction, if the claim is not actionable in the other jurisdiction due to lapse of time. *See* Ala. Code § 6-2-17; Alaska Stat. § 09.10.220; Ariz. Rev. Stat. § 12-506(A); Cal. Civ. Proc. Code § 361; Colo. Rev. Stat. § 13-80-110; Fla. Stat. § 95.10; Hawaii Rev. Stat. § 657-9; Idaho Code § 5-239; 735 Ill. Comp. Stat. 5/13-210; Kan. Stat. § 60-516; Me. Rev. Stat. Ann. tit. 14, § 866; Mass. Gen Laws, Art. 260, § 9; Miss. Code Ann. § 15-1-65; Mo. Rev. Stat. § 516.190; Nev. Rev. Stat. § 11.020; N.C. Gen. Stat. § 1-21; Ohio Code § 2305.03(b); R.I. Gen. Laws § 9-1-18; Tenn. Code § 28-1-112; Tex. Civ. Prac. & Rem. Code § 71.031(a)(3); Utah Code § 78B-2-103; Wash. Rev. Code Ann. § 4.16.290.

defending against," the limitation period of the forum state applies. *Id.* § 4. This clause, however, was not designed to provide an "easy escape," such as when the statute of limitations has expired in the state where the action arose and the forum state provides a longer period to bring a claim. *See id.* cmt.; *see, e.g., Hein v. Taco Bell, Inc.*, 803 P.2d 329, 333-34 (Wash. Ct. App. 1991) (rejecting use of the "escape clause" to apply Washington's three-year statute of limitations rather than California's one-year statute of limitations to a personal injury claim that arose in California, even with respect to a plaintiff who was a Washington resident). Such a reading would defeat the entire purpose of the Uniform Law, creating an exception that swallows the rule.

It is important to recognize that the escape clause is provided for the benefit of the party opposing application of the statute of limitations of another state. It is does not, as the Plaintiffs here assert, provide additional elements of proof to be shown by the party asserting a statute of limitation defense. Plaintiffs have the burden of proof backward. North Dakota law does not, as the Plaintiffs' brief states, require that a defendant make an affirmative showing that the plaintiffs "had been 'afforded a fair opportunity to sue upon. . . .'" Rather, the language of Section 28-01.2-04 expressly states that the escape clause applies upon a showing that the limitations period of another state "has *not* afforded a fair opportunity to sue upon. . . ." (emphasis added). That is because plaintiffs, not defendants, are in the best position to demonstrate the basis of any assertion that they did not have a fair opportunity to sue in their home states—a rare occurrence. The escape clause is an exception to the rule that would otherwise require application of the statute of

limitations of another state. The burden of showing the applicability of the exemption shifts to the nonmoving party, here Plaintiffs-Appellants.[9]

Finally, North Dakota law is clear that deciding which state's statute of limitation applies, and whether the unfairness requires a different result, is a matter of law to be decided by the court, not an issue for the fact finder to decide at trial. *See* N.D. Cent. Code § 28-01.2-04 ("*If the court determines* that the limitation period of another state applicable under sections 28-01.2-02 and 28-01.2-03 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies.") (emphasis added). To hold otherwise would defeat the purpose of a statute of limitations, requiring an action to proceed to trial, and imposing substantial costs on the court and litigants, simply to determine that the claim should not have proceeded at all.

At the time of a plaintiff's alleged exposure to asbestos in a state such as Louisiana or Mississippi, the plaintiff would have reasonably expected that any injury arising as a result of that exposure would be governed by Louisiana or Mississippi law. Likewise, plaintiffs who live and work in California, Florida, and Pennsylvania would reasonably expect to have a claim decided under the law of that state. None of the parties

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[9] This Court has recognized the general principles of shifting burdens of proof. A moving party may have the burden of proof, but once that initial burden is met, it shifts to the opposing party to demonstrate the application of an exception, such as that provided by N.D. Cent. Code § 28-01.2-04. *See, e.g., In re Guardianship/Conservatorship of Van Sickle*, 2005 ND 69, ¶27, 694 N.W.2d 212, 221 (N.D. 2005) (recognizing that "the moving party generally bears the burden of proof" but "[i]f the party bearing the burden of proof presents evidence strong enough, if uncontradicted, to support a finding in her favor," then the burden shifts to opposing party to "offer proof to the contrary") (quoting *Helbling v. Helbling*, 541 N.W.2d 443, 445-46 (N.D. 1995)).

at the time of exposure could possibly have foreseen the potential application of wholly foreign North Dakota law many years later.

III. ASBESTOS LITIGATION IS PARTICULARLY PRONE TO FLOW TO STATES WITH FAVORABLE LAW OR PROCEDURES

This Court should be careful to avoid a ruling that would augment asbestos or other tort filings in North Dakota, particularly where the plaintiffs have no connection to the state. It may seem far-fetched that residents of other states would come *en masse* to file claims in North Dakota, but the specter of many new claims becomes clearer when, as here, the choice is between no claim and a potentially large award. Moreover, while North Dakota has not traditionally hosted a disproportionate share of asbestos claims, the history of asbestos litigation clearly demonstrates that nonresident claims flow to jurisdictions that develop reputations for favorable procedures and a willingness to accept nonresident claims.

"One of the greatest challenges facing both state and federal courts is the crush of tort suits arising from the extensive use of asbestos" throughout much of the last century. *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 348 (2d Cir. 1993); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits."). The United States Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997), described the litigation as a "crisis."[10] Through 2002, approximately 730,000

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[10] *See generally* David C. Landin *et al.*, *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589 (2008); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

asbestos-related claims had been filed nationally. *See* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005).[11]

The RAND Institute for Civil Justice found that between 1970 to 1987, four states hosted sixty-one percent of the asbestos claims filed in state courts: California (thirty-one percent), Pennsylvania (seventeen percent), New Jersey (seven percent), and Illinois (six percent). *See* Carroll *et al.*, *supra*, at 61-62. By the late 1990s, however, asbestos filings in these states accounted for only eight percent of the total. *Id.* Between 1998 and 2000, five other states captured sixty-six percent of all state court filings: Texas (nineteen percent), Mississippi (eighteen percent), New York and Ohio (each twelve percent), and West Virginia (five percent). *Id.* These states had accounted for only nine percent of the claims filed before 1988. *Id.*

As RAND recognized, "Sharp changes in filing patterns over time more likely reflect changes in parties' strategies in relationship to changes in the (perceived) attractiveness (or lack thereof) of state substantive legal doctrine or procedural rules, judicial case management practices, and attitudes of judges and juries toward asbestos plaintiffs and defendants, than changes in the epidemiology of asbestos disease." *Id.* at 63. Recent legislative and judicial reforms that have dramatically improved the asbestos litigation climate in other states are leading plaintiffs' lawyers to seek out more favorable

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[11] So far, the asbestos litigation has forced over eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, *available at* http://www.abajournal.com/magazine/article/backing_away_from_the_abyss/, and has had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003). Over 8,500 defendants have been named. *See* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns: Asbestos, Aug. 2004, at 5.

venues. *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501, 533-44 (2009).

For example, Madison County, Illinois, east of St. Louis, which has one of the most active asbestos dockets in the nation, *see* Victor E. Schwartz *et al.*, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 Wash. U. J.L. & Pol'y 235 (2004), "has packed on more cases at this year's mid point than it had at the same time last year." Amelia Flood, *Madison County Asbestos Cases Up From Last Year*, July 1, 2010, *available at* http://www.madisonrecord.com/news/228004-madison-county-asbestos-cases-up-from-last-year. A 2006 report found that up to seventy-five percent of the asbestos cases filed in Madison County over a ten-year period were "by plaintiffs who had never before set foot in the county." Manhattan Inst., Trial Lawyers, Inc.: Illinois 10 (2006), *available at* http://www.triallawyersinc.com/IL/il05. html. Filings are also beginning to pick up in nearby St. Clair County. *See id.*

Out West, judges in California have acknowledged the ever-increasing burden placed on the judicial system by that state's asbestos docket. *See* Alfred Chiantelli, *Judicial Efficiency in Asbestos Litigation*, 31 Pepp. L. Rev. 171, 171 (2003) (Chiantelli, a former San Francisco Superior Court judge, stating that "[l]ately, we have seen a lot more mesothelioma and other cancer cases than in the past"). Many of these plaintiffs lack any meaningful connection to California, having lived most of their lives outside of the state and alleging asbestos exposure that ostensibly occurred elsewhere. *See* Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, Mealey's Litig. Rep.: Asbestos, Nov. 2006, at 41. Now, large plaintiffs' firms that manage these and other asbestos claims are moving to California. *See* Alan Calnan & Byron G. Stier, *Perspectives on*

Asbestos Litigation: Overview and Preview, 37 Sw. U. L. Rev. 459, 462 (2008) ("[T]here is a sense locally among the bar that Southern California may be in the midst of a surge."); Steven D. Wasserman *et al.*, A*sbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883, 885 (2007) ("With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.").

Delaware is another state that has experienced an increase in asbestos filings. *See, e.g.*, Steve Korris, *Delaware Court Seeing Upsurge in Asbestos Filings*, Madison-St. Clair Record, July 1, 2005, *available at* http://madisonrecord.com/news/contentview.asp?c=162494 (noting an upsurge in asbestos cases filed in Wilmington, Del.). Delaware may be attractive to plaintiffs' counsel because many companies are incorporated in the state, making it hard for defendants to obtain dismissal on forum grounds.

The factors driving asbestos litigation to states such as Illinois, California, and Delaware may be different than North Dakota, but the experience of these states underscores the point that asbestos litigation is mobile. Should this Court apply North Dakota's six-year, general torts statute of limitations to cases that have no connection to the state and that are time-barred elsewhere, the decision would effectively raise a billboard that North Dakota courts are open to expired nonresident claims. This dubious distinction would not be in the interests of North Dakota taxpayers, litigants, or courts. This Court should issue a holding in this case that does not create a further incentive for forum shopping. The law of the state where the most substantial exposures giving rise to the alleged injury occurred should govern the plaintiffs' claims.

IV. THE UNSOUND PUBLIC POLICY IMPACT OF PERMITTING EXPIRED NONRESIDENT CLAIMS

A decision to apply North Dakota's six-year general tort statute of limitations and essentially make the state a place where otherwise time-barred personal injury lawsuits from all over the country can spring back to life would have far-reaching and negative effects. Such a ruling would damage the reputation of North Dakota's judiciary for having a fair, reliable and predictable civil justice system. It would also place an unfair burden on North Dakota courts, including its judges, litigants, and jurors, as well as state taxpayers who fund the state's court system.

A. Damage to North Dakota's Reputation for Having a Fair Civil Justice System

Applying North Dakota's six-year general tort statute of limitations would undercut the predictability and certainty of the laws that the defendants presumably relied upon when making business decisions.

Businesses price their goods and services based on what they reasonably expect to be the costs of doing business, including their tort liability. If liability can be imposed after the statute of limitations that they reasonably expect to apply to their claims has expired, then businesses may be unjustly harmed because they cannot go back in time and choose not to offer the particular good or service at issue. Nor can a business charge more after the fact to reflect a greater than expected liability risk.

Moreover, businesses reasonably believe that liability stemming from their products is limited to the period of time set in those states in which they operate, not North Dakota and not extended as long as six years. A business that is subject to a lawsuit invoking a foreign, significantly longer statute of limitations cannot make a

retroactive decision to purchase insurance, or more insurance, to guard against that unexpected risk.

B. Out-of-State Litigation Should Not Burden North Dakota

Allowing claims by nonresidents who seek to take advantage of North Dakota's lengthy statute of limitations for general tort claims would lead to a flood of nonresident litigation in North Dakota courts. As explained, asbestos claims are particularly prone to move in droves from state to state. Given that North Dakota's statute of limitations is longer than almost every other state, the state's district courts could become venues of last resort for stale claims.

This Court can look to the experience of Minnesota to view the potential impact of a decision allowing expired, nonresident claims to proceed in North Dakota. Minnesota is one of the two other states with a statute of limitations as long as North Dakota. *See* Minn. Stat. Ann. § 541.07 subd. 1(5). After Minnesota applied its longer statute of limitations to nonresident claims, more than 9,000 nonresident plaintiffs filed lawsuits against out-of-state pharmaceutical companies and medical device makers in Minnesota's state and federal courts that would be time barred in the plaintiffs' home states. *See* Mark Hansen, *Lawsuits Travel Up North*, ABA J., Dec. 2007, *available at* http://www.abajournal.com/magazine/article/lawsuits_travel_up_north/. According to an attorney that has monitored this trend, nonresident filings in Minnesota increased from 500 in 2004 to 6,891 in 2006. *Id.* (citing Minneapolis defense lawyer Scott Smith). In recent years, more than nine out of ten drug and medical device cases filed in

Minnesota's state and federal courts were filed by nonresidents. *See id.*[12] The situation led *Minnesota Law & Politics* to declare that the "Land of 10,000 Lakes" has become the "Land of 10,000 Lawsuits." Erin Gulden, *The Land of 10,000 Out-of-State Lawsuits, and Scott Smith Has Had Enough of Them*, Minn. L. & Pol., Dec./Jan. 2009, at 37, *available at* http://www.lawandpolitics.com/minnesota/Lawsuits-of-the-Year/b2ec8292-358b-461d-b1d2-df7e3b8680d0.html. A ruling in this case that North Dakota's statute of limitations applies to nonresident claims would have a similar effect.

Should this occur, North Dakota district court judges would feel the pressure of an increased civil docket, which has already steadily risen by nearly twenty-five percent over the past decade. *Compare* North Dakota Judicial System, 2008 Annual Report 23 (2009) (reporting 31,580 civil filings in district courts) *with* North Dakota Courts Annual Report 1999 (2000) (reporting 25,414 civil filings in district courts), *available at* http://www.ndcourts.com/court/annual.htm. North Dakota plaintiffs will see justice delayed if they must wait behind earlier-filing nonresidents to have their day in court.

Moreover, it is unfair to expect North Dakota residents to serve as jurors, or to pay the taxes to fund the work of the courts, in cases having little or nothing to do with their local communities.

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[12] The Minnesota Legislature reacted to the increasing number of nonresident claims by enacting the Uniform Conflict of Laws-Limitations Act, which explicitly directs its courts to apply the statute of limitations of the state whose law the claim is substantively based. *See* Minn. Stat. § 541.31 subd. 1. Since the Minnesota reform applies only to claims arising from incidents occurring on or after August 1, 2004, and the state has a six-year statute of limitations, the new law will not have an impact until August 1, 2010. *See Fleeger v. Wyeth*, 771 N.W.2d 524 (Minn. 2009) (responding "yes" to the certified question: "In a case commenced in Minnesota, does the Minnesota statute of limitations apply to the personal injury claims of a non-Minnesota resident against a defendant not a resident of Minnesota, where the events giving rise to the claims did not occur in Minnesota and took place before August 1, 2004?").

CONCLUSION

For the foregoing reason, *amici* respectfully request that this Court affirm the decision below.

Respectfully submitted,

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CERTIFICATION

I certify that on July 21, 2010, an original and seven copies of the foregoing Brief were sent by overnight mail to Penny L. Miller, Clerk of the Supreme Court, State Capitol, 600 E. Boulevard Avenue, Bismarck, ND 58505-0530. I further certify that one copy of the foregoing Brief was sent by first class U.S. mail, postage prepaid, to the following:

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