

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SENATE BILL 648
RATIFIED BILL

AN ACT TO CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY GENERAL AND PRIVATE ATTORNEYS, TO PREVENT THE ABUSE OF PATENTS, TO ALLOW FOR SHAREHOLDER ASSENT TO EXCLUSIVE FORUM, AND TO LIMIT ASBESTOS-RELATED LIABILITIES FOR CERTAIN SUCCESSOR CORPORATIONS.

The General Assembly of North Carolina enacts:

PART I. CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY GENERAL AND PRIVATE ATTORNEYS

SECTION 1.1. Chapter 114 of the General Statutes is amended by adding a new Article to read:

"Article 2A.

"Transparency in Third-Party Contracting by Attorney General.

"§ 114-9.2. Title.

This Article shall be known and may be cited as the "Transparency in Private Attorney Contracts Act (TIPAC)."

"§ 114-9.3. Definitions.

The following definitions apply in this Article:

- (1) Contingency fee contract. – A contract entered into by a State agency to retain private counsel that contains a contingency fee arrangement, including, but not limited to, pure contingency fee agreements and hybrid agreements, including a contingency fee aspect.
- (2) Government attorney. – An attorney employed by the State as a staff attorney in a State agency.
- (3) Private attorney. – An attorney in private practice or employed by a private law firm.
- (4) State. – The State of North Carolina, including State officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of State government and any of its agents.
- (5) State agency. – Every agency, institution, department, bureau, board, or commission of the State of North Carolina authorized by law to retain private counsel.

"§ 114-9.4. Procurement.

(a) A State agency may not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into the contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

- (1) Whether there exist sufficient and appropriate legal and financial resources within the Attorney General's office to handle the matter.
- (2) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.
- (3) The geographic area where the attorney services are to be provided.



(4) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

(b) If the Attorney General makes the determination described in subsection (a) of this section, the Attorney General shall request proposals from private attorneys to represent the State agency on a contingency fee basis and draft a written request for proposals from private attorneys, unless the Attorney General determines that requesting proposals is not feasible under the circumstances and sets forth the basis for this determination in writing. A request for proposals under this provision is not subject to Article 3 of Chapter 143 of the General Statutes. Until the conclusion of the legal proceeding or other matter for which the services of the private attorney were sought, all proposals received shall be maintained by the Attorney General and shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes. All proposals maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(c) A private attorney who submits a proposal under this section shall simultaneously pay a fee in the amount of fifty dollars (\$50.00). All fees collected under this subsection shall be used for the maintenance of the Attorney General's Web site.

§ 114-9.5. Contingency Fees.

(a) The Attorney General may not give permission under G.S. 114-2.3 for a State agency to enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee, exclusive of reasonable costs and expenses, in excess of:

- (1) Twenty-five percent (25%) of any damages up to ten million dollars (\$10,000,000); plus
- (2) Twenty percent (20%) of any portion of such damages between ten million dollars (\$10,000,000) and fifteen million dollars (\$15,000,000); plus
- (3) Fifteen percent (15%) of any portion of such damages between fifteen million dollars (\$15,000,000) and twenty million dollars (\$20,000,000); plus
- (4) Ten percent (10%) of any portion of such damages between twenty million dollars (\$20,000,000) and twenty-five million dollars (\$25,000,000); plus
- (5) Five percent (5%) of any portion of such damages exceeding twenty-five million dollars (\$25,000,000).

(b) In no event shall the aggregate contingency fee exceed fifty million dollars (\$50,000,000), exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.

(c) A contingency fee shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines.

§ 114-9.6. Control.

(a) Decisions regarding disposition of the case are reserved exclusively to the discretion of the State agency in consultation with a government attorney.

(b) The Attorney General shall develop a standard addendum to every contract for contingency fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the State agency, including, without limitation, the requirement listed in subsection (a) of this section.

§ 114-9.7. Oversight.

(a) Until the conclusion of the legal proceeding or other matter for which the services of the private attorney have been retained, the executed contingency fee contract and the Attorney General's written determination pursuant to G.S. 114-9.4 shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes. All records maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(b) The amount of any payment of contingency fees pursuant to a contingency fee contract subject to this Article shall be posted on the Attorney General's Web site within 15 days after the payment of those contingency fees to the private attorney and shall remain posted on the Web site for at least 365 days thereafter.

(c) Any private attorney under contract to provide services to a State agency on a contingency fee basis shall maintain all records related to the contract in accordance with the Revised North Carolina Rules of Professional Conduct.

(d) By February 1 of each year following a year in which a State agency entered into a contingency fee contract with a private attorney, the Attorney General shall submit a report to the President Pro Tempore of the Senate and the Speaker of the House of Representatives

describing the use of contingency fee contracts with private attorneys in the preceding calendar year. To the fullest extent possible without waiving the evidentiary privileges of the State in any pending matters, the report shall:

- (1) Identify each new contingency fee contract entered into during the year and each previously executed contingency fee contract that remains current during any part of the year.
- (2) Include the name of the private attorney with whom the department has contracted in each instance, including the name of the attorney's law firm.
- (3) Describe the nature and status of the legal matter that is the subject of each contract.
- (4) Provide the name of the parties to each legal matter.
- (5) Disclose the amount of recovery.
- (6) Disclose the amount of any contingency fee paid.
- (7) Include copies of any written determinations made under G.S. 114-9.4.

"§ 114-9.8. No expansion of authority.

Nothing in this Article shall be construed to expand the authority of any State agency or officer or employee of this State to enter into contracts for legal representation where no authority previously existed."

SECTION 1.2. G.S. 114-2.3 reads as rewritten:

"§ 114-2.3. Use of private counsel limited.

(a) Every agency, institution, department, bureau, board, or commission of the State, authorized by law to retain private counsel, shall obtain written permission from the Attorney General prior to employing private counsel. This section does not apply to counties, cities, towns, other municipal corporations or political subdivisions of the State, or any agencies of these municipal corporations or political subdivisions, or to county or city boards of education.

(b) Article 2A of this Chapter applies to any contract to retain private counsel authorized by the Attorney General under this section."

SECTION 1.3. Sections 1.1 and 1.2 of this act are effective when they become law and apply to any contract to retain private counsel authorized by the Attorney General entered into on or after that date.

PART II. PREVENT THE ABUSE OF PATENTS

SECTION 2.1. Chapter 75 of the General Statutes is amended by adding a new Article to read:

"Article 8.
"Abusive Patent Assertions.

"§ 75-136. Title.

This Article shall be known and may be cited as the "Abusive Patent Assertions Act."

"§ 75-137. Purpose.

(a) The General Assembly finds the following:

- (1) North Carolina is home to a growing high-technology, knowledge-based economy. With its top-tier research universities and active technology sector, North Carolina is poised to continue its growth. To continue growing, North Carolina must attract new, small, and mid-sized technology companies. Doing so will help provide jobs for North Carolina's residents and boost North Carolina's economy. North Carolina also is home to companies in retail, manufacturing, and other industries, many of whom are customers of technology companies. Those other businesses are more likely to succeed if not inhibited by abusive and bad-faith demands and litigation.
- (2) Patents encourage research, development, and innovation. Patent holders have legitimate rights to enforce their patents.
- (3) The General Assembly does not wish to interfere with good-faith patent litigation or the good-faith enforcement of patents. The General Assembly also recognizes that North Carolina is preempted from passing any law that conflicts with federal patent law.
- (4) Patent litigation can be technical, complex, and expensive. The expense of patent litigation, which may cost millions of dollars, can be a significant burden on companies. North Carolina wishes to help its businesses avoid

- these costs by encouraging the most efficient resolution of patent infringement claims without conflicting with federal law.
- (5) In order for North Carolina companies to be able to respond promptly and efficiently to patent infringement assertions against them, it is necessary that they receive specific information regarding how their product, service, or technology may have infringed the patent at issue. Receiving this information at an early stage will facilitate the resolution of claims and lessen the burden of potential litigation on North Carolina companies.
 - (6) Abusive patent litigation, and especially the assertion of bad-faith infringement claims, can harm North Carolina companies. A business that receives a letter asserting such claims faces the threat of expensive and protracted litigation and may feel that it has no choice but to settle and to pay a licensing fee even if the claim is meritless. This is especially so for small- and medium-sized companies and nonprofits that lack the resources to investigate and defend themselves against infringement claims.
 - (7) Not only do bad-faith patent infringement claims impose a significant burden on individual North Carolina businesses, they also undermine North Carolina's efforts to attract and nurture technology and other companies. Funds used to avoid the threat of bad-faith litigation are no longer available to invest, produce new products, expand, or hire new workers, thereby harming North Carolina's economy.
 - (8) North Carolina has a strong interest in patent matters involving its citizens and its businesses, including protecting its citizens and businesses against abusive patent assertions and ensuring North Carolina companies are not subjected to abusive patent assertion by entities acting in bad faith.
 - (9) In lawsuits involving abusive patent assertions, an accused infringer prevailing on the merits may be awarded costs and, less frequently, fees. These awards do not serve as a deterrent to abusive patent assertion entities who have limited liability, as these companies may hold no cash or other assets. North Carolina has a strong interest in making sure that prevailing North Carolina companies sued by abusive patent assertions entities can recover what is awarded to them.

(b) The General Assembly seeks, by this narrowly tailored act, to strike a balance between (i) the interests of efficient and prompt resolution of patent infringement claims, protection of North Carolina businesses from abusive and bad-faith assertions of patent infringement, and building of North Carolina's economy and (ii) the intentions to respect federal law and be careful to not interfere with legitimate patent enforcement actions. Except as specifically set forth in this act regarding bad-faith patent assertions, nothing in this act is intended to alter current law concerning piercing the corporate veil or otherwise concerning personal liability of principals in business entities.

"§ 75-138. Definitions.

The following definitions apply in this Article:

- (1) Affiliate. – A business establishment, business, or other legal entity that wholly or substantially owns, is wholly or substantially owned by, or is under common ownership with another entity.
- (2) Demand. – A letter, e-mail, or other communication asserting or claiming that a target has engaged in patent infringement or should obtain a license to a patent.
- (3) Institution of higher education. – Defined in 20 U.S.C. § 1001(a).
- (4) Interested party. – A person, other than the party alleging infringement, that (i) is an assignee of the patent or patents at issue; (ii) has a right, including a contingent right, to enforce or sublicense the patent or patents at issue; or (iii) has a direct financial interest in the patent or patents at issue, including the right to any part of an award of damages or any part of licensing revenue. A "direct financial interest" does not include either of the following:
 - a. An attorney or law firm providing legal representation in the civil action alleging patent infringement if the sole basis for the financial interest of the attorney or law firm in the patent or patents at issue

- arises from the attorney or law firm's receipt of compensation reasonably related to the provision of the legal representation.
 - b. A person whose sole financial interest in the patent or patents at issue is ownership of an equity interest in the party alleging infringement, unless such person also has the right or ability to influence, direct, or control the party alleging infringement.
- (5) Operating entity. – A person primarily engaged in, when evaluated with its affiliates over the preceding 24-month period and when disregarding the selling and licensing of patents, one or more of the following activities:
 - a. Research and technical or experimental work to create, test, qualify, modify, or validate technologies or processes for commercialization of goods or services;
 - b. Manufacturing; or
 - c. The provision of goods or commercial services.
- (6) Target. – A North Carolina person that meets one or more of the following:
 - a. The person has received a demand or is the subject of an assertion or allegation of patent infringement.
 - b. The person has been threatened with litigation or is the defendant of a filed lawsuit alleging patent infringement.
 - c. The person has customers who have received a demand asserting that the person's product, service, or technology has infringed a patent.

"§ 75-139. Abusive patent assertions.

(a) It is unlawful for a person to make a bad-faith assertion of patent infringement. A court may consider the following factors as evidence that a person has made a bad-faith assertion of patent infringement:

- (1) The demand does not contain all of the following information:
 - a. The patent application number or patent number.
 - b. The name and address of the patent owner or owners and assignee or assignees, if any.
 - c. Factual allegations concerning the specific areas in which the target's products, services, and technology infringe the patent or are covered by specific, identified claims in the patent.
 - d. An explanation of why the person making the assertion has standing, if the United States Patent and Trademark Office's assignment system does not identify the person asserting the patent as the owner.
- (2) Prior to sending the demand, the person failed to conduct an analysis comparing the claims in the patent to the target's products, services, and technology, or the analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent.
- (3) The demand lacks the information described in subdivision (1) of this subsection, the target requests the information, and the person fails to provide the information within a reasonable period of time.
- (4) The person demands payment of a license fee or response within an unreasonably short period of time.
- (5) The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license, or the person offers to license the patent for an amount that is based on the cost of defending a potential or actual lawsuit.
- (6) The claim or assertion of patent infringement is meritless, and the person knew or should have known that the claim or assertion is meritless; or the claim or assertion relies on an interpretation of the patent that was disclaimed during prosecution, and the person making the claim or assertion knows or should have known about the disclaimer, or would have known about the disclaimer if the person reviewed the patent's prosecution history.
- (7) The claim or assertion of patent infringement is deceptive.
- (8) The person or its subsidiaries or affiliates have previously or concurrently filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and (i) those threats or lawsuits lacked the

- information described in subdivision (1) of this subsection or (ii) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless.
- (9) The person making the claim or assertion sent the same demand or substantially the same demand to multiple recipients and made assertions against a wide variety of products and systems without reflecting those differences in a reasonable manner in the demands.
- (10) The person making the claim or assertion is aware of, but does not disclose, any final, nonfinal, or preliminary postgrant finding of invalidity or unpatentability involving the patent.
- (11) The person making the claim or assertion seeks an injunction when that is objectively unreasonable under the law.
- (12) Any other factor the court finds relevant.
- (b) A court may consider the following factors as evidence that a person has not made a bad-faith assertion of patent infringement:
- (1) The demand contains the information described in subdivision (1) of subsection (a) of this section.
- (2) Where the demand lacks the information described in subdivision (1) of subsection (a) of this section and the target requests the information, the person provides the information within a reasonable period of time.
- (3) The person engages in a good-faith effort to establish that the target has infringed the patent and to negotiate an appropriate remedy.
- (4) The person makes a substantial investment in the use of the patent or in the production or sale of a product or item that the person reasonably believes is covered by the patent. "Use of the patent" in the preceding sentence means actual practice of the patent and does not include licensing without actual practice.
- (5) The person is either (i) the inventor or joint inventor of the patent or, in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventor, is the original assignee or (ii) an institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education.
- (6) The person has demonstrated good-faith business practices in previous efforts to enforce the patent, or a substantially similar patent, or has successfully enforced the patent, or a substantially similar patent, through litigation.
- (7) Any other factor the court finds relevant.
- (c) This Article does not apply to any of the following:
- (1) A demand letter or assertion of patent infringement arising under any of the following:
- a. 7 U.S.C. § 136, et seq.
- b. 7 U.S.C. § 2321, et seq.
- c. 21 U.S.C. § 301, et seq.
- d. 35 U.S.C. § 161, et seq.
- e. 35 U.S.C. § 271(e)(2).
- f. 42 U.S.C. § 262.
- (2) A demand letter or assertion of patent infringement by or on behalf of (i) an institution of higher education incorporated under the laws of and with its principal offices in North Carolina or (ii) a technology transfer organization owned by or affiliated with the institution of higher education.
- (3) A demand letter or assertion of patent infringement by or on behalf of a nonprofit research organization recognized as exempt from federal income tax under 26 U.S.C. § 501(c)(3) incorporated under the laws of and with its principal offices in North Carolina, or a technology transfer organization owned by or affiliated with the organization.
- (4) A demand letter or assertion of patent infringement made by an operating entity or its affiliate.
- (d) Subject to the provisions of subsections (a) and (b) of this section, and provided the activities are not carried out in bad faith, nothing in this section shall be construed to deem it an

unlawful practice for any person who owns or has the right to license or enforce a patent to do any of the following:

- (1) Advise others of that ownership or right of license or enforcement.
- (2) Communicate to others that the patent is available for license or sale.
- (3) Notify another of the infringement of the patent.
- (4) Seek compensation on account of past or present infringement or for a license to the patent.

"§ 75-140. Bond.

(a) Upon motion by a target and a finding by the court that a target has established a reasonable likelihood that a person has made a bad-faith assertion of patent infringement in violation of this Chapter, the court shall require the person to post a bond in an amount equal to a good-faith estimate of the target's fees and costs to litigate the claim and amounts reasonably likely to be recovered under G.S. 75-141, conditioned upon payment of any amounts finally determined to be due to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this section shall not exceed five hundred thousand dollars (\$500,000).

(b) The court may waive the bond requirement of subsection (a) of this section if it finds the person has available assets equal to the amount of the proposed bond or for other good cause shown.

(c) If the person asserting patent infringement fails within 30 days to pay any fee or cost ordered by a court in a matter related to the asserted patent infringement, the amount not paid shall be paid out of the bond posted under subsection (a) of this section without affecting the obligation of the person asserting patent infringement to pay any remainder of those fees or costs not paid out of the bond.

"§ 75-141. Enforcement; remedies; damages.

(a) The Attorney General shall have the same authority under this Article to make rules, conduct civil investigations, bring civil actions, and enter into assurances of discontinuance as provided under this Chapter. In an action brought by the Attorney General pursuant to this section, the court may award or impose any relief available under this Chapter.

(b) A target or a person aggrieved by a violation of this Article or by a violation of rules adopted under this Article may bring an action in superior court against a person who has made a bad-faith assertion of patent infringement. A court may award to a plaintiff who prevails in an action brought pursuant to this subsection one or more of the following remedies:

- (1) Equitable relief.
- (2) Damages.
- (3) Costs and fees, including reasonable attorneys' fees.
- (4) Exemplary damages in an amount equal to fifty thousand dollars (\$50,000) or three times the total of damages, costs, and fees, whichever is greater.

(c) A court may award to a defendant who prevails in an action brought pursuant to this section costs and fees, including reasonable attorneys' fees, if the court finds the action was not well-grounded in fact and warranted by existing law or was interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) Joinder of Interested Parties. – In an action arising under subsection (a) or (b) of this section, the court shall grant a motion by the Attorney General or a target to join an interested party if the moving party shows that the party alleging infringement has no substantial interest in the patent or patents at issue other than making demands or asserting such patent claim in litigation.

(e) In an action arising under subsection (a) or (b) of this section, any person who has delivered or sent, or caused another to deliver or send, a demand to a target in North Carolina has purposefully availed himself or herself of the privileges of conducting business in this State and shall be subject to suit in this State, whether or not the person is transacting or has transacted any other business in this State. This Article shall be construed as a special jurisdiction statute in accordance with G.S. 1-75.4(2).

(f) If a party is unable to pay an amount awarded by the court pursuant to subsection (a) or (b) of this section, the court may find any interested party joined pursuant to subsection (d) of this section jointly and severally liable for the abusive patent assertion and make the award recoverable against any or all of the joined interested parties.

(g) This Article shall not be construed to limit rights and remedies available to the State of North Carolina or to any person under any other law and shall not alter or restrict the

Attorney General's authority under this Article with regard to conduct involving assertions of patent infringement."

SECTION 2.2. Section 2.1 of this act is effective when it becomes law and applies to causes of actions commenced on or after that date and demands made on or after that date.

PART III. SHAREHOLDER ASSENT TO EXCLUSIVE FORUM

SECTION 3. Article 7 of Chapter 55 of the General Statutes is amended by adding a new section to read:

"§ 55-7-50. Exclusive forum or venue provisions valid.

A provision in the articles of incorporation or bylaws of a corporation that specifies a forum or venue in North Carolina as the exclusive forum or venue for litigation relating to the internal affairs of the corporation shall be valid and enforceable."

PART IV. LIMIT SUCCESSOR ASBESTOS-RELATED LIABILITIES

SECTION 4.1. Chapter 99E of the General Statutes is amended by adding a new Article to read:

"Article 5.

"Successor Asbestos-Related Liability.

"§ 99E-40. Definitions.

The following definitions apply in this Article:

- (1) Asbestos claim. – Any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including any of the following:

 - a. The health effects of exposure to asbestos, including a claim for personal injury or death, mental or emotional injury, risk of disease or other injury, or the costs of medical monitoring or surveillance.
 - b. Any claim made by or on behalf of any person exposed to asbestos or a representative, spouse, parent, child, or other relative of the person.
 - c. Any claim for damage or loss caused by the installation, presence, or removal of asbestos.
- (2) Corporation. – Any corporation established under either domestic or foreign charter and includes a corporate subsidiary and any business entity in which a corporation participates or is a stockholder, a partner, or a joint venturer.
- (3) Successor. – A corporation that assumes or incurs or has assumed or incurred successor asbestos-related liabilities through operation of law, including, but not limited to, a merger or consolidation or plan of merger or consolidation related to such consolidation or merger or by appointment as administrator or as trustee in bankruptcy, debtor in possession, liquidation, or receivership and that became a successor before January 1, 1972. Successor includes any of that successor corporation's successors.
- (4) Successor asbestos-related liability. – Any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, which are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation with or into another corporation, or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under G.S. 99E-43, were or are paid or otherwise discharged or committed to be paid or otherwise discharged, by or on behalf of the corporation or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this State or another jurisdiction.
- (5) Transferor. – A corporation from which successor asbestos-related liabilities are or were assumed or incurred.

"§ 99E-41. Applicability.

The limitations in G.S. 99E-42 shall apply to any successor but shall not apply to any of the following:

- (1) Workers' compensation benefits paid by or on behalf of an employer to an employee under the provisions of Chapter 97 of the General Statutes, or a comparable workers' compensation law of another jurisdiction.
- (2) Any claim against a corporation that does not constitute a successor asbestos-related liability.
- (3) Any obligation under the National Labor Relations Act, 29 U.S.C. § 151, et seq., as amended, or under any collective bargaining agreement.
- (4) A successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor.

"§ 99E-42. Limitation on successor asbestos-related liability.

(a) Except as further limited in subsection (b) of this section, the cumulative successor asbestos-related liabilities of a successor corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The successor corporation does not have responsibility for successor asbestos-related liabilities in excess of this limitation.

(b) If the transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior merger or consolidation with a prior transferor, then the fair market value of the total assets of the prior transferor determined as of the time of the earlier merger or consolidation shall be substituted for the limitation set forth in subsection (a) of this section for purposes of determining the limitation of liability of a successor corporation.

"§ 99E-43. Establishing fair market value of total gross assets.

(a) A successor corporation may establish the fair market value of total gross assets for the purpose of the limitations under G.S. 99E-35 through any method reasonable under the circumstances, including either of the following:

- (1) By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arms-length transaction.
- (2) In the absence of other readily available information from which the fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

(b) Total gross assets include intangible assets.

(c) To the extent total gross assets include any liability insurance that was issued to the transferor whose assets are being valued for purposes of this section, the applicability, terms, conditions, and limits of such insurance shall not be affected by this statute nor shall this statute otherwise affect the rights and obligations of an insurer, transferor, or successor under any insurance contract and/or any related agreements, including, without limitation, preenactment settlements resolving coverage-related disputes, and the rights of an insurer to seek payment for applicable deductibles, retrospective premiums, or self-insured retentions or to seek contribution from a successor for uninsured or self-insured periods or periods where insurance is uncollectible or otherwise unavailable. Without limiting the foregoing, to the extent total gross assets include any such liability insurance, a settlement of a dispute concerning any such liability insurance coverage entered into by a transferor or successor with the insurers of the transferor before the effective date of this act shall be determinative of the total coverage of such liability insurance to be included in the calculation of the transferor's total gross assets.

"§ 99E-44. Adjustment.

(a) Except as provided in subsections (b), (c), and (d) of this section, the fair market value of total gross assets at the time of the merger or consolidation shall increase annually at a rate equal to the sum of the following:

- (1) The prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the merger or consolidation, unless the prime rate is not published in that edition of the Wall Street Journal, in which case any reasonable determination of the prime rate on the first day of the calendar year may be used.
- (2) One percent (1%).

(b) The rate defined in subsection (a) of this section shall not be compounded.

(c) The adjustment of the fair market value of total gross assets shall continue as provided in subsection (a) of this section until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by or on behalf of the successor corporation or a predecessor or by or on behalf of a transferor after the time of the merger or consolidation for which the fair market value of total gross assets is determined.

(d) No adjustment of the fair market value of total gross assets shall be applied to any liability insurance that may be included in the definition of total gross assets by subsection (c) of G.S. 99E-43.

"§ 99E-45. Scope of Article; application.

(a) This Article shall be liberally construed with regard to successors.

(b) This Article shall apply to all asbestos claims filed against a successor on or after the effective date of this act."

SECTION 4.2. Section 4.1 of this act becomes effective January 1, 2015.

PART V. SEVERABILITY AND EFFECTIVE DATE

SECTION 5.1. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

SECTION 5.2. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 1st day of August, 2014.

s/ Neal Hunt
Presiding Officer of the Senate

s/ Thom Tillis
Presiding Officer of the House of Representatives

Pat McCrory
Governor

Approved _____,m. this _____ day of _____, 2014