

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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SENATE BILL 648
Commerce Committee Substitute Adopted 5/7/13
PROPOSED COMMITTEE SUBSTITUTE S648-CSTG-76 [v.2]

5/21/2014 8:49:55 PM

Short Title: NC Commerce Protection Act of 2014.

(Public)

Sponsors:

Referred to:

April 4, 2013

A BILL TO BE ENTITLED
AN ACT TO CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY
GENERAL AND PRIVATE ATTORNEYS, TO CREATE TRANSPARENCY IN
CLAIMS AGAINST PERSONAL INJURY TRUSTS, TO AMEND THE LAWS
GOVERNING PRODUCT LIABILITY ACTIONS, TO PREVENT THE ABUSE OF
PATENTS, AND TO ALLOW FOR SHAREHOLDER ASSENT TO EXCLUSIVE
FORUM.

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.



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"§ 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 exists 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 a contingency fee, exclusive of reasonable costs and expenses, in excess of twenty-two and one-half percent (22.5%).

(b) In its discretion, the court may reduce the private attorney's fee after the State agency has reached a settlement or obtained an award.

(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 requirements 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, from the inception of the contract until at least four years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of those attorney services. In addition, the private attorney shall maintain detailed contemporaneous time records for all attorneys and paralegals working on the matter in increments of no greater than one-tenth of an hour and shall promptly provide these records to the Attorney General, upon request. All records maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(d) By February 1 of each year, 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. CREATE TRANSPARENCY IN CLAIMS AGAINST ASBESTOS AND SILICA TRUSTS

SECTION 2.1 Chapter 99E of the General Statutes is amended by adding a new article to read:

"Article 6." Asbestos And Silica Trusts Claims Transparency Act."§ 99E-45. Title.

This Article shall be known and may be cited as the "Asbestos And Silica Trusts Claims Transparency Act."

"§ 99E-46. Definitions.

The following definitions apply to this Article:

- (1) "Asbestos claim" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on, or related to the health effects of exposure to asbestos, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance, and any other derivative claim made by or on behalf of a person exposed to asbestos or a representative, spouse, parent, child, or other relative of that person. The term does not include a claim for compensatory benefits pursuant to workers' compensation law or veterans' benefits.
- (2) "Asbestos or silica trust" means a government-approved or court-approved trust, qualified settlement fund, compensation fund, or claims facility created as a result of an administrative or legal action, a court-approved bankruptcy, or pursuant to 11 U.S.C. § 524(g) or 11 U.S.C. § 1121(a) or other applicable provision of law that is intended to provide compensation to claimants arising out of, based on, or related to the health effects of exposure to asbestos or silica.
- (3) "Plaintiff" means a person asserting an asbestos claim or silica claim, a decedent if the asbestos claim or silica claim is brought through or on behalf of an estate, and a parent or guardian if the asbestos claim or silica claim is brought through or on behalf of a minor or incompetent.
- (4) "Silica claim" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on, or related to the health effects of exposure to silica, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance, and any other derivative claim made by or on behalf of a person exposed to silica or a representative, spouse, parent, child, or other relative of that person. The term does not include a claim for compensatory benefits pursuant to workers' compensation law or veterans' benefits.
- (5) "Trust claims materials" means a final executed proof of claim and all other documents and information related to a claim against an asbestos or silica trust, including claims forms and supplementary materials, affidavits, depositions and trial testimony, work history, and medical and health records, documents reflecting the status of a claim against an asbestos or silica trust, and if the trust claim has settled, all documents relating to the settlement of the trust claim.
- (6) "Trust governance documents" means all documents that relate to eligibility and payment levels, including claims payment matrices, trust distribution procedures, or plans for reorganization, for an asbestos or silica trust.

"§ 99E-47. Required disclosures by plaintiff.

(a) Within 30 days after the effective date of this Article or within 30 days after an asbestos claim or silica claim is filed, the plaintiff shall provide all parties with a sworn statement identifying all claims against asbestos and silica trusts that have been filed by the plaintiff or on the behalf of the plaintiff, including with respect to conditions other than those

that are the basis of the immediate asbestos claim or silica claim, or that potentially could be filed by the plaintiff or on the behalf of the plaintiff against an asbestos or silica trust. For each claim, the statement shall include the name, address, and contact information for the asbestos or silica trust; the amount claimed or to be claimed by the plaintiff; the date the plaintiff filed the claim, if the plaintiff has done so; the disposition of the claim, if it has been disposed; and whether there has been a request to defer, delay, suspend, or toll the claim. The sworn statement shall include an attestation from the plaintiff, under penalties of perjury, that the sworn statement is complete and is based on an investigation of all potential claims against asbestos or silica trusts.

(b) The plaintiff shall provide to all parties all trust claims materials for each claim that has been filed by the plaintiff or on the behalf of the plaintiff against an asbestos or silica trust, including with respect to conditions other than those that are the basis for the immediate action for an asbestos claim or silica claim.

(c) The plaintiff shall supplement the information and materials provided pursuant to this section within 30 days after the plaintiff files an additional asbestos claim or silica claim, supplements an existing claim, or receives additional information or materials related to any claim or potential claim against an asbestos or silica trust.

(d) Failure by the plaintiff to provide to all parties all trust claims materials as required by this section shall constitute grounds for the court to decline to set an initial trial date or extend the trial date in an asbestos or silica action.

"§ 99E-48. Discovery; use of materials.

(a) Trust claims materials and trust governance documents are presumed to be relevant and authentic and are admissible in evidence. No claims of privilege apply to any trust claims materials or trust governance documents.

(b) A defendant in an action for a personal injury claim may seek discovery from an asbestos or silica trust. The plaintiff may not claim privilege or confidentiality to bar discovery and shall provide consent or other expression of permission that may be required by the asbestos or silica trust to release information and materials sought by the defendant.

"§ 99E-49. Scheduling trial; stay of action.

(a) The court may not schedule a trial in an action for an asbestos claim or silica claim until at least 180 days after the plaintiff makes the disclosures required under G.S. 99E-47.

(b) If a plaintiff identifies a potential claim against an asbestos or silica trust under G.S. 99E-47, the action for an asbestos claim or silica claim shall be stayed until the plaintiff files such claims against an asbestos or silica trust and provides to all parties all trust claims materials for each claim. The plaintiff shall also state whether there has been a request to defer, delay, suspend, or toll the claim against the asbestos or silica trust.

"§ 99E-50. Identification of additional or alternative personal injury trusts by defendant.

(a) Not less than 75 days before trial, if a defendant identifies a potential claim against an asbestos or silica trust not identified by the plaintiff that the defendant reasonably believes the plaintiff can file, the defendant may move the court for an order to require the plaintiff to file the claim against an asbestos or silica trust. The defendant shall produce or describe the documentation it possesses or is aware of in support of the motion.

(b) Within 10 days of receiving the defendant's motion under subsection (a) of this section, the plaintiff shall, for each potential claim against an asbestos or silica injury trust identified by the defendant, either:

(1) File a claim against an asbestos or silica trust; or

(2) File a written response with the court setting forth why there is insufficient evidence for the plaintiff to file the claim against the asbestos or silica trust.

(c) If the court determines that there is a sufficient basis for the plaintiff to file claim against an asbestos or silica trust identified by a defendant under subsection (a) of this section, the court shall order the plaintiff to file the claim against the asbestos or silica trust and shall

1 stay the immediate action until the plaintiff files the claim against the asbestos or silica trust
2 and provides to all parties all trust claims materials for each claim the plaintiff filed against the
3 asbestos or silica trust.

4 (d) Notwithstanding any other provision of this section, if a plaintiff produces
5 additional information that supports the filing of an additional claim against an asbestos or
6 silica trust, a defendant may file a motion to stay the immediate action within seven days of
7 receiving the additional information.

8 (e) Not less than 60 days after the plaintiff provides the documentation required under
9 this section, the court may schedule an action for an asbestos claim or silica claim for trial.

10 (f) Not less than 30 days prior to trial in an action for an asbestos claim or silica claim,
11 the court shall enter into the record a document that identifies each claim the plaintiff has made
12 against an asbestos or silica trust.

13 **"§ 99E-51. Valuation of personal injury trust claims; judicial notice.**

14 (a) If a plaintiff proceeds to trial in an action for an asbestos claim or silica claim before
15 a claim against an asbestos or silica trust is resolved, there is a rebuttable presumption that the
16 plaintiff is entitled to, and will receive, the compensation specified in the trust governance
17 document applicable to the claim at the time of trial. The court shall take judicial notice that the
18 trust governance document specifies compensation amounts and payment percentages and shall
19 establish an attributed value to the plaintiff's claim against an asbestos or silica trust.

20 (b) Trust claim materials that are sufficient to entitle a claim to consideration for
21 payment under the applicable trust governance documents may be sufficient to support a jury
22 finding that the plaintiff may have been exposed to products for which the trust was established
23 to provide compensation and that such exposure may be a substantial factor in causing the
24 plaintiff's injury that is at issue in the action for an asbestos claim or silica claim.

25 **"§ 99E-52. Setoff; credit.**

26 In any asbestos claim or silica claim for which damages are awarded, a defendant is entitled
27 to a setoff or credit in the amount of the valuation established under G.S. 99E-51 and any
28 amount the plaintiff has been awarded from an asbestos or silica trust identified in
29 G.S. 99E-50(f). If multiple defendants are found liable for damages, the court shall distribute
30 the amount of setoff or credit proportionally between the defendants, according to the liability
31 of each defendant.

32 **"§ 99E-53. Failure to provide information; sanctions.**

33 A plaintiff who fails to provide all of the information required under this Article is subject
34 to sanctions as provided in Rules 11, 26, and 37 of the North Carolina Rules of Civil Procedure
35 and any other relief for the defendants that the court considers just and proper.

36 **"§ 99E-54. Application.**

37 This Article shall apply to all actions for asbestos claims or silica claims filed on or after
38 the effective date of the Article. The Article shall also apply to all pending actions for asbestos
39 claims or silica claims in which trial has not commenced as of the effective date of the Article."

40 **SECTION 2.2** Section 2.1 of this act becomes effective July 1, 2014.

41
42 **PART III. AMEND THE LAWS GOVERNING PRODUCTS LIABILITY ACTIONS**

43 **SECTION 3.1** G.S. 99B-1 reads as rewritten:

44 **"§ 99B-1. Definitions.**

45 When used in this Chapter, unless the context otherwise requires:

46 (1) "Claimant" means a person or other entity asserting a claim and, if said
47 claim is asserted on behalf of an estate, an incompetent or a minor,
48 "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.

49 (1a) "Government agency" means this State or the United States, or any agency
50 of this State or the United States, or any entity vested with the authority of
51 this State or of the United States to issue rules, regulations, orders, or

standards concerning the design, manufacture, packaging, labeling, or advertising of a product or provision of a service.

(2) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

(3) "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.

(4) "Seller" includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product."

SECTION 3.2 Chapter 99B of the General Statutes is amended by adding the following new section to read:

"§ 99B-13. Regulatory compliance.

(a) No manufacturer or seller shall be held liable in any product liability action if any one of the following apply:

(1) The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license, or similar determination of a government agency, where the approval, license, or similar determination is relevant to the event or risk allegedly causing the harm.

(2) The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where the statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.

(3) The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

(b) This section does not apply if the claimant proves that the manufacturer or seller at any time before the event that allegedly caused the harm did any of the following:

(1) Sold the product after the effective date of an order of a government agency to remove the product or service from the market, withdraw its approval, or substantially alter its terms of approval in a manner that would have avoided the claimant's alleged injury.

(2) Intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product, and such information is relevant to the harm which the claimant allegedly suffered.

(3) Made an illegal payment to an official or employee of a government agency for the purpose of securing or maintaining approval of the product.

(c) Nothing in this section shall be construed to (i) expand the authority of any State agency or State agent to adopt or promulgate standards or regulations where no such authority

previously existed; (ii) reduce the scope of any limitation on liability based on compliance with the rules or regulations of a government agency applicable to a specific act, transaction, person, or industry; or (iii) affect the liability of a service provider based on rates filed with and reviewed or approved by a government agency."

SECTION 3.3 Sections 3.1 and 3.2 of this act become effective October 1, 2014, and apply to actions commenced on or after that date.

PART IV. PREVENT THE ABUSE OF PATENTS

SECTION 4.1 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, or 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 small- and medium-sized 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 assertion 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. Nothing in this Act is intended to alter current law concerning piercing the corporate veil.

"§ 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 civil action.

(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: (i) research and technical or experimental work to create, test, qualify, modify,

or validate technologies or processes for commercialization of goods or services, (ii) manufacturing, or (iii) 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.

- 1 (9) The person making the claim or assertion sent the same demand or
2 substantially the same demand to multiple recipients and made assertions
3 against a wide variety of products and systems without reflecting those
4 differences in a reasonable manner in the demands.
- 5 (10) The person making the claim or assertion is aware of, but does not disclose,
6 any final, nonfinal, or preliminary postgrant finding of invalidity or
7 unpatentability involving the patent.
- 8 (11) The person making the claim or assertion seeks an injunction when that is
9 objectively unreasonable under the law.
- 10 (12) Any other factor the court finds relevant.
- 11 (b) A court may consider the following factors as evidence that a person has not made a
12 bad-faith assertion of patent infringement:
- 13 (1) The demand contains the information described in subdivision (a)(1) of this
14 section.
- 15 (2) Where the demand lacks the information described in subdivision (a)(1) of
16 this section and the target requests the information, the person provides the
17 information within a reasonable period of time.
- 18 (3) The person engages in a good-faith effort to establish that the target has
19 infringed the patent and to negotiate an appropriate remedy.
- 20 (4) The person makes a substantial investment in the use of the patent or in the
21 production or sale of a product or item that the person reasonably believes is
22 covered by the patent. "Use of the patent" in the preceding sentence means
23 actual practice of the patent and does not include licensing without actual
24 practice.
- 25 (5) The person is either (i) the inventor or joint inventor of the patent or, in the
26 case of a patent filed by and awarded to an assignee of the original inventor
27 or joint inventor, is the original assignee or (ii) an institution of higher
28 education or a technology transfer organization owned or affiliated with an
29 institution of higher education.
- 30 (6) The person has demonstrated good-faith business practices in previous
31 efforts to enforce the patent, or a substantially similar patent, or has
32 successfully enforced the patent, or a substantially similar patent, through
33 litigation.
- 34 (7) Any other factor the court finds relevant.
- 35 (c) This Article does not apply any of the following:
- 36 (1) A demand letter or assertion of patent infringement arising under any of the
37 following:
- 38 a. 7 U.S.C. 136 et seq.
39 b. 7 U.S.C. 2321 et seq.
40 c. 21 U.S.C. 301 et seq.
41 d. 35 U.S.C. 161 et seq.
42 e. 35 U.S.C. 271(e)(2).
43 f. 42 U.S.C. 262.
- 44 (2) A demand letter or assertion of patent infringement by or on behalf of (i) an
45 institution of higher education incorporated under the laws of and with its
46 principal offices in North Carolina or (ii) a technology transfer organization
47 owned by or affiliated with the institution of higher education.
- 48 (3) A demand letter or assertion of patent infringement by or on behalf of a
49 nonprofit research organization recognized as exempt from federal income
50 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 that 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) 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.

(d) In an action arising under subsection (a) or (b) of this section, any person who has delivered or sent a demand to a target in North Carolina has purposefully availed himself 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).

(e) 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 (c) 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.

(f) 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 4.2 Section 4.1 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 V. SHAREHOLDER ASSENT TO EXCLUSIVE FORUM

SECTION 5.1 Article 7 of Chapter 55 of the General Statutes is amended by adding a new section to read:

"§ 55-7-50. Shareholder assent to exclusive forum.

A provision included in the articles of incorporation of a corporation that provides that the State courts of the State of North Carolina shall be the exclusive forum for any derivative proceeding under this Chapter shall be effective and enforceable against any shareholder who shall have voted in favor of approval of any amendment to include such a provision in the articles of incorporation and any shareholder with respect to any shares acquired after the inclusion of such a provision in the articles of incorporation."

SECTION 5.2 Section 5.1 of this act is effective when it becomes law and applies to all articles of incorporation and all amendments to articles of incorporation adopted on or after that date.

PART VI. SEVERABILITY AND EFFECTIVE DATE

SECTION 6.1 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 6.2 Except as otherwise provided, this act is effective when it becomes law.