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Comments to Senate Subcommittee on Pharmaceutical Immunity

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Good afternoon, Senators. My name is Kim Wilson and I am here, again, on behalf of North Carolina Advocates for Justice and all individuals who have been or will be injured by a dangerous prescription drug. I have carefully listened to all the speakers and your comments and questions during the subcommittee [only two, until now] meetings; and, I can tell that you are taking this proposed legislation very seriously and want to do what's best for North Carolina. I want to leave you with the following to think about as you decide whether this proposed legislation is good for the citizens of North Carolina:

First, North Carolina already affords special legal protection to pharmaceutical companies to the detriment of injured residents by being only one of five states that do not recognize strict liability for products. In 45 other states, a manufacturer is strictly liable if a consumer is injured by a defect in the product, with no requirement that the plaintiff prove negligence. In North Carolina, by contrast, proof of negligence is always required.

Second, North Carolina is a contributory negligence state. We are one of four states in the country that embrace the proposition that if a corporation is 99% at fault in injuring one of our citizens, but the injured person is 1% at fault, the 1% bars all recovery against the negligent corporation. Residents in 46 other states do not bear this burden.

Third, in North Carolina, because of the learned intermediary defense, the pharmaceutical company can blame the local doctor when adequate warnings about a drug are not passed along to patients. And, trust me, they always do.

Fourth, the current North Carolina product liability statute already includes an "FDA compliance defense." Under N.C.G.S. 99B-6(b)(4), judges and juries must consider the fact that a drug was approved by the FDA when determining liability against a pharmaceutical company in a failure to warn case.

Now, let's talk about New Jersey and Michigan. As you may recall, the defense lawyer from New Jersey who currently represents Johnson & Johnson and other pharmaceutical companies came down here to tell you that the "rebuttable presumption" in New Jersey has not stopped litigation there; and that the bill you are considering is very similar to New Jersey law. This is simply not accurate. Unlike the proposed bill, New Jersey's rebuttable presumption does not have a "clear and convincing" standard of proof. Additionally, NJ recognizes strict liability for products and is a modified comparative negligence state.

Michigan is the only state that affords total immunity to pharmaceutical companies based on the FDA approval defense. The legislation proposed here will have the same effect because injured residents will not be able to obtain legal representation. Big PHRMA understands this. The pharmaceutical companies know that all they need is a statute that makes it financially impossible for a lawyer to accept a contingency fee case. If an injured resident and an attorney face not only the learned intermediary defense and the contributory negligence defense, but also a "rebuttable presumption" which can only be overcome by "clear and convincing" evidence,

lawyers will no longer be able represent North Carolinians injured by unsafe drugs. This legislation, in effect, will deny access to the courtroom to injured North Carolina residents.

Senators, I leave you with two questions. First, does big PHRMA really need more protection? Second, do the residents of North Carolina deserve less protection? The answer to both questions is no.

Thank you.