IN THE SUPREME COURT OF OHIO

LINDA ACKISON, Administratrix of the estate of Danny Ackison,	:	Case Nos. 2007-0219; 2007-0415
Appellee,	:	On appeal from the Lawrence County Court of Appeals, Fourth Appellate District
v.	:	
	:	Court of Appeals Case No. 05 CA 46
ANCHOR PACKING Co., *et al.*,	:	
Appellants	:	

AMICI CURIAE BRIEF OF AMERICAN INSURANCE ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF APPELLANTS

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The American Insurance Association, National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Chemistry Council — collectively "*amici*" — respectfully request that this Court overturn the decision below and declare Ohio Rev. Code §§ 2307.91 *et seq.* to be constitutional as applied retroactively.

STATEMENT OF THE QUESTION PRESENTED

The question before this Court is whether Ohio Rev. Code §§ 2307.91 *et seq.*, which outlines asbestos claims procedures, is constitutional as applied to claims pending at the time of its enactment.

INTEREST OF *AMICI CURIAE*

As organizations that represent Ohio companies and their insurers, *amici* have a significant interest in the fair and effective administration of justice. In particular, *amici* have an interest in ensuring that Ohio courts respect the General Assembly's authority to enact legislation addressing serious problems in asbestos litigation and to do so retroactively when necessary to accomplish the General Assembly's legitimate public policy goals.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files amicus briefs in cases that will impact small businesses nationwide.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

Founded in 1895, the National Association of Mutual Insurance Companies ("NAMIC") is a full-service national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto

Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Ohio, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF FACTS

Amici adopt Appellants' Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has described asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor* (1997), 521 U.S. 591, 597. Asbestos lawsuits have forced an estimated eighty-five employers into bankruptcy, and the litigation is spreading. Payments to deserving asbestos claimants are threatened.

Studies indicate that *up to ninety percent* of recent asbestos plaintiffs *have no physical impairment* that affects their daily activities. Many of these claims have been generated through unreliable mass screenings. The presence of the non-sick "on court dockets and in settlement

negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now." Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 393 (1993) [hereinafter Edley & Weiler]. "The extraordinary volume of nonmalignant asbestos cases continues to strain federal and state courts." *Wilson v. AC&S, Inc.* (Ohio Ct. App. 12th Dist. 2006), 864 N.E.2d 682, 689, *cause dismissed*, (Ohio 2007) 864 N.E.2d 645.

Other claimants, such as the decedent's estate in this action, have filed asbestos actions without credible evidence by a competent medical authority that exposure to asbestos contributed substantially to their injury or death. Here, the plaintiff's death certificate states that his cause of death was congestive heart failure and aortic stenosis. Such speculative actions deplete resources needed to provide timely and adequate compensation to deserving claimants who can objectively demonstrate an impairing condition for which exposure to asbestos was a substantial contributing factor.

In 2004, the Ohio General Assembly enacted H.B. 292, 125th Gen. Assem., Reg. Sess. (Ohio 2004) (the "Act") in response to an overwhelming public necessity to address these problems. A primary goal of the Act is to preserve resources for meritorious asbestos claimants and allow those claims to be resolved more quickly by deferring the enormous number of asbestos claims involving persons who lack physical impairment and causation. By changing the *timing* of a plaintiff's traditional proof requirements, the Act helps to ensure that resources needed to pay deserving asbestos claimants are not depleted in premature, meritless, or speculative litigation. Importantly, statutes of limitations are tolled for claimants who cannot make the Act's requisite prima facie showing; these individuals may bring a claim in the future

should they demonstrate an impairing condition caused by asbestos. Thus, the law provides a benefit to claimants who might have been time-barred under previous Ohio law.

Plaintiff would have this Court nullify the General Assembly's finding of a public necessity for the Act. This result is not supported by Ohio law or sound policy. *Amici* urge this Court instead to respect the General Assembly's authority to enact meaningful asbestos litigation reform to promote the broad public policy needs of the State. *See generally* Victor E. Schwartz *et al., Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000). As we have explained:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

Accordingly, *amici curiae* ask this Court to overturn the decision below and declare Ohio Rev. Code §§ 2307.91 *et seq.* to be constitutional as applied retroactively.

ARGUMENT

I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THE SUBJECT APPEAL MUST BE CONSIDERED

A. The Recent Asbestos Litigation Environment

Courts and commentators have recognized since the early 1990s the extraordinary problems created by the "elephantine mass" of asbestos cases. *Norfolk & W. Ry. Co. v. Ayers* (2003), 538 U.S. 135, 166 (quoting *Ortiz v. Fibreboard Corp.* (1999), 527 U.S. 815, 821); *see also In re Combustion Eng'g, Inc.* (3d Cir. 2005), 391 F.3d 190, 200 ("For decades, the state and

federal judicial systems have struggled with an avalanche of asbestos lawsuits.").[1] As far back as 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation found:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 2-3 (Mar. 1991), *reprinted at* 6:4 Mealey's Litig. Rep.: Asbestos 2 (Mar. 15, 1991).

By 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162 [hereinafter RAND Rep.]. The litigation was accelerating when the General Assembly passed the Act at issue.

1. Filings by Claimants Who Are Not Sick

"By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic." James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 823 (2002).[2] The RAND Institute for

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1 *See also* 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); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945 (2003).

2 *See also* Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186, *available at* 2004 WLNR 17888598 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds'--that is, they have slight or no physical symptoms."); Kathryn Kranhold, *GE To Record $115 Million Expense for Asbestos Claims*, Wall St. J., Feb. 17, 2007, at A3, *abstract available at* 2007 WLNR 3378738 (GE reporting that more than 80% of its

(Footnote continued on next page)

Civil Justice concluded, "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living." RAND Rep., *supra*, at 76.

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003). "There often is no medical purpose for these screenings and claimants receive no medical follow-up." *Id.* *U.S. News & World Report* has described the claimant recruiting process:

> To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WLNR 7718069. These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. *See Owens Corning v. Credit Suisse First Boston* (D. Del. 2005), 322 B.R. 719, 723 ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of

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pending cases involve claimants "who aren't sick."); Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, Wall St. J., Jan. 8, 2001, at B12, *abstract available at* 2001 WLNR 2004812 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people"); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A15.

claims by persons who had never experienced adverse symptoms.").[3] It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 69 (2003); *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

Many X-ray interpreters (called "B Readers") hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning*, 322 B.R. at 723; *see also* American Bar Association Commission on Asbestos Litigation, *Report to the House of Delegates* (2003), *available at* http://www.abanet.org/leadership/full_report.pdf (litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding 50% and sometimes reaching 90%);[4] *see also* Joseph N. Gitlin *et al.*, *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004) (B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays); John M. Wylie II, *The $40 Billion Scam*, Reader's Digest, Jan. 2007, at 74; Editorial, *Beware the B-Readers*, Wall St. J., Jan. 23, 2006, at A16, *abstract available at* 2006

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3 *See also In re Joint E. & S. Dists. Asbestos Litig.* (E.D.N.Y. & S.D.N.Y. 2002), 237 F. Supp. 2d 297, 309 (asbestos claimants "are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media."); *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.* (D. Mass. 1989), 718 F. Supp. 1053, 1057 ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

4 As a result of its findings, the Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA's House of Delegates adopted the Commission's proposal in February 2003. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-Elect, Am. Bar Ass'n), *available at* 2003 WL 785387.

WLNR 1332176.[5] As one physician explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

2. Bankruptcies and the Economic Impact of the Litigation

"For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d at 201, including an estimated eighty-five employers. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; *see also* Edley & Weiler, *supra*, at 392 (each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."). RAND found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." RAND Rep., *supra*, at xxvii.

Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues studied the direct impact of asbestos bankruptcies on workers and found that

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[5] One of the earliest detailed reviews of B Reads in litigation arose out of information distributed to tire workers, which said that 94% of the workers screened at one location and 64% at another were found to have asbestosis. *See Raymark Indus., Inc. v. Stemple* (D. Kan. May 30, 1990), 1990 WL 72588. In 1986, the National Institute for Occupational Safety and Health looked into the matter and found that only 0.2% of the workers they evaluated had physical changes consistent with asbestosis. *See* J. Jankovic & R.B. Reger, *Health Hazard Evaluation Report*, NIOSH Rep. No. HETA 87–017–1949 (Dep't Health & Human Servs., NIOSH 1989). In 1998, an audit by the Manville Settlement Trust determined that 59% of X-ray readings relied upon by plaintiffs' counsel to show asbestos-related abnormalities were inaccurate. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d at 309. Another review conducted by medical experts appointed by an Ohio federal judge found that 65% of the claimants reviewed had no asbestos-related conditions and 20% presented only pleural plaques. *See* Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37-39 (1991).

bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,* 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost up to $200 million in wages, *see id.* at 76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83; *see also* Jonathan Orszag, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 44 S. Tex. L. Rev. 1077 (2003).

Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003) [hereinafter *Secondary Impacts of Asbestos Liabilities*]. For every ten jobs lost directly, the community may lose eight additional jobs. *See id.* at 8. The shutting of plants and job cuts decrease per capita income, leading to a decline in real estate values, and lower federal, state, and local tax receipts. *See id.* at 11-13.

Bankrupt companies and communities are not the only ones affected:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003). A Managing Director at Goldman Sachs also explained, "the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy

as a whole." *Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, before the Sen. Comm. on the Judiciary*, 107th Cong. (June 4, 2003) (statement of Scott Kapnick, Managing Director, Goldman Sachs).

RAND has estimated that $70 billion was spent in asbestos litigation through 2002; future costs could reach $195 billion. *See* RAND Rep., *supra*, at 92, 106. To put these vast sums in perspective, former United States Attorney General Griffin Bell has pointed out that asbestos litigation costs will exceed the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002), *available at* http://www.nlcpi.org.

3. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314; *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

More than 8,500 defendants have now become "ensnarled in the litigation." *In re Joint E. & S. Dists. Asbestos Litig.* (E.D.N.Y. & S.D.N.Y. 1991), 129 B.R. 710, 747-48, *vacated*, 982 F.2d 721 (2d Cir. 1992); Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, Columns – Raising the Bar In Asbestos Litig., Aug. 2004, at 5. Many of these defendants are

familiar household names. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. Other defendants include small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *abstract available at* 2003 WLNR 3099209. Nontraditional defendants now account for over half of asbestos expenditures. *See* RAND Rep., *supra*, at 94.

B. Ohio's Experience Reflects Reflects National Trends to a Greater Degree Than Most Other States

The asbestos litigation environment in Ohio has followed the same troubling national trends, and to a greater degree than in most other states. These impacts led Ohio to become the first state to enact legislation outlining asbestos claims procedures. As Ohio Senator Steve Stivers acknowledged, "We are one of the states suffering the most from the asbestos crisis. Jobs have been lost. Otherwise healthy companies have gone bankrupt because of asbestos lawsuits. Because we are the poster child for abuse, we should be a poster child for reform." *Bill Curbing Asbestos Suits Signed into Law by Ohio Gov.*, Cong. Daily, June 7, 2004, *available at* 2004 WLNR 17660524.

The legislative history of the Act stated in no uncertain terms Ohio's major involvement in asbestos litigation. Findings adopted by the Ohio General Assembly in the Act describe how before 1998, Ohio, along with Mississippi, New York, West Virginia, and Texas, accounted for nine percent of asbestos cases filed nationally. *See* H.B. 292, *supra*. Between 1998 and 2000, however, the percentage of asbestos claims filed in Ohio and these other states jumped to sixty percent of all cases filed nationally. *See id.* According to estimates by one of the judges appointed by the Supreme Court of Ohio to manage the Cuyahoga County case management order for asbestos claims, there were approximately 12,800 pending asbestos cases in 1999, and

over 39,000 pending cases by the end of 2003. *See id.* The General Assembly concluded, "Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos claims." *Id.; see also Wilson*, 864 N.E.2d at 689. The General Assembly further recognized that the "vast majority" of asbestos claimants in Ohio did not suffer from asbestos-related impairment. *Id.; see also Wilson*, 864 N.E.2d at 689.

Ohio businesses have borne a direct and substantial economic impact from asbestos litigation. According to the General Assembly's findings, at least five Ohio-based companies were forced into bankruptcy by 2004 due to the "unending flood of asbestos cases." *Id.* For example, Toledo-based Owens Corning filed for bankruptcy after facing over 400,000 asbestos-related injury claims. *See id.* The company had previously made payments to 440,000 asbestos claimants. *See* John Seewer, *Owens Corning Files Chapter 11 Protection*, Assoc. Press, Oct. 6, 2000, *available at* 2000 WLNR 9027664. As a result of its asbestos woes, the company laid off 275 workers from its Granville plant. *See* H.B. 292, *supra.* The ripple effect of these job losses were predicted to result in a total loss of 500 jobs and a $15 to $20 million annual reduction in regional income. *See* Kurtis A. Tunnell *et al.*, Commentary, *New Ohio Asbestos Reform Law Protects Victims and State Economy*, 26:22 Andrews Asbestos Litig. Rep. 10 (Aug. 26, 2004); *see also Secondary Impacts of Asbestos Liabilities, supra.* Owens Corning's bankruptcy also affected the retirement planning of the 1,000 employees at the firm's Toledo headquarters and 19,000 others elsewhere. *See* Gary Pakulski, *Asbestos Lawsuits Hurt Defendants' Workers*, The Blade (Toledo), Dec. 27, 2002, *available at* 2002 WLNR 10599324.

Barberton-based Babcock & Wilcox faced a similar predicament. The company, which employs about 1,000 in Barberton, was forced to file for bankruptcy court protection as a result of over 400,000 asbestos-related lawsuits. *See* Thomas Gerdel, *Babcock Seeks Bankruptcy*

Protection; Barberton Boilermaker Cites Asbestos Lawsuit Demands, Cleveland Plain Dealer, Feb. 23, 2000, at C1, *available at* 2000 WLNR 9008572; *B&W Emerges From Chapter 11*, Akron Beacon Journal (Ohio), Feb. 23, 2006, at D2, *available at* 2006 WLNR 3113250.

All told, at least twenty large Ohio companies have been targets of asbestos litigation. *See* Jon Craig, *Senate OKs New Limits on Lawsuits for Asbestos*, Columbus Dispatch, May 12, 2004, at 1B, *available at* 2004 WLNR 21190291. Even for those companies able to ward off bankruptcy, the cost of the litigation has have been considerable. For example, Owens-Illinois, Inc. and Dana Corp. have estimated their total asbestos liability at $7.5 billion to $21 billion. *See* Homer Brickley, *Toledo, Ohio Firms Try to Manage Asbestos Liability Claims*, The Blade (Toledo), Mar. 24, 2005, *available at* 2005 WLNR 4601331.

In addition, RPM International, which employs several thousand people in Ohio, has reported that asbestos litigation has cost the company $270 million since 2000. *See Trying to Keep Momentum Successor at CEO Hopes to Mimic His Forefathers at RPM and Surpass Their Success*, Cleveland Plain Dealer, Sep. 10, 2006, at G1, *available at* 2006 WLNR 15770794. This figure is even more alarming considering that between 1985 and 2000, the company's total asbestos costs were only $2 million. *See id.*

The surge of asbestos lawsuits, fueled by questionable mass screening practices, threaten payments to meritorious claimants in Ohio, as elsewhere. Some Ohio plaintiffs did not even know they had an asbestos lawsuit filed on their behalf. *See* Stephen Hudak, *Proposals Aim to Limit Rising Asbestos Claims*, Cleveland Plain-Dealer, May 28, 2003, at A1, *available at* 2003 WLNR 416996.

It was these public policy issues that the General Assembly considered in developing the procedures in the Act. This is also what lead the General Assembly to expressly intend that the

Act be applied retroactively. *See Wilson*, 864 N.E.2d at 694. If the Act is not enforced retroactively, "plaintiffs who cannot make the necessary prima facie showing would be permitted to proceed to trial, 'clog up' the court's busy trial docket, limit the access of current and future plaintiffs who make the requisite prima facie showing, and deny those plaintiffs who do make the requisite showing priority in obtaining a trial setting." *In re Asbestos Litig.* (Fla. App. 2006), 933 So. 2d 613, 617-18 (upholding retroactive application of Florida's asbestos claims procedures); *see also Robinson v. Crown Cork & Seal Co., Inc.* (Tex. App. May 2, 2006), 2006 WL 1168782 (upholding retroactive application of successor asbestos-related liability reform law), *pet. for rev. filed* (Tex. Nov. 6, 2006). As Ohio's Twelfth District Court of Appeals recently explained:

> There are at least 35,000 asbestos personal-injury cases pending in Ohio state courts. If the 233 Ohio state-court general jurisdictional judges started trying these asbestos cases today, each would have to try over 150 cases before retiring the current docket. That figure conservatively computes to at least 150 trial weeks, or more than three years per judge to retire the current docket.

Wilson, 864 N.E.2d at 694 (internal citations omitted); *see also Stahlheber v. Du Quebec, LTEE* (Ohio Ct. App. 12th Dist. Dec. 28, 2006), 2006 WL 3833888 (asbestos claims procedures did not violate ban on retroactive legislation).

II. OHIO'S ASBESTOS MEDICAL CRITERIA LAW WAS A REASONABLE PUBLIC POLICY RESPONSE

The General Assembly passed the Act in response to an overwhelming public necessity to address the problems described herein. *See* H.B. 342, 125th Gen. Assem., Reg. Sess. (Ohio 2004). These laws establish fair procedures for claimants to bring or maintain asbestos claims. The core of these laws requires the submission of evidence of impairment and causation early in the case. The purpose is to allow meritorious claims to be resolved more quickly by deferring the enormous number of claims involving persons who lack physical impairment and causation.

"By limiting cases to those claimants suffering from actual, physical impairment, the statutes reserve judicial resources and corporate money for those claimants that need it most." Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm. & Mary L. Rev. 2043, 2061-62 (2007); *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 531 (2007) ("[I]t is unreasonable to compensate hundreds of thousands of people exposed to asbestos, who may have physical markers of exposure, but who have no current impairment from a disease caused by asbestos exposure."). Moreover, the Act's procedures help to ensure that resources are not wasted in premature, meritless, or speculative litigation.

Absent a prima facie showing of impairment and causation, cases are required to be administratively dismissed. Importantly, claimants who cannot presently make the prima facie showing required under the Act are protected from having their claims time-barred in the future. *See* Ohio Rev. Code § 2307.94. Thus, some claimants might benefit by their ability to bring claims that would have been time-barred under previous Ohio law. It is also important to note that the Act merely changes the *timing* of the plaintiffs' traditional burden of proving actual physical injury for which exposure to asbestos was a substantial contributing factor.

Reports suggest the Act is having a substantial impact. For example, a prominent Ohio asbestos litigation defense lawyer has said that Ohio's medical criteria law "dramatically cut the number of new case filings by more than 90%." Peter Geier, *States Taking up Medical Criteria: Move is to Control Asbestos Caseload*, Nat'l L.J., May 22, 2006. The CEO of a large mutual insurer further highlighted the effects of Ohio's law and that of other states in testimony before Congress:

> The beneficial impact of these efforts cannot be overstated. Historically Texas, Ohio and Mississippi have been the leading

> states to generate claims filed against [our] policyholders, collectively accounting for approximately 80% of the asbestos claims filed against [our] insureds. Since the statutory and judicial reforms in those three key states, the decrease in the volume of claims has been truly remarkable. In Mississippi, the decrease has been 90%, in Texas nearly 65% and, in Ohio, approximately 35%. Across all states, from 2004 to 2005 we have seen over a 50% decrease in the number of new claims filed, a trend that continued in 2006. These numbers are the best evidence that state-driven initiatives are working . . . .

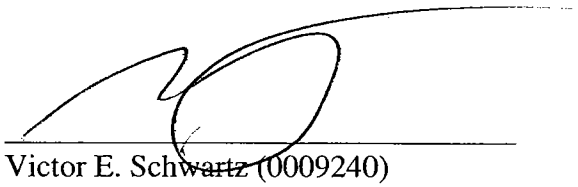
The Fairness in Asbestos Injury Resolution Act of 2006: Legislative Hearing on S. 3274 before the Sen. Comm. on the Judiciary, 109th Cong., at 5 (June 7, 2006) (testimony of Edmund F. Kelly, Chairman, President & CEO, Liberty Mutual Group), *available at* 2006 WLNR 9748946; *see also* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning,* 12 Conn. Ins. L.J. 477, 492-93 (2006).

Importantly, the General Assembly determined that, given the substantial number of asbestos claims pending in Ohio at the time the Act was passed, the public policy goals the General Assembly sought to achieve would be severely undermined if the law did not apply to pending and future claims. For instance, if the crush of pending claims were enough to force Ohio employers into bankruptcy, the policy behind the law would be entirely eviscerated.

CONCLUSION

For the reasons stated, *amici* request that this Court overturn the decision below and declare Ohio Rev. Code §§ 2307.91 *et seq.* to be constitutional retroactively.

Respectfully submitted,



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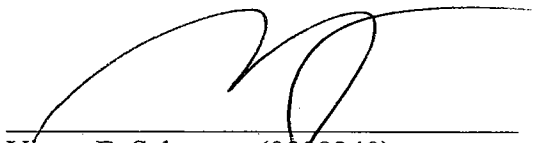

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