NO. 06-0714

IN THE SUPREME COURT OF TEXAS

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED,

Petitioner,

v.

CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION

Respondent.

ON APPEAL FROM THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

AMICI CURIAE BRIEF OF THE TEXAS CIVIL JUSTICE LEAGUE, AMERICAN TORT REFORM ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF RESPONDENT

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Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, the Texas Civil Justice League, American Tort Reform Association, National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, Property Casualty Insurers Association of America, American Chemistry Council, and National Association of Mutual Insurance Companies — collectively "*amici*" — file this brief to explain why we believe review of

the appellate court's decision is not warranted. If this Court does decide to rule, however, it should affirm the decision below and uphold the constitutionality of Tex. Civ. Prac. & Rem. Code Ann. § 149.001 *et seq.* ("Limitations in Civil Actions of Liabilities Relating to Certain Mergers or Consolidations").[1]

STATEMENT OF INTEREST

As organizations that represent Texas companies and their insurers, *amici* have a significant interest in the fair and effective administration of justice. *Amici*'s members play a significant role in the Texas economy, with headquarters and facilities in the state, through hundreds of thousands of employees and pensioners that are Texas residents, and through taxes paid to Texas. Accordingly, *amici* have a significant interest in ensuring that Texas courts respect the Legislature's police power authority to enact legislation addressing serious problems in asbestos and other tort litigation, and to do so retroactively when necessary to accomplish the Legislature's legitimate public policy goals.

* * *

Established in 1986, the Texas Civil Justice League (TCJL) is the state's first legal reform coalition, established to promote fairness and stability in the Texas civil justice system. TCJL's **5,000 Texas members** include individuals, health care providers, defense law firms, professional and trade associations, cities, counties, chambers of

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[1] This brief was paid for by the above-referenced *amici* organizations.

commerce, school districts, and businesses of all sizes. TCJL has actively supported efforts to curb forum-shopping abuse in Texas. In addition, TCJL files *amicus curiae* briefs in the Texas courts on issues that impact its members.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

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 **over 21,000 members in Texas** and offices in Washington, D.C. and all fifty 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 – **including over 12,000 members in Texas.** 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 has 1,355 members and branch facilities in Texas. In 2006, manufacturing activity in Texas employed 913,500 and generated approximately 12% of the Texas GDP.** 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.

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 U.S. property and casualty insurance industry. **In 2005, PCI members accounted for 32.2% of the homeowners' insurance premiums in Texas, 46.9% of the personal automobile insurance policies issued in Texas, and wrote $11,662,399,000 of direct written premiums in Texas. Eighty-one PCI members are domiciled in Texas.** In light of its involvement in Texas, 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. **The chemical industry has substantial involvement in Texas.** According to 2006 ACC data, the chemistry industry in Texas directly created 73,593 jobs; over 505,000 non-chemical manufacturing jobs in Texas are generated indirectly by chemical industry activity in Texas and beyond. For every chemical industry job in Texas, six jobs are created within the state, a total of 371,573 jobs. Another 134,299 Texas jobs come from chemical industry activity generated outside the state. **In total, 579,465 jobs in Texas are supported by the chemical industry.**

Founded in 1895, 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 40% of the property/casualty insurance premium in the United States. **NAMIC has 130 members who write business in Texas (30 of them are domiciled in the state), accounting for 29% of the total property/casualty market in Texas.** Nationally, NAMIC members account for 47% of the homeowners market, 39% of the automobile market, 39% of the workers' compensation market, and 34% of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

STATEMENT OF FACTS

Amici adopt Respondent's 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*, 521 U.S. 591, 597 (1997); *see also Humble Sand & Gravel, Inc. v. Gomez,* 146 S.W.3d 170, 203 (Tex. 2004) (O'Neill and Schneider, JJ., dissenting) (the "systemic impact of cases involving exposure to asbestos . . . has created what has been termed "an asbestos-litigation crisis."). The litigation has forced an estimated eighty-five employers into bankruptcy and has had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy. *See* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

In 2003, a two-thirds majority of the Legislature passed Tex. Civ. Prac. & Rem. Code Ann. § 149.001 *et seq.* (the "Statute") to lessen the injustice caused by the application of successor liability to innocent asbestos defendants, such as the Respondent. The Legislature sought to protect innocent successor corporations from potential bankruptcy, promote fundamental fairness, and safeguard the jobs and pensions of Texas residents.

Specifically, the Statute provides that certain successor corporations of former asbestos product manufacturers, such as the Respondent, may limit their total asbestos liability to the total gross asset value of the predecessor company at the time of the merger or consolidation, adjusted for inflation. *See* Tex. Civ. Prac. & Rem. Code Ann. § 149.003.[2] The Statute became effective on June 11, 2003.

Importantly, the Legislature determined that the important public policy goals it sought to be accomplished required that the law apply to *pending* and future claims. As the Fourteenth Court of Appeals correctly appreciated, the Legislature's decision to exercise its police power to affect pending lawsuits was supported by the public interest.

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[2] The Statute finds support in a model Successor Asbestos-Related Liability Fairness Act developed by the American Legislative Exchange Council, a nonpartisan membership organization of state legislators, and in Suggested State Legislation approved by the Council of State Governments in December 2006. Laws similar to the Texas statute have been enacted in Mississippi, Ohio, Pennsylvania, Florida, South Carolina, and Georgia. *See* Miss. Code Ann. § 79-33-1 *et seq.*; Ohio Rev. Code Ann. § 2307.91 *et seq.*; 15 Pa. Cons. Stat. Ann. § 1929.1; Fla. Stat. Ann. § 774.001 *et seq.*; S.C. Code Ann. § 15-81-110 *et seq.*; Ga. S.B. 182 (2007) (to be codified at Ga. Code Ann. § 51-14-1 *et seq.*). The South Carolina and Georgia laws are not retroactive.

See Robinson v. Crown Cork & Seal Co., Inc., 2006 WL 1168782 (Tex. App.—Houston [14th Dist.] 2006, pet. filed).

A decision by this Court to invalidate the Statute would undermine the Legislature's police power and represent unsound public policy. Moreover, such a holding would likely have potentially broader impacts, especially with respect to Tex. Civ. Prac. & Rem. Code Ann. § 90.001 *et seq.*, a 2005 law which established procedures for asbestos and silica claims. The 2005 law seeks to balance the most-sick plaintiffs' needs against others, reduce the pressure on defendant companies to seek bankruptcy court protection, slow the spread of asbestos litigation to newer "peripheral defendants," relieve congested court dockets, curb litigation fraud and abuse, and promote economic growth.[3] Like the subject Statute, the 2005 asbestos and silica claims procedures apply to cases that were pending on or filed after the effective date (September 1, 2005). *See* Tex. Civ. Prac. & Rem. Code Ann. § 90.003.

Amici believe review of the appellate court's decision is not warranted. If this Court does decide to rule, however, it should uphold the Statute at issue and respect the Legislature's authority to enact meaningful successor asbestos-related liability reform in the manner the Legislature found necessary to meet the public policy needs of the State.

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[3] *See* James S. Lloyd, *Administering a Cure-All or Selling Snake Oil? Implementing an Inactive Docket for Asbestos Litigation in Texas*, 43 Hous. L. Rev. 159 (2006) (describing the sound public policy basis for the asbestos claims procedures in the medical criteria law and arguing the law should pass constitutional muster).

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).

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*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) ("For decades, the state and federal judicial systems have struggled with an avalanche of

asbestos lawsuits.").[4] 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 Texas Legislature passed the Statute at issue. *Id.* ("The number of asbestos claims has increased sharply through the 1990s and into 2002.").[5]

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4 *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).

5 Just two years after passing the subject Statute, the Legislature made findings that twice emphasized the "crush" of asbestos litigation. Acts 2005, 79th Leg., ch. 97, § 1(g) & (h).

1. 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* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."). The process has accelerated in recent years. RAND found: "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 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). 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 groups 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) [hereinafter Christian & Craymer]. 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.

In 2005, the Texas Legislature made explicit findings about the litigation's impact:

> The crush of asbestos litigation has been costly to employers, employees, litigants, and the court system. In 2003, the American Bar Association Commission on Asbestos Litigation noted that in 1982, the nation's single largest supplier of asbestos-containing insulation products, the Johns-Manville Corporation, 'declared bankruptcy due to the burden of the asbestos litigation.' Since then, more than 70 other companies have declared bankruptcy due to the burden of asbestos litigation. It is estimated that between 60,000 and 128,000 American workers already have lost their jobs as a result of asbestos-related bankruptcies and that eventually 423,000 jobs will be lost due to asbestos-related bankruptcies. Each worker who loses a job due to an asbestos-related bankruptcy loses between $25,000 and $50,000 in wages over the worker's career. These workers also have seen the value of their 401(k) retirement plans drop by 25 percent or more due to these bankruptcies.

Acts 2005, 79th Leg., ch. 97, § 1(g) (emphasis added).

2. Peripheral Defendants Are Being Dragged into the Litigation

As a result of the large number of asbestos-related 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.*, 129 B.R. 710, 747-48 (E.D.N.Y. & S.D.N.Y. 1991), *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

more than half of asbestos expenditures. *See* RAND Rep., *supra*, at 94. Respondent Crown Cork & Seal is an example of this trend at work.

B. Texas: Hard Hit by Asbestos Litigation

Texas was hit particularly hard by asbestos litigation. *See, e.g.*, Connie Scott, Editorial, *Asbestos Lawsuit Abuse Creates a Crisis in Texas*, Corpus Christi Caller-Times, Mar. 17, 2005, at A9, *available at* 2005 WLNR 4229572. Historically, Texas has been a magnet for asbestos cases from around the country. *See* Christian & Craymer, *supra*, at 986 ("Some Texas businesses estimate that out-of-state claims make up seventy-five percent or more of their total asbestos claims in the state."); *see also* House Research Org., *Asbestos Litigation: An Inactive Docket Proposal* (Apr. 2, 2004) (Texas accounted for "more than 60 percent of filings between 1998 and 2000."); RAND Rep., *supra*, at 62 (from 1988 to 2000, Texas led the nation in asbestos filings).

In passing the 2005 asbestos and silica claims procedures, the Legislature emphasized the effect of asbestos litigation on Texas:

> Texas has not been spared this crisis. In the period from 1988 to 2000, more lawsuits alleging asbestos-related disease were filed in Texas than in any other state. Thousands of asbestos lawsuits are pending in Texas courts today.

Acts 2005, 79th Leg., ch. 97, § 1(e).

C. Crown Cork & Seal: A Compelling Example of the Need for Asbestos Litigation Reform

By 2003, the problematic asbestos litigation trends described above presented the Legislature with a clear need for reform. The Legislature enacted the subject law to

address these problems with regard to a category of defendants for which the need for reform was immediate and particularly compelling, namely, peripheral defendants then in peril of bankruptcy that had been dragged into the litigation through no fault of their own, but because of the application of successor liability.

The rule of successor liability generally provides that when a predecessor merges with another corporation, the successor can be held liable for the torts of the dissolved predecessor, even if the successor did nothing wrong and the activity of the predecessor that created the liability was terminated before the merger. In some circumstances, the rule can cause a tremendous injustice, as in the case of Crown Cork & Seal (Crown), a producer and seller of metal bottle caps, known in the industry as "crowns." Crown has been named in numerous asbestos-related lawsuits even though it never manufactured, sold, or installed any asbestos-containing products. Crown has been swept into the litigation because of its brief association with a dormant division of a competing bottle cap manufacturer over forty years ago.

In November 1963, Crown purchased a majority of the stock of Mundet Cork (Mundet), a company that made bottle caps, just as Crown did. Before the acquisition, Mundet had a side business making, selling, and installing asbestos insulation. By the time of Crown's stock purchase, however, Mundet had shut down its insulation operations. Approximately three months after Crown obtained its stock ownership interest in Mundet, the idled Mundet insulation division was sold off. Thereafter, Crown acquired all of Mundet's stock and Mundet, now having only bottle-cap operations, was

merged into Crown in 1966. *See Robinson*, 2006 WL 1168782, at *2; 150 Cong. Rec. S4241, 2004 WL 867931 (Cong. Rec.), Apr. 22, 2004 (statement of Sen. Santorum). Crown paid approximately $7 million for all of Mundet's assets. *See* Brief of Appellee Crown Cork & Seal Company, Inc. in *Robinson v. Crown Cork & Seal Co., Inc.*, 2004 WL 3106121, *3 (Tex. App.—Houston [14th Dist.] Dec. 29, 2004) [hereinafter Brief of Appellee Crown Cork & Seal Company, Inc.].

As a result of this brief passive ownership, the merger of Mundet into Crown has spawned more than 300,000 asbestos-related claims against Crown and Crown's $7 million purchase of Mundet has cost Crown almost $600 million in asbestos-related costs. Moreover, Crown's credit rating has been reduced and the company has been forced to pay higher than prevailing interest rates on its borrowing. *See* Mark A. Behrens, *Successor Asbestos-Related Liability Fairness Act*, 7:1 ALEC Pol'y Forum 18 (Spring 2005). According to U.S. Senator Orrin Hatch, "The trial lawyers have made Crown Cork & Seal pay dearly for the ninety days it owned the insulation division of Mundet. . . . They should never have had to pay a dime to begin with." 150 Cong. Rec. S4139, 2004 WL 840405 (Cong. Rec.), Apr. 20, 2004 (statement of Sen. Hatch).

The Legislature enacted Tex. Civ. Prac. & Rem. Code Ann. § 149.001 *et seq.* to lessen the devastating effects of asbestos litigation on innocent successor corporations, such as Crown, and to promote fundamental fairness. In addition to protecting such innocent successors from the potential threat of bankruptcy, the Legislature sought to

safeguard the jobs and pensions of Texas residents. *See* H.J. of Tex., 78th Leg., R.S. 6043-45 (2003) (quoted at length in *Robinson*, 2006 WL 1168782, *6-8).

According to Crown, 1,000 Texas jobs and 1,000 retirees' pension in Texas would be at risk if Crown is forced into bankruptcy as a result of its successor asbestos-related liabilities. *See* Brief of Appellee Crown Cork & Seal Company, Inc., *supra*, 2004 WL 3106121, *1. Crown's Texas operations also produce about $5 million in property and franchise taxes for Texas; these, too, could be at risk if Crown were forced to seek the protection of the bankruptcy courts. *See id.* at *28.

Importantly, the Legislature determined that, given the substantial number of asbestos claims pending in Texas against innocent successors such as Crown, the public policy goals the Legislature sought to achieve in the Statute would be severely undermined if the law did not apply to pending and future claims. For instance, fundamental fairness would be denied if Crown were forced to litigate the thousands of claims pending against it in Texas at the time the Statute was enacted. Moreover, if the crush of pending claims were enough to force Crown into bankruptcy, the policy behind the law would be entirely eviscerated.

In light of these considerations, the Statute clearly reflected a valid exercise of the Legislature's police power to protect the public welfare. *See LJD Prop., Inc. v. City of Greenville*, 753 S.W.2d 204, 207 (Tex. App.—Dallas 1988, writ denied) (citing *Spann v. City of Dallas*, 235 S.W. 513, 515 (1921)).

II. This Court Should Defer to the Legislature's Reasonable Policy Decisions

"Retroactivity" has not traditionally been an absolute limit to the Legislature's power to solve problems affecting the public welfare. This Court and other Texas courts have affirmed retroactive Texas statutes after analyzing the ultimate purpose of that constitutional provision and the purposes (and fairness) of the challenged legislation.

A. Texas Courts Traditionally Defer to Legislative Decisions

Texas courts recognize a presumption in favor of the constitutionality of any statute. *See Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985). This presumption is a fundamental part of our democracy. The Legislature is a co-equal branch of the government that is charged with making the laws—and making the findings necessary to determine whether a law is appropriate. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968) ("It is to be presumed that the Legislature has not acted unreasonably or arbitrarily. . . . The wisdom or expediency of the law is the Legislature's prerogative, not ours.").

The Texas Legislature has said as much. In passing the Code Construction Act, the Legislature directed Texas courts to presume that the Legislature intended a fair result and favored public interest over private interests:

> In enacting a statute, it is presumed that:
>
> (1) compliance with the constitutions of this state and the United States is intended;
>
> (2) the entire statute is intended to be effective;
>
> (3) *a just and reasonable result is intended*;

(4) a result feasible of execution is intended; and

(5) *public interest is favored over any private interest.*

Tex. Gov't. Code Ann. § 311.021 (emphasis added).

Here, the Legislature's decision to pass retroactive legislation was particularly deliberate and surgical. The Statute was intended to address a compelling public policy problem in the State and to do so in the manner that would best effectuate the Legislature's sound and fair goals.

B. Texas Does Not Have an Absolute Prohibition Against Retroactive Legislation

Texas courts have repeatedly held that the prohibition against retroactive legislation is not absolute. *See Liberty Mut. Ins. Co. v. Texas Dept. of Ins.*, 187 S.W.3d 808, 820 (Tex. App.—Austin 2006, pet. denied) ("The retroactive prohibition is not absolute and must yield to the State's responsibility to safeguard the public welfare."); *Barshop v. Medina Co. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 633-344 (Tex. 1996) ("Mere retroactivity is not sufficient to invalidate a statute. A valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive."); *Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("overriding public interest" justified retroactive application of marital property law); *Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs*, 610 S.W.2d 867, 871 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (public safety concerns can override retroactive law prohibition); *Caruthers v. Board of Adjustment of the City of Bunker Hill Village*,

290 S.W.2d 340, 345 (Tex. Civ. App.—Galveston 1956, no writ) (police power justified retroactive zoning ordinance).

For example, in *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex.), *cert. denied sub nom. Moore v. Owens-Corning*, 528 U.S. 1005 (1999), this Court reviewed a borrowing statute[6] that governed pending asbestos claims. In a unanimous opinion, the Court rejected constitutional challenges that had been based, in part, on the retroactive aspects of the statute. *See id.* at 580-83. Acknowledging "[i]t is within the authority of the Legislature to make reasoned adjustments in the legal system," *Id.* at 574, the Court found that the Legislature's policy decision had a rational basis. *See id.* at 582-83.

This Court undertook a similar analysis in another unanimous decision in 2003, *In re A.V.*, 113 S.W.3d 355 (Tex. 2003). In *A.V.*, the Court upheld the retroactive application of a statute that terminated parental rights based on a pre-existing criminal conviction. *Id.* The Court cited the ultimate fairness and necessity of the law in permitting its retroactive effect. *See id.* at 361.

Likewise, the subject Statute should be upheld as a legitimate exercise of the Legislature's police power. The Legislature acted reasonably to promote the public welfare, including the protection of jobs and pensions of Texas residents and protecting the state's treasury against the potential loss of tax revenue that would occur if an innocent successor defendant with Texas operations were forced into bankruptcy.

III. A Decision to Nullify The Legislature's Decision to Apply the Statute Retroactively Could Have Other Adverse Impacts on Texas Asbestos Litigation

A decision to nullify the Legislature's decision to meet the needs of the State with respect to successor asbestos-related liability also would likely impact the Legislature's other recent attempt to inject fairness and sound public policy into Texas asbestos and silica litigation. In 2005, the Legislature enacted Tex. Civ. Prac. & Rem. Code Ann. § 90.001 *et seq.*, which established procedures for asbestos and silica claims.[7] The Legislature sought to balance the most-sick plaintiffs' needs against others,[8] reduce the pressure on defendant companies to seek bankruptcy court protection, slow the spread of

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(...continued)

6 *See* Tex. Civ. Prac. & Rem. Code § 71.052, repealed by Acts 2003, 78th Leg., ch. 204, § 3.09 (effective Sept. 1, 2003).

7 The Texas law finds support in a February 2003 resolution by the American Bar Association's House of Delegates supporting federal asbestos medical criteria legislation. *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; American Bar Association Commission on Asbestos Litigation, *Report to the House of Delegates* (2003), *available at* http://www.abanet.org/leadership/full_report.pdf.

8 "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). Mass screenings 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); *see also Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("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 claims by persons who had never experienced adverse symptoms.").

asbestos litigation to newer "peripheral defendants," relieve congested court dockets, and promote economic growth. *See* Christian & Craymer, *supra.*[9]

The Legislature found it necessary for the asbestos and silica claims procedures to apply to pending and future cases. *See* Tex. Civ. Prac. & Rem. Code Ann. § 90.004.[10] In support of its approach, the Legislature included findings that emphasized the *current* "crush" of asbestos litigation. Acts 2005, 79th Leg., ch. 97, § 1(g) & (h).

If this Court declines to enforce the Legislature's policy decision in this appeal, the ultimate impact may be to nullify the Legislature's reasonable decision to inject needed fairness and sound policy into the tens of thousands of asbestos and silica lawsuits pending at the time the medical criteria law was enacted. The Texas courts would then

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[9] In addition, the 2005 law curbs litigation fraud and abuse, such as the misconduct described by the manager of the federal silica multi-district litigation docket, U.S. District Judge Janis Graham Jack of the Southern District of Texas. *See In re Silica Prods. Liab. Litig.*, MDL 1553, 398 F. Supp. 2d 563 (S.D. Tex. 2005). Judge Jack recommended that all but one of the 10,000 federal court silica claims should be dismissed on remand because the diagnoses were fraudulently prepared. "[T]hese diagnoses were driven by neither health nor justice," Judge Jack wrote, "they were manufactured for money." *Id.* at 635.

[10] *See also DaimlerChrysler Corp. v. Hurst,* 949 So. 2d 279 (Fla. Ct. App.) (upholding retroactive application of Florida asbestos medical criteria law), *review denied* (Fla. July 6, 2007); *Flowserve Corp. v. Bonilla*, 952 So. 2d 1239 (Fla. Ct. App. 2007) (same); *Wilson v. AC&S, Inc.*, 864 N.E.2d 682 (Ohio Ct. App. 2006) (retroactivity of Ohio asbestos medical criteria law upheld), *cause dismissed*, 864 N.E.2d 645 (Ohio 2007); *Stahlheber v. Du Quebec, LTEE,* 2006 WL 3833888 (Ohio Ct. App. Dec. 28, 2006) (same); *cf. In re Asbestos Litig.*, 933 So. 2d 613, 617-18 (Fla. App. 2006) (if medical criteria law did not apply 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.").

be faced with resolving this huge mass of cases. *Amici* submit that the better approach would be to respect the Legislature's police power authority and uphold the Statute at issue.

IV. THE SUCCESSOR ASBESTOS-RELATED LIABILITY REFORM STATUTE IS NOT AN UNCONSTITUTIONAL "SPECIAL LAW"

Finally, Petitioner argues that the subject Statute is an unconstitutional "special law" under Tex. Const. art. 3, § 56. As this Court explained in *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000), when it upheld a law allowing interlocutory appeal of class certification decisions involving a motor vehicle licensee, "[t]he primary and ultimate test of whether a law is general or special is (1) whether there is a reasonable basis for the classification made by the law, and (2) whether the law operates equally on all within the class." *Id.* at 451. Here, both tests are met by the Statute.

First, it is clear that the Legislature had a reasonable basis for exercising its "broad authority to make classifications for legislative purposes." *Id.* at 450; *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996). The serious problems caused by the "asbestos-litigation crisis," *Amchem Prods.*, 521 U.S. at 597, have been well-documented. The Legislature acted soundly by choosing to lessen these devastating impacts on innocent successor corporations and, in turn, safeguard the jobs and pensions of Texas residents. *See Robinson*, 2006 WL 1168782, *13 (The Statute's Statement of Legislative Intent "reflects that the rationale and purpose of the legislation was (1) 'to limit the benefits of the statute to those who were more innocent than others

and were unwittingly saddled with often massive long-tail liabilities only because of a merger,' and (2) 'to help keep remaining hard-pressed successors out of bankruptcy.'") (quoting H.J. of Tex., 78th Leg., R.S. 6044 (2003)).

Furthermore, the Statute was carefully crafted to meet the Legislature's legitimate policy goals.[11] *See* Tex. Civ. Prac. & Rem. Code Ann. § 149.003. For instance, the limitations in the Statute apply only if the merger occurred before May 13, 1968. *See* Tex. Civ. Prac. & Rem. Code Ann. § 149.002(a). This time limit reflects the Legislature's decision to provide liability fairness to successors deemed "innocent" by virtue of merging before the hazards of asbestos exposure became widely recognized and before the 1972 adoption of federal Occupational Safety & Health Act regulations governing workplace asbestos exposure. *See* H.J. of Tex., 78th Leg., R.S. 6044 (2003). The Legislature also provided that the post-merger entity must not have "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." Tex. Civ. Prac. & Rem. Code Ann. § 149.002(b)(5). This limitation, again, reflects the Legislature's reasonable conclusion that if a company continued in the asbestos business after the merger, it could not be deemed to be an innocent defendant.

The Statute also meets the second prong of the test set forth in *Ford Motor Co. v. Sheldon* – *i.e.*, whether the law operates equally on all within the class. So far, Crown may be the only company that has raised a defense based on its satisfaction of the criteria set forth in the Statute, but that does not make the law unconstitutional. The Statute "applies uniformly to all members of the affected class," *Sheldon*, 22 S.W.3d at 451, that the Legislature reasonably concluded were deserving of relief, namely, innocent successor asbestos-related defendants. As the appellate court in this appeal explained: "Clearly [the Statute] was drafted to include Crown Cork within its scope, but it was not written to exclude companies similarly situated to Crown Cork. And, because it operates on a subject in which the public at large is interested, it affects all of the citizens of the State." *Robinson*, 2006 WL 1168782, *1.

Texas courts have repeatedly upheld liability reform laws against "special law" challenges; the Statute at issue should be upheld too. *See*, *e.g.*, *Sheldon*, *supra*; *Trinity River Auth. v. URS Consultants, Inc.--Texas*, 889 S.W.2d 259 (Tex. 1994) (statute of repose limiting negligence actions against architects and engineers was not prohibited special legislation); *Zaragosa v. Chemetron Inv., Inc.*, 122 S.W.3d 341 (Tex. Civ. App.—Forth Worth 2003) (product liability statute of repose was not prohibited special legislation); *McGlothlin v. Cullington*, 989 S.W.2d 449 (Tex. Civ. App.—Austin)

(...continued)

[11] We understand that several limitations in the Statute were specifically included at the request of Texas plaintiffs' asbestos lawyers.

(requirement that plaintiff file a cost bond or submit an expert report with a medical malpractice claim was not a "special law"), *cert. denied*, 528 U.S. 1062 (1999); *cf. County of Cameron v. Wilson*, 326 S.W.2d 162 (Tex. 1959) (law providing for development of public parks in counties bordering the Gulf of Mexico was not a prohibited special law); *Robinson v. Hill*, 507 S.W.2d 521 (Tex. 1974) (law imposing special bail bond regulations in counties with a population of 150,000 or more was not prohibited special legislation).

CONCLUSION

For these reasons, *amici* believe that review of the appellate court's decision is not warranted, but if this Court does decide to rule, it should affirm the decision below and uphold the constitutionality of Tex. Civ. Prac. & Rem. Code Ann. § 149.001 *et seq.*

Respectfully submitted,

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CERTIFICATE OF SERVICE AND EBRIEF CERTIFICATE OF COMPLIANCE

I certify that I served a copy of the foregoing *Amici Curiae* Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service this 2nd day of August, 2007, addressed as follows:

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At the request of the Supreme Court of Texas, I also certify that a pdf copy of the foregoing was sent electronically to the Clerk's office (scebriefs@courts.state.tx.us). The ebrief complies with the following requests of the Court:

1. Information for ebrief being submitted:
   a. Case Style: *Barbara Robinson, Individually and as Representative of the Estate of John Robinson, Deceased v. Crown Cork & Seal Company, Inc., Individually and as Successor Mundet Cork Corporation*
   b. Case Number: 06-0714
   c. Type of Brief: *Amici Curiae* Brief
   d. The Word Processing Software and Version Use to prepare the ebrief: Microsoft Office Word 2003.
2. The email attachment contains only an electronic copy of the original document which was filed in the Texas Supreme Court Clerk's office and does not contain any document or portion thereof that is not included in the original filing.
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4. I understand that the ebrief will be posted on the Court's web site.

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