IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Appellants, Cross-Appellees,

vs.

Case No. 86,213

ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIX SUPERMARKETS, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC., and PHILIP MORRIS, INC.

Appellees, Cross-Appellants.

_____/

APPELLEES' REPLY BRIEF

On Direct Review from a Decision of the
Second Judicial Circuit, Certified for Immediate Resolution

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I. THE 1994 AMENDMENTS ARE FUNDAMENTALLY UNFAIR, NOT REQUIRED BY FEDERAL LAW, AND RADICALLY CHANGE RIGHTS AND LIABILITIES IN MEDICAID REIMBURSEMENT LAWSUITS

In disregard of the express language of the 1994 Amendments to the Medicaid Third-Party Liability Act, the State repeats three "threshold" arguments that it believes shield the Amendments from all constitutional attack: (1) that the 1994 Amendments are not nearly as unfair as plaintiffs describe, (2) that federal Medicaid law somehow saves the 1994 Amendments from being held invalid under the Florida Constitution, and (3) that the 1994 Amendments do nothing more than "codify" and "refine" existing law, particularly certain amendments enacted in 1990. Each of these threshold arguments is fundamentally flawed for the reasons addressed below.[1]

A. The 1994 Amendments Are Fundamentally Unfair and Result in a Biased Proceeding Against Third Parties

On pages 5-11 of Appellees' Answer and Cross-Appeal Brief ("AAB"), we described how the 1994 Amendments radically change the parties' rights and obligations in Medicaid reimbursement suits. In response, the State asserts that plaintiffs' description of the Amendments is "extreme" and should not be adopted by the Court. SRB at 4. However, the State does not suggest any realistic alternative reading of the 1994 Amendments. Indeed, no other reading is possible.

1. Abrogate All Affirmative Defenses. It is absolutely clear that the 1994 Amendments are designed to abolish all existing affirmative defenses for the sole purpose of assuring that the State will always win Medicaid reimbursement lawsuits. There is no ambiguity here, no open issue. The statutory language expressly recognizes that "affirmative

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[1] The State relies on and incorporates these threshold arguments as part of its cross-appeal response. See, e.g., State of Florida's Consolidated Answer and Reply Brief ("SRB") at 38, 40.

defenses" are "normally available to a liable third party" (a proposition the State denies), yet expressly "abrogates" them "to the extent necessary to ensure full recovery." § 409.910(1), Fla. Stat. (Supp. 1994). There is simply no way to read this statutory language other than as abrogating all affirmative defenses -- defenses that clearly were "available to a liable third party" before 1994.

2. **Grant New Joinder Rights**. The 1994 Amendments grant the State -- and only the State -- new joinder rights: specifically, the right to join an unlimited number of claims for reimbursement in a single action. § 409.910(9). The State argues that this joinder provision simply recognizes that the State has been "injured in the aggregate." SRB at 33. Whatever that means, the fact remains that under the Amendments each item of expense is a separate cause of action, § 409.910(12)(h), and only by joining these causes of action together can the State seek "aggregated" damages. Again, there is no way to avoid the conclusion that this provision is at war with the Florida Rules of Civil Procedure, which grant courts substantial discretion over joinder.

3. **Abolish Fundamental Elements of Causation**. The 1994 Amendments give the State the right to prove causation and damages "by use of statistical analysis." § 409.910(9). The State asserts that this provision simply recognizes that statistics are sometimes admitted at trial. SRB at 46. But the Amendments do much more than simply allow the admission of statistics. They authorize the State to rely exclusively on statistics to prove causation and damages in every case. Under the Amendments, the State's so-called "injury" derives directly from its decision to pay for the medical care of a recipient allegedly injured by a manufacturer. The inevitable result of the Amendments is to abolish the State's burden of showing an actual causal link between the manufacturer's product and each recipient's injury -- a burden that ordinarily requires the State to demonstrate on an individualized basis at least

(a) the accuracy of the recipient's diagnosis, (b) the absence of alternative causes, and (c) the reasonableness and validity of the expenses reported in each case. Would the State agree that it must still prove that a manufacturer's product is the proximate cause of a recipient's injury on a recipient-by-recipient basis? Of course not -- once a statistical case is made out between a product and an injury, the Amendments presume all of the individualized issues in the case. No Florida court -- indeed, no court in the country -- has sustained a plaintiff's product liability claim based exclusively on statistics.

4. **Erect Barriers to Defense**. The 1994 Amendments also ensure that manufacturers are unable to mount any kind of defense based on these individualized proximate cause issues. The Amendments give the State the right not to identify the individual Medicaid recipients allegedly injured. § 409.910(9)(a). Without information identifying who was allegedly injured, how can a manufacturer begin to demonstrate that it did not cause any particular recipient's injury (and thus should not reimburse the State)? No matter how liberally one reads the statute, the result is inevitable: the Amendments not only reduce the State's proximate cause burden to statistics -- they also erect insurmountable barriers preventing a manufacturer from exercising its right to dispute causation on any other basis.

5. **Adopt a New Form of Market Share**. The State pretends that the market share liability adopted by the 1994 Amendments is the same market share liability adopted by this Court in Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). But no court in the country, including the Conley Court, has applied market share liability together with joint and several liability, as the 1994 Amendments do. See § 409.910(1), (9)(b). The 1994 Amendments would impose 100% liability on a manufacturer who has 1% of the market -- and do so in 100% of the cases involving the same type of product. The State cannot seriously contend such a rule of law is fair or consistent with Conley.

6. **Create Institutional Bias**. The 1994 Amendments require a court to interpret common law theories of recovery and the evidence code solely in favor of the State. § 409.910(1), (9). Once again, no other reading of the statute is possible, nor is any other reading even suggested by the State. The State has pointed to no other law in the country that commands a court to apply extrinsic bodies of law such as the common law and the evidentiary code in favor of one particular litigant and not in an impartial manner.

In sum, there is nothing "extreme" about plaintiffs' reading of the 1994 Amendments; rather, it is the Amendments that are "extreme." The provisions together create wholly new rights and impose new burdens -- and eviscerate fundamental principles of proximate cause -- in violation of basic constitutional rights.

B. Federal Medicaid Law Does Not Require This Court to Uphold the 1994 Amendments

The State makes the remarkable argument that federal law somehow mandates the adoption of the 1994 Amendments and would preempt the Florida Constitution to the extent it invalidates those Amendments. SRB at 5-6. At the very least, says the State, federal law requires this Court to apply "a double dose" of the presumption of constitutionality in this case. Id. at 6.

This argument is absurd on its face. No federal law mandated the passage of the 1994 Amendments -- indeed, no other state has adopted any law even remotely similar to the Amendments. Federal law requires states to adopt at most traditional subrogation and assignment remedies. See 42 U.S.C. § 1396a(a)(25); 42 C.F.R. § 433.146. These remedies have been part of Florida Medicaid law for years. See Ch. 90-295(7)(a), (b) (Medicaid remedies of subrogation and assignment). There is no federal policy that the State should always win in Medicaid reimbursement suits -- or obtain any recovery when traditional

principles of subrogation and assignment would not allow such recovery. And there is certainly no policy that the State should win when winning would violate Florida constitutional rights.[2]

Federal courts have repeatedly rejected similar arguments to the effect that federal interests in obtaining recoveries "preempt" or otherwise displace state laws that afford defendants certain rights or protections in lawsuits. For example, in Resolution Trust Corp. v. Artley, 28 F.3d 1099, 1103 (11th Cir. 1994), the RTC, acting as receiver for an insolvent bank, argued that "federal interests" in obtaining a recovery against former officers and directors should "overrule" Georgia's statute of limitations. The court rejected this argument, holding that "[a] state statute cannot be considered `inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." Id. The court noted that, "[i]f success . . . were the benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." Id. (quoting Robertson v. Wegmann, 436 U.S. 584, 593 (1978)). Similarly, any federal interest in Medicaid reimbursements cannot "overrule" Florida constitutional rights.

Indeed, if the 1994 Amendments were compelled by federal law, one wonders how the Governor could justify Executive Order No. 95-105 (or his unilateral stipulation), purporting to limit the enforcement of the 1994 Amendments to the tobacco industry. If federal law requires the Amendments to be enforced against the tobacco industry, federal law must surely

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[2] Thus, the circumstances here are significantly different from those of State ex rel. Pittman v. Stanjeski, 562 So. 2d 673 (Fla. 1990), relied upon by the State. The 1994 Amendments were not necessary "to bring Florida into full compliance with . . . congressional acts and implementing federal regulations, thus avoiding a loss of federal funds." Id. at 678. No federal funds would be lost by the invalidation of the 1994 Amendments. Indeed, no other State has enacted legislation even close to the 1994 Amendments.

require the Amendments to be enforced against other potential defendants as well. The Governor's actions cannot be squared with his radical legal position.

C. The 1994 Amendments Do Not Codify Existing Law

Once again, the State argues that the 1994 law merely recodifies law adopted by the 1990 Amendments. SRB at 8-16. The State's creative argument cannot withstand scrutiny.[3]

In our initial brief, we demonstrated that the history of the 1990 Amendments began with Underwood v. Department of Health & Rehabilitative Servs., 551 So. 2d 522 (Fla. 2d DCA 1989), review denied, 562 So. 2d 345 (Fla. 1990). AAB at 32. There, the court held that, in an equitable distribution proceeding between the State and a Medicaid recipient, the State was entitled to take only its pro rata share of the recovery. Id. The 1990 Amendments were designed to overrule this specific holding by making sure that the State had first priority to funds -- that is, funds that had become available for distribution. The State does not and cannot deny this was the fundamental purpose of the 1990 Amendments.

Instead, the State argues that, in attempting to overrule Underwood, the legislature also radically expanded the State's rights against third parties. SRB at 9-15. The State shamelessly mischaracterizes the 1990 Amendments by quoting and half-quoting snippets of

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[3] The State also argued in its initial brief that the Florida subrogation statute had "always" incorporated the 1994 law. State's Initial Brief at 24-26. Although the State appears to have largely abandoned that argument, it does assert the remarkable proposition that defenses do not apply in an "equitable subrogation" case as opposed to a "contractual subrogation" case. SRB at 40. Although there are differences between equitable and contractual subrogation, the availability of defenses is not one of them. Even in equitable subrogation the subrogee is subject to all the available defenses the defendant could assert against the subrogor. See Scott & Jobalia Constr. v. Halifax Paving, Inc., 538 So. 2d 76, 79 (Fla. 5th DCA 1989), aff'd 565 So. 2d 1346 (Fla. 1990). The case relied upon by the State in its initial brief -- Allstate Ins. Co. v. Metropolitan Dade County, 436 So. 2d 976 (Fla. 3d DCA 1983), review denied, 447 So. 2d 885 (Fla. 1984) -- did not distinguish between the two regarding the availability of defenses. See AAB at 29.

the statutory language taken completely out of context. Id. Perhaps the most egregious example of this is on page 11 of its reply brief, where the State says:

> Comparing the statutes, it is clear that as of 1990, the Legislature unequivocally stated that . . . principles of common law and equity as to assignment, lien and subrogation were abrogated to the extent necessary to ensure full recovery from third-parties ("Third-Party" was defined in 1990 as any party "that is, may be, could be, should be, or has been liable for all or part of the cost of medical services related to any medical assistance covered by Medicaid").

In actuality, the 1990 Amendments do not say this at all. The actual 1990 provision states:

> If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are to be abrogated to the extent necessary to ensure full recovery by Medicaid from **third-party resources**. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

Ch. 90-295(1) (emphasis added). This entire paragraph is concerned solely with ensuring that the State has priority over Medicaid recipients and creditors to existing funds already recovered from third parties. Nothing in this provision expands the rights of the State against third parties -- thus, the provision addresses only what happens after "benefits of a liable third party are discovered or become available." Similarly, the provision abrogates principles of common law and equity only to the extent necessary to ensure recovery from "third party resources," not "third-parties" -- the phrase mistakenly used by the State in its brief. The statutory definition of "third-party" (quoted by the State) therefore does not apply. The use of the phrase "third-party resources" throughout the provision -- instead of "third parties" --

clearly connotes existing resources that have already "become available" from a third party found liable under the ordinary rules of liability.[4]

The State also relies on subsection 90-295(12) of the 1990 Amendments as proof that those Amendments allowed the State to sue "individually." SRB at 12. But the State's rights against third parties are spelled out, not in subsection (12), but in subsection 90-295(7):

> When the department provides, pays for, or becomes liable for medical care under § 409.266, it shall have the following rights, as to which the department may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits: [(a) subrogation, (b) assignment, and (c) lien)].

(Emphasis added.) This subsection provides the State with only three rights: subrogation, assignment, and lien -- all of which are clearly derivative of the rights of the injured recipient. There is no subsection "(d)" giving the State the expansive cause of action created by the 1994 Amendments. The phrase "independent principles of law" -- another phrase the State repeatedly takes out of context -- is used by the statute only with respect to these three remedies to mean that independent principles of subrogation, assignment, and lien shall govern these rights. To be sure, subsection 90-295(12) allows the State to sue in its "individual" capacity. But that subsection does not create rights and in fact expressly provides that the State may sue "individually" solely "in order to enforce its rights under this section" -- rights which subsection 90-295(7) define as being limited to subrogation, assignment, and lien. The mere fact that the State can file a suit directly against a third party (without naming the recipient as a necessary party or waiting for the injured recipient to sue and obtain a recovery) does not change the essential nature of that suit or the applicability of

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[4] Nothing in Underwood v. Fifer, 50 Fla. Supp. 2d 199 (Fla. 10th Cir. Ct. 1991), contradicts this plain reading of the statute. Fifer did not address whether the 1990 Amendments created an expansive new cause of action against third parties, as the State suggests.

traditional principles of subrogation and assignment. Cf. Hedgebeth v. Medford, 378 A.2d 226 (N.J. 1977) (recognizing direct claim but not any additional rights).[5]

The State's reliance on other portions of the 1990 Amendments is equally faulty. To a large degree, the State simply restates arguments it made in its first brief, and these are addressed on pages 33-35 of our initial brief. In addition:

* The State asserts that under Florida law a jointly and severally liable party could not assert the comparative fault of another tortfeasor to reduce the claim of a damaged plaintiff. SRB at 11. But that is hardly the relevant inquiry. The Comparative Fault Act reduces damage as a result of contributory fault "chargeable to the claimant." § 768.81(2), Fla. Stat. (1985). Nothing in the Comparative Fault Act addresses the question of when contributory fault will be "chargeable to the claimant" -- as it clearly is in subrogation and assignment cases. AAB at 28-29.

* The State relies on the 1990 provision stating that the "`department is a bonafide assignee for value in the assigned right . . . and takes vested legal and equitable title free and clear of latent equities in a third person.'" SRB at 13 (citing Ch. 90-295(7)(b)(2)). But "latent equities" are not the same thing as legal defenses, such as comparative fault. Moreover, the sentence clearly was intended simply to ensure that the State would have priority to funds once they are made available. Thus, the statute uses the phrase "third persons," not "third parties" (a special term of art under the statute, as the State points out) -- and defines "third persons" in the very next sentence to mean "legal representatives, creditors, or health care providers." Ch. 90-295(7)(b)(2).

* The State makes much of its right to an automatic lien, SRB at 14, but the lien is only for that amount of Medicaid assistance "for which a third-party is or may be liable." Ch. 90-295(7)(c). The lien itself does not expand third-party liability.[6]

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[5] Indeed, subsection 90-295(12)(b) of the 1990 Amendments confirms that, in enacting the statute, the legislature intended to give the State only causes of action that were derived from the recipient so as not to waive sovereign immunity. That subsection states: "An action by the department to recover damages in tort under this subsection, which action is derivative of the rights of the recipient or his legal representative, shall not constitute a waiver of sovereign immunity." Id. (emphasis added).

[6] The State also takes issue with plaintiffs' reading of Waldron v. Miami Valley Hosp., 1994 WL 680152 (Ohio Ct. App. 1994), appeal denied, 72 Ohio St. 3d 1415 (1995), (SRB at 19), but Waldron stands for the proposition that each state Medicaid statute must be interpreted on its own terms; the Federal Medical Care Recovery Act cannot be grafted on a state statute. See AAB at 31 n.33.

In short, the State's reading of the 1990 Amendments is refuted by a close reading of the text of the Amendments. Prior to this lawsuit, no one suggested -- and certainly no court ruled -- that the 1990 Amendments expanded the State's rights against third parties. The 1994 Amendments themselves refute these arguments by recognizing that the abrogated affirmative defenses are "normally available to a liable third party." § 409.910(1). Furthermore, the State's argument does not even begin to account for all of the provisions of the 1994 Amendments -- market share liability, joint and several liability, limitless joinder rights, immunity from discovery, etc. -- provisions which not even the State in its wildest imagination can argue were adopted by the 1990 Amendments. The State's argument that the 1994 Amendments are constitutional because they reenact existing law must be rejected.[7]

* * *

The State's argument that the 1994 Amendments merely reflect existing equitable theories of unjust enrichment and indemnity fares no better, see SRB at 28-32, even assuming that such remedies are available to the State at all. See AAB at 37 n.36. The State never explains adequately how the provision of medical care to recipients confers a benefit on manufacturers -- and it is "axiomatic that there must be a benefit conferred before unjust enrichment exists." Challenge Air Transp. Inc. v. Transportes Aereos Nacionales, 520 So. 2d 323, 324 (Fla. 3d DCA 1988); see also AAB at 37-39. The only way the State can show such a benefit is by proving that its payment of medical expenses discharged the manufacturer's liability to the individual recipient -- which is exactly the requirement the 1994 Amendments abolish. See AAB at 37-39.

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[7] It should be recalled the Governor attempted to reassure manufacturers in Florida by purporting through Executive Order to limit the applicability of the 1994 Amendments to the tobacco companies. If the State all along believed that the law was the same both before and after the enactment of the 1994 Amendments, the issuance of the Executive Order was at best misleading.

The State also fails to cite a single case that supports its position that an indemnitor need not be liable to the injured party.[8] Indeed, the law clearly requires that such liability be proved.[9] The critical point is this: the cause of action created by the 1994 Amendments is not coextensive with the remedies of unjust enrichment or indemnity (theories not even mentioned in the statute); accordingly, the 1994 Amendments cannot be read as merely "codifying" those remedies.

II. THE STATE'S OTHER ARGUMENTS ARE MERITLESS

The State asserts a series of other arguments on cross-appeal in support of the constitutionality of the 1994 Amendments. None has any merit.

A. Access to Courts

The State argues that the Florida Constitution's access-to-courts provision has "never been interpreted to guarantee a defendant the right to present any particular affirmative defense." SRB at 39 (emphasis in original). But this proposition ignores the clear holdings of this Court. This Court has repeatedly held that access to courts protects rights to assert

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[8] The State asserts that "much of the indemnity analysis" in Scott & Jobalia Constr. "was dicta" and refers the Court instead to Allstate Ins. Co. SRB at 31. But Allstate is not even an indemnity case -- it is a subrogation case. Allstate did not address the issue of whether the indemnitor must be liable to the injured party -- even in dicta. Likewise, Houdaille Industries, Inc. v. Edwards, 374 So. 2d 490 (Fla. 1979), another case cited by the State, SRB at 31, does not address the issue -- and, in fact, the alleged indemnitor there was liable to the injured party. Houdaille stands for the proposition that there must be a special preexisting relationship between the party seeking indemnity and the alleged indemnitor. Houdaille rejected an indemnity claim because there was no such relationship between the employer and the manufacturer -- just as here there is no such relationship between the State and possible defendants.

[9] See, e.g., Joint Medical Products Corp. v. NME Hosps., 610 So. 2d 675, 676 (Fla. 2d DCA 1992) (rejecting indemnity claim in part because "there has been no finding of liability on [indemnitor's] part"); Scott & Jobalia Constr., 538 So. 2d at 79 ("indemnitor must have a coextensive liability to the plaintiff"); 42 C.J.S. Indemnity § 41 at 133 ("the prospective indemnitor must also be liable to the third-party"); see generally Smith v. H.C. Bailey Co., 477 So. 2d 224, 235 (Miss. 1985) ("the law requires one seeking indemnity to first prove actual legal liability to the party injured").

claims and defenses. Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992) (emphasis added); State ex rel. Pittman v. Stanjeski, 562 So. 2d 673, 676 (Fla. 1990). The Court in State ex rel. Pittman specifically listed specific equitable defenses (against claims for child support) that were protected by the access-to-courts guarantee. Id. at 677.

The Florida access-to-courts provision does more than provide parties with a right to be heard. This Court has repeatedly recognized the provision as protecting specific rights defined in "the common law as it existed as of November 5, 1968," the date the 1968 Florida Constitution was adopted. See Eller v. Shova, 630 So. 2d 537, 542 n.4 (Fla. 1993).[10] Here, the 1994 Amendments abolish the right to assert specific defenses, such as comparative fault, that were clearly part of the common law before 1968. See id. (contributory negligence and assumption of the risk existed before 1968); see also AAB at 53-55. Accordingly, the 1994 Amendments violate the right of access to courts.[11]

Beyond that, even under the State's erroneous version of the law, the 1994 Amendments would still violate access to courts. The Amendments do not simply abrogate one defense. Rather, the Amendments abolish "all . . . affirmative defenses normally available to a liable third party." § 409.910(1) (emphasis added). Indeed, the Amendments reject the very notion that third parties should have any affirmative defenses against the State at all. It is difficult to conceive of a statute that more clearly violates access to courts.[12]

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[10] See also Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987) (holding that a cap on damages, while not abolishing a specific cause of action, violated the right to access because it prevented a plaintiff from recovering for injuries that were previously actionable).

[11] The State misplaces its reliance on cases involving a statute of repose. SRB at 39. Plaintiffs agree that legislation creating a statute of repose defense post-1968 would not be protected under access to courts.

[12] The State's additional argument that the 1994 Amendments do not deny defendants critical discovery ignores section 409.910(9)(a), which gives the State the right not to disclose the identities of the injured Medicaid recipients. As noted above, without this information, a

B. Market Share Liability

We demonstrated in our initial brief that the Amendments' unique market share liability provision violates both access to courts and due process. AAB at 55-56, 60-64. The State does not address these arguments directly, but asserts that the market share liability provision is consistent with Conley. SRB at 43-45. The State is wrong.

In the ordinary product liability case, the plaintiff must demonstrate that the defendant's product caused the particular injuries at issue. In a market share liability case, that burden is relaxed, and a manufacturer may be held liable without any showing that its product caused the harm as long as the manufacturer participated in the relevant product market. Thus, when market share liability theory applies, a participant in the market would potentially be named in 100% of the cases involving a certain type of product. Courts have recognized that imposing joint and several liability in such a case would inevitably impose on a manufacturer excessive liability -- that is, liability for harm that the manufacturer clearly did not cause. To avoid such an impermissible result, courts uniformly have held that a manufacturer in such a case should only be severally liable in proportion to its market share.[13]

For this reason, the State's assertion that the imposition of joint and several liability in a market share liability case is no big deal because joint and several liability has been around

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defendant is denied critical information necessary to prove that its product did not cause a particular recipient's injury.

[13] See, e.g., George v. Parke-Davis, 733 P.2d 507 (Wash. 1987); Brown v. Superior Court, 751 P.2d 470, 487 (Cal. 1988); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989). Suppose, for example, a manufacturer's product caused 10% of the injuries caused by a particular type of generic product. Under ordinary product liability law -- even if joint and several liability applies -- the manufacturer would be held liable in no more than 10% of the cases. In a traditional market share liability context, the manufacturer would be held liable in all cases, but in each case its liability would be limited to 10% of the damages (its market share). Under the 1994 Amendments, however, the manufacturer would be held liable in 100% of the cases and in each case its liability would be for 100% of the damages.

for 450 years is completely disingenuous. SRB at 47. No court in the country has applied joint and several liability in a market share liability case. This Court in Conley expressly refused to do so because it recognized that "[t]he cornerstone of market share alternate liability is that if a defendant can establish its actual market share, it will not be liable under any circumstances for more than that percentage of the plaintiff's total injuries." 570 So. 2d at 285 (emphasis added).[14] In fact, this Court upheld the constitutionality of market share liability because "the extent to which each defendant will be held liable will be equivalent to the percentage of harm it actually could have caused within the relevant market." Id. at 287. By imposing joint and several liability on top of a market share liability theory -- and not providing manufacturers with any meaningful opportunity to exculpate themselves or limit liability to market share -- the 1994 Amendments guarantee excessive and arbitrary liability in violation of access to courts and due process. See AAB at 55-56, 60-64.[15]

C. Due Process

Relying on both Florida and federal law, we argued in our initial brief that the 1994 Amendments violate due process by (1) creating irrebuttable presumptions, (2) abolishing common law protections against arbitrary liability, and (3) creating a broad institutional bias in favor of the State. AAB at 59-64. The State does not address any of these arguments

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[14] The Conley court cited the Comparative Fault Act ("CFA) only as a secondary basis for its decision, contrary to the State's suggestion. See 570 So. 2d at 285. Furthermore, the State's reliance on the Comparative Fault Act is misplaced because that Act allows joint and several liability only when the plaintiff's fault does not exceed the defendants' fault. § 768.81(3), Fla. Stat. (1985). Since the Amendments deny manufacturers the opportunity to establish any plaintiff's fault, joint and several liability would directly contradict the policies of the CFA.

[15] The State also suggests that the court retains discretion to apply market share liability and joint and several liability. Section 409.910(1) states that "[t]he concept of joint and several liability shall apply to any recovery." Similarly, section 409.910(9)(b) says that the "agency shall be allowed to proceed under a market share theory." The 1994 Amendments leave no room for a court's discretion.

directly -- and thus we stand on our initial brief. The State, in plain disregard of the language of the 1994 Amendments, says only that "the Amendments do not preclude a defendant from rebutting a claim in any way it wishes." SRB at 47. As discussed above, this manifestly erroneous statement cannot be reconciled with the express purpose or text of the 1994 Amendments, which bar defendants from obtaining or introducing any individualized evidence. The 1994 Amendments clearly violate due process.[16]

CONCLUSION

For the foregoing reasons, the 1994 Amendments violate the access-to-courts and separation of powers provisions of the Florida Constitution as well as Florida and federal due process guarantees.

Respectively submitted,

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[16] In its short discussion of due process, the State ignores Florida law entirely, which provides an independent basis for invalidating the 1994 Amendments. SRB at 46-47. This omission is not an accident. In arguing another due process issue -- whether retroactive application of the Amendments would violate due process -- the State also entirely ignores Florida caselaw which directly contradicts the State's arguments. See AAB at 24-27.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Appellees' Reply Brief has been furnished this 23rd day of October 1995, by hand delivery to:

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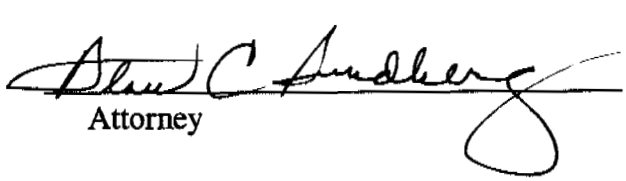

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