IN THE SUPREME COURT OF FLORIDA

AMERICAN OPTICAL CORP., *et al.*,

Appellants/Petitioners, Case No. SC08-1616

v.

WALTER R. SPIEWAK, *et al.*, L.T. Case Nos. 4D07-405, 4D07-407
CONSOLIDATED: SC08-1617,
SC08-1639, SC08-1640

Appellees/Respondents.
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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The State of Florida has an interest in defending the constitutionality of the Asbestos and Silica Compensation Fairness Act (the "Act") and its application to Appellees' claims that were pending when the Act became effective, in accordance with the Legislature's intent. See DaimlerChrysler Corp. v. Hurst, 949 So. 2d 279, 284-85 (Fla. 3d DCA 2007) (finding "it is clear that the legislature intended that the Act be applied retroactively"); see also Ch. 2005-274, §10, Laws of Fla. ("the act shall apply to any civil action asserting an asbestos claim in which trial has not commenced as of the effective date of this act [July 1, 2005]."). Pursuant to sections 16.01(4) and (5), Florida Statutes, the Attorney General is authorized to appear in all suits in which the State may have an interest. "It cannot be doubted that the constitutional integrity of the laws of Florida is a matter in which the State has great interest … [where a] court finds a statute to be unconstitutional, it is proper that the Attorney General appear on appeal to defend the statute." State ex rel. Shevin v. Kerwin, 279 So. 2d 836, 837-38 (Fla. 1973); see also Fla. Stat. § 86.091. The Attorney General's interest herein is to preserve the authority of the Legislature to enact laws with retroactive application in appropriate circumstances, as is the case for the Act. The Attorney General respectfully submits that he can assist the Court in its determination of the constitutional issues through his perspective as the State's chief legal officer.

SUMMARY OF THE ARGUMENT

The Attorney General respectfully submits that the Legislature, consistent with its authority, appropriately resolved the competing public policy concerns for asbestos claims. The Legislature's decision to apply the Act retroactively was also necessary, in light of the approximately six thousand (6,000) asbestos claims then pending in Florida's courts plus an unknown number of future claims. The decision below would leave the Legislature powerless to address a public policy crisis of thousands of unsupported cases clogging Florida's courts - a crisis that might have persisted for decades given the delay between an individual's exposure to asbestos and his or her resulting physical impairment, if any. The Act's requirement of minimal medical standards for establishing an actual, asbestos-related injury is procedural in nature, similar to increasing a burden of proof.

Moreover, individuals who were merely exposed to asbestos did not have any settled, vested common law right of action to recover damages. The Act is also fully constitutional under the Knowles balancing test, given the strong public interest in providing priority to those who are presently feeling the effects of asbestos exposure and protecting their recoveries. Finally, the access to courts provision is inapplicable; in any event, the Act provides meaningful access to the court to the parties with actual controversies and tolls any applicable limitations period for those merely exposed to asbestos.

ARGUMENT

I. THE ACT IS THE PRODUCT OF THE LEGISLATURE'S PUBLIC POLICY DELIBERATIONS

As this Court has recognized, "[t]he judiciary must defer to the wisdom of those who have carefully evaluated and studied the social, economic, and political ramifications of this complex issue-the legislature." Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 407 (Fla. 1996); see also Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, 982 So. 2d 629, 637 (Fla. 2008) ("policy preferences are within the purview of the Legislature."). In considering the crisis of thousands of unimpaired claimants flooding Florida's courts to the detriment of the seriously ill, the Legislature considered many sources of information in arriving at the appropriate public policy for asbestos claims. See Ch. 2005-274, Laws of Fla., *codified at* §§ 774.201 et seq., Fla. Stat. (2005); see also Haire v. Dep't of Agric. & Consumer Servs., 870 So. 2d 774, 782 (Fla. 2004) (in considering a due process challenge, "a court must remain 'cognizant of the legislature's broad range of discretion in its choice of means and methods by which it will enhance the public good and welfare.'").

The bill that would become the Act was filed in the Florida House on February 22, 2005 by Rep. Pickens and had its first hearing on March 30, 2005. Prior to the hearing, the legislators received a House Staff Analysis that provided a history of asbestos use and exposure; discussed previous reform efforts; explained

the state of asbestos and silica litigation in Florida, and analyzed legal issues relating to the proposed bill.[1] (AO029-0041). In compiling this analysis, the House staff considered twelve (12) sources, all of which were available to the legislators to read and refer to when debating and amending the bill. After a series of hearings and debates, the full House voted to pass the bill 90 to 22. See Meeting of Fla. H. of Reps. (April 22, 2005) (Committee Appearance Record and tape available at Fla. Dep't of State, Bureau of Archives & Records Mgmt., Fla. St. Archives, Tallahassee, Fla.).

At the same time that the Act was being debated in the House, a companion bill was being considered in the Senate. Before taking up the bill, the Senate received a Staff Analysis. (AO043-0057). In preparing the Senate Staff Analysis, the Senate's attorneys considered and made available to the Legislature sixteen (16) sources. After a series of hearings, the Senate took up the House bill, amended the House bill so that it was identical to the Senate bill, and voted to pass the bill 32 to 8. See Meeting of Fla. Senate (May 3, 2005) (Committee Appearance

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[1] "[T]his court has on numerous occasions looked to legislative history and staff analysis to determine legislative intent." Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 369 (Fla. 2005). Likewise, courts frequently look to whereas clauses for legislative intent. See, e.g., Carr v. Broward County, 541 So. 2d 92 (Fla. 1989); see also Lakeland Reg'l Med. Ctr., Inc. v. Agency for Healthcare Admin., 917 So. 2d 1024 (Fla. 1st DCA 2006).

Record and tape available at Fla. Dep't of State, Bureau of Archives & Records Mgmt., Fla. St. Archives, Tallahassee, Fla.).

On May 5, 2005, the bill that was approved by the Senate went back to the House for approval and it was passed 103 to 13. See Meeting of Fla. H. of Reps. (May 5, 2005) (Committee Appearance Record and tape available at Fla. Dep't of State, Bureau of Archives & Records Mgmt., Fla. St. Archives, Tallahassee, Fla.). By the time the bill was passed, it had been amended a total of twenty-five (25) times. The Senate and House staff analyses were revised each time that the bill was amended and went to a new committee, thereby ensuring that the analyses were as comprehensive and up-to-date as possible; in addition, each of the House and Senate committees received public comments, both oral and written. The House passed the final version of the bill by a significantly greater margin than the previous version, reflecting the substantial amendments made by the Senate to address the concerns of the bill's opponents.

The Legislature decided, due to the thousands of unsupported lawsuits filed in Florida's courts, that asbestos plaintiffs should be required to provide diagnoses in the form of physical impairment reports addressing the criteria set forth in the Act. The statutory criteria have two basic purposes: (1) to establish that the plaintiff suffers from an objective, physical impairment; and (2) to demonstrate a causal link between the plaintiff's physical impairment and exposure to asbestos.

Indeed, "there are more than 150 causes of fibrosis, other than exposure to asbestos, including obesity and old age, that present similarly to 1/0 asbestosis on X-rays." Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 49 (2004).

The Legislature found "an overpowering public necessity" for the Act, after recounting, in detail, the "crush" of asbestos litigation on state resources and the recoveries of the seriously ill. See Ch. 2005-274, Laws of Fla. Indeed, the Office of State Courts Administrator reported that five (5) jurisdictions (Broward, Duval, Hillsborough, Miami-Dade and Palm Beach) had established special procedures to cope with the flood of asbestos claims. [2] (AO032). The same report "estimated that around 6,000 asbestos claims are pending in the state." Id.

One of the problems noted by the Legislature was that "asbestos-related illnesses can take forty years and longer to manifest themselves." (AO030). Specifically, the Legislature found "the vast majority" of asbestos claimants alleged that they had been exposed to asbestos but had no present asbestos-related impairment. See Ch. 2005-274, Laws of Fla. The Legislature further found that the

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[2] The demands on the limited resources of the judicial system and the parties made by asbestos cases can be seen by the size of the record in this matter; the thirteen (13) consolidated cases generated a record exceeding sixty thousand (60,000) pages, although each of the cases was dismissed long before trial.

cost of compensating exposed but unimpaired claimants jeopardized and substantially reduced the value of recoveries by the seriously ill. Id.

Deciding that remedial action was in the public interest, the Legislature prioritized the claims of the impaired and expressly tolled any applicable statute of limitations for those plaintiffs who were currently unimpaired until (and unless) they become impaired. See Fla. Stat. § 774.206(1) (2005). In deciding to toll any applicable limitations period for asbestos claims, the Legislature recognized that concerns about statutes of limitations had prompted exposed but unimpaired claimants to bring premature lawsuits as a placeholder for possible, but not inevitable, future impairment and that judicial procedures further encouraged such needless filings. See Ch. 2005-274, Laws of Fla. In this way, the Legislature maintained its goal of prioritizing the claims of the most seriously injured individuals without foreclosing other individuals from bringing claims as their injuries, if any, become manifest, an eminently reasonable public policy decision.

"The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts. Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." Univ. of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993) (reversing the lower court's holding that improperly questioned the Legislature's public necessity determination) (internal

citations omitted); see also Fast Track Framing, Inc. v. Caraballo, 994 So. 2d 355, 357 (Fla. 1st DCA 2008) (noting separation of powers concerns). The Legislature's determination of a public purpose and the facts supporting the necessity for passage of the Act are buttressed by the United States Supreme Court's description of asbestos cases as an "elephantine mass" that "defies customary judicial administration."[3] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). Moreover, "the legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." Florida House of Representatives v. Crist, 999 So. 2d 601, 613 (Fla. 2008).

The Act is before this Court clothed with a presumption of constitutionality and must be construed as constitutional if at all possible. See Crist v. Florida Ass'n of Criminal Defense Lawyers, 978 So. 2d 134, 139 (Fla. 2008). The Act may not be declared invalid unless it is "clearly contrary" to the Constitution. Id. at 141; see also State ex rel. Crim v. Juvenal, 159 So. 663, 664 (Fla. 1935). "The burden of proving the unconstitutionality of a statute is upon the party challenging its validity, and this challenger must show that beyond all reasonable doubt the statute conflicts with some designated provision of the constitution." State Farm Mut.

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[3] Similar legislation has been enacted by other states. See, e.g., Ohio Rev. Code Ann. §§2307.71, *et seq.*; K.S.A. §§60-4901, *et seq.*; S.C. Code Ann. §§44-135-10 *et seq*.

Auto. Ins. Co. v. Warren, 805 So. 2d 1074, 1077 (Fla. 5th DCA 2002). As will be explained in detail below, the Attorney General respectfully submits that Appellees have failed to establish the unconstitutionality of the Act, a sound public policy resolution to the asbestos crisis that was clogging Florida's courts.

II. THE ACT IS A PROPER EXERCISE OF THE LEGISLATURE'S AUTHORITY TO ENACT RETROACTIVE LEGISLATION

Because the Act clearly applies to pending cases, such as those of Appellees, the Court's inquiry is whether its retrospective application is constitutionally permissible. See, e.g., Promontory Enter. v. S. Eng'g & Contracting, Inc., 864 So.2d 479, 483 (Fla. 5th DCA 2004). Likewise, the fact that the statute might be characterized as substantive does not end the inquiry. Id. at 485 ("regardless of whether the statute is substantive or remedial, it may be retroactively applied if that is constitutionally permissible."); see also Lakeland Reg'l Med. Ctr., Inc. v. Agency for Health Care Admin., 917 So. 2d 1024, 1031-32 (Fla. 1st DCA 2006) ("Although the amendments may be substantive as in *Environmental Confederation*, they may have retroactive effect if constitutionally permissible.").

As this Court has held, "[a] retrospective provision of a legislative act is not necessarily invalid." McCord v. Smith, 43 So. 2d 704, 708-09 (Fla. 1950). In other words, "[r]etroactive application is constitutionally permissible if it does not violate due process by abrogating a vested right." Promontory, 864 So. 2d at 485. The United States Supreme Court has noted that "[r]etroactivity provisions often

serve entirely benign and legitimate purposes, whether to respond to emergencies… or simply to give comprehensive effect to a new law Congress considers salutary." Landgraf v. USI Film Prods., 511 U.S. 244, 267-68 (1994).

The Act serves just such a legitimate purpose - responding to the asbestos crisis and the thousands of unsupported cases. Moreover, "procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases." Village of El Portal v. City of Miami Shores, 362 So. 2d 275, 278 (Fla. 1978). The Act is constitutionally permissible as a procedural statute; in any event, even if the Act is considered substantive, no settled, vested rights have been abrogated by its operation.

A. The Act Is Procedural

As previously noted, procedural statutes do not present any constitutional issues, even with retroactive application. Id.; see also Butler v. Bay Ctr. / Chubb Ins. Co., 947 So. 2d 570, 572 (Fla. 1st DCA 2006) (court notes that parties "do not have vested rights in the procedure."). "Burden of proof requirements are procedural in nature" and have therefore been applied retroactively to pending cases. See Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 243 (Fla. 1977); see also Shaps v. Provident Life & Accident Ins. Co. 826 So. 2d 250, 254 (Fla. 2002). Indeed, the Legislature's decision to increase the burden of proof, even to a requirement of clear and convincing evidence, does not amount to a substantive

change in the law and is properly applied to pending cases. See, e.g., Ziccardi v. Strother, 570 So. 2d 1319, 1320-21 (Fla. 2d DCA 1990); see also Stuart L. Stein, P.A. v. Miller Indus., 564 So. 2d 539, 540 (Fla. 4th DCA 1990).

The Legislature properly raised the burden of proof of establishing an asbestos-related injury from meager factual allegations to credible and objective medical evidence of a physical impairment that was caused by asbestos exposure. See Fla. Stat. § 774.204(2) (2005); see also Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 504-27 (Spring 2009). The Act requires persons filing or maintaining nonmalignant asbestos-related injury claims to make a prima facie showing of an asbestos-related injury with a minimum of medically-credible evidence. See Fla. Stat. § 774.204(2) (2005); see also Yocom v. Wuestoff Health Sys., Inc., 880 So. 2d 787, 789 (Fla. 5th DCA 2004) ("The purpose of a corroborating [pre-suit] affidavit is to assure the legitimacy of the [medical malpractice] claim and to prevent the filing of baseless claims.").

Persons filing or maintaining certain malignant asbestos-related injury claims must similarly make a prima facie showing. In an alternative holding, the Third District Court of Appeal correctly found that "[t]his section sets forth the plaintiff's burden of proof … and shifts the timing of when the plaintiff must present evidence that exposure to asbestos substantially contributed to the alleged injury. As section 774.204(3) of the Act merely affects the means and methods the

plaintiff must follow when filing or maintaining an asbestos cause of action, the provision is procedural in nature, and may be applied retroactively." DaimlerChrysler Corp. v. Hurst, 949 So. 2d 279, 287 (Fla. 3d DCA 2007).

The Act's prima facie showing is similar to the statutory requirement that a plaintiff provide a pre-suit corroborating affidavit in a medical malpractice action. See Paley v. Maraj, 910 So. 2d 282, 283 (Fla. 4th DCA 2005) (holding that "[a]lthough the incident in this case occurred in 2001, prior to the passage of section 766.202(6), the statute is procedural and therefore applicable here."). Finally, the Ohio Supreme Court recently held that substantially similar provisions requiring prima facie evidence of impairment for an asbestos claim were constitutional even if retroactively applied because they "do not relate to the rights and duties that give rise to this cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive." Ackison v. Anchor Packing Co., 897 N.E.2d 1118, 1124-26 (Ohio 2008) (also finding there was no common-law claim for pleural thickening alone).

As the Third District Court of Appeal has found, "[t]o require all plaintiffs to comply with the prima facie evidence requirement serves the intent of the [Act] by preserving the ability of defendants to compensate people who have serious asbestos-related injuries, and deferring the claims of those who are not currently

sick." In re Asbestos Litig., 933 So. 2d 613, 618-19 (Fla. 3d DCA 2006) (also noting that there were four hundred and sixty (460) asbestos cases set for trial in Miami-Dade Circuit Court as of July 1, 2005). The procedural change, to prioritize the claims by the presently sick and require objective medical evidence of an impairment caused by asbestos exposure, achieves the Act's remedial purpose to "enhance[] the ability of the most seriously ill to receive a prompt recovery." Ch. 2005-274, § 10, Laws of Fla.; see also Fla. Stat. § 774.202 (2005). The Attorney General respectfully submits that the Act's prima facie criteria operate as the functional equivalent of a requirement of clear and convincing evidence, a procedural change not subject to a constitutional challenge.

B. There Was No Settled, Vested Common Law Right of Action Without Impairment

"[T]he Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former on the subject concerning which a later statute is enacted." Williams v. Jones, 326 So. 2d 425, 435 (Fla. 1975). Indeed, the Legislature recognized the lack of a vested right to pursue an asbestos claim in the absence of impairment, stating that "[b]ecause the act expressly preserves the right of all injured persons to recover full compensatory damages for their loss, it does not impair vested rights. In addition, because it enhances the ability of the most seriously ill to receive a prompt recovery, it is remedial in nature." Ch. 2005-274, § 10, Laws of Fla.; see

also Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, 832 So. 2d 948, 952 (Fla. 2d DCA 2002) (noting that "the Florida Legislature itself has indicated that parts of chapter 737 may be procedural in nature.").

While retroactive application may be problematic if substantive, vested rights are impaired, a "person has no property, no vested interest, in any rule of the common law. … To be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a demand." Clausell v. Hobart Corp., 515 So. 2d 1275, 1276 (Fla. 1987) (alteration in original) (internal citations omitted). "The mere prospect that Plaintiff might recover damages from a defendant on a tort theory is clearly not tantamount to a vested right." Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144, 1149 (S.D. Fla. 1986); see also Lakeland Reg'l, 917 So. 2d at 1031-33 (court noted that plaintiff "had only a mere expectation of a continuing right under the statute … [instead of a] vested constitutionally protected property right."); Promontory, 864 So. 2d at 485.

Instead, "[a] substantive, vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment." In re Will of Martell, 457 So. 2d 1064, 1067 (Fla. 2d DCA 1984), *citing* City of Sanford v. McClelland, 163 So. 513 (Fla. 1935). This Court recently relied on these principles to conclude that the expectation of a statutory guarantee of confidentiality afforded to medical

reports had "never risen to the level of a settled, vested substantive right." Florida Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 491 (Fla. 2008); see also Lakeland Reg'l Med. Ctr. v. Neely, 8 So. 3d 1268, 1270 (Fla. 2d DCA 2009) ("As a product of case law, the [work product] doctrine grants health care providers no more of a vested, substantive right than the statutory privileges at issue in *Buster*."). The "right" claimed by Appellees, essentially that they might have been able to obtain a settlement or jury verdict under the chaotic atmosphere prior to enactment of the Act, likewise falls far short of a settled, vested substantive right.

No Florida court has hinted, much less held, that mere exposure to asbestos constitutes a legally cognizable injury giving rise to a compensable damages claim. The court below could not cite a case for this proposition; rather, the court mentioned two cases from this Court "that **justify** the recognition" and merely relied on "Plaintiffs' **assertion**" that Florida common law previously recognized "a cause of action for money damages arising from the exposure to asbestos even if the injury has not yet become malignant or caused any physical impairment." Williams v. Am. Optical Corp., 985 So. 2d 23, 25, 29-30 (Fla. 4th DCA 2008) (emphasis added). However, a close reading of the case law confirms the non-existence of a settled, vested right to recover damages for mere exposure to asbestos as of July 1, 2005. The cases predating the Act generally refer to a diagnosis of asbestosis; in any event, the extent of the injury was never raised as a

possible bar to recovery in any of the reported decisions. To the extent that the case law provides any guidance, the Third District Court of Appeal rejected claims "for those persons … whose exposure to asbestos has merely increased their risk of contracting cancer in the future." Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 525 (Fla. 3d DCA 1985) (noting public policy grounds against liability for exposure).

Under Florida law, "[t]here is no cognizable cause of action for a mere wrong without damage." Simon v. Bartel, 502 So. 2d 1011, 1012 (Fla. 3d DCA 1987); see also Colville v. Pharmacia & Upjohn Co., 565 F.Supp. 2d 1314, 1322-23 (N.D. Fla. 2008) (granting summary judgment because "plaintiff has been unable to establish any current or future injury as a result of her low bone density diagnosis."). The Restatement (Second) of Torts similarly defines 'harm,' a necessary element of a cause of action, as a "loss or detriment to a person, and not a mere change or alteration in some physical person … . In so far as physical changes have a **detrimental effect** on a person, that person suffers harm." § 7, comment b (emphasis added). Courts in other states have held that pleural scarring without functional impairment is not a legally compensable injury based on this definition of harm. See, e.g., Owens-Illinois v. Armstrong, 591 A.2d 544, 734-35 (Md. App. 1991), *rev'd in part on other grounds*, 604 A.2d 47 (Md. 1992); Giffear v. Johns-Manville Corp., 632 A.2d 880, 884-85 (Pa. Super. Ct. 1993); Ackison v. Anchor Packing Co., 897 N.E.2d 1118, 1124-26 (Ohio 2008) (relying on drafts of

the Restatement (Third) of Torts and overruling contrary precedent). Since many claims for asbestos-related injury have historically been based on subjective declarations of plaintiffs, indefinite x-rays or pulmonary analysis and "widely differing opinions" of experts, courts have noted the "need for some form of easily verifiable standard for determining whether an 'injury' exists and when such injury warrants an award of compensation." In re Hawaii Fed. Asbestos Cases, 734 F.Supp. 1563, 1566-67 (D. Haw. 1990) (holding compensable harm from asbestos exposure must be shown by "objectively verifiable functional impairment.").

Appellees' **assertion** of a right to recovery in the absence of impairment was based on two jury verdicts in unreported cases. This Court recently held that a decision concluding there was no false light cause of action did not improperly abolish any right to a previous jury verdict based on the tort. See Anderson v. Gannett Co., 994 So. 2d 1048, 1050-51 (Fla. 2008). The same reasoning should hold true for the Act, which merely affirms the non-existence of a cause of action for a damages claim for exposure to asbestos without any physical impairment.

C. The Act Should Also Be Upheld Under A Balancing Test

Even assuming *arguendo* that the Court found Appellees had a settled, vested right to pursue their "exposure" claims such a finding would not be determinative. See Dep't of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 30 (Fla. 1990) ("whether or not the plaintiffs' rights are vested…is essentially

irrelevant.”). Retroactive application of the Act’s prima facie requirements would still be constitutionally permissible because the strong public interest served by the Act outweighs the nature of Appellees’ affected ‘right’ (if any) and the extent to which it is affected. See Dep’t of Transp. v. Knowles, 402 So. 2d 1155, 1158 (Fla. 1981).

First, Appellees did not have any vested ‘right’ to pursue their actions before enactment of the Act, as previously discussed. Moreover, Appellees’ claims have not been abrogated; such claims have been postponed until they can show objectively verifiable impairment, with any applicable limitations period tolled. See Fla. Stat. § 774.206(1) (2005). The Act has a strong public interest, providing priority to those who are presently feeling the effects of asbestos exposure and protecting their potential recoveries, fully preserving the rights of those who have been exposed but are not (and may never be) impaired, and enhancing the ability of the judicial system to control asbestos litigation. See Fla. Stat. § 774.202 (2005).

III. THE ACT ENSURES MEANINGFUL ACCESS TO THE COURTS FOR ALL PARTIES

Appellees have alternatively claimed that the Act violates their constitutional right to access the courts, a claim not addressed by the court below. Of course, the Legislature can **eliminate** causes of action without violating the access to courts provision if there is both an overpowering public necessity and no reasonable alternative method of meeting such a necessity, see Kluger v.

White, 281 So. 2d 1, 4-5 (Fla. 1973), although the Act does not restrict, much less abolish, any vested cause of action for asbestos-related injuries. In any event, the access to courts provision "protects only rights at common law or by statute prior to the [1968] enactment of the Declaration of Rights of the Florida Constitution." Id.

There was no common law or statutory right to pursue an asbestos claim of any kind as of 1968. See, e.g., Lifemark Hosps. of Florida, Inc. v. Afonso, 4 So.3d 764, 769 (Fla. 3d DCA 2009) (access to courts claim "falls short" where statutory right did not exist until 1972). The first jury verdict for a plaintiff in an asbestos tort case in the United States did not occur until October 1969. See Timothy Mueller, *Tomororw's Causation Standards for Yesterday's Wonder Material: Reiter v. Acands, Inc.*, 25 J. CONTEMP. HEALTH L. & POLICY 437, 446 (Spring 2009). Likewise, the first mention in a reported decision of an asbestos case in a state or federal court in Florida was In re Asbestos & Asbestos Insulation Material Prod. Liab. Litig., 431 F.Supp. 906 (J.P.M.L. 1977) (noting that cases were filed in the Southern District of Florida in 1975).

Moreover, the access to courts provision does not apply to a statute which "imposes a reasonable condition precedent to filing a claim." Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1097 (Fla. 2005). The Act, by requiring objective medical evidence of impairment at the start of a case, serves as a

mechanism for early identification of unsupported asbestos cases rather than abolishing a cause of action. Id.; see also Amorin v. Gordon, 996 So. 2d 913, 917-18 (Fla. 4th DCA 2008) (court found no constitutional violation where common law right was reduced instead of "completely abolished").

Even assuming *arguendo* that the Court found the access to courts provision might apply, the Act serves an overpowering public necessity of prioritizing claims of the presently sick to protect their recoveries and enhancing the judicial system's ability to supervise and control the thousands of pending cases and an unknown number to come. See Fla. Stat. § 774.202 (2005). The rights of persons who were exposed to asbestos but not yet impaired have been **fully preserved** by tolling any applicable statute of limitations if and until they become impaired. Id.; Fla. Stat. § 774.206(1). The means chosen by the Legislature appropriately balanced the needs of persons exposed to asbestos, both those who are impaired and unimpaired, as well as the needs of the overburdened judicial system; Appellees certainly have not suggested any other feasible method to reach this outcome. See, e.g., Univ. of Miami v. Echarte, 618 So. 2d 189,195-97 (Fla. 1996).

CONCLUSION

Based upon the foregoing, the Attorney General respectfully submits that this Court should reverse the decision of the Fourth District Court of Appeal and declare the Act to be a constitutional exercise of the Legislature's authority.

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