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,
Appellees/Respondents. SC08-1639, SC08-1640

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AMICI CURIAE BRIEF OF THE ASSOCIATED INDUSTRIES OF FLORIDA, AMERICAN INSURANCE ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANTS/PETITIONERS

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STATEMENT OF INTEREST

As organizations that represent companies doing business in Florida and their insurers, *amici* have a substantial interest in ensuring that resources needed to compensate the truly sick are not depleted by claimants with premature or meritless asbestos or silica claims. *Amici* also have a substantial interest in ensuring that Florida's tort system is fair and reflects sound public policy.

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). Studies indicate that *up to ninety percent* of recent asbestos plaintiffs *have no physical impairment* that affects their daily activities. Many of these claims have been generated through unreliable mass screenings. The presence of the non-sick "on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now." Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 393 (1993). Sick plaintiffs and asymptomatic claimants have been forced to compete for diminishing, scarce resources. Payments to the truly sick are threatened.

State legislatures, as in Florida, are acting to address filings by unimpaired asbestos claimants and the adverse ripple effects such claims produce. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20:23 Mealey's Litig. Rep.: Asbestos 19 (Jan. 10, 2006); Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 Conn. Ins. L.J. 477 (2006). These laws have received the support of the Council of State Governments and find additional support in a 2003 American Bar Association resolution calling for federal legislation to require claimants to demonstrate impairment before proceeding with an asbestos claim.[1]

In June 2005, the Florida Legislature enacted the Asbestos and Silica Compensation Fairness Act ("Act"), 2005 Fla. Laws ch. 274, Fla. Stat. §§ 774.201 *et seq*., in response to an overwhelming public necessity to address the problems outlined above and to address an increase in silica-related filings. A primary goal of the Act is to preserve resources for meritorious asbestos claimants and allow those claims to be resolved more quickly by deferring the enormous number of

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[1] *See* ABA Comm'n on Asbestos Litig., *Report to the House of Delegates* (2003), *available at* http://www.abanet.org/leadership/full_report.pdf; *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, ABA President-elect), *available at* 2003 WL 785387.

asbestos claims involving persons who lack physical impairment and causation. By changing the *timing* of a plaintiff's traditional proof requirements, the Act's procedures help to ensure that resources needed to pay deserving claimants are not wasted in premature or meritless litigation. Importantly, statutes of limitations are tolled for claimants who cannot make the Act's requisite prima facie showing so that these individuals may bring a claim in the future should they demonstrate an impairing condition caused by asbestos. Thus, the law provides a benefit to claimants who might have been time-barred under previous Florida law.

Plaintiffs/Appellees would have this Court nullify the legislature's finding of an overwhelming public necessity for the Act and permit their cases to proceed despite a lack of objective evidence showing that Plaintiffs are actually impaired. This result is not supported by Florida law or sound policy. *Amici* urge this Court to respect the Legislature's authority to enact meaningful asbestos and silica litigation reform to promote the broad public policy needs of the State. *See generally* Victor E. Schwartz *et al*., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000). As we have explained:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a

> judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

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

ARGUMENT

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

A. The Recent Asbestos Litigation Environment

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005); *see also Amchem Prods.*, 521 U.S. at 597 (describing the asbestos litigation as a "crisis"); *Wilson v. AC&S, Inc.*, 864 N.E.2d 682, 689 (Ohio Ct. App. 2006) ("The extraordinary volume of nonmalignant asbestos cases continues to strain federal and state courts."), *cause dismissed*, 864 N.E.2d 645 (Ohio 2007).[2]

[2] *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).

As far back as 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation found:

> [D]ockets 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). Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll *et al*., *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005). At least 322,000 asbestos claims may be pending. *See* American Academy of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), *at* http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf. RAND has estimated that $70 billion was spent in the litigation through 2002; future costs could reach $195 billion. *See* RAND Rep. at 92, 106.

In Florida, asbestos litigation "has been considerable and persistent for a number of years." *Williams v. American Optical Corp.*, 985 So. 2d 23, 25 (Fla. 4th DCA 2008).

1. Asbestos Litigation Is Driven by Mass Filings by Unimpaired Claimants

"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); Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186, *available at* 2004 WLNR 17888598 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds'--that is, they have slight or no physical symptoms.").[3]

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

[3] *See also* Kathryn Kranhold, *GE To Record $115 Million Expense for Asbestos Claims*, Wall St. J., Feb. 17, 2007, at A3, *abstract available at* 2007 WLNR 3378738 (GE reporting that more than 80% of its pending cases involve claimants "who aren't sick."); Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, Wall St. J., Jan. 8, 2001, at B12, *abstract available at* 2001 WLNR 2004812 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people"); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A15.

Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said, "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired claimants. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 273 (2001); *see also* Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers Are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 158, *available at* 2002 WLNR 11958234.

2. Lawyers Generate Plaintiffs Through Notoriously Unreliable Screenings

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003). "There often is no medical purpose for these screenings and claimants receive no medical follow-up." *Id*.; *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005). These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they

were exposed to asbestos.[4] *U.S. News & World Report* has described the claimant recruiting process:

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

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WLNR 7718069. It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 69 (2003).

Many X-ray interpreters (called "B readers") hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005); *see also* ABA Comm'n on Asbestos Litig., *Report to the House of Delegates* (2003), *available at*

[4] *See 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."); *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co*. 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

http://www.abanet.org/leadership/full_report.pdf (litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding 50% and sometimes reaching 90%); *see also* Joseph N. Gitlin *et al*., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004) (B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays); John M. Wylie II, *The $40 Billion Scam*, Reader's Digest, Jan. 2007, at 74; Editorial, *Beware the B-Readers*, Wall St. J., Jan. 23, 2006, at A16, *abstract available at* 2006 WLNR 1332176. As one physician explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

3. Impact of Unimpaired Claimants on Asbestos Litigation

a. The Truly Sick

Mass filings by unimpaired claimants have created judicial backlogs and exhausted scarce resources that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied*

sub nom. Collins v. Mac-Millan Bloedel, Inc., 532 U.S. 1066 (2001) (internal citation omitted). Substantial transaction costs are expended in such cases. As a result, compensation is unavailable to truly ascertained asbestos victims.

Consider, for example, the litigation involving Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990 and did not resume until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6. The Trust is now paying out just *five cents on the dollar* to asbestos claimants. Many other trusts have been forced to cut or delay payments to claimants. *See* Mark P. Goodman *et al*., Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, Nat'l L.J., Apr. 1, 2002, at B14; James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 262 (2006).

Cancer victims have a well-founded fear that they may not receive adequate or timely compensation unless mass filings by unimpaired claimants are addressed. *See* Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, Wash. Post., Sept. 25, 2002, at E1. In fact, asbestos personal injury lawyers who

primarily represent cancer victims have been highly critical of unimpaired claimant filings and have endorsed mechanisms to give trial priority to the truly sick:

- Matthew Bergman of Seattle: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."[5]
- Peter Kraus of Dallas: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."[6]
- Andrew O'Brien of St. Louis: "There is a limited amount of money available to properly compensate people who are really sick from asbestos disease" and consideration should be given to "the needs of those who are seriously ill" by not "flooding the courts with those who are not sick today and may never become impaired to the point they can't lead a normal life."[7]
- Randy Bono, formerly of SimmonsCooper in Madison County, Illinois: "Getting people who aren't sick out of the system, that's a good idea."[8]
- Steve Kazan of Oakland: "The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that

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5 Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer, May 30, 2002, at B7, *available at* 2002 WLNR 2149929.

6 Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, *abstract available at* 2002 WLNR 2320384..

7 Andrew Schneider, *Asbestos Lawsuits Anger Critics; Mass Medical Screenings, Run by Lawyers, Reel in Many Who Don't Feel Ill*, St. Louis Post-Dispatch, Feb. 9, 2003, at A1.

8 Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties; Bill Would Substitute Trust Fund for Lawsuits*, St. Louis Post-Dispatch, July 23, 2003, at A1.

> his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them."[9]

b. Bankruptcies and the Economic Impact of Asbestos Litigation

Asbestos has forced over eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, with devastating impacts on the companies' employees, retirees, shareholders, and surrounding communities. For instance, a study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University found that asbestos-related bankruptcies 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 and employee retirement assets declined roughly twenty-five percent. Bankrupt companies and communities are not the only ones affected:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive

[9] *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan).

> 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).

c. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing," Editorial, *Lawyers Torch the Economy,* Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314,[10] and has been described 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 been named. *See* Mark A. Behrens & Phil Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings*

[10] *See also* 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; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *available at* 2003 WLNR 3099209.

by the Non-Sick, 20:6 Mealey's Litig. Rep.: Asbestos 33 (Apr. 13, 2005). Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND, *supra*, at 94.

4. Florida's Experience Is in Line with National Trends

The asbestos litigation environment in Florida followed the same troubling national trends, as the "whereas" clauses in the preamble to the Act make clear. *See In re Asbestos Litig.*, 933 So. 2d 613 (Fla. 3d DCA 2006). By the 1990s, South Florida was a "mecca for asbestos lawsuits." Mary McLachlin, *Asbestos Litigation Clogs State Courts in South Florida*, Palm Beach Post, July 4, 2004, at 1A, *available at* 2004 WLNR 3018505. In 2004, Broward County was handling up to 8,000 active cases, and Miami-Dade, Palm Beach, Hillsborough, and Duval Counties each had an estimated 800 to 1,750 asbestos cases. *See id*. In 2002, Palm Beach County alone had 3,200 asbestos cases. *See* Jane Musgrave, *Judge Suspends 500 Asbestos-Related Lawsuits*, Palm Beach Post, July 9, 2005, at 3B, *available at* 2005 WLNR 10907861. As recently as June 2006, a Florida appellate court noted "the large volume of asbestos personal injury cases in Miami-Dade County." *In re Asbestos Litig.*, 933 So. 2d at 619.

The inflow of cases—many of which involved *nonresident* plaintiffs with little or no connection to Florida—led Palm Beach Judge Timothy McCarthy to

comment: "It seems we have built a machine here. . . . It's like building the Sawgrass Expressway in the middle of nowhere. Build it, and they will come." McLachlin, *supra*.[11]

The surge in asbestos lawsuits by unimpaired claimants, fueled by questionable mass screening practices, threatened payments to the truly sick in Florida, as elsewhere. These filings also clog the courts and delay justice for asbestos and other civil claimants with legitimate and serious injuries. As another Florida appellate court observed: if the Act were not enforced, "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

[11] Florida has also experienced the "double dipping" practices exposed in other jurisdictions. Prior to the Act's effective date, 111 actions were filed in Broward County; 72% alleged asbestos and silica-related conditions, despite the extreme medical rarity of a person having both conditions. *See* Editorial, *Trial Bar Cleanup*, Wall St. J., Feb. 11, 2006, at A8, *abstract available at* 2006 WLNR 2515792. Broward County Circuit Judge David Krathen found that the involvement of a litigation screening firm embroiled in the federal silica litigation scandal "reek[ed] of fraud" and he criticized the plaintiffs' shotgun approach to naming 80 defendants without identifying the specific products to which the claimants were exposed. Judge Krathen was "concerned about the good clients, the good cases, and . . . the economic well-being of our economy and our companies that support jobs here," which is why he required the lawyers to submit more detailed information to support their cases. *Id*.; *see also* Peter Geier, *Wary Judge to 'Ride Herd' on Florida Silica Cases*, Nat'l L.J., Jan. 30, 2006, at 6.

plaintiffs who make the requisite prima facie showing, and deny those plaintiffs who do make the requisite showing priority in obtaining a trial setting." *In re Asbestos Litig*., 933 So. 2d at 617-18.

In addition, mass filings by the non-sick helped force key Florida employers into bankruptcy, such as Tampa homebuilder Walter Industries, and Celotex Corp., which was once one of the largest companies based in Tampa Bay with as many as 2,900 employees. *See* Scott Barancik, *Asbestos Specter Haunts Walter*, St. Petersburg Times, May 1, 2003, at 1E, *available at* 2003 WLNR 15673020; McLachlin, *supra*; Jerome R. Stockfisch, *Tampa, Fla.-Based Building Products Firm Will Close*, Tampa Trib., July 25, 2001, *available at* 2001 WLNR 10005526. These were the broad public policy issues that the legislature appropriately considered in enacting the procedures in the Act.

II. THE ASBESTOS AND SILICA COMPENSATION FAIRNESS ACT WAS A REASONABLE PUBLIC POLICY RESPONSE

The Legislature enacted the Asbestos and Silica Compensation Fairness Act as a surgical response to the problems described above and to address an increase in questionable silica-related filings.[12] "The Florida Legislature recognized that

[12] *See In re Silica Prods. Liab. Litig. (MDL No. 1553)*, 398 F. Supp. 2d 563 (S.D. Tex. 2005) (recommending that all but one of the 10,000 claims on the federal silica multi-district litigation docket should be dismissed on remand because the diagnoses were fraudulently prepared).

'exposure to asbestos has created a flood of litigation in state and federal courts that the United States Supreme Court in *Ortiz v. Fibreboard Corp.*, [527 U.S. 815, 821 (1999)], has characterized as an 'elephantine mass' of cases that 'defies customary judicial administration.'" *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279, 283 (Fla. 3d DCA), *review denied*, 962 So.2d 279 (Fla. 2007) (internal citations omitted). "Additionally, the legislature recognized that 'the vast majority of asbestos claims are fled by individuals who allege they have been exposed to asbestos and who may suffer some physical sign of exposure, but who suffer no present asbestos-related impairment." *Id*.

The Act was a recognition "that there is an overpowering public necessity to defer the claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos–related and silica-related injuries and to safeguard the jobs, benefits, and savings of workers in this state and the well-being of the economy of this state." 2005 Fla. Laws ch. 274 (legislative findings).

The Act established fair procedures for the filing of asbestos and silica claims. The core of the Act is the adoption of procedures requiring the submission of evidence of actual impairment early in the case. *See* Fla. Stat. § 774.204.

Absent a prima facie showing of impairment and causation, cases are required to be dismissed without prejudice.

Importantly, claimants who cannot presently make the prima facie showing required under the Act are protected from having their claims time-barred in the future. Thus, some claimants might benefit by their ability to bring claims that would have been time-barred under previous Florida law. It is also important to note that the Act merely changes the *timing* of the plaintiffs' traditional burden of proving actual physical injury for which exposure to asbestos was a substantial contributing factor. *See Reaves v. Armstrong World Indus*., 569 So. 2d 1307 (Fla. 4th DCA 1990), *review denied*, 581 So. 2d 166 (Fla. 1991); Fla. Std. Jury Inst. (Civ.) 5.1(a); *see also Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 528 (Fla. 3d DCA 1985) ("The physical injury requirement is consistent with Florida law, necessary, and fair" because "[m]illions of people have been exposed to asbestos."), *review denied*, 492 So. 2d 1331 (Fla. 1986).

Florida's asbestos and silica claims procedures Act has a compelling public policy basis, *see In re Asbestos Litig*., 933 So. 2d 613 (Fla. 3d DCA 2006), like other Florida laws that have withstood constitutional challenge. *See Eller v. Shova*, 630 So. 2d 537 (Fla. 1993) (workers' compensation); *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974) (auto negligence); *University of Miami v. Echarte*, 618

So. 2d 189 (Fla.) (medical malpractice), *cert. denied*, 510 U.S. 915 (1993). The Act should be upheld, as the Third District Court of Appeal has concluded. *See DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA), *review denied*, 962 So.2d 279 (Fla. 2007); *Flowserve Corp. v. Bonilla*, 952 So. 2d 1239 (Fla. 3d DCA), *review denied*, 967 So. 2d 196 (Fla. 2007). The Ohio Supreme Court reached the same conclusion with respect to Ohio's asbestos medical criteria law. *See Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008).

"By limiting cases to those claimants suffering from actual, physical impairment, the [Act] reserve[s] judicial resources and corporate money for those claimants that need it most." Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm. & Mary L. Rev. 2043, 2061-62 (2007); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 531 (2007) ("[I]t is unreasonable to compensate hundreds of thousands of people exposed to asbestos, who may have physical markers of exposure, but who have no current impairment from a disease caused by asbestos exposure.").[13]

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[13] *See also* Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 Sw. U. L. Rev. 671, 689 (2008) ("medical criteria acts are a step in the right direction."); James S. Lloyd, Comment, *Administering a Cure-All or Selling Snake Oil? Implementing an Inactive Docket for Asbestos Litigation in Texas*, 43 Hous. L. Rev. 159 (2006) (Texas medical criteria law is constitutional); Philip Zimmerly,

(Footnote continued on next page)

In addition, the Act will help unclog court dockets, slow the rate of asbestos-related bankruptcies, and help stem the spread of the litigation to an ever-growing list of attenuated defendants. *See* 2005 Fla. Laws ch. 274 (legislative findings).

CONCLUSION

For these reasons, this Court should declare the subject Act constitutional.

Respectfully submitted,

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Comment, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, 59 Ala. L. Rev. 771 (2008).

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I certify that the foregoing Brief is submitted in Times New Roman 14-point font and complies with the requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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