IN THE SUPREME COURT OF FLORIDA

AMERICAN OPTICAL CORP., et al., Appellants/Cross-Petitioners, v. WALTER R. SPIEWAK , et al., Appellees/Cross-Respondents.	Case Nos. SC08-1616, SC08-1617, SC08-1639, and SC08-1640 (consolidated) L.T. Case Nos. 4D07-143, 4D07-144, 4D07-145, 4D07-146, 4D07-147, 4D07-148, 4D07-149, 4D07-150, 4D07-151, 4D07-153, 4D07-154, 4D07-405, and 4D07-407

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS/CROSS-PETITIONERS AMERICAN OPTICAL CORP. , ET AL.

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IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of engaging in litigation in matters affecting the public interest. PLF's Atlantic Center, based in Stuart, Florida, has participated as amicus curiae in many Florida Supreme Court cases on matters ranging from private property rights to environmental law, civil rights, and the civil justice system. PLF attorneys are familiar with the legal issues raised by this case and have read the briefs thus far submitted by the parties. PLF seeks to augment the arguments in the parties' briefs by addressing the serious social and economic costs inherent in asbestos litigation.

INTRODUCTION

Courts are good at resolving disputes between individuals based on specific facts. Conversely, legislatures are uniquely equipped to reach careful and fully informed decisions about policy matters that affect large numbers of people, particularly when many of those people have divergent, sometimes competing, interests.

In 2005, the Florida Legislature enacted the Asbestos and Silica Compensation Fairness Act (Act). The Act was a response to rampant, out-of-control asbestos litigation in Florida. It was designed to provide relief to both the Florida judicial system and Florida economy, which were overly burdened by

litigation brought by uninjured and often out-of-state asbestos plaintiffs. The Act also was designed to help those plaintiffs who are actually harmed by asbestos by granting them priority access to the courts, and ensuring that the few solvent asbestos defendants remained able to compensate those who are actually injured. This is a task for which the legislative branch is well suited, because of its comparative advantage over the courts in the development of public policy. *See* Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 Loy. U. Chi. L.J. 745, 753 (1997). Legislators have access to information provided by all stakeholders in a situation that enables them to weigh and balance the full range of competing social, economic and policy considerations. *See id.* Thus, courts should show proper deference to the policy-making prerogative of the legislative branch.

The question now before this Court is whether the Act should apply to those claims that were filed before the Act went into effect. In resolving this question, the Court should keep in mind the central tenet of Florida and national tort law, namely, that public policy remains a primary consideration in all tort cases. *See, e.g.*, *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 794 (Fla. 2004); *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1202-03 (Fla. 2003). Furthermore, the Court should be aware of the voluminous legislative record of asbestos-related litigation abuse, and accord proper deference to the Legislature's policy-making

here.

The Legislature responded to a question of dire importance to all Florida residents by reforming a badly flawed system. A balance of the equities involved in applying the Act retroactively demonstrates that this Court should require asbestos plaintiffs, in all cases, to demonstrate actual physical impairment. Moreover, the harms that asbestos litigation has placed on the nation as a whole, and Florida in particular, counsel in favor of applying the Act retroactively.

I

THE LEGISLATURE'S REFORMATION OF ASBESTOS RELATED LITIGATION SHOULD BE GIVEN THE BROADEST APPLICATION

A. Statutes Are Presumed Constitutional in Deference to the Legislature's Policy-Making Duties

In accordance with the separation of powers doctrine, the courts of this state may not seek to substitute their judgment for that of another co-equal coordinate branch of government. As stated in *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996), "The judiciary must defer to the wisdom of those who have carefully evaluated and studied the social, economic, and political ramifications of this . . . issue—the legislature." For these reasons, it has long been held in this state that

> no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, *unless it clearly appears beyond all reasonable doubt that, under any rational view that may be*

> *taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law*. . . . The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

City of Jacksonville v. Bowden, 64 So. 769, 772 (Fla. 1914) (emphasis added).

The judiciary has no constituency; it should have no role in policy-making outside the confines of constitutional litigation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (6-0 decision) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."). Courts are good at resolving disputes between individuals based on specific facts. They are ill-suited, however, to make decisions based on complicated voluminous data received by the Legislature as it crafted the Act. It is unrealistic to expect courts to shift the focus of their causal inquiry from specific cause to functional cause, or to identify the functional cause or causes of particular types of injuries in an efficient and effective manner. Richard Pierce, *Symposium: Alternative Compensation Schemes and Tort Theory: Institutional Aspects of Tort Reform*, 73 Calif. L. Rev. 917, 930 (1985).

B. Florida Asbestos Litigation Prior to 2005 Was Badly Flawed

The Act amended Florida tort law to require plaintiffs to show actual ailments before recovering damages from companies linked to asbestos. *See* §774.204, Fla. Stat. (2006). Previously, asbestos-related plaintiffs need not prove

actual injury before moving forward with their suits, yet the claims still purported to sound in basic tort/negligence law. *See DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279, 286 (Fla. 3d DCA 2007).

Prior to the enactment of the Act, asbestos litigation in Florida had reached the breaking point. In 1997, a $31 million verdict for a Mississippi resident resulted in plaintiffs' attorneys traveling en masse to Florida for their asbestos litigation. *See* James M. Taylor, The Heartland Institute, *Florida Reins in Asbestos Litigation Abuse*, Environment & Climate News (Aug. 2005).[1] In 2002, in Palm Beach County courts alone, 3,400 such cases were filed. *Id.* Furthermore, thousands of these Florida cases "are filed in jurisdictions with no direct relation to the plaintiffs or defendants." Mary McLachlin, *Asbestos Litigation Clogs State Courts in South Florida*, Palm Beach Post, July 4, 2004, at 1A, *available at* 2004 WLNR 3018505. Unsurprisingly, the resulting business environment was atrocious, as James Taylor explained:

> Largely due to the preexisting asbestos litigation system, the Institute for Legal Reform currently ranks Florida's legal system as one of the 10 worst in the country. Moreover, Palm Beach County and South Florida in general are considered by the American Tort Reform Foundation to be the nation's seventh worst judicial "hellhole."

Taylor, *supra*.

In response to this untenable situation, the Florida Legislature passed the

[1] *Available at* http://www.heartland.org/policybot/results/17566/Florida_Reins_in_Asbestos_Litigation_Abuse.html (last visited Aug. 7, 2009).

Act. In the preamble of the Act, the Legislature made clear that the current tort regime for asbestos was flawed in part because of the tremendous costs it placed on the business community:

> WHEREAS, exposure to asbestos has created a flood of litigation in state and federal courts . . . asbestos personal injury litigation can be unfair and inefficient, imposing a severe burden on litigants and taxpayers alike . . ., the inefficiencies and societal costs of asbestos litigation have been well documented . . ., the extraordinary volume of nonmalignant asbestos cases continues to strain state courts . . ., estimates show that between 60,000 and 128,000 American workers already have lost their jobs as a result of asbestos-related bankruptcies and that the total number of jobs that will be lost due to asbestos-related bankruptcies will eventually reach 432,000 . . ., asbestos litigation is estimated to have cost over $54 billion, with well over half of this expense going to attorney's fees and other litigation costs . . . .

H.R. 1019, 2005 Leg. (Fla. 2005); *see also In re Asbestos Litig.*, 933 So. 2d 613, 618 (Fla. 3d DCA 2006) (discussing the Legislature's findings).

The Legislature was unquestionably concerned with the policy implications of asbestos litigation on Floridians. And policy considerations counsel against allowing cases like these to go forward where there is no demonstrable injury. All liability claims—whether serious and valid, or trifling and without merit—create economic costs. As Nobel Laureate Friedrich Hayek noted, liability rules "will normally raise the cost of production or, what amounts to the same thing, reduce over-all productivity." Friedrich A. Hayek, *The Constitution of Liberty* 224 (1960). For this reason, legislators may reasonably choose to balance the cost of

expansive tort liability against the plaintiffs' claims for compensation. A presumption against imposing liability is justified because the "over-all cost is almost always underestimated." *Id.* at 225. This underestimation is due to the fact that tort law has the potential of stifling entrepreneurial activity, driving away investors, and depriving society of jobs, as well as goods and services, that might otherwise have existed. Since these jobs, goods, and services never come into existence once a legal cost is imposed on all businesses, it is easy to overlook their cost to society. *See generally* Frederic Bastiat, *That Which Is Seen, and That Which Is Not Seen* (1850), *available at* http://bastiat.org/en/twisatwins.html (last visited Aug. 7, 2009).

The Florida Legislature attempted to make a correction to a severely flawed asbestos-related tort system. The astronomical awards to mostly uninjured, out-of-state plaintiffs, the strain on scarce judicial resources, and the reckless damage to the Florida business community were at the forefront of the Legislature's decision.

C. The Balance of the Equities Favors Application of the Act's Reforms to Pending Cases

It is undisputed that the intent of the Legislature in enacting the Act was that it would apply to pending cases. Nevertheless, the court below held that these noninjured Plaintiffs' tort cause of action created a "vested right," which could not be abrogated by legislation. *Williams v. Am. Optical Corp.*, 985 So. 2d 23, 32 (Fla. 4th DCA 2008). Since conventional methods of statutory interpretation of the Act

may not yield for this Court a definitive answer as to whether the statute's reforms should be applied to pending lawsuits, this Court should balance the equities of the parties affected. *See, e.g.*, *Atkinson v. State*, 791 So. 2d 537, 538-39 (Fla. 2d DCA 2001) (citation omitted) ("Courts are constrained as a basic tenet of statutory interpretation to avoid a construction of a statute that would result in unreasonable, harsh, or absurd consequences. To read [the statute differently] would produce . . . a result . . . contrary to public policy."); *Pokress v. Tisch Florida Props., Inc.*, 153 So. 2d 346 (Fla. 3d DCA 1963); *cf.* Richard A. Posner, *Economic Analysis of Law* 577-78 (5th ed. 1998) ("[I]n areas where conventional methods of interpretation leave the judge in doubt, perhaps he should feel free to use his interpretive freedom to nudge the statute in the direction of efficiency."). A decision of this Court to apply the Act's reforms to pending cases will produce many "winners" and few "losers." Weighing the interests of the various interest groups that might be impacted by this Court's ruling, it would be far more equitable to apply the Act's reforms to pending lawsuits than not.

1. Those Who Stand to Win: The Judicial System, Businesses, Employees, Consumers, and Actually Injured Plaintiffs

By 2004, asbestos litigation had taken control of the Florida court system. Indeed, prior to the Act going into effect, Palm Beach County Circuit Court Judge Timothy McCarthy explained, "This is not only expensive, but unfair to the thousands of Florida citizens whose access to court is being delayed while Florida

funds and provides court access to strangers." McLachlin, *supra*, at 1A. However, applying the Act's reforms to pending cases will weed out those asbestos cases without a real dispute between the parties, permitting courts to dedicate their limited resources to hearing the claims of actually injured litigants. The Act ensures that injured parties, their attorneys, and consumers at large will benefit from the greater access to judicial resources.

The Legislature's decision to create greater access to the judicial system is echoed by federal district court judges who have borne the brunt of the asbestos and similar mass torts. Recognizing the potential for fraud, particularly with noninjured plaintiffs, the judicial trend is to demand not only a claim of injury, but a showing of some proof of injury before permitting individual claims to proceed. United States District Court Judge Eduardo Robreno requires asbestos plaintiffs to state specific claims against each company they sue. *See In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2009 WL 2222977 (E.D. Pa. July 17, 2009), Administrative Order No. 19. This follows the shattering report by United States District Court Judge Janis Jack, who excoriated the lawyers who paraded thousands of noninjured plaintiffs through her court, frequently with trumped-up diagnoses provided by doctors acting in cahoots with the lawyers. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 633-34 (S.D. Tex. 2005).

Applying the Act's reforms to pending cases also will bring a modicum of

fairness to the businesses being sued by uninjured plaintiffs. In those cases it is often the small businesses that lack the funds to litigate who are most negatively affected. For example, the Rand Institute reported 73 corporate asbestos defendants that had dissolved or filed for reorganization, with a full 36 of those occurring in the short period from January, 2000, through Summer, 2004. Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* 109 (2005).[2]

Denying the Act's reforms to such businesses will force them to divert resources away from productive activity and into defending themselves from often meritless lawsuits by uninjured, out-of-state plaintiffs. Businesses can internalize only so much: costs associated with a business' continued litigation of an uninjured plaintiff action ultimately will be borne by that business' customers, through higher prices, and employees, through lower wages and benefits. Council of Economic Advisers, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (Apr. 2002), *available at* http://www.heartland.org/custom/semod_policybot/pdf/13266.pdf (last visited Aug. 7, 2009); *see also* Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645, 645 (2003) (discussing how outlandish tort verdicts are ultimately born by consumers through higher

[2] *Available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf (last visited Aug. 7, 2009).

prices).

Importantly, the Legislature recognized that applying the Act to pending cases helps ensure that those victims who are actually injured by asbestos receive the compensation to which they are entitled. In fact, three of the four listed "purposes" of the Act relate to ensuring that actually injured plaintiffs receive compensation for their claims. §774.202, Fla. Stat. (2005) reads:

> It is the purpose of this act to:
> (1) Give priority to true victims of asbestos and silica, claimants who can demonstrate actual physical impairment caused by exposure to asbestos or silica; (2) Fully preserve the rights of claimants who were exposed to asbestos or silica to pursue compensation if they become impaired in the future as a result of the exposure; . . . and (4) Conserve the scarce resources of the defendants to allow compensation to cancer victims and others who are physically impaired by exposure to asbestos or silica while securing the right to similar compensation for those who may suffer physical impairment in the future.

The Legislature had good reason to question whether there would be enough funds to compensate those plaintiffs who can actually demonstrate injury from asbestos. "[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." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 531 (2007). Not only is it unreasonable to expect the few remaining asbestos defendants to pay all the costs borne by current asbestos litigation, but it is also unjust. "Whether or not it can be justified when there is enough money to satisfy

all claims, the case for compensating the unimpaired seems very weak if it results in limiting or preventing compensation to people with serious diseases." *Id.* at 531-32.

In order to ensure that the injured victims would have priority over uninjured claimants, the Legislature crafted simple but effective procedural rules that require plaintiffs to offer evidence of injury up front. "The requirement for basic, prima facie evidence supported by a diagnosis from a 'qualified physician' serves several purposes. . . . By limiting cases to those claimants suffering from actual, physical impairment, the statutes reserve judicial resources and corporate money for those claimants that need it most." Matthew Mall, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Medical Diagnosing*, 48 Wm. & Mary L. Rev. 2043, 2061-62 (2007) (analyzing asbestos reform statutes in Florida, Georgia, Ohio, and Texas). Ohio, Texas, Kansas, South Carolina, and Georgia also demand evidence of medical criteria before allowing asbestos claims to proceed. Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501, 505 (2009). Without the Legislature's actions here, the true victims of asbestos would never be able to recover from the bankrupt tortfeasors.

2. Those Who Stand to Lose: Plaintiffs Who Have Suffered No Injury, and the Attorneys Who Represent Them

Plaintiffs who lack even the minimal injury needed to confer standing will lose if this court applies the Act retroactively as the Legislature intended. This

"loss" however, should be considered in context. In most noninjury cases, "a substantial majority of claims were brought on behalf of unimpaired claimants diagnosed largely through plaintiff-lawyer-arranged mass screenings. It is estimated that over one million workers have undergone attorney-sponsored screenings." Behrens, *supra*, at 504. Notably, the Act does not bar plaintiffs from refiling their suit if they can later demonstrate an actual asbestos-related injury. Thus, only those plaintiffs who lack any asbestos-related injury, and who can never demonstrate an asbestos-related injury, will be prevented from filing suit.

The major losers of retroactive application of the Act to pending asbestos-related claims are the lawyers representing noninjured plaintiffs. These lawyers, who are most likely bringing the suit on a contingency basis, will not be able to recover. Because even under the former procedures plaintiffs would eventually be required to prove actual asbestos-related injury, many plaintiffs' attorneys filed suit without ever intending to go to trial. "In South Florida, hundreds of asbestos cases actually get set on trial dockets—though trial is the last thing most of them want. The real objective is to reach a settlement, which happens in more than 99 percent of asbestos claims." McLachlin, *supra*, at 1A. And settlement is usually easy to come by. "Defendant corporations, which can number more than 100 in a single lawsuit, and their insurance carriers pay out thousands or even hundreds of thousands of dollars per claim to avoid the expense of a trial and the risk of a

multimillion-dollar verdict." *Id.*

Unsurprisingly, this method of litigation has led to serious frauds on the judicial system. As one scholar notes:

> One of those doctors [used by plaintiffs' attorneys throughout the country] . . . is reported to have read the x-rays of more than 75,000 claimants since the early 1990s, accounting for approximately ten percent of all the claims ever filed. This kind of fraud is only the most obvious. Some lawyers representing plaintiffs have engaged in dubious practices to improve the testimony of their clients; such practices are particularly important in asbestos cases because of the long latency of asbestos diseases and the difficulty in establishing responsibility for (or even the existence of) long-ago exposures.

Hanlon & Smetak, *supra*, at 530-31. *See also* Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1231 (2008) (discussing how litigation initiated screenings result in over 1000% increase in positive diagnoses over the same individuals being examined in a clinical setting).

Balancing the equities in this case produces a one-sided scale. On the one hand, applying the Act retroactively eases the tremendous burden on the judicial system, allows greater access to Florida courts by injured victims, hastening their ability to recover compensation, and protects Florida business. On the other hand, refusing to apply the Act retroactively allows uninjured plaintiffs to continue to burden the Florida judicial system, primarily to the benefit of their attorneys. This balancing of the equities counsel the Court in favor of following the Legislature's

intent by allowing the Act to be applied retroactively.

II

ASBESTOS LITIGATION IMPOSES SERIOUS ECONOMIC HARMS

In the 1980s and 1990s, asbestos exposure became one of the primary targets for abusive and exploitative mass tort litigation. Such litigation harms citizens of Florida by deterring economic investment and job creation and curbing the availability of goods and services on the market—thus increasing the cost of living. Worse, asbestos litigation created serious injustices in the tort system, by changing the rules and extending liability beyond the traditional limits of tort law. It is important to consider the ramifications this Court's decision may have in the context and history of asbestos litigation as a whole.

Asbestos litigation now is widely recognized as the epicenter of a massive breakdown in American tort law. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997). According to a 2005 report by the RAND Institute, $54 billion has already been spent on litigation over asbestos-related injuries, more than half of which has gone to "transaction costs," such as attorneys' fees. Carroll, *supra*, at 93. After 30 years, this litigation

> has spread well beyond the asbestos-related manufacturing and installation industries . . . to touch almost every form of economic activity that takes place in the United States. [The study] found that 75 out of a total of 83 different types of industries . . . included at least one firm that had been named as an asbestos litigation defendant.

Id. at 81. Because virtually all manufacturers of products containing asbestos are bankrupt, the plaintiffs' bar has sought out other defendants with peripheral connections to the asbestos industry.

> These "peripheral defendants" have only an attenuated connection to asbestos, but are now named in asbestos litigation because of their "deep pockets"; "the net has spread . . . to companies far removed from the scene of any putative wrongdoing." There were 300 asbestos defendants in 1982; now there are more than 8,500. Asbestos litigation now touches firms in industries engaged in almost every form of economic activity that takes place in the economy. Senior U.S. District Court Judge Jack Weinstein has said "it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy."

Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (citations omitted). Of course, some of these cases are justified on the merits. There is no doubt that industrial exposure to dangerous chemicals is properly the subject of tort law. The problem is that when damages awards become so vast, and courts willing to bend the rules of tort law in favor of plaintiffs and against "deep pockets" defendants, that asbestos litigation creates an entire industry within the legal profession. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 233 (2006) (identifying two "fundamental phenomena" that combine to create the asbestos litigation crisis: "claimant elasticity," defined as "the essentially inexhaustible supply of claimants," and "defendant elasticity," defined as "the

correspondingly unbounded source of defendants," which stem from "the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as 'solvent bystanders'" (citations omitted)).

The asbestos litigation industry has had collateral ill effects, such as attorneys being in often strained compliance with their ethical duties. Because asbestos litigation remains profitable for plaintiffs' attorneys, the lawyers continue to fight for numerous clients in order to produce mass settlements. "It is highly doubtful that compliance with the Model Rule [1.8(g)] is possible in asbestos litigation because each plaintiff is involved in numerous settlements with individual defendants so that no litigant really can know what another has received." Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 530 (2008).[3] Judge Freedman also notes that asbestos litigation creates serious ethical conflicts for attorneys with respect to advertising, screening, and contingency fees among others. *See generally id.*

This asbestos litigation industry is economically wasteful, in that it puts resources into unproductive litigation, drives businesses that do produce social

[3] ABA Rule 1.8(g) reads: "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client." Model Rules of Prof'l Conduct R. 1.8(g) (2007).

benefits into bankruptcy, and overdeters legitimate enterprises. James Stengel identified 32 bankruptcies related to asbestos litigation just from 2000-2005. Stengel, *supra*, at 265 (listing each bankrupt company and the year it filed for bankruptcy). Moreover, the financial windfalls produced by verdicts in these cases often fail to effect any reparation or justice. "Plaintiffs' attorneys collect an estimated $30 billion annually in legal fees—money that could otherwise help prevent or compensate injuries. . . . [I]n mass tort litigation involving asbestos, two-thirds of insurance expenditures have gone to lawyers and experts." Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke L.J. 447, 464 (2004). In addition to the fees lawyers and experts generate from asbestos litigation, "almost a third of the dollars set aside to compensate asbestos victims" are spent on administrative and transaction costs necessary for asbestos litigation. Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 Sw. U. L. Rev. 575, 576 (2008).

The RAND Institute survey cites a Tillinghast-Towers Perrin projection that the number of claimants in asbestos cases will increase to a total of 1 million plaintiffs, and a total cost of over $200 billion. *See* Carroll, *supra*, at 105. How many businesses will be driven into bankruptcy, and how much time and resources will be exhausted by lawyers and courts investigating and prosecuting these claims, is unclear. And the amount of entrepreneurial activity, industrial

innovation, and increased productivity that will be stifled in the process is impossible to calculate.

A state legislature acts well within its policy- and law-making function when it responds to the asbestos litigation that creates genuine injustices in the name of placing the burden of risk onto those parties that are wealthiest rather than parties that genuinely deserve the blame. So many businesses are at risk for such potentially devastating damages awards with regard to asbestos that some defense lawyers warn their clients that

> [t]he turbulent waters of asbestos litigation have seeped into virtually every type of economic activity in our country. Defense attorneys are striving to protect their clients from the perils attendant to the most enduring mass tort litigation recorded in the annals of American jurisprudence—a marathon that has yet to reach full stride.

Kenneth R. Meyer et al., *Emerging Trends in Asbestos Premises Liability Claims*, 72 Def. Couns. J. 241, 241 (2005) (citation omitted). Faced with this difficult, large-scale problem the Legislature acted to transform the system to one of justice for injured plaintiffs from one that does little more than redistribute wealth on the basis of a jury's subjective feelings of compassion.

CONCLUSION

In order to relieve an overtaxed judicial system and provide truly injured asbestos plaintiffs with the ability to be made whole, the Legislature amended a badly flawed system. Its sound public policy decision to apply the Act to all

present and future asbestos cases should be afforded its proper deference by this Court. The Act will help the Florida judicial system, Florida businesses, consumers, and employees, and help ensure that those actually injured receive compensation for their injuries. At the same time, applying the Act retroactively only hurts those plaintiffs without any demonstrable asbestos-related injury, and the attorneys who represent them. These considerations, along with the tremendous costs that asbestos litigation forces onto Floridians, and the entire nation, should counsel the Court in favor of applying the Act to all cases, as the Legislature intended.

DATED: August 18, 2009.

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and it is double-spaced in compliance with Fla. R. App. P. 9.210(a)(2).

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