

**IN THE SUPREME COURT OF OHIO**

LINDA ACKISON,	:	Case Nos. 2007-0219; 2007-0415
	:	
Plaintiff-Appellee,	:	On Appeal from the Lawrence
	:	County Court of Appeals,
v.	:	Fourth Appellate District
	:	
ANCHOR PACKING CO., <i>et al.</i> ,	:	Court of Appeals Case No: 05CA46
	:	
Defendants-Appellants.	:	

**MERIT BRIEF OF *AMICI CURIAE*, OHIO MANUFACTURERS' ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OHIO, OHIO CHAMBER OF COMMERCE, OHIO ALLIANCE FOR CIVIL JUSTICE, AND OHIO CHEMISTRY TECHNOLOGY COUNCIL IN SUPPORT OF APPELLANTS**

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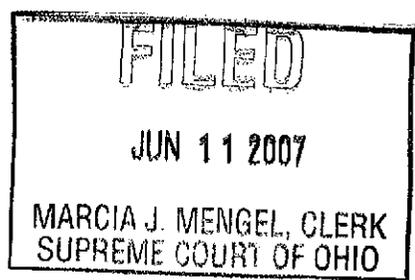
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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The General Assembly enacted Amended Substitute House Bill 292 (“H.B. 292”) in order to address the exploding asbestos litigation crisis in Ohio in a manner that serves the interests of asbestos personal injury litigants, as well as Ohioans more broadly by

deferring of claims of exposed individuals who are not sick in order to preserve, now and in the future, defendants’ ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits and savings of the state’s employees and the well being of the Ohio economy.

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H.B. 292 emerged out of the legislature’s recognition of the magnitude of the asbestos litigation problem in Ohio and an acknowledgement of the importance of discerning a solution that serves all of Ohio’s citizens.

A hallmark of H.B. 292 is the early evaluation of claims, allowing plaintiffs with “actual physical harm or illness” caused by asbestos exposure to be compensated first, while those who have been exposed to asbestos but have no physical impairment are required to wait. The various definitions that H.B. 292 provides with respect to the “prima facie” requirements for asserting an asbestos claim, including that of a “competent medical authority” from whom a diagnosis must be provided, were clarified in an effort to resolve Ohio’s asbestos litigation crisis. However, the Fourth District Court of Appeals declared the retroactive provisions of H.B. 292 unenforceable with respect to cases pending at the time of the law’s passage and, as a result, barred enforcement of key provisions of the legislation. *Ackison v. Anchor Packing Co.*, 2006-Ohio-7099.

*Amici curiae* have a significant interest in the continued application of H.B. 292’s provisions. With more than 39,000 personal injury asbestos cases pending in Cuyahoga County alone, the sheer magnitude of the asbestos litigation crisis in Ohio prompted the passage of H.B. 292. And with good reason. As the General Assembly recognized, applying the remedial

provisions of H.B. 292 to pending cases will have a positive impact on impaired plaintiffs and defendants alike, as well as on Ohio's business community, and the State's overall economic well being.

The Ohio Manufacturers' Association ("OMA") is a statewide association of nearly 2,000 manufacturing companies, which collectively employ the majority of the 800,000 men and women who work in the manufacturing sector in the State of Ohio. The OMA and its members have a substantial interest in H.B. 292 as dozens of manufacturers doing business in Ohio have been named as defendants in thousands of asbestos personal injury lawsuits. Several Ohio manufacturers have declared bankruptcy and/or have closed facilities as a direct result of asbestos litigation. The OMA has a strong interest in doing everything it can to create an environment where Ohio manufacturers, their employees, and the communities in which they are located can survive the onslaught of asbestos personal injury litigation. H.B. 292 is essential to this goal.

The National Federation of Independent Business/Ohio ("NFIB/Ohio") is an association with more than 25,000 governing members, making it the state's largest association dedicated exclusively to the interests of small and independent business owners. The NFIB/Ohio is committed to supporting a balanced civil justice system that treats individuals, businesses, corporations and other entities fairly, on a statewide basis. It supports H.B. 292 because the Bill is designed to do just that.

Founded in 1893, the Ohio Chamber of Commerce ("Chamber") is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business

leaders, the Chamber is a respected participant in the public policy arena. The Chamber dedicates its advocacy efforts to the creation of a strong pro-jobs environment and, in turn, an Ohio business climate responsive to expansion and growth. The Chamber believes strongly that H.B. 292 is critical to meeting these goals.

The Ohio Alliance for Civil Justice (“OACJ”) is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. OACJ members, large and small, support a balanced civil justice system that not only awards fair compensation to injured persons, but also imposes sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system so that Ohio’s businesses and professions may know what risks they assume as they carry on commerce in Ohio.

The Ohio Chemistry Technology Council (“OCTC”) is a trade association representing over 80 chemical industry and related companies that do business in Ohio. OCTC members’ interests are aligned with those of the OMA with respect to H.B. 292.

### **STATEMENT OF THE CASE AND FACTS**

*Amici curiae* defer to the Statement of the Case and Facts as presented by Appellants.

## ARGUMENT

**Proposition of Law: R.C. 2307.91, 2307.92, and 2307.93 apply to cases pending on September 2, 2004.**

Asbestos litigation has enveloped the American court system.<sup>1</sup> But while the myriad complexities of asbestos litigation have been a national problem, they have been of particular concern in Ohio. In Cuyahoga County alone, there were more than 39,000 cases pending in October 2003, with an estimated 200 new cases being filed every month. In fact, Ohio has been one of the top five states—along with Mississippi, Texas, New York and West Virginia—in which litigants have chosen to file asbestos personal injury cases.<sup>2</sup> The result has been lost jobs, business bankruptcies, and the inequitable distribution of awards to the benefit of plaintiffs who are not even sick. See H.B. 292, Section 3.

Against this backdrop, and in response to the magnitude and growth of the number of asbestos lawsuits in Ohio and the effects such lawsuits have upon potential claimants and potential defendants, the General Assembly enacted H.B. 292 (effective September 2, 2004). In H.B. 292, the General Assembly struck a balance between the competing interests with a stake in the Ohio asbestos litigation quagmire. Specifically, H.B. 292 was designed to allow claimants who have shown actual injury from asbestos exposure to pursue their claims while those who have not must wait, thereby preserving available resources for those who are actually sick from exposure to asbestos.

Though H.B. 292 is comprised of numerous statutory enactments, none is more important than the requirements for a “prima facie” showing of asbestos-related injury, now codified at R.C. 2307.92 and R.C. 2307.93. Those provisions clarify the already existing minimum medical

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<sup>1</sup> See, generally, *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (providing historical backdrop to asbestos litigation in the federal court system).

<sup>2</sup> Amended Substitute House Bill 292 (“H.B. 292”), Section 3(A)(3)(b).

requirements for a tort action alleging an asbestos claim by setting forth explicit and objective standards for what constitutes “bodily injury caused by exposure to asbestos” and the evidence necessary to establish its existence. See R.C. 2307.92-93. Specifically, R.C. 2307.92 provides criteria necessary to sustain a claim for asbestos exposure when the claimant alleges physical impairment, cancer, or wrongful death as the result of asbestos exposure. R.C. 2307.93 provides the framework for the trial court’s review. R.C. 2307.91 sets out the definitions of the various terms governing the prima facie showing, including, e.g., who constitutes a “competent medical authority.”

The result of the statutory scheme is a system whereby claimants with a genuine injury or illness caused by asbestos exposure have the best and first opportunity to receive compensation for any liability found to exist against asbestos defendants—defendants that otherwise would have been forced to pay billions of dollars to plaintiffs who may not have had any asbestos-related impairment. See H.B. 292, Sections 3(A)(2), 3(A)(5), 3(A)(6). If a plaintiff cannot demonstrate that a competent medical authority has concluded that the plaintiff suffers from a real and objectively defined physical injury caused by exposure to asbestos, then the plaintiff’s claim will be administratively dismissed. R.C. 2307.93(A)(3)(c). The claim will then be preserved with an opportunity for reinstatement if and when a prima facie showing of asbestos-related injury can be made. *Id.*

The decision of the Fourth District Court of Appeals in *Ackison v. Anchor Packing Co.* (2006), 2006-Ohio-7099 improperly construes the efforts of the General Assembly as retroactive revisions to the substantive law of torts rather than as modifications or clarifications to the manner of adjudication of tort claims. The result threatens to destroy what Ohio’s lawmakers intended to be a viable solution to the asbestos litigation morass in Ohio. By incorrectly

deciding that key features of H.B. 292 violate the Ohio Constitution's prohibition against retroactive laws (Article II, Section 28), the court of appeals has jeopardized the validity of the very provisions of H.B. 292 that are vital to the interests of impaired asbestos claimants and defendants alike. The continued application of H.B. 292's "prima facie" criteria to pending cases is necessary to effectuate the legislature's efforts at addressing a real and significant public policy dilemma.

In contrast to the Fourth District's decision, the Twelfth District in *Wilson v. AC&S, Inc.* (2006), 169 Ohio App. 3d 720 (and subsequently in *Staley v. AC&S, Inc.*, 2006-Ohio-7033) properly concluded that, "the provisions in H.B. 292 at issue..., i.e., R.C. 2307.91 through 2307.93, constitute remedial provisions that merely affect 'the methods and procedure by which rights are recognized, protected and enforced, not the rights themselves.'" *Wilson* at 744 (quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205). Recognizing that the General Assembly had merely clarified the meaning of terms in R.C. 2305.10, the Twelfth District found that the provisions of H.B. 292 "merely substitute a new or more appropriate remedy for the enforcement of an existing right," and could be applied constitutionally to cases pending on the effective date of the statute. *Id.*

The Ohio Supreme Court has recognized that not all retroactive laws are unconstitutional. Remedial laws, which substitute a new or more appropriate remedy for an existing right (such as the statutory provisions at issue), are not unconstitutionally retroactive, even if they have an occasional substantive effect. See *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100. Indeed, this Court has recognized that laws "affecting only the enforcement of [a] right," are constitutional even when applied retroactively. *State ex rel. Kilbane v. Industrial Comm'n of Ohio* (2001), 91 Ohio St. 3d 258, 259. This Court has also acknowledged that, "[l]egislation is

remedial, and therefore permissibly retroactive, when the legislation seeks only to avoid ‘the necessity for multiplicity of suits and the accumulation of costs [or to] promote the interests of all parties.’” *Beilat v. Beilat* (2000), 87 Ohio St. 3d 350, 354 (quoting *Rairden v. Holden* (1864), 15 Ohio St. 207, 211). H.B. 292 was enacted to minimize the multiplicity of asbestos cases and to balance the rights of all parties. See H.B. 292, Section 3(B). Both as a matter of law and of sound public policy, this Court should uphold the retrospective application of R.C. 2307.91-93 as a constitutional exercise of the General Assembly’s legislative power.

**A. The Provisions of R.C. 2307.91-93 Do Not Unconstitutionally Impair the Substantive Rights of Litigants, but Rather Establish a Remedial Mechanism for the Administration of Asbestos Claims in Ohio’s Courts**

Any review of statutory provisions challenged under provisions of the Ohio Constitution begins with the proposition that, “legislative enactments are entitled to a strong presumption of constitutionality.” *State ex rel. Ohio Congress of Parents and Teachers v. State Board of Ed.* (2006), 111 Ohio St. 3d 568, 573 (“*Board of Ed.*”). Because the constitutionality of a statute is a question of law, the question presented to the Court in the case sub judice is to be reviewed de novo, without any deference to the lower court’s decision. See, e.g., *Ohio Bell Telephone Co. v. Public Util. Comm’n* (1992), 64 Ohio St. 3d 145, 147. In conducting its review, this Court should begin with the presumption that the challenged provisions of H.B. 292 are consistent with the Ohio Constitution. To overcome this presumption, Appellee must show “beyond a reasonable doubt” that the statute violates Section 28, Article II’s limited prohibition on retroactive legislation. *Board of Ed.* at 574.

“The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively..., [and] if so, the court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial.” *Bielat*, 87 Ohio St.3d at 353

(citing *State v. Cook* (1998), 83 Ohio St. 3d 404, 410-11). Because there is no dispute that the General Assembly intended the legislation at issue to apply retrospectively, the only question before the Court is whether the law is remedial and constitutional, or substantive and unconstitutional.

In order for a legislative enactment to run afoul of the Ohio Constitution's ban on substantive retroactive laws, the Court must find that the statute "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat*, 87 Ohio St. 3d at 354, citing *State v. Cook* (1998), 83 Ohio St. 3d 404, 410-11. Because substantive law constitutes that "part of the law that creates, defines, and regulates the rights, duties, and powers of parties," only those statutory enactments that retroactively affect a change in the rights, duties, and powers of the parties and that implicate the scope and nature of the parties' relationship outside the courtroom will present a constitutional problem. *See Black's Law Dictionary* (7<sup>th</sup> Ed. 1999) 1443. Laws governing the methods by which those preexisting rights and duties are adjudicated and the process according to which remedies will be administered, on the other hand, are permissible even when applied retrospectively. *See Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100 ("A statute purely remedial in its operation on pre-existing rights, obligations, duties and interests, is not within the mischiefs against which [Section 28, Article II]...was intended to guard" (quotation omitted)). Since the provisions of R.C. 2307.91-93 do not alter the substantive rights of the parties, they survive constitutional scrutiny under Section 28, Article II of the Ohio Constitution.

1. R.C. 2307.91-.93 do not impair any vested rights of Appellee.

This Court has consistently rejected the notion that individuals have vested rights in the adjudicative process. It is well established that, "there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by

legislative authority.” *Strock v. Presnell* (1988), 38 Ohio St. 3d 207, 214 (quoting *Leis v. Cleveland R. Co.* (1920), 101 Ohio St. 162, para. one syllabus) In addition, the “mere expectation of future benefit or interest founded upon a continuance of existing laws” is insufficient to give rise to the vesting of a right. *See Wilson*, 169 Ohio App. 3d at 738 (citation omitted). “[A] party has no vested right in the forms of administering justice that precludes the Legislature from altering or modifying them and better adapting them to effect [sic] their end and objects.” *Morgan v. Western Electric Co., Inc.* (1982), 69 Ohio St. 2d 278, 280, fn. 4 (citation omitted).

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Contrary to the assertion of the Fourth District in *Ackison*, the imposition of additional procedural requirements in the enforcement of a right that do not go to the substance of the right itself cannot be the basis for a challenge pursuant to the Ohio Constitution Section 28, Article II. *See, e.g. Kilbane*, 91 Ohio St. 3d at 259-60 (holding that a retroactive amendment to the procedures by which settlement hearings could be invoked in the enforcement of worker’s compensation rights was constitutional); *Cook*, 83 Ohio St. 3d at 412 (holding that retroactive revisions to sex offender registration requirements were procedural, not substantive and therefore constitutional). In *Ackison*, however, the Fourth District held that because a plaintiff was not previously required to set forth a prima facie case, that requirement did not provide clarification, but was rather a substantive change. *Ackison* at ¶28. The operative consideration, however, is whether the law affects a remedial change or a substantive one. If the law changes merely the enforcement mechanism for a substantive right, it must be constitutional as retroactively applied. A litigant can have no vested right in the prior procedure.

As described above, the three challenged Revised Code provisions set out requirements for asbestos claimants to present a prima facie case before being permitted to proceed with the

prosecution of a claim. R.C. 2307.91-93 establish the minimum medical requirements, including the qualifications of medical authorities, that must be followed in making a prima facie showing of injury in an asbestos claim. These requirements do not go to the elements of the substantive right asserted. It is only in the course of enforcing the rights to which those provisions apply that the statute has any effect, and that effect can only be construed as remedial in nature.

2. R.C. 2307.91-93 do not alter the substantive rights of asbestos claimants.

The provisions at issue here plainly do not alter the substance of the rights at issue. In order for a statute to be considered a substantive change in the law, and thereby unconstitutionally retroactive, it must “take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attaché a new disability, in respect to transactions or considerations already past...” *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106. In contrast, a remedial statute affects “only the remedy provided and include[s] laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Cook*, 83 Ohio St. 3d at 411 (citation omitted). Viewing the statutory scheme as a whole, there can be no doubt that R.C. 2307.91 through 2307.93 merely address the procedures and remedies applicable to the enforcement of substantive rights, but do not address the substance of the rights themselves.

First, as described above, the three challenged Revised Code provisions set out requirements for asbestos claimants to present evidence of a prima facie case before being permitted to proceed with the prosecution of a claim. As an initial matter, it is significant that the law itself, in identifying those claims to which its remedial provisions apply, actually classifies claimants based on the preexisting vested substantive rights that they are seeking to enforce. According to R.C. 2307.92, the minimum medical requirements for a prima facie

showing depend upon the substantive claim being asserted: R.C. 2307.92(B) applies to asbestos claims based on a non-malignant condition; R.C. 2307.92(C) applies to asbestos claims based on lung cancer of a person who is a smoker; and R.C. 2307.92(D) applies to asbestos claims based on wrongful death. These are the substantive rights at issue—yet H.B. 292 does nothing to amend these substantive rights. Instead, it sets out specific criteria governing the evidentiary obligations of claimants for each of the three categories with respect to the presentation of a prima facie case. To the extent the obligations of litigants are more exacting under H.B. 292 than before its enactment, such a conclusion has no bearing on whether those obligations relate to the enforcement of the litigants' substantive rights or to the rights themselves.

The provisions at issue do not alter any substantive rights. Instead, R.C. 2307.91-93 establishes the minimum medical requirements, including the qualifications of medical authorities, the type of medical evidence, and the procedure for acquiring such evidence that must be followed in making a prima facie showing of injury in an asbestos claim. These requirements may be new, but they do not go to the elements of the substantive right asserted. In fact, not one of the legal requirements set out in the challenged provisions makes any sense except within the context of the process of adjudication and the methods for pursuing a remedy, i.e., in terms of the remedial process, not the substance of rights. Outside the context of adjudication, the provisions of R.C. 2307.91 through 2307.93 have no application. It is only in the course of enforcing the rights to which those provisions apply that the statute has any effect, and that effect can only be construed as remedial in nature.

3. Even if R.C. 2307.91 through 2307.93 affect substantive rights, no right is impaired as a result of their retrospective application.

Finally, and perhaps most importantly, even if the Court were to find that R.C. 2307.91-.93 affects a substantive right in more than a merely ancillary way, it still must come to the

conclusion that the right itself is *impaired* before concluding that retrospective application is unconstitutional. As this Court has recognized, although a remedial law may have an “occasional substantive effect, it is yet generally true that law which relate to procedures are ordinarily remedial in nature, including rules of practice, courses of procedure and methods of review, but not the rights themselves.” *Van Fossen* at 107-8 (citations omitted). In addition, because a vested right is, in essence, an “enforceable claim,” a law will not violate the retroactivity clause of the Ohio Constitution unless it purports to alter the elements of a pending claim in a manner that mitigates its enforceability going forward. *See State ex rel. Estate of McKenney v. Indus. Comm’n.* (2006), 110 Ohio St. 3d 54, 55. *See also* Black’s Law Dictionary (8<sup>th</sup> Ed. 2004), 1349 and *compare Van Fossen* (finding a retroactive modification of the elements of a claim unconstitutional) *with Kilbane* (holding that retroactive changes in the means of enforcing a claim are permissible). The mere fact that a remedial law affects the prospects for a particular litigant’s success is not sufficient to declare it unconstitutionally retroactive. Accord, *Beilat* at 360-61.

As the Twelfth District observed, none of the challenged provisions represents a departure from previously defined terms in the substantive law, either as set forth by the General Assembly or by this Court. Specifically, “[p]rior to H.B. 292, neither the General Assembly nor the Ohio Supreme Court had defined the phrase [“competent medical authority”], and, therefore, it was appropriate for the General Assembly to define that phrase..., clearly a procedural, rather than substantive, act.” *Wilson* at 740. Litigants have no vested right to an undefined statutory term. The definition of “competent medical authority” in R.C. 2307.91 constitutes a mere clarification and not a substantive revision of the law.

In addition, the definition of “substantial contributing factor” found at R.C. 2307.91(FF) and challenged by the Plaintiff in the *Wilson* case, does not deviate from the common law standard of cause required to sustain a claim. Rather, the definition set out in H.B. 292 incorporates the common law definition of “predominant cause” and merely states with precision what a “competent medical authority” must find to support such a showing. As the Twelfth District correctly points out at length, nothing in the application of that definition affects a revision in the common law understanding of the meaning of proximate cause. *See Wilson* at 738-43. The particularities of R.C. 2307.91 through 2307.93 merely clarify the meaning for the purposes of the administrative scheme that the provisions establish. Nothing in the challenged provisions amounts to an alteration of the elements of an enforceable claim. The tort claims based on occupational exposure to asbestos remain unchanged.

The Fourth District specifically rested its decision on the improper understanding that failure to satisfy the prima facie requirement would result in the termination of an otherwise viable claim. *See Ackison*, ¶26 (“applying R.C. Chapter 2307 to appellants’ cause of action would *remove* their potentially viable,<sup>3</sup> common law cause of action by imposing a new, more difficult statutory standard...” (emphasis added)). To the contrary, under R.C. 2307.93(C), cases are “administratively dismissed” and can proceed at any time in the future when the claimant is able to offer evidence to satisfy the medical criteria.

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<sup>3</sup> It is instructive to note that, as the Fourth District recognized, the claims governed by R.C. 2307.91-93 are only “potentially viable” at the prima facie stage. Indeed, it is precisely the purpose of the statute to provide a mechanism for determining viability—or at least identifying those claims that are *not yet* viable—prior to expending the resources required by full adjudication. As a result, no claimant who has an *actually* viable cause of action will ever be foreclosed from proceeding with his claim.

**B. The Asbestos Litigation Crisis in Ohio is Real and Significant, and Allowing Retrospective Application of R.C. 2307.91-.93 is Essential to Ohio's Ability to Manage the Current Crisis as well as to Preserving the General Assembly's Authority to Pursue Solutions in Response to Future Litigation Crises.**

The public policy consequences of declaring the provisions of H.B. 292 unconstitutionally retroactive are significant both with respect to the immediate asbestos litigation crisis and with respect to future efforts of the General Assembly to address concerns related to the efficient and effective administration of mass tort litigation in Ohio's courts. The magnitude of Ohio's asbestos litigation docket is undeniable. Whether or not the General Assembly has the authority to pass remedial legislation that aims to provide administrative solutions to problems will have dramatic consequences for how Ohio deals with challenges in the years to come.

Ohio's asbestos litigation crisis is well documented and beyond dispute. *See, e.g.,* Amici Curiae Brief of American Insurance Assoc., *et al.* In the years immediately preceding the adoption of H.B. 292, Ohio experienced a tremendous surge in asbestos claims filed in its courts. Ohio has had to bear an unusually high percentage of the claims filed throughout the country. Over the last decade Ohio has emerged as one of "the top five state court venues" for asbestos claim filings. Between 1998 and 2000, Ohio shared with just four other states—Mississippi, New York, West Virginia, and Texas—the responsibility for sixty-six percent (66%) of all asbestos filings. H.B. 292, Section 3(A)(3)(b); see also RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report ("RAND")*, p. vi. When the General Assembly was considering H.B. 292, in Cuyahoga County alone—one of the most burdened state court jurisdictions in the country—the number of asbestos claims pending in 2003 exceeded 39,000, with an estimated two hundred new cases filed every month. H.B. 292, Section 3(A)(3)(e).

The General Assembly recognized the devastating impact that this flood of litigation was having (and will continue to have) throughout Ohio. One of the most troubling aspects of the crisis is that an overwhelming majority of all asbestos claims asserted are filed on behalf of individuals who do not suffer from any injury or illness as a result of asbestos exposure. *Id.*, Section 3(A)(5). According to a Tillinghast-Towers Perrin study, of the fifty-two thousand nine hundred (52,900) new asbestos claims filed nationwide in 2000, an astonishing ninety-four percent (94%) “concerned claimants who [were] not sick.” *Id.* Indeed, “sixty-five percent of the compensation paid, thus far, has gone to claimants who are not sick.” *Id.*, Section 3(A)(2).

The costs of this asbestos litigation free-for-all have been staggering. Some have estimated that the total nationwide costs in litigation expenses alone exceed fifty-four billion dollars (\$54,000,000,000), with total costs of claims throughout the United States estimated at approximately two hundred and fifty billion dollars (\$250,000,000,000). H.B. 292, Section 3(A)(2). During the first ten months of 2002 alone, fifteen companies nationwide filed for bankruptcy due to asbestos-related liabilities, the consequence of which was the loss of over sixty thousand (60,000) jobs. *Id.*, Section 3(A)(4)(a).

Ohio has suffered more than its fair share of the consequences of this nationwide problem. The regions of the State that depend on defendant businesses for their economic health have suffered significantly. Indeed, prior to the enactment of H.B. 292, “at least five Ohio-based companies [became] bankrupt because of the cost of paying people who are not sick.” *Id.*, Section 3(A)(4)(e). And in 2000, Ohio’s own Toledo-based Owens Corning laid off two-hundred seventy five employees in its Granville plant after declaring bankruptcy due to a flood of asbestos claims. The closing was estimated to cost the region fifteen to twenty million dollars in regional income. *Id.*, Section 3(A)(4)(d).

But businesses have not been alone in bearing the costs of asbestos lawsuits brought by individuals who have no asbestos-related injury. As the General Assembly recognized, “[t]he cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future.” *Id.*, Section 3(A)(6). As claims are paid out to plaintiffs who are not sick, the limited resources of defendant businesses dwindle while claimants with real and serious health problems are forced to the back of the line. Bankruptcy in particular has a devastating effect on the ability of ill patients to secure compensation, since during bankruptcy no claims are paid and afterward “significantly fewer dollars are available for claims and thus claimants are paid less.” RAND, p. 67. When healthy plaintiffs drain the funds available for compensation, there’s nothing left for the truly sick.

Sadly, this statistical nightmare appears to be the product of misdiagnoses procured exclusively for the purpose of litigation. Judge Janis Jack, presiding over federal multidistrict litigation of silicosis claims in Texas, concluded in 2005 that the unusually high number of pending cases, (approximately 10,000), and the outrageously high percentage of plaintiffs with dual asbestosis and silicosis diagnoses in particular—a medical rarity that proved anything but rare in the context of litigation—were the products of lawyers controlling the information between doctors and patients and tailoring diagnoses to their litigation needs. See *In re: Silica Prod. Liab. Litig.* (S.D. Tex. 2005), 398 F. Supp. 2d 563. Ultimately, a small cadre of doctors and screening companies, originally set up for asbestos claims and used largely by the same handful of law firms substantially responsible for the exploding asbestos dockets throughout the country, were used once again to procure “diagnoses [that] were about litigation rather than health care.” *Id.* at 633-35.

Asbestos claims, like any claim for product liability, are in principle supposed to be about compensating victims who actually have been injured by the goods produced by another. But the facts reveal a very different picture in Ohio and throughout the nation. The high costs of defending against such claims and paying plaintiffs who are not sick are wreaking havoc on the economy and the judicial system. And the consequences not only devastate Ohio businesses, jobs, and economic growth, but also sick individuals who are forced to compete with healthy plaintiffs for the scarce resources of companies throughout Ohio that have been forced under by schemes designed to benefit the healthy plaintiffs and their attorneys.

The General Assembly passed H.B. 292 in an effort to address these very problems. The goal was to bring Ohio's exploding asbestos litigation docket under control by putting into place, among other things, the common sense requirement that a plaintiff make a minimum showing that he or she is sick as the result of asbestos exposure *before* being permitted to prosecute an asbestos claim against a defendant. Broadly, the provisions now codified at R.C. 2307.91 through 2307.98 were designed to:

(1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer impairment in the future.

H.B. 292, Section 3(B). In essence, H.B. 292 was designed so that courts would be better able to manage asbestos claims and to do so in a manner that is consistent with the rights of all parties.

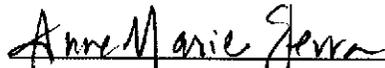
Sections 2307.91-.93 of the Revised Code achieve these goals by shrinking the size of the active asbestos litigation docket without extinguishing the rights of claimants that have yet to

manifest a legally cognizable injury. The benefits include courts that are significantly less strained by the sheer volume of cases; limits on claims to those that involve a cognizable injury; mitigation of business losses associated with the present flood of claims; and allowing defendants to better equip themselves to compensate legitimately injured plaintiffs. The system set up by the General Assembly is not only favored by the economics—it is demanded by the equities as well.

**CONCLUSION**

For the reasons stated, *amici curiae* respectfully request that this Court overturn the decision below and declare Ohio Rev. Code §§ 2307.91 through 2307.93 to be constitutional when applied retroactively.

Respectfully submitted,



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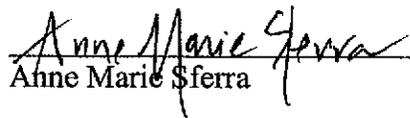
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