SUPREME COURT OF GEORGIA

DAIMLERCHRYSLER CORP., et al. APPELLANTS, v. RICHARD FERRANTE and PAULETEE FERRANTE, APPELLEES.	)	Case No. S06A0902

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, GEORGIA CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, GEORGIA CHEMISTRY COUNCIL, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The Georgia Chamber of Commerce is the unified voice of the Georgia business community, aggressively advocating the business viewpoint in the shaping of public policy, encouraging ethical business practices and ensuring the state's future as economically prosperous, educationally competitive and environmentally responsible.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important

function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal court.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state supreme courts that have addressed important liability issues.

The Georgia Chemistry Council ("GCC") is the voice of the chemical industry in Georgia. GCC represents the chemical industry on public policy issues and coordinates the industry's efforts regarding environmental, health, and safety performance improvement.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health

and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the importance of manufacturing to America's economic strength.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of the Defendants.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has said that this country is experiencing an "asbestos-litigation crisis." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,

597 (1997). At least 322,000 asbestos claims are pending, and claims continue to be filed at an extraordinary rate.

The plaintiff here may have an impairment, but that is atypical. Recent studies indicate that up to ninety percent of plaintiffs filing claims today have no physical impairment that affects their daily activities. Many plaintiffs may feel compelled to file now rather than risk having their claims barred by statutes of limitations if they wait until such time, if ever, that they develop an asbestos-related impairment.

Claims brought by unimpaired plaintiffs – often generated through mass screenings and supported by questionable medical evidence – are at the heart of the current crisis, and were central to the legislature's decision to enact the law at issue in this matter. The causes for the "file now" trend may be understandable, but the impacts are nevertheless devastating for the truly sick, affected companies and their communities, and the judicial system. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

Claims by the unimpaired clog the court system, causing unwelcome delays for asbestos claimants with fatal diseases and other civil plaintiffs. Perhaps most troubling, the presence of unimpaired claimants "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).

Recent filing practices have created an environment where sick plaintiffs and asymptomatic claimants are forced to compete against each other for diminishing, scarce resources. *See* 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). Already, asbestos lawsuits have forced at least seventy-eight employers into bankruptcy, and the litigation is spreading. More than 8,500 defendants have been named, including many small and medium size companies in industries that cover eighty-five percent of the economy. Before it ends, the litigation may cost up to $195 *billion* – in addition to the $70 billion spent through 2002. Asbestos litigation in Georgia reflects these national trends.

To address these problems, an increasing number of courts and state legislatures are taking action 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). Georgia is part of this forward-thinking crowd. It is against this background that the instant appeal should be considered.

In April 2005, the General Assembly passed, and Governor Perdue signed, H.B. 416 (2005) (Ga. Code Ann. §§ 51-14-1 to -10) as a surgical response to the problems outlined above, and to address a recent increase in silica-related filings.[1] The core of the new asbestos and silica claims procedure statute embodies the sound public policy that: (1) plaintiffs with asbestos-related or silica-related impairments should be given priority and should not be forced to wait for justice behind earlier-filing individuals who are not sick; and (2) statute of limitations should be tolled for persons who have been exposed to asbestos or to silica, but who are not presently sick, so that these individuals' claims will not be time-barred if they develop an asbestos-related or silica-related impairment in the future. Other provisions of the law would curb forum-shopping abuse and prevent the improper joinder of dissimilar claims.

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[1] As state legislatures and courts have acted to stem abuses in asbestos litigation, some plaintiffs' lawyers appear to have modified their "asbestos litigation kits" to bring questionable silica claims using many of the same mass screening practices. The manager of the federal silica docket recently recommended that all but one of the 10,000 claims on the docket should be dismissed on remand because the diagnoses were fraudulently prepared. *See In re Silica Prods. Liab. Litig. (MDL No. 1553)*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

Amici curiae ask this Court to hold that Ga. Code Ann. § 51-14-1 *et seq.* is constitutional and that pending and future claims that fail to meet the law's procedural requirements should be dismissed without prejudice.

ARGUMENT

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

A. The Current Asbestos Litigation Crisis: An Overview

Courts and commentators have recognized since the early 1990s the extraordinary problems created by the "elephantine mass" of asbestos cases in this country. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)). The United States Supreme Court has described the litigation as a "crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Since the Court's observation, asbestos filings have spread like a wild fire, taking on even greater proportions. Former U.S. Attorney General Griffin Bell has said, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 7 (Nat'l Legal Center for the Pub. Interest June 2002), *available at* http://www.nlcpi.org [hereinafter Bell, *Courts' Duty*]. Indeed, the number of asbestos cases pending nationwide doubled to more than 200,000 during

the 1990s. At least 322,000 asbestos claims are now pending. *See* Am. Acad. of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), *at* http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf [hereinafter Am. Acad. of Actuaries Rep.].

1. Mass Filings by the Non-Sick Threaten Payments to the Truly Sick

When asbestos litigation was in its infancy, most claims were filed by "workers suffering from grave and crippling maladies. The most common was mesothelioma," a type of cancer. 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.

Today, the vast majority of new asbestos claimants – up to 90% - are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong., at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). RAND recently concluded that "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." Stephen J. Carroll *et al., Asbestos Litigation* 76 (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162 [hereinafter RAND Rep.]. 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).

Various factors have driven the avalanche of filings by unimpaired claimants. A primary reason for the "file now" trend is that many claimants may feel compelled to file claims prematurely because of the "fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability." *In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991). Another reason plaintiffs file unripe claims may be fear that compensation will not be available later as a result of many asbestos defendants going bankrupt. Finally, some plaintiffs and their

lawyers may think, "Why wait for an injury to manifest itself if I can receive compensation now?"

2. Lawyers in Search of Plaintiffs

According to Attorney General Bell, mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Hon. Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003) [hereinafter Bell, *Sleeping Constitution*]; *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. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002) ("Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.").

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. Other commentators have described the process as follows:

> The active and retired members of [asbestos-affected union] crafts are notified through their newsletters and through meetings of retired employees that mobile vans or temporary offices equipped with X-ray machines are available to screen those with a history of asbestos exposure. The X-rays in turn are then viewed by radiologists for any abnormalities. At the initial screening, representatives associated with the national counsel of the various unions are present and distribute brochures advising both retired and still working employees of their legal remedies. Retainer agreements are often obtained on the spot. After initial screenings, those with anything other than normal X-rays are called in for a second examination which may include more chest X-rays, CT scans, pulmonary function tests and a clinical examination. A more detailed history of asbestos exposure is also obtained. If abnormal findings consistent with asbestos exposure are again demonstrated, a lawsuit is usually filed.

John C. Corrigan & Craig J. Whitney, *Asbestos Litigation Under the F.E.L.A.*, 20 The Forum 580 (Summer 1985); *see also* Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?* (AEI-Brookings Joint Center for Regulatory Studies Sept. 2005), *available at* http://www.aei-brookings.org/publications/abstract.php?pid=993.

Professor Lester Brickman has written that the number of construction and plant workers that have undergone attorney-sponsored screenings over the past eighteen years "undoubtedly exceeds 1,000,000. Currently, hundreds of thousands of potential litigants are screened each year." Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 69 (2003); *see also 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.").

3. Screenings Are Notoriously Unreliable

The practice of mass litigation screenings has come under significant scrutiny. Attorney General Bell has pointed out that "[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up." Bell, *Sleeping Constitution*, *supra*, at 5. Senior U.S. District Judge John Fullam recently said that many X-ray interpreters (called "B readers") hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning*, 322 B.R. at 723.

The American Bar Association Commission on Asbestos Litigation ("Commission") studied this problem. *See* Am. Bar Ass'n Comm'n on Asbestos Litig., *Report to the House of Delegates* (2003). With the assistance of the American Medical Association, the Commission consulted some of the nation's most prominent physicians in the field of occupational medicine and pulmonary disease on the evidence needed to show an asbestos-related impairment.[2] The doctors interviewed represented a cross-section of experts in this area – some had testified for plaintiffs in asbestos litigation, some had testified for defendants, some for both and some for neither. These physicians confirmed published reports that only a small percentage of current asbestos claims involve functional impairment:

> Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings. . . . In sum, it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily life.

Id. at 7.

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[2] As a result of its findings, the Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA's House of Delegates adopted the Commission's proposal in February 2003. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-elect, Am. Bar Ass'n), *available at* 2003 WL 785387.

The Commission also confirmed that a large percentage of asbestos cases arise from the activities of for-profit litigation screening companies whose sole purpose is to identify large numbers of people who have minimal X-ray changes that are "consistent with" prior asbestos exposure, thus providing the pretext for a lawsuit. The Commission reported:

> For-profit litigation "screening" companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have "free" testing done – usually only chest X-rays. Promotional ads declare that "You May Have Million $ Lungs" and urge the workers to be screened even if they have no breathing problems because "you may be sick with no feeling of illness." The X-rays are usually taken in "X-ray mobiles" that are driven to union halls or hotel parking lots. There is evidence that many litigation-screening companies commonly administer the X-rays in violation of state and federal safety regulations. In order to get an X-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are "positive."
>
> The X-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the X-rays are taken or have malpractice insurance for these activities. According to these doctors, no doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for X-ray evidence that is "consistent with" asbestos-related disease. Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars – in some cases, millions – in the aggregate by the

> litigation screening companies due to the volume of films read.

Id. at 8. The Commission reported that the rate of "positive" findings (*i.e.*, findings consistent with prior asbestos exposure) generated by litigation screening companies is "startlingly high," often exceeding fifty percent and sometimes reaching ninety percent. *Id.*

Issues concerning B reader variability in the litigation context have been documented for many years, with B readers becoming directly involved in the claimant recruiting process and taking part in screening practices that would never be used in a clinical setting. One of the earliest detailed reviews of these types of positive B reads arose out of the National Tire Workers Litigation Project ("NTWLP"). *See Raymark Indus., Inc. v. Stemple*, 1990 WL 72588, *5 (D. Kan. May 30, 1990). The focus there was on litigation screenings performed around the country through X-ray equipment loaded on mobile vans. Information distributed to tire workers stated that at one location where screenings were conducted, sixty-four percent were positive for asbestosis and at a second location ninety-four percent tested had asbestosis. *Id.* at *10.

In 1982, under collective bargaining agreements between the United Rubber Workers' International Union ("URW") and selected rubber companies, a multiphasic medical surveillance program was put in place to benefit its members

in the early detection of occupational and non-occupational related conditions. *See* J. Jankovic & R. B. Reger, *Health Hazard Evaluation Report*, NIOSH Rep. No. HETA 87–017–1949 (Dep't Health & Human Servs., NIOSH, 1989). The surveillance program included chest X-ray examinations. After four cycles of examinations the program had failed to detect any excess asbestosis or other pneumoconiotic conditions among tire workers.

In October 1986, the union requested that the National Institute for Occupational Safety and Health ("NIOSH") conduct an evaluation of the occurrence of pneumoconiosis among tire workers to determine if the union/industry operated medical surveillance program had missed cases of asbestos-related disease. *Id.* Focusing on workers with the greatest potential for disease, NIOSH had an independent panel evaluate 987 X-rays from the surveillance program of workers greater than forty years of age. Of the 987 films read by three independent B readers (who were board-certified radiologists), *only* twenty-two of the 987 films (2.2%) were found to show pleural plaques, a marker of asbestos exposure, and *only* two (0.2%) showed physical changes consistent with asbestosis. *Id.* at 14.

In addition to the NIOSH evaluation, the reported high prevalence of asbestosis among tire workers in the NTWLP was the subject of a peer-reviewed

article in the medical literature. *See* R. B. Reger *et al.*, *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation,* 32 J. Occupational Med. 1088-90 (1990). In that study, 439 chest films from tire workers that had filed legal claims were re-evaluated by three board-certified radiologists, who were certified B readers, in an independent manner using the International Labor Office's classification system for chest X-rays. Of the 439 originally found to have X-ray changes consistent with asbestos-related disease, the consensus independent interpretation of the three radiologists was that *only* sixteen (3.6%) had either parenchymal and/or pleural changes consistent with an asbestos exposure. *Id.*

Another court cited an audit performed in 1998 by the Manville Settlement Trust, which determined that fifty-nine percent of X-ray readings relied upon by plaintiffs' counsel to show asbestos-related abnormalities were inaccurate. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d at 309.

In another instance, U.S. District Judge Carl Rubin of the Southern District of Ohio studied the merits of sixty-five asbestos bodily injury cases by appointing medical experts to evaluate the claims. *See* Hon. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991). All of the plaintiffs had claimed some asbestos-related condition, but the court-appointed experts found that *sixty-five percent* of the claimants had no asbestos-related

conditions at all. Of the remaining thirty-five percent of claimants, approximately fifteen percent had asbestosis, and the rest presented only pleural plaques. *See id.* at 37-39.

More recently, researchers at Johns Hopkins University compared the X-ray interpretations of B readers employed by asbestos plaintiffs' counsel with the subsequent interpretations of six independent B readers who had no knowledge of the X-rays' origin. *See* Joseph N. Gitlin *et al.*, *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (Aug. 2004). The study found that for a group of 492 plaintiffs, the B readers hired by plaintiffs found asbestos-related lung abnormalities on the X-rays 95.9% of the time, whereas the independent B readers found such abnormalities on the same X-rays only 4.5% of the time. *Id.* at 855. The study concluded that the magnitude of that difference was "too great to be attributed to inter-observer variability." *Id.* at 852, 843.

One physician, Lawrence Martin, M.D., has candidly explained the reason for such inflated findings by plaintiffs' experts hired to support litigation: "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.). Some attorneys reportedly even pass an X-ray around to numerous radiologists until they find one who is willing to say that the X-ray shows symptoms of an asbestos-related disease, a practice strongly suggesting unreliable scientific evidence.[3] The result, according to Dr. Andrew Ghio, is an "epidemic of asbestosis observed . . . in numbers which are inconceivable and among industries where the disease has never been previously recognized by medical investigation. Andrew J. Ghio, M.D., Editorial, *Asbestosis: Over Diagnosed?*, News & Observer (Charlotte, N.C.), Apr. 12, 2004, at A11. In the wake of these studies, considerable doubt has been placed on the reliability of claims generated through mass screenings.[4]

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[3] *See* David Egilman, *Asbestos Screenings*, 42 Am. J. of Indus. Med. 163 (2002); *see also* Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at A1, *available at* 2002 WLNR 269888 (reporting that one expert medical witness for plaintiffs remarked, "I was amazed to discover that, in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one.").

[4] *See* Editorial, *X-raying an Asbestos Quagmire*, Chi. Trib., Aug. 16, 2004, at 16 ("Do doctors hired to be expert witnesses by plaintiffs' lawyers need better eyeglasses, or is something more nefarious going on here?"); *see also* Joseph Perkins, Editorial, *The Great Asbestos Deception*, San Diego Trib., Aug. 13, 2004, at B7, *available at* 2004 WL 59001133 (stating that the study "ought to be read by judges presiding over asbestos-related lawsuits. . . .").

4. Impact of "Unimpaired Claimants" on Asbestos Litigation

a. The Truly Sick

Mass filings by unimpaired claimants have created judicial backlogs and are exhausting 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).[5] Sick plaintiffs and asymptomatic claimants are forced to compete against each other for scarce resources.[6] Senior U.S. District Judge Charles Weiner, who managed the federal asbestos docket, explained this problem:

> Oftentimes, [asbestos] suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.

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5 *See also Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 23 (Mich. 1986) ("We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers.").

6 *See In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991) ("Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency – as in the case of some dozen manufacturers already in bankruptcy."), *vacated*, 982 F.2d 721 (2d Cir. 1992).

In re Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Admin. Order No. 8, 2002 WL 32151574, *1 (E.D. Pa. Jan. 16, 2002); *see also* Steven Hantler, *Judges Must Play Key Role in Stemming Tide of Asbestos Litigation*, 25:14 Andrews Asbestos Litig. Rptr. 12 (May 22, 2003) ("The tragedy is that as plaintiffs' lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying.").

As a result, cancer victims have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. 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. *See id.* The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to

claimants. *See* Mark Goodman *et al.*, Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, Nat'l L.J., Apr. 1, 2002, at B14.

The same injustice can be seen on an individual level. For example, the widow of a Washington State man who died from mesothelioma has been told that she should expect to receive only fifteen percent of the $1 million she might have received if her husband had filed suit before the companies he sued went bankrupt. *See* Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, Wash. Post, Sept. 25, 2002, at E1. The widow of an Ohio mechanic will recover at most $150,000 of the $4.4 million award that she received for her husband's death. *See* Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at A1, *available at* 2002 WLNR 269888.

For these reasons, lawyers who represent cancer victims have been highly critical of unimpaired claimant filings and have endorsed mechanisms to give trial priority to the truly sick. Here is what some of the lawyers have said:

> ✓ Matthew Bergman of Seattle: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."[7]

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

- ✓ Peter Kraus of Dallas: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."[8]
- ✓ Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.[9]
- ✓ Terrence Lavin, an Illinois State Bar President and Chicago plaintiffs' lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray."[10]

b. Bankruptcies and the Economic Impact of Asbestos Litigation

Asbestos has forced at least seventy-eight employers into bankruptcy. *See* Am. Acad. of Actuaries Rep., *supra*, Attachment 3, Sheet 1. The "process is accelerating," *In re Collins*, 233 F.3d at 812, due to the "piling on" nature of asbestos liabilities.[11] For instance, RAND found: "Following 1976, the year of the

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

9 *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise), *available at* 2003 WL 785389.

10 Editorial, *ABA Backs Asbestos Reform*, Wash. Times, Feb. 16, 2003, at B2.

11 *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy."); Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (with each bankruptcy "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited.").

first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." RAND Rep., *supra*, at xxvii.

As the Enron collapse illustrated, bankruptcies represent more than the demise of a business. They can cost employees their jobs and ordinary citizens their retirement savings, as well as have a deep impact on entire communities. A study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation 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, *see id.* at 76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83.

Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts of Asbestos*

Liabilities (Nat'l Econ. Research Assocs., Jan. 23, 2003). For every ten jobs lost directly, the community may lose eight additional jobs. *See id.* at 8. The shutting of plants and job cuts decrease per capita income, leading to declining real estate values, and lower federal, state and local tax receipts. *See id.* at 11-13.

RAND has estimated that $70 billion was spent in asbestos litigation through 2002. *See* RAND Rep., *supra*, at 92. Future costs could reach $195 billion. *See id.* at 106. To put these vast sums in perspective, Attorney General Bell has pointed out that asbestos litigation costs will exceed the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Bell, *Courts' Duty, supra*, at 4.

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. The asbestos defendants of today are diverse, ranging from oil companies to automobile manufacturers to utilities to hospitals and colleges. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1. Many asbestos defendants are household names, *see* Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a*

Court Perennial, Wall St. J., Mar. 5, 2001, at A1, while others are small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. Some may have participated in the chain of distribution of the sale of an asbestos-containing product; others are premises liability defendants. *See* Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22. As the Congressional Budget Office observed, asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities." Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003). One well-known plaintiffs' attorney has described the litigation 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).

The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation.

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

These facts reveal that the asbestos litigation system has not been working for anyone: neither the truly sick victims nor defendants, the judicial system, or the unemployed workers or retirees whose retirement savings have fallen precipitously as a result of the avalanche of claims against their former employers. As a result, many courts and state legislatures have been re-evaluating the way they handle asbestos claims.

B. The Litigation Has Detrimentally Affected the Georgia Economy

Asbestos litigation trends in Georgia reflect those occurring elsewhere in this country. Like other states, Georgia has witnessed a substantial number of asbestos filings. For example, approximately 3,200 asbestos claims were on the Fulton County court docket as of September 2005; many of those claimants were not exposed to asbestos in Georgia. *See* Steven H. Pollak, *New State Law May Nix Asbestos Cases*, Fulton County Daily Rep., Sept. 20, 2005. As one Georgia defense lawyer observed, "We became a dumping ground" for asbestos lawsuits. *See id.* (quoting E. Elaine Shofner of Hawkins & Parnell).

Mass screenings of the type that have made headlines due to abuse in other states have also found their way into Georgia. For instance, it has been reported that the owner of Netherland Enterprises has administered X-rays to approximately 10,000 to 20,000 people in five states, including Georgia. *See* David M. Setter *et*

al., Why We Have to Defend Against Screened Cases: Now Is the Time for a Change, 18:20 Mealey's Litig. Rep.: Asbestos 9 (Nov. 12, 2003). This system reportedly involves generating potential plaintiffs through parking a trailer in a motel lot and conducting chest X-rays on site. The mass screenings, thousands of asbestos filings, and job losses demonstrate that Georgia is very much a part of the national asbestos litigation crisis.

II. H.B. 416 WAS A REASONABLE PUBLIC POLICY RESPONSE TO SUBSTANTIAL ASBESTOS LITIGATION PROBLEMS

The surge in asbestos (and silica) lawsuits by unimpaired claimants, fueled by questionable mass screening practices, has impacted the availability of compensation for the sick and the economy, including in Georgia. The General Assembly passed, and Governor Perdue signed, H.B. 416 (2005) (codified at Ga. Code Ann. §§ 51-14-1 to -10) as a surgical response to these problems. The law was a recognition that "[s]ound public policy requires deferring the claims of persons exposed to asbestos or silica and who are not presently impaired in order to give priority to those cases that involve claims of actual and current conditions of impairment; preserve compensation for people with cancer and other serious injuries; and safeguard the jobs, benefits, and savings of workers." H.B. 416, § 1 (Ga. 2005) (as introduced on Feb. 10, 2005).

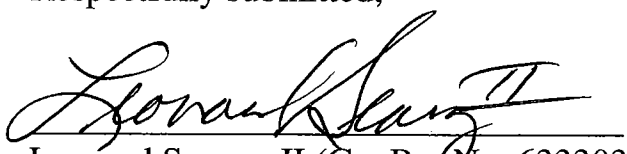
The law, which gained the almost unanimous support of the House of Representatives and Senate, established fair procedures for the filing of asbestos and silica claims. The law went into effect immediately upon approval on April 12, 2005. The core of the new law is the adoption of procedures requiring the submission of evidence of impairment early in the case. Absent such a submission, the cases are required to be dismissed without prejudice. Presently unimpaired claimants would be protected from having their claims barred by the statute of limitations should they develop an asbestos-related or silica-related impairing condition in the future. The law also contains provisions to address forum-shopping abuse and the improper joinder of dissimilar claims.

Georgia's asbestos and silica claims procedure statute has a compelling public policy basis. It fairly prioritizes the claims of the sick, while tolling the statute of limitations for the presently unimpaired to allow those individuals to file claims in the future if they develop an asbestos-related or silica-related impairment. The law will protect limited resources for sick claimants, 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.

CONCLUSION

For these reasons, this Court should hold that Ga. Code Ann. § 51-14-1 *et seq.* is constitutional and that pending and future claims that fail to meet the law's procedural requirements should be dismissed without prejudice.

Respectfully submitted,



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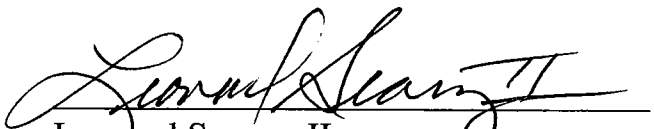

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