

Retroactive Application of Florida's Asbestos and Silica Act Held Unconstitutional

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In a 5-2 decision released Friday, July 8, the Florida Supreme Court held that the retroactive application of the 2005 Asbestos and Silica Compensation Fairness Act (Act) is unconstitutional because it divested the named plaintiffs of their asbestos-related causes of action in violation of the due process clause of the Florida Constitution. See *Am. Optical Corp. v. Spiewak*, No. SC08-1616, slip op. at 26 (Fla. 2011). After going through a recitation of the history and applicable sections of the Act, the majority opined that because there was a vested right that accrued on mere diagnosis, regardless of impairment, retroactive application was unconstitutional because it would "completely abolish" the plaintiffs' vested rights. *Id.* at 25.

Background

The Act was created "to give priority to 'true' victims of asbestos" suffering from cognizable injuries, such as mesothelioma or cancer. *Id.* at 5. The rationale behind the Act was that if victims were required to show a physical impairment and not merely a potential for a future impairment that: (1) judicial oversight of the asbestos-related cases would be enhanced to better provide support for true victims; (2) resources of defendants would be conserved for bigger payouts to those suffering actual impairments; and (3) the rights of future claimants would be preserved if they ever became impaired. *Id.* at 6. Under the Act, plaintiffs would be required to meet certain minimum medical criteria in order to bring or **maintain** a lawsuit for an asbestos or silica-related injury. Thus, the Act by its own terms, applied retroactively to plaintiffs who had lawsuits pending at the time the Act became effective on July 1, 2005. It is the retroactive application of the Act that was the focus of the Supreme Court's opinion.

The Opinion

The majority began its discussion of the Act by finding that any actual harm was sufficient to establish a vested right of the plaintiffs. In support of its position, the court stressed that under Florida common law a cause of action in negligence had never required an impairment or a particular manifestation of injury according to some "arbitrarily adopted level before a cause of action accrues," *id.* at 14, but that quite contrary, it only required a showing of "some actual harm." *Id.* at 12. The majority went on to agree with the Fourth District Court of Appeal's decision in as far as it stated that even the "emotional effects from contracting asbestosis were actionable under Florida law . . . [despite there being] no physical impairment or cancer." *Id.* at 4. The court concluded its discussion by finding that any actual harm created a vested right for the plaintiffs, which could not be divested. *Id.* at 12.

After establishing that the plaintiffs had a vested right, the majority discussed the retroactivity of the statute. The court noted that while retroactive legislation is permissible, a statute cannot be applied "retroactively if it impairs vested rights." *Id.* at 20 (internal quotations & citations omitted). The majority found that although the Florida Legislature intended the Act to apply retroactively, the retroactivity would not only "impair [the plaintiffs'] vested rights," but would completely "destroy[] them." *Id.* at 21. Thus, the court concluded that the Act could not be applied retroactively because its application would be in clear violation of the due process clause of the Florida Constitution. *Id.* at 25-26. Unfortunately, the opinion fails to address the longstanding and previously successful argument that even if the plaintiffs had a vested right, a balancing test required the court to consider the overwhelming public interest found by the Legislature to justify the action.

What now?

The majority did not address the method by which many, if not all, of the named plaintiffs were "diagnosed" with their alleged asbestos-related condition. Additionally, the majority ignored that most, if not all, of the plaintiffs did not have an actual diagnosis of an asbestos-related

disease. It would seem that under the majority's own diagnosis test, the Act can be constitutionally applied to "screened" plaintiffs.

In conclusion, the impact of this decision is that claims involving non-malignancies, lung cancers and "other cancers" that could not satisfy the Act's medical criteria - and have essentially been dormant for the past six years - will likely resurface as viable cases.

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