

ALERT

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OHIO SUPREME COURT RULES THAT 2004 ASBESTOS REFORM APPLIES RETROACTIVELY

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On October 15, 2008, the Ohio Supreme Court issued a highly anticipated decision holding that the retroactive application of H.B. 292, Ohio's 2004 groundbreaking asbestos reform legislation, *does not* violate the Ohio Constitution. *Ackison v. Anchor Packing Co.*, Slip Op. No. 2008-Ohio-5243 (Oct. 15, 2008).

In September of 2004, Ohio became the first state to enact asbestos reform legislation to address an alarming backlog of asbestos personal injury lawsuits in the state courts. Specifically, House Bill 292 establishes important threshold requirements that claimants must meet in order to maintain a lawsuit. The legislation requires claimants to provide, *inter alia*, evidence of physical impairment, along with a treating physician's report identifying asbestos as a substantial contributing factor, in order to avoid automatic dismissal of the complaint without prejudice. Designed to provide immediate relief to an "unfair and inefficient" system, the bill contained a retroactivity provision that applied these threshold requirements to *all* asbestos cases pending in Ohio courts, regardless of filing date.

Linda Ackison filed a claim as administrator of the estate of her deceased husband in May 2004, prior to passage of H.B. 292. The trial court dismissed her asbestos exposure claim because Ackison failed to satisfy the new statutory requirements. The Fourth District Court of Appeals reversed, finding retroactive application of the evidentiary requirements of H.B. 292 unconstitutional. The court certified that its decision directly

conflicted with three 2006 decisions from the Twelfth District Court of Appeals.

Writing for a majority in a 6-1 decision, Justice Robert R. Cupp concluded that the statute is "remedial and procedural in nature," rather than "substantive," and therefore, is not unconstitutionally retroactive. The court stated that the evidentiary requirements establish "a procedure to prioritize the administration and resolution" of asbestos-related cases and do not impair vested rights by altering the substantive common law applicable to asbestos claims. Justice Paul E. Pfeifer authored a comprehensive dissenting opinion, arguing that retroactive application of H.B. 292 is clearly unconstitutional because the statute "chang[ed] the substance of what constitutes a valid injury," and "alter[ed] the nature of the medical proof necessary to prove a claim."

The Supreme Court's decision is of particular importance to the insurance industry, as insurers continue to shoulder the burden of tens of thousands of asbestos claims per year, whether through the funding of bankruptcy trusts, or through the defense and indemnity of solvent asbestos defendants.

Cozen O'Connor is a global leader in representing the insurance industry in all coverage areas. Please contact William P. Shelley (wshelley@cozen.com, 215.665.4142), Chair of the Global Insurance Group, or Joseph A. Arnold (jarnold@cozen.com, 215.665.2795) with any questions regarding this Alert!

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