Case No. 130509

In the
Supreme Court of Illinois

Candice Martin, Individually, and as Executrix of the Estate of Rodney Martin, deceased,

Plaintiff-Appellee,

v.

Goodrich Corporation f/k/a B.F. Goodrich Company, and PolyOne Corporation, Individually and as Successor-By-Consolidation to the Geon Company n/k/a Avient Corporation,

Defendants-Appellants.

Questions of Law Certified by the United States
Court of Appeals for the Seventh Circuit, Case No. 23-2343,
There on appeal from the United States District Court
for the Central District of Illinois, Case No. 1:21-cv-01323,
Honorable James E. Shadid, Judge Presiding

BRIEF OF AMICUS CURIAE THE ILLINOIS TRIAL LAWYERS ASSOCIATION

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E-FILED
9/3/2024 11:10 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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INTERESTS OF THE AMICUS

The Illinois Trial Lawyers Association ("ITLA") is a statewide organization whose members represent injured workers and consumers. Founded in 1952, the organization currently has more than 2,000 members. ITLA has a particular interest in promoting the fair, prompt and efficient administration of justice while striving to protect injured peoples' rights. To this end, ITLA advocates for a plaintiff's longstanding right to seek a remedy for his injury, whether the injury occurs at or outside the workplace.

INTRODUCTION

There is no real dispute that by amending the Workers' Occupational Diseases Act, 820 ILCS 310/1 *et. seq.* ("ODA"), in 2019, the General Assembly intended to permit a civil tort remedy when compensation benefits under the ODA are barred by any repose provision ("2019 Amendments"). Both the plain language of the 2019 Amendments and the legislative debate support such a conclusion.

Even Defendants and their Amici readily acknowledge that the General Assembly acted (as it is empowered to do) to remedy the "harsh result" identified by this Court in *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 43. Defense Counsel Amicus agrees that it is the role of the legislature to set the proper balance after considering "different types of claims based on the nature of the evidence and the public policies the legislature sought to achieve." *Def. Counsel Br.*, p. 8.

Of course, Defendants and its Amici are critical of the solution the General Assembly chose. However, "[w]hether the statute is wise or sets forth the best means to achieve the desired results are matters for the legislature, not the courts." *Hayashi v. Ill. Dept. of Fin. & Prof'l Regul.*, 2014 IL 116023, ¶ 29. The issue is whether the General

Assembly acted within its authority and the boundaries of the Illinois Constitution, which it did.

Therefore, this Court should answer the certified questions in favor of Plaintiff and hold that: (1) Section 1(f) is a repose provision under the 2019 Amendments; (2) there is no issue of retroactive application because the 2019 Amendments apply only to cases accruing after the effective date; and (3) employers have no vested rights precluding prospectively applied changes to the exclusive remedy provisions.

ARGUMENT

(I)
The Three Certified Questions Are Readily Answered in Favor of Plaintiff

If this Court is so inclined, there are simple, straightforward answers in favor of Plaintiff to the certified questions from the Seventh Circuit, the first two of which call for simply interpreting what the General Assembly intended when it enacted Section 1.1 of the ODA. *See Caveney v. Bower*, 207 Ill. 2d 82, 87 (2003) ("fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent"). The third question is easily answered by reference to more than a century of decisions holding that the legislature has the power to create and amend remedial schemes without violating anyone's vested rights because such schemes do not give rise to vested rights. *See e.g. Hilberg v. Indus. Comm'n*, 380 Ill. 102, 106 (1942) (*citing Wall v. Chesapeake & Ohio Ry. Co.*, 290 Ill. 227 (1919) & *Smolen v. Indus. Comm'n*, 324 Ill. 32 (1926)).

There should be no question that the General Assembly considered Section 1(f) a repose provision (within the meaning of Section 1.1) because Section 1(f) operates to bar a claim for benefits before the claim accrues. That is the most basic, plain, ordinary and functional meaning of "repose." *See Folta*, 2015 IL 118070, ¶ 33 ("a statute of repose

begins to run when a specific event occurs [*e.g.*, last exposure], 'regardless of whether an action has accrued or whether any injury has resulted'") (*quoting Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001). The *Folta* Court looked to the effect of portions of Section 6(c) in determining that it "acts as a statute of repose." *Id*. This Court should follow the same reasoning in determining that Section 1(f) is a repose provision for purposes of Section 1.1 because it too, by its functional effects in barring claims for benefits before they accrue, "acts as a statute of repose." The legislature is presumed to have been aware of that accepted meaning when it used a term of art like repose. *See Caveney*, 207 Ill. 2d at 88 ("best indication of legislative intent is the statutory language, given its plain and ordinary meaning").

Moreover, Section 1.1 by its terms applies when benefits are barred by "*any* period of repose or repose provision" (*emphasis added*). Had the General Assembly intended that only Section 6(c) would trigger the right to bring a civil action, it could have specifically referenced that provision rather than using the broader phrasing "any" period or provision. The General Assembly certainly knows how to limit its enactments to only asbestos injuries when it intends to do so—as demonstrated by its enacting the longer 25-year repose period that specifically applies to diseases caused by exposures to "asbestos." The fact that the legislative debates in 2019 discuss Section 6(c) is inconsequential and unsurprising. Section 1.1 was enacted in response to *Folta*, which was an asbestos case that involved Section 6(c). There is nothing in the language of the 2019 Amendments nor the legislative debate to indicate that the legislature intended to exclude Section 1(f) from "repose" as used in Section 1.1.

As to the second question, there is no real issue of temporal reach here because Section 1.1 does not apply retroactively. For almost 150 years, Illinois has adhered to the rule that 'retroactive' means applying a change in the law to matters that are already accrued or pending. *See Dickson v. Chi., B & Q, R. Co*., 77 Ill. 331, 333 (1875) (test of whether a statute or amendment is being applied retroactively is whether it has an "effect upon any causes of action which had accrued before the time when the act went into effect"); *Rivard v. Chi. Fire Fighters Union, Local No. 2*, 122 Ill. 2d 303, 306 (1988) (prospective means that an Act applies "only to causes of action accruing after [its] effective date"). *See also A.O. Smith Corp. v. Indus. Comm'n*, 109 Ill. 2d 52, 56 (1985). Consistent with that well-established rule "the law in effect at the time of disablement governs an occupational diseases proceeding." *Millis v. Indus. Comm'n*, 89 Ill. 2d 444 (1982). *See also Owens Corning Fiberglas Corp. v. Indus. Comm'n*, 198 Ill. App. 3d 605, 615 (4th Dist. 1990) ("[i]f the legislature had intended the date of last exposure to the hazard of an occupational disease to be the date of injury, it would have so stated…"). The current framework for the ODA, as enacted in 1951, provided that it "appl[ied] to all occupational diseases and deaths occurring on or after July 1, 1951." 820 ILCS 310/27. Thus, the date of disease or death has always determined which version of the ODA applies.

Here, the 2019 Amendments are the presumptively and prospectively applicable law precisely because they were part of the law that was in effect when Plaintiff's claims accrued. The General Assembly does not need to specify any temporal reach when it intends an amendment to apply only to subsequently accruing matters. Accordingly, no actual retroactivity analysis is necessary here.

The straightforward answer to the third question is that the 2019 Amendments, by modifying the exclusive remedy provisions, simply adjusted the balance of available remedies between employers and employees in a remedial statutory scheme that the legislature created in the first place. No one has *ever* been held to have a vested right in any legislatively created remedial scheme such that the legislature cannot change it—especially where, as here, the change only applies prospectively to matters accruing after the effective date of the change. *See Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291 (1999); *Hayashi*, 2014 IL 116023; *Trexler v. Chrysler Corp.*, 104 Ill. 2d 26, 30 (1984) (*citing Maki v. Frelk*, 40 Ill. 2d 193, 196 (1968) & *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 190 (1952)); *Shelton v. City of Chicago*, 42 Ill. 2d 468, 473-74 (1969); *Otis Elevator Co. v. Indus. Comm'n*, 302 Ill. 90, 93 (1922). *See also Hilberg*, 380 Ill. at 106; *Wall*, 290 Ill. at 232; *Smolen*, 324 Ill. at 36-37.

Goodrich and its Amici cite nothing that should persuade this Court to even consider departing from the prolific line of decisions consistently following that well-established rule. In particular, this Court should reject their invitation to import inapplicable jurisprudence from childhood abuse cases involving the actual repeal of a repose provision itself. *See Union Amicus Br.*, Part III.

(II)
The Legislative Debate Fully Supports Answering All Three Questions in Favor of Plaintiff

The General Assembly accepted this Court's invitation and properly struck a balance to cure the "harsh result" identified in *Folta*. As shown through the plain and ordinary meaning of the 2019 Amendments, the General Assembly was clear in its purpose to permit a civil tort remedy if benefits under the ODA are barred by any repose provision.

The legislative debate upon passing the 2019 Amendments removes any doubt that the General Assembly intended to provide a remedy in such instances. Benefiting from this Court's guidance in *Folta,* the General Assembly carefully chose to include "any" repose provision when adding Section 1.1 to the ODA. Importantly, the same arguments that Defendants and its Amici now raise were raised in opposition to the 2019 Amendments and were at that time properly considered and balanced by the legislature.

(A)
The Legislature Intended Section 1.1 to Apply to
"Any" Repose Provision, including Section 6(c) and Section 1(f)

The legislature intended Section 1.1 to apply to "any" repose provision, including Section 6(c) and Section 1(f). This Court has long provided guidance when reviewing legislative action. "The primary objective in construing a statute is to ascertain and give effect to the intention of the legislature. All other rules of statutory construction are subordinate to this cardinal principle." *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chi.*, 2012 IL 112566, ¶ 15 (*citing Kraft, Inc. v. Edgar,* 138 Ill. 2d 178, 189 (1990)). "In construing a statute, courts presume that the General Assembly did not intend absurdity, inconvenience, or injustice." *Mich. Ave. Nat'l Bank v. Cnty. of Cook,* 191 Ill. 2d 493, 504, (2000).

"The most reliable indicator of legislative intent is the language of the statute, which must be given its plain and ordinary meaning." *Chi. Teachers Union,* 2012 IL 112566, ¶ 15. "Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *Id*. "In construing the provisions of the Workmen's Compensation Act ["WCA"], all portions thereof must be

read as a whole and in such manner as to give to them the practical and liberal interpretation intended by the legislature." *Vaught v. Indus. Comm'n,* 52 Ill. 2d 158, 165 (1972).

Here, the plain and ordinary meaning of Section 1.1. provides for a civil action when "the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision." The legislature's choice to incorporate "any" repose period is critical. Despite Defendants' and its Amici's assertions to the contrary, "any" is a simple and commonly understood word. "Any" is defined as "one or some indiscriminately of whatever kind." *Any, Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/any. Accessed 22 Aug. 2024; *see also Oxford English Dictionary*, s.v. "any (adj.)", https://doi.org/10.1093/OED/9105214830 ((with plural or mass noun) used to refer to an unspecified number or quantity of a thing or things, no matter how much or how many; some.")) Common synonyms include "each," "every," and "all." *Any*, Merriam-Webster.com Thesaurus, https://www.merriam-webster.com/thesaurus/any. Accessed 22 Aug. 2024.

Thus, it follows that the General Assembly's use of "any" signals its recognition that there are multiple repose provisions in the ODA, and that Section 1.1 applies to "each," "every," and "all" repose periods. Put another way, the use of "any" would be superfluous unless referring to more than one repose period. In reviewing the ODA as a whole to ascertain the practical and liberal interpretation of the legislature, the two repose provisions are found in Section 6(c) and Section 1(f). Contrary to Defendants' and its Amici's arguments, there would be no reason to use "any" if Section 6(c) were the only repose provision.

Furthermore, the General Assembly had the benefit of responding to this Court's concerns in *Folta*, wherein the Court expressly stated, "[s]ince 1936, section 1(f) has functioned as a temporal limitation on the availability of compensation benefits and not as a basis to remove occupational diseases from the purview of the Act." *Folta*, 2015 IL 118070, ¶ 42. Armed with *Folta's* lessons, the General Assembly amended the ODA in 2019 to address "any" repose period, including Section 1(f). Adopting Defendants' argument that the 2019 Amendments only apply to Section 6(c) would mean that the General Assembly ignored this Court's concerns in *Folta.* This Court presumes "the General Assembly did not intend absurdity, inconvenience, or injustice." *Mich. Ave. Nat'l Bank,* 191 Ill. 2d at 504. Respectfully, this Court should not accept Defendants' jaded view of the General Assembly.

In sum, the General Assembly amended the ODA to address this Court's concerns in *Folta*. The General Assembly clearly intended to provide a civil tort remedy when benefits are not available under the ODA. Section 1.1 applies to any, and all, repose periods in the ODA, including Section 1(f). To the Seventh Circuit's first certified question, "Yes, Section 1(f) is a period of repose or repose provision."

(B)
If There Remains any Doubt, the Legislative Debate Clearly Reflects its Intent to Permit a Civil Tort Remedy when Benefits Under the ODA are Unavailable

If there remains any doubt, the legislative debate clearly reflects the General Assembly's intent to permit a civil tort remedy when benefits under the ODA are unavailable. In reviewing a statute, this Court "may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Chi. Teachers Union*, 2012 IL 112566, ¶ 15

(citing *Hubble v. Bi-State Dev. Agency of Ill.-Mo. Metro. Dist.,* 238 Ill. 2d 262, 268 (2010)). The ODA is "a humane law of a remedial nature whose fundamental purpose is to provide employees and their dependents prompt, sure and definite compensation, together with a quick and efficient remedy, for injuries or death suffered in the course of employment." *Gen. Am. Life Ins. Co. v. Indus. Comm'n,* 97 Ill. 2d 359, 370 (1983).

Here, the legislative debate (Senate Bill 1596) demonstrates that the General Assembly carefully considered the reasons for and against the 2019 Amendments, the problems sought to be remedied, the purposes to be achieved, and the potential consequences. To begin, the General Assembly accepted the responsibility of curing this Court's concerns in *Folta*. Senator Sims explained:

> Senate Bill 1596 is in response to a request by the Illinois Supreme Court in its decision in Folta versus Ferro Engineering that the Illinois General Assembly address a glaring inequity in our [sic] workers' compensation laws [sic] which leaves workers who are exposed to asbestos or other cancer-causing materials without the ability to collect for their injuries under the current state of the law.

101st Ill. Gen. Assembly, Senate Tr., Mar. 6, 2019, at 20 (stmt. of Sen. Sims). The General Assembly agreed with the *Folta* court that it was the province of the legislature to strike the proper balance:

> Nevertheless, ultimately, whether a different balance should be struck under the acts given the nature of the injury and the current medical knowledge about asbestos exposure is a question more appropriately addressed to the Legislature.

101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 5 (stmt. of Rep. Hoffman). Representative Hoffman added:

> And under the laws, currently the common laws as a result of this decision, the 2015 decision of Folta, the court has begged us for a solution. They don't believe that their decision based on current law was something that was not harsh, they believed it was harsh, and they indicated in their decision that

> they believed the results were harsh. And they indicated to us that this question more appropriately needs to be address by the Legislature.

101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 42 (stmt. of Rep. Hoffman). Representative Hoffman made clear that the legislature was "actually doing what the Supreme Court requested us to do, a legislative fix." 101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 15 (stmt. of Rep. Hoffman). Representative Thapedi highlighted this point:

> [W]e want to be extremely clear of what we're doing today. And that is responding to the directives of the Illinois Supreme Court to address this very important issue when… the Supreme Court has encouraged us to engage on the issue and make a legislative change now.

101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 17 (stmt. of Rep. Thapedi). In determining the proper balance, the General Assembly recognized that the ODA has historically been considered a humane law:

> [T]his bill allows us to protect workers who [sic] are currently not protected under the law. This allows us to ensure that we are handling cases the way they were being handled before the Supreme Court's decision in Folta. [sic] [T]he Workers' compensation laws are 'humane' laws, we should be ensuring that individuals are given the opportunity to recovery for injuries they have sustained.

101st Ill. Gen. Assembly, Senate Tr., Mar. 6, 2019, at 30-31 (stmt. of Sen. Sims). Representative Evans added, "as research comes and as things change, the legislation should change and take steps to help the people of [sic] State of Illinois." 101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 19 (stmt. of Rep. Evans). Notably, the opponents to the 2019 Amendments agreed that the ODA needed and could be amended to address claims such as Plaintiff's:

> The sponsor has come forward with a proposal, this legislation, which is a solution to a problem that I believe both sides agree exists… The system

> today resulted in an unfair situation for an aggrieved party. There's no dispute over the fact that we should do something about this.

101st Ill. Gen. Assembly, Senate Tr., Mar. 6, 2019, at 25 (stmt. of Sen. Barickman).

Importantly, the General Assembly considered the opposition viewpoint and the practical impact the 2019 Amendments would have on civil lawsuits. The legislature considered the impact on employers, insurance providers, and the State of Illinois' economy. In fact, the same arguments now raised by Defendant and its Amici were raised and considered during the legislative debate. *See Grasse*, 412 Ill. at 189 ("[i]n adjudging the constitutionality of [the provision], we are not concerned with the wisdom of the statute…hence, defendant's discussion of the advantages and disadvantages for the employer and employee is in no way determinative").

For example, the legislature anticipated the defense side's concerns regarding the fairness to employers in defending civil lawsuits. The legislature considered that exempting employers from liability was not only unfair to plaintiffs, but also unfair to other defendants. In addressing multi-party lawsuits, Representative Hoffman pointed out that a plaintiff may "only recover once for [his] damages. [A plaintiff does not] double recover, it's called contribution." 101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 35 (stmt. of Rep. Hoffman).

Representative Hoffman's remarks signal that the legislature was concerned with fairness to all defendants in a civil lawsuit, not merely the narrow subset of employers for which Defendant and its Amici now advocate. To illustrate, a lawsuit may involve multiple defendants, including premises owners, contractors, equipment manufacturers, and employers. The defendant-employer position ignores the question of fairness to these other defendants when an employer, who may be largely to blame and has the best access to

evidence, is immune from suit. The legislature considered such questions of fairness to *all* defendants.

Additionally, Defendants and its Amici repeatedly complain about the difficulty for employers in defending "stale claims" and the difficulty in accessing evidence from years ago. Such theories ignore the reality that the same evidentiary challenge impacts plaintiffs and other defendants as much, if not more so, than employers. Indeed, employers often have better access to certain records than other parties. It is not uncommon for employers in toxic exposure cases to be subpoenaed for records or included as respondents-in-discovery when they could not be named as defendants.

Defense side's fictional theories also ignore the reality that the tort system places the evidentiary burden on the plaintiffs to prove their cases. Although employers are now subject to the *potential* of paying higher damages in cases under Section 1.1, plaintiffs no longer have the benefit of no-fault recovery and instead must prove negligence. Moreover, in some cases, an employer's contributory share of fault might lead to lower damages than benefits would be, had they been available. As further addressed below, the 2019 Amendments were not unfairly one-sided in rebalancing this *quid pro quo* relationship. Essentially, the 2019 Amendments reflect a considered rebalancing that is consistent with the traditional *quid pro quo* structure.

Although Defendant and its Amici ignore these practical realities, the General Assembly did not:

> [A plaintiff] would have to prove causation, [a plaintiff] would have to prove that [a defendant] knew or should have known [of the harm.] So, [a plaintiff] still [has] to prove the elements necessary to prove [in order to] receive compensation.

101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 37-38 (stmt. of Rep. Hoffman). Of course, long before a plaintiff presents an opening statement to a jury, he must survive a variety of dispositive motions with competent evidence. The mere filing of a lawsuit against an employer does not equate to an automatic jury verdict in the plaintiff's favor. As the legislature pointed out, nothing in the 2019 Amendments "removes the right for a corporation to have counsel to defend against [suits.]" 101st Ill. Gen. Assembly, House Tr., Mar. 14, 2019, at 38. Defense Counsel Amicus' exaggerated fears of "indefinite liability" that is "driven by sympathy and bias, rather than law and evidence" *(Def. Counsel Br.*, p. 13.), is simply hyperbole that impugns the civil justice system and the integrity of juries to make fair, unbiased decisions.

In conclusion, in response to this Court's invitation in *Folta*, the General Assembly carefully weighed the arguments in support and in opposition to the 2019 Amendments. As it is empowered to do, and as it has previously done with the ODA, the legislature struck a balance. Respectfully, this Court should not now upset that balance.

(C)
The Illinois Workers Compensation Scheme Has Always Been Based Upon a *Quid Pro Quo* Bargain Between Employer and Employee

The Illinois WCA scheme has always been based upon a *quid pro quo* bargain[1] between employer and employee. The 2019 Amendments maintain this historical balance. Illinois has a long history of promoting workplace safety, including the prevention of industrial and occupational diseases. The first major public attempt to investigate

[1] As noted in the *Union Amicus Brief*, referring to this arrangement as a "bargain" is a helpful metaphorical description and not a concession that there ever existed any actual bargained-for contract between employers and employees giving rise to the ODA/WCA. *See e.g. Hilberg*, 380 Ill. at 106.

occupational disease in general was undertaken by a special occupational disease commission established by the state of Illinois, which published its results in 1911. United States Department of Labor, History Monograph, http://www.dol.gov/dol/aboutdolihistory/mono-regsafepart06.htm, retr. March 24, 2015. The Health, Safety and Comfort Act of 1909 (later the Health and Safety Act, Ill. Statutes 1912 Ch. 48 par.113 et sec.) and the "Occupational Diseases Law" of 1911 provided strict regulations for workplaces utilizing or creating dangerous chemicals and dusts, including asbestos.

The original 1911 ODA allowed a direct right of action against employers by their employees for violations of the requirements of the act. Both the Health, Safety and Comfort Act and the ODA reflected the growing public concern over industrial accidents and occupational diseases. Increased urban manufacturing, the growth of organized labor, the recognition of industrial hygiene as a science (the Office of Industrial Hygiene was instituted as part of the US Public Health Service in 1911), and the Progressive social reforms led by Jane Addams, Dr. Alice Hamilton, Samuel Gompers and others both in Illinois and nationally resulted in dozens of laws promoting worker health and safety being enacted by legislatures across the country.

While the ODA of 1911 initially allowed an employee to exercise common law tort remedies against an employer responsible for his injury, the parallel WCA, Ill. Statutes 1912 Ch. 48 par. 149, did not. From its enactment in 1912, The Illinois WCA permitted employers to elect to pay compensation under the Act, and not be subject to liability in the tort system. Par. 149 (1) (a). An employer's election to participate in the WCA program became referred to as an 'exclusive remedy,' inasmuch as the vast majority of industrial

employers elected to be covered under the Act and foreclose plaintiffs' common law remedies.

Twenty-five years later, after several unworkable amendments to both Acts, the ODA was amended to include all the provisions of the WCA, including the exclusive remedy provision. *See* Ill. Statutes 1935, chap. 48, par. 199(4). Although greater damages could be awarded in the tort system, assumption of the risk and contributory negligence were common and powerful defenses in 1935. Many workers did not know their rights, and often had no access to attorneys. And while employers rarely lost their cases at common law, the growing number of industrial workers unsurprisingly led to a growing number of occupational disease claims, particularly lung disease claims.

The Illinois Manufacturers Association's Occupational Diseases Committee described the occupational disease issue as "one of the major problems of American industry," although the Association also charged that although "some of the suits were meritorious…to a large extent they were stirred up and solicited by ambulance chasers for unethical lawyers!" Occupational Disease Legislation in Illinois; Hebling, Albert T.; *The Social Service Review, Vol.* 12, No.1 (Mar. 1938) pp. 105-122, at 112, University of Chicago Press. Thus, both employers and employees were in a position to benefit from a legislatively imposed "bargain." That so-called bargain, legislatively balancing the parties' respective interests, has been present in every version of Illinois WCA and ODA legislation since that time.

The ODA of 1936 was found constitutional by this Court shortly after its enactment. In *Radium Dial v. Ryan*, 371 Ill. 597 (1939), the employee made an ODA claim for radium poisoning. The Industrial Commission found in her favor, but the employer refused to

either pay the employee or pay for an appeal bond. The employer sought a writ of mandamus in order to appeal without posting a bond. The Court denied the writ and held that the employer had forfeited its right of review. The Court explained the *quid pro quo* inherent in the Act:

> The Occupational Diseases Act under consideration applies to both employer and employee. The employee is required to forego his common law suit against the employer but has a right to presume that the compensation provided will be paid by reason of the requirement of the statute that the employer will give bond or make the insurance provisions that will make payment certain. The employer, on the other hand, by the terms of the statute, can calculate in advance the approximate measure of payment to the employee, based upon the compensation he is receiving, is immune from suits at law and makes provision for the prompt payment of such liability as a condition of carrying on what the legislature deems to be an extra hazardous business.

Id. at 602. Thus, since it was included in the legislative scheme in 1936, the ODA's exclusive remedy provision has been "part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." (2 A. Larson, Law of Workmen's Compensation ' 65.11 (1988).)

In this case, Defendants ask this Court to ignore the *quid pro quo* arrangement. Defendants are not assuming any "liability without fault," they simply insist that Plaintiff give up her rights in exchange for . . . nothing. Today, the bargain or *quid pro quo* remains the theoretical cornerstone of the WCA/ODA system in Illinois. Employees must rely and trust that their employers are honoring their end of the bargain and will compensate them according to the ODA if they are injured on the job. If an injury is not, or as in this case, cannot be compensated under the Act, the bargain is off, and workers should be free to pursue their common law remedies. This is the precise rebalancing achieved by the

legislature in passing the 2019 Amendments in response to this Court's concerns in *Folta*. *See Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 161-62 (1991) ("the proper relationship between the legislature and the court is one of cooperation and assistance in examining and changing the [law] to conform with the ever-changing demands of the community") (*quotation omitted*).

(III)
Section 1.1 Does Not Constitute Special Legislation

Defense Counsel Amicus asserts that the 2019 Amendments violate the special legislation clause, Ill. Const. 1970, art. IV, § 13 because they "provide a benefit to only a select group of people—those whose claims have been barred" by repose under the ODA. *Def. Counsel Br.*, pp. 12-13. That challenge is meritless. First and foremost, the 2019 Amendments did not "create" any classification but merely changed the outcome for groups of workers already differentially treated based upon when their occupational diseases manifest. Basically, if it was not unconstitutional to deny ODA benefits to certain workers based on repose, it is likewise not unconstitutional to afford them a different remedy than other workers based on the same repose cutoff. Moreover, differential treatment based upon how long it takes a claim to accrue has routinely been upheld. *See e.g. Anderson v. Wagner*, 79 Ill. 2d 295, 313-21 (1979) (rejecting special-legislation challenge to medical malpractice statute of repose).

According to Defense Amicus, "[d]epending on when [their respective] disabilit[ies] occurred in relation to the last exposure," two identically exposed, disabled employees "could have completely different rights." *Def. Counsel Br.*, p. 13. However, that was true even prior to the 2019 Amendments which did not "create" any new classes under the ODA. Rather, Section 1.1 merely changes the outcome for a class of workers that has

existed for decades—namely, workers barred by repose from recovering ODA benefits. The only effect of the 2019 Amendments is that that particular pre-existing class now has a civil remedy instead of no remedy against the employer, but they have always been treated differently from workers whose diseases manifest within the repose periods. Accordingly, declaring Section 1.1 to be unconstitutional on special legislation grounds is not only analytically wrong, doing so would also not eliminate that long-standing classification. It would simply relegate workers like Mr. Martin back to different, differential treatment—*i.e.* no remedy.

Either way, what divides the two groups of workers is a temporal cutoff, and as this Court held in *Piccioli*, "there is nothing arbitrary about using a cutoff date to limit benefits to a finite number of individuals." *Piccioli v. Bd. of Trs. of Teachers' Ret. Sys.*, 2019 IL 122905, ¶ 23. *See also id*. ¶ 21 ("inclusion of a cutoff date in a statute…is entirely rational"). "The special legislation provision does not…prohibit all classifications." *Cutinello v. Whitley*, 161 Ill. 2d 409, 417 (1994) ("purpose is to prevent arbitrary legislative classifications"). *See also Bridgewater v. Hotz*, 51 Ill. 2d 103, 109 (1972) (prohibition against special legislation "does not mean that every law shall effect alike every place and every person in the state").

Where, as here, the statute does not affect fundamental rights or involve a protected class, arbitrariness is determined using the rational basis test— "whether the statutory classification is rationally related to a legitimate state interest." *Piccioli*, 2019 IL 122905, ¶ 20. "Under the rational basis test, the court may hypothesize reasons for the legislation, even if the reasoning advanced did not motivate the legislative action." *Id*. (*emphasis and internal quotation omitted*). *See also id.* ¶ 23 ("to satisfy the rational basis standard, a

statutory classification requires '[n]either perfection nor mathematical nicety'") (*quoting Maddux v. Blagojevich*, 233 Ill. 2d 508, 547 (2009)).

Laws are not arbitrarily discriminatory if they are "alike in their operation upon all persons *in like situation*." *Bridgewater*, 51 Ill. 2d 103, 109 (1972) (*quotations omitted*). Here, the worker groups at issue are not *similarly situated* but divided by when their diseases manifest, which is a well-accepted basis for differential treatment. The legislature could *conceivably* decide that, after a certain amount of time, keeping certain workers in a no-fault system was inappropriate as opposed to simply denying them any remedy. In fact, this is similar to how the Illinois product liability statute of repose operates by limiting only claims for strict liability. *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 469 (1997) ("repose statute exclude[s] negligence from its scope").[2]

If, as the Court held in *Folta*, it was "the province of the legislature to draw the appropriate balance" in the first place in terms of the *quid pro quos* of the ODA and WCA (2015 IL 118070, ¶ 43), it is equally within the legislature's province to redraw that balance. This Court has consistently recognized that the legislature has broader authority to adjust and amend a statutory compensation scheme that the legislature created in the first place. *See Dardeen.*, 186 Ill. 2d at 291; *Shelton*, 42 Ill. 2d at 473-74. That has included the foundational principle for purposes of the ODA and WCA that "the relationship between employers and employees" is "*a recognized class for special legislation*." *Grasse*, 412 Ill. at 191 (*emphasis added*). *See also Casparis Stone Co. v. Indus. Bd. of Ill.*, 278 Ill. 77, 81

[2] The fact that the products liability statute of repose precludes some, but not all, theories of recovery against the same parties also refutes the defense-side contention that repose must bar everything. Repose is still repose even if it bars only certain types of recovery before a claim accrues (*i.e.* ODA benefits), and it does not bar other types of recovery not covered by the statutory language (i.e. civil actions).

(1917) (rejecting special legislation challenge to enactment of WCA; "question of classification is primarily for the state Legislature and only becomes a judicial question when the legislative action is clearly unreasonable"); *First Nat'l. Bank v. Wedron Silica Co.*, 351 Ill. 560 (1933) (original ODA, which applied only to certain industries, did not violate special-legislation clause).

The purpose of the ODA is to compensate workers suffering from occupational diseases. Arguing that Section 1.1 is not rationally related to that purpose begs the question—how can providing a new remedy to an already-existing class of workers (who had no remedy) be less related to that purpose than relegating them to no compensation whatsoever? *See e.g. Grasse*, 412 Ill. at 197 (completely depriving an employee of all recovery does not effectuate the purposes of the WCA). Basically, if it was not unreasonable to *deny* compensation to a group of workers based on when their diseases manifest, it cannot be unreasonable to provide them with a remedy now. Indeed, to eliminate the supposedly improper *classification*, this Court would have to go beyond the 2019 Amendments and declare the repose provisions themselves, which actually create the classification, to be unconstitutional special legislation. Of course, this Court has already held otherwise. *See Folta*, 2015 IL 118070, ¶¶ 46-48 (ODA repose provisions do not violate special legislation clause).

A repose statute always and unavoidably divides injured individuals into two classes, those whose injuries accrue before it runs and those whose injuries accrue afterwards. Yet, Illinois courts routinely uphold the constitutionality of legislatively enacted repose provisions. *See e.g., Anderson*, 79 Ill. 2d at 313-21. Holding the 2019 Amendments unconstitutional on special legislation grounds would, therefore, arguably

call into question the constitutionality of *every* Illinois statute prescribing a repose period. It is rather doubtful that any potential defendant—employer or otherwise—would truly favor that development.

(IV)
The Idea that Employers Were Unfairly Caught Off-Guard By The 2019 Amendments Is Pure Fiction

As noted above, the availability of insurance to cover employers' civil liabilities is a policy consideration for the legislature to weigh—which it did, in fact, weigh here when enacting the 2019 Amendments. As also noted, employers should be able to obtain claims-made coverage for such potential liability even now.

Additionally, it is completely disingenuous for employers to assert that being subject to civil liability, where repose bars ODA benefits, came as a complete surprise as a result of the 2019 Amendments. Prior to this Court's decision in *Folta*, some Illinois circuit courts were reaching the opposite result and concluding that such matters fell within the already-existing exception to exclusivity for claims that were non-compensable under the ODA. *E.g., Whittington v. U.S. Steel*, 02-L-1113 (3d Jud. Cir.) (asbestos exposure); *Kavich v. Air Prod. & Chem., Inc*., 08-L-242 (3d Jud. Cir.) (benzene exposure).

That is precisely what the Court of Appeals held in *Folta*—that exclusivity did not apply— before this Court reversed that decision. *See* 2014 IL App (1st) 123219. Similarly, two years before *Folta*, the Pennsylvania Supreme Court held that civil suits against an employer were not precluded by exclusivity where that state's repose provisions barred recovering benefits. *See Tooey v. AK Steel Corporation*, 81 A.3d 851 (Pa. 2013). This Court observed in *Folta*, that it had previously "had limited opportunity to address what [it] originally meant in *Collier* [1980] when [it] used the phrase 'not compensable' to carve out

a category of injuries for which the exclusive remedy provision would not be applicable." 2015 IL 118070, ¶ 17. Until this Court decided the issue in *Folta*, it was not a forgone conclusion that the exclusive remedy provisions applied to matters where benefits were barred by repose, and employers had no reason to believe that exclusivity would apply.

Thus, the exclusive remedy provisions have never completely and absolutely shielded employers from civil liability. Illinois law has long provided exceptions to the ODA/WCA exclusive remedy provisions, making it necessary (or at least expedient) for employers to have always made some provision for possible civil suits by employees. *See Collier v. Wagner Castings Co.*, 81 Ill. 2d 229 (1980). *See also Doyle v. Rhodes*, 101 Ill. 2d 1, 10-11 (1984) (because exclusivity is an affirmative defense, an employer's "potential for tort liability exists until the defense is established"). In fact, the General Assembly has amended the rules for ODA exclusivity since it was first enacted. The ODA, as enacted in 1911 imposed certain obligations on employers but provided that the employees' remedy was an action at law instead of an exclusive remedy for benefits. *See Wedron Silica Co.*, 351 Ill. at 565 (original ODA and WCA provided "different remedies…the diseased employee obtained damages; the accidentally injured employee received compensation"). In 1923, the General Assembly amended the ODA to provide that diseases arising in specific hazardous industries were subject to a no-fault / limited remedy scheme. *Id*.

The fact that standard CGL policies typically contained employee exclusions does not mean that coverage was unavailable for employers' potential liabilities to employees for injuries within one of the exceptions to exclusivity. Such coverage has been available under optional policy riders for any employer that had the foresight to purchase it. It could be obtained now as claims-made coverage. Most importantly, the law has never prevented

employers from making provisions, by insurance or otherwise, for possible civil liability to employees, but it has always provided that no one should count on the law remaining unchanged. *See Bowman v. Indus. Comm'n*, 289 Ill. 126, 133 (1919). "The rule in this State is that if, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws, these individuals have no cause to complain." *Hire v. Hrudicks*, 379 Ill. 201, 205-06 (1942) ("[t]hese principles are firmly fixed in our jurisprudence"). An employer's failure to provide for possible civil claims, based on unilateral expectations that it could not be sued, does not give rise to vested rights. *See Orlicki v. McCarthy*, 4 Ill. 2d 342, 347 (1954) (a 'vested right' is "something more than a mere expectation, based upon an anticipated continuance of existing law"); *Hayashi*, 2014 IL 116023, ¶ 25.

The recognized exceptions to exclusivity were not judicially imposed but, rather, based on statutory interpretation. *E.g., Collier*, 81 Ill. 2d at 240 (intentional tort exception based on interpreting term "accident" and conclusion "that the legislature could not be presumed to have intended to permit an intentional tortfeasor to shift his liability to a fund paid for with premiums collected from innocent employers"). *Folta* was likewise decided on the basis of statutory interpretation—whether or not the legislature intended exclusivity to apply to claimants who were ineligible for benefits due to repose. *See* 2015 IL 118070, ¶ 10 ("[t]his case requires us to interpret the exclusive remedy provisions of the [WCA] and the [ODA]"). *See also McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶¶ 17-18 (issue was one of statutory interpretation—whether or not legislature intended employee claims under Privacy Act to come within an exception to WCA exclusivity).

Such is part of the cooperative give-and-take relationship between the Court and the legislature to arrive at how statutes apply. *See Kotecki*, 146 Ill. 2d at 161-62.

In some instances, the legislature's response to the Court's interpretation will be to clarify what it intended all along rather than being an actual change in the law. "[N]o vested right[s] are at stake," where the legislature amends a statute to clarify what it always intended. *Premier Prop. Mgmt., Inc. v. Chavez*, 191 Ill. 2d 101, 109 (2000). Respectfully—although no vested rights are at stake either way—the 2019 Amendments could be viewed as a clarification by the legislature rather than an actual change in the law, especially in light of the different interpretations by the lower courts and this Court's limited opportunity to address the non-compensability exception prior to the decision in *Folta*. In any event, whether the legislature changed the law regarding exclusivity or simply clarified it, potential civil liability to employees cannot be seen as an unexpected development. *McDonald*, 2022 IL 126511 (recently holding that WCA exclusive remedy did not preclude employee civil claims for liquidated damages under the Privacy Act).

CONCLUSION

It is respectfully submitted that, for the reasons stated herein, this Court should answer the certified questions in favor of Plaintiff and hold: (1) that Section 1(f) is a repose provision under the 2019 Amendments; (2) that there is no issue of retroactive application because the Amendments apply only to cases accruing after the Amendments' effective date; and (3) that employers have no vested rights precluding prospectively applied changes to the exclusive remedy provisions.

Dated: August 23, 2024

Respectfully submitted,

Amicus Curiae the Illinois Trial Lawyers Association,

By: */s/ Matthew J. Adair*
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7,237 words.

Dated: August 23, 2024

/s/ *Matthew J. Adair*
Counsel for Amicus Curiae

Case No. 130509

In the
Supreme Court of Illinois

Candice Martin, Individually, and as Executrix of the Estate of Rodney Martin, deceased,

Plaintiff-Appellee,

v.

Goodrich Corporation f/k/a B.F. Goodrich Company, and PolyOne Corporation, Individually and as Successor-By-Consolidation to the Geon Company n/k/a Avient Corporation,

Defendants-Appellants.

Questions of Law Certified by the United States
Court of Appeals for the Seventh Circuit, Case No. 23-2343,
There on appeal from the United States District Court
for the Central District of Illinois, Case No. 1:21-cv-01323,
Honorable James E. Shadid, Judge Presiding

NOTICE OF FILING AND CERTIFICATE OF SERVICE

On August 23, 2024, the undersigned electronically filed the attached Brief of Amicus Curiae Illinois Trial Lawyers Association using the Odyssey eFileIL system.

Service on all parties is effected this date through the electronic filing system pursuant to Supreme Court Rule (c)(1)(i) via e-mail address as follows:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the file stamped Amicus Brief bearing the Court's file stamp will be mailed to the Office of the Clerk of the Supreme Court, Supreme Court Building, 200 E. Capitol Ave., Springfield, IL 62701.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Matthew J. Adair

Matthew J. Adair