IN THE SUPREME COURT OF TEXAS

NO. 06-0714

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER,

v.

CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued February 7, 2008

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting.

The Legislature enacted Chapter 149 of the Civil Practice and Remedies Code to protect businesses, which acquired other entities, from financial disaster based solely upon the acquired entities' past, discontinued manufacture of asbestos products. The statute limits the liability of the acquiring business, which had not engaged in the asbestos business, to the fair market value of the acquired entity at the time of the acquisition. Through Chapter 149, the Legislature balances limitations on asbestos-related recoveries against protecting the assets and employees of businesses who did not cause the illness, while leaving intact the entirety of potential liability and damages proven against companies that were involved in the asbestos business and are, perhaps, more

culpable. The Court's holding that the legislation is unconstitutional prevents the Legislature from addressing an injustice arising from a crisis that caused dozens of bankruptcies and the loss of thousands of jobs in this state and throughout the country due to asbestos-related litigation. *See, e.g.*, Jonathan Orszag, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, Remarks at the Asbestos Litigation Symposium at the South Texas College of Law in Houston, Tex. (Mar. 7, 2003), *in* 44 S. TEX. L. REV. 1077, 1078–80 (2003) (describing results of a study indicating that sixty-one companies entered into bankruptcy and that 52,000 to 60,000 people lost their jobs due to asbestos litigation).

The Court's new balancing test reaches the wrong result. By holding that an unliquidated claim with "substantial basis in fact" is entitled to constitutional protection, it ignores an important principle. ___ S.W.3d ___. The constitutional retroactivity doctrine does not protect an asserted entitlement to property one does not own, and until a final judgment in a case, we do not know whether the claim will be vindicated or refuted. The Court's reasoning that the right to file a claim is protected by the retroactivity doctrine because, at least in part, the claim is well founded with a "substantial basis in fact" springing from a "mature tort" with " more predictable" recovery, is a troubling proposition. ___ S.W.3d ___. It is unclear what that means, but it suggests that the constitutional retroactivity protection is dependent on the perceived strength of a claim. The likelihood of success in litigation is dependent on a myriad of factors that make such predictions difficult at best. We have held that an unliquidated personal injury claim is not a protected property interest, and the contingent recovery from one should not be either.

While JUSTICE MEDINA, who writes separately, and I disagree on the result, we agree that the Court should not abandon vested rights jurisprudence in favor of a new and uncertain approach. The analysis in the Court's opinion is contrary to both the clear rule among the federal courts of appeals that have addressed the issue and the majority rule among our courts of appeals. The Court could rely on traditional police power jurisprudence in which, even if the Robinsons had a vested right in their unliquidated cause of action, courts consider whether the Legislature's action was justified by its constitutionally recognized police power to act in the interest of the health and welfare of Texas. Indeed, the Court's new balancing test for retroactivity analysis is similar to the police power balancing test I expound under existing law, but is newly incorporated into the retroactivity doctrine. For all these reasons, I respectfully dissent.

I. BACKGROUND

John Robinson served in the Navy for twenty years, and during that time he was exposed to steam pipes and boiler doors coated with insulation containing asbestos. Some of the insulation and other products were marked with a "big M," the trademark used by Mundet Cork Corporation. In August 2002, Robinson was diagnosed with mesothelioma. He claims the disease occurred as a result of his exposure to asbestos in, among others, insulation products produced by Mundet.

Crown Cork itself has never been in the business of mining, manufacturing, installing, selling, distributing, removing, or otherwise making asbestos or any asbestos-containing product. However, on November 7, 1963, Crown Cork's predecessor entered into an agreement to purchase the majority of Mundet's stock after the majority shareholder died and offered the shares for sale. Crown Cork paid approximately $7 million for the stock, a majority interest in the company.

Mundet ceased manufacturing insulation products prior to Crown Cork's acquisition of Mundet, but continued to hold insulation products in stock until early 1964, when a third-party entity purchased the assets of Mundet's insulation division, including its inventory, contracts, raw materials, and accounts receivables. On January 4, 1966, Mundet statutorily merged with Crown Cork's predecessor, and in 1989 Crown Cork was reincorporated in Pennsylvania.[1]

After he had been diagnosed with mesothelioma, Mr. Robinson and his wife filed suit in 2002 against Crown Cork and twenty other defendants for damages caused by Mr. Robinson's exposure to asbestos-containing products. The Robinsons sought to hold each defendant jointly and severally liable. On November 25, 2002, the Robinsons filed a motion for partial summary judgment to establish Crown Cork's liability for actual damages as Mundet's successor. Crown Cork did not contest its successor liability for compensatory damages, and on July 16, 2003 the trial court granted the Robinsons' motion, holding that Crown Cork "is liable and bears responsibility for the compensatory damages, if any, awarded to Plaintiffs that are attributable to the conduct, products, or torts of its predecessor Mundet Cork Corporation."

House Bill 4, a bill drafted to comprehensively address perceived crises in medical malpractice, asbestos, and other litigation issues in Texas, was introduced in the Texas House of Representatives on February 17, 2003, without any provision regarding successor asbestos liability. Tex. H.B. 4, 78th Leg., R.S. (2003). Its purpose was to operate as a "comprehensive civil justice

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[1] The term "statutory merger" is used to distinguish business mergers made pursuant to the statutory scheme of the state of incorporation from other, nonstatutory forms of combinations, for example asset-purchase and stock-purchase transactions. 20A ROBERT W. HAMILTON, ELIZABETH S. MILLER, & ROBERT A. RAGAZZO, TEXAS PRACTICE SERIES: BUSINESS ORGANIZATIONS § 43.2 (2d ed. 2004).

reform bill intended to address and correct problems that currently impair the fairness and efficiency of our court system." House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. at 1 (2003).

In late March 2003, more than 100 amendments were submitted to the Bill, including Article 17, the asbestos successor-liability article. The article was debated on the floor of the House on March 25, 2003 and passed the House three days later. Both the House and Senate held hearings on the bill as a whole. In an April 30, 2003 meeting of the Senate State Affairs Committee, Senator Ratliff, the committee chair, introduced hearings on the Senate Substitute to House Bill 4. He described Article 17 as follows:

> Article 17, limitations in civil actions of liabilities relating to certain mergers or consolidations. This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this—in this matter.

Hearings on the Proposed Senate Substitute for H.B. 4 Before the S. Comm. on State Affairs, 78th Leg., R.S. (Apr. 30, 2003) (Statement of Sen. Bill Ratliff, Chairman, S. Comm. on State Affairs). The act passed the Senate on May 16, 2003; the House accepted the Conference Committee compromise bill on June 1, 2003; both adopted corrections on June 2, 2003; and the bill was signed into law by the Governor on June 11, 2003. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847, 899 (codified at TEX. CIV. PRAC. & REM. CODE §§ 149.001–.006). With a two-thirds vote in both chambers, the bill took effect immediately and was made retroactive to all cases "pending on that effective date and in which the trial, or any new trial or retrial following motion,

appeal, or otherwise, begins on or after that effective date."[2] *Id.* § 17.02(2), 2003 Tex. Gen. Laws at 895; *see also* TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.").

The act limits the "cumulative successor asbestos-related liabilities" "incurred by a corporation as a result of or in connection with a merger or consolidation . . . with or into another corporation or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation that occurred" prior to May 13, 1968. TEX. CIV. PRAC. & REM. CODE §§ 149.001–.003.[3] The asbestos liabilities of successor corporations "are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation," *id.* § 149.003(a), and adjusted for inflation at a simple interest rate of the prime rate plus one percent, *id.* § 149.005(a). An "asbestos claim" is "any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including" property damage caused by

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[2] The House also defeated an amendment making the bill applicable only to successor liabilities assumed or incurred after the effective date of the act. H.J. of Tex., 78th Leg., R.S. 818–19 (2003).

[3] The act also provides a number of exceptions, excluding, among other things, workers' compensation claims, an insurance corporation, a claim made in a bankruptcy proceeding begun prior to April 1, 2003, claims for premises liability, or claims against a "successor that, after merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured . . . by the transferor." *Id.* § 149.002(b).

asbestos, the health effects of asbestos exposure, or any claim made by or on behalf of any person exposed to asbestos. *Id.* § 149.001(1). The Legislature clearly intended to limit recoveries only against so-called "innocent" successor companies.

According to Crown Cork's experts, by May 2003, Crown Cork had paid or agreed to pay asbestos related claims, not covered by insurance, totaling more than seven times the present value of Mundet according to the statutory formula. On July 3, 2003, Crown Cork filed a Motion for Summary Judgment raising the affirmative defense of Chapter 149, introducing evidence of the value of Mundet and total asbestos-related payments made by Crown Cork to date. The Robinsons asserted that the statute was a "special law" in violation of article III, section 56 of the Texas Constitution, that it deprived the Robinsons of a vested property right in violation of article I, section 16 of the Texas Constitution, that the statute was an unconstitutional taking, violating article I, section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, that it constituted a deprivation of substantive due process rights under the Texas and United States Constitutions, that it deprived John Robinson of a contractual right, contrary to article I, section 16 of the Texas Constitution, and deprived John Robinson of his common law causes of action in violation of the Open Courts guarantee in article I, section 13 of the Texas Constitution. The Robinsons raise only the retroactivity and special law challenges before this Court. Implicitly finding that Crown Cork had established that the statute applied to it as a matter of law, and that Crown Cork had already paid liabilities in excess of Mundet's adjusted value, the trial court granted Crown Cork's motion for summary judgment on October 2, 2003. It issued an amended order

nineteen days later, dismissing claims against Crown Cork brought by the Robinsons.[4] The Robinsons nonsuited their remaining claims against Crown Cork and then appealed the summary judgment.[5] The court of appeals affirmed. Characterizing the jurisprudence on vested rights as "inconsistent and difficult to use as a guide," the court instead balanced the Legislature's police power against the private rights impacted by the statute, and held that the statute was constitutional. 251 S.W.3d 520, 532–35 (Tex. App.—Houston [14th Dist.] 2006, pet. granted). One justice dissented, arguing that the court should have applied a vested rights analysis and concluded that the statute violated article I, section 16. *Id.* at 551–52 (Frost, J., dissenting).

II. ANALYSIS

In this Court, the Robinsons raise only two issues, and both are grounded exclusively in Texas law. They argue that Chapter 149 of the Texas Civil Practice and Remedies Code is an unconstitutional "special law" and that it is unconstitutionally retroactive when applied to the Robinsons' claims to effectively bar recovery.[6] As the party challenging the constitutionality of the statute, the Robinsons must overcome the presumptions that "the Legislature intended for the law

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[4] The Robinsons' remedies against the other defendants pending at the time of the enactment of the statute was not limited by Chapter 149, but their remedy against Crown Cork was. The Robinsons eventually recovered at least $850,000 from other defendants sued in addition to Crown Cork.

[5] On November 16, 2003, after the trial court entered its amended order granting summary judgment, John Robinson died. Mrs. Robinson continued to prosecute her claims individually and as representative of the estate of John Robinson. Because the claims still live independently, one for Mrs. Robinson and one for the estate of John Robinson, this opinion will refer to petitioners as the Robinsons.

[6] The Court astutely notes that, due to the odd procedural posture of the case, as well as Mr. Robinson's untimely passing, it is unclear which legal claims are being allegedly retroactively extinguished. Because the parties raise only whether Chapter 149 is unconstitutionally retroactive as applied to Mr. Robinson's common law claims (kept alive through the survival statute and pursued derivatively through the wrongful death statue) I, as the Court, address only those arguments. However, as more fully discussed below, the fact that the Robinsons' claims are statute-based reinforces the conclusions of this vested rights analysis.

to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest." *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002) (citing TEX. GOV'T CODE § 311.021; *Spence v. Fenchler*, 180 S.W. 597, 605 (Tex. 1915)). The Robinsons also bear the burden of showing that the law is contrary to a provision of the state constitution. *See, e.g.*, *Walker v. Guiterrez*, 111 S.W.3d 56, 66 (Tex. 2003). The Robinsons' retroactivity claim is an as-applied challenge, which means that they must demonstrate that the statute is unconstitutional as it operates in practice against them. *Tex Mun. League*, 74 S.W.3d at 381 (citing *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995)). Their special law challenge is a facial challenge, which means that the Robinsons must demonstrate there is no conceivable set of facts that could exist under which the statute would be constitutional. *Garcia*, 893 S.W.2d at 520.

In this case the Court determines that the law is unconstitutionally retroactive and thus does not reach the special law challenge. However, for the reasons that follow, I would hold that the law survives both challenges, but for reasons different from those articulated by the court of appeals.

A. Retroactive Law

Article I, section 16 of the Texas Constitution, part of the Texas Bill of Rights, declares that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16. A retroactive law "takes away or impairs vested rights acquired under existing laws . . . ." *Paschal v. Perez*, 7 Tex. 348, 365 (1851). A retroactive law means a law applying to things that are past. *DeCordova v. City of Galveston*, 4 Tex. 470, 475 (1849).

Of course, not every law that affects relationships among parties based upon events occurring in the past is automatically unconstitutional, just as not every law that may affect a person's right to speak, that may affect a contractual obligation, or that may allow a search of a person's dwelling without a warrant, is unconstitutional. *See Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). This Court has articulated three doctrines that further define the scope of the retroactivity prohibition. First, a law is not unconstitutionally retroactive unless it impairs a person's "vested rights." *E.g.*, *id.* at 219. Second, a law is not unconstitutionally retroactive if it only modifies or reduces the person's remedy. *E.g.*, *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997); *Holder v. Wood*, 714 S.W.2d 318, 319 (Tex. 1986). And finally, even if the law affects a person's vested rights, and not a remedy, a law may not violate the retroactivity prohibition if the government's interest in protecting society, based upon its police power, outweighs the individual's interest in his or her particular right. *E.g.*, *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633–34 (Tex. 1996). The first two tests are definitional—this Court has determined that a retroactive law does not implicate article I, section 16 of the Constitution unless the law both affects a vested right and impairs an actual right, not merely a remedy or a procedure. The third test may operate as an exception to the rule. Although related, the review of each doctrine is separate. *E.g.*, *In re A.V. & J.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (describing "exceptions" to retroactivity); *David McDavid Nissan*, 84 S.W.3d at 219 (analyzing the procedural/remedial test as part of the vested rights exception because "procedural and remedial statutes typically do not affect a vested right"). Although the Court has not had occasion recently

to address the specific meaning of article I, section 16's prohibition of retroactive laws, our precedents provide a useful roadmap.

1. Vested Rights

Vested rights derive from "[c]onsiderations of fair notice, reasonable reliance, and settled expectations." *Owens-Corning v. Carter*, 997 S.W.2d 560, 572–73 (Tex. 1999). "A retroactive statute only violates our Constitution if, when applied, it takes away or impairs vested rights acquired under existing law." *David McDavid Nissan*, 84 S.W.3d at 219 (citing *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981)); *McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955).

We explained "vested rights" in *Ex parte Abell*:

> *[A] right, in a legal sense, exists, when, in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another a given claim,* or to resist the enforcement of a claim urged by another. Facts may exist out of which, in the course of time or under given circumstances, a right would become fixed or vested by operation of existing law, but until the state of facts which the law declares shall give a right comes into existence there cannot be in law a right; and for this reason it has been constantly held that, *until the right becomes fixed or vested, it is lawful for the lawmaking power to declare that the given state of facts shall not fix it*, *and such laws have been constantly held not to be retroactive* in the sense in which that term is used.

613 S.W.2d at 261 (quoting *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887)) (emphasis added). "A right cannot be considered a vested right unless it is something more than "a *mere expectation* as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable . . . ." *Id.* (citation omitted) (emphasis added). This Court has clearly articulated that "no one has a vested right in the continuance of present laws in relation to a

particular subject . . . . There cannot be a vested right, or a property right, in a mere rule of law." *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916).

The court of appeals called the vested rights analysis "inconsistent and difficult to use as a guide." 251 S.W.3d at 526. Other courts of appeals have called the vested rights analysis "amorphous." *Sims v. Adoption Alliance*, 922 S.W.2d 213, 216 (Tex. App.—San Antonio 1996, writ denied); *Ex parte Kubas*, 83 S.W.3d 366, 369 (Tex. App.—Corpus Christi 2002, pet. ref'd). Courts from other states and commentators have also criticized vested rights analyses, preferring an analysis requiring a balancing of the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the pre-enactment right, and the nature of the right the statute alters. *See, e.g.*, *Owen Lumber Co. v. Chartrand*, 73 P.3d 753, 755–56 (Kan. 2003); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 356–57 (Minn. 1969); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960). And the Court's opinion, in rejecting a "bright-line test for unconstitutional activity," and in recognizing that the Texas Constitution "does not insulate every vested right from impairment," seems to abandon the vested rights analysis altogether, or, at a minimum, detaches the concept of vested rights from its traditional significance in a retroactivity analysis. ___ S.W.3d ___. However, the doctrine's difficulty is not a justification to abandon it wholesale. For, at the core of the vested rights doctrine lies an extremely important principle—the constitutional retroactivity doctrine does not protect an asserted entitlement to property one does not own, and until a final judgment in a case, we do not know whether the lawsuit will prove or refute a claim to recover.

Applying our century-old jurisprudence, I would hold that an accrued, but unliquidated cause of action is not a vested right because: (1) the framers of the Texas Constitution would not have considered an unliquidated cause of action to be a vested property right entitled to protection under the Retroactivity Clause; (2) a lawsuit is not a right to recover anything but a contingent and unliquidated pursuit of a claimed injury that may or may not be successful; and (3) until and unless a final judgment is rendered in favor of the claimant, there is no right to recover damages on the claim against another. *See Mellinger*, 3 S.W. at 252; *Graham v. Franco*, 488 S.W.2d 390, 393 (Tex. 1972); *Ex parte Abell*, 613 S.W.2d at 260.

In interpreting the Texas Constitution, our duty is "to ascertain and give effect to the plain intent and language of the framers of [the constitution] and of the people who adopted it." *Wilson v. Galveston Cnty. Cent. Appraisal Dist.*, 713 S.W.2d 98, 101 (Tex. 1986) (quoting *Gragg v. Cayuga Indep. Sch. Dist.*, 539 S.W.2d 861, 866 (Tex. 1976)). We look

> to such things as the language of the constitutional provision itself, its purpose, the historical context in which it was written, the intentions of the framers [and ratifiers], the application in prior judicial decisions, the relation of the provision to [other parts of the constitution and] the law as a whole, the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values including justice and social policy.

Davenport v. Garcia, 834 S.W.2d 4, 30 (Tex. 1992) (Hecht, J., concurring) (citations omitted).

Examining the state of "vested rights" and what constitutes a vested property right at the time of the framing of the 1876 Constitution provides important insight into what the Framers considered protected by the Retroactivity Clause. Prior to and at the time of the adoption of the Texas Constitution in 1876, it was well established that the doctrine of vested rights created an exception

to the prohibition on retroactive legislation. *See, e.g.*, *DeCordova*, 4 Tex. at 475; *Paschal*, 7 Tex. at 365 ("Mr. Justice Story defines a retrospective law to be, one which takes away or impairs vested rights acquired under existing law, or creates a new obligation, or imposes a new duty, or attaches a new disability in relation to transactions already past." (citing *Soc'y for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 138, 22 F. Cas. 756, 767 (No. 13,156) (C.C.D.N.H. 1814))).[7] A vested right is now, and was then, considered some form of "property right." *Middleton*, 185 S.W. at 560. However, at the time of the framing of the cCnstitution of 1876, an accrued, but unliquidated, cause of action for personal injury, was not "property" in any sense. *See G. H. & S. A. R.R. v. Freeman*, 57 Tex. 156 (1882); *Stewart v. H. & T. C. Ry. Co.*, 62 Tex. 246 (1884). Common law tort causes of action for personal injury could not be assigned and did not survive the death of the victim. As described by Chief Justice Greenhill:

> By the clear weight of common law authority, *a cause of action for personal injury is not property in any sense, nor for any purpose till it has been reduced to judgment*; and the judgment, as property, takes its character as separate or common from the right violated in committing the wrong—the personal injury.

Graham, 488 S.W.2d at 393 (emphasis added) (quotation omitted); *see also State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706–07 (Tex. 1996) (discussing the role at common law regarding the assignability and survivability of personal injury tort causes of action). Legislation was required to amend both of those common law rules. *E.g.*, Act of May 4, 1895, 24th Leg., R.S., ch. 89, § 1,

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[7] *See also Milam Cnty. v. Bateman*, 54 Tex. 153, 163 (1880); *Moore v. Letchford*, 35 Tex. 185, 222 (1871) (Ogden, J., dissenting) (noting that the Legislature may pass retrospective legislation that "would *regulate" and neither "create nor destroy* vested rights" (emphasis added)); *Hamilton v. Avery*, 20 Tex. 612 (1857); *Nichols v. Pilgrim*, 20 Tex. 426, 428–29 (1857) (discussing whether an executed contract for the sale of land was a "vested right" allowing suit for partition of land, notwithstanding the enactment of the statute of frauds).

1895 Tex. Gen. Laws 143 (current version at TEX. CIV. PRAC. & REM.CODE § 71.021) (allowing survival of personal injury claims); TEX PROP. CODE § 12.014(a) (allowing "an interest in a cause of action on which suit has been filed" to be "sold, regardless of whether the . . . cause of action is assignable in law or equity"); *Gandy*, 925 S.W.2d at 707 (noting that personal injury claims only became assignable after they could survive the owner's death).

As in other circumstances, property is treated differently. In 1876, choses in action for injury to property were considered property, and they were alienable, assignable, and devisable.

> [W]hen the injury affects the estate rather than the person, when the action is brought for damage to the estate and not for injury to the person . . . the right of action could be bought and sold. Such right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of his assets . . . .

Graham, 488 S.W.2d at 393 (quoting *Freeman*, 57 Tex. at 158); *see also Gandy*, 925 S.W.2d at 706 (noting that "[t]he pressures against the rule of inalienability were commercial and thus affected only debts and other contract rights that were not personal to the owner and could survive to his estate upon his death"). The common law in Texas did not consider tort causes of action for personal injury to be "property," and "vested rights"— a concept recognized in common law at the time of the framing of the 1876 Constitution—are a species of property. Therefore, under the Texas Constitution, ratified in 1876, an accrued, but unliquidated personal injury cause of action was not considered to be a "vested right" for purposes of the Retroactivity Clause. *Gandy*, 925 S.W.2d at 706. This reasoning applies with special force to the Robinsons' as-applied challenge, because at common law Mr. Robinson's claims would not have survived his death. His claims exist today only by virtue of statutes. The framers of the Texas Constitution would have not believed that there

would be a settled expectation in allowing Mrs. Robinson to continue to prosecute these uncertain claims, either as Mr. Robinsons's personal representative or derivatively through a statutorily created wrongful death action.

The Court recognizes this historical disconnect, yet dismisses it in a single sentence, stating simply that "[t]he rights protected by the constitutional prohibition against retroactive laws are no more limited to those recognized at the time the prohibition was adopted than are the rights protected by due course of law." ___ S.W.3d ___. A court should be cautious in providing new protections for rights that were not part of the sphere of rights contemplated by the democratic institutions that enacted the constitution. *See McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3051–53 (2010) (Scalia, J., concurring) (criticizing the dissent's conceptual framework to "'do justice to [the Due Process Clause's] urgent call and its open texture' by exercising the 'interpretive discretion the latter embodies" and to hold that the Clause encompasses "new freedoms the Framers were too narrow-minded to imagine" (quoting *Id.*, ___ U.S. ___, 130 S. Ct. at 3099–100 (Stevens, J., dissenting))).

The right to file a cause of action is not an entitlement to enforce the alleged claim, but a "mere expectation" subject to numerous contingencies. *Ex parte Abell*, 613 S.W.2d at 261–62; *Mellinger*, 3 S.W. at 252–53. A plaintiff's ultimate recovery is contingent upon more than just success at trial. For example, it is contingent upon finding—and serving with process— the right defendant, who may be an inaccessible foreign defendant, or, as in this case, may be a corporation long since out of business. *See, e.g.*, TEX. R. CIV. P. 103–109a (discussing methods of service); *GFTA Trendanalysen B.G.A. Herrdum GMBH & Co., K.G. v. Varme*, 991 S.W.2d 785, 785 (Tex.

1999) (per curiam) (holding special appearance by foreign corporation did not waive challenge to jurisdiction). A plaintiff's recovery may be contingent upon following particular pretrial procedures, such as the filing of an expert report or providing discovery. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (requiring the service of an expert report by the plaintiff in a health care liability claim and demanding dismissal of the claim if the report is not timely served); *Cire v. Cummings*, 134 S.W.3d 835, 841–42 (Tex. 2004) (holding that "death penalty" sanctions of dismissing plaintiff's claim was warranted because of plaintiff's failure to produce audiotapes that would have proved or disproved plaintiff's legal malpractice claims). Any informed client knows that winning a lawsuit, even a seemingly "open and shut" case, is never certain, particularly when multiple defendants and multiple products may have caused the same injury, and no reasonable person has a "settled expectation" of achieving monetary recovery once she discovers a harm inflicted upon her.

Rather, I would hold, consistent with the jurisprudence of the United States Supreme Court[8] a majority of the federal courts of appeals,[9] a number of other states,[10]

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[8] *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (recognizing that the "*constitutional* impediments to retroactive civil legislation are now modest"); *see also* Hochman, 73 HARV. L. REV. at 717 & n.135 ("[T]he Court has many times sustained the application of a retroactive statute to an accrued cause of action." (citing *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911))).

[9] *Hammond v. United States,* 786 F.2d 8, 12 (1st Cir. 1986) ("The question whether the rights asserted in plaintiff's state-law causes of action are 'vested' cannot be answered by looking to see whether suit had already been filed . . . . No person has a vested interest in any rule of law [and] this is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained." (citations and quotations omitted)); *In re TMI*, 89 F.3d 1106, 1115 n.9 (3d Cir. 1996) (distinguishing cases holding accrued causes of action to be vested rights, calling them "contrary to current federal constitutional precedent that finds no vested right in a tort cause of action before final judgment); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997) ("No person has a vested right in a nonfinal tort judgment . . . ."); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (quoting *Sowell*); *Konizeski v. Livermore Labs, (In re Consol. U.S. Atomospheric Testing Litig.)*, 820 F.2d 982, 989 (9th Cir. 1987) (quoting *Hammond*); *Grimesy v. Huff*, 876 F.2d 738, 743–44 (9th Cir. 1989) (reviewing vested rights cases under a Fifth Amendment takings analysis); *Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477–78 (10th Cir. 1984) (holding that "inchoate" rights, such as the right to pursue legal remedies are not "vested" for purposes of the Colorado

and a majority of the courts of appeals to address the issue in this state,[11] that a cause of action

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state and federal constitutions); *Salmon v. Schwartz,* 948 F.2d 1131, 1143 (10th Cir. 1991) (quoting *Arbour* and *Sowell*); *Sowell v. Am. Cyanid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("The fact that the statute is retroactive does not make it unconstitutional [because] a legal claim affords no definite or [enforceable] property right until reduced to a final judgment."); *see also Lunsford v. Price*, 885 F.2d 236, 240–41(5th Cir. 1989) (holding the applicability of a statute to pending claims was not manifestly unjust); *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004) (noting that Michigan statute of repose, which "prevent[s] causes of action from accruing" did not violate retroactivity provisions of the federal constitution); *Symens v. SmithKline Beecham Corp.*, 152 F.3d 1050, 1056 n.3 (8th Cir. 1998) (noting that federal regulations, which may preempt state law claims would apply to plaintiffs' tort and implied warranty claims "because plaintiffs had no vested rights in these unasserted claims at the time [the] preemption was modified" (citing *Landgraf*, 511 U.S. at 269, 273)). *But see Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007) (recognizing, in a copyright case applying patent law, that a retroactive assignment destroys an owner's "valuable and *vested* right to enforce her claim"); *Hoyt Metal Co. v. Atwood*, 289 F. 453, 454–55 (7th Cir. 1923) (deciding whether a *judgment* is to be accorded the status of a vested right and stating "[t]hat an accrued cause of action is a vested property right is well settled . . . . Certainly a judgment is a vested property right."); *De Rodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir. 1972) (indicating that "a vested cause of action, whether emanating from contract or common law principles, *may* constitute property beyond the power of the legislature to take away," but not so holding because no cause of action—interference with contract—existed in the case (emphasis added)).

[10] I concede that a majority of other states to directly address the issue have held that an accrued, yet unliquidated cause of action is a "vested right" under either retroactivity or due process analyses. However, a number of other states provide a more nuanced view. For example, Colorado, one of the jurisdictions whose constitution also includes a prohibition on retroactive legislation, has held that a "vested right" is "one that is not dependent on the common law or statute but instead has an independent existence." *In re Estate of DeWitt*, 54 P.3d 849, 853 (Colo. 2002). The Colorado Supreme Court would determine this "independent existence" by balancing: "(1) whether the public interest is advanced or retarded; (2) whether the statute gives effects to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law." *Id.* Nonetheless, the court, and the state's lower courts, do not recognize that an accrued cause of action is a vested right per se. *City of Greenwood Vill. v. Pets. for the Proposed City of Centennial*, 3 P.3d 427, 445–46 (Colo. 2000) ("[C]ontemporary precedent also demonstrates that expectations of parties to litigation are not equivalent to vested rights."); *see also Miller v. Brannon*, 207 P.3d 923 (Colo. App. 2009) ("A vested right must be a contract right, a property right, or a right arising from the transaction in the nature of a contract which has become perfected to the degree that it is not dependent *on the continued existence of the statute or common law*." (emphasis added) (quotations omitted)).

[11] *See Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co.*, 798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *see also Walls v. First State Bank of Miami*, 900 S.W.2d 117, 122 (Tex. App.—Amarillo 1995, writ denied) (holding that retroactive application of federal law shielding employees of a financial institution for reporting suspected wrongdoing was properly applied to lawsuit for malicious prosecution and defamation that had been filed prior to the enactment of the law and stating that "only final, nonreviewable judgments will be accorded the dignity of vested, constitutionally guarded rights, and a law will be deemed to have a prohibited retroactive effect only when it impairs those rights"); *Tex. Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28, 32 (Tex. App.—Texarkana 1991, writ denied) ("A party has no vested right to a cause of action; neither the Constitution of the United States nor this state forbids the abolition of common-law rights to attain a permissible legislative objective."); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (noting that even though a plaintiff's cause of action had accrued against a minor child, the plaintiff could not proceed because the Legislature amended the statute to foreclose recovery against children the defendant's age and the plaintiff "had not acquired a 'title . . . to the present

becomes a "vested right" for the constitutional retroactivity analysis when it has reached a final determination—that is, where it has been reduced to an enforceable judgment in the plaintiff's favor.[12] As aptly put in an opinion of the Court of Appeals for the First District:

> A "vested right" implies an immediate right or entitlement—it is not an expectation or a contingency. . . . Engrained in the concept of vested rights is the idea of certainty. . . . The filing of a lawsuit in order to obtain relief or pursue a remedy is generally held not to create or destroy vested rights; the triggering event for the vesting of a right is the resolution of the controversy and the final determination—not the filing of the suit.

Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co., 798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

This rule is most consistent with the understanding of vested property rights at the time of the ratification of the 1876 Constitution. It is consistent with our subsequent interpretation of the words of the Retroactivity Clause.[13] It is consistent with our case law and the great weight of court

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or future enforcement of a demand'" (quotations omitted)); *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 221–41 (Tex. App.—Austin 2008, no pet.) (Law, C.J., dissenting) (noting that the plaintiffs had no vested right in the successor liability remedy against Crown because vested rights are "certain and immediately enforceable," the successor liability theory does not create a cause of action, and economic interests could be considered in police power balancing). *But see Satterfield*, 268 S.W.3d at 206–09 (holding that plaintiff in asbestos suit had vested rights in accrued cause of action).

[12] The Open Courts Clause of the Texas Constitution, not at issue in this case, may impose limitations on the extent to which unliquidated claims may be barred. TEX. CONST. art. I, § 13; *Sax v. Votteler*, 648 S.W.2d 661, 665–66 (Tex. 1983) (holding that the "right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress"); *see also Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 295 (Tex. 2010).

[13] JUSTICE MEDINA, citing *Ex parte Abell* and quoting *Mellinger*, alleges that the Retroactivity Clause "goes beyond federal guarantees of property and due process." ___ S.W.3d ___ (Medina, J., concurring). While *Abell* recognized that proposition, it did so while simultaneously recognizing that "[i]n practice . . . retroactive lawmaking has not been viewed as the gross abuse of power once assumed." *Ex parte Abell*, 613 S.W.2d at 259–60. Further, commentators and jurists from other states have more recently recognized that specific retroactivity clauses should not be read overly broadly. *See, e.g.*, 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 58 (1977) ("The other prohibition concerning 'retroactive laws' seems to spring from a

of appeals opinions. And it is more predictable and avoids confusion and ambiguity when the Legislature attempts to constitutionally craft a law affecting past conduct.

This Court's first significant discussion of retroactivity occurs in *Mellinger v. City of Houston*, 3 S.W. 249 (Tex. 1887). The City of Houston sued to recover taxes on property that would otherwise have been barred by a subsequently repealed statute of limitations. The Court ruled that the statute was not to be applied retroactively and thus *did not* specifically decide whether Mellinger had a vested right that would be violated by retroactive application of the law. *Id.* at 251–52. It then stated that "an action barred by the statute of limitations was forever barred" and explained that a law may be unconstitutionally retroactive "if a statute of limitations applied to existing causes barred all remedy, or did not afford a reasonable period for their prosecution; or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred . . . ." *Id.* at 253–55. *Mellinger* did not hold that an unaccrued cause of action was a vested right subject to protection, but it did indicate that a shortening of the statute of limitations would require a grace

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general suspicion regarding all retroactive laws of which the three mentioned [ex post facto, bills of attainder, and laws impairing the obligation of contracts] were notorious examples. Early judicial restriction of the scope of ex post facto laws to retroactive criminal laws may have prompted a desire to re-establish the broader sweep, which the prohibition had in the minds of some people, by general condemnation of retroactive laws."); *see also id.* at 59 (discussing the *Mellinger* dicta also quoted by JUSTICE MEDINA and commenting that the authoring justice's argument "excluded not only the specific guarantees of section 16 but the due course of law limitation as well. Although he perceived the growing scope of due process of law at the time of his opinion, Justice Straton could not have foreseen its remarkable subsequent development . . . . Thus, it has been said that laws are retroactive in the sense of section 16 only when they contravene another specific prohibition of the Constitution."); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1926) (noting that, in most states at the time, the explicit retroactive law provisions in other states' constitutions were coterminous with due process). Regardless of whether the Retroactivity Clause in section 16 deserves a broader read than just due process, there is nothing in the text of the Constitution to suggest that it should apply to contingent expectancies such as exist in this case.

period to allow those who had not filed their cause of action to do so before the new limitations period would come into effect. *Id.*

Subsequent cases from this Court recognize that the Legislature cannot resurrect causes of action that have already been extinguished by retroactively lengthening the statute of limitations. *E.g.*, *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 & n.12 (Tex. 1999); *Wilson v. Work*, 62 S.W.2d 490, 490–91 (Tex. 1933) (per curiam). This rule makes sense because "[t]o permit barred claims to be revived years later would undermine society's interest in repose, which is one of the principal justifications for statutes of limitations." *Baker Hughes*, 12 S.W.3d at 4. In other words, when the statute extinguished a cause of action, a defendant received a vested right of repose barring the extinguished claim.

In *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997), a case upon which the Robinsons principally rely, this Court held that a modification of the Tort Claims Act to provide the city with sovereign immunity from the plaintiff's common law tort claims was not constitutionally retroactive. It recognized that the statute "affect[ed] a remedy" for the plaintiff, which usually does not implicate the Retroactivity Clause unless the "remedy is entirely taken away." *Id.* at 502 (citation omitted). We noted that "[t]he Legislature can affect a remedy by providing a shorter limitations period for an accrued cause of action without violating the retroactivity provision of the Constitution if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law, or if the amendment does not bar all remedy." *Id.* (citing *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971); *Mellinger*, 3 S.W. at 254–55). Because the statute became effective seventeen months after her action accrued, the Court held that the plaintiff had a reasonable time to

preserve her rights, and thus the statute was not unconstitutional as applied. *Id.* *Likes* emphasizes (as discussed further below) that where the legislation affects the plaintiff's remedy without entirely taking it away, the legislation is not unconstitutionally retroactive. *Id.*

Finally, this Court has specifically held that the *Mellinger* retroactivity exception, requiring that a party receive reasonable time to preserve its rights, which was relied on in *Likes*, has an exception itself. In *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999), the Court upheld a retroactive application of an amended borrowing statute against a constitutional challenge. At the time the lawsuit underlying the case was filed, Texas's borrowing statute provided that a non-Texan who was injured in a foreign state could bring an action in Texas, even if the limitations period in the plaintiff's home state had run, so long as the action was begun within the time provided by Texas law. *Id.* at 565; *cf. Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 90–91 (Tex. 2008) (holding that res judicata bars relitigation of administratively determined facts and distinguishing a rule where "a claimant whose action is precluded by limitations in one state court may still be able to pursue the same action in a different state with a longer limitations period"). In early 1997, while the plaintiffs' lawsuits were pending, the Legislature amended the statute to require, among other things, that the action is begun in Texas within the time provided both by Texas law and the law of the foreign state in which the wrongful act, neglect, or default took place. *Carter*, 997 S.W.2d. at 572 (citing TEX. CIV. PRAC. & REM. CODE § 71.031(a)(3)). The plaintiffs challenged the law as unconstitutionally retroactive, and we rejected that challenge. First, we recognized that the plaintiffs did not have any settled expectations in the continuance of the current law—the limitations period. Second, we noted that "requiring a grace period for otherwise time-barred claims would defeat the

very purpose of the borrowing statute: a plaintiff should not be able to gain greater rights than he would have in the state where the cause of action arose and where he lives simply by bringing suit in Texas." *Id.* at 573. In other words, even if the statute of limitations "grace period" rule articulated in *Mellinger* were to apply, because Alabama plaintiffs applying Alabama law had no expectation in the continuation of the borrowing statute, "such concerns play a minimal role and do not justify the application of a grace period." *Id.* (citing *In re TMI*, 89 F.3d 1106, 1116 (3d Cir. 1996)).

This Court has recognized that contingencies, future expectations, and mere rules of law do not constitute vested rights. We have upheld retroactivity challenges only when it interferes with a final judgment, involved the vested parent-child relationship, or when the statute attempts to revive a cause of action previously barred by the statute of limitations. *E.g.*, *Milam County*, 54 Tex. at 168; *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003); *Baker Hughes*, 12 S.W.3d at 5. Otherwise, we have held on many occasions that laws, even those that explicitly apply retroactively, do not violate the Retroactivity Clause in article 1, section 16. *See, e.g.*, *David McDavid Nissan*, 84 S.W.3d at 219–20; *Carter*, 997 S.W.2d at 573; *Likes*, 962 S.W.2d at 502; *Barshop*, 925 S.W.2d at 634; *Ex parte Abell*, 613 S.W.2d at 262; *Exxon Corp. v. Brecheen*, 526 S.W.2d 519, 525 (Tex. 1975); *McCain*, 284 S.W.2d at 900; *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1012–13 (Tex. 1937).

The Robinsons' expectation that they could recover damages against Crown Cork as one of the numerous defendants in their lawsuit was low at the time Mr. Robinson's common law causes action accrued. Numerous contingencies surrounded their litigation, not the least of which were the identity of the potential tortfeasors and proving causation against Mundet from among nine other

defendants.[14] If they knew that Mundet was one of the parties responsible for producing asbestos that Mr. Robinson was exposed to, it is unlikely that they knew that Mundet had been bought by Crown Cork decades prior. This is not a situation where the obligations of two parties are identified by contract, where the government seeks to interfere with the parent-child relationship, or a party seeks to resurrect a claim long extinguished by a statute of limitations. Our case law is consistently hesitant to void statutes outside those categories as retroactive, and this is not an area into which our jurisprudence should expand.[15]

Finally, a "brighter-line" view provides more certainty and predictability and avoids confusion and ambiguity. Causes of action accrue when claimants are on notice of their injury and have the opportunity to seek a judicial remedy, when the injury occurs, or at the death of a promisor. *Quigley v. Bennett*, 227 S.W.3d 51, 58 (Tex. 2007); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). Certainly, these accruals almost always occur prior to the filing of a lawsuit (otherwise the claim would not be ripe). Therefore, accepting the Court's position that a right to file a lawsuit is a vested right would, in effect, preclude the Legislature from taking any action to modify or restrict a cause of action for some lawsuits that had not even been filed yet. It would further lead to unnecessary uncertainty and confusion.

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[14] The causation question to the jury may have listed ten potential defendants, the number remaining at the time Crown Cork's partial summary judgment motion was granted.

[15] JUSTICE MEDINA argues that the final judgment rule is inappropriate because "it is the right to sue itself—the lawsuit—that is being taken away, not the final outcome." ___ S.W.3d ___ (Medina, J., concurring). On the contrary, the Robinsons sued Crown Cork. There were pleadings, discovery, and motion practice. Crown Cork had to prove that it was entitled to the Chapter 149 defense, which it did through summary judgment. In fact, if Crown Cork's prior payout had been below Mundet's fair value, the Robinsons could recover against Crown Cork, but that question must be established in the lawsuit. To the extent there is an expectation to file and prosecute a cause of action (and not to recover on a claim), that expectation was satisfied in this case.

The Robinsons did not have a vested right in their accrued causes of action when Mr. Robinson was diagnosed with mesothelioma. At most, they had contingent belief that they might be able to recover against Crown Cork or the other defendants. At the time Mr. Robinson's cause of action accrued, the Robinsons had not taken any action in reliance on the law at the time, and they had no entitlement to the law as it existed. Even after they filed their action and received a partial summary judgment that Crown Cork was liable as a successor corporation, they had an unliquidated interest in a personal injury tort claim that was not recognized as a property right—vested or otherwise—at common law. The expectation further deteriorated when Mr. Robinson passed away, and Mrs. Robinson asserted new statutory survival and wrongful death claims. I would hold that, when the Legislature limited recovery for asbestos claims only against innocent successor corporations that had caused no injury to claimants, the Legislature did not deprive the Robinsons of a vested right of action against Crown Cork, and thus Chapter 149 is not unconstitutionally retroactive as applied to the Robinsons. The Robinsons are not foreclosed, however, from going forward with their claims against other entities, consistent with the Act's limitations on recovery.

2. Police Power Balancing

The Robinsons argue that there is no room for a balancing of interests in the retroactivity analysis. They contend that if a right is vested, it cannot be affected by retroactive legislation.[16]

[16] The Robinsons also argue that article I, section 29 of the Texas Bill of Rights, compels that result. I agree with the Court that section 29 does not determine whether and how the substantive portions of the Bill of Rights apply. ___ S.W.3d ___. Furthermore, section 29 is generally cited only for the proposition that courts have the power to declare laws unconstitutional. 1 BRADEN at 86–87, *cited in Oakley v. State*, 830 S.W.2d 107, 110–11 (Tex. Crim. App. 1992); *cf. Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 (Tex. 1934) (citing to section 29, among other things, to depart from the U.S. Supreme Court's view and declare unconstitutional a law impairing the obligation of contracts); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148–49 (Tex. 1995) ("Section 29 has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void."); *Republican*

Regardless of whether the "vested rights" threshold exists, a balancing of interests and expectations is an integral part of retroactivity analysis in Texas jurisprudence, the jurisprudence of other states, and commentators and scholars in this area. Although the Court also balances interests, much in the same way I believe our jurisprudence demands that we balance interests pursuant to the state's police power, the Court's analysis overlooks a few critical points.

Courts carefully recognized that a retroactive law affecting vested rights may nonetheless be constitutional if the overriding public purpose of the act and the Legislature's legitimate exercise of its police power outweigh the interests or expectations of the affected party. *E.g.*, *Barshop*, 925 S.W.2d at 633–34. As Justice Oliver Wendell Holmes, Jr. recognized in the context of a takings suit based on a statute retroactively preventing a mining company exercising its contractual rights to mine coal under a house:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.

Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1920); *see also In re Marriage of Bouquet*, 546 P.2d 1371, 1376 (Cal. 1976) (noting that vested rights may be impaired when "reasonably necessary to the protection of the health, safety, morals, and general well being of the people"); *Phillips v. Curiale*, 608 A.2d 895, 902 (N.J. 1992); Hochman, 73 HARV. L. REV. at 697 (advocating the abrogation of the "vested rights" concept and instead analyzing U.S. Supreme Court jurisprudence

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Party of Tex. v. Dietz, 940 S.W.2d 86, 89–91 (Tex. 1997) (analyzing section 29 and holding that the Texas Bill of Rights protects against government, not private, conduct).

on retroactivity balancing the nature of the public interest served, the extent to which the statute modifies the asserted pre-enactment right, and the nature of the right which the statute alters).

In considering the balancing test to be applied this case, the court of appeals balanced the proper exercise of the police power (weighing presumably not only the validity of the exercise, but the importance as well) against the "detrimental impact on plaintiffs such as the Robinsons," noting that the statute was narrowly tailored to protect the most innocent corporations but still "leaving the pool of potential [asbestos] defendants as large as possible . . . ." 251 S.W.3d at 532–33. The Court, on the other hand, balances: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment. ___ S.W.3d ___. Using this test, the Court determines that Chapter 149 is unconstitutionally retroactive as applied to the Robinsons.

The Court asserts that what "constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity. . . [and there is] a deep division over whether a retroactive restriction on a cause of action impairs vested rights. " __ S.W.3d ___. So the Court vanquishes the vested rights jurisprudence because it is too hard to decide and it believes some cases applying it in the past were inconsistent. What areas of jurisprudence that span two centuries are not subject to the same criticisms? No one who has raised children doubts the statement that bathing a baby is challenging and risky and can be a tough chore, but it must be done. The Court throws out the baby it once embraced along with the bath water. It will come as no surprise that the new balancing test the Court establishes for evaluating retroactive legislation will be fraught with at least as many similar challenges, but have no precedents for guidance. The

balancing test in Texas retroactivity jurisprudence is, candidly, a new baby in new bath water. Certainly, there are limits imposed by the Constitution on legislative power (as well as executive and judicial authority), but as Justice Scalia insightfully explained about a balancing test under the Commerce Clause of the U.S. Constitution:

> The problem is that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course you cannot decide which interest "outweighs" the other without deciding which interest is more important to you. And that will always be the case. I would abandon the . . . balancing enterprise [used in dormant commerce clause cases] altogether. . . .

Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part) (emphasis added).

Assuming that the Robinsons' accrued but unliquidated cause of action for personal injury is a vested right under the Retroactivity Clause, I consider whether the Legislature's exercise of its general police power outweighs the private interests at issue.

a. The Balancing Test to be Applied

We have not had the opportunity to fully discuss the contours of the police power exception vis-a-vis a retroactivity challenge. In *Barshop v. Medina Underground Water Conservation District*, we upheld the Edwards Aquifer Act against a retroactivity challenge where landowners above the Edwards Aquifer argued that the Act affected their vested right to withdraw unlimited amounts of water from the Aquifer. 925 S.W.2d 618, 634 (Tex. 1996). Without deciding whether rights to

groundwater were vested rights, we stated that because the authority was "required for the effective control of the [aquifer] to protect . . . life, . . . water supplies, the operation of existing industries, and the economic development of the state" and the aquifer itself was "vital to the general economy and welfare of this state," that the Retroactivity Clause in the Texas Constitution does not "absolutely bar the Legislature from enacting such statutes." *Id.* (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626 §§ 1.01, 1.06(a), 1993 Tex. Gen. Laws 2355, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505). In *In re A.V.,* we upheld retroactive application of a statute allowing the termination of parental rights for those who are incarcerated for an extended period of time because the state has a duty to protect the safety and welfare of its children, and "[t]his 'valid exercise of the police power by the Legislature to safeguard the public safety and welfare' is a recognized exception to the unconstitutionality of retroactive laws." 113 S.W.3d 355, 361 (Tex. 2003) (quoting *Barshop*, 925 S.W.2d at 633–34). In *Lebohm v. City of Galveston*, we struck down a statute providing the City of Galveston a complete defense for injury caused by defective roads, streets, sidewalks, or other public places within the city limits, noting that "[n]o broad public policy or general welfare considerations are advanced to justify the charter provision as a reasonable exercise of police power [and w]e can think of none that could be advanced inasmuch as the operational effect of the provision extends only to the city limits . . . ." 275 S.W.2d 951, 955 (Tex. 1955).

Other states, however, have created a fuller rubric for examining the balance between the police power and the prohibition against retroactive laws. Each formulation seems to balance the nature of the public interest articulated by the Legislature, the extent to which the statute modifies

or abrogates the vested right, the nature of the right the statute alters, and the fairness of the application of the new statute.[17] The Robinsons' retroactivity challenge is an as-applied challenge, and thus the Robinsons must demonstrate that the statute is unconstitutional as it operates in practice against them. *See Tex. Mun. League*, 74 S.W.3d at 381. Therefore, it is appropriate to balance the expectations the Robinsons lost with the enactment of Chapter 149 against the degree of harm sought to be protected by the legislative enactment.

When considering the application of the police power, this case is a close one. It does not involve the potential shortage of water for millions of people, *Barshop*, 925 S.W.2d at 634, and it does not involve the state's duty as *parens patriae* to children, *In re A.V.*, 113 S.W.3d at 361. But there are five reasons that Chapter 149 was a legitimate exercise of the police power, as applied to the Robinsons. The first three demonstrate that the Robinsons' expectations in the continued state

[17] *E.g.*, *Phillips*, 608 A.2d at 902 (articulating a similar test balancing: "(1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates the asserted right, and (3) the nature of the right that the statute alters" and discussing whether the application of the statute would result in "manifest injustice"); *Estate of DeWitt*, 54 P.3d at 855 (balancing the vested right against public health and safety concerns, the state's police powers to regulate certain practices, and other public policy concerns, so long as there is a rational relationship between the government interest that is asserted and the retroactive legislation); *Marriage of Bouquet*, 546 P.2d at 1376 (examining "the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions"); *Reed v. Brunson*, 527 So. 2d 102, 115–16 (Ala. 1988) (eliminating co-employee lawsuits, while noting that "[i]t is certainly within the police power of the legislature to act to enhance the economic welfare of the citizens of this state [by eliminating the common law cause of action]. . . in an attempt to eradicate or ameliorate what it perceives to be a social evil"); *Mergenthaler v. Asbestos Corp. of Am.*, 534 A.2d 272, 276–77 (Del. Super. Ct. 1987) (noting that the determination of retroactivity "rests on subtle judgments concerning the fairness of applying the new statute" and noting that the considerations of vested rights "may be moderated or overcome if the statute is in furtherance of the general police power for concerns of public, health, morals, safety, or general welfare" and holding retroactive application of workers' compensation benefits to asbestos claimants who were exposed prior to coverage was not unconstitutionally retroactive).

of the law, as-applied, are low. The second two demonstrate that the Legislature's exercise of the police power was rational, justifiable, and reasonably limited.

First, at common law, Mr. Robinson's claims were not "property," were not assignable, and were extinguished when he passed away. It is only by statute that wrongful death claims continue to exist. The Legislature has broad authority to modify rights it creates by statute. "When a right or remedy is dependent on a statute, the unqualified repeal of that statue operates to deprive the party of all such rights that have not become vested or reduced to final judgment," and "all suits filed in reliance on the statute must cease . . . ." *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998). This Court has further held that "[i]t is generally conceded that a right of action given by a statute may be taken away at any time, even after it has accrued and proceedings have been commenced to enforce it." *Nat'l Carloading Corp. v. Phoenix-El Paso Exp.*, 176 S.W.2d 564, 568 (Tex. 1944). Even assuming the Robinsons' acts of filing a lawsuit and receiving partial summary judgment resulted in some vested expectation, the Robinsons' claims, based in common law negligence and products liability, may continue only because of the statutory rights of survival, wrongful death, and successor liability through corporate merger. Accordingly, the Legislature retained discretion to modify the nature of their rights through Chapter 149's restriction on the amount of total damages recoverable against Crown Cork.

Second, Chapter 149 does not interfere with a claim sounding in contract or a claim for an injury to real or personal property, which was protected much more stringently at common law. *E.g.*, *Landgraf*, 511 U.S. at 271 (noting that the "largest category of cases in which [the Supreme Court of the United States has] applied the presumption against statutory retroactivity has involved new

provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance"). The Robinsons did not have an established relationship with Crown Cork (or even Mundet) with predetermined expectations that may have vested upon the occurrence of a contractual condition. Until this litigation, it is unlikely that the Robinsons even knew that Crown Cork was a successor to Mundet, or that Mundet manufactured asbestos products used in the ships on which Mr. Robinson was stationed. This weakens the expectancy the Robinsons may have had in their cause of action.

Third, Chapter 149, as applied, does not deprive the Robinsons of their cause of action against Crown Cork, and it does not deprive the Robinsons of real and substantial remedies for their alleged wrongs. The Robinsons sued twenty other defendants in this case and recovered approximately $850,000 from a number of the defendants for their injuries. They alleged that "[e]ach exposure to [asbestos-containing products] cause and/or contributed to Plaintiffs' injuries . . ." and "[t]he actions of each and every Defendant are a producing and proximate cause of Plaintiffs' injuries and damages." Thus, the Robinsons lost only the right to recover against Mundet/Crown Cork, which had reached its maximum payout under Chapter 149. But the statute did not impair their right to seek substantial recoveries against other defendants, which were involved in the business of asbestos insulation for the same injuries to Mr. Robinson. There is no vested right in a remedy, and the Legislature may retroactively modify remedial laws, affect a court's jurisdiction, or provide alternative procedures or remedies. *See Tex. Mun. Power Agency v. Pub. Utils. Comm'n*, 253 S.W.3d 184, 198 (Tex. 2007); *David McDavid Nissan*, 84 S.W.3d at 219; *Ex*

parte Abell, 613 S.W.2d at 260; *Mellinger*, 3 S.W. at 254.[18] This case is a multi-defendant lawsuit where it is difficult to determine which asbestos products were the cause of Mr. Robinson's injuries.

Chapter 149 does not deprive the Robinsons of any cause of action or prohibit their right to sue any party. It simply cuts off recovery against innocent defendants at the point that the defendants have paid out for asbestos-related liabilities the fair market value of the assets of the company acquired. Importantly, Chapter 149 does not make any defendants immune from suit. Chapter 149 limits the remedy under prescribed circumstances. It is not disputed that if, for instance, Mundet's assets, acquired by Crown Cork, had a fair market value of $1 billion, Crown Cork could still be liable for damages in this suit. But because Crown Cork's asbestos-related liability payments exceeded the asset value of Mundet, it had reached the statutory limit for its liabilities as successor to Mundet. Even assuming for the sake of argument that the removal of recovery against one defendant in such a suit is not merely a change in remedy but a deprivation of a right, in this case the infringement was not a complete bar to all recovery for the wrongs alleged. Accordingly, the Robinsons were able to proceed against other defendants for the same claims based on admittedly the same injury.

Fourth, the Legislature rationally drew Chapter 149 to address a problem it perceived as very important—the effects on the Texas economy and employment because of the bankruptcy of

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[18] Courts have repeatedly recognized that a statute depriving a court of jurisdiction to hear a dispute does not implicate a vested right. *David McDavid Nissan*, 84 S.W.3d at 220; *In re A.D.*, 73 S.W.3d 244, 249 (Tex. 2002); *see also Landgraf*, 511 U.S. at 274 (recognizing that statutes that confer or oust jurisdiction are regularly applied retroactively). If the mere right to sue were the constitutionally protected interest, then the Robinsons would have it, and those whose claims were no longer justiciable in a court of competent jurisdiction would not. Therefore, the right protected by the Retroactivity Clause must truly be focused on the substance of the claim—the actual recovery—rather than the right to get to a recovery.

companies that never manufactured, sold, or distributed asbestos-containing products. The asbestos litigation "crisis" had been well recognized in academic journals and even court decisions at the time the Legislature debated and enacted House Bill 4. *E.g.*, Orszag, 44 S. TEX. L. REV. at 1078–81; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) ("'The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.'" (quoting Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, at 2–3 (Mar. 1991))); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 203–04 (O'Neill, J., dissenting) (recognizing the crisis and noting that "the solution to these problems is legislative, not judicial"); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 1, 4–9 (2001) (describing the "ever-expanding" crisis, and the filing of claims "[o]ver $20 billion and thirty bankruptcies later"). Others examined the potential for unfairness when a larger corporation's assets became susceptible to the stress of asbestos liability from a long-since acquired subsidiary. As stated by one commentator:

> [I]n asbestos litigation, courts have cast aside the theory behind the [successor liability] doctrine. Instead of limiting the successor corporation's liability to the market value of the acquired corporation, or even to that value plus any profits generated by the acquisition, courts have allowed successors to be subjected to limitless liability[, which is a] runaway application of the successor liability doctrine.

Mark H. Reeves, Note, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 VAND. L. REV. 1949, 1972–73 (2003); *see also, e.g.,* Lester Brickman, *The Asbestos Litigation Crisis: Is there a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1831–33 (1992) (recognizing that the asbestos litigators invoked successor liability laws "so as to reach into the deeper pockets of the companies that bought far smaller entities that manufactured asbestos-containing materials regardless of the culpability of the purchasing companies").

The Statement of Legislative Intent filed by Representative Nixon recognized an "unfairness" existing in corporate merger law where a "larger successor can easily be bankrupted by the asbestos-related liabilities it innocently received from a much smaller predecessor with which it merged may [sic] decades ago." H.J. of Tex., 78th Leg., R.S. 6042, 6043 (2003) (HB 4 Statement of Legislative Intent). The Statement also recognized that "Corporations actually in the asbestos business and their successors through merger have been financially drained by decades of litigation. As a result, nearly 70 such corporations have sought protection through bankruptcy. The cost in jobs and pension benefits, to cite just two examples, has been substantial." *Id.* at 6044. These findings were recognized in the House floor during debate, and were codified into the omnibus statute two years later that reformulated the method in which asbestos claims are litigated in Texas. *See* Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1 (b)–(h), 2005 Tex. Gen. Laws 169, 169–70 (codified at TEX. CIV. PRAC. & REM. CODE §§ 90.001–.012). Protection of Texas's economy and jobs is certainly a rational basis for enacting legislation, and here there is a sufficient reason for the Legislature to enact the statute that it did.

Finally, the class of persons protected by the legislation has a rational relation to the legislative purpose of the legislation. The Legislature chose to relieve liability on "innocent successors," companies that did not manufacture or sell asbestos, but rather acquired a company that did. And the Legislature mediated the perceived unfairness not by foreclosing a remedy altogether, but merely limiting the remedy to the fair value of the acquired company's assets. TEX. CIV. PRAC. & REM. CODE §§ 149.001, .003. In this case, that is exactly what happened. Crown Cork's total liabilities for the asbestos sold and manufactured by Mundet far exceeded Mundet's present-day fair value. Had Mundet never been acquired by Crown Cork, its payouts for asbestos liability would have exceeded its value as a going concern, it likely would have been bankrupt, and, almost certainly, no money would have remained to pay the Robinsons' claims if they obtained a judgment against it. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 302–06 (E.D.N.Y. 2002) (discussing the factual and procedural background of the bankruptcy of the Manville Corporation, the establishment of the Manville Trust following its bankruptcy to pay asbestos claims, and its reformation once it was discovered that the trust was "deeply insolvent" and that beneficiaries would not be able to be paid in full, or even paid at all). Crown Cork chose to acquire Mundet through a statutory merger and not through an asset purchase, but it remains the purview of the Legislature to modify the legal effect of continuing liability of such mergers in Texas to avoid the ruin of businesses possessing assets that had nothing to do with asbestos production or manufacture. Importantly, the legislation restricts neither the right nor the remedy of plaintiffs who prove that Crown Cork itself caused them injury; it only addresses imputed successor liability.

In short, for the reasons articulated above, the Robinsons' interest in their accrued, but unliquidated cause of action, is low. Their vested expectancy, if any, is minimal. Their right of recovery for the injuries complained of was not foreclosed. And their relation to Crown Cork was attenuated. The public interest in the legislation, and its retroactivity, is moderate. The Legislature acted in response to a known litigation crisis and acted with a reasonable and narrowly tailored response based on the current climate. Individuals may or may not personally believe in the wisdom of the particular legislation, but it is not our province to second-guess legislation because we do not agree with its policy. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003).

b. A Critique of the Court's Test

Although I disagree with the Court's analytical framework in arriving at its three-factor balancing test and the unfoundedly rigorous legal standards it applies, I do not wholesale disagree with the categories it has set up to determine whether a retrospective law is unconstitutionally retroactive. However, the Court's application of the law to the facts in this case creates more difficulties for the Legislature and the courts of our state in reviewing retroactive laws, and creates significant and unnecessary impediments to the Legislature's ability to correct law and make beneficial legislative changes in the future.

First, I disagree with the "compelling reason" standard applied by the Court. Nothing in our precedent, or any case law, requires such a heightened review of retroactive legislation. The Court repeatedly mentions the heavy presumption against retroactive legislation, but the presumption falls away in this case. The presumption is removed when a legislature "itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable

price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272–73. Not only did the Legislature "consider the potential unfairness" in this case, it voted to apply Chapter 149 retroactively by a supermajority. The Court's point that we should view fully retroactive legislation with skepticism is well taken; however, the presumption against retroactivity is unnecessary when the Legislature expressly concludes that the statute is to be applied retroactively. *Id.*; *accord Lockheed Corp. v. Spink*, 517 U.S. 883, 896–97 (1996) ("[When] the temporal effect of a statute is manifest on its face, 'there is no need to resort to judicial default rules,' and inquiry is at an end." (quoting *Landgraf*, 511 U.S. at 280)); *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1281–82 (11th Cir. 2005) ("[The] presumption and analysis, however, are unwarranted when Congress states its unambiguous intention that the statute apply retroactively to pre-enactment conduct . . . ."). Because it is for the Legislature to initially determine whether the benefits of retroactive legislation outweigh the detriments (at least to the statute as a whole), we are not commanded to review that decision to determine whether their justification was "compelling."

Second, the Court's evaluation of the Robinsons' interest seems to be focused on its pretrial evaluation of not only the existence of the Robinsons' claims, but their strength. The Court argues that the Robinsons' claims have "a substantial basis in fact" and that their claims are "mature tort[s], [such that] recovery is more predictable." ___ S.W.3d ___. I would not require courts in this state to evaluate plaintiffs' claims or defendants' defenses, under the Retroactivity Clause on whether the parties are likely to win or their claims have a "substantial basis in fact." As any experienced lawyer will acknowledge, the strength of a claim and the likelihood of success in litigation may be separate and independent things. This consideration is unwieldy, suggesting that the Legislature can enact

retroactive legislation affecting substantive rights so long as there is a chance that it will not matter, at the end of the day.

Third, the statute does not affect settled expectations to the degree alleged by the Court. The Court alleges that the statute will affect the recovery "to which the Robinsons are entitled," once again presuming that the Robinsons' claims against Crown Cork will be successful. ___ S.W.3d ___. As discussed above, the Robinsons had no pre-tort contact with Crown Cork, and had no settled expectation that Mundet would be acquired by a richer company able to pay for Mundet's debts.

Fourth, the Court penalizes the Legislature because the legislation does not contain expressed "findings to justify Chapter 149." ___S.W.3d___. The Court does not consider the well-known facts about the asbestos crisis, Crown Cork's financial stake, subsequently codified legislative findings, or the possibility that other businesses may be subjected to financial ruin, as these facts were not included in the actual statutory language in House Bill 4. While I agree that such statutory findings are most helpful in determining legislative intent, *United States v. Lopez*, 514 U.S. 549, 562–63 (1995) (concerning the Commerce Clause), I am aware of no Texas case that requires them. And, in fact, if the Legislature were to be so required for every bill in which their police power may be challenged, certainly the legislative process would be significantly burdened. Rational basis review does not require the Legislature to provide any particular purpose; the law will be upheld "if there is any conceivable state of facts which would support it." *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509 (1937). The law may be valid even if the Legislature did not consider the valid

purposes, but so long as the purpose "may have been considered to be true." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citations omitted).

Thus, I believe it is imprudent to abandon our vested rights jurisprudence, and as applied, the Robinsons' do not have vested rights in their causes of action against Crown Cork. Even if the Robinsons' claims are vested rights, I would hold that, on balance, the Legislature's exercise of police power outweighs the Robinsons' rights, and thus Chapter 149 does not violate article I, section 16 of the Texas Constitution.

B. Special Law

Because the Court determines that Chapter 149 is unconstitutionally retroactive as applied to the Robinsons, it does not address the Robinsons' second argument, that Chapter 149 is an unconstitutional "special law." I would hold that it is not.

Article III, section 56(b) of the Texas Constitution provides that "where a general law can be made applicable, no local or special law shall be enacted." TEX. CONST. art. III, § 56(b). A "special law" is a statute that "relates to *particular* persons or things of a class," rather than the class as a whole. *Clark v. Finley*, 54 S.W. 343, 345 (Tex. 1899) (emphasis added), *cited in Lucas v. United States*, 757 S.W.2d 687, 700 (Tex. 1988); *see also Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 456 (Tex. 2000) (defining a "special law" as one that "impermissibly distinguishes between groups on some basis other than geography" (citing *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997))). The prohibition on special laws was added to the Texas Constitution of 1876 as one of many practical answers to the prevalent abuse of legislative and executive power that occurred in Texas following the Reconstruction. A.J. Thomas, Jr. & Ann

Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 915 (1957). In one session of the post-Reconstruction legislature five hundred special laws were passed. *Id.* Section 56 was thus seen to prevent "logrolling,"[19] to ensure against the granting of special privileges, and to prevent lawmakers from trading votes "for the advancement of personal rather than public interest." *Miller v. El Paso Cnty.*, 150 S.W.2d 1000, 1001 (1941); *Sheldon*, 22 S.W.3d at 456.

In the early twentieth century, the Court developed a test for reviewing whether a law providing a privilege to a particular class is in actuality a veiled attempt to provide a privilege to a particular member of the class. *See Sheldon*, 22 S.W.3d at 450–51; *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996); *Robinson v. Hill*, 507 S.W.2d 521, 525 (Tex. 1974); R.H.O, Recent Case, *Statutes—Special Laws—Reasonableness of Classification*, 11 TEX. L. REV. 134, 134–35 (1932) (collecting cases describing the legal standard for review of a special law). The Court first determines whether there is a reasonable basis for the classification made by the law, and then determines whether the law operates equally on all within the class. *Rodriguez v. Gonzales*, 227 S.W.2d 791, 793 (1950); *Sheldon*, 22 S.W.3d at 451. Only if the law fails both tests is it a special law and unconstitutional.

The determination of a "reasonable basis" for the classification is not an invitation for the Court to engage in weighing the relative pros and cons of a particular policy choice made by the Legislature. As stated by this Court over 100 years ago:

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[19] "Logrolling" has been defined by our Courts of Appeals as "the inclusion in a bill of several subjects having no connection with each other in order to create a combination of various interests in support of the whole bill," *Skillern v. State*, 890 S.W.2d 849, 861 (Tex. App—Austin 1994, no writ) (citations omitted), and "trading votes to advance personal rather than public interests," *Diaz v. State*, 68 S.W.3d 680, 684 (Tex. App.—El Paso 2000, pet. denied).

> Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. . . . To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. When the intent of the legislature is clear, the policy of the law is a matter which does not concern the courts.

Clark, 54 S.W. at 345–46. We do not analyze the Legislature's classification to determine whether the classification is a good or bad idea. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). Rather we analyze to ensure that the classification is not made to "evade the prohibition of the constitution as to special laws by making a law applicable to a pretended class, which is, in fact no class . . . ." *Clark*, 54 S.W. at 345. We presume the statute is valid, and "a mere difference of opinion" between the Court and the Legislature will not be sufficient to overcome the presumption of validity. *Smith*, 426 S.W.2d at 831.

The *Rodriguez* test's two-part structure provides the framework to determine whether a class is a "pretended class." The first part of the test examines the delineated class vis-a-vis the purpose of the legislation. *Rodriguez*, 227 S.W.2d at 793. For example, if the purpose of the law is to provide tax relief to businesses in the sports entertainment industry, but the tax relief is given only to businesses belonging to or supporting teams in leagues or conferences with "National" in their name but not with leagues or conferences with "American" in their name, the classification would likely have no rational relation to the purpose of the statute.

The second part of the test examines whether similarly situated parties are treated similarly under the classification, or whether the classification makes an irrational category considering the intent of the statute. *See, e.g.*, *Rodriguez*, 227 S.W.2d at 794 (holding that statute setting out special

procedures for collecting delinquent taxes on parcels of land greater than 1,000 acres situated in counties bordering Mexico and whose title emanated from the King of Spain as an unconstitutional special law, as there was "no substantial difference in the situation or circumstance of border counties relating to suits for delinquent taxes"); *Miller*, 150 S.W.2d at 1002–03 (holding as unconstitutional a statute providing an economic development tax only in counties meeting population requirements, due to the fact that the statute's classification was not distinct in any substantial manner from other counties in the state). Back to the example, the tax relief statute above would likely be unconstitutional, as its effect is to provide relief to the Houston Astros and the Dallas Cowboys and the businesses that support them (as the Astros are a member of the National League, and the Cowboys are a member of the National Football Conference), but would not provide relief to supporters of the Houston Texans and the Texas Rangers (as the Texans are a member of the American Football Conference and the Rangers are a member of the American League). The classification is a "pretended class" because the classification has no relation to the purpose of the law and treats similarly situated teams differently. Although the Court does not defer to the Legislature to determine whether a law is general or special, it does defer to the Legislature's policy choices and presumes that law is constitutional. *See Smith*, 426 S.W.2d at 831; *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003) ("Our role here, however, is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent.").

In this case, the purpose of the law has been clearly expressed by the Legislature—to eliminate the unfairness created when a corporation merged with a smaller corporation that had

previously been engaged in the manufacture or sale of asbestos is exposed to asbestos liability exceeding the value of the acquired corporation, and to save such a corporation from bankruptcy. H.J. of Tex., 78th Leg., R.S. 6042, 6043 (2003) (HB 4 Statement of Legislative Intent). To address concerns in the Legislature, the measure was restricted in three ways. First, the original transfer of liabilities had to occur prior to May 13, 1968. This was the date in which the American Conference of Governmental Industrial Hygienists first adopted a change in the recommended threshold limit for asbestos in the air of a workplace. Second, to get the benefit of the legislation, the acquiring corporation could not continue in the asbestos business. Third, if the successor continued to control a premises after the merger, the successor would continue to be liable for any asbestos-related premises liabilities it received from the predecessor for injuries caused on those premises. *Id.* at 6043–44.

The Robinsons attack these limitations as pretexts to limit relief just to Crown Cork. However, it is clear that, regardless of the wisdom of the classifications, the classifications are rationally related to the objective of the bill. The act sought to protect "innocent" successor corporations. To define the most "innocent," the Legislature chose to limit mergers occurring prior to May 13, 1968. The Robinsons claim that this date was chosen arbitrarily and that the dangers of asbestos in the workplace were known prior to the ACGIH's modification. However, this is the date decided upon by the Legislature, and it has a rational relationship to the legislation—the Legislature could have, no doubt, chosen any number of cutoff dates to decide which successor corporations are the most "innocent," and while others may disagree as to the appropriateness of the date, such would merely be a "difference of opinion," and insufficient basis for overturning the statute. *Smith*, 426

S.W.2d at 831; *see also Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 420–22 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (discussing, in the context of the basis for a punitive damages award "scientists' knowledge of the risk to refinery workers" of asbestos, and noting studies originating in the 1940s, 1950s, 1960s, and 1970s). Similarly, the second and third limitations also seek to limit protection to those businesses that were not involved with the manufacture or distribution of asbestos, or those that actually had asbestos on the premises. This is also a rational distinction: The Legislature sought to protect those businesses that had nothing to do with asbestos prior to a merger, had nothing to do with asbestos after the merger, and had no asbestos on its premises. The classifications are rational.

The Robinsons also argue that the law is a "special law" because it created a class of one—evidenced by (a) the fact that Crown Cork did not identify any other businesses to which the law applied, (b) Crown Cork's lobbying for the law in Texas and other states, and (c) statements by members of the Legislature that they were addressing "the Crown Cork and Seal Issue."

The Robinsons cite to *Miller's* statement that classification "must be broad enough to include a substantial class . . ." to mean that it is the burden of the proponent of the law to prove that the law must apply to more than one person. *Miller*, 150 S.W.2d at 1001. On the contrary, the size of the class, itself, is not determinative. While courts must be more exacting in reviewing a law that appears only to apply to one party, a "substantial" class does not equate to a class with thousands, hundreds, or even dozens of members. There are no doubt many Texas laws that apply to a small subset of the population; rather, a "substantial" class is one that has substance—a real class of persons or entities, as opposed to a "pretended" class created as a pretext.

The Robinsons' evidence of pretext is no evidence at all. The Robinsons' bare argument that Crown Cork is a "class of one" is insufficient. First, it is not Crown Cork's, but the Robinsons' burden to demonstrate that the law is a special law. Second, even if the Robinsons could show that the law currently applied only to Crown Cork, that alone would not fulfill the burden that the law was special. As discussed above, the Robinsons must show that the classifications made by the Legislature were not rationally related to the objective of the law, and the Robinsons must show that the legislation has treated a similarly situated successor company differently from Crown. They have done neither.

The only other evidence the Robinsons provide is evidence of legislative history. The Robinsons argue that the law is special because Crown Cork lobbied for the act and that at least one legislator called the Act the "Crown Cork issue" in a committee hearing. This evidence is also unavailing. First, as a beneficiary of this law, Crown Cork would certainly lobby for its enactment. But then again, public interest groups, individuals, and businesses regularly lobby for legislation that affects them directly or as an industry, and lobbyists regularly draft legislation for legislators. *See, e.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583, 587, 591 (2002) (noting a number of responses by legislative aides that lobbyists regularly draft the text of bills debated in the Senate Judiciary Committee and discussing an account by a legislative aide where a companion bill was "negotiated and drafted by lobbyists and introduced with only 'minor changes'"). Many involved in the "sausage

making"[20] task of developing law use lobbyists to draft the text of bills because lobbyists provide valuable information and perspective on the bills being introduced. *Id.* at 583. Cognizant as I am of the need to avoid the gifts given by the Legislature to favored individuals, the Robinsons must come up with more evidence than the mere fact that Crown Cork was involved in the passing, or even the drafting, of the act in question.

Likewise, the Robinsons' evidence of Senator Ratliff's statement is also not evidence of House Bill 4's "special law" status. The senator described Article 17 as "the Crown Cork and Seal asbestos issue." First, the statement is no evidence because, as this Court has repeatedly stated, a single statement by a single legislator does not evidence legislative intent and does not determine legislative intent. *E.g.*, *AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528–29 (Tex. 2006); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993). Second, to countenance this statement as even "persuasive authority as might be given the comments of any learned scholar of the subject," *De La Lastra*, 852 S.W.2d at 923, would be to do a disservice to the legislative process. Countless laws are either championed by a particular person or entity or arise out of the circumstances that will be or have been experienced by an individual or a business.[21]

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[20] "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." John Godfrey Saxe, *as quoted in* THE YALE BOOK OF QUOTATIONS 86 (2006). This quotation has previously been attributed to Otto von Bismarck. *See id.*; *In re Graham*, 104 So. 2d 16, 18 (Fla. 1958).

[21] No one could claim that the Brady Handgun Violence Prevention Act of 1993, 18 U.S.C. § 921–22, advanced by former White House Press Secretary James Brady and his wife Sarah, or the proliferation of Megan's Laws, *e.g.*, N.J. STAT. § 2C:7-1 to 11, dealing with sex offender registration throughout the country, named after Megan Kanka, a minor who was sexually assaulted in New Jersey, or even the Copyright Term Extension Act, which was sometimes known as the "Mickey Mouse Act," because Disney lobbied extensively for the act and because the act prevented the original Mickey Mouse cartoon "Steamboat Willy" from entering the public domain, *see* Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH, no. 4, Spring 2004, at 3 n.2, would be special laws merely because an individual, or even Disney, lobbied for them so strenuously that the bill

In sum, the Robinsons meet neither of the factors in the *Rodriguez* test. The Robinsons have not shown that the Legislator's classifications are irrational or not related to the objective of the statute, nor have they shown that the Legislature has created a "pretended" class by excluding similarly situated entities.

III. CONCLUSION

I would hold that Chapter 149 is not an unconstitutional special law, and is not unconstitutionally retroactive as applied to the Robinsons because the law limited available remedies and did not destroy the Robinsons' vested rights. I therefore respectfully dissent.

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Dale Wainwright
Justice

OPINION DELIVERED: October 22, 2010

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was eventually named for them.