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 MEDINA filed a concurring opinion.

I join the Court's opinion because I agree that a retroactive law is presumptively "unconstitutional without a compelling justification that does not greatly upset settled expectations" and that no such justification exists here. ___ S.W.3d ___, ___. I further agree that the "constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power[.]" *Id*. at ___. And finally, I agree that Chapter 149 here violates article I, section 16 of the Texas Constitution because it operates to retroactively abolish the Robinsons' vested property rights, or in the words of the Court—"significantly impacts a substantial interest the Robinsons have in a well-

recognized common-law cause of action." ___ S.W.3d at ___. I write separately because I do not share the Court's disdain for traditional vested rights analysis nor the dissent's view of that analysis.

I

I begin, as the Court does, with the twin goals served by the Retroactivity Clause: (1) it protects individuals against legislative enactments that unfairly deprive them of legitimate expectations, *Owens Corning v. Carter*, 997 S.W.2d 560, 572 (Tex. 1999), and (2) it ensures that legislative enactments do not single out individuals for preferential or arbitrary treatment. *See In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (upholding law against retroactivity challenge because "the State [was] not pursuing a retributive or punitive aim"); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 284–85 & n.20 (1994). As the United States Supreme Court has observed, retroactive lawmaking creates special opportunities for rewarding favored constituencies at the expense of disfavored ones. *Landgraf*, 511 U.S. at 266–67.

When determining whether a statute violates the Retroactivity Clause, vested rights analysis poses three related questions. First, does the claimant have a vested right affected by the statute? Second, does the retroactive statute impair that vested right? And finally, does a compelling public interest justify impairment through the state's police power? *See In re A.V.*, 113 S.W.3d at 361; *Barshop v. Medina Cnty. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 633–34 (Tex. 1996).

Concluding that vested rights analysis was "difficult" and "inconsistent," the court of appeals declined to address whether the Robinsons had a vested right in their accrued tort claim or whether Chapter 149 intruded upon that right. 251 S.W.3d 520, 526. The court concluded instead that, regardless of whether Chapter 149 implicated vested rights, the law could be upheld as a reasonable

exercise of the police power. *Id*. at 534 (citing *Barshop*, 925 S.W.2d at 633–34). Taking much the same tack, the Court begins with the last question but correctly rejects the court of appeals' rational basis analysis as the appropriate constitutional standard. Along the way, the Court grapples with the nature of the underlying property interest and its impairment, ultimately concluding that the Robinsons possessed a substantial interest in a well-founded claim (dare I say a vested property right) that Chapter 149 retroactively impaired. Although the Court is reluctant to use the term "vested rights," preferring instead to speak of "settled expectations," I believe we are talking about the same thing.

II

Whether a right may be regarded as vested depends on considerations of "fair notice," "reasonable reliance," and "settled expectations." *Owens Corning*, 997 S.W.2d at 572– 73; *see also McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955). Because the parties agree that Robinson's claim has accrued, *see Pustejovsky v. Rapid-Am Corp.*, 35 S.W.3d 643, 653 (Tex. 2000), the first question is whether or not that accrued tort claim is a vested right. I conclude that it is.

While we have never invalidated a statute on the grounds that it retroactively abrogated an accrued cause of action, we have noted on several occasions that accrued causes of action enjoy constitutional protection under article I, section 16. To be sure, no one has a vested right in a "mere expectation . . . based upon an anticipated continuance of the present general laws." *Ex parte Abell*, 613 S.W.2d 255, 261 (Tex. 1981). At the same time, the Retroactivity Clause

> must be held to protect every right, even though not strictly a right of property, which may accrue under existing laws prior to the passage of any act which, if permitted a retroactive effect, would take away the right. A right has been well defined to be a

> well founded claim and a well founded claim means nothing more nor less than a claim recognized or secured by law. . . . [A] right, in a legal sense, exists when in consequence of given facts the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another.

Mellinger v. City of Houston, 3 S.W. 249, 253 (Tex. 1887); *see also Owens Corning*, 997 S.W.2d at 572–73 (observing that "[c]onsiderations of fair notice, reasonable reliance, and settled expectations play a prominent role" when determining rights entitled to constitutional protection); *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916) (observing that a vested common law right of action is a property right that the legislation at issue did not affect).

We have also held that the Legislature may affect remedies for accrued causes of action, so long as the remedy is not entirely taken away. *See, e.g., City of Tyler v. Likes*, 962 S.W.2d 489, 502–03 (Tex. 1997); *Phil H. Pierce Co. v. Watkins*, 263 S.W. 905, 907 (Tex. 1924) (orig. proceeding); *see also DeCordova v. City of Galveston*, 4 Tex. 470, 477–78 (1849) (explaining the remedial exception and endorsing a New Hampshire decision affording protection to accrued causes of action). If Texas law afforded no constitutional protection to accrued causes of action, there would be no need to permit the Legislature to modify attendant remedies, nor any need to bar the Legislature from stripping a plaintiff of all remedy.

Not all courts agree with this analysis, however. Several federal courts suggest that a plaintiff has no vested right in an accrued tort claim until the claim is pursued to final judgment.[1] The

[1] *Compare Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (holding that a plaintiff has no vested right in a tort claim until the claim is pursued to final judgment); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997); *Lunsford v. Price*, 885 F.2d 236, 240–41 (5th Cir. 1989); *Symens v. SmithKline Beecham Corp.*, 152 F.3d 1050, 1056 n.3 (8th Cir. 1998); *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989), *with Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007) (holding that a plaintiff has a vested right in an accrued

majority of jurisdictions, however, appear to afford constitutional protection to accrued tort claims without a final-judgment requirement.

For example, the Kansas Supreme Court has rejected the notion that a property right in an accrued tort claim should not vest before final judgment. *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 500–06 (Kan. 1995). The court noted some disagreement about vested rights, particularly in the federal courts, but suggested that "the apparent conflicting holdings [were] not as divergent as they initially appear[ed]." *Id.* at 503. Instead, the court observed that the outcome in decisions espousing a final-judgment requirement could generally be explained by other factors, such as: "(1) the nature of the rights at stake (e.g., procedural, substantive, remedial), (2) how the rights were affected (e.g., were the rights partially or completely abolished by the legislation; was any substitute remedy provided), and (3) the nature and strength of the public interest furthered by the legislation." *Id.* The court then noted that most of the federal cases favoring a final-judgment requirement involved issues of federal preemption and the substitution of a federal remedy for the common law claim, while others involved either the clarification of defects in an existing ambiguous statute or retroactive legislation aimed at urgent problems of great public interest. *See Id.* (citing cases). In short, the cases generally turned on factors other than the existence of a final judgment.

The United States Supreme Court has hesitated to apply the due process clause in this area. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 332 (1986) (rejecting reasoning that would superimpose the Fourteenth Amendment as a "font of tort law"); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (same);

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patent infringement claim); *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004); *Hoyt Metal Co. v. Atwood*, 289 F. 453, 454–55 (7th Cir. 1923);*De Rodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir. 1972).

but see Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (considering it "settled" that "a cause of action is a species of property"). Notions of comity and federalism may explain this hesitancy in part, particularly when state enactments are under review. David Richards & Chris Riley, *Symposium on the Texas Constitution: a Coherent Due-Course-of-Law Doctrine*, 68 TEX. L. REV. 1649, 1666 (1990). But these considerations do not similarly encumber state courts. Moreover, our state Constitution, unlike its federal counterpart, includes an independent anti-retroactivity provision, and Texas's Retroactivity Clause goes beyond federal guarantees of property and due process. *Ex parte Abell*, 613 S.W.2d at 260. As we explained in *Mellinger*:

> It can not be presumed that in adopting a Constitution which contained a declaration "that no retroactive law shall be made," that it was intended to protect thereby only such rights as were protected by other declarations of the Constitution which forbade the making of ex post facto laws, laws impairing the obligation of contracts, or laws which would deprive a citizen of life, liberty, property, privileges or immunities, otherwise than by due course of the law of the land. . . .

3 S.W. at 252; *see also* Richards & Riley, 68 TEX. L. REV. at 1650 (noting that drafters of our 1836 Constitution held "a distinctly Jacksonian" concept of democracy and a "wariness of governmental authority"). And finally, every state whose constitution includes an independent anti-retroactivity provision concludes that accrued causes of action are vested rights.[2]

Though a plaintiff's ultimate right to recover is contingent upon success at trial, a plaintiff may nonetheless have a "settled expectation" that, once wronged, he or she will be able to pursue

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[2] *See DeCordova*, 4 Tex. 476–77 (looking to the decisions of other states whose constitutions contain anti-retroactivity provisions); *see also Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 164-65 (Colo. 1878); *Synalloy Corp. v. Newton,* 326 S.E.2d 470, 472 (Ga. 1985); *Bryant v. City of Blackfoot,* 48 P.3d 636, 642 (Idaho 2002); *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769–72 (Mo. 2007); *Shea v. North-Butte Mining Co.,* 179 P. 499, 503 (Mont. 1919); *Groch v. Gen. Motors Corp.*, 883 N.E.2d 377, 408 (Ohio 2008); *Mills v. Wong*, 155 S.W.3d 916, 921 (Tenn. 2005).

a claim against his wrongdoer under the substantive laws as they existed at the time his or her cause of action accrued. *Mellinger*, 3 S.W. at 253; *see also Likes*, 962 S.W.2d at 502 (indicating that retrospective law that entirely eliminates pending cause of action would be "unconstitutionally retroactive"). A plaintiff thus has a property interest in an accrued cause of action which the Texas Constitution protects like other property. *Subaru of Am. v. David McDavid Nissan, Inc.,* 84 S.W.3d 212, 219 (Tex. 2002).

III

The dissent, however, prefers the minority view that a property interest in an accrued cause of action not vest before final judgment is rendered. According to the dissent, no reasonable litigant has a "'settled expectation' of achieving monetary recovery" before judgment. ___ S.W.3d ____, ____ (Wainwright, J. dissenting). And as to this case, the dissent submits that the "Robinsons' expectation in the continued state of law [was] low" because of "numerous contingencies" and their failure to take "any action in reliance on the law at the time." ___ S.W.3d ____, ____, ___ (Wainwright, J. dissenting). In the dissent's view, the Robinsons' pending tort claims were nothing more than a valueless contingent interest in an uncertain future judgment. I disagree for several reasons.

First, I reject the notion that an accrued cause of action has no value apart from a judgment and is not itself a protected property interest. An accrued cause of action is clearly property under Texas law. *See* TEX. PROP. CODE § 12.014. It has value, even if that value is not always easy to measure. Ownership and control is vested in the holder of the claim, and those interests can generally be sold or assigned. *Int'l Proteins Corp. v. Ralston-Purina Co.,* 744 S.W.2d 932, 934

(Tex. 1988); *see PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 106 (Tex. 2004) (tracing development of modern law allowing transfer of choses in action); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 707 (Tex. 1996) (noting that "[p]racticalities of the modern world have made free alienation of choses in action the general rule").

Further, an accrued cause of action is "constitutional" property, a vested property right, because the holder has a legitimate expectation that the claim will be recognized by state law. *See* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277, 302 (1988); *see also Logan,* 455 U.S. at 428 (considering it "settled" that "a cause of action is a species of property"). The dissent's preoccupation with final judgments is misguided because the relevant expectations here involve the cause of action, not some future judgment. It is the right to sue itself—the lawsuit—that is being taken away, not the final outcome.

Once a lawsuit is filed, subsequent action by the sovereign interferes not with possible or potential rights that might accrue in the future, but with existing expectations and rights that have accrued—that have "vested"—and that constitute a present property interest. As one legal scholar explains: "a cause of action might be thought of as an entitlement to employ the state's adjudicatory machinery which can only be denied for cause, cause being the failure to establish the elements of the cause of action or to comply with reasonable procedural requirements." Beermann, 68 B.U.L. REV. at 305 n.121 (citing *Logan*, 455 U.S. 422). Other authorities share the same view:

> Determining whether vested rights exist implicates whether the property owner has a "legitimate claim of entitlement." . . . Clearly, the plaintiff has no "entitlement" to the damages sought, or to any form of successful resolution of the lawsuit, as he

> might lose on the merits or because of procedural aspects of the case. But just as clearly, the plaintiff's interest in the lawsuit itself should qualify as an "entitlement that may be terminated only for cause" that should warrant constitutional protection.

Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 401 (Spring 2009) (footnotes omitted); *see* also *Resolution Trust Corp.*, 892 P.2d at 502 (holding accrued tort claim to be vested property right and rejecting similar final-judgment argument because it "fails to recognize the distinction between a right of action and a right of recovery").

Finally, even if some manner of affirmative act is, as the dissent suggests, a necessary part of the "settled expectations" test, it is clearly established here. Contrary to the dissent's characterization, the Robinsons were not idle while Crown Cork labored to undo their accrued claim. The Robinsons filed suit, litigated their claim for several months, and obtained a partial summary judgment. Only after that did the Legislature enact Chapter 149, taking away the Robinsons' summary judgment and their underlying cause of action. Although the Robinsons had not yet obtained a final judgment (and thus had no vested property right in that non-existent judgment), they did possess a vested property right in their pending cause of action that included the right to prosecute the claim. *See Washington-Southern Navigation Co. v. Baltimore & Philadelphia S.B. Co.*, 263 U.S. 629, 635 (1924) ("The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment.").

Although I emphatically disagree with the dissent's view that an accrued cause of action is too indefinite, and its owner's expectations too insignificant, to warrant constitutional protection,

I readily concede that "no one has a vested right . . . or a property right, in a mere rule of law." ___ S.W.3d at ____ (Wainwright, J. dissenting) (quoting *Middleton*, 185 S.W. at 560). The continuation of a rule of law in the abstract, however, is very different from the preservation of a claim that has already accrued under that law. Although a "person has no property, no vested interest, in any rule of the common law," nevertheless, "[r]ights of property which have been created by the common law cannot be taken away without due process." *Munn v. Illinois,* 94 U.S. 113, 134 (1877).

The distinction is the difference between the prospective or retroactive application of a law. Prospective laws that diminish or eliminate future causes of action (or defenses) do not ordinarily implicate vested property rights. However, where "a law changes the legal consequences of past actions, it interferes with vested rights, and courts have found that property . . . is implicated." Olivia A. Radin, *Rights as Property*, 104 COLUM. L. REV. 1315, 1331 (2004). A cause of action vests upon the occurrence of an injury, and that "vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference." *Pritchard v. Norton,* 106 U.S. 124, 132 (1882).

Our opinion in *Ex parte Abell*, which the dissent quotes at length, is to the same effect. ___ S.W.3d at ___ (Wainwright, J. dissenting) (quoting *Ex parte Abell*, 613 S.W.2d at 261). *Abell* restates the rule from *Mellinger* that the Legislature can declare prospectively that the state of facts that once created a claim, no longer will; but once "the state of facts which the law declares shall give a right comes into existence," the right is "fixed" or "vested," and the Legislature cannot retroactively undo what has already accrued. *Abell*, 613 S.W.2d at 261 (quoting *Mellinger*, 3 S.W. at 253).

The dissent accepts the rule, but only to a point. It acknowledges that a defense of repose vests upon accrual and cannot thereafter be rescinded by the Legislature:

> . . . 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). . . . In other words, when the statute extinguished a cause of action, a defendant received a vested right of repose barring the extinguished claim.

__ S.W.3d at ____ (Wainwright, J. dissenting). But the dissent refuses to extend similar protection to an accrued claim. I see no basis for limiting the Retroactivity Clause to defensive claims. *See* 1 GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 58 (1977) (observing that the "prohibition concerning 'retroactive laws' seems to spring from a general suspicion regarding all retroactive laws").

Rights acquired under existing law, whether defensive or offensive, are treated similarly under the Texas Constitution. Thus, once a statute of limitations has run or a cause of action has accrued, retroactive legislation that either revives an extinguished claim, or bars an existing one, affects a vested property right. The Retroactivity Clause applies in either instance. *See Mellinger*, 3 S.W. at 253 (observing that Retroactivity Clause applies both to vested claims and defenses). I would therefore conclude that the Robinsons' accrued claims are vested rights to which the protection of article I, section 16 may apply.

IV

Crown Cork argues, however, that even if a plaintiff has a vested right in an accrued tort claim, Chapter 149 does not intrude upon the Robinsons' vested rights for several reasons. First,

Crown Cork argues that Chapter 149 does not infringe on this right because the statute merely works a change to procedure or remedy. It is well established that a party has no vested right in a remedy or rule of procedure. *Subaru,* 84 S.W.3d at 219. The lines that divide substance from procedure or remedy, however, are notoriously difficult to draw. *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648–49 (Tex. 1971). But we need not parse these "superfine" distinctions here, *Langever v. Miller*, 76 S.W.2d 1025, 1029 (Tex. 1934), because, whether regarded as remedial or substantive, Chapter 149 entirely eliminates the Robinsons' remedy for Mundet's torts. *See Likes*, 962 S.W.2d at 502–03; *Phil H. Pierce Co.*, 263 S.W. at 907; *DeCordova*, 4 Tex. at 479–80. Though it is conceivable that Robinson may establish that one of the other defendants in the original action is jointly and severally liable for all of her damages, Robinson has a separate cause of action against each of these defendants that might properly be tried and determined as if it were the only claim in controversy. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733–34 (Tex. 1984). Chapter 149 extinguishes this separate action in its entirety, releasing Crown Cork from its obligation assumed under the merger agreement to pay for Mundet's torts. *See Sam Bassett Lumber Co. v. City of Houston*, 198 S.W.2d 879, 882 (Tex. 1947) (distinguishing permissible changes to statutes of limitations from enactments releasing or extinguishing a debt).

Crown Cork also argues that Chapter 149 does not intrude on the Robinsons' vested rights because it affects vicarious liability. In *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.), the court of appeals upheld a law retroactively repealing the statutory vicarious liability of some parents for the torts of their minor children. Though *Aetna* described vicarious liability as "remedial," it did not hold that the Legislature might

alter vicarious liabilities at will without running afoul of the Retroactivity or Contract Clauses. *Aetna* merely held that statutory causes of action do not generally give rise to vested rights. *Id.* at 285 (citing *Dickson v. Navarro Levee Imp. Dist.*, 139 S.W.2d 257, 259 (Tex. 1940)). Unlike the parents' vicarious liability for the torts of their children, successor liability is not purely statutory. Successor liability, at least when it attends a formal merger, instead arises from the contractual merger agreement and from the plaintiff's underlying tort or contract claim, and was recognized at common law. *See Tex. & P. R. Co. v. Murphy*, 46 Tex. 356, 360 (1876); *Stephenson v. Tex. & P. R. Co.*, 42 Tex. 162, 167–68 (1874); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 877–78 (Mich. 1976) ("Most of [the rules of successor liability] may fairly be said to have arisen from case law"). Though successor liability is now governed by statute, the corporations law is a shield to common law liability, not a legislatively created right within the meaning of *Dickson*.

Crown Cork next argues that Chapter 149 does not intrude on the Robinsons' vested rights because it is akin to a borrowing statute or choice of law rule mandating that Texas, rather than Pennsylvania or New York, law apply to determine corporate successor liability in asbestos cases. In *Owens Corning*, we held that a plaintiff had no vested right in a borrowing statute that permitted out-of-state plaintiffs to file stale out-of-state claims in Texas courts under Texas' more permissive statute of limitations. 997 S.W.2d at 571–73. But Chapter 149 represents not only a choice of law rule but also a change to Texas' substantive law of successor liability. *Cf. id.* at 573. Before the passage of Chapter 149, no matter which state's law applied, Crown Cork would have faced liability for Mundet's torts. TEX. BUS. ORG. CODE § 10.008(a)(3)–(4); TEX BUS. CORP. ACT § 5.06(3); N.Y. BUS. CORP. LAW § 906; 15 PA. CONS. STAT. § 1929. Indeed, Pennsylvania has already invalidated

a statute providing protections virtually identical to those found in Chapter 149. *See Ieropoli v. AC&S Corp.*, 842 A.2d 919, 921 (Pa. 2004).

Finally, Crown Cork cites *Owens Corning* to argue that Chapter 149 does not interfere with vested rights because Robinson had no legitimate expectation that Mundet would merge with a much larger corporation and because it is not inequitable to relieve Crown Cork of wholly unexpected and innocently acquired asbestos liabilities. 997 S.W.2d at 572–73. In approving the borrowing statute at issue in *Owens Corning*, we noted that it was not inequitable to require a plaintiff bringing an out-of-state claim to satisfy the statute of limitations provided by the law supplying the cause of action: "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. But Chapter 149 goes much further and "creates an immunity where none existed before." *Id.* To be sure, Crown Cork probably did not expect the merger with Mundet to entail such extensive liability, and Robinson could hardly have a settled expectation that Mundet would be acquired by a much larger corporation. But it is not inequitable to require Crown Cork to pay for Mundet's torts because when two corporations formally merge, the law regards them as one. Though this rule may permit plaintiffs to recover where they otherwise would not, "[i]n substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 & cmt. b.

Thus, I conclude that the Robinsons' accrued tort claim here is a vested right that Chapter 149 has retroactively abrogated. But this is not the end of the analysis. As the Court observes, "the constitutional prohibition against retroactive laws does not insulate every vested right from

impairment" and a compelling public interest may justify impairment, although "the heavy presumption against retroactive laws" makes instances of this quite rare. ___ S.W.3d at ___.

In fact, we have only twice recognized legislative interests of sufficient import to override vested private rights: *Barshop,* 925 S.W.2d 618, and *In re A.V.,* 113 S.W.3d 355. At issue in *Barshop* was a statute regulating water use in the Edwards Aquifer basin. Before the enactment of the law, property owners were permitted, under the rule of capture, to extract as much water as they desired from the aquifer. Concerned that the rule of capture discouraged water conservation, the Legislature authorized local water districts to regulate water use through a permitting scheme that allocated use permits on the basis of historical use. Without conducting a vested rights analysis, we held that the Legislature's interest in water conservation trumped whatever interest landowners had in the continued existence of the rule of capture because "[c]onservation of water has always been a paramount concern in Texas, especially in times, like today, of devastating drought." *Barshop,* 925 S.W.2d at 626.

In *In re A.V.*, 113 S.W.3d 355, we held that the Legislature could permissibly enact a statute terminating parental rights on the basis of a parent's future imprisonment for prior criminal convictions. Though we found that the provision did not intrude upon vested rights, we explained that, even if it had, the Legislature's interest in protecting "the safety and welfare of its children" trumped any individual interest in retaining parental rights while unable to care for the child. *Id.* at 361.

In contrast to the public interest at issue in those cases, the interest protected here is essentially a private economic one. As the Court observes, "the legislative record is fairly clear that

chapter 149 was enacted to help only Crown and no one else." ___ S.W.3d at ___. The Legislature certainly has a valid interest in protecting Crown Cork's shareholders and pensioners, and in promoting business in the state. The Legislature also has a legitimate interest in protecting defendants from excessive liability. But the Legislature's interest in protecting the financial well-being of a favored defendant is not on par with the public interest in the avoidance of catastrophic drought or the protection of child welfare. *Cf. Barshop*, 925 S.W.2d at 626; *In re A.V.*, 113 S.W.3d at 361. Private economic interests will generally not justify intrusions into the vested private rights of others. *See, e.g., Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 –12 (Tex. 1934) (holding that the interests of homeowners during the Great Depression did not justify interference with private mortgage contract rights); *Lucas v. United States*, 757 S.W.2d 687, 701 (Tex. 1988) (holding that it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."). Moreover, the Legislature's interest in protecting "innocent" defendants does not justify its assumption here of the judiciary's role of adjusting private obligations incurred under existing law. *See Landgraf*, 511 U.S. at 267 n.20 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513–14 (1989) (Stevens, J., concurring in part and concurring in the judgment)). As with the takings clause, one of the purposes of the prohibition on retroactive lawmaking is to ensure that the burdens of governance do not fall unfairly on a small number of citizens. *See id.* (citing THE FEDERALIST No. 44 (James Madison)). The legislative interest asserted here is simply insufficient to justify an intrusion into the Robinsons' vested rights, and thus I agree with the Court that the innocent successor provisions of Chapter 149 cannot be justified as a valid exercise of the police power and is, as applied here, prohibited under the Retroactivity Clause. TEX. CONST. art. I, § 16.

David M. Medina
Justice

Opinion Delivered: October 22, 2010