No. 130509

In the

Supreme Court of Illinois

CANDICE MARTIN, Individually, and as Executrix of the Estate of Rodney Martin, Deceased,

Plaintiff-Appellee,

KWAME RAOUL, in his official capacity as Illinois Attorney General,

Intervenor-Appellee,

v.

GOODRICH CORPORATION, f/k/a B.F. GOODRICH COMPANY, and POLYONE CORPORATION, Individually and as Successor-By-Consolidation to THE GEON COMPANY, n/k/a AVIENT CORPORATION,

Defendants-Appellants.

Questions of Law Certified by the
United States Court of Appeals for the Seventh Circuit, Case No. 23-2343
On Appeal from the United States District Court for the Central District of Illinois,
Case No. 1:21-cv-10323-JES-JEH, the Honorable James E. Shadid, Judge Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiff-appellee Candice Martin ("plaintiff"), along with intervenor-appellee Attorney General Kwame Raoul ("intervenor") and supporting amicus curiae, Illinois Trial Lawyers Association ("ITLA"), raise several arguments in defense of the imposition of 820 ILCS 310/1.1 ("Exception 1.1") in this action that all suffer the same flaw—they focus exclusively on *plaintiff's* newly created right of civil action, while turning a blind eye to the evisceration of *defendants'* long-held rights. The Court should decline plaintiff's invitation to ignore the long-standing authority in place to protect parties like defendants-appellants Goodrich Corporation and PolyOne Corporation (now known as Avient Corporation) (together, "defendants") from being stripped of their vested defenses arising from the employer-employee relationship with decedent, Rodney Martin ("decedent").

Plaintiff rightly spells out the very purpose and nature of the Illinois Occupation Diseases Act ("ODA"): "the ODA is to provide employees and their dependents *prompt*, *sure*, and *definite* compensation, together with a *quick* and *efficient* remedy for injuries or death *suffered in the course of employment*;" "employees are subject to statutory limitations on recovery for injuries and occupational diseases;" "the Act reflects the legislative balancing of rights;" and the ODA's exclusive remedy provisions are "part of a quid pro quo in which the sacrifices and gains of employees and employers *are to some extent put in balance*, for, while the employer assumes a new liability without fault, *he is relieved of the prospect of large damage verdicts*" and "intended to prevent

double recovery and the *proliferation of litigation*." Plaintiff-Appellee's Brief ("Pl. Br.") 9-11 (emphases added).

There is a sense of irony in beginning with this recitation though, as the remainder of plaintiff's brief ignores any sense of balance and the rights that defendants held for decades under Illinois' statutory scheme arising from the employer/employee relationship. Instead, plaintiff strings together distinguishable case law, narrow logic, and a piecemeal analysis of the ODA in an attempt to end run longstanding Illinois precedent and constitutional safeguards.

LAW & ARGUMENT

I. SECTION 1(F) IS NOT A REPOSE PROVISION OR PERIOD OF REPOSE AND THUS EXCEPTION 1.1 DOES NOT APPLY.

Because Exception 1.1 only eradicates exclusivity under the ODA where a party is barred from recovery by the operation of "a period of repose or repose period" (820 ILCS 310/1.1), plaintiff's case depends upon establishing, as a threshold matter, that 820 ILCS 310/1(f) ("Section 1(f)") is a statute of repose. Plaintiff fails to make this showing, and because plaintiff does not fall within the scope of Exception 1.1 in the first instance, the Court need not even address the temporal reach of Exception 1.1 or whether its application here violates defendants' due process rights.

A. Illinois Case Law Weighs in Favor of Finding that Section 1(f) is a Condition Precedent Not a Statute of Repose.

Plaintiff's contention that it is well-settled law and has been "long held" by Illinois courts that Section 1(f) is a statute of repose is a misrepresentation

of the law. *See* Pl. Br. 20-21. Rather, as the Seventh Circuit accurately noted and cited as the basis for its decision to certify the question to this Court, the decisions of courts "point in both directions." Brief of Defendants-Appellants ("Def. Br.") A105.

While plaintiff relies on two appellate court cases that describe Section 1(f) as a statute of repose (*Whitney v. Indus. Comm'n,* 229 Ill. App. 3d 1076, 1078 (3d Dist. 1992) and *Dickerson v. Indus. Comm'n,* 224 Ill. App. 3d 838, 841 (5th Dist. 1991)), these opinions are contradicted by three other appellate court cases that distinguish Section 1(f) from 820 ILCS 310/6(c) ("Section 6(c)"), explaining that Section 1(f) is a condition precedent to recovery under the ODA, whereas Section 6(c) is a statute of repose. *See Docksteiner v. Indus. Comm'n (Peabody Coal Co.),* 346 Ill. App. 3d 851, 856 (5th Dist. 2004); *Plasters v. Indus. Comm'n*, 246 Ill. App. 3d 1, 6-8 (5th Dist. 1993) (citing *Goodson v. Indus. Comm'n*, 190 Ill. App. 3d 16, 18 (1st Dist. 1989)); *Freeman United Coal Mining Co. v. Indus. Comm'n (Gower)*, 263 Ill. App. 3d 478, 486 (5th Dist. 1994). Plaintiff's dismissive contention that these contrary opinions "simply used different terminology" is unavailing. Pl. Br. 23. As plaintiff points out in other portions of her brief, (1) words matter (Pl. Br. 28), and (2) the Fifth District opinions cited by defendants succeed *Dickerson*, and thus could have addressed or adopted *Dickerson's* statute of repose definition and/or terminology (*see* Pl. Br. 23), but they did not.

In a similar vein, plaintiff argues that this Court's holding in *Folta v. Ferro Engineering*, 2015 IL 118070, is consistent with the holdings in *Whitney* and *Dickerson*. Plaintiff is again mistaken. The *Folta* opinion is consistent with the authorities cited by defendants that likewise declined to define Section 1(f) as a statute of repose. In *Folta*, Section 6(c) was at issue, and this Court held that Section 6(c) "acts as a statute of repose" and "creates an absolute bar on the right to bring a claim under the ODA" after expiration of the applicable repose period "regardless of whether an action has accrued or whether an injury has resulted." 2015 IL 118070 at ¶ 33. After explicitly defining Section 6(c) as a statute of repose, this Court *sua sponte* raised Section 1(f); and instead of defining the provision in the same terms as Section 6(c), it stated that Section 1(f) merely "function[s] as a temporal limitation." *Id.* ¶ 42.

Contrary to plaintiff's suggestion, the terms adopted and the language employed by courts, especially this Court, matter. Section 1(f) is not transformed into a repose provision merely because plaintiff thinks it "looks like a duck." Pl. Br. 21. It is only a repose provision if this Court says that it is—and in *Folta*, it did not.

B. The Legislature Enacted Exception 1.1 to Address the 25-Year Repose Periods in Section 6(c), Not the Condition Precedent in Section 1(f).

A comprehensive review of the transcripts of the Illinois Senate and House detailing the presentation and debate Senate Bill 1596, which was later enacted and written into law as Exception 1.1, demonstrate that the focus of the new statute was to address the reality of the 25-year statute of repose found

in Section 6(c). *See, e.g.,* Transcript of Illinois Senate Debate taken March 6, 2019, at Def. Br. A140 ("Under current law the repose period is twenty-five years."); Transcript of Illinois House of Representatives Debate taken March 6, 2019, Def. Br. A169 (Rep. Hoffman arguing "Senate Bill 1596 is an initiative that would ensure that individuals who are affected by diseases such as mesothelioma would actually be adequately compensated," as *Folta* "took away" the right to be compensated after the 25-year statute of repose); *Id*. A177 (Q: "The statutes of repose for both those Acts, and I'm referring to the Workers' Compensation Act and the Workers' Occupation Disease Act [sic], is ***25 years*** from the date of last exposure, ***correct?*** A: "***Yes***.") (emphases added); *Id.* A179 ("This legislation...is going to allow individuals who…have contracted some type or been in contact with…asbestos or some other type of chemical, and ***after 25 years***, they then discover that they have some type of terrible disease.") (emphasis added); *Id*. A197 ("Well, the current statute [of] repose is 25 years.").

Plaintiff argues that this Court should ignore the helpful and elucidative legislative history of Exception 1.1 in interpreting whether Section 1(f) is a statute of repose and falls within its scope because, according to plaintiff, Exception 1.1 is not ambiguous. This argument is also without merit. If Exception 1.1 was as clear and unambiguous as plaintiff claims, the question of its construction would not be before this Court. Nor does plaintiff's argument find support in the comments of Representative Hoffman, who "clearly stated

that the intent of the amendment was that 'if you're exposed to some of these *asbestos* or you're exposed to *benzene* or you're exposed to *radioactive waste*, or you're exposed *to whatever else is going to be put forward and spewed forward* by businesses in the future and that disease lays dormant **for over 25 years**, you should be able to recover even though – even though it doesn't manifest itself **until 25 years**.'" Pl. Br. 31 (italics in original, bold emphases added). While plaintiff attempts to downplay the 25-year language by emphasizing the various diseases mentioned by Representative Hoffman, the transcript leaves no doubt that the legislative purpose was to address diseases with a 25-year manifestation period,[1] implicating the various 25-year repose periods in

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[1] In support of the argument that Section 1(f) is a statute of repose, ITLA argues that the legislative history and debate "clearly reflect[]" such an intent. Brief of Amicus Curiae ITLA ("ITLA Br.") 8. At no point does ITLA cite to any discussion about Section 1(f) specifically, nor could it. The transcript only references a 25-year statute of repose. A 2- or 3-year time period was raised only once when Representative Ugaste asked whether diseases "that could be currently covered under the time periods of the two to three years within the Occupational Disease Act" are "included in this piece of legislation?" The conversation that followed implies that the answer is no:

> Hoffman: "Well, I would think that ... and just so we're clear with regard to the current workers' compensation in the statute of repose that statute of repose simply applies, my understanding, to asbestos and exposure to radiological materials, but having said that if there is some other type of exposure to... it could be benzene or something else that later manifests itself in a diagnoses after the 25 years, and it is not diagnosed prior to the 25 years, then you can avail yourself of the provisions of this law."
>
> Ugaste: "Okay, but it would definitely ... it would definitely have to be after the 25-year period not just the 2- to 3-year period, Leader?"
>
> Hoffman: "Yeah..." [...]

Def. Br. A191-192.

Section 6(c), not the 2 or 3-year condition precedent in Section 1(f) at issue here.

C. Defendants Have Not Conceded That Section 1(f) is a Statute of Repose.

Plaintiff's gamesmanship in citing to the portions of defendants' brief where defendants assumed for the purpose of argument that Section 1(f) is a statute of repose and claiming that defendants conceded that Section 1(f) is a repose period is another red herring. *See* Pl. Br. 26 (citing Def. Br. 29, 37, 38). Defendants have never conceded that Section 1(f) is a statute of repose except for the sole purpose of addressing the issues of retroactivity and constitutionality in the event the Court finds that Section 1(f) is a statute of repose and Exception 1.1 applies. *See* Def. Br. 16, 23. Defendants cannot answer or even begin to address the second and third questions certified to this Court without assuming *arguendo* that Section 1(f) is a repose period, just as the Court need not answer the second and third questions presented if it finds that Section 1(f) is not a repose period.

Based on the language of the statutes, the legislative history, and the opinions of Illinois appellate courts, Section 1(f) of the ODA is not a period of repose or repose provision for purposes of Exception 1.1. The answer to the first question certified to this Court is "NO." Exception 1.1 does not apply and the Court need not consider the second and third questions presented.

II. EXCEPTION 1.1 DOES NOT APPLY HERE PURSUANT TO THE ILLINOIS STATUTE ON STATUTES.

Whenever a new law or amendment is enacted and a party's prior conduct ***and*** rights are involved, Illinois courts must employ the modified *Landgraf* analysis to determine whether the law is retroactive or prospective. *See Perry v. Dep't of Fin. & Prof'l Reg.,* 2018 IL 122349; *see also Landgraf v. USI Film Products,* 511 U.S. 244, 278 (1994) (supporting a "presumption against applying statutes that affect substantive rights, liabilities, or duties to conduct arising before their enactment").

Under this analysis, courts first look to whether the language of the new law clearly expresses its temporal reach, and if not, the default rule in Section 4 of the Statute on Statutes (5 ILCS 70/4) ("Section 4") applies. Section 4 provides "a clear legislative directive as to the temporal reach of statutory amendments and repeals when none is otherwise specified." *Doe v. Diocese of Dallas*, 234 Ill. 2d 393, 406 (2009). A court is to apply a new statute in accordance with Section 4's directive unless to do so would interfere with a constitutional right. *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶¶ 20-25, 72 N.E.3d 346 (Ill. 2016); *see also Perry,* 2018 IL 122349, ¶¶ 41-43.

Plaintiff does not dispute that Exception 1.1 does not clearly express its temporal reach; nor does plaintiff dispute that Section 4 must govern its intended application. Where plaintiff's argument goes awry is in its disregard for the clear mandate set out in Section 4:

> ***No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to***

> any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or ***any right accrued, or claim arising under the former law,*** **OR** ***in any way whatever to affect*** any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or ***any right accrued, or claim arising before the new law takes effect,*** save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.

5 ILCS 70/4 (emphases added). Illinois courts have consistently interpreted this language as prohibiting any new, substantive law from being construed and applied in a manner that strips or impairs any right that accrued or claim that arose prior to the effective date of the new law. *Caveney v. Bower*, 207 Ill. 2d 82, 95 (2003) ("[S]ection 4 represents a clear legislative indication that the retroactive application of substantive statutory changes is forbidden."). Yet, this is exactly what plaintiff is asking this Court to do here.

A. Exception 1.1 is a Substantive Change That Impairs Defendants' Rights Already Accrued and Guaranteed Under the ODA.

While notably not fully addressed by plaintiff in answering the second question presented, Exception 1.1 is a substantive change in Illinois law that creates a "***non-waivable right***" to bring a civil action for a previously barred claim—a right that that did not previously exist under the ODA. 820 ILCS 310/1.1 (emphasis added). Contrary to plaintiff's representations (Pl. Br. 36), defendants do not argue that the application of Exception 1.1 would be contrary to the directives of Section 4 solely because this case involves 40-year-old facts. Rather, it is the fact that Exception 1.1 is a new, substantive change that directly affects defendants' vested, accrued defenses arising out of the

employment relationship, which, until May 2019, governed defendants' potential liabilities by barring decedent or plaintiff from asserting any claim for damages caused by an occupational disease contracted from exposures in the 1960s to the early 1970s, during his employment, in any forum, regardless of when or even if the disease ever manifested.

In an attempt to avoid the mandate of Section 4, plaintiff argues, incorrectly, that the substantive change and effect of Exception 1.1 does not "matter[] for this case" because the amendment is being applied "prospectively" only, and disregards defendants' prior rights. Pl. Br. 34-35. In an attempt to muster support for this argument, plaintiff relies on wholly distinguishable cases where no accrued rights were involved (*see Barajas v. BCN Tech. Servs., Inc.,* 2023 IL App (3d) 220178; *Cotton v. Coccaro,* 2023 IL App (1st) 220788, *pet. for leave to appeal den'd*, 468 Ill. Dec. 563 (2023); *First Midwest Bank v. Rossi,* 2023 IL App (4th) 220643; *Johnson v. Ames,* 2016 IL 121563); where the plain text of the statute set out its temporal reach and intent (*e.g., Rossi,* 2023 IL App (4th) 220643); where the new law was not a substantive change but merely a procedural change to common law and inherently tied to litigation (*e.g.*, *Cotton*, 2023 IL App (1st) 220788); where the injurious conduct, the injury, and the cause of action all occurred *after* the amendment (*e.g., Barajas*, 2023 IL App (3d) 220178); and where the issue did not even involve the application of a statute, but rather whether a referendum could be added to a ballot or whether it was too vague and ambiguous in the absence of a statement

of its temporal reach (*e.g., Johnson,* 2016 IL 121563 (new statute preventing candidates who have already served two full terms from running in future elections is prospective)). These opinions have no bearing on the facts here: where both the injurious conduct (*i.e.*, the alleged workplace exposure ending by early 1974) had occurred and the rights to defend against any claims for damages had accrued by 1976 at the latest, as guaranteed by statute, decades before the disease manifested and plaintiff attempted to invoke Exception 1.1 to pursue a brand new civil cause of action.

B. The Directives of Section 4 Serve to Protect Defendants' Existing Rights, Not Plaintiff's Newly Obtained (and Previously Barred) Cause of Action.

Plaintiff improperly attempts to narrow this Court's review of prospectivity and retroactivity to focus on when ***plaintiff's*** cause of action arose and was filed. Pl. Br. 35, 37. This is not the proper inquiry here. Retroactivity is not defined in terms of when the case is filed or when the new right or claim provided by a new statute accrues, but rather in terms of the new law's effect on already accrued rights. *First of Am. Trust Co. v. Armstead*, 171 Ill. 2d 282, 289 (1996) ("[R]etroactivity is defined in terms of the effect an amendment has on vested rights."). While it is true that a statute is not retroactive solely because it draws on antecedent facts, plaintiff ignores the long-established principle that a new law that takes away or impairs rights and defenses already acquired under former laws are ***retroactive*** by nature. *Id*. 290 (citing *U.S. Steel Credit Union v. Knight,* 32 Ill. 2d 138, 142 (1965)). It is under this principle that Section 4 prohibits courts from interpreting and

applying new, substantive changes for which there is no explicit temporal directive in a manner that takes away or impairs in any way a right bestowed and accrued under the former law. *See People v. Glisson*, 202 Ill. 2d 499 (2002) (first applying the Section 4 approach and explaining that "Section 4 prohibits retroactive application of statutory changes that affect substantive provisions or vested rights."); *see also Caveney*, 207 Ill. 2d at 91-96 (adopting *Glisson* approach for all civil actions and finding that plaintiffs could not seek a tax credit under the new amendment because it was substantive and could not retroactively apply to past expenditures).

Plaintiff's cited authorities neither dispute nor contradict this principle. *See* Pl. Br. 36 (citing *U.S. Steel,* 32 Ill. 2d at 142 (finding that the legislature intended the law to be retroactive); *Hiroshi Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation,* 2014 IL 116023, ¶ 21-26 (permitting the application of a statute that was procedural, explicitly prospective, and did not involve a vested right); *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27 (2001) (relying on the former two-step approach and finding that it was the intent of legislature to apply the statute retroactively); *People v. Valdez*, 79 Ill. 2d 74, 81 (1981) (amendment to acquittal procedure could be applied because (1) provisions of the statute were triggered not by his past offense but by his acquittal, which occurred *after* the enactment, and (2) the change did not affect any right acquired before the date of the change); *Sipple v. Univ. of Ill.*, 4 Ill. 2d 593, 597 (1955) (statute permitting the certification of candidates who

passed examinations conducted prior to the statute's enactment was not retroactive); and *Midwest Generation, LLC v. Ill. Pollution Control Bd.*, 2024 IL App (4th) 210304, ¶ 18 (finding that the legislature granted the agency authority to promulgate rules that are retroactive but that the rule at issue had no retroactive effect just because it relied on when the impoundment closed to determine which regulations it would be subject to).

Based on the plain text of Section 4, the proper focus for analysis here is not *plaintiff's* discovery of a cause of action or filing of the action, but rather the prior accrual of *defendants'* right to assert the exclusivity and repose defenses, as guaranteed under the ODA's statutory scheme, to avoid liability for the decades old conduct at issue.[2] 5 ILCS 70/4. If Exception 1.1 were to apply, it would be contrary to the mandate of Section 4 because it would impair defendants' antecedent defenses guaranteed by statute and defendants' rights to assert these defenses that accrued in the 1970s during the employment relationship. From the moment that an employee crosses the threshold of the workplace, he obtains the right to recover under the ODA for any compensable injury resulting from occupational exposure, while his employer obtains the right to assert the exclusivity and repose defenses to limit its liability. To say that Exception 1.1 does not have any impact on defendants' already accrued

[2] ITLA improperly ignores Section 4 entirely and instead argues that the law at the time of disablement applies because that is when the cause of action accrues. As with plaintiff's argument, this approach is contrary to Section 4's review of whether a right had already accrued in favor of defendants.

defenses is illogical, as the amendment eviscerates the repose and exclusivity provisions and defendants' long-held expectations that they would not be hauled into court for common law claims based on a former employee's alleged exposures to vinyl chloride nearly half a century ago in the course of employment.

A similar situation was addressed by the First District in *Kim v. Kim*, 196 Ill. App. 3d 1095 (1st Dist. 1990). There, plaintiff filed suit against her husband for negligent conduct that occurred during the course of their marriage. *Id.* 1096-97. To bring the claim, plaintiff relied on an amendment to the interspousal immunity statute, effective prior to suit, which provided a spouse with a new right to sue the other for a tort committed while married. *Id.* The former version of the statute, which was in place at the time of defendant's alleged conduct, prohibited a spouse from suing for tortious conduct "committed during coverture [marriage]," unless the tort was intentional. *Id.* 1097. Because the new statute did "not expressly state the legislature's intent as to retroactivity," the court looked to whether the change in law was substantive or procedural. *Id.* 1100. The court found that the amendment, as here, was a substantive change because it "conferred the new ability upon a spouse to file a cause of action for nonintentional torts and exposed spouses to liability for nonintentional torts for which their spouses could not have sued them prior to the amendment." *Id.* Therefore, although the case was filed after the new right was obtained, the court held that the

amendment could not be applied retroactively to impose liability on the defendant. *Id.*; *see also Loch v. Bd. of Educ.,* No. 3:06-cv-17-MJR, 2007 U.S. Dist. LEXIS 75589, at *7-8 (S.D. Ill. Oct. 11, 2007) (holding that the statute providing a parent's standing under the Individuals with Disabilities Education Act was substantive and could not be retroactively applied because it would impermissibly impact the defendant's liability or impose new duties on the defendant for claims dismissed months prior).

Exception 1.1 is similarly retroactive here, but goes one step further by impairing *two* defenses held by defendants against damages arising from claimed exposures occurring decades ago during the course of employment. Prior to Exception 1.1, neither plaintiff nor decedent could hold defendants liable for "damages, disability or death caused or contributed to by any disease contracted or sustained ***in the course of employment***." 820 ILCS 310/11 (emphasis added). Because the defense was tied to decedent's employment and defendants' conduct during employment, defendants' right to exclusivity had certainly accrued by late 1976 for this claim and defendants gained the expectation that they would not be exposed to future ***civil*** liability, "at common law or otherwise," for diseases arising out of employment. *Id.* Furthermore, when decedent's disease failed to manifest by mid-1976, defendants accrued the additional right to assert Section 1(f) in defense of future statutory liability. 820 ILCS 310/1(f). Thus, when taken together, by the time of Exception 1.1's enactment, the manifestation of decedent's injury, and the filing of this action,

defendants were already vested with an accrued right to be free from ***any*** liability, because the "complete and only measure of the liability of the employer" for damages resulting from decedent's disease, contracted via alleged exposures in the course of employment, had been barred for decades. 820 ILCS 310/1(f), 5(a), 11; *Folta*, 2015 IL 118070, ¶ 33. Thus, interpreting the 2019 law to apply to the present action, in which plaintiff seeks damages arising from a disease contracted from exposures that occurred decades ago, only during the course of employment, would impair and affect defendants' rights accrued under the ODA and would violate the directive of Section 4.

Accordingly, if Section 1(f) falls within Exception 1.1, then in answer to the second certified question, this Court should find that the temporal reach of Exception 1.1 is dictated by Section 4 and, on the facts before the Court, cannot be applied to affect defendants' already accrued rights and defenses, as Section 4 "step[s] in and render[s] Exception 1.1 inapplicable." Def. Br. A108. Because plaintiff cannot invoke Exception 1.1 to pursue claims against defendants based on decedent's alleged occupational exposure, the Court need not reach the third certified question—whether the application of Exception 1.1 here would violate defendants' due process rights.

III. EXCEPTION 1.1 AS APPLIED TO DEFENDANTS VIOLATES THE ILLINOIS CONSTITUTION'S DUE PROCESS CLAUSE BY STRIPPING DEFENDANTS OF THEIR VESTED RIGHTS.

Even if this Court were to conclude that the legislature intended Exception 1.1 to apply in cases like this one, the legislature's intent should not be given effect because, as applied, Exception 1.1 violates defendants' due

process rights under the Illinois Constitution by stripping them of their vested defenses. *See Commonwealth Edison Co.*, 196 Ill. 2d at 38; *see also Galloway v. Diocese of Springfield in Ill.*, 367 Ill. App. 3d 997, 1000 (5th Dist. 2006) ("*Commonwealth Edison Co.* makes clear that previous decisions that define rights that are 'vested' and thus protected from the impact of statutory change by the due process clause of the Illinois Constitution remain relevant to the extent that they address the issue of constitutionality.").

The principles applied in the constitutional analysis of Exception 1.1 reflect the same principles applied in the Section 4 analysis. And notably, plaintiff's and intervenor's constitutional arguments suffer the same fatal flaw as their arguments posed in response to question two—they focus on plaintiff's newly created right of action, which did not exist under the former law, rather than defendants' long vested defenses.

A. Defendants Have a Vested Property Right in Both the Exclusivity and Repose Defenses Against Liabilities Arising From Decedent's Employment.

This Court has defined a vested right as "an expectation that is so far perfected that it cannot be taken away by legislation" and "a complete and unconditional demand or exemption that may be equated with a property interest." *Armstead,* 171 Ill. 2d at 291; *see also* Ill. Const. Art. 1, § 2. A vested right in a defense is as fully protected from being impaired by an act of the legislature as is a vested cause of action. *Lazenby v. Mark's Constr., Inc.*, 236 Ill. 2d 83, 95 (2010). Thus, a vested right of defense "cannot be ignored" where,

as here, "the legislature has subsequently changed its position." *M.E.H. v. L.H.,* 177 Ill. 2d 207, 218 (1997).

For decades, defendants have been assured by statute that they would be free from any potential liability for damages caused by a disease contracted or sustained in the course of employment by operation of the exclusivity provisions and Section 1(f). As applied here, Exception 1.1 unconstitutionally destroys this perfected expectation. Urging the Court to disregard defendants' existing rights in favor of creating a new right for plaintiff, plaintiff and intervenor incorrectly argue that there is no constitutional violation because there are no vested rights involved.

1. Defendants have a vested right in Section 1(f)'s temporal limitation that would be eviscerated by application of Exception 1.1.

Plaintiff concedes that defendants "enjoyed a vested right in the statute of repose defense." Pl. Br. 42. There is no merit to plaintiff's contention that this vested right is a "nonissue" because the defense can still be invoked to bar plaintiff from obtaining statutory compensation. *Id*. In reality, if Exception 1.1 is applied in this case, the purpose and function of the repose provisions within the ODA's statutory scheme is rendered meaningless.

Focusing on the language in Section 1(f) that refers to a bar on statutory compensation, plaintiff overlooks that under the former version of the statute, statutory compensation was the "full, complete and ***only*** measure" of defendants' potential liability. 820 ILCS 310/11. As such, Section 1(f), coupled with the exclusivity provisions, in practice, operated to insulate defendants

from any and all liability, at common law or otherwise, upon vesting. Plaintiff and intervenor miss this reality by improperly reading Section 1(f) in isolation from the exclusivity provisions. *See* Brief of Intervenor-Appellee ("Int. Br.") 16; Pl. Br. 42-43. The two serve the common purpose of limiting employer exposure.

The ODA is a comprehensive statutory system governing workplace disease claims and should thus be read as a whole. *See Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001); *Kleber v. CareFusion Corp.*, 914 F.3d 480, 483 (7th Cir. 2019). When the exclusivity and repose defenses are read together, as this Court did in *Folta*, it is clear that the vesting of a repose provision, in conjunction with the exclusivity guaranteed during the employer-employee relationship, provided defendants with the right to be free from liability for any claims that fell within the scope of the ODA relating to injuries from occupational exposures. *See Folta*, 2015 IL 118070 ¶¶ 30-42.

By providing plaintiff a wholly new avenue to assert civil claims against defendants for injuries arising from the same exposure and employment relationship that were previously barred from recovery, Exception 1.1 destroys the purpose of the repose provisions—which is to terminate the possibility of stale claims and liability after a defined period of time and curtail long tail exposure claims—and renders the repose bar meaningless by exposing defendants to indefinite liability. *See Folta*, 2015 IL 118070, ¶ 33 ("The purpose of a repose period is to terminate the possibility of liability after a

defined period of time. After the expiration of the repose period, there is no longer a recognized right of action.")

This Court has repeatedly held that legislative attempts to revive previously barred claims, whether directly or indirectly, violate due process guarantees. *See, e.g., Diocese of Dallas,* 234 Ill. 2d at 411-12 (citations omitted); *M.E.H.*, 177 Ill. 2d at 218; *Wilson v. All-Steel, Inc.,* 87 Ill. 2d 28 (1981). The Court's holding is *Wilson* is particularly instructive here.

In *Wilson*, the plaintiff-employee was discharged by her employer and filed a discrimination claim with the Illinois Fair Employment Practices Commission (the "Commission") under the Fair Employment Practices Act ("FEPA"). 87 Ill. 2d at 31. Over a year later, the Commission issued a complaint for the plaintiff's cause, but the claim was ultimately dismissed based on the Commission's failure to comply with a FEPA provision that required complaints to be issued within 180 days after the filing of a charge, in recognition of the employer's "right to an expeditious determination of liability." *Id.* 31, 36. While plaintiff waited for the Commission's issuance of a complaint, the Illinois General Assembly amended FEPA to include a provision (later codified in the Illinois Human Rights Act) that created a new cause of action for persons, like plaintiff, whose claims had been barred by administrative delay. *Id.* 32-33. Pursuant to this new cause of action, plaintiff brought a claim against her employer in civil court. *Id.* 33. Plaintiff's employer argued that the new claim stripped it of its property right without due process

by reviving a previously barred claim in violation of the Illinois Constitution. *Id.* This Court agreed.

As this Court explained: "There can be no question that the legislature has broad discretion in passing statutes designed to remedy what it perceives to be undesirable results reached under existing law...so long as they do not violate constitutional guarantees." 87 Ill. 2d at 35. In *Wilson*, "the evil sought to be cured" by the amendment was the possibility that an employee may lose his or her right to recover due to administrative delay beyond his or her control. *Id.* 36. To remedy this harsh result, the amendment did not eliminate the 180-day requirement, but merely circumvented the rule by granting a new right to seek relief in a civil court where an administrative complaint was not issued by the Commission within 180 days. *Id.* 32. This Court found that in creating this new cause of action, the amendment unconstitutionally attempted to revive a previously barred claim and impaired the employer-defendant's vested right to invoke the 180-day requirement defense which "was included...for the specific purpose of conferring a benefit upon a person charged under [FEPA]." *Id.* 42. Therefore, application of the amendment violated the employer's right to due process under the Illinois Constitution. *Id.*

Similarly, Exception 1.1 is unconstitutional as applied to defendants here because the amendment provided plaintiff the ability to circumvent the statutory bars with a new civil cause of action. Before 2019, there could be no recovery in any forum for disease-related injuries allegedly arising from

decedent's occupational exposure in the 1970s, as the ODA provided the exclusive remedy and any claims had been barred for more than four decades under Section 1(f). With the expiration of the repose period, defendants' right to invoke the liability defense vested. *See Folta,* 2015 IL 118070, ¶¶ 33-41. Now, if Exception 1.1 is applied, claims against defendants that were forever barred under the statutory scheme more than four decades ago are revived by giving parties an alternate path to relief, and like the defendant in *Wilson*, defendants are stripped of their vested rights to assert the repose bar, and exclusivity bar, in violation of the Illinois Constitution.

2. Defendants have a vested right in the exclusivity defenses that would be extinguished by application of Exception 1.1.

i. Defendants gained a right to exclusivity at the commencement of the employer-employee relationship as to any damage or injury arising out of or occurring in the course of employment.

Plaintiff's argument that defendants had no vested right in the exclusivity provision because plaintiff's cause of action had not yet accrued fares no better. First, as discussed above, the exclusivity provisions cannot be read in isolation because they operate and vest in conjunction with the ODA's repose provisions to provide a complete defense against stale claims and curtail any liability in any forum in perpetuity.[3] *See Folta,* 2015 IL 118070, ¶¶ 32-43.

[3] Plaintiff misrepresents that Sections 5 and 11 "speak to 'damages' and 'civil liability'" while sections 1(f) and 6(c) "concern 'compensation' recoverable under the statute," in a failed attempt to distinguish the two. Sections 5 and 11 expressly concern compensation and provide that "compensation" is the sole measure of liability under the ODA. *See* 820 ILCS 310/5, 11.

Second, the language of Section 11 makes clear that defendants' right to exclusivity is tied directly to the employer-employee relationship, providing that defendants' liability for compensation and benefits "shall be exclusive and in place of any and all other civil liability whatsoever, at common law or otherwise" on account of damage, disability or death "caused or contributed to by any disease contracted or sustained ***in the course of employment***," as is the claim here. 820 ILCS 310/11 (emphasis added). Plaintiff's argument that the disability did not arise until December 2019 misses the point. By the time exposures ended in early 1974, defendants had undeniably gained a vested expectation "so far perfected" that they would be able to assert the exclusivity provisions in defense of any claim for damages or injury, regardless of when the disablement occurred, provided that it arose from decedent's exposure during the period of employment. Plaintiff and intervenor cite no authority for the suggestion that parties can only gain vested rights in defenses supplied by statutes of repose or statutes of limitations and not in an exclusive remedy provision. Indeed, the exclusivity defense that defendants gained in conjunction with decedent's employment in the 1970s is no different than the defense defendants gained when the period in Section 1(f) expired, a defense that plaintiff and intervenor both admit "vested" in defendants. Pl. Br. 42; Int. Br. 16.

When the employment relationship ended in 2012, defendants had the security and certainty of knowing that the only future liability, not already

barred, that they might face for past conduct was the potential compensation set out clearly under the ODA's statutory scheme.[4] Defendants were entitled to rely on this expectation during the course of decedent's employment and forever thereafter. For instance, in reliance on this right to defenses and the belief that they would not face unpredictable future civil damages, defendants could make informed decisions regarding insurance coverage and negotiate decedent's wages and benefits with that insurance cost structure in mind. Exception 1.1 upsets this commercially beneficial transparency, interferes with the expectations tied to the employer-employee relationship, and strips defendants of the vested expectations guaranteed by the ODA by imposing new liabilities stemming from a long-past employment relationship with decedent. Neither plaintiff nor intervenor cite any case in which the Court has upheld such a change; nor can they, as it is in direct violation of defendants' due process rights.

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[4] ITLA argues that the exclusivity provisions have never "completely and absolutely shielded employers from civil liability." ITLA Br. 22. ITLA relies on *Doyle v. Rhodes,* 101 Ill. 2d 1, 10-11 (1984) in support of this point, but *Doyle* stands only for the proposition that an employer is not immune from *all* liability because it has potential liability to third-parties under the Contribution Act, not liability to an employee under the ODA or Workers' Compensation Act ("WCA"). The *Folta* opinion also clarifies that the common law exceptions to the ODA and WCA that impose civil liability on employers only apply where the disease falls outside the jurisdiction, scope, and coverage of the acts. 2015 IL 118070, ¶¶ 57-83. Where the ODA applies, exclusivity does too. To escape exclusivity, it is the *plaintiff's* burden to prove that an injury falls within an exception, which plaintiff has expressly waived. *See Hartline v. Celotex Corp.,* 272 Ill. App. 3d 952, 955 (1st Dist. 1995).

Notably, plaintiff and intervenor also fail to cite a single case in which an Illinois court upheld the removal of any defense enshrined in the ODA or the WCA. To fill this void, plaintiff artfully asserts that "this Court has previously upheld amendments to the WCA to remove defenses thereto"—as opposed to defenses *provided therein*. Pl. Br. 43. The opinions cited by plaintiff did not involve the removal of vested rights or of defenses set out in the statutes themselves; rather, in those cases, the Court upheld the legislature's removal of *common law* rights and defenses through its enactment of the WCA and amendments thereto. Pl. Br. 43-44 (citing *Deibeikis v. Link-Belt Co.*, 261 Ill. 454 (1914) and *Strom v. Postal Telegraph-Cable Co.*, 271 Ill. 544 (1916)).

In a similarly misleading fashion, plaintiff suggests that defendants should have no expectation in the continuation of the exclusivity provisions because they are "statutory in nature" and "laws do not create private contractual or vested rights, but merely declare a policy to be pursued until the legislature ordains otherwise." Pl. Br. 45. The cases cited by plaintiff in support of the latter proposition offer no guidance here, as they involved statutes governing *public* rights to funding from the legislature, whereas the statutory provisions at issue here implicate private rights that arise from the contractual relationship between employer and employee. *See* Pl. Br. 45 (citing *People ex rel. Sklodowski v. State,* 182 Ill. 2d 220, 231-32 (1998) and *Jones v. Mun. Emps.' Annuity & Ben. Fund of Chi.,* 2016 IL 119618, ¶ 40). And, as to the former argument, while it is true that no person has a vested interest in a

rule of law which entitles him to insist that the law shall remain unchanged, it is also well settled that the legislature may only pass statutory amendments where there is no interference with rights which have already accrued and vested under an existing statute. 5 ILCS 70/4; *see also Wilson,* 87 Ill. 2d at 35.

ii. Defendants' Right to the Assert the Exclusivity Defenses Vested Prior to Exception 1.1 and Decedent's Disablement.

Despite defendants' well-settled expectations and reliance on their vested right to assert the exclusivity provisions in defense of any potential liability based on conduct that occurred during the employment relationship, plaintiff argues that the right to assert the exclusivity defense could not accrue before the amendments took effect in May 2019 because the injury had not yet manifested and plaintiff's cause of action had not yet accrued.

As an initial matter, this argument is nonsensical and ignores that the reason plaintiff's cause of action did not accrue prior to enactment is because the exclusivity provisions and statutes of repose operated, ***as designed***, to extinguish any cause of action relating to disability or death arising from an exposure-related disease contracted during employment, regardless of when (or whether) the injuries themselves manifested. Plaintiff did not have a cause of action that defendants could raise an exclusivity defense against prior to enactment of Exception 1.1 because it was Exception 1.1 that ***created*** plaintiff's new cause of action and imposed upon defendants this new liability for decades old conduct.

Plaintiff's argument also seemingly creates a novel, inflexible default rule where one has already been adopted. Indeed, it is a longstanding principle that "[a] right is vested when its enjoyment, present or prospective, has become the property of a particular person as a [present] interest." *Arnold & Murdock Co. v. Indus. Comm'n*, 314 Ill. 251, 256 (1924) (finding that plaintiff had a vested right in his compensation judgment under the WCA and that the legislature was prohibited from extinguishing it by subsequent enactment); *see also In re Marriage of Duggan,* 376 Ill. App. 3d 725, 729 (2d Dist. 2007) ("[A] right has not vested until it is so perfected, complete, and unconditional that it may be equated with a property interest.") (citing *Armstead*, 171 Ill. 2d at 290-91); *Smith v. Hill*, 12 Ill. 2d 588, 594 (1958) (a right vests when it "become[s] a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another").

Rather than rely on the longstanding principle that adapts to the particular rights and facts at issue, plaintiff borrows a single, conclusory statement from one case, *Heinrich v. Libertyville High School*, 186 Ill.2d 381, 405 (1998) to create an inflexible rule that all affirmative defenses vest when the related cause of action accrues. This myopic reliance on *Heinrich* is misplaced. Not only does *Heinrich* fail to provide any explanation for its conclusion that the defendant's statutory defense "vested when the cause of action accrued," but it also addresses a distinguishable factual scenario where

the injury and conduct occurred at nearly the same time. *See id*. 384-86, 405.[5] The situation here is far more complex, as several decades passed between the alleged injurious conduct, *i.e.*, the alleged exposure to vinyl chloride monomer in the 1960s to the early 1970s, and decedent's diagnosis. The flexible, general rule, which looks to the nature of the rights at issue and the expectations attached thereto, is better suited to address the present situation and fill the noticeable gaps in plaintiff's argument, including those caused by defenses that have been held to vest at a time other than the accrual of the cause of action. *See M.E.H.*, 177 Ill. 2d at 214-15 (statute of repose defense vests upon expiration of repose period); *Diocese of Dallas*, 234 Ill. 2d at 409 (statute of limitations defense vests upon expiration of limitations period); *Wilson*, 87 Ill. 2d at 42 (FEPA defense which had "not been labeled a statute of limitations," but operated like one, vested once the 180-day period had run); *Foster Wheeler Energy Corp. v. LSP Equip., LLC*, 346 Ill. App. 3d 753, 761 (2d Dist. 2004) ("It is well settled that a party's rights under a contract become 'vested' for the

[5] Intervenor similarly places undue emphasis on the singular statement in *Heinrich* and only cites one other case, *Zielnik v. Loyal Order of Moose, Lodge No. 265,* 174 Ill. App. 3d 409 (1st Dist. 1988), in support of the supposed "general rule" that a plaintiff's right to a cause of action and a defendant's right to a defense vest at the same time. As with *Heinrich*, *Zielnik* is distinguishable from the case at bar, in that the injury and conduct at issue occurred simultaneously. *Zielnik* also lends support *against* intervenor's argument in that the court there emphasized that the rights and obligations became vested *as of the date of the occurrence*, a time at which it did not have the legal capacity to sue or be sued, and thus demonstrates that the proper focus of the inquiry is the date of exposure or the time at which decedent "contracted" the disease, not when the disease manifested.

purposes of the retroactive application of a statute when the contract is entered into rather than when the rights thereunder are asserted. The Supreme Court's opinion in *Landgraf* did not alter these principles, but reaffirmed the protection against retroactive application of a new statute to vested contract rights.") (internal citation omitted).

B. Exception 1.1 Impairs Defendants' Rights Through its Creation of a New Cause of Action.

In a last-ditch attempt to avoid Exception 1.1's unconstitutional realities, plaintiff argues that even if defendants maintain a vested right in asserting the exclusivity provisions and Section 1(f) in defense of liability, Exception 1.1 does not unconstitutionally and retroactively impair these rights because the amendment does not "create" new liabilities or claims but merely adjusts the remedies available to plaintiff. Pl. Br. 48-50. As set out exhaustively above, and throughout defendants' opening brief, this is far from true. The very language of Exception 1.1 grants certain parties standing under a new "nonwaivable right to bring such an action against any employer or employee." 820 ILCS 310/1.1. Plaintiff never had this right of civil action before. By granting this new right of action, the amendment imposes all new civil liabilities on defendants and strips them of their vested rights to invoke the repose and exclusivity defenses under the ODA in violation of due process.

Accordingly, because Exception 1.1 cannot apply in this case without stripping defendants of their vested property right to assert their accrued repose and exclusivity defenses and exposing defendants to an otherwise stale,

and now unlimited, damages claim that was already forever extinguished in any forum, Exception 1.1 cannot apply without violating the Illinois Constitution.

For the foregoing reasons and the reasons set forth in defendants' opening brief, the answer to the third certified question is "YES." Application of Exception 1.1 to this case involving vested rights and defenses to past conduct would offend defendants' due process guarantee under the Illinois Constitution.

CONCLUSION

For the foregoing reasons and the reasons set forth in defendants' opening brief, the Court should answer the three questions certified to it as follows:

(1) No, Section 1(f) of the ODA (820 ILCS 310/1(f)) is not a "period of repose or repose provision" for Exception 1.1 (820 ILCS 310/1.1) purposes.

(2) If Section 1(f) falls within Exception 1.1, then the temporal reach of Exception 1.1 is dictated by Section 4 (5 ILCS 70/4) and, on the facts before the Court, cannot be applied to affect defendants' already accrued rights and defenses. Section 4 thus bars plaintiff's claim.

(3) Yes, application of Exception 1.1 in this case involving vested rights and defenses to past employment conduct would offend Illinois's due process guarantee.

Dated: October 11, 2024

Respectfully submitted,

/s/ Emily G. Montion

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms with the requirements of Illinois Supreme Court Rule 341(a) and defendants-appellants' Motion for Leave to File a Reply Brief in Excess of Length Limitations filed on October 4, 2024, which seeks an extension of the word limitations in Rules 341(b) from 6,000 to 8,350 words and is presently pending before this Court. The length of this brief, excluding the words contained the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 8,084 words.

/s/ Emily G. Montion
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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

CANDICE MARTIN, Individually, and as Executrix of the Estate of Rodney Martin, Deceased,	)	
Plaintiff-Appellee,	)	
KWAME RAOUL, in his official capacity as Illinois Attorney General,	)	
Intervenor-Appellee,	)	
v.	)	No. 130509
GOODRICH CORPORATION, f/k/a B.F. GOODRICH COMPANY, and POLYONE CORPORATION, Individually and as Successor-By-Consolidation to THE GEON COMPANY, n/k/a AVIENT CORPORATION,	)	
Defendants-Appellants.	)	

The undersigned, being first duly sworn, deposes and states that on October 11, 2024, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Defendants-Appellants. On October 11, 2024, service of the Reply Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

SEE ATTACHED SERVICE LIST

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Emily G. Montion
Emily G. Montion

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

/s/ Emily G. Montion
Emily G. Montion

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