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Workers' comp system could be under threat with public act

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The howl of Robert Plant's voice on Led Zeppelin's "When the Levee Breaks" is apt to describe the current situation for employers as the workers' compensation system in Illinois is threatened.

The balance of the workers' compensation system was upset with Public Act 101-0006 that amended the Illinois Workers' Compensation Act and the Illinois Workers' Occupational Disease Act to allow workers to bring civil actions against their employers in latent injury and disease cases that developed from exposure more than 25 years before the filing of the suit.

Prior to PA 101-0006, and since 1911, under Illinois law the exclusive remedy provision found in the acts "is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." *Meerbrey v. Marshall Field & Co., Inc.*, 139 Ill.2d 455, 462 (1990). "This trade-off between employer and employee promoted the fundamental purpose of the [a]ct, which was to afford protection to employees by providing them prompt and equitable compensation for their injuries." *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 180-81 (1978).

In reliance on these longstanding tradeoffs, most commercial general liability policies contain employee exclusions and most workers' compensation policies have exclusions for actions brought in the civil system by employees. Although superficially appearing to have the noble purpose of compensating employees barred by a short repose period, the practical effect of PA 101-0006 is to divest many Illinois employers of their insurance protection — a result emblematic of the unmooring of the workers' compensation system.

The previously impenetrable divide between the workers' compensation system and the civil law system was breached for the first time by PA 101-0006. The statute created a new class of employees, those who were exposed more than 25 years before the filing of their suit, that were allowed to bring their claims in civil court, while those exposed within the last 25 years, remained in the workers' compensation system.

Obviously aimed at asbestos claimants, this creation of a special class of tort plaintiffs violated the Illinois Constitution's prohibition on passing special laws. Ill. Const. 1970, Article IV, Sec. 13. The courts, which under the Illinois Constitution are the exclusive arbitrators of what constitutes special legislation, have held that this clause means that the "General Assembly is prohibited from passing laws that confer a special benefit on a select group to the exclusion of others similarly situated." *Best v. Taylor Machine Works*, 179 Ill.2d 367, 391 (1997). By arbitrarily dividing workers by their date of exposure, the General Assembly did just that.

In addition, friable asbestos insulation products were no longer produced after the mid-1970s, and asbestos was largely in disuse by the mid-1980s. Most, if not all of the potential plaintiffs who could bring a civil action under PA 101-0006, were exposed to asbestos more than 25 years before the May 17, 2019, effective date of the act. The Illinois Supreme Court held in *John Doe A v. Diocese of Dallas*, 234 Ill.2d 393, 411-412 (2009), that "once a claim is time barred, it cannot be revived through subsequent legislative action without offending the due process protections of our state's constitution." This violation of basic due process protection is yet another problem created by recent legislative overreach.

Exacerbating the problems to the workers compensation system created by PA 101-0006 would be the passage of HB 5769, the Personal Protective Equipment Responsibility Act. HB 5769 would allow employees to bring actions against employers for their failure to provide personal protection equipment in situations when there is a disaster proclamation by the governor. This obligation would exist not only under the current COVID-19 crisis, but to protect from "biological hazards, chemical hazards, radiological hazards, or mechanical irritants."

The bill does not limit the scope or type of disaster declaration that is necessary and takes no account of the availability to employers of personal protection equipment that might be needed in a given, and potentially unforeseeable, circumstance. Again ignoring the longstanding balance of the workers' compensation system, the bill would create indeterminate liabilities for Illinois employers in the tort system, and make the employer subject to employees' recovery of three times actual damages plus punitive damages and attorneys' fees.

Illinois policy has long been to separate the workers' compensation and civil justice systems. In reliance on that separation, employers purchased specific policies of insurance to protect against the risks that were presented in each system, but these policies offer no coverage when the legislature ignores this distinction.

PA 101-0006 breached that separation and HB 5769 threatens to turn that crack into a full breach. Levees exist to keep back flood waters. If Illinois continues down this path and abandons the wisdom of more than a century of policy and the protection provided by the Illinois Constitution, a damaging flood will likely result and "cryin' won't help you prayin' won't do you no good."