SUPREME COURT OF LOUISIANA

No. 2001-C-2767

JIMMY AND BRENDA BONNETTE, ET AL.

V.

CONOCO, INC., ET AL.

CIVIL PROCEEDING

ON WRIT OF CERTIORARI AND/OR REVIEW TO THE COURT OF APPEAL, THIRD CIRCUIT, ON ITS DECISION IN NO. 01-0297, AFFIRMING THE JUDGMENT OF THE FOURTEENTH JUDICIAL DISTRICT COURT, PARISH OF CALCASIEU, NO. 95-4112, THE HONORABLE KENT SAVOIE, PRESIDING JUDGE

AMICI CURIAE BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES, COALITION FOR ASBESTOS JUSTICE, INC., LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY, LOUISIANA CHAPTER OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND LOUISIANA MID-CONTINENT OIL AND GAS ASSOCIATION IN SUPPORT OF APPELLANT CONOCO, INC.

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STATEMENT OF INTEREST

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The National Association of Manufacturers ("NAM") – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly 3 million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 600 *amicus curiae* briefs with the Supreme Court of the United States, the United States Courts of Appeals, and various state courts.

[1]

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1]

The Louisiana Association of Business and Industry ("LABI") is the largest business advocacy group in Louisiana. Its members include over 5,000 business people and 117 local chambers and trade associations. Over 80 percent of LABI's members are small businesses. LABI's mission is to foster a climate of economic growth by championing the principles of the free enterprise system and to represent the general interests of the business community through active involvement in the legislative, regulatory, and judicial processes.

The Louisiana Chapter of the National Federation of Independent Business ("NFIB") is a statewide organization, consisting of almost 6,000 small, independent businesses operating in Louisiana. The NFIB is a nonprofit corporation and is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. Although some NFIB members may have more than 100 employees, the typical Louisiana NFIB member is a family-owned business employing ten or fewer employees. Collectively, these businesses employ thousands of Louisiana citizens who work in agriculture, manufacturing, distribution, wholesale, retail, and service-related jobs.

The Louisiana Mid-Continent Oil and Gas Association, a Division of US Oil and Gas Association ("LMOGA"), is a trade association whose members participate in all aspects of the oil and gas industry in Louisiana, including exploration, production, refining, transportation, and marketing. The membership of LMOGA consists of both "major" and "independent" oil and gas companies, pipeline companies, refiners, marketers, and firms otherwise affiliated with the oil and gas industry in Louisiana. LMOGA's fundamental mission is the enactment and consistent enforcement and interpretation of laws conducive to economic and efficient operation of the oil and gas industry in Louisiana.

STATEMENT OF THE CASE

Amici curiae adopt and incorporate Appellant Conoco, Inc.'s ("Conoco") statement of the case in this action.

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[1] The Coalition for Asbestos Justice, Inc. includes the following insurers: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., Liberty Mutual Insurance Group, and the St. Paul Fire and Marine Insurance Company.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici curiae file this brief in support of Conoco and urge this Court to reverse the Third Circuit Court of Appeal's decision below.

The Third Circuit's ruling below creates several issues of concern to *amici curiae*. We focus here on just one. Under the appellate court's ruling, plaintiffs in Louisiana can now bring a cause of action for damages based on *any* exposure to a potentially hazardous substance, no matter how slight, and no matter whether any physical injury occurred. This far-reaching opinion disregards fundamental principles of tort law and, if upheld, will subject Louisiana courts and employers to years of open-ended litigation.

We offer this brief not to repeat Conoco's arguments but, rather, to illustrate why allowing recovery for even *de minimis* exposures would only exacerbate problems faced by courts and litigants involved in mass tort litigation. If this Court were to hold otherwise – and announce a rule that *any* exposure to a potentially hazardous substance justifies an award of damages – the ramifications for tort litigation in Louisiana would be dire.

Everyone in the world is exposed to substances that can be potentially harmful at some level – car exhaust, cleaning products, gasoline, fertilizer, pesticides, pharmaceutical products, medical and dental x-rays, pollution, prescription and over-the-counter drugs, and even sunlight. Minute levels of asbestos itself are found in everything from the air outside to the drinking water in the courthouse where this case was tried. Creating a new cause of action for mere exposure would create a flood of lawsuits by people seeking windfall damages, clog the court system, and tie up scarce resources that otherwise would be available for truly injured claimants. If the last three decades of asbestos litigation teaches anything, it is that relaxing the legal standards for toxic tort cases creates far more problems than it solves for the fair and speedy administration of justice.[2]

Amici discuss the potentially adverse public policy effects of allowing plaintiffs to proceed with claims based on mere *de minimis* exposure. They include: (1) the further erosion of the bedrock principle that proof that the defendant's behavior actually *caused harm* should be a prerequisite to redress in our tort system lest our courts become overwhelmed with claims brought on behalf of persons who merely fear, but do not yet have and may never have, an injury; (2) the prospect that such an inundation of claims by unimpaired claimants may leave truly injured plaintiffs without complete or prompt redress; and (3) the fundamental

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[2] *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000).

unfairness of imposing a potentially huge, new financial liability upon a wide range of defendants.

The appeals court's ruling hinges on the court's erroneous adoption of the so-called "linear no-threshold model" of causation, which was developed for regulatory purposes. This model essentially states that *any* level of exposure to a toxic agent may theoretically cause injury. "In this view, any dose could have the risk of yielding negative health consequences." *Sutera v. Perrier Group of Am., Inc*., 986 F. Supp. 655, 660 (D. Mass. 1997). *Amici* discuss the inherently speculative nature of this theory and its failure to satisfy fundamental admissibility requirements for expert evidence.

ARGUMENT

Our society has developed a heightened sensitivity to environmental issues, and toxic tort claims have emotional and political appeal. Given the adverse publicity about asbestos, it is understandable that courts and juries may wish to compensate claimants for their subjective fears that even *de minimis* exposures may cause deleterious health effects at some point in the future. But no matter how well-meaning the decision in this case, the lower court's ruling that *any* exposure to a potentially harmful substance is compensable departs from fundamental tort principles with no attendant public policy benefits. Instead, the ruling will foster widespread litigation with potentially crippling liability, leaving virtually no entity safe from toxic tort claims. The practical effect of such a broad rule could well be to facilitate tort recoveries for people who are *not injured* – at the expense of those persons who are seriously injured and in need of redress.

I. Allowing Recovery For Mere Exposure Will Harm Plaintiffs and Defendants Alike

For over 200 years, it has been a basic principle of tort law that plaintiffs must prove that the defendant's wrongful behavior actually caused the injury claimed by the plaintiffs. *See* Victor E. Schwartz *et al., Prosser, Wade, and Schwartz's Torts* 518 (10th ed. 2000); *Quick v. Murphy Oil Co.*, No. 93-2267 (La. App. 4 Cir. 9/20/94), 643 So. 2d 1291, 1294, *writ denied*, No. 94-2583 (La. 1/6/95), 648 So. 2d 923 ("When evaluating liability in an asbestos claim, we apply traditional theories of tort liability ... [4]which require proof of causation."). By *assuming* that any exposure is harmful, the appellate court's approach flips the burden of proof of causation from plaintiffs to defendants. Defendants are then placed in the near-impossible position of proving a negative, *i.e.*, that their allegedly wrongful behavior was *not* the cause of the plaintiffs' alleged injuries.[3] This is likely to lead to the arbitrary imposition of liability on

[3] The difficulty of proving a negative is well-known. *See, e.g.*, Bruce R. Parker, *Understanding Epidemiology and Its Use in Drug and Medical Device Litigation*, Def. Couns. J. 35 (Jan. 1998)

defendants and encourage the filing of fraudulent claims.[4]

The appellate court's ruling departs from the law in other Louisiana circuits.[5] Instead, it creates a brand-new cause of action that will generate a flood of new cases. Windfall damages awards will be newly available to plaintiffs who merely allege exposure to a hazardous substance. Plaintiffs already have been successful in achieving high awards at trial.[6] To open a Pandora's box of claims for which no proof of injury is required will attract litigants in large numbers. Moreover, plaintiffs with even the flimsiest of evidence will be able to defeat summary judgment and force defendants to incur the time and expense of discovery and trial. Faced with a deluge of questionable claims, defendants will be forced to choose between incurring high legal fees and risking multimillion-dollar damages awards to litigate, or negotiating quick nuisance settlements.

This is not idle speculation. It is vividly illustrated by the experience of litigating asbestos claims over the last several decades. Early in the asbestos litigation, courts empathetic to the claims of plaintiffs deviated from accepted legal principles to allow recoveries by presently unimpaired claimants that otherwise would have been barred. While the courts in such cases undoubtedly had good intentions, the litigation has turned into a judicial disaster of major

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("Because of the role of chance, it is very difficult to prove a negative proposition scientifically. For example, bringing back rocks from the moon would be highly probative evidence to refute a claim that the moon is made of cheese. However, plaintiffs' experts would argue that the moon rocks had not disproved the claim because the correct area of the mo on had not been searched that 'certainly' would have proved that the moon is made of cheese."); *accord* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1293 (1991) ("It is difficult enough to prove a negative. … the defendant must carry a daunting load.").

[4] *See* Mark Mildred, *Litigation Rules and Culture: The European Perspective*, 23 N.Y.U. Rev. L. & Soc. Change 433, 438 (1997) ("The impossibility of proving a universal negative would deprive the defense of any meaning and, thereby, offend the requirement of a fair apportionment of risk, which serves as the rationale for the existence of . . . defenses.").

[5] *See, e.g., Quick v. Murphy Oil Co.*, No. 93-2267 (La. App. 4 Cir. 9/20/94), 653 So.2d 1291; *Bickham v. Metro. Life Ins. Co.*, No. 99-1525 (La. App. 1 Cir. 6/23/00), 764 So. 2d 345 (accepting plaintiff's argument that exposure included causation "would be tantamount to permitting a cause of action for damages based on exposure to asbestos alone, and eliminating causation entirely from the analysis"). *Accord Austin v. Abney Mills, Inc.*, No. 34,494 (La. App. 2 Cir. 4/4/01), 785 So. 2d 177, *writ granted*, No. 01-1598 (La. 12/14/01), 2001 WL 1681174 (exposure theory fails to include the element of damage necessary for the accrual of a cause of action in negligence); *Abadie v. Metro. Life Ins. Co.*, Nos. 00-CA-0344 *et seq.* (La. App. 5 Cir. 3/28/01), 784 So. 2d 46, *writ denied*, No. 01-1533 (La. 12/13/01), 2001 WL 1681458 *et seq.* (plaintiffs must show more than mere exposure to asbestos; exposure must be significant and have started the disease process).

[6] *See, e.g., La. Jury Awards Deceased Seaman, Family $1.3 Million from 5 Ship Companies*, Vol. 16 No. 8 Mealey's Litig. Rep.: Asbestos 5 (May 18, 2001); *La. Jury Awards Waterfront Worker $2.4 Million*, Vol. 16 No. 5 Mealey's Litig. Rptr.: Asbestos 6 (Apr. 6, 2001); *Louisiana Court Assesses Oil Companies, Dow Chemical $5 Million in Benzene Death*, Vol. 9 No. 19 Mealey's Emerging Toxic Torts 6 (Jan. 5, 2001); *Jury Hands Down $9.25M Verdict to Meso Victims*, Vol. 15 No. 18 Mealey's Litig. Rptr.: Asbestos 6 (Oct. 20, 2000); *Verdict Against Flexitallic Yields $1.2 Million Award for Louisiana Meso Victim*, Vol. 15, No. 4 Mealey's Litig. Rep: Asbestos 20 (Mar. 17, 2000); *Louisiana Jury Awards Millwright $2.5 Million*, Vol. 14 No. 21 Mealey's Litig. Rptr.: Asbestos 3 (Dec. 3, 1999); *Louisiana App. Court Lets $2 Million Verdict Stand in Chemical Exposure Suit*, Vol. 8 No. 16 Mealey's Litig. Rptr.: Toxic Torts 16 (Nov. 24, 1999).

proportions. As the courts lowered legal standards, new claims flooded the justice system. The number of pending asbestos cases doubled in the six years from 1993 to 1999, from 100,000 to more than 200,000 cases throughout the country, and is expected to result in up to 700,000 more claims by 2050. *See* Christopher Edley, Jr., Harvard Law School, *Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act*, *Before the House Comm. on the Judiciary*, at 4 (July 1, 1999). *See also* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. On Legis. 383 (1993).[7]

The consequences for individual plaintiffs and the court system of this relaxation of legal standards for the assertion of asbestos claims have been alarming. In 1990, Chief Justice Rehnquist appointed a distinguished panel of judges to serve on the Judicial Conference Committee charged with examining the growing asbestos litigation problem. After extensive study, the Committee reported in 1991 that the "situation has reached critical dimensions and is getting worse." *Report of the Judicial Conference Ad Hoc Comm. on Asbestos Litigation*, at 2 (March 1991). Characterizing the state of asbestos litigation as "a disaster of major proportions to both the victims and the producers of asbestos products," the Committee concluded that the courts were "ill-equipped" to address the mass of claims in an effective manner. *Id.* Bloated court dockets have made long pre-trial delays increasingly "routine," while the continuing exhaustion of defendants' assets has raised a real prospect that "future claimants may lose altogether." *Id.* at 3. As Dean Paul Verkuil of Cardozo Law School testified before Congress, "[t]he rate of new filings and the growing number of pending cases vividly demonstrates a basic fact – the asbestos litigation problem is not getting better, it is getting worse."[8]

This "elephantine mass of asbestos cases"[9] has driven at least 53 companies into bankruptcy,[10] and "the process is accelerating."[11] Neither the nation's judicial resources nor the

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[7] There is no clear end in sight to these claims. With latency periods for asbestos-related illnesses ranging from 15 to 40 years, actual disease claims are likely to continue at peak levels for at least another 20 years. *See* Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1973-74 (1992).

[8] *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (July 1, 1999) (statement of Paul R. Verkuil, Dean, Benjamin N. Cardozo School of Law).

[9] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

[10] *See* Am. Acad. of Actuaries, *Overview of Asbestos Issues and Trends* 17 (Dec. 2001) (listing 52 asbestos-related bankruptcies. North American Refractories Co. filed bankruptcy after the monograph was released). *See generally* Mark. D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Vol. 1, No. 1 Mealey's Asbestos Bankr. Rep., Aug. 2001.

[11] *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000)), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 121 S. Ct. 2216 (200). In 2000, Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc. declared bankruptcy. *See* Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, Wall St. J., Dec. 21, 2000, at B4; Mark D. Plevin *et al.*, *Don't Bankrupt Asbestos*, Legal Times, Mar. 19, 2001, at 68; *Asbestos Liability System Needs*

resources of defendants are infinite. The very real possibility that future claimants may have no practical recourse against bankrupt asbestos defendants has been recognized by numerous authorities. As the California Supreme Court said:

> [A]llowing recovery to all victims who have a fear of cancer may work to the

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Immediate Overhaul, Nat'l Underwriter, Apr. 9, 2001, at 18; Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Vol. 16, No. 6 Mealey's Litig. Rptr.: Asbestos, Apr. 20, 2001. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co., and G-I Holdings, Inc., formerly known as GAF Corp., declared bankruptcy. *See* Mitchell Pacelle, *Federal-Mogul Files in Bankruptcy Court After Estimate for Asbestos Liability Soars*, Wall St. J., Oct. 2, 2001, at B11; Patricia Callahan, *USG Files for Chapter 11 After Referring to Senate's Power Shift as Latest Setback*, Wall St. J., June 26, 2001, at A4; Susan Warren, *W.R. Grace Seeks Bankruptcy Protection In the Face of Asbestos-Related Litigation*, Wall St. J., Apr. 3, 2001, at B8; Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, Wall St. J., Jan. 8, 2001, at B12. In January of 2002, RHI, the world's leading producer of refractory materials for the steel industry, was forced to seek bankruptcy protection for one of its U.S. subsidiaries (North American Refractories Co.) as a result of asbestos claims NARCO inherited from businesses it acquired. *See* William Hall, *RHI forced to seek protection for US business*, Fin. Times.- FT.com, Jan. 7, 2002. Asbestos litigation has thus far cost American companies over $21.6 billion and may wind up costing another $43.4 billion during the next 20 years, for a total of $65 billion, according to a recent study by ratings agency A.M. Best. *See* Christopher Oster, *Some Insurers Face Shortfall in Reserves For Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4. A recent study by Tillinghast-Towers Perrin estimates that the ultimate cost will reach $200 billion. *See Tillinghast-Towers Perrin Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, Bus. Wire, June 12, 2001.

detriment of those who sustain actual physical injury and those who ultimately develop cancer as a result of toxic exposure. That is, to allow compensation to all plaintiffs with objectively reasonable cancer fears, even where the threatened cancer is not probable, raises the very significant concern that defendants and their insurers will be unable to ensure adequate compensation for those victims who actually develop cancer or other physical injuries.

Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 813 (Cal. 1993) (appeals court erred in concluding reasonableness of plaintiff's fear of cancer was established by mere exposure to toxins). *See also In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 121 S. Ct. 2216 (2001) ("The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating."); *Judicial Conference Rep.* at 3. The unavoidable fact is that there is a limited amount of money available to compensate those individuals injured by asbestos, and that pool of funds may be exhausted at some point.

The practical effect of making a cause of action available to the countless persons in our society who can claim *any exposure* to toxic substances could well be to facilitate tort recoveries for individuals who have no meaningful exposure, no present injury, and will never become sick at the expense of those who have sustained harmful levels of exposure to toxic substances: "the sick and dying, their widows and survivors[, who] should have their claims addressed first." *In re Patenaude*, 210 F.3d 135, 139 (3d Cir.), *cert. denied*, 531 U.S. 1011 (2000).

The rule announced by the Third Circuit in this case – that any exposure to a hazardous substance, no matter how slight and even if below ambient levels, can be actionable – would make everyday exposures the subject of claims and would effectively prevent the orderly conduct of business without the threat of constant litigation. Slight and unquantifiable exposures "below ambient background levels" are unavoidable and occur every day at the many different worksites of *amici* members and throughout the United States at large. Over the years, asbestos was used in some "3000 different products," *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 106 (Tenn. App. 1995), including "tooth brushes, ironing board covers, brake linings, roofing shingles, fireproofing and insulating material." *Id.; see also In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 736 (E. & S. D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on reh'g*, 993 F.2d 7 (2d Cir. 1993) (surveying the "multitude of applications" of asbestos-containing products).

Moreover, the court's ruling extends beyond asbestos litigation and would apply in *all* toxic tort cases. Mere exposure to any one of a number of potentially hazardous substances would justify a lawsuit.[1] Because so many individuals may qualify as potential claimants, people could literally be recruited off the street to serve as plaintiffs. The familiar advertisement, "Have you been injured?" could become, "Don't wait until you're hurt, call now!" *See* Victor

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[1] As one Louisiana lawmaker explained in discussing the need for limits on medical monitoring claims for presently unimpaired claimants, "People are going to go to court and say they were exposed, that they worked in a dry cleaners or a dentist office and were exposed to some chemical." Leslie Zganjar, *Senate changes, then passes, Foster's medical monitoring bill*, Assoc. Press, June 15, 1999.

Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA Today, July 5, 1999, at A17.

As well as adversely impacting truly injured claimants, potentially huge verdicts against defendant organizations for mere exposures will affect employees, employee families and the communities they live in. Ripple effects can include reduced or lost consumer products and services, higher taxes, higher insurance costs, and curtailed research and development, to name a few. [2]

In sum, before this Court endorses a rule that would open the courthouse doors to anyone with a mere exposure claim, it should carefully assess its potential impact on our judicial system's practical ability to deliver prompt justice to those who need it – the truly injured – and its potential impact on our society as a whole. The Third Circuit's ruling clearly would thwart this goal.

II. The Court Should Enforce Existing Evidentiary Rules To Avoid A Potential Flood of Lawsuits.

This Court can stem the potential flood of lawsuits and the resulting problems by simply applying existing law and requiring the district court to act as a "gatekeeper" to prohibit the introduction of speculative expert testimony.[3]

In this case, the plaintiffs' experts were unable to establish that plaintiffs were exposed to harmful levels of asbestos from the Conoco site. They conceded there was no evidence of plaintiffs' actual exposure to asbestos and could not identify any particular level of asbestos to which the plaintiffs may have been exposed. Instead, they merely assumed that at least one respirable fiber attributable to the Conoco dirt must have been released and inhaled by the plaintiffs at some time. This in and of itself was error. *See, e.g., Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 151-52 (1997) (Stevens, J., concurring in part and dissenting in part) (expert opinion that exposure to substances may cause disease is inadmissible where there is no evidence of exposure); *Allen v. Penn. Eng'g Corp.*, 102 F. 3d 194, 199 (5th Cir. 1996) ("Scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort

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[2] *See The Liability Maze* 5-7 (Peter W. Huber and Robert E. Litan, eds. The Brookings Inst., 1991). Supporters of the Louisiana's 1999 law restricting claims for medical monitoring recognized that allowing people to sue businesses for mere exposure to hazardous chemicals would drive companies out of Louisiana and "ultimately lead to economic chaos in the state." Randy McClain, *Legislature limits suits for medical monitoring*, Baton Rouge Advoc., June 22, 1999, at 1A (quoting state Sen. John Hainkel); Scott Dyer, *Foster-backed bill addresses medical monitoring*, Baton Rouge Advoc., June 2, 1999, at 1A (interviewing state Rep. Charlie DeWitt).

[3] The district court denied Conoco's request for a *Daubert* hearing on the ground that *Daubert* does not apply in a bench trial. This was obvious error. *See Caubarreaux v. E.I. DuPont de Nemours & Co.*, No. 97-978 (La. App. 3 Cir. 5/6/98), 714 So. 2d 67 (reversing and remanding for *Daubert* hearing when district court refused *Daubert* hearing in a bench trial), *writ denied*, No. 98-2101 (La. 11/6/98), 728 So. 2d 868.

case.").[4]

Instead of requiring plaintiffs to establish that they had been exposed to a harmful level of asbestos from the Conoco site, the district court relied on the inherently speculative theory of plaintiffs' experts that *one fiber* of asbestos can cause harm. *See Bonnette v. Conoco*, No. 01-0297, at 12-15 (La. App. 3 Cir. 9/12/01), 801 So. 2d 501. This testimony was based on a "linear no-threshold" model developed for federal regulatory purposes, not tort law. Unlike fundamental principles of tort law, the linear no-threshold model "assumes" a theoretical increase in risk from *any* exposure to asbestos. Under this approach, *any* level of exposure to a toxic agent is deemed sufficient to cause injury. This approach fails to satisfy the requirements for admissibility of expert testimony under Louisiana law. It is not reliable, nor does it "fit" this case.

In *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993), the Louisiana Supreme Court adopted the guidelines for the admissibility of expert evidence that were set forth by the United States Supreme Court in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[5] These guidelines require that the expert opinions be grounded in approved methods and procedures of science, rather than just subjective belief or unsupported speculation. *Daubert*, 509 U.S. 588; *Foret*, 628 So. 2d at 1121-22. *Daubert* "requires the trial court to act in a 'gatekeeping' function to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable," *Foret*, 628 So. 2d at 1122, thus "insuring that the factfinding process does not become distorted by what is popularly called 'junk science.'" *Sutera*, 986 F. Supp. at 660 (citing *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995)).

This gatekeeping role is especially sensitive in cases "where the plaintiff claims that exposure to a toxic substance caused his injury, [because a] jury may blindly accept an expert's opinion that conforms with their underlying fears of toxic substances without carefully understanding or examining the basis for that opinion." *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995) (quoting *O'Conner v. Commw. Edison Co.*, 807 F. Supp. 1376,

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[4] Moreover, while the plaintiffs' experts conceded that the Conoco dirt was not the only source of potential asbestos exposure, they did not attempt to quantify the potential contributions from the other sources toward the alleged risk plaintiffs may have of contracting an asbestos-related disease. The failure to rule out such "confounding factors" renders the testimony of these "experts" inadmissible on *Daubert-Foret* grounds. *See, e.g., Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 279(5th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999) (expert's failure to consider plaintiff's personal habits and medical history made expert opinion unreliable); *Porter v. Whitehall Lab. Inc.*, 9 F.3d 607, 616 (7th Cir. 1993); *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358, 376 (D. N.J. 1995) (a meaningful diagnosis of specific causation must specifically negate other possible causes); *Coleman v. Danek Med. Inc.*, 43 F. Supp. 2d 637, 651 (S.D. Miss. 1999).

[5] Louisiana has adopted the United States Supreme Court's interpretation of Federal Rule of Evidence 702, which mirrors Louisiana Code of Evidence article 702. *See State v. Foret*, 628 So. 2d 1116 (La. 1993); *White v. State Farm Mut. Auto. Ins. Co.*, No. 95-551 (La. App. 3 Cir. 7/17/96), 680 So. 2d 1.

1391 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) (alteration in original)). Unfortunately, the district court in this case abandoned this critical gatekeeping role. It clearly erred in admitting testimony based on the no-threshold model, and the Third Circuit failed to correct this error. *See Mistich v. Volkswagen of Germany, Inc.*, 666 So. 2d 1073, 1079 (La. 1996) (appeals court may set aside trial court's ruling on expert testimony where trial court's decision was clearly erroneous).

Under the *Daubert* and *Foret* holdings, expert testimony must be reliable and must "fit" the facts of the case. *See Daubert*, 509 U.S. at 589; *Foret*, 628 So. 2d at 1122. The reliability requirement demands that the expert's opinion be based on the methods and procedures of science rather than on "subjective belief or unsupported speculation." *See In re Paoli R.R.Yard PCB Litig.*, 35 F.3d 717, 742 (3rd Cir. 1994), *cert. denied sub nom. Gen. Elec. Co. v. Ingram*, 513 U.S. 1190 (1995). Factors that a court may use to determine the reliability of scientific testimony include: (1) whether the opinion can or has been tested; (2) whether the theory or technique on which the opinion is based has been subjected to peer review and publication; (3) the technique's known or potential error rate; (4) the existence and maintenance of standards controlling the technique's operations; and (5) "general acceptance." *Foret*, 628 So. 2d at 1122 (citing *Daubert*, 509 U.S. at 593-94). The "fit" requirement" refers to the necessity of a connection between the expert's testimony and the facts of the case. *Sutera*, 986 F. Supp. 655, 661 (citing *Grimes v. Hoffman-LaRoche, Inc.*, 907 F. Supp. 33, 35 (D. N.H. 1995)). Where an expert seeks to testify regarding the cause of an injury, it is the court's responsibility to assure that the opinion is properly grounded in fact. *Id.* An expert opinion as to the cause of injury must provide "more than unsubstantiated conclusions." *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 94 (1st Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994).

1. <u>The Linear No-Threshold Model Is Unreliable</u>

Courts have held that even if an expert seeking to testify is not a toxicologist, he must employ principles and methods of toxicology if he is to give an opinion on an issue relating to that specialty. *See, e.g., Mancuso v. Consol. Edison Co. of N.Y., Inc.*, 967 F. Supp. 1437, 1445 (S.D.N.Y. 1997) (citing *Cavallo v. Star Enter.*, 892 F. Supp. 756, 771 (E.D. Va.), *aff'd in relevant part*, 100 F.3d 1150, 1159 (4th Cir. 1996), *cert. denied*, 522 U.S. 1044 (1998)). A central tenet of toxicology is that the "dose makes the poison" and that all chemical agents, including water, are harmful if consumed in large quantities. Federal Judicial Center, *Reference Manual on Scientific Evidence* 408 (2d ed. 2000) [hereinafter "Federal Judicial Center *Reference Manual*"]. A competent expert witness must make three preliminary assessments as the premise for an opinion on causation: First, the expert witness should analyze whether the disease can be

related to chemical exposure by a biologically plausible theory. Second, the expert should examine if the plaintiff was exposed to the chemical in a manner that can lead to absorption into the body. Finally, the expert should offer an opinion as to whether the dose to which the plaintiff was exposed is sufficient to cause the disease. *See id.* at 419.[6]

Plaintiffs' experts, however, rejected the dose-response theory, the foundation of toxicology, in favor of the linear no-threshold model, which assumes that there is *no* safe level of exposure to a toxic agent. This model is intrinsically speculative and fails to satisfy *Daubert* and *Foret* requirements. It "cannot be falsified, nor can it be validated." *Sutera*, 986 F. Supp. at 667 (quoting *Whiting*, 891 F. Supp. at 25); *see also Foret*, 628 So. 2d at 1125 (rejecting expert's use of psychodynamics theory as theory is "difficult to impossible to test for accuracy" and thus the "key question"of testability cannot be answered). Indeed, plaintiffs' experts admitted that this model is no more than a "theoretical" one which has never been scientifically verified and is not supported by any epidemiological studies. Instead, "[i]t is merely a hypothesis." *Sutera*, 986 F. Supp. at 667 (quoting *Whiting*, 891 F. Supp. at 25); *Nat'l Bank of Commerce of El Dorado v. Associated Milk Producers, Inc.*, 22 F. Supp. 2d 942, 960 (E.D. Ark. 1998), *aff'd*, 191 F.3d 858 (8th Cir. 1999) (stating that "…the linear no threshold model of causation is merely an hypothesis with 'no known or potential rate of error.'") (citation omitted).

Similarly, the Federal Judicial Center's *Reference Manual on Scientific Evidence* notes that while development of cancer from "one hit" is theoretically possible, in practice the risk "is very small, since it is unlikely that any one molecule of a potentially cancer-causing agent will reach that one particular spot in a specific cell and result in the change that eludes the body's defenses and leads to a clinical case of cancer. However, the risk is not zero." Federal Judicial Center *Reference Manual* at 407-08. As one federal district court recognized, and the United States Court of Appeals for the Eighth Circuit affirmed, "[e]stablishing that the risk of causation 'is not zero' falls woefully short of the degree of proof required by *Daubert* and its progeny." *Nat'l Bank*, 22 F. Supp. 2d at 961(rejecting no-threshold model as evidence of causation for actual injury; stating that "the same *Daubert* analysis found herein would apply to any attempt to recover based upon the theory of fear of future consequences, with the Court obviously arriving at the same conclusion."). Indeed, there is no way to measure the presence of fibers at such theoretical low levels. Their presence has to be assumed. Thus, the plaintiffs' experts are in the anomalous position of suggesting the plaintiffs are entitled to damages for exposures that are so

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[6] *See also Mancuso v. Consol. Edison Co. of N.Y., Inc.*, 967 F. Supp. 1437, 1445 (S.D.N.Y. 1997) (describing similar methodology adopted by World Health Organization, National Academy of Sciences, and various United States Government agencies).

low they cannot be measured and which may not have occurred at all. This is not provable reality. It is simply speculation and conjecture.

Speculation, even when offered by a so-called "expert," will not support an award of damages. Damages cannot be awarded where the fact of damage, *i.e.*, whether damage has occurred or not, is speculative and cannot be proven. *See, e.g., Phillips Petroleum v. Liberty Servs., Inc.*, No. 97-758 (La. App. 3 Cir. 12/10/97), 704 So. 2d 890, 896, *writ denied*, No. 95-1650 (La. 10/27/95), 661 So. 2d 1354; *Culpepper v. Natchitoches Parish School Bd.*, 333 So. 2d 453, 454 (La. App. 3d Cir.), *writ denied*, 338 So. 2d 289 (La. 1976). Expert testimony that offers speculation instead of well-reasoned and solidly grounded opinion is inadmissible under the *Daubert* and *Foret* decisions. *See Miramon v. Bradly*, No. 96-1872 (La. App. 1 Cir. 9/23/97), 701 So. 2d 475, 479 (expert opinion excluded where "…not supported by any empirical data or vetted scientific theory"); *Mitchell v. Uniroyal Goodrich Tire Co.*, No. 95-0403 (La. App. 4 Cir. 12/28/95), 666 So. 2d 727, 733-31, *writ denied*, No. 96-0260 (La. 3/15/96), 669 So. 2d 421. *See also Joiner*, 522 U.S. at 156-57 (Stevens, J., concurring in part and dissenting in part) (expert opinion that exposure to substances may cause disease is inadmissible where there is no evidence of exposure).

2. *The Linear No-Threshold Theory Does Not "Fit" This Case*.

The no-threshold theory was developed for federal regulatory purposes and does not satisfy *Daubert*'s "fit" requirement. *See Daubert*, 509 U.S. at 593-94. A regulatory standard, rather than being a measure of causation, is a public-health exposure level that an agency determines pursuant to statutory standards set by Congress. *See Sutera*, 986 F. Supp. at 664 (citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 630-32 (1980)). A regulator's purpose is to "suggest or make prophylactic rules governing human exposure … from the preventive perspective that agencies adopt in order to reduce public exposure to harmful substances." *See Allen*, 102 F.3d at 198. In doing so, the "agencies' threshold of proof is reasonably lower than that in tort law, which 'traditionally make[s] more particularized inquiries into cause and effect' and requires a plaintiff to prove that it is more likely than not that another individual has caused him or her harm.'" *Id.* (quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996) (alteration in original)).

Numerous authorities have cautioned that "generalizations made in personal injury litigation from regulatory positions" are "particularly problematic." Federal Judicial Center *Reference Manual* at 423 (problematic due to great variability in the amount of evidence needed to support different regulations). As Judge Weinstein explained in the *Agent Orange* case:

> **The distinction between avoidance of risk through regulation and compensation for injuries after the fact is a fundamental one. In the former, risk assessments may lead to control of a toxic substance even though the probability of harm to any individual is small and the studies necessary to assess the risk are incomplete; society as a whole is willing to pay the price as a matter of policy. In the latter, a far higher probability (greater than 50%) is required since the law believes it unfair to require an individual to pay for another's tragedy unless it is shown that it is more likely than not that he caused it.**

In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 781 (E.D.N.Y. 1984), *aff'd in relevant part*, 818 F.2d 145 (2d Cir. 1987). *See also Wright*, 91 F.3d at 1107 ("At a minimum, we think that there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered."); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999) (rejecting as speculative plaintiff's expert testimony that exposure to hazardous substance at any level would cause plaintiff's injury; "[u]nder the *Daubert* regime, trial courts are encouraged to exclude such speculative testimony as lacking any scientific validity.").

The use of the linear no-threshold model as causation evidence in litigation, therefore, is at odds both with the regulatory purposes of the model and with sound public policy. The appellate court erred in accepting the plaintiffs' experts testimony, based on the linear no-threshold model, that *any* exposure to a toxic substance can cause disease.

CONCLUSION

Amici curiae American Tort Reform Association, National Association of Manufacturers, Chamber of Commerce of the United States, Coalition for Asbestos Justice, Inc., Louisiana Association of Business and Industry, Louisiana Chapter of the National Federation of Independent Business, and Louisiana Mid-Continent Oil and Gas Association are the principal voices of the business and manufacturing communities. As potential defendants in civil litigation, *amici*'s members have serious concerns that if this Court allows the judgment against Conoco to stand, a deluge of unwarranted litigation will clog courts, tie up financial resources currently used to develop products and services for the public, and hinder the ability of injured claimants to recover for their injuries. *Amici* urge this Court to reverse the Third Circuit Court of Appeal's holding.

Respectfully submitted,

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