

NO. 13-30281

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CRAIG MOORE, Individually and on behalf of minor child A.D.M.;
TONI JEANNE LABAT MOORE, Individually and on behalf of
minor child, A.D.M.
Plaintiffs - Appellants

v.

INTERNATIONAL PAINT, L.L.C.
Defendant - Appellee

On appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans, No. 2:11-CV-1001

**OPPOSITION TO MOTION FOR LEAVE TO FILE AMICI CURIAE
BRIEF IN SUPPORT OF APPELLEE**

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ARGUMENT

A. Standard for Acceptance of Amici Curiae Brief

It is within the Court's discretion to accept an amicus curiae brief.¹ However, as noted by the Seventh Circuit in *Ryan v. Commodity Futures Trading Comm'n*, "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief."² The Court held that "Such amicus briefs should not be allowed. They are an abuse."³ The term "amicus curiae" means friend of the court, not friend of a party.⁴

Courts have recognized the circumstances in which an amicus briefs should normally be allowed: (1) when a party is not represented competently or is not represented at all, (2) when the amicus has an interest in some other case that may be affected by the decision in the present case, or (3) when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for

¹ *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012)

² *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)

³ *Id.*

⁴ *Id.* Citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir.1991).

the parties are able to provide.⁵ If these conditions are not met, leave to file an amicus curiae brief should be denied.⁶

The Court in *Ryan* noted the tendency in commercial case with large money stakes to the duplication of arguments by the filing of amicus briefs. And notes that “in an era of heavy judicial caseloads and public impatience with the delays and expense of litigation” judges should be diligent to bar amicus curiae briefs that fail to meet the conditions that would assist the court’s decision.⁷

In *In re Halo Wireless, Inc.*, This Court found that even the “unique perspective” of a regulator did not meet the standard for filing an amicus brief where

⁵ *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012); *See also Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203 (9th Cir.1982) (per curiam); *Northern Securities Company v. U.S.*, 194 U.S. 555, 24 S. Ct. 119, (1903)

⁶ *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); citing *Northern Securities Co. v. United States*, 191 U.S. 555, 556, 24 S.Ct. 119, 119, 48 L.Ed. 299 (1903) (Chief Justice Fuller, in chambers); *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644 (3d Cir.1983) (per curiam); *Rucker v. Great Scott Supermarkets*, 528 F.2d 393 n. 2 (6th Cir.1976); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir.1970); *United States v. Gotti*, 755 F.Supp. 1157 (E.D.N.Y.1991); *Fluor Corp. v. United States*, 35 Fed. Cl. 284 (1996).

⁷ *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)

the regulator provided no new information or arguments than those presented by the parties, and there is was no evidence that any of the Appellees were poorly represented.⁸

B. Circumstance of the proposed Amici Curiae

The amicus curiae brief in this instance fails to meet any of the above enumerated criteria.

The Amici point to no other existing case which may be affected by the decision in this matter. They simply refer to the general possibility of other cases applying Federal Rules of Evidence 702 and 702. While the Amici may have an interest in the application of Federal Rules of Evidence 702 and 703, they have no greater interest than every other individual, corporation, or industry group that may be involved in toxic tort litigation in the future. The Amici, as representatives of paint and coating manufacturers, and companies engaged in the “business of chemistry” offer’s no unique perspective that would differ from that of the Appellee, International Paint, Inc.

⁸ *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012)

It appears the Amici are merely seeking leave to re-iterate and expand the Appellee-Defendant's arguments, effectively adding another 26 pages to the Appellee's 40 page brief. Thus providing a total of 66 pages supporting the Appellee's position. Yet, there is no evidence to demonstrate that Appellee, International Paint, is inadequately represented or is not represented by competent counsel. So, there is no need for additional assistance to support the Appellee's position.

Contrary to the arguments of the Amici, this case does not employ a "new type of litigation expert." Courts have been evaluating the reliability of opinions offered by scientific experts concerning historical exposure to harmful substances for decades. In 1935, the Federal District Court of New Jersey presided over *La Porte v. U.S. Radium Corp.*, in which the plaintiff sought damages for the decedent who was exposed to radium while painting luminous watch dials.⁹ *In re TMI Litigation* involved consolidated cases alleging past exposure to radiation released from the TMI facility in 1979.¹⁰ Asbestos exposure litigation in which it was necessary to determine the "length, intensity and type of vocational exposure" to asbestos was

⁹*La Porte v. U.S. Radium Corp.*, 13 F. Supp. 263, 269 (D.N.J. 1935)

¹⁰*In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999) *amended*, 199 F.3d 158 (3d Cir. 2000) (argued 1997)

handled by the Federal Courts as early at 1977.¹¹ Occupational exposure suits concerning benzene were brought as early as the mid- 1980's, see *In re Agent Orange Prod. Liab. Litig.*¹² In 1988 the Court in *Friedman v. F.E. Myers Co.*, evaluated expert testimony concerned with claims of exposure to PCB's.¹³ In 1993 expert opinions concerning fetal exposure to a prescription medication were considered by the court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁴ *In re Paoli R.R. Yard PCB Litig.* which involved expert scientific opinions concerning exposure to PCBs, was decided in 1994.¹⁵ In 1996 the court in *Allen v. Pa. Eng'g Corp.* (cited by the Amici) considered expert opinions regarding exposure to ethylene oxide.¹⁶ *Curtis v. M&S Petroleum* evaluated expert opinions regarding exposure to benzene in 1999.

¹¹ See *In re Asbestos & Asbestos Insulation Material Products Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977)

¹² See *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1232 (E.D.N.Y. 1985) *aff'd sub nom. In re Agent Orange Prod. Liab. Litig.* MDL No. 381, 818 F.2d 187 (2d Cir. 1987).

¹³ *Friedman v. F.E. Myers Co.*, 706 F. Supp. 376, 380 (E.D. Pa. 1989)

¹⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¹⁵ *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 732 (3d Cir. 1994)

¹⁶ *Allen v. Pa. Eng'g Corp.* 102 F.3d 194 (5th Cir. 1996)

The cases described above demonstrate that expert testimony involving the determination of historical dose or exposure to a harmful substance have been addressed by the Courts for decades. Considering the plethora of case law available in which courts have evaluated the reliability of expert testimony regarding past exposure to harmful substances such as radiation, asbestos, PCB's, benzene and other chemicals it can not reasonably be asserted that dose reconstruction is a "new science" or a new type of expert.

Finally, the Appellee's statement regarding oral argument appears to contradict the arguments presented in favor of the Amicus brief. The Appellee states: "The facts and legal arguments are adequately presented in the briefs, and the decisional process would not be significantly aided by oral argument. Moreover, this case presents no significant legal issues which need to be resolved by this Court."¹⁷

¹⁷ Record Document 00512268879, page 4 filed 6/10/2013

In summary, the Amici do not offer adequate basis on which to believe the Parties' briefs do not supply all the information the Court needs to decide the appeal. Therefore, the Plaintiff- appellants' request this Honorable Court deny the Motion for Leave to File Amici Curiae Brief in Support of Appellee.

Respectfully submitted,

s/ Amber E. Cisney

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**CERTIFICATE OF SERVICE
AND ECF CERTIFICATIONS**

I hereby certify that (1) the required privacy redactions have been made pursuant to Fed. 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document; and (3) the document was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. I further certify, pursuant to Fed. R. App. P. 25(d), that I have served an ECF copy of Plaintiffs'-Appellants' Opposition to Motion for Leave to File Amici Curiae Brief in Support of Appellee on all counsel of record through the Clerk of Court using the CM//ECF system the 22th day of June, 2013, service by other means has been sent to:

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