STATE OF MICHIGAN
IN THE SUPREME COURT

GARY AND KATHY HENRY, et al.,

Plaintiffs-Appellees,

Docket No.
Supreme Court No. 136298

v.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT

Dana M. Mehrer, P63024*
SHOOK, HARDY & BACON L.L.P
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Victor E. Schwartz
Cary Silverman
SHOOK, HARDY & BACON L.L.P
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Attorneys for *Amici Curiae*
* Counsel of Record

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Of Counsel

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court erred by failing to undertake a "rigorous analysis" of the prerequisites for class certification, and whether the Court of Appeals erred by affirming the certification order in absence of such an analysis.

2. Whether the trial court erred by certifying a class based solely on the plaintiffs' allegations without consideration of substantial evidence in the record indicating the predominance of individual issues of fact and law, and whether the Court of Appeals erred by affirming the certification order not withstanding the manifest lack of predominance.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three 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 1,000 *amicus curiae* briefs in federal and state courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers 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 vital role of manufacturing to America's economic future and living standards.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative

products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $664 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Amici adopt by reference the Statement of Facts and Procedural Background of Defendant-Appellant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The questions presented in this case go to the very heart of the protections afforded putative class members and defendants when a court determines whether to certify a class action: the level of scrutiny a trial judge must give to determining whether the case warrants class treatment. For the purpose of class certification, should judges merely accept statements in a plaintiff's pleading, or conduct an independent analysis of this important issue? Federal and state courts alike have ruled that a "rigorous analysis" or similar meaningful review of the suitability of class certification is required. This requirement recognizes that inappropriate class certification implicates constitutional due process rights and places undue practical burdens on class members and defendants. Close consideration of class certification requests also helps assure that class treatment is granted only where it is truly appropriate and will further the goals of full, fair and efficient resolution of claims.

The superficial standard used by the trial court in this case harkens back to the days of "drive by" class certifications, where some state trial courts routinely granted class action treatment without any meaningful evaluation of the class action factors, sometimes on the same day the complaints were filed. The error is particularly egregious where, as here, there was a sizeable record demonstrating that individualized issues of fact predominate, yet that record is not considered by the court. This laissez-faire approach to class certification has a number of adverse impacts on class members and defendants, ranging from reducing individual class members' recoveries while increasing class counsel's fees to forcing defendants into "blackmail settlements" of questionable claims. Moreover, it fuels forum shopping from federal to state courts. In 2005, Congress enacted legislation to curb abuses in certain interstate class actions, but, properly, not in primarily state-focused class actions. As a result, plaintiffs' lawyers are likely to seek out class-action friendly state courts in order to avoid the reach of the federal law.

By affirming the circuit court's decision adopting a superficial class certification standard, the Court of Appeals extends an invitation to recreate these class action mills in Michigan courts. If this ruling is upheld, then class action filings against Michigan-based businesses and industries will increase dramatically, regardless of the merits of the claims or the propriety of class treatment. The attendant adverse effects will hurt consumers of products and services, the state's economy and workforce, and participants in the state's civil justice system. Such a ruling also will stand as persuasive precedent for those in other states seeking to undermine the protections that a more rigorous standard provides to litigants.

As a result, *Amici Curiae* respectfully ask the Court to grant leave to appeal or enter a peremptory order reversing the Court of Appeals' decision affirming the trial court's order granting class certification dated October 21, 2005, emphasizing that Michigan follows the

"rigorous analysis" standard set by the Supreme Court of the United States for class certification decisions, and remand for entry of an order denying class certification.

ARGUMENT

Class certification should not be treated as a routine matter, with a cursory review of the allegations in a complaint and an order devoid of any meaningful analysis of the class action factors applied to the record in the case. Class treatment is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Gen Tel Co of Sw v. Falcon*, 457 US 147, 155 (1982) (quoting *Califano v Yamasaki*, 442 US 682, 700-01 (1979)). As such, "careful attention" to the requirements of class certification rules is "indispensable." *E Tex Motor Freight Sys, Inc v Rodriguez*, 431 US 395, 405 (1977).

The Supreme Court of the United States has emphasized that federal courts are required to conduct a "rigorous analysis" of the class action prerequisites before certifying a class. *Falcon*, 457 US at 161. This analysis is more akin to a "diamond cutter" than a "cookie cutter" approach – it requires a laser-sharp individualized examination of the issues.

Many state courts adopted the federal class action rule when they created their own class action procedures and have decided to follow federal precedent when making their own class certification decisions. *See Zine v. Chrysler Corp*, 236 Mich App 261, 288 n 12, 600 NW2d 384, 400 n 12 (1999) ("There being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule ... for guidance."); The Class Action Fairness Act of 2005, S Rep 109-14, at 13 (February 28, 2005) (stating that 36 states adopted the basic federal class action rule, some with minor revisions, and most of the rest adopted federal court class action policy and contain similar requirements); *see, e.g., Hefty v All*

Other Members of the Certified Settlement Class, 680 NE2d 843, 848 (Ind 1997); *Getto v City of Chicago*, 426 NE2d 844, 848 (Ill 1981).

Most state courts have adopted the "rigorous analysis" standard for the certification of class actions under state rules. For example, in Ohio, a trial court "is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of [Ohio] Civ. R. 23 have been satisfied." *Hamilton v Ohio Savings Bank*, 694 NE2d 442, 447 (Ohio 1998); *see Creveling v Gov't Employees Ins Co*, 828 A2d 229, 238-39 (Md 2003) ("A trial court must conduct a 'rigorous analysis' of these prerequisites before certifying a class" under Rule 23 of the Maryland Rules of Civil Procedure); *Sw Ref Co, Inc, v. Bernal*, 22 SW3d 425, 435 (Tex 2000) (adopting "rigorous analysis" standard and recognizing that "[a]ggregating claims can dramatically alter substantive tort jurisprudence...by removing individual considerations from the adversarial process," thus magnifying and strengthening the number of unmeritorious claims"); *Baptist Hosp. of Miami, Inc v Demario*, 661 So 2d 319, 321 (Fla Dist Ct App. 1995) (requiring "rigorous analysis" of class certification factors and stating that certification of a class "considerably expands the dimensions of the lawsuit, and commits the Court and the parties to much additional labor over and above that entailed in an ordinary private suit"); *accord Chemtall, Inc v Madden*, 607 SE2d 772, 783 (W Va 2004) ("a class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied. Further, the class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions.").

This approach makes both legal and common sense. Rulings by federal courts experienced with the benefits and drawbacks of class certification can provide guidance on the

issues. As a policy matter, it makes sense for federal and state courts to use similar standards in certifying class actions to avoid systematic abuses and rampant forum shopping.

Indeed, the Court of Appeals recently applied the "rigorous analysis" standard in an unpublished case. *Jackson v Wal-Mart Stores, Inc*, No 258498, 2005 WL 3191394, *2 (Mich Ct App November 29, 2005). In upholding a trial court's denial of class certification in a case arising out of the plaintiffs' employment. The Court wrote:

> [C]lass certification should be granted only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied." Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question."

Id. (citing *Falcon*, 147 US at 155, 160, 161) (citation and internal quotation marks omitted in original)). The Court further explained:

> [T]he principle that a court must accept as true a plaintiff's allegations in support of class certification merely limits review of the merits of the plaintiff's claim, and should not be invoked to artificially limit the required "rigorous analysis" of the factors necessary to the determination whether plaintiffs have met their burden of establishing each of the certification requirements.

Id. at *4 (citing *Falcon*, 147 US at 161; *Bell v Ascendant Solutions, Inc*, 422 F3d 307, 311-13 (CA 5, 2005) (noting that the suggestion that a court "must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification" is fundamentally "at odds" with the court's duty to make findings that the requirements for certification have been met")).

While *Jackson* is an unpublished case and as such does not constitute binding precedent under the rule of stare decisis, MCR 7.215(C)(1), the public policy judgments made by the court in its ruling are sound. The "rigorous analysis" level of scrutiny of class action certification

decisions should be applied in this case and in all future cases considering whether to grant class certification under MCR 3.501. The potential for problems under a laissez-faire approach to class certification is simply too great.

This case provides an example of such a laissez-faire approach. As Defendant-Appellant has aptly explained, the trial court's ruling certifying the class failed to give the appropriate level of scrutiny to whether the purported class claims met the Michigan class action requirements, such as predominance, superiority, typicality and adequacy. The court was clearly erroneous in certifying a class whose members owned property with substantially varying dioxin levels, including some with no elevated dioxin level, with different flooding histories alleged to have caused the dioxin contamination, and some properties subject to other dioxin sources, such as those standing on former industrial or manufacturing sites. Moreover, the effect of the alleged dioxin contamination on each class member varies considerably, with some expressing no more than vague concerns, others experiencing some impact on their gardening or yard usage, and still others claiming a variety of property value diminution claims. Thus, injury, causation, and damages are all highly individualized issues in this case. Had the circuit court engaged in a "rigorous analysis" of the record and properly applied the class action factors, it would have found that this litigation can only proceed on a case-by-case, property-specific basis.

In affirming the circuit court's ruling, the Court of Appeals placed undue emphasis on the need for an evidentiary hearing, *see* Slip Op. at 8, despite clear evidence in the record of the widely divergent situations of class members. The Court of Appeals minimized instructive cases demonstrating the inappropriateness of certifying classes lacking commonality as simply "each side present[ing] case law that supports its respective position," *id.*, without meaningful distinction from the case before this Court. In both those cases, *Zine v Chrysler Corp*, 236 Mich

App 261; 600 NW2d 384 (1999), and *Tinman v Blue Cross & Blue Shield*, 364 Mich App 546, 562, 692 NW2d 58 (2004), the factual inquiries involved individualized proof that rendered the case unmanageable as a class action, as they do in the case before this Court. The Court of Appeals below, simply concluded, without basis, that "the variants present in *Zine* are not present here." Slip. Op. at 9. With respect to *Tinman*, the Court of Appeal disregarded the defendant's argument (and the clear facts of the case), stating that "the trial court is not required to accept the defendant's assertions and proofs, but looks to the allegations in the complaint." *Id.* at 11. Nevertheless, the Court of Appeals cherry-picked evidence outside the complaint, particularly with heavy reliance on information presented by the plaintiffs from the MDEQ, as supporting class certification while ignoring more current evidence from the MDEQ submitted by the defense. *Id.* at 11-12. This one-sided analysis of class certification cannot stand.

I. A "LAISSEZ-FAIRE" APPROACH TO CLASS CERTIFICATION, LIKE THAT TAKEN BY THE TRIAL COURT, INVITES EXCESSIVE AND UNWARRANTED LITIGATION AND ABUSIVE LEGAL PRACTICES.

The ways in which inconsistent and lax certification standards encourage class action abuse became notorious when it spurred a cottage industry in nationwide class litigation in certain state courts in the late 1980s and 1990s. During that time, class action filings against Fortune 500 companies increased 338 percent in federal court and *more than 1,000 percent* in state court. *See* Federalist Society, *Analysis: Class Action Litigation--A Federalist Society Survey*, 1:1 Class Action Watch 5 (1999). The RAND Institute reported in 1997 that "class action activity has grown dramatically" with the increase "concentrated in the state courts." Deborah Hensler et al, *Preliminary Results of the RAND Study of Class Action Litigation*, at 15 (RAND Inst for Civ Just 1997).

The reason: some state courts did not adopt the United States Supreme Court's requirement for a "rigorous analysis" and took a laissez-faire approach to applying the class certification factors. Entrepreneurial contingency fee lawyers flocked to these state "magnet" courts to file putative class action suits, hoping that class treatment would give them an advantage in litigation. *See, e.g.*, S Rep 109-14, at 14 (explaining that the "explosion" in state class action filings occurred because "many state court judges are lax about following the strict requirements of Rule 23 (or the state's governing parallel rule), which are intended to protect the due process rights of both unnamed class members and defendants").

Some state trial courts certified classes while federal courts considering identical claims against the same defendant would not, explaining that constitutional due process guarantees prevented class treatment of individualized claims. *See In re Masonite Hardboard Siding Prods Liab Litig*, 170 FRD 417, 419 (ED La 1997) (rejecting class certification of claims against of plaintiffs alleging their house siding was defective, while recognizing that an Alabama state court had certified a nearly identical class action). Other state courts engaged in so-called "drive by" class certifications, certifying a class at the request of plaintiffs' counsel before defendants were served with a complaint or had been given an opportunity to answer. *See* S Rep 109-14, at 22 (discussing Kansas and Tennessee cases in which the court certified the class almost immediately upon filing of the complaint). While some plaintiffs' lawyers defended the practice on the ground that the certifications were "conditional" and subject to challenge, it created an uphill battle for defendants.

It became clear through such cases that class certification can greatly influence the dynamics and even the outcome of a lawsuit, a troubling result since the class action device was intended as a procedural tool, not a mechanism to affect substantive litigation results. State

courts should be cognizant of past abuses and the opportunities for future ones, and affirmatively work to ensure that their implementation of state class action rules does not invite them. These abuses occur in numerous ways.

A. Lax Class Action Certification Encourages Unwarranted Litigation.

As a fundamental matter, class treatment greatly increases the number of claims brought against a defendant. Sometimes class members are swept into lawsuits from which they may not benefit and that they may not have wanted to bring in the first place. This happens because under the rules in many jurisdictions, including Michigan, once a class is certified, all potential plaintiffs are automatically included in the class unless they affirmatively choose to "opt out." *See, e.g.*, MCR 3.501(A)(3) (addressing class members' right to elect to be excluded from the action); Fed R Civ P 23(c)(2). Potential class members, who may not understand an opt-out notice written in dense legalese, may inadvertently be included in a class. When this occurs, class members lose their right to bring an individual claim and they are bound by the result obtained by class counsel.

In other cases, plaintiffs may be drawn to participate because of the perception that they can get easy money. As the Honorable Jack B. Weinstein, a judge who has been particularly sensitive to plaintiffs' needs, observed, "[t]he drum beating that accompanies a well-publicized class action . . . may well attract excessive numbers of plaintiffs with weak to fanciful cases." *In re "Agent Orange" Prod Liab Litig*, 818 F2d 145, 165 (CA 2, 1987), *cert den*, 484 US 1004 (1988). For example, one plaintiff in a mass tort case was quoted in the media as saying that he did not know whether he had a claim, but "heard that they were getting up a suit, ... [and] wanted to get in on the party." Bruce Nichols, *Steel Plant Lawsuit Lingers 9 Years*, Dallas Morning News, April 21, 1996, at 32A.

B. Class Actions May Result in "Judicial Blackmail."

It is particularly important to closely examine a request for class certification, as the grant of certification places tremendous pressure on a defendant to settle, regardless of a case's merit. The resulting settlements have been variously termed "blackmail settlements,"[1] "legalized blackmail,"[2] and "judicial blackmail"[3] by federal courts considering nationwide class actions, and the characterization applies equally in high-risk statewide class actions. The specter of a high damages award, potentially including punitive damages, is daunting, whether the case involves a nationwide or a statewide class. "For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable," even where an adverse judgment is improbable. Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 FRD 483, 490 (1996). In addition, the legal defense costs associated with discovery of individual class members' claims, pre-trial practice, and trial can be crippling.

As a result, the economics of class action practice mean that even claims with a very small chance of success at trial are frequently settled when the anticipated costs of defense and the claims for damages are high. Many defendants who are denied timely interlocutory appellate review of the claims against them – the most important safeguard against unfairness in the court system – are forced to settle before trial and appeal. *See* McNeil & Fanscal, *supra*, at 490. The lack of appellate court review of questionable legal claims, in turn, invites more questionable claims to be filed and "processed," distorting the civil justice system even further.

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[1] *In re Rhone-Poulenc Rorer, Inc*, 51 F3d 1293, 1298 (7 CA, 1995) (Posner, J.) (quoting Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973)).

[2] *In re Gen Motors Corp Pick-up Truck Fuel Tank Prods Liab Litig*, 55 F3d 768, 784 (3 CA, 1995).

[3] *Castano v Am. Tobacco Co*, 84 F3d 734, 746 (5 CA, 1996).

C. Class Action Status Influences Trial Outcomes.

Class treatment can severely hamper a defendant's prospects at trial by "skewing trial outcomes." *Castano v Am Tobacco Co*, 84 F3d 734, 746 (CA 5, 1996). Evidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award which may result. *See* McNeil & Fanscal, *supra*, at 491-92. Defendants are far more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs, and their damages (particularly punitive damages) tend to be higher. *See id.*; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decision*s, 73 Judicature 22 (1989).

Evidence suggests that the presence of even one severely injured plaintiff will likely increase the damages awarded to the other plaintiffs, regardless of individual circumstances. *See* McNeil & Fanscal, *supra*, at 491; Kenneth S. Bordens & Irwin A. Horowitz, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 L & Human Behav 209, 211-12, 226 (1988) (juror interviews from actual trial and empirical research indicate jurors assume all plaintiffs will suffer as much harm as the most severely injured person). This gives those class members with less severe injuries a windfall benefit. *Id.*; McNeil & Fanscal, *supra*, at 491. Likewise, in settlements, the higher potential jury award value for serious claims is spread to weaker claims, at least in part. This benefits those with weaker claims and the attorneys who receive contingency fees at the expense of those who have experienced greater injury. *See* Christopher Edley, Jr., *Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong at II.1. (July 1, 1999) (discussing treatment of consolidated dissimilar claims in asbestos litigation). A jury's commonsense ability to gauge an

individual's actual damage is abandoned and instead juries are confronted with statistical manipulations of "average" damages for hundreds or thousands of class members.

D. Class Actions Let Lawyers Benefit at Their Clients' Expense.

1. Plaintiffs' Lawyers Call the Shots.

The class action system allows lawyers, not their clients, to decide when and whether to file lawsuits. While some class actions undoubtedly spring from the concerns of injured consumers, many are the result of the creativity of entrepreneurial contingency fee lawyers. Plaintiffs' lawyers search for some corporate misstep that arguably could constitute a colorable claim by scanning newspapers, searching the Internet, and digging through advertisements. *See* Editorial, *Class War,* Wall St J, March 25, 2002, at A18. Once they identify a "misstep," they typically find friends or colleagues who fit the class to be the representative plaintiffs. *Id.* However, unnamed class members – the real parties in interest – may not want their claims adjudicated in the forum chosen or under the strategies selected. They may not even want to be plaintiffs.

Lawyer-driven class actions can put class members' rights at risk by proceeding on a lowest-common-denominator basis. Class members with more serious and complex claims may simply be "lumped into" the rest of the class and not given the individual attention they need. *See* John H. Beisner, *Prepared Statement Before the Subcomm. On Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary, Hearing on S. 353: The Class Action Fairness Act of 1999*, 10 (May 4, 1999). Moreover, plaintiffs' lawyers may dispense with certain claims for tactical reasons – such as waiving fraud claims because they require individual demonstrations of reliance that can defeat class status. *See id.*

Unnamed class members, particularly those without legal training, have little say in how their claims are handled. Notices of class actions or proposed settlements provide little or no information about rights to class members not versed in legalese. Class members may therefore miss opportunities to make the crucial decision to opt out of a plaintiff class.

2. Plaintiffs' Lawyers Can Generate Windfall Fees, Leaving Their Clients Empty-handed.

The opportunity to generate large fees is a major reason plaintiffs' lawyers file class actions. As Stanford University Law Professor Deborah Hensler observed, "[l]awyers are entrepreneurial, they're part of the capitalist economy, and there are very powerful economic incentives to bring these types of lawsuits." Eddie Curran, *On Behalf of All Others: Legal Growth Industry Has Made Plaintiffs of Us All*, Mobile (Ala) Register, December 26, 1999, at 1A.

While class counsel should receive fair compensation for work to further their clients' interests, class action settlements have been abused in courts that use a "rubber stamp" approach in their class action decisions. This allows class lawyers to bring in windfall fees at the expense of their clients. One notorious example is the Bank of Boston case, which involved allegations that the Bank of Boston had over-collected escrow monies from homeowners and profited from the interest. *Kamilewicz v Bank of Boston Corp*, 92 F3d 506, 508-09 (CA 7, 1996), *cert den*, 520 US 1204 (1997). The settlement awarded up to $8.76 to individual class members. *See id.* The plaintiffs' lawyers received more than $8.5 million in fees, which were debited directly from individual class members' escrow accounts, leaving many of them worse off than they were before the suit. *See* Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, NY Times, November 21, 1995, at A1. In testimony before the Subcommittee on Administrative Oversight and the Courts, class member Martha Preston recounted how she received $4 from the

settlement, but was charged a mysterious $80 'miscellaneous deduction,' which she later learned was an expense used to pay the class lawyers' settlement fees. S Rep 109-14, 14-15.

Another is the practice of "coupon settlements" that began in the early 1990s. These settlements provided that class members received coupons, often for the same product or services at issue in the suit and accompanied by restrictions that made them difficult to use, while class counsel were rewarded with millions of dollars in fees. *See* S Rep 109-14 (providing numerous examples of such settlements). Congress recently curbed the use of coupon settlements in interstate class actions when it enacted the Class Action Fairness Act of 2005 (CAFA), Pub L No 109-2 § 3, 119 Stat 4 (2005) (codified at 28 USC §§ 1711 to 1715), but the potential for its exploitation in statewide class litigation remains.

These problems certainly do not mean that class actions are always or almost always inappropriate. What is important to understand is that it is critical for a trial court to give serious consideration to the question of whether class certification in a given case is appropriate and desirable under the factors set forth in the class action rule.

II. IF LEFT TO STAND, THE TRIAL COURT'S RULING WILL FOSTER UNWARRANTED CLASS LITIGATION AND MAKE MICHIGAN COURTS A MAGNET FOR STATEWIDE CLASS ACTIONS.

The legal and public policy implications of this case are important to interests beyond the litigants before the Court. If allowed to stand, the trial court's ruling sanctioning the "rubber stamping" of class certification requests would adversely impact Michigan-based businesses and the state's economy, Michigan consumers, and participants in the state's civil justice system.

Michigan courts would likely be flooded with statewide class actions under this standard, particularly in light of the enactment of CAFA. When CAFA was enacted, class litigation practice was an extremely lucrative cottage industry for a certain segment of the contingency fee

bar. State courts with lax class certification standards provided the key to this business, as they allowed lawyers to obtain nationwide classes in state courts and wield the power of class certification to generate lucrative settlements and high fee awards. *See generally* Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv J Legis 483 (2000).

Congress enacted CAFA to reduce this forum shopping by providing federal jurisdiction over class actions with certain interstate characteristics. Importantly, out of respect for federalism and states' interests in addressing issues primarily affecting their own jurisdictions, Congress did not provide solutions for abuses in intrastate class action litigation. Lawyers seeking to fill the gap in their litigation portfolios created by CAFA will naturally turn to states with easy class certification rules and avoid federal jurisdiction, for example, by suing only in-state businesses or including mostly resident plaintiffs as class members. *See* Victor E. Schwartz, *The Class Action Fairness Act of 2005: The Defense Discusses Benefits and Minefields*, Prod Liab L & Strategy, vol 24, no 3, September 2005, at 1, 4-5. As a result, the composition of class action lawsuits brought in state courts will change, but attempts to abuse them will not.

A. Potential Effects on Michigan Businesses, Consumers and the Economy.

Michigan businesses would likely become repeated targets of unwarranted class litigation under the trial court's laissez-faire class certification standard. CAFA contains provisions that could allow sizable class actions to proceed in a state court. For example, if all of the defendant companies are citizens of the forum state, a federal court can decide to allow the class action to proceed in state court even if up to two-thirds of the class members are from other states. 28

USC §§ 1332(d)(3) & (d)(4)(A)(i)(I). Plaintiffs' lawyers already have illustrated their ability to generate class action claims from thin air. *See Class War, supra.* They would be likely to concoct claims against Michigan-based businesses in order to pursue class actions in Michigan courts, rather than try to meet the more exacting class certification standards used in federal court and in other states.

The adverse effects of excessive litigation on business and industry are well-documented. Corporations that are subject to repeated lawsuits are unwilling or unable to invest resources in the development of new products and services. They are forced to pass their liability and legal defense costs on to consumers, resulting in higher prices. They may be forced to withdraw beneficial products and services because the litigation costs associated with them are too much to bear. *See, e.g.*, Steven B. Hantler, Mark A. Behrens & Leah Lorber, *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy L Rev 1113, 1120 & n 31 (2005) (providing examples of effects of excessive liability); Michael Moore & W. Kip Viscusi, *Product Liability, Research and Development, and Innovation*, 101 J of Political Econ 161, 174-75 (1993) (explaining that once damages become excessively high, either product development will stagnate or firms will withdraw from the market altogether); The Liability Maze 5-7 (P.W. Huber & R.E. Litan, eds The Brookings Inst, 1991) (noting that in the United States, excessive liability has created problems in a number of industries, raising consumer costs, causing beneficial products to be removed from the market, discouraging innovation, and leading to corporate layoffs and bankruptcies).[4]

[4] A Conference Board survey of more than 2,000 chief executive officers in 1988 found that 36 percent of the companies had discontinued product lines as a result of actual liability experience and that 11 percent of the companies had done so based on anticipated liability problems. Thirty percent of the companies surveyed had decided against introducing new products and 21 percent had discontinued product research as a result of adverse liability

If the state gains a reputation for having a lax class certification standard, then economic development efforts will be hampered by unwarranted class litigation, as new companies are likely to decide against basing themselves in Michigan and existing companies may move their headquarters elsewhere to avoid the potential for overwhelming liability costs. At the worst end of the spectrum, as illustrated by years of asbestos litigation, lie litigation-driven corporate bankruptcies, job layoffs, and company closings, with adverse consequences for employees, shareholders, and retirees with investments in those companies. *See* Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev of Litig 253, 254, 285-86 (2005).[5]

B. Potential Effects on the Michigan Court System and its Participants.

The Michigan civil justice system itself would suffer under the trial court's certification standard, particularly in light of another CAFA provision which allows a class action to proceed in state court if there are up to 99 plaintiff class members, whether from the forum state or elsewhere. 28 USC § 1332(d)(5). An adroit plaintiffs' lawyer could seek to evade this restriction by filing multiple complaints, identical except for narrowly drawn class descriptions, thereby keeping essentially national claims in state court, subject to what would be a less-rigorous class certification standard.[6] While CAFA provides the potential for some relief in such

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experiences. *See* S Rep No 105-32, at 8 (citing E. Patrick McGuire, *The Impact of Product Liability*, The Conference Board, Research Report No 908, tbl 28 (1988)).

[5] The Conference Board also reported that as a result of actual adverse liability experiences, 15 percent of the companies had laid off workers, and 8 percent closed production plants. Nearly a quarter of the companies lost market share, and 17 percent decided against acquiring or merging with another company. *See id.*

[6] In a parallel example of profit-driven legal creativity, in August 2005 lawyers filed more than 1,000 claims in Alabama state court alleging injury from decades-old pollution from polychlorinated biphenyls, or PCBs, in and around Anniston, Alabama. Most of the lawsuits were filed in neat packages of just under 100 plaintiffs, apparently to avoid any attempt to move them to federal court in accordance with CAFA. 28 USC § 1332(d)(11)(A) (providing for

situations, such claims could flood court dockets, consuming court resources and delaying the adjudication of the claims of Michigan residents and others who legitimately deserve access to Michigan courts. There is no reason for Michigan courts to encourage the development of class action mills within the state.

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removal to federal court of "mass action" state court cases with 100 or more plaintiffs). These filings came just two years after a $700 million global settlement resolved the claims of more than 20,000 plaintiffs in two massive class action PCB lawsuits – and awarded class counsel (including some of these lawyers) over 40 percent of that amount in fees. *See* Assoc Press, *$700 Million Settlement in Alabama PCB Lawsuit*, NY Times, August 21, 2003, at C4; Charles Seabrook, *PCB Settlement Share Irks Claimants; Lawyers Win Big in Alabama Class-Action Case*, Atlanta J & Const, April 12, 2004, at A1; *Jay Reeves, Attorney Fees Rile Alabama Plaintiffs; PCB Victims Average $7,725 Each, Lawyers About $4 Million Each*, St Louis Post-Dispatch, March 24, 2004, at C1. *See also Reaves v Pharmacia Corp*, No. 05-4624 (Jefferson County Cir Ct, Ala) (filed August 5, 2005) (96 listed plaintiffs); *Satcher v Pharmacia Corp*, No. 05-4623 (Jefferson County Cir. Ct., Ala.) (filed August 5, 2005) (79 listed plaintiffs); *Conley v Pharmacia Corp*, No 05-4622 (Jefferson County Cir Ct, Ala) (filed August 5, 2005) (96 listed plaintiffs); *Allen v. Pharmacia Corp*, No 05-4671 (Jefferson County Cir Ct, Ala) (filed August 9, 2005) (99 listed plaintiffs); *Abbott v Pharmacia Corp*, No 05-4718 (Jefferson County Cir Ct, Ala) (filed August 11, 2005) (99 listed plaintiffs); *Bentley v Pharmacia Corp*, No 05-4824 (Jefferson County Cir Ct, Ala) (filed August 15, 2005) (99 listed plaintiffs); *Cambric v Pharmacia Corp*, No 05-4823 (Jefferson County Cir Ct, Ala) (filed August 16, 2005) (99 listed plaintiffs); *Adams v Pharmacia Corp*, No 05-4865 (Jefferson County Cir Ct, Ala) (filed August 17, 2005) (93 listed plaintiffs); *Kelley v Pharmacia Corp*, No 05-4967 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Roberts v Pharmacia Corp*, No 05-4968 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Stanfield v Pharmacia Corp*, No 05-4969 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Brown v Pharmacia Corp,* No 05-4969 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Carlisle v Pharmacia Corp*, No 05-4963 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (98 listed plaintiffs); *Clayburn v Pharmacia Corp*, No 05-4964 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (74 listed plaintiffs); *Fitzpatrick v Pharmacia Corp*, No 05-4965 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Taylor v Pharmacia Corp*, No 05-4970 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Woods v Pharmacia Corp*, No 05-4971 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Austin v Pharmacia Corp*, No 05-4962 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Bowman v Pharmacia Corp*, No 05-4960 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (96 listed plaintiffs); *Ary v Pharmacia Corp*, No 05-4987 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Creed v Pharmacia Corp*, No 05-4988 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Henderson v Pharmacia Corp*, No.05-4989 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Moates v Pharmacia Corp*, No 05-4990 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Roberts v Pharmacia Corp*, No 05-4991 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Thompson v Pharmacia Corp*, No 05-4992 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Aderholt v Pharmacia Corp*, No 05-4982 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs).

III. THIS COURT SHOULD REJECT PLAINTIFFS' NOVEL APPROACH TO CLASS CERTIFICATION BASED ON THE LOWEST COMMON DENOMINATOR

Plaintiffs-Appellees suggest a novel and dangerous approach to class certification that this Court should firmly reject. Faced with the fact that the property of class members have substantially varying levels of dioxin, including some that do not have elevated levels of dioxin, and that each property has a different flooding history and other potential sources of contamination, plaintiffs propose that class certification proceed based on the lowest common denominator. That is, Plaintiffs-Appellees request that the court certify a class based on the little all members have in common – that they are located within the one-hundred year Flood Plain of the Tittabawassee River and that, as such, they are at risk of injury from contamination. *See* Plaintiffs-Appellees' Brief in Opposition at 31 ("The injury is the same for all properties in the class area because Dow's contamination. . . threatens every property in the class area."). Plaintiffs-Appellees suggest that a purported common injury can be found "through fate and transport modeling and further analysis / extrapolation of existing and future testing of soil samples in class areas." *Id.* at 13-14. In other words, there is no existing injury common to class members, but Plaintiffs-Appellees propose finding one through predicting what might occur. This is essentially a fear of a future injury claim.

Moreover, Plaintiffs-Appellees present as common factual issues matters that diverge significantly among class members. "Whether and to what extent" is the key phrase that begins each of these purported statements of commonality. *See id.* at 22-23. The "whether" and the "extent," however, of any threat to health or convenience of the owners, any interference with the use or enjoyment of the properties, and any impact on the value of the properties cannot be

determined in the abstract, or for a generalized area, but must be proven for each individual plaintiff's property. As Judge Kelly recognized in her strong dissent:

> [T]he trial court simply framed a common question that merely encompassed the legal claim made by plaintiffs, i.e. defendant allegedly polluted the Tittabawassee River. However, even if this common question were to be resolved in plaintiffs' favor, the trial court would still have to determine, for each plaintiff, exposure levels, causation, injury-in-fact, damages and/or defenses.

Slip Op. at 5 (Kelly, J. dissenting).

Aside from the obvious lack of typicality between members who might experience future contamination and those who have found contamination on their property, as a matter of public policy, courts should not certify such a claim. Allowing for "threat-based" class actions is contrary to Michigan law which disfavors claims where there is only a fear of future injury; these claims are particularly susceptible to class action abuse. For example, in this very case, this Court recognized that allowing a claim for medical monitoring would result in a "potentially limitless pool of plaintiffs," allowing personal injury lawyers to "virtually begin recruiting people off the street" to act as plaintiffs. *See, e.g., Henry v Dow Chem Co*, 473 Mich 63, 84-85, 701 NW2d 684, 694 (2005). The Court also recognized that lawsuits by plaintiffs who are not presently hurt have the potential to "create a stampede of litigation" and "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." 473 Mich at 84-85, 701 NW2d at 694-95. The Court has also recognized the principle that a plaintiff must show a tangible injury in other types of actions where, without some reasonable limit, have the potential for unbridled claims. *See, e.g., Bogaerts v Multiplex Home Corp*, 423 Mich 851, 851, 376 NW2d 113, 113 (1985) (reinstating trial court order vacating emotional damages award where plaintiffs "failed to allege and prove a sufficient physical injury"); *Daley v LaCroix*, 384 Mich 4, 12-13, 179 NW2d 390, 395 (1970) (recovery available only where a

"definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct"); *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 319, 399 NW2d 1, 9 (1987) (cancer-related claims do not accrue until "the discoverable appearance of cancer").

The same public policy considerations hold true with respect to the plaintiffs' request for class treatment of a nuisance claim resting on a fear of future harm. Should this Court recognize such an action, plaintiffs lawyers could file class action lawsuits on behalf of groups of individuals around nearly any industrial facility, claiming that a substance released from that facility at some time in the past (perhaps even a century ago, as here) might fall on the land of some of the thousands of people surrounding the site at some undetermined point in the future and could affect the future use and enjoyment of the property.

CONCLUSION

For the foregoing reasons, *Amici Curiae* the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the American Chemistry Council respectfully request this Court to reverse the trial court's order granting plaintiffs' motion for class certification dated October 21, 2005, and rule that a "rigorous analysis" of the class action factors is required before a class action can be certified under MCR 3.501.

Respectfully submitted,

Dana M. Mehrer, P63024*
SHOOK, HARDY & BACON L.L.P
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Victor E. Schwartz
Cary Silverman
SHOOK, HARDY & BACON L.L.P.

600 14th Street, NW, Suite 800
Washington, DC 20005-2004
(202) 783-8400

Attorneys for *Amici Curiae*
* Counsel of Record

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Of Counsel

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PROOF OF SERVICE

Dana M. Mehrer, being first duly sworn, deposes and says that on June 27, 2008, she served 2 copies of the foregoing *amicus curiae* brief by first-class U.S. Mail, postage prepaid, addressed to the following:

Teresa A. Woody
THE WOODY LAW FIRM, P.C.
Lead Counsel for Plaintiffs-Appellees
1044 Main Street, Suite 500
Kansas City, MO 64105
(816) 421-4246

Kathleen A. Lang (P34695)
Phillip J. DeRosier (P55595)
DICKINSON WRIGHT PLLC
Attorneys for Defendant-Appellant
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

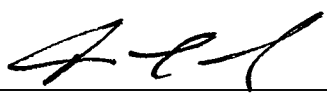
Carl H. Helmstetter
Michael F. Saunders
SPENCER, FANE, BRITT & BROWNE, LLP
Attorneys for Plaintiffs-Appellees
1000 Walnut, Suite 1400
Kansas City, MO 64106
(816) 474-8100

John A. Decker (P31078)
BRAUN KENDRICK FINKBEINER, PLC
Attorneys for Defendant-Appellant
4301 Fashion Square Boulevard
Saginaw, MI 48603
(989) 498-2100

Bruce F. Trogan (P26612)
TROGAN & TROGAN, PC
Local Counsel for Plaintiffs-Appellees
7628 Gratiot Road
Saginaw, MI 48609
(989) 781-2060

Douglas J. Kurtenbach (admitted pro hac vice)
Marcus E. Sernel
Christopher M.R. Turner
KIRKLAND & ELLIS LLP
Attorneys for Defendant-Appellant
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Respectfully submitted,



Dana M. Mehrer