IN THE SUPREME COURT OF THE STATE OF LOUISIANA

DOCKET NUMBER: 07-C-567

TROY ROBICHAUX, SHANNON ROCHICHARUS,
MICAHEL J. TUMINELLO, SR. and OLIVE D. TUMINELLO

Plaintiffs-Respondents

VERSUS

STATE OF LOUISIANA, THROUGH DEPARTMENT OF HEALTH and HOSPITALS and through THE DEPARTMENT OF ENVIRONMENTAL QUALITY AND DOW CHEMICAL COMPANY

Defendants-Applicants

ON WRIT OF REVIEW FROM
THE FIRST CIRCUIT COURT OF APPEAL
NO. 2006-C-0437

EIGHTEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF IBERVILLE
NO. 56903, THE HONORABLE JAMES J. BEST

CIVIL PROCEEDING

THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN CHEMISTRY COUNCIL, THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY, AND THE LOUISIANA CHEMICAL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

NOW INTO COURT, through undersigned counsel, come the Chamber of Commerce of the United States ("Chamber"), the America Chemistry Council ("ACC"), the Louisiana Association of Business and Industry ("LABI"), and the Louisiana Chemical Association ("LCA") (collectively, "*amici*") and move this Court for leave to file a brief as *amici curiae* in support of Appellants. For the following reasons, *amici*'s motion should be granted.

1.

This action addresses the issue of whether the trial court appropriately certified plaintiffs' negligence and remediation claims under Louisiana law.

2.

The Chamber, ACC, LABI, and LCA ask that the Court grant them leave to file a brief as *amici curiae* in this case in order to aid the Court's understanding of the serious implications of the class certification decision below.

3.

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

4.

The Chamber regularly files *amicus* briefs in significant appeals involving class certification issues, including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998), and *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996).

5.

The ACC represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, 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.

6.

The LABI represents a wide range of large and small business in Louisiana and has approximately 3,200 members throughout the state. The LABI works to foster the interests of the business community through active involvement in the political, legislative, judicial and regulatory processes.

7.

The LCA is a nonprofit Louisiana corporation, composed of 68 member companies located at over 90 chemical manufacturing plant sites in Louisiana. Each LCA member

company, as does any business in the current legal climate, faces the constant threat of litigation, including class actions, and may be adversely affected by the decision rendered in this litigation.

8.

Amici's motion for leave to file a brief in support of appellants as *amici curiae* should be granted for two important reasons. ***First***, *amici* have substantial, legitimate business interests that will likely be affected by the outcome of the case. Few issues are of more concern to American business than those pertaining to class certification. The Chamber, ACC, LABI, LCA and their members have a strong interest in reversal of the Court of Appeal's opinion in this matter because absent reversal, the appeals court's loose interpretation of class certification requirements would threaten the ability of the chemical industry and other businesses in Louisiana to fairly defend themselves against potentially bankrupting class action judgments.

9.

Second, *amici* can offer this Court significant guidance on the class certification questions at issue in this appeal that might otherwise escape the Court's attention. Specifically, *amici*'s familiarity with relevant federal class certification precedents and the policy implications of relaxed class certification standards (topics not addressed in appellants' petition) can be of great assistance to the Court in understanding the broader implications of the appeals court's ruling.

10.

WHEREFORE, the Chamber of Commerce of the United States, the American Chemistry Council, the Louisiana Association of Business and Industry, and the Louisiana Chemical Association respectfully request that this Court grant them leave to file a brief as *amici curiae*.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion by the United States Chamber of Commerce, the American Chemistry Council, the Louisiana Association of Business and Industry, and the Louisiana Chemical Association for Leave to File Amicus Brief in Support of Appellants has been sent to counsel of record listed below by hand delivery and/or by placing same in the United States mail, properly address and postage pre-paid, this 16th day of March, 2007.

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IN THE SUPREME COURT OF THE STATE OF LOUISIANA

DOCKET NUMBER: 07-C-367

TROY ROBICHAUX, SHANNON ROCHICHARUS,
MICAHEL J. TUMINELLO, SR. and OLIVE D. TUMINELLO

Plaintiffs-Respondents

VERSUS

STATE OF LOUISIANA, THROUGH DEPARTMENT OF HEALTH and HOSPITALS and through THE DEPARTMENT OF ENVIRONMENTAL QUALITY AND DOW CHEMICAL COMPANY

Defendants-Applicants

ON WRIT OF REVIEW FROM
THE FIRST CIRCUIT COURT OF APPEAL
NO. 2006-C-0437

EIGHTEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF IBERVILLE
NO. 56903, THE HONORABLE JAMES J. BEST

CIVIL PROCEEDING

ORDER

Considering the above and foregoing;

IT IS ORDERED that the Chamber of Commerce of the United States, the American Chemistry Council, the Louisiana Association of Business and Industry, and the Louisiana Chemical Association's Motion for Leave to File Amicus Brief in Support of Appellants be and the same hereby is granted, and that their Brief be and hereby is deemed filed with the Court.

_____, Louisiana, this _____ day of _____, 2007.

JUDGE

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

DOCKET NUMBER: 07-C-5107

TROY ROBICHAUX, SHANNON ROCHICHARUS,
MICHAEL J. TUMINELLO, SR. and OLIVE D. TUMINELLO

Plaintiffs-Respondents

VERSUS

STATE OF LOUISIANA, THROUGH DEPARTMENT OF HEALTH and HOSPITALS and through THE DEPARTMENT OF ENVIRONMENTAL QUALITY AND DOW CHEMICAL COMPANY.

Defendants-Applicants

ON WRIT OF REVIEW FROM THE
FOURTH CICRUIT COURT OF APPEAL
NO. 2006-C-1502

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 2003-11573 and NO. 2004-873
THE HONORABLE LLOYD J. MEDLEY, JR.

CIVIL PROCEEDING

Brief Of The Chamber Of Commerce Of The United States Of America, The American Chemistry Council, The Louisiana Association of Business And Industry, And The Louisiana Chemical Association As *Amici Curiae* In Support Of Petitioner

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber"), the American Chemistry Council ("ACC"), the Louisiana Association of Business and Industry ("LABI"), and the Louisiana Chemical Association ("LCA") submit this brief as *amici curiae* in support of Appellants.

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. The Chamber regularly files amicus briefs in significant appeals involving class certification issues, including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998), and *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996).

The ACC represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, 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.

The LABI represents a wide range of large and small business in Louisiana and has approximately 3,200 members throughout the state. The LABI works to foster the interests of the business community through active involvement in the political, legislative, judicial and regulatory processes.

The LCA is a nonprofit Louisiana corporation, composed of 68 member companies located at over 90 chemical manufacturing plant sites in Louisiana. Each LCA member company faces the constant threat of litigation, including class actions, and may be adversely affected by the decision rendered in this litigation.

Few issues are of more concern to American business than those pertaining to class certification. The Chamber, the ACC, the LABI, the LCA and their members have a strong interest in reversal of the Court of Appeal's opinion in this matter because absent reversal, the appeals court's loose interpretation of class certification requirements would threaten the ability of businesses in Louisiana to fairly defend themselves against potentially bankrupting class action judgments. *Amici* believe that their perspective can be of assistance to the Court in understanding the broader implications of the appeals court's ruling.

INTRODUCTION

Despite recognizing that Louisiana class action law is intended to be consistent with federal standards, *Robichaux et al. v. State ex rel. Dep't of Health & Hosps.*, 06-0437 p. 7 n.7 (La. Ct. App. 1 Cir. 12/28/06); 2006 WL 3804664, at *3 n.7 (Act 839 provisions "track the language of Federal Rule of [Civil] Procedure 23 almost verbatim"), the Court of Appeal performed a class certification analysis in this case that contradicted the federal standard in multiple respects. Most notably, the Court of Appeal (1) held that courts should exercise a presumption in favor of class certification "in light of the relative ease of subsequent modification as future developments or circumstances may warrant," *Robichaux*, 2006 WL 3804664, at *3; and (2) refused to consider how plaintiffs planned to establish the various elements of their causes of action on the ground that such an analysis constituted an impermissible inquiry into the merits of the litigation, *see id.* at pp. 11-12, 16-17; 2006 WL 3804664, at *5, *8. Both of these determinations are contrary to well established United States Supreme Court precedent; they also conflict with prior decisions of this Court.

Review of the Court of Appeal's decision is warranted for several reasons. First, review is necessary to resolve conflicting decisions and to ameliorate uncertainty and confusion in the lower courts over significant issues of law. La. S. Ct. R. 10(1)(a). Although nearly a decade has passed since Act 839 went into effect, this Court has yet to issue an opinion addressing the proper interpretation of the revised class action standard. Indeed, this Court has only issued one decision during that time period that addressed the propriety of class certification at all, *Banks v. New York Life Insurance Co.*, 98-0551 (La. 7/2/99); 737 So. 2d 1275, and that case involved the pre-Act 839 standard. The Court of Appeal's decision, which conflicts with past decisions of this Court and persuasive federal authority, highlights the need for clearer guidelines regarding class certification under Louisiana law.

Second, judicial review of the Court of Appeal's decision is also warranted because, if left undisturbed, the Court of Appeal's erroneous conclusions are likely to "cause material injustice" and significantly affect the public interest. La. S. Ct. R. 10(1)(a)(4). At present, there is a general consensus in both state and federal courts that class certification should be granted only if the court first determines that it is possible to establish each class member's entitlement to damages with common proof. The Court of Appeal's decision, however, departs from that consensus – under the Court of Appeal's reasoning, a superficial demonstration of similarity,

coupled with a presumption in favor of certification, will be sufficient to carry a plaintiff's burden. Such an approach would serve as a beckoning call to class action attorneys around the country – a proclamation that Louisiana courts welcome class actions that would be rejected virtually everywhere else. Accordingly, if the lower court's order is upheld, Louisiana will likely become the latest class action "magnet" jurisdiction, imposing huge costs on companies that do business in the state and placing an unnecessary strain on Louisiana courts.

For these reasons, the Court should grant the Petitioner's writ and reverse the appeals court's order affirming class certification in this case.

STATEMENT OF FACTS

This suit arises from the Louisiana Department of Health and Hospitals' routine periodic testing of well-water near the Myrtle Grove Trailer Park in Plaquemine, Louisiana in the late 1990s. In 1997 and 1998, these tests detected levels of vinyl chloride slightly in excess of federal drinking water standards. In March 2002, plaintiffs – landowners near or in the vicinity of the contamination – filed a putative class action against the Louisiana Department of Health and Hospitals and the Louisiana Department of Environmental Quality alleging negligent failure to warn of the 1997 and 1998 contamination results. Plaintiffs also filed claims against Dow Chemical Company ("Dow") alleging that it negligently caused the contamination. The trial court initially denied certification of the class but later reversed itself. Defendants appealed to the First Circuit Court of Appeal, which affirmed certification of the class.

ARGUMENT

Under Louisiana Supreme Court Rule 10(1)(a), Supreme Court review is appropriate (a) to resolve uncertainty or conflict regarding significant legal issues; and (b) to correct errors that will significantly affect the public interest. The Court of Appeal's ruling in this matter merits Supreme Court review for several reasons. First, the court's finding of a presumption in favor of class certification directly contravenes the well-established principle that class certification is a narrow exception to the general rule that claims should be litigated individually and thus creates conflict regarding significant legal issues. Second, the court's refusal to consider how plaintiffs planned to establish the various elements of their causes of action – *i.e.*, to determine whether plaintiffs had a trial plan that would make a classwide trial feasible – will create confusion among lower courts by suggesting that they should not consider how a case would be tried in deciding whether to grant class certification. And third, the appeals court's ruling will

substantially affect the public interest because these two propositions, taken together, significantly reduce the showing necessary to certify a class in Louisiana, thereby potentially opening the door to widespread class action abuse in the state's courts.

I. SUPREME COURT REVIEW IS NECESSARY TO CLARIFY FUNDAMENTAL CLASS ACTION PRINCIPLES UNDER LOUISIANA LAW.

Although Act 839 was enacted exactly a decade ago, 1997 La. Acts 839, this Court has yet to issue any rulings explaining the requirements of that provision and how they should be applied in class certification analyses. The resulting confusion is evident in the appeals court's ruling which initially recognizes that Louisiana class action law is intended to conform to federal standards but then goes on to conduct an analysis that is directly contrary to federal practice and precedents. Under the Court of Appeal's approach, a plaintiff enjoys a presumption in favor of certification and can carry his or her burden merely by showing that "proposed class members share identical claims regarding contamination by a single substance." *Robichaux*, 06-0437 at p. 17; 2006 WL 3804664, at *8. Any further "factual differences and distinctions that could potentially affect class commonality" are a merits concern in the appeals court's view and thus not relevant to class certification. *Id.* at p. 16; 2006 WL 3804664, at *8. This permissive attitude toward class certification is directly contrary to federal precedent, this Court's own rulings and the legislature's purpose in enacting Act 839; it also essentially eviscerates the requirements for class certification by suggesting that as long as there is some common question in a case, a court should just assume the remaining requirements (particularly the requirement that common questions must predominate) are satisfied.

For these reasons, as explained further below, the Court should grant Petitioner's writ and confirm that: (1) plaintiffs bear the burden of demonstrating compliance with class certification standards; (2) there is no presumption in favor of class certification under Louisiana law unless all requirements of Act 839 are satisfied; and (3) a court can and should inquire as to how a plaintiff intends to try a proposed class action as part of the class certification analysis.

A. The Court of Appeal's Presumption In Favor Of Class Certification Turns Traditional Class Certification Analysis On Its Head.

The first aspect of the Court of Appeal's decision that demands Supreme Court review is its finding – directly contrary to well established law – that courts should exercise a presumption in favor of class certification when evaluating the propriety of class certification, a presumption which it justified, in part, on the ground that a class can always be modified or decertified later in

the litigation. *See Robichaux*, 06-0437 at p. 7; 2006 WL 3804664, at *3 ("[a] trial court considering certification should generally favor maintaining the class in light of the relative ease of subsequent modification as future developments or circumstances may warrant"). This presumption apparently infected all aspects of the Court of Appeal's certification analysis. *See id.* at p. 8; 2006 WL 3804664, at *3 (noting in recitation of class certification requirements that "class certification by the trial court is preferred for the reasons noted above").

The Court of Appeal's erroneous "prefer[ence]" for certification merits review by this Court both because it is contrary to Act 839's purpose of harmonizing Louisiana and federal class action law[1] and because it effectively loosens the class certification criteria adopted by Louisiana in that provision. *See Banks*, 98-0551 pp. 6-7; 737 So. 2d at 1280. As numerous courts have recognized, Fed. R. Civ. P 23, on which Louisiana class action law is based, was designed to be a limited exception to the "usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979); *see generally Amchem Prods. v. Windsor*, 521 U.S. 591, 613-17 (1997). Thus, it has long been recognized that "actual, not presumed, conformance" with class certification standards is required in the context of Rule 23. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) ("similarity of claims and situations must be demonstrated rather than assumed" for certification to be appropriate).

The U.S. Supreme Court addressed this issue nearly twenty-five years ago in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). In *Falcon*, the plaintiff argued in favor of an "across-the-board" rule in the context of employment discrimination claims, *i.e.*, he contended that if he could show individual discrimination, it should be assumed that discrimination occurred across-the-board to all members of the proposed class. *Id.* at 156-57. The Supreme Court, however, rejected this premise, noting that "[c]onceptually, there is a wide gap" between establishing individual discrimination and establishing "the existence of a class of persons who have suffered the same injury as that individual" and asserting that "[f]or respondent to bridge that gap, he must prove much more than the validity of his own claim." *Id.* at 157-58. The Court went on to hold that no class action should be certified under Rule 23 unless, after conducting a "rigorous analysis," the trial court was satisfied that the certification

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[1] *See Ford v. Murphy Oil U.S.A., Inc.*, 96-2913 (La. 9/2/97); 703 So. 2d 542, 545 n.5 (noting that Act 839 was designed to make the language of Louisiana class action provisions "more closely track the language of Federal Rule of Civil Procedure 23").

requirements had been met.[2] *Id.* at 161. This is precisely opposite to the approach taken by the Court of Appeal here, which eschewed any "rigorous analysis," and instead based its decision on a "prefer[ence]" for certification.

Permitting courts to certify class actions on the basis of a presumption does not merely conflict with U.S. Supreme Court precedent; it also runs afoul of constitutional due process. Due process requires that all parties to a case receive "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted). Thus, whatever procedure a court employs for adjudicating the claims at issue in a class action, it must accord each plaintiff the "opportunity to present his case and have its merits fairly judged," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982), and protect each defendant's ability to defend fully against each and every claim being asserted, *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997), *aff'd sub nom.*, *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998).

A properly-certified class action meets this condition because the class members' claims are so factually and legally similar that adjudicating the class representative's claims necessarily and fairly resolves the claims of the absentee class members. If a class action is certified on the basis of a presumption, however, the court is simply assuming that the class representative's lawsuit is a valid proxy for those of the rest of the class. And if the court is wrong – *i.e.*, if class members' claims actually vary significantly in terms of their merit – then a classwide judgment has the potential to be either over-inclusive or under-inclusive. If the class representative's claims are stronger than those of certain absentee class members, for example, a defendant may ultimately be found liable to class members who could never have established an entitlement to damages in an individual action. Conversely, if the class representative's claims are weaker than those of the absentee class members, then absentee class members who would have been able to prevail in an individual action might end up with no recovery. In neither circumstance can it be said that all parties received an "opportunity to be heard at a meaningful time and in a meaningful manner." *Eldridge*, 424 U.S. at 333 (quotation omitted); *see also Szabo*, 249 F.3d at 677 (noting that certification based on presumed conformance with Rule 23 threatens injury to the rights of "absent class members and defendants").

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[2] Notably, other states' class action statutes that are modeled on Rule 23 have been interpreted to prohibit presumptions in favor of class certification. *See, e.g., Dragon v. Vanguard Indus., Inc.*, 89 P.3d 908, 916 (Kan. 2004); *W. Va. ex rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772, 783 (W. Va. 2004); *Gardner v. S.C. Dep't of Revenue*, 577 S.E.2d 190, 200 (S.C. 2003); *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

The Court of Appeal's exercise of a presumption in favor of class certification also warrants this Court's review because it calls into question the validity of the well-established principle, embraced in both federal and Louisiana courts, that the plaintiff bears the burden of establishing the propriety of class certification. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) ("The party seeking certification bears the burden of proof."); *Carr v. GAF, Inc.*, 98-1244 at p. 6 (La. App. 1 Cir. 4/8/98); 711 So. 2d 802, 805-06 ("The burden of proving the appropriateness of class certification is on the party seeking to maintain the class action to establish these elements."). Although the Court of Appeal indicated without explanation that a presumption in favor of class certification could somehow be reconciled with the principle that a plaintiff bears the burden of establishing the propriety of class certification, *Robichaux*, 06-0437 at pp. 7-8; 2006 WL 3804664, at *3, the two concepts are in fact contradictory. By definition, a presumption in favor of certification shifts the burden to the defendant to rebut the presumption and demonstrate why certification is inappropriate. *See Windham v. Am. Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977) (rejecting concept of a presumption favoring certification in the context of antitrust class actions because such a rule "would operate to remove the burden of establishing [the] right to class action treatment from the plaintiff in an anti-trust suit and impose it on the defendant or defendants"); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007 n.40 (D.C. Cir. 1986) (citing *Windham* with approval); *see generally St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption[.]" (quoting Fed. R. Evid. 301)). Accordingly, the Court of Appeal's decision also creates uncertainty over whether and to what extent a plaintiff bears the burden of establishing the propriety of class certification under Louisiana law.

Finally, independent of the presumption itself, the Court of Appeal's justification for that presumption – that a court can modify or decertify the class if certification later proves unwarranted, *Robichaux*, 06-0437 at p. 7; 2006 WL 3804664, at *3 – is also flatly contrary to federal law. To certify a class on such a basis is essentially to engage in the practice of "conditional class certification," in which a class is certified on a tentative basis with an eye towards revisiting certification once it becomes clear whether the certification requirements have been met. This practice has been repeatedly rejected by courts as inconsistent with the essential purpose of the class action procedure. *See In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.

1974) ("Conditional certification is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of the Rule have been substantially met.").[3] Indeed, Fed. R. Civ. P. 23 was recently amended to specify that "conditional certification" is prohibited. According to the committee of federal judges responsible for proposing amendments to the federal rules, this change was made to "avoid the unintended suggestion, which some courts [had] adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied." Report of the Judicial Conference Committee on Rules of Practice and Procedure at 12 (September 2002), *available at* http://www.uscourts.gov/rules/reports.htm. *See also* Fed. R. Civ. P. 23(c)(1), 2003 advisory comm. note ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."). Adherence to this rule is particularly important because a class certification ruling "can propel the stakes of a case into the stratosphere"; erroneous certification decisions – even if characterized as tentative – thus have the potential to force a settlement of claims before the trial court can undo its error. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (certification of a class "can put considerable pressure on [a] defendant to settle, even when the plaintiff's probability of success on the merits is slight" because "a grant of class status can propel the stakes of a case into the stratosphere").

Supreme Court review is necessary to correct the appeals court's erroneous presumption ruling and restore the long-standing rule that plaintiffs bear the burden of satisfying each requirement for class certification.

B. The Court of Appeal's Refusal To Examine How Plaintiffs Planned To Establish The Elements Of Their Claims Is Contrary To Well Established Law Requiring Such An Analysis.

The second underpinning of the decision below that warrants this Court's review and reversal was the Court of Appeal's repeated refusal to examine how the plaintiffs intended to establish each of their claims on the ground that doing so would constitute an impermissible inquiry into the merits of the litigation. Throughout its opinion, the Court of Appeal declined to address whether differences in class member circumstances might preclude certification,

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[3] *See also Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 425-26 (5th Cir. 2004) (decertifying class of plaintiffs alleging antitrust claims against a large number of defendants because in its "certification order, the court did not indicate that it has seriously considered the administration of the trial. Instead, it appears to have adopted a figure-it-out-as-we-go-along approach that . . . cases have not endorsed."); *Castano*, 84 F.3d at 741 (rejecting the lower court's assertion that its certification order was "conditional" upon it being determined at a later date that the class was manageable); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 147 (E.D. La. 2002) ("[c]onditional certification of a class action involving multiple state laws without analyzing the effect of this variation on . . . manageability" is prohibited).

asserting that the "[d]efendants here seek to import excessive merits and substance inquiries into the class certification analysis." *Robichaux*, 06-0437 at p. 13; 2006 WL 3804664, at *6. Thus, in rejecting defendants' argument that the "trial court failed to consider factual differences and distinctions that could potentially affect class commonality" and the plaintiffs' ability to establish predominance, the Court of Appeal held that "[i]nternal differences within the proposed class that may arise on the merits" are irrelevant to the class certification inquiry. *Id.* at pp. 16-17; 2006 WL 3804664, at *8. Similarly, the Court of Appeal dismissed the defendants' argument that causation could not be established by common proof by asserting that such an argument "sought to import too much of a discussion of this case's merits and substance into the procedural inquiry of class certification." *Id.* at p. 12; 2006 WL 3804664, at *5. Instead, the Court of Appeal concluded that plaintiffs could satisfy their burden merely by making the general showing that all the proposed class members allege "contamination by a single substance." *See id.* at p. 17; 2006 WL 3804664, at *8.

Once again, the Court of Appeal's analysis turns prevailing, well established class certification jurisprudence on its head. Although the Court of Appeal was correct in its assertion that the propriety of class certification should not involve an assessment of the plaintiffs' likelihood of success on their claims, *id.* at p. 9; 2006 WL 3804664, at *4, it has long been acknowledged that "[e]valuation of many of the questions entering into determination of [class certification] is intimately involved with the merits of the claims." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (quoting 15 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3911, at 485 n. 45 (1976)). This is so because the essential focus of class certification is whether a trial for one can serve as trial for all, *i.e.*, whether it is possible to fairly resolve all the class members' claims by trying the claims of only the class representative. *See* Alba Conte & Herbert B. Newberg, 1 Newberg on Class Actions, § 1.2, p. 14-17 (4th ed. 2002). And as the U.S. Supreme Court recognized long ago, the only way a court can adequately determine whether a class trial would fairly adjudicate the proposed class members' claims is to examine the nature of those claims and how class plaintiffs intend to prove them at trial. *See Coopers & Lybrand*, 437 U.S. at 469 ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.") (quotation omitted); *Castano*, 84 F.3d at 744 ("Going beyond the pleadings is

necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.").[4]

For this reason, examining how plaintiffs intend to prove their claims – and determining whether factual or legal differences in the nature of class members' claims would preclude plaintiffs from establishing proof on a classwide basis – is not only a permissible component of federal class certification analysis; it is required. *See Falcon*, 457 U.S. at 160 ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); *Robinson*, 387 F.3d at 425 ("A court ***must*** consider how a trial on the alleged causes of action would be tried.") (emphasis added) (quotation omitted); *Szabo*, 249 F.3d at 676 (emphasis added) ("[I]f some of the considerations under Rule 23(b) . . . overlap the merits . . . then the judge ***must*** make a preliminary inquiry into the merits."); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) ("While it is true that a trial court may not properly reach the merits of a claim when determining whether the class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." (citation omitted)). Such an inquiry does not constitute "a weighing of the merits" or an otherwise impermissible determination of the validity of the plaintiffs' claims; rather, it merely "involves delineation of the anticipated factual disputes while determining whether such disputes tend to be class-wide for the predominance analysis." *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 345 n.6 (D.N.J. 1997) ("*Ignition Switch*").

Notably, the Advisory Committee Notes to the recent 2003 Amendments to Rule 23 explicitly confirm the permissibility and necessity of engaging in this sort of class certification analysis. Fed. R. Civ. P. 23(c)(1), 2003 advisory comm. note. According to the Committee, in determining whether certification of a proposed class is warranted, "[a] ***critical need is to***

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[4] As a procedural device, the class action cannot by definition affect substantive law and therefore class actions are only appropriate in those circumstances where a class trial is legitimately capable of establishing the elements of liability for each individual class member. *Amchem Prods.*, 521 U.S. at 620-21; *see also Collins v. Anthem Health Plans*, 880 A.2d 106, 122 (Conn. 2005) ("[T]he method advanced by the plaintiffs essentially amounts to an end run around the defendant's right to have each class member prove the essential elements of liability. Although it is understandable that the plaintiffs seek the advantages of the class action mechanism, those advantages cannot be conferred at the expense of the defendant's legal rights.").

determine how a case will be tried." *Id.* (emphasis added). Accordingly, the Committee observed that "it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis." *Id.* And the Committee even noted that, in carrying out this obligation, "[a]n increasing number of courts [are requiring] a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." *Id.*; *see also Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 186 n.7 (3d Cir. 2006) (asserting that "the pre-certification presentation of the aforementioned trial plans represents an advisable practice within the class action arena").

Inquiry into a trial plan is also necessary to demonstrate compliance with the "superiority" requirement for class certification. *Castano*, 84 F.3d at 747-49. Class certification is not warranted simply because a class action is a possible mechanism for adjudicating the class members' claims; rather, class certification is only appropriate where the class action procedure is "superior to other available methods for the fair and efficient adjudication of the controversy." La. Code Civ. Proc. Ann. art. 591(B)(3) (1999). In other words, unless a class action represents the best approach for handling the matters in dispute, the case should not proceed on a classwide basis. And the key factors on which a court must focus in determining whether class adjudication represents the "superior" alternative are whether (a) it creates judicial efficiency and economy and (b) it furthers the vindication of individual class member rights. *Castano*, 84 F.3d 747-49 & n 27; *Sterling v. Vesicol Chem. Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988) ("Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims, but, rather, to achieve the economies of time, effort, and expense.").

However, before a court can determine whether a class action furthers efficiency or the vindication of individual rights, it must first determine whether the proceeding is even manageable on a classwide basis. *See Robinson*, 387 F.3d at 425 (concluding that trial court abused its discretion in finding superiority without "conducting any kind of analysis or discussion regarding how it would administer the [class] trial"). If the case is unmanageable on a classwide basis, then a class action is clearly not the "superior" method of adjudication. *Ignition Switch*, 174 F.R.D. at 352 (finding superiority requirement not satisfied, *inter alia*, because "if certified as presently proposed, this case would quickly devolve into an unmanageable morass of divergent legal and factual issues"). Obviously, a court can only determine whether a proceeding

is manageable on a classwide basis – and whether classwide treatment will improve judicial economy – if it has a clear sense of how the class representatives plan to try their claims. Without such an understanding, a court has no basis for reasonably evaluating either issue. *See Castano*, 84 F.3d at 747 (rejecting district court's superiority analysis because, *inter alia*, "[t]he district court's rationale . . . i.e., that a class trial would preserve judicial resources in the millions of inevitable individual trials is based on pure speculation"). Indeed, it is for precisely this reason that Fifth Circuit and other federal courts have been highly reluctant to certify class actions predicated on "novel" or "immature" claims, *i.e.*, claims that lack "a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority requirements." *Id.* If a court has little idea of how a claim will proceed on an individual basis, a determination that class adjudication represents a superior alternative amounts to nothing more than speculation. *See id.* at 749; *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).[5]

The Court of Appeal's refusal to examine how the plaintiffs intend to try their claims is also contrary to this Court's past decisions which have recognized that an "entanglement with the merits" is valid in the context of class certification analysis. *Ignition Switch*, 174 F.R.D. at 345 n.6. In fact, the last two decisions of this Court addressing class certification issues involved the very sort of merits-related inquiries that the Court of Appeal refused to perform in this case. In *Ford v. Murphy Oil U.S.A., Inc.*, this Court held that class certification was inappropriate in large part because factual variations among class members made it impossible to establish each class member's entitlement to damages through common proof. 96-2913 (La. 9/2/97); 703 So. 2d 542, 548-549 ("far from offering the same facts, each class member will necessarily have to offer different facts to establish that certain defendants' emissions, either individually or in combination, caused them specific damages on yet unspecified dates...[t]he causation issue is even more complicated considering the widely divergent types of personal property and business damages claimed and considering each plaintiffs' unique habits, exposures, length of exposures,

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[5] The Court of Appeal also erred in rejecting the argument that certification was inappropriate because plaintiffs are pursuing a "novel" claim. The Court of Appeal concluded that such an argument had no merit because, although the statute on which plaintiffs predicated their claims was of relatively recent vintage, the "legislature expressly specified this statute to be procedural, not substantive." *Robichaux*, 06-0437 at p. 18; 2006 WL 3804664, at *8. But federal analysis regarding when and to what extent novel claims can be certified does not turn solely on whether the plaintiff is asserting a new substantive theory; rather, it hinges on whether there have been a sufficient number of individual actions of the type being asserted in the class proceeding such that the court analyzing certification has sufficient information to make a reasonable determination regarding predominance and superiority. *Castano*, 84 F.3d at 747. And with respect to that sort of analysis, how a claim will proceed, including the procedures that must be followed in prosecuting and adjudicating such a claim, are entirely relevant.

medications, medical conditions, employment, and location of residence or business"). Similarly, in *Banks v. New York Life Insurance Co.*, this Court concluded that class certification was not warranted because, *inter alia*, differences in putative class members' circumstances made "causation and injury-in-fact . . . difficult if not impossible to prove on a class-wide basis since each member of the class must prove that the alleged fraud or misrepresentation and not some other cause resulted in an injury to him." 98-0551 at pp. 11-12 (La. 7/2/99); 737 So. 2d 1275, 1283.

In short, the appeals court's ruling erroneously confuses the appropriateness – and need – for a trial court to determine how plaintiffs intend to try the merits of their claims with what courts have found to be inappropriate: allowing the strength or weakness of a plaintiff's claim to affect the class certification determination. *Szabo*, 249 F.3d at 677 ("The success of the 1966 amendments . . . depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones. A court may not say something like 'let's resolve the merits first and worry about the class later' . . . or 'I'm not going to certify a class unless I think that the plaintiffs will prevail.'"). For this reason too, the appeals court's ruling will engender confusion among Louisiana trial courts regarding proper application of the state's class certification standards and should be reviewed – and reversed – by this Court.

II. SUPREME COURT REVIEW IS NECESSARY TO ENSURE THAT LOUISIANA DOES NOT BECOME A "MAGNET" FOR CLASS ACTIONS.

Supreme Court review is also necessary to ensure that the appeals court's loosening of class certification standards does not cause Louisiana to become the next class action "magnet" jurisdiction.

Over the past decade, plaintiffs' lawyers have moved from jurisdiction to jurisdiction throughout the country in search of courts willing to relax traditional class certification and claims aggregation requirements. Whenever they have found such a court, they have bombarded it with a deluge of massive lawsuits that has usually only ceased when the appellate courts of the jurisdiction in question have stepped in and reasserted the traditional class action and aggregate litigation principles. For example, when Alabama courts became a haven for abusive class actions in the 1990s, the Alabama Supreme Court stepped in and established bright-line rules for class certification. *See, e.g., Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199, 203 (Ala. 1997) (rejecting "drive by" class certification practice under which some Alabama state trial courts

conditionally certified classes before service on defendants). Plaintiffs next found success with "mass actions" in Mississippi – but in due course, the Mississippi Supreme Court stepped in to stop the rampant abuses in such cases. *See Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 47-48 (Miss. 2004) (rejecting mass joinder product liability cases), *modified and reh'g denied*, 2004 Miss. LEXIS 1002 (Aug. 5, 2004). More recently, plaintiffs' efforts focused on Illinois, as certain county courts made known their willingness to rubber stamp class certification proposals and approve abusive settlements. *See, e.g.*, American Tort Reform Foundation, *Judicial Hellholes 2004* 14-15 (2004), *available at* http://www.atra.org/reports/ (identifying Madison County, Illinois as "Number One Judicial Hellhole" because it has "become a magnet court" for class actions). But, as with Alabama and Mississippi, the Illinois Supreme Court ultimately intervened and ended the abusive rulings in a decision rejecting the trial court's application of Illinois insurance law to a nationwide class of automobile insurance policy-holders. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005) (reversing certification of nationwide insurance class action) *cert. denied*, 126 S. Ct. 1420 (2006).

There is no reason to think that the result will be any different if this Court leaves the Court of Appeal's decision intact. History has shown that every time a jurisdiction has loosened standards for aggregated claims litigation, the result has been the same – an influx of abusive lawsuits against businesses by plaintiffs' lawyers eager to take advantage of the newest mass tort haven. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam.").

Moreover, it is no answer to suggest that the enactment of the Class Action Fairness Act ("CAFA"), Pub. L. 109-2, 119 Stat. 4, 4-14 (2005), has eliminated any negative consequences caused by the Circuit Court's ruling. Although most nationwide class actions are now removable to federal court under CAFA, plaintiffs will inevitably attempt to expand the import of this decision beyond class action suits in various ways if the appeals court's decision is left undisturbed. For example, because single-state and certain multi-state class action suits brought against Louisiana companies in Louisiana courts generally cannot be removed to federal court under CAFA, the effects of this ruling will be felt disproportionately by Louisiana-based companies.

As this Court is well aware, such class action abuse will impose tremendous costs on all parties concerned with the litigation process. In *Ford*, this Court observed that class certification "dramatically affects the stakes for defendants," "magnif[ying] and strengthen[ing] the number of unmeritorious claims" and creating "insurmountable pressure on defendants to settle." *Ford*, 96-2913; 703 So. 2d at 550 (quoting *Castano*, 84 F.3d at 746). Many defendants choose to settle in such circumstances, regardless of the merit of the plaintiff's claims, as "[m]any corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation." *Id.*; *see also Rhone-Poulenc*, 51 F.3d at 1298 (observing that companies facing millions of dollars of potential liability "may not wish to roll the[ ] dice. That is putting it mildly."). Loosening class certification standards will thus hurt both Louisiana companies and Louisiana consumers, who will pay higher prices for goods and services and see their legitimate lawsuits take a back seat as the Louisiana courts are deluged with meritless class action lawsuits.

This Court should reverse the Circuit Court's decision before Louisiana courts become the next haven for class action abuse to the detriment of the state's consumers and businesses and the integrity of the state's legal system.

CONCLUSION

For the reasons set forth above, and those set forth in Petitioner's writ application, the Court should accept the petition for review and reverse the Court of Appeal's class certification order.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief as Amici Curiae in Support of Petitioner has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed, this 16th day of March, 2007.

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