No. 80472-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents

v.

WEYERHAEUSER COMPANY,
a Washington Corporation,

Petitioner.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

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

Of Counsel

James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

(Additional *Of Counsel* Listed on Next Page)

Of Counsel

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
Counsel for the Coalition for Litigation Justice

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

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

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

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

No. 80472-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents

v.

WEYERHAEUSER COMPANY,
a Washington Corporation,

Petitioner.

MOTION OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

The Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, American Insurance Association, and American Chemistry Council – collectively "*amici*" – hereby move for leave to file the accompanying brief in support of Petitioner.

As organizations that represent Washington companies and their insurers, *amici* have an interest in ensuring that Washington's *forum non conveniens* law is fair, consistent with past precedent, complies with the United States Constitution, and reflects sound public policy. We believe the appellate court's opinion violates these principles.

First, the appellate court's opinion is inconsistent with past precedent from this Court and the Court of Appeals. *See* RAP 13(b)(2). This Court has set a high bar for trial court *forum non conveniens* decisions to be overturned – an "abuse of discretion" standard of review applies. *Myers v. Boeing Co.*, 115 Wn. 2d 123, 128, 794 P.2d 1272, 1275 (1990). A dismissal "may *only* be reversed if it is *manifestly* unfair, unreasonable, or untenable." *Id.* (emphasis added) (internal citation omitted). The appellate court's opinion is out of step with that standard. The trial court "did not conclude that a single factor favored a Washington trial." *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 230, 156 P.3d 303, 307 (2007). The appellate court might have disagreed with the trial court's decision, but could not reasonably conclude the trial court abused its discretion.

The appellate court also altered the test for when *forum non conveniens* dismissal may be granted, adding an unprecedented new element: whether the defendant may assert its right to remove to federal

court in the alternate forum state. We are not aware of any reported decisions in Washington or elsewhere that have conditioned dismissal on this basis.

Furthermore, the appellate court's decision to condition *forum non conveniens* dismissal on a defendant waiving its right to removal pursuant to federal law raises a significant question of law under the United States Constitution. *See* RAP 13(b)(3).

Finally, the appellate court's decision raises an issue of substantial public importance that should be determined by this Court. *See* RAP 13(b)(4). Washington residents will bear an unfair burden if this Court lets the *possibility* of removal in the alternate forum become the paramount factor in the *forum non conveniens* calculus. Washington will experience more nonresident filings in asbestos and other cases subject to a federal MDL. It is unfair to expect Washington residents to serve as jurors, or to pay the taxes to fund the work of the courts, in cases having little or nothing to do with their local communities. Washington plaintiffs will see justice delayed if they must wait behind earlier-filing nonresidents to have their day in court.

For all these reasons, this case should be reviewed by this Court and the appellate court's decision should be overturned.

* * *

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.[1] The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. 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 U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

---

[1] The Coalition for Litigation Justice includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is

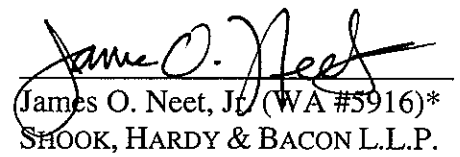
literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Washington, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The American Chemistry Council (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.

For these reasons, *amici* request that the Court grant their Motion for Leave to file a brief in this case.

Respectfully submitted,



James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400
Counsel for the Coalition for Litigation Justice, Inc.

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
Counsel for the Coalition for Litigation Justice, Inc.

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

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW, Suite 1000
Washington, DC 20036
(202) 828-7100

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

Of Counsel

Dated: August 21, 2007

No. 80472-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents

v.

WEYERHAEUSER COMPANY,
a Washington Corporation,

Petitioner.

BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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

Of Counsel

James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

(Additional *Of Counsel* Listed on Next Page)

Of Counsel

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
Counsel for the Coalition for
Litigation Justice

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

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE
ASSOCIATION
1130 Connecticut Ave, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

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

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

INDEX

Page

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

As organizations that represent Washington companies and their insurers, *amici* have an interest in ensuring that Washington's *forum non conveniens* law is fair, consistent with past precedent, complies with the United States Constitution, and reflects sound public policy. As described below, the appellate court's decision below violates these principles.

STATEMENT OF FACTS

Amici adopt Petitioner's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The appellate court's opinion is inconsistent with past precedent from this Court and the Court of Appeals. Furthermore, the appellate court's decision to condition *forum non conveniens* dismissal on a defendant waiving its right to removal pursuant to federal law raises a significant question of law under the United States Constitution. The decision also raises an issue of substantial public importance that should be determined by this Court. For all these reasons, this case should be reviewed by this Court and the appellate court's decision overturned.

ARGUMENT

I. THE APPELLATE COURT'S DECISION CONFLICTS WITH PAST PRECEDENT

This Court has set a high bar for trial court *forum non conveniens* decisions to be overturned – an "abuse of discretion" standard of review

applies. *Myers v. Boeing Co.*, 115 Wn. 2d 123, 128, 794 P.2d 1272, 1275 (1990). A dismissal "may *only* be reversed if it is *manifestly* unfair, unreasonable, or untenable." *Id.* (emphasis added) (internal citation omitted).[1]

The appellate court's opinion is out of step with that standard. The trial court heard two oral arguments on Petitioner's *forum non conveniens* motion, carefully reviewed the parties' briefs and the applicable law, and wrote a thorough decision granting Petitioner's request.[2] The trial court "did not conclude that a single factor favored a Washington trial." *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 230, 156 P.3d 303, 307 (2007). The appellate court might have disagreed with the trial court's decision, but could not reasonably conclude the trial court abused its discretion.

The appellate court also altered the test for when *forum non conveniens* dismissal may be granted, adding an unprecedented new element: whether the defendant may assert its right to remove to federal court in the alternate forum state. We are not aware of any reported decisions in Washington or elsewhere that have conditioned dismissal on

---

1 *See also Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 667, 771 P.2d 711, 727 ("no reasonable judge would have reached the same conclusion"), *amended*, 780 P.2d 260 (Wash. 1989).

2 *See* CP at 161 (trial court "review[ed] the cases cited by counsel"); RP at 14:10–12 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06) (trial court "exhaustively" reviewed case law in its written opinion).

this basis. In fact, Washington courts have traditionally granted dismissal when the plaintiff merely had *some* remedy elsewhere.[3] It is "the rare case" where the remedy provided by the alternate forum is "so clearly inadequate or unsatisfactory that there is no remedy at all." *Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67, 68 (2006), *review denied*, 160 Wn. 2d 1014, 161 P.3d 1027 (2007).

The appellate court justified its holding by concluding that the federal asbestos Multi-District Litigation (MDL) system would prevent Plaintiffs from trying this case in a timely manner. In effect, the appellate court held that the federal MDL is inadequate as a matter of law.

The federal MDL, however, has done a remarkable job responding to what the U.S. Supreme Court has described as "an asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598, 117 S. Ct. 2231, 2237, 138 L. Ed.2d 689 (1997).[4] When the MDL was created in

---

[3] *See Myers*, 115 Wn. 2d at 139, 794 P.2d at 1281 (dismissing Japanese plane crash victims' action where it was argued that Japan's "legal system is cumbersome"); *Hill v. Jawanda Transport Ltd.*, 96 Wn. App. 537, 543, 983 P.2d 666, 670 (1999) (British Columbia provided adequate remedy even though it does not allow recovery for pain and suffering or for lost and future earnings); *Wolf v. Boeing Co.*, 61 Wn. App. 316, 324-25, 810 P.2d 943, 949 (dismissing action by Mexican plane crash victims even though Mexico dramatically limited recoverable damages), *review denied*, 117 Wn. 2d 1020, 818 P.2d 1098 (1991); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed.2d 419 (1981), *reh'g denied*, 455 U.S. 928, 102 S. Ct. 1296, 71 L. Ed.2d 474 (1982) (dismissing Scottish nationals' action).

[4] *See also* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002), *at* http://www.nlcpi.org; Mark A. Behrens, *Some*

(Footnote continued on next page)

1991, nearly two new asbestos cases were being filed in federal court for each action that was terminated. Shortly after taking control of the MDL, the late Judge Charles Weiner instituted procedures to gain control of the docket. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996). Cases were prioritized so that those involving malignancies and other serious diseases were addressed first. *See id.*

As a result of Judge Weiner's leadership, the tide began to turn. In 1996, the number of cases resolved exceeded the number of new cases filed. *See id.* at *2. In 1997 and 1998, Judge Weiner was closing 10,000 cases a year. *See In re Patenaude*, 210 F.3d 135, 140 (3d Cir.), *cert. denied*, 531 U.S. 1011, 121 S. Ct. 565, 148 L. Ed.2d 484 (2000). By September 2006, nearly 75,000 of the 110,000 cases in the MDL were resolved. *See* Judicial Panel on Multidistrict Litig., *Statistical Analysis of Multidistrict Litigation 2006*, at 11, *available at* http://www.jpml.uscourts.gov/Statistics/statistics.html. Few of the remaining cases involve malignancies.

Despite this track record, the appellate court cited *In re Maine Asbestos Cases*, 44 F. Supp. 2d 368 (D. Me. 1999), and *Madden v. Able*

Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

Supply Co., 205 F. Supp. 2d 695 (S.D. Tex. 2002), as allegedly proving that the federal MDL is inadequate. The *Maine Asbestos* opinion, however, makes its comments only in passing, in a footnote. *See Maine Asbestos*, 44 F. Supp. 2d at 374 n.2. Neither the *Maine Asbestos* nor the *Madden* court cited any statistics or authority for their conclusions.

In *Patenaude*, *supra*, multiple asbestos plaintiffs implicitly asserted that the federal MDL was an inadequate forum. After failing to convince the MDL court and the JPML Panel to remand their claims to their original courts for trial, they filed a petition for writ of mandamus. The Third Circuit rejected the petition largely because the MDL court was appropriately handling its cases consistent with its legislative mandate. *See* 210 F.3d at 142. The Third Circuit highlighted the MDL court's explicit favoritism toward malignancy cases: "the sick and dying, their widows and survivors should have their claims addressed first." *Id.* at 139; *see also id.* at 140 ("cases of mesothelioma and lung cancer with asbestosis will be 'address[ed] ... on a priority basis.'") (citations omitted).

In sum, the published cases and available statistics demonstrate that the federal asbestos MDL is a fair and balanced forum, especially for malignancy cases. This Court should thus have no hesitation to allow the federal system to handle this case if that is indeed what would happen.

II. CONDITIONING *FORUM NON CONVENIENS* DISMISSAL ON A DEFENDANT WAIVING ITS RIGHT TO REMOVAL RAISES A SIGNIFICANT QUESTION OF LAW UNDER THE UNITED STATES CONSTITUTION

The trial court found that well-settled principles of *forum non conveniens* warranted dismissal of this case. The appellate court, however, conditioned dismissal on Petitioner's stipulation to try the case in Arkansas state court, effectively requiring Petitioner to waive its right to remove the case to federal court. This presents a significant constitutional issue for resolution by this Court.

Federal diversity-of-citizenship jurisdiction has its foundation in Article III, § 2 of the U.S. Constitution: "The judicial power shall extend to all cases, in law and equity, arising . . . between citizens of different states. . . ." Congress has codified the criteria for removing a case from state to federal court in diversity actions. 28 U.S.C. § 1332(a) provides defendants with an "absolute right" to remove a case that complies with the terms of the statute. *Home Ins. v. Morse*, 87 U.S. 445, 458, 22 L. Ed. 365, 20 Wall. 445 (1874). A party's motivation for seeking removal, including the potential for delay, "is beside the point as the right to removal is statutory, jurisdictional, and absolute, regardless of motivation, when it is found to exist." *White v. Wellington*, 627 F.2d 582, 586 (8th Cir. 1980).

The Supremacy Clause is the source of constitutional protection for a defendant's right to remove a qualifying case from state to federal court pursuant to 28 U.S.C. § 1332. The Supremacy Clause provides that the Constitution and the laws of the United States may not be trumped by state law. *See* U.S. Const. art. VI, cl. 2. As the U.S. Supreme Court has explained: "[W]hen state law touches upon the area of federal statutes enacted pursuant to constitutional authority, it is familiar doctrine that the federal policy may not be set at naught, or its benefits denied by the state law." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-80, 94 S. Ct. 1879, 1885, 40 L. Ed.2d 315 (1974) (internal citations and quotations omitted).

"[T]he judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal." *Goldey v. Morning News*, 156 U.S. 518, 523, 15 S. Ct. 559, 561, 39 L. Ed. 517 (1895). The Supreme Court has stated:

> It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it.

Harrison v. St. Louis & San Francisco R.R., 232 U.S. 318, 327, 34 S. Ct. 333, 335, 58 L. Ed. 621 (1914).

Here, the appellate court's conditional dismissal is contrary to well-established Supreme Court precedent holding that a state may not condition its grant of a privilege on a party's surrender of a federal right. For example, in *Terral v. Burke Const. Co.*, 257 U.S. 529, 532-33, 42 S. Ct. 188, 188-89, 66 L. Ed. 352 (1922), the Court found that Arkansas could not revoke a foreign company's authority to do business in Arkansas if the company removed a case to federal court. *See also Barron v. Burnside*, 121 U.S. 186, 199-200, 7 S. Ct. 931, 936, 30 L. Ed. 915 (1887); *Morse*, 87 U.S. at 454-55. The Supreme Court has also intervened to invalidate procedural rulings by state courts that deprive the federal courts of their congressionally granted jurisdiction. *See, e.g., Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98, 42 S. Ct. 35, 37-38, 66 L. Ed. 144 (1921). The right of removal is to be "unchecked or unburdened by state authority." *Harrison*, 232 U.S. at 329, 34 S. Ct. at 336.

The Supreme Court continues to recognize the continuing validity of these cases. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed.2d 562 (1967). Federal appellate courts have also held

that a state may not interfere with federal jurisdiction.[5] Furthermore, courts have found that the Constitution imparts a duty to safeguard and preserve the balance between state sovereignty and federal supremacy, including the right to remove where the requirements of 28 U.S.C. § 1332 are satisfied. *See 17th Street Assocs., LLP v. Markel Int'l Ins. Co.*, 373 F. Supp. 2d 584, 593-95 (E.D. Va. 2005).

Thus, this case presents the important constitutional issue of whether a state court may effectively nullify 28 U.S.C. § 1332 under the guise of a balancing of factors in a *forum non conveniens* analysis. Constitutional precedent strongly suggests that a state court may not condition dismissal on a defendant's waiver of its federal right of removal.

III. THE APPELLATE COURT'S DECISION RAISES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT SHOULD BE DETERMINED BY THIS COURT

Washington residents will bear an unfair burden if this Court lets the *possibility* of removal in the alternate forum become the paramount factor in the *forum non conveniens* calculus. Washington will experience

---

[5] *See, e.g., Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 840 (6th Cir. 1996) (invalidating Ohio statute affecting removal right of out-of-state insurers); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 4 F.3d 614, 619 (8th Cir. 1993) ("states cannot indirectly prevent, defeat, or limit the free exercise of the right to remove"); *Frost v. Railroad Comm'n*, 271 U.S. 583, 593, 46 S. Ct. 605, 607, 70 L. Ed. 1101 (1926) (state may not strip a citizen of the right to remove "under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens to otherwise withhold").

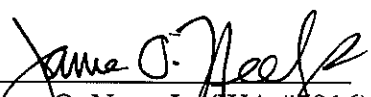
more nonresident filings in asbestos and other cases subject to a federal MDL - particularly as claimants seek to avoid states such as Mississippi, Texas, and Ohio, that have recently acted to curb forum-shopping and improve the overall asbestos litigation environment. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning,* 12 Conn. Ins. L.J. 477 (2006).

It is unfair to expect Washington residents to serve as jurors, or to pay the taxes to fund the work of the courts, in cases having little or nothing to do with their local communities. Washington plaintiffs will see justice delayed if they must wait behind earlier-filing nonresidents to have their day in court. These issues are of substantial importance to Washington residents and merit this Court's consideration of this appeal.

CONCLUSION

For these reasons, *amici curiae* ask this Court to review this case and overturn the appellate court's decision.

Respectfully submitted,



James O. Neet, Jr. (WA #9916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400
Counsel for the Coalition for Litigation Justice, Inc.

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
Counsel for the Coalition for Litigation Justice, Inc.

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

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

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

Of Counsel

Dated: August 21, 2007

PROOF OF SERVICE

I certify that on August 21, 2007, an original and one copy of the foregoing Motion and Brief were sent by overnight mail to:

Ronald Carpenter, Clerk
Supreme Court of Washington
415 Twelfth Avenue SW
Olympia, WA 98504-0929
(360) 357-2077

I further certify that a copy of the foregoing Motion and Brief were sent via the United States Postal Service in a first-class postage-prepaid envelope addressed to the following:

Matthew Bergman
BERGMAN & FROCHT
614 First Avenue, 4th Floor
Seattle, WA 98104

John Phillips
Phillips Law Group
315 Fifth Avenue S.
Seattle, WA 98104

Diane Kero
GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON &
DAHEIM, L.L.P.
One Union Square
600 University, Suite 2100
Seattle, WA 98101

James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550