No. 2013-0591

NEW HAMPSHIRE SUPREME COURT

STATE OF NEW HAMPSHIRE,

Plaintiff-Appellee-Cross-Appellant,

v.

HESS CORPORATION, ET AL.,

Defendants-Appellants-Cross-Appellees.

On Appeal From the Merrimack County Superior Court
(Consolidated with No. 2013-0668)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber has an interest in this case because the decision below significantly lowered the bar to liability for companies doing business in New Hampshire. In particular, the superior court abrogated traditional tort-causation requirements, allowing the State to prove liability based on evidence of appellants' share of the market for MTBE gasoline. It then exacerbated this error by applying that market share theory not only to alleged MTBE pollution that has already occurred, but also to a broad range of speculative future injuries that the State claimed it might sustain in wells that it did not even attempt to identify. Both rulings will have the effect of promoting the litigation of weak and speculative claims in this State, discouraging business growth and hurting consumers.

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

The superior court fundamentally altered bedrock principles of tort litigation in order to facilitate the State's desire to litigate aggregated claims of alleged MTBE pollution throughout the State in a single case. The court adopted a variety of impermissible innovations, many of which are documented in appellants' brief. This brief focuses on two innovations that, if sustained, bode particularly ill for businesses and consumers in New Hampshire.

First, the superior court dispensed with traditional causation requirements. Rather than holding the State to the traditional burden of identifying a well, proving contamination, and

linking that contamination to appellants, the court allowed the State to bypass this mode of proving the essential element of causation. Instead, it allowed the State to prove – and hold appellants accountable for – their share of the market for MTBE gasoline in New Hampshire. This ruling went against the prevailing trend in other jurisdictions, which for years has been to reject or strictly limit the use of the doctrine. More than that, the court applied the doctrine without holding the State to the burden of making a predicate showing – required in other market-share jurisdictions – that proof of causation by traditional means was impossible. Indeed, if the court had held the State to this traditional burden, the State could not have satisfied it, because documentation exists that would have allowed the State to litigate causation issues in the traditional manner. It was solely a function of the State's desire to try the case on an aggregate basis – i.e., its litigation strategy – that made the traditional mode of proof undesirable, a ground that no other court has held sufficient to dispense with the requirement of proving causation. The court's embrace of such a loosely defined doctrine of market-share liability will deter innovation in the State by exposing defendants to the same extent of liability regardless of how much they invest in safety, to the detriment of businesses and consumers alike.

Second, the superior court improperly adjudicated unripe claims when it authorized hundreds of millions of dollars in damages for injuries that have not yet been sustained *and may never be sustained.* Specifically, it allowed the State to recover damages to cover the possible costs of treating existing private wells that have not been determined to have been contaminated – and further to recover damages to cover the possible costs of treating private wells *that have not even been dug yet.* The court's willingness to entertain these claims – again to facilitate the State's litigation preference to resolve all MTBE issues in one suit – violates long-established principles of ripeness and will encourage litigants who have not yet been injured to bring suits

based on their speculation that some business practice may injure them at some undefined point in the future, a practice that will significantly increase the cost of doing business in the State.

ARGUMENT

I. THE SUPERIOR COURT'S ADOPTION OF MARKET-SHARE LIABILITY WILL TURN MANUFACTURERS INTO INSURERS OF THEIR PRODUCTS AND INCREASE THE COST OF DOING BUSINESS IN THE STATE.

"Identification of the party responsible for causing injury to another is a longstanding prerequisite" to any tort action. *Payton v. Abbott Labs*, 437 N.E.2d 171, 188 (Mass. 1982); *see also Trull v. Volkswagen of Am., Inc.*, 145 N.H. 259, 264 (2000) ("'[C]ausation is a necessary element in both negligence and strict liability actions.'") (alteration in original) (citation omitted); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993) ("'[I]t remains a principle so fundamental as to require no authority that the mere existence of negligence and the occurrence of injury are insufficient to impose liability upon anyone. There remains to be proved the vitally important link of causation.'") (alteration in original) (citation omitted). Nonetheless, the superior court relieved the State of that traditional burden in this case. Instead of requiring proof that it was appellants' gasoline that contaminated each of the wells at issue in this litigation, the superior court allowed the State to proceed on a theory of market-share liability as an accommodation of the State's desire to try all MTBE issues in a single trial.

This contortion of the law to facilitate the State's litigation preferences came at a significant expense. It stripped appellants of a critical defense by allowing for the imposition of liability when the plaintiff has not established a causal nexus between any wrongdoing and the injury. As other courts have recognized, the market-share approach essentially allows "'negligence in the air'" to serve as a substitute for causation in fact. *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) (citation omitted). This approach does away with the important tort limitation that a defendant should only be liable for the injuries it causes. And because it

effects such a "radical departure from traditional tort concepts," *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 334 (Ill. 1990), the market-share theory "has been met with *consistent disapproval*." *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1064 (Okla. 1987) (emphasis added); *see also Smith*, 560 N.E.2d at 334 ("[T]he concept of market share liability has not received strong support."); *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 189-90 (Ohio 1998) ("This atypical theory of tort recovery has not gained wide acceptance outside California.").

Indeed, the superior court's ruling here marked a particularly radical change to the law because, unlike other jurisdictions that have applied market-share liability, the superior court did not hold the State to the burden of first demonstrating that proof of causation by traditional means was impossible. Of the few jurisdictions that have recognized a theory of market-share liability, most require a plaintiff to make a preliminary showing that "she has made a genuine attempt to locate and to identify the manufacturer responsible for her injury." *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285-86 (Fla. 1990); *see also Bly v. Tri-Cont. Indus., Inc.*, 663 A.2d 1232, 1243 (D.C. 1995) ("Market share liability is a remedy of last resort which was developed to provide a remedy to injured parties who could not identify the manufacturer of the product which caused them harm."). "Mere difficulty in identifying the source of the product is insufficient; plaintiff must make a genuine attempt to identify the party responsible for the harm." *Bly*, 663 A.2d at 1243. After all, "[w]here a plaintiff does have information as to the identity of the defendants who caused his alleged injury, the rationale" for market-share liability "is simply not present." *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).

The State never could have made the requisite showing here. Other MTBE cases demonstrate that the State could have identified the supplier(s) of gasoline by tracing spills or

leaks to particular service station or other source. The record in this case is the same. Indeed, as one of appellants' experts explained, "[t]he paperwork exists to determine who owns the product at any point in the supply chain."[1] Specifically, the State has Motor Fuel Distributor Reports that identify the supplier, distributor, and trucker of gasoline brought into New Hampshire, along with where it is delivered.[2] Even though the State has this information, the superior court did not require it to demonstrate an inability to identify whose gasoline contaminated each of the wells. As such, not even the rationale that has justified application of market-share liability in the small minority of states that accept the concept existed in this litigation, making its application all the more erroneous.

This Court should follow the lead of these other jurisdictions and reject the drastic change in the law followed by the superior court, for several reasons. For starters, the doctrine of market-share liability is little more than a "court-constructed insurance plan." *Mulcahy*, 386 N.W.2d at 76. After all, the party "actually responsible for the plaintiff's injuries may not be before the court" but because "the plaintiff is discharged from proving this important causal link," "'manufacturers are required to pay or contribute to payment for injuries which their product may not have caused.'" *Sutowski*, 696 N.E.2d at 190 (citation omitted). Such a "judicially created form of industry-wide insurance" collides with the long-established notion that "'[m]anufacturers are not insurers of their products.'" *Id.* (citation omitted); *see also Elliott v. Lachance*, 109 N.H. 481, 484 (1969) ("'Strict liability does not make the manufacturer or seller an insurer not [sic] does it impose absolute liability.'") (citation omitted). And courts have cautioned that such "social engineering" is "more appropriately within the legislative domain,"

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1 Tr. 7528:11-7529:3 (O'Brien Mar. 11, 2013).

2 *See* Tr. 5902:4-5914:13, 6013:3-14; 6017:9-6019:16 (Hastings Feb. 20, 2013); State Ex. 197, at NHDOS0026413.

not the judiciary. *Mulcahy*, 386 N.W.2d at 76; *Smith*, 560 N.E.2d at 344-45 (same); *see also Senn v. Merrell-Dow Pharms., Inc.*, 751 P.2d 215, 223 (Or. 1988) ("[A]doption of any theory of alternative liability requires a profound change in fundamental tort principles of causation, an adjustment rife with public policy ramifications" that should be left in the domain of the legislature.).

As courts have gone on to explain, the tort policy interest in compensating injured plaintiffs does not suffice to justify such a radical innovation in the law. "[T]he public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries." *Case*, 743 P.2d at 1067. As such, courts have held "that as between an innocent plaintiff and negligent defendants," there are "strong countervailing considerations" to deciding that "the latter should bear the cost of the injury" and "absorb" the cost, including the fact that it would "alter[] . . . existing rights and liabilities." *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246-47 (Mo. 1984). Such rights, as the U.S. Supreme Court recently made clear, include a defendant's entitlement to mount a defense to each individual claim against it – a right that cannot be ignored to facilitate a plaintiff's or court's desire to adjudicate a massive number of claims in a single trial. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546, 2552-53 (2011); *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'") (citation omitted).

The adoption of market-share liability doctrines also results in increased insurance premiums for businesses, the costs of which are borne by consumers. *See* Grimm, *supra*, at 575 ("Market share liability is likely to cause the price of insurance to rise exponentially, as near industry-wide liability makes judgment more likely."). Indeed, "[c]oncern over increasing

liability for defective products has prompted insurers to raise premiums dramatically over the last decade." Jonathan B. Newcomb, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 Nw. U.L. Rev. 300, 322 (1981). "Market share liability may compound this problem by further broadening manufacturers' liability exposure." *Id.* In turn, these increased insurance costs will likely be passed along to consumers in the form of higher prices. *See* Steven Bonanno, Casenote, *Presumed Innocent: Illinois' Rejection of Market-Share Liability in Smith v. Eli Lily & Company is "Cause in Fact" to Celebrate*, 24 J. Marshall L. Rev. 869, 888-89 (1991) ("[A]pplying the marketing share theory . . . would likely cause a rise in drug prices reflecting resulting insurance cost increases.") (footnotes omitted). For all of these reasons, this Court should follow the path of other jurisdictions, reject the market-share theory of liability, and reverse the superior court's judgment.

II. THE SUPERIOR COURT'S ADJUDICATION OF UNRIPE CLAIMS WILL ENCOURAGE SPECULATIVE AND BOUNDLESS LITIGATION AGAINST BUSINESSES.

The superior court magnified the effect of its other errors by allowing the State to recover hundreds of millions of dollars in damages for injuries that have not been sustained and may never be sustained. The alleged future injuries at issue concern private wells that have not been determined to be contaminated and future wells that have not been dug yet. Although the State could simply have waited to see whether these prophesied injuries materialized and brought suit if and when they did, it insisted on its right to recover now – presumably pursuant to its desire to resolve all MTBE issues in a single proceeding. The resulting judgment – inflated by speculation about future damages that might flow from appellants' alleged misconduct (as estimated by their market share) – ran afoul of this Court's ripeness precedents and will promote an expansion of litigation of speculative claims in New Hampshire's courts.

"The ripeness doctrine prevents courts 'from entangling themselves in abstract disagreements'" by allowing judicial cognizance of a controversy only once "'its effects [are] felt in a concrete way by the challenging parties.'" *Appeal of State Emps.' Ass'n of New Hampshire, Inc.*, 142 N.H. 874, 878 (1998) (citation omitted). In evaluating the ripeness of a dispute, this Court has considered two prongs: (1) "the fitness of the issue for judicial determination" and (2) "the hardship to the parties if the court declines to consider the issue." *Id.* (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) and *Maine Public Service Co. v. Public Utils. Comm'n*, 490 A.2d 1218, 1221 (Me. 1985)); *see also In re State of N.H. (State v. Fischer)*, 152 N.H. 205, 210 (2005) (applying same two-pronged analysis). This approach is essentially the same ripeness test that has been applied by federal courts. *See, e.g., id.* (citing *Alascom, Inc. v. F.C.C.*, 727 F.2d 1212, 1217 (D.C. Cir. 1984)).

Applying these principles, this Court has rejected claims of entitlement to recover based on "potential future claims" that, by their nature, cannot be elaborated with "detailed explanation or specific example." *Appeal of State Employees' Ass'n*, 142 N.H. at 878. In *Appeal of State Employees' Association of New Hampshire*, for example, the employee union of the New Hampshire Department of Health and Human Services sued the state, the governor, and the commissioner of the department, alleging that the defendants had committed an unfair labor practice by passing a bill that would empower them to alter the employees' wages and benefits under an existing collective bargaining agreement. *Id.* at 875-77. At the time of suit, however, the state had not taken any action that "breach[ed] or invalidate[d] any provisions of the CBA." *Id.* at 877. This Court held that the claim was not ripe for adjudication. It explained: "the record contains only general allegations that the union was actually harmed by the passage of" the bill. *Id.* at 878. "Instead, the union's arguments are based on unsubstantiated facts, general

allegations of harm, and requests for resolution of potential future claims rather than on actual facts contained in the record." *Id.* Thus, the case was "not ripe for [this Court's] review." *Id.*

Applying similar logic, courts in other jurisdictions have rejected claims, like those here, that rest on speculation about future water contamination. In *City of Moses Lake v. United States*, for example, the City of Moses Lake sued various aircraft manufacturers, seeking to hold them liable for alleged contamination of the city's water supply with trichloroethylene ("TCE"). 430 F. Supp. 2d 1164, 1167-70 (E.D. Wash. 2006). The city was unable to demonstrate the presence of TCE in excess of the maximum contaminant level ("MCL") for drinking water, and the court accordingly concluded that the city had not established any current damage. *Id.* at 1184. Like the State here, the city argued that it should nonetheless be allowed to proceed with its claim because, "if it drills new wells, they may become contaminated with TCE in excess of the MCL." *Id.* The court rejected this argument as premature, explaining that, "if and when one of the wells exceeds the MCL for TCE, Moses Lake will have a cause of action because clearly then a health risk will exist." *Id.*

Similarly, in *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Prot., Inc.*, the court rejected a putative class action claim brought by two public water systems against a manufacturer of the herbicide Atrazine, seeking damages for water treatment costs. 45 F. Supp. 2d 934, 936-37 (S.D. Ala. 1999), *aff'd*, 204 F.3d 1122 (11th Cir. 1999) (unpublished table decision), *declined to follow on other grounds by Adinolfe v. United Techs. Corp.*, 768 F.3d 1161 (11th Cir. 2014). The public water systems sought recovery on the ground that Atrazine had exceeded the MCL thresholds established under the Safe Drinking Water Act and the regulations promulgated under the Act by the Environmental Protection Agency. *Id.* The court rejected the claim, concluding that the MCL threshold had never been exceeded, and thus that the plaintiffs

"do[] not, and cannot, show any injury-in-fact." *Id.* at 941. Addressing the possibility of future contamination, the court was emphatic that such a risk did not constitute presently redressable injury:

> While Atrazine contamination may well affect both District 3 and Bowling Green in an individual way, albeit not in a way that, at present, causes legal harm, there is no indication that either system is in *imminent danger* of exceeding the Atrazine MCL. Plaintiffs have presented nothing to indicate that Atrazine levels in their water sources are rising in any predictable manner such that it is clear that the levels will certainly violate the MCL. Neither has either Plaintiff presented evidence that would, in some manner, show a significant increase in Atrazine usage which would result in a *definite increase* in Atrazine levels. *Without any indication of an imminent and nearly certain threat of injury*, both [of] Plaintiff's claims amount to little more than conjecture and are claims for which no standing will lie.

Id. at 942 (emphases added).

The superior court should have reached the same conclusion with respect to the speculative claims of future injury advanced by the State in this case against appellants. Indeed, the allegations here were even less definite, imminent, and certain than those rejected in *City of Moses Lake* and *Iberville*. Unlike in those cases, which involved identified and testable water sources, the alleged future injuries asserted in this case involved alleged damages stemming from *unidentified* wells – and even wells *that do not exist yet* and *may never exist*. Thus, like the union in *Appeal of State Employees' Association of New Hampshire*, the State in this case sought damages for alleged future harm based on "unsubstantiated facts, general allegations of harm, and requests for resolution of potential future claims rather than on actual facts contained in the record." *Appeal of State Emps.' Ass'n*, 142 N.H. at 878. Accordingly, the superior court should have declined to adjudicate those claims as unripe.

The superior court's approach, if allowed to stand, would encourage the initiation of broader and more aggressive mass-tort actions, seeking recovery for speculative future injuries

that may be decades off and far from certain ever to occur. Such sprawling proceedings will consume considerable superior court resources, and the gigantic records resulting from these proceedings will impose significant burdens on this Court in the inevitable appeals that follow. The threat of such litigation will also significantly increase the perceived cost of operating in the State, discouraging business expansion and increasing costs for consumers as existing businesses try to adjust to cover indeterminable, future liabilities. This Court should not countenance the establishment of such a destructive precedent. Instead, it should reverse the superior court and make clear that New Hampshire continues to apply traditional ripeness requirements that limit allegations of injury and entitlement to damages to present or imminent and identifiable harm.

CONCLUSION

For the foregoing reasons, and those set forth in appellants' brief, the Court should reverse the judgment of the superior court.

Dated: November 3, 2014

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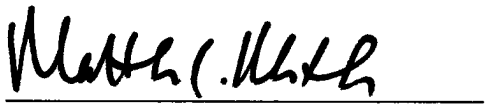
CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, two (2) copies of the *Brief of Amicus Curiae The Chamber of Commerce of the United States of America* were served by first-class mail, postage prepaid, on each party through counsel, Paul D. Clement, Bancroft PLLC, 1919 M Street N.W., Washington, D.C., 20036, for the appellants; and Brendan J. Crimmins, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., 1615 M Street N.W., Washington, D.C. 20036, for the appellee.



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