SUPREME COURT OF LOUISIANA

No. 09-C-2750 09 C 2750

DONNA HOWARD, individually and on behalf of her two minor children, CHAD HOWARD and KENDRA HOWARD, CLARENCE JOHNSON, JOYCE JOHNSON, ORVILLE JOHNSON and HELEN JOHNSON,

Plaintiffs-Respondents,

v.

UNION CARBIDE CORPORATION,

Defendant-Applicant.

On Writ of Review to the Court of Appeal, Fifth Circuit, No. 08-CA-750; Twenty-Ninth Judicial District Court, Parish of St. Charles, No. 50,399

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, *AMICI CURIAE,* IN SUPPORT OF DEFENDANT-APPLICANT

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May it please the Court:

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 Defendant-Applicant.

The Chamber is the world's largest business federation, directly representing 300,000 members and indirectly representing the interests of 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 ACC represents the leading companies engaged in the business of chemistry. The business of chemistry – a $689 billion enterprise – is a key element of the nation's economy, accounting for ten cents of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

LABI represents a wide range of large and small businesses in Louisiana and has approximately 3,200 members throughout the State. 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 non-profit corporation formed in 1959 and is currently comprised of sixty-three member companies at approximately ninety-four manufacturing sites in Louisiana. The mission of the LCA is to provide a positive climate for chemical manufacturing that ensures long-term economic growth for its members. The LCA's member companies currently employ over 24,000 employees within the State. The chemical manufacturing industry is the State's largest single employer in the manufacturing sector and contributes hundreds of millions of dollars to state and local governments through taxes and fees.

The Chamber's members and the businesses represented by the ACC, LABI and the LCA are frequently defendants in class actions and thus have a strong interest in the Supreme Court of Louisiana's scrutiny of the damages awards in this matter, which will undoubtedly affect the outcome of future nuisance-claim class actions. Despite alleging merely *de minimis* symptoms like sneezing and coughing, plaintiffs were able to recover substantial awards in the

trial court – in some cases, thousands of dollars. Unless overturned, the trial court's excessive damages awards will pave the way for misuse of the class action device to secure broad recoveries for individuals with minimal – if any – damages. Given the profound effect that the decision below will have on the Chamber's members and the businesses represented by the ACC, LABI and the LCA, *amici* respectfully submit this brief to assist the Court in its review.

INTRODUCTION

The judgment below stands to set an astonishing precedent – that a person who starts sneezing or feels nauseous after short-term exposure to a chemical at a safe level can establish entitlement to thousands of dollars of damages. The Court of Appeal should have reversed these awards, holding that they far exceeded the highest award any reasonable trier of fact could have awarded to someone who suffered nothing worse than a runny nose or upset stomach. Instead, it sustained the awards, concluding in a 3-2 decision that they were within the trial court's "vast discretion." That decision was wrong and should be reversed for at least two reasons.

First, the rulings below will encourage abuse of the class action device. Class actions were intended only to serve as procedural devices. They were not designed to alter the merits of underlying claims. Nonetheless, the decision below demonstrated that the mere filing of large numbers of claims can create the illusion of merit, artificially increasing the value of trivial claims – and even resulting in compensation for fraudulent claims. The judgment will thus promote the filing of frivolous class action claims and aid the proliferation of "judicial blackmail."

Second, the judgment poses a significant threat to Louisiana businesses and consumers – and to the integrity of the State's judicial system. The excessive awards below – and the many more that are sure to follow if they are left to stand – will operate to penalize a defendant that, by all accounts, acted quickly and responsibly to control a chemical release caused by a tropical storm. It is precisely this sort of transfer of wealth – from the responsible corporate citizen to claimants who sustained little to no injury – that casts serious doubt on the fairness and integrity of the judicial process.

For these reasons, the Court should vacate the district court's judgment and remand the case for further proceedings in the manner set forth in defendant's brief.

STATEMENT OF THE FACTS

This suit arises from a 1998 release of naphtha,[1] triggered by Tropical Storm Frances, from the Union Carbide Corporation ("Union Carbide" or "defendant") plant in Taft, Louisiana. In April 2004, the trial court certified a class encompassing the Louisiana communities of Taft, Killona and Montz. More than two thousand individuals filed claims forms seeking compensation. The claims forms alleged a variety of symptoms, including headaches, mild stomach discomfort, watery eyes and runny noses. In October 2007, the district court conducted a three-day bench trial on the damages claims of thirty randomly selected claimants. The court rejected the claims of sixteen plaintiffs as meritless and awarded damages to the remaining fourteen plaintiffs in amounts ranging from $750 to $3,500.

Union Carbide appealed the quantum of the awards to the Louisiana Fifth Circuit Court of Appeal. A five-judge panel of the Fifth Circuit affirmed all but two of the awards in a 3-2 split decision. The majority found the awards to be within the trial court's "vast discretion" to make findings of fact. The dissent argued that the damages were excessive in light of the fact that the symptoms complained of were so trivial – plaintiffs never sought medical treatment, never missed any work because of their symptoms and never complained of any continuing problems from their exposure to the chemicals. The dissent thus opined that the claims should have been reduced to a range of $100 to $500. This Court granted Union Carbide's application for supervisory review of the quantum of damages on April 23, 2010.[2]

ARGUMENT

I. THE JUDGMENT ENCOURAGES THE USE OF LARGE CLASSES AS A TOOL TO SKEW TRIAL OUTCOMES.

The Court of Appeal's judgment should be vacated because the decisions below improperly sanction the use of the class action device to inflate the value of *de minimis* claims. It is well settled that the class action device was intended to be a procedural tool rather than a mechanism that affects the substantive outcome of a lawsuit. *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("class action is a procedural device") (citation omitted); *Southwest. Ref. Co. v.*

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1 "Naphtha" is a generic term that includes several different liquid mixtures of hydrocarbons.

2 *Amici* support defendant's position on all of the issues briefed in this Court. (*See generally* Def.'s Br.) Inasmuch as defendant's brief thoroughly details the factual background of the proceedings and the legal merits of its case, *amici* rely on defendant's brief for the broader factual background and the merits – and write merely to highlight the dangers of class action abuse.

Bernal, 22 S.W.3d 425, 437 (Tex. 2000) ("[t]he class action is a procedural device . . . . It is not meant to alter the parties' burdens of proof . . . or the substantive prerequisites to recovery under a given tort"). Thus, the size of a given class is not an adequate determinant of liability or proof of damages. Rather, the merit of the claim and the reality of the harm to the class members should remain controlling. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (stating that the relevant question is the specific issue of "whether [a substance] *did* cause harm and to whom").

The trial court's judgment traded in these principles for the well-worn adage that there is "strength in numbers." On their own, many of the claims below would have gone nowhere. The record is replete with weak, fanciful – and even blatantly false – claims. Some claimants, hoping that their claims forms would not undergo rigid scrutiny, failed to allege that they experienced any symptoms whatsoever. (R. at 131-33.) And claims forms were filed on behalf of persons who were not yet born at the time of the incident or who resided outside of the class boundaries. (R. at 139.) Even those plaintiffs whose testimony was credited by the trial court claimed nothing but the most minimal of symptoms – headaches, mild stomach discomfort, watery eyes and runny noses. Notwithstanding the weak and minimal nature of these claims, the district court awarded excessive and unconscionably high damages.

Allowing the decisions below to stand would signal to plaintiffs' lawyers that the "[a]ggregation of claims makes it more likely that a defendant will be found liable and results in significantly higher damages awards." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also Ford v. Murphy Oil U.S.A., Inc.*, 96-2913, -2917, -2929 (La. 9/9/97), 703 So. 2d 542, 550 (critiquing aggregation of claims and affirming denial of class certification where the alleged link between the harm and the defendants' conduct involved a "novel and untested" theory); *Scott v. Am. Tobacco Co.*, 98-0452 (La. App. 4 Cir. 11/4/98), 725 So. 2d 10, 12 (noting that aggregation of claims has the effect of "skewing trial outcomes"). It would also promote the filing of meritless claims. As Louisiana courts have previously recognized, "there may be plaintiffs who manufacture a class action or attempt to take advantage of an incident where no one is actually damaged." *Hampton v. Ilinois. Cent. R.R.*, 98-0430 to -0435 (La. App. 1 Cir. 4/1/99), 730 So. 2d 1091, 1097 (Kuhn, J., concurring). The incentive to do so will increase once plaintiffs' attorneys realize that claims of coughing and sneezing are met with thousand-dollar awards. And the potential for such abuse will be all the greater because class actions that allege

minor injuries are the easiest to enlarge. *See, e.g.*, *In re Agent Orange*, 818 F.2d at 165 (noting that the "drum-beating that accompanies a well-publicized class action claiming harm from toxic exposure and the speculative nature of the exposure issue may well attract excessive numbers of plaintiffs with weak to fanciful cases").

By signaling that such frivolous suits will be taken seriously, the trial court's decision will also encourage the use of class actions for "judicial blackmail" or to secure "blackmail settlements." *See* H.J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) (coining the term). Courts have lamented such misuse of class actions as a means "to extort settlement from defendants who are not liable." *See, e.g.*, *Hampton*, 730 So. 2d at 1097; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (critiquing class action lawsuits where corporations are unfairly "forced by fear of the risk of bankruptcy to settle even if they have no legal liability"). Likewise, the United States Congress has noted that class actions give plaintiffs' attorneys unbounded leverage that often "force[s] corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits." S. REP. NO. 109-14, at 20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 21.

This Court should overturn the lower courts' rulings – and make it clear that Louisiana will not sanction such abuses of the class action device.

II. THE JUDGMENT WILL HAVE DETRIMENTAL CONSEQUENCES FOR BUSINESS AND THE PUBLIC AT LARGE.

The trial court's judgment – if left undisturbed – will also establish other troubling public policy precedents. Specifically, the judgment would usher in a class action jurisprudence that: (1) unfairly harms corporations that have acted responsibly; (2) adversely affects the free flow of commerce; and (3) undermines public respect for the judicial system. *See* Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2 § 2(a), 28 U.S.C. § 1711 (2005) (discussing these three effects of class action abuse).

First, the trial court's judgment punished a corporation that acted responsibly. In the aftermath of the tropical storm, Union Carbide took the proper steps to contain the release by covering the tank roof with chemical foam, thereby halting the evaporation process. *Howard v. Union Carbide Corp.*, 08-750, at 3-4 (La. App. 5 Cir. 10/27/09), 21 So. 3d 1084, 1086. After Union Carbide took these initiatives, air monitors revealed that the residual fumes in the air immediately dissipated. *Id.* Despite these extensive curative efforts, the trial court imposed excessive damages on the basis of minor and generic "symptoms" attributed by claimants to the

incident. The judgment thus suggests that Louisiana courts will impose disproportionate monetary punishments, regardless of the nature of the alleged harm or the actions that a corporation has voluntarily taken to remediate such harm. Such a precedent would unfairly punish corporations that have acted responsibly.

Second, by inviting frivolous class actions, the trial court's judgment threatens to disrupt the free flow of commerce. Frivolous lawsuits have the unfortunate side effects of "clogging America's judicial system, endangering America's small businesses, jeopardizing jobs and driving up prices for consumers," sometimes culminating in the discontinuation of vital products. W. Branigin, *Congress Changes Class Action Rules*, Wash. Post, Feb. 17, 2005 (quoting House Majority Whip Roy Blunt). The overall cost to consumers can amount to billions of dollars per year. *See* T. Perrin, 2009 UPDATE ON U.S. TORT COSTS TRENDS 3 (2009), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf (reporting that the tort-lawsuit industry cost Americans $254.7 billion in 2008). Moreover, as the costs of conducting business increase, these baseless class actions often force companies to scale back operations and can, in the worst case scenario, wipe out entire industries. Thus, the instant case threatens to have a serious negative impact upon Louisiana commerce. Moreover, because federal jurisdictional laws governing class actions make it likely that only Louisiana businesses will ever have to defend class actions in Louisiana courts, the rulings below will disproportionately burden Louisiana companies, putting the State's businesses at a unique disadvantage relative to their peers in other states.

Third, absent reversal, the lower courts' rulings would impose substantial costs on the legal system itself and undermine public respect for judicial institutions. By making Louisiana courts appear plaintiff-friendly, the excessive damages awards position the State to become a "magnet" jurisdiction for plaintiffs' lawyers to file frivolous class actions, thereby backlogging Louisiana's judicial system. *See Deshautelle v. US Agencies Cas. Ins. Co., Inc.*, 2000 0036 (La. App. 1 Cir. 2/16/01), 808 So.2d 433, 435 (Kuhn, J., concurring) (identifying "clogging of the courts" as a problem presented by class action litigation); F.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 fillings . . . . If you build a superhighway, there will be a traffic jam."). The result would be an enormous waste of time and resources as

judges devote increased attention to the adjudication of frivolous, tenuous, or speculative claims. To make matters worse, these baseless class actions would crowd out legitimate legal grievances, raising the overall costs of litigation. And by forcing businesses to engage in gambling and bet-the-company litigation, speculative class action suits make a mockery of the legal system, turning "courthouses into casinos." *See* W. Simon, *Class Actions – Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 394 (1972); *see also Rhone-Poulenc*, 51 F.3d at 1298 (observing that companies facing high-stakes litigation "may not wish to roll the[] dice. That is putting it mildly.").

This Court should vacate the damages awards, lest Louisiana courts become the next haven for class action abuse, to the detriment of the State's consumers and businesses, as well as the integrity of the State's legal system.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Union Carbide, *amici urge* the court to grant Union Carbide such relief as it has prayed for, vacating the awards below and remanding or rendering such reduced or take-nothing judgments as are appropriate on the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief of the *amici curiae* has been sent to counsel of record by hand delivery and/or by placing the same in United States mail, properly-addressed and postage pre-paid, this 18th day of May, 2010.

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