No. 02-08-001980-CV

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

ROSEMARY SMITH, BRADY SMITH AND DONNA HUBBARD,
Individually and as Personal Representative of the Heirs and
Estate of Dorman Smith, Deceased,
Appellants,
v.
KELLY-MOORE PAINT COMPANY, INC.

Appellee.

Appeal from the 348th Judicial District Court of Tarrant County,
The Honorable Kenneth Curry, presiding

BRIEF OF *AMICUS CURIAE* COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF APPELLEE'S BRIEF ON THE MERITS

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INTERESTS OF AMICI

The Coalition for Litigation Justice, Inc. (the "Coalition") is a nonprofit organization formed in 2000 to address and improve problems and issues arising in connection with toxic torts, especially asbestos litigation. Established by insurers, the Coalition seeks to foster fair and prompt compensation to deserving current and future asbestos claimants, while reducing or eliminating abuses and inequities that exist within the current civil justice system, including those that unfairly lead to the imposition of liability and settlement pressure where none is warranted – which often serves to limit fair and efficient compensation to deserving claimants. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos and toxic tort litigation environment.[1]

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.

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[1] The Coalition 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. Pursuant to Texas Rule of Appellate Procedure 11, counsel state that this brief was paid for entirely by the above-referenced *amici* organizations.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing major property and casualty insurers writing business in Texas, nationwide, and globally. AIA members, based in Texas and most states, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files amicus curiae briefs in significant cases before federal and state courts, including this Court.

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.

SUMMARY OF ARGUMENT

The *Borg-Warner* decision stated clearly that standard causation evidentiary rules – including *Havner*'s dose and epidemiology requirements – will be applied in asbestos litigation in this state.[2] Not surprisingly, plaintiffs in the asbestos litigation have begun

[2] *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

attempts to narrow the Supreme Court's ruling, seeking to shove it as far under the rug as the courts will permit.

This appeal represents just such an effort, and one the Court should reject. Plaintiffs argue that there must be a *mesothelioma exception* to the *Borg-Warner* holding since mesothelioma is a different disease, a cancer supposedly caused by any amount of exposure to occupational asbestos. But there is no mesothelioma exception to the rules articulated in *Borg-Warner*, and for good reason. *Borg-Warner* merely extends *Havner's* now well-settled dose and epidemiology requirements into the previously sacrosanct world of asbestos litigation. Plaintiffs are not just asking for an exception to *Borg-Warner*; they are asking for an exception to *Havner* itself, which would undercut the foundation of Texas toxic tort causation law.

Further, plaintiffs' evidence purportedly supporting an exception to *Borg-Warner* does not survive even minimal scientific muster. Their "no safe dose" mesothelioma argument is derived from the discredited *any exposure* theory (although plaintiffs are careful not to call it that in their briefs), under which plaintiffs' experts declare any occupational exposure a "substantial factor" in causing the disease – they make no attempt to assess the sufficiency of the dose. This approach has been rejected as a "fiction" not just by the Texas Supreme Court but by more than a dozen courts in other states.[3]

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[3] *E.g., Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 226-27 (Pa. 2007)

Alternatively, plaintiffs contend they have done enough to satisfy *Borg-Warner*'s dose requirement, but in fact their experts have merely pasted short-term exposure measurements onto the "some" exposure approach rejected in *Borg-Warner*. Exposure and dose are not the same thing, and substituting selective exposure data for a true dose assessment does not satisfy *Borg-Warner*.

Asbestos litigation is at a crossroads today as plaintiffs seek to expand the litigation into more and more meaningless exposure scenarios. Many courts have begun to push back, including those rejecting the *any exposure* theory, the engine driving this expansion. In *Borg-Warner,* the Texas Supreme Court joined that movement by coming down squarely on the side of requiring real proof of a real dose, even in asbestos litigation. This Court should reject any evisceration of *Borg-Warner* and *Havner* through a mesothelioma exception and any attempt to substitute mere exposure measurements for a dose assessment.

ARGUMENT

I. PLAINTIFFS' MESOTHELIOMA EXCEPTION WOULD GUT THE REQUIREMENTS OF *HAVNER* IN ASBESTOS LITIGATION.

Plaintiffs' request for a mesothelioma exception to *Borg-Warner* should be rejected because the request would require the Court to decide that *Havner* itself does not apply to mesothelioma cases. Texas courts have adopted a scientific, well-founded set of principles for resolving the claims of plaintiffs who lack direct proof of exposure to asbestos. First and foremost among those principles is *dose,* the bedrock principle of toxicology – the dose makes the poison, and virtually any substance can be toxic or

nontoxic depending on the dose.[4] The *Havner* court recognized and adopted this principle for Texas tort litigation:

> To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A ***claimant must show that he or she is similar to those in the studies***. This would ***include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies***, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.

Havner, 953 S.W.2d at 721 (emphasis added). The *Havner* Court looked to epidemiology to determine how much of a dose is required to cause disease – if the epidemiology studies do not demonstrate a doubling of the risk, it is unlikely the dose received by that population was enough. The *Havner* Court then required plaintiffs to prove their own exposures were comparable to those in the studies (if any) demonstrating a doubled risk. The entire point of this lengthy discussion in *Havner* is the centrality of dose – no toxic tort plaintiff in Texas can get to a jury merely by testifying they received "some exposure" to a toxic substance.

Borg-Warner merely extended this principle to asbestos litigation, where some courts were ignoring the need for causation rules with a scientific basis. The *Borg-*

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[4] David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer In Toxicology For Judges And Lawyers*, 12 J.L. & POL'Y 5, 11 (2003) ("[d]ose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect"). *See* Goldstein, Bernard and Mary Sue Hefinin, *Reference Guide on Toxicology*, in Federal Judicial Center Reference Manual on Scientific Evidence 411 (West Group 2d ed. 2000)(explaining the first tenet of toxicology is "the dose makes the poison"). Examples are legion – two aspirin cure a headache but fifty can kill; small amounts of alcohol do not cause liver cirrhosis; the body needs small amounts of metals (*e.g.*, zinc) that at large doses can be deadly.

Warner Court said, quite simply, *no more:* asbestos cases will be treated like any other tort litigation, and the dose/epidemiology requirement of *Havner* applies.[5] There would be nothing particularly startling about the *Borg-Warner* ruling, except for the fact that asbestos plaintiffs have managed to evade these bedrock evidentiary rules for such a long time. Getting asbestos litigation back on track was clearly one of *Borg-Warner*'s goals, and it did so by applying *Havner* standards to the asbestos world and requiring evidence of a sufficient dose. Creating a mesothelioma exception would thus undercut the holdings and intent of both *Havner* and *Borg-Warner.*

Nor can Plaintiffs satisfy *Havner* in asbestos litigation without epidemiology relevant to the plaintiffs' exposures and dose. Plaintiffs contend that *Havner* does not require epidemiological evidence in every case, and they are thus justified in failing to present any studies showing that drywallers or similar occupations have a doubled risk of mesothelioma. Appellants' Reply Brief at 4. *Havner*'s lesson, at a minimum, however, is that if plaintiffs use epidemiology studies themselves to prove causation (as in the Bendectin litigation in that case), those studies must bear on the relevant dose and population and show a doubling of the risk.

That is exactly the case here. Plaintiffs in mesothelioma cases rely heavily on epidemiology – just the wrong studies. Dr. Maddox's report is filled with references to epidemiological studies – of insulators, shipyard workers, asbestos factory workers, and

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[5] The Court cited with approval numerous authorities which advanced the proposition that scientifically reliable causation opinions are premised on the quantification of the dose of the chemical which was absorbed into the plaintiff's body. *See Borg-Warner*, 232 S.W.3d at 770.

other highly exposed populations. He uses this literature to prove the most basic tenet of plaintiffs' case – that asbsetos causes mesothelioma – but he does not cite to any epidemiology studies showing a doubling of risk of mesothelioma in drywall workers or similarly exposed populations. Under *Havner* it is not sufficient to cite studies of other populations, exposed to other fiber types, at irrelevant doses, and then declare the same thing would happen to a different population. It is, at a minimum, *unproven* scientifically that drywall workers incur mesothelioma from their work, and neither *Havner* nor *Borg-Warner* permit a case to move forward when the epidemiology simply does not support it. *See Free v. Amatek, Inc.*, No. 07-2-04-091-9 SEA, Ruling on Motion in Limine Under *Frye v. United States* (Wash. Super. Ct. Feb. 29, 2008) (App.at Tab 1) (rejecting any exposure testimony due to lack of epidemiology studies showing disease at low dose levels).

The exception plaintiffs seek would, if adopted, reduce the impact of *Borg-Warner* to near irrelevancy in today's asbestos litigation. The "exception" sought – carving mesothelioma cases out of the *Havner/Borg-Warner* world – would exempt most current asbestos litigation from the requirements every other toxic tort litigation must satisfy. A mesothelioma exception from *Borg-Warner* is impossible to square with that case or *Havner*. This could not have been the intent of the Texas Supreme Court in either case.

II. THE *ANY EXPOSURE* APPROACH HAS BEEN WIDELY REJECTED, INCLUDING IN MESOTHELIOMA CASES.

Even though their briefs carefully avoid using the term, plaintiffs are in fact attempting to obtain acceptance of the *any exposure* theory in the guise of a

mesothelioma exception. Their medical expert, Dr. Maddox, makes no bones about it – he explicitly endorses the *any exposure* approach and relied on it for his causation opinion regarding Mr. Smith:

> As each exposure to asbestos contributes to the total amount of asbestos that is inhaled and in so doing shortens the necessarily period for asbestos disease to develop, ***each exposure to asbestos is therefore a substantial contributing factor in the development of the malignant mesothelioma*** that actually occurred, when it occurred, in a given patient.[6]

Mesothelioma, plaintiffs argue, is not a dose-based disease at all and will occur at any dose. Appellants' Reply Brief at 6. In consequence, their experts did not, as required by *Havner* and *Borg-Warner*, either quantify or estimate Mr. Smith's lifetime dose or match that dose up with epidemiology studies of drywall or other chrysotile-only workers showing a doubling of the risk.

Plaintiffs studiously avoid acknowledging that their experts rely on the *any exposure* theory, for the very reason that this theory has been so severely discredited by both *Borg-Warner* and many other courts in Texas and elsewhere in the country.[7] As

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[6] Report of John C. Maddox, 7 C.R. 1540, at 6.

[7] The other decisions, including those in Texas, which have rejected the "any exposure" approach or theory as inadmissible, or held such testimony insufficient to support causation are *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App. – Houston [1st Dist.] 2007, pet. denied); *In re Toxic Substance Cases*, No. A.D. 03-319, 2006 WL 2404008 (Pa. Ct. C.P. Aug. 17, 2006), on appeal, *Betz v. Pneumo-Abex LLC*, No. 1058 WDA 2006 (Sup.Ct. Pa.); *Bartel v. John Crane Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff'd, Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Martin v. Cincinnati Gas & Electric Co.*, No. 07-6385, 2009 WL 188051 (6th Cir. Jan. 7 2009); *In re Asbestos Litigation, Certain Asbestos Friction Cases Involving Chrysler LLC*, Control No. 084682, Order (Pa. Ct. C.P. Sept. 24, 2008) ("Tereshko Order") (App.at Tab 2); *In re W.R. Grace & Co.*, 355 B.R. 462, 474, 478 (Bankr. D. Del. Dec. 14, 2006); *Brooks v. Stone Architecture*, 934 So. 2d 350, 355-56 (Miss Ct. App. 2006); *In re Asbestos*, No. 2004-03964, Letter Ruling (Tex. Dist. Ct., 11th Dist. Harris County Jan. 20, 2004) (App.at Tab 3); *In re Asbestos*, No. 2004-3964, Letter Ruling (Tex. Dist. Ct., 11th Dist. Harris County July 18,

(continued...)

stated by the Pennsylvania Supreme Court, the any exposure theory is "a fiction" that its proponents seek to "indulge" for the purpose of creating liability "in the absence of any reasonably developed scientific reasoning. . . ." *Gregg*, 943 A.2d at 226-27. As another Pennsylvania court noted:

> If someone walks past a mechanic changing brakes, he or she is exposed to asbestos. If that person worked for thirty years at an asbestos factory making lagging, it can hardly be said that the one whiff of the asbestos from the brakes is a "substantial" factor in causing disease.[8]

The United States District Court for the Northern District of Ohio, as affirmed by the Sixth Circuit Court of Appeals, stated that the any exposure theory "is not supported by the medical literature." *Bartel*, 316 F. Supp. 2d at 611. The *Georgia-Pacific* Texas appellate court concluded that the plaintiffs' experts "failed to show that the "any exposure" theory is generally accepted in the scientific community." *Georgia-Pacific*, 239 S.W.3d at 320. One trial court summarized the scientific flaw as follows: "[T]here is no medical authority or generally accepted methodology that would support the conclusion that . . . 'each and every exposure' substantially contributed" to asbestos disease; that opinion is "fundamentally flawed and not generally accepted by the relevant scientific community." *In re Toxic*

(continued)

2007) (App.at Tab 4); *Basile v. American Honda Motor Co.*, No. 11484 CD 2005, Order Granting Caterpillar Inc.'s Motion to Exclude Plaintiffs' Expert Testimony (Pa. Ct. C.P. Feb. 22, 2007) (App.at Tab 5); *Summers v. Certainteed Corp.*, 886 A.2d 240, 244 (Pa. Super. Ct. 2005) (equally divided court); *Anderson v. Asbestos Corp.*, No. 05-2-04551-5SEA (Wash. King County Super. Ct. Oct. 31, 2006) (App.at Tab 6).

[8] *Summers,* 866 A.2d at 244.

Substances, 2006 WL 2404008, at *13.[9] A Washington court held that the any exposure theory "is not a scientifically proved proposition that is generally accepted in the field of epidemiology, pulmonary pathology, or any other field relevant to this case." *Free* at 3-4 (App.at 1).

Fundamentally, the *any exposure* theory is flawed because it ignores the dose principle and assumes, without supporting epidemiology studies, that any occupational dose will cause mesothelioma. At the same time, the *any exposure* experts readily agree (as does Dr. Maddox in his report)[10] that millions of *background* asbestos fibers found in normal human lungs from the general environment do *not* contribute to disease. This artificial line drawing is pure (and illogical) hypothesis, without proof or basis, a litigation construct that virtually never appears in the peer-reviewed scientific literature. At most, these positions represent the theories of a handful of testifying experts rather than any accepted science, and they cannot substitute for the dose and epidemiology evidence required under *Havner* and *Borg-Warner*.

The numerous opinions rejecting the no-threshold or *any exposure* approach have all issued since 2004, and many of them involve mesotheliomas (*e.g., Georgia-Pacific, Bartel, Lindstrom, In re Toxic Substances (all diseases), Free, Martin*). They are thus far more relevant to the current state of asbestos law than the line of decisions the plaintiffs cite for the decades-old *Lohrman* "frequency, regularity and proximity" test. The *Borg-*

[9] *See also Anderson v. Asbestos Corp.*, No. 05-2-04551-5SEA (Wash. King County Super. Ct. Oct. 31, 2006) (Erlick, J.) (Transcript of bench ruling at 144-45) ("[T]his is not a theory which is generally accepted in the scientific community.") (App.at Tab 6).

[10] Report of John C. Maddox, 7 C.R. 1540, at 4.

Warner court criticized the *Lohrman* standard for not "captur[ing] the emphasis our jurisprudence has placed on causation as an essential predicate to liability" because, for one thing, it omitted the critical requirement that defendant's conduct or product be a "substantial factor in causing the plaintiff's injury. 232 S.W.3d at 770.

The arguments plaintiffs present to support their theory, as discussed in several of the *any exposure* cases, are nonsensical, inconsistent with their experts' own testimony, and at best only unproven hypotheses.[11] As a few examples:

- *Mesothelioma is a non-dose cancer:* The mere fact that mesothelioma is a cancer is not a basis to jettison any form of dose requirement. Humans encounter very low levels of carcinogens every day in their lives without incurring cancer, largely because our bodies are quite adept at repairing or eliminating carcinogenic cells.[12]

- *No safe threshold:* Contending, as plaintiffs do, that science has not established a known "threshold" or safe level of asbestos exposure does not advance the ball either. It is true that scientists have not yet determined precisely where a "safe" level

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[11] Amicus cannot discuss all the flaws of the *any exposure* approach or responses to the arguments plaintiffs use to support it. Those flaws are well set forth in the opinions cited above, in particular the Pennsylvania *In re Toxic Substances* case and the Washington *Free* decision.

[12] Amicus National Paint and Coatings Association has set forth other cases rejecting *any exposure* approaches to cancers, and we add to that *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1155 (E.D. Wash. 2009), a benzene cancer case in which the court held that the "use of the no safe level or linear 'no threshold' model for showing unreasonable risk 'flies in the face of the toxicological law of dose-response, that is, the 'dose makes the poison'" (citing similar opinions); and the New York Court of Appeals' decision in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 449 (2006), also a benzene cancer case, rejecting plaintiff experts' resort to qualitative terms like "substantial" and "significant" and anecdotal stories to describe the exposure in lieu of a dose assessment.

of exposure exists, but stating that there is "no *known* safe dose" is a far cry from the testimony of these experts that "all doses are therefore causative." If background doses are not harmful, as these experts admit, then some quantum of occupational exposures also must *not* be harmful and it is therefore incumbent on plaintiffs to demonstrate what the level of occupational dose would in fact (not theoretically) cause disease.

- *Asbestos is the only cause.* Plaintiffs argue that mesothelioma is an asbestos disease *per se* because asbestos exposure is, they contend, the only known cause of mesothelioma. This argument is both wrong[13] and reaches too far. It is widely-recognized that many cases of mesothelioma are idiopathic and not due to any known asbestos contribution. Mesothelioma may be an asbestos-related disease, but claiming that all mesotheliomas are asbestos induced because some minimal exposure exists in all instances is a purely circular argument based on the assumption that every exposure causes mesothelioma.

The upshot of all this is that if mesothelioma were in fact a doseless cancer that occurred in any population with virtually any exposure, plaintiffs would have no problem presenting this court with epidemiology studies finding excess disease (and a doubling of the risk) in drywall workers. Where are those studies? If drywall exposures were as high as plaintiffs claim – far above background – this worker population would have a massive

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[13] Epidemiology studies have recently established radiation therapy as a cause of mesothelioma, and other suspected causes (inflammation, tuberculosis, SV virus) are under investigation. Teta, J., *Therapeutic Radiation for Lymphoma*, 109 Cancer 1432 (2007), article located at http://www3.interscience.wiley.com/cgi-bin/fulltext/114125514/PDFSTART.

excess of disease. It does not. The rules of *Havner* and *Borg-Warner* are intended to prevent just this sort of highly-speculative, nonscientific testimony from entering Texas courtrooms. Under the *any exposure* theory, a *mesothelioma exception*, or any other guise, this testimony does not satisfy toxic tort causation.

III. PLAINTIFFS' EXPERTS HAVE NOT PROVIDED THE DOSE ASSESSMENT AS REQUIRED BY *HAVNER* AND *BORG-WARNER*.

As an alternative to their request for a mesothelioma exception, plaintiffs also assert that their experts have in fact met the *Borg-Warner* requirement of proving a dose sufficient to cause disease. To the contrary, their experts have done nothing more than paste exposure numbers onto the "some exposure" approach they continue to assert despite *Borg-Warner*.

The key to understanding plaintiffs' position is to focus on the difference between mere *exposure* – the amount of fiber in the air at a given time – and *dose* – the cumulative amount of inhaled fibers over time. Unlike exposure, dose takes into account the frequency and duration of the activity throughout the worker's life. An exposure could be high or low over a short term or long term, and thus an exposure measurement alone says virtually nothing about the likelihood that activity would cause disease. As an example, a person who simply handles a piece of asbestos insulation once may well have an "exposure," and the short-term number of fibers in the air might be somewhat high, but the overall *dose* from that activity would be very low and not likely to contribute to disease in any real sense. A longer-term, repeated, and significant exposure to insulation, however, can create the dose necessary to cause asbestos disease.

Plaintiffs' claimed "dose" assessment consists chiefly of short-term *exposure* studies identifying levels of fibers (in fibers per cubic centimeter or f/cc) measured during dry-wall work. Plaintiffs compare these short-term results, improperly, to OSHA's eight-hour average standards (the TWA)[14] and declare Mr. Smith's exposures excessive.[15] This is not a dose assessment. It is a snapshot exposure picture that says nothing about the overall cumulative dose. Nothing in plaintiffs' expert testimony even attempts to estimate the lifetime dose Mr. Smith received over the duration of his Kelly-Moore drywall work. The flaw in this case is on all fours with that in *Borg-Warner*, in which plaintiff experts failed to assess the dose of a lifetime brake mechanic. The mechanic's near daily exposures from brakes and gaskets was not enough to excuse assessing whether the overall lifetime dose was enough to cause disease.

Amicus request that the Court reject plaintiffs' minimalist attempt to satisfy *Borg-Warner*. A true dose assessment requires substantially more – namely, an assessment of the lifetime dose[16] and comparison of that dose to comparable populations in epidemiology studies.

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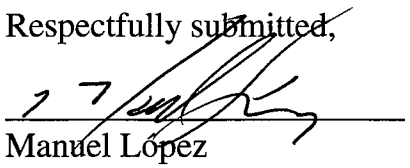
[14] A short-term sample cannot be compared to OSHA's TWA because the TWA requires a full eight-hour measurement. Someone working for 15 minutes to an "exposure" of 0.2 f/cc, for instance, is not in violation of the OSHA TWA of 0.1 f/cc 8-hr TWA if the person is not exposed to that level for at least half the day.

[15] Plaintiffs' experts like Dr. William Longo opined only that Mr. Smith was exposed to fiber levels greater than the 1976 OSHA Permissible Exposure limit and greater than the 1972 OSHA excursion limit to fibers in joint compound. Appellant's Brief at 37.

[16] The precision level of such an estimate will vary depending on plaintiffs' recall of the work activities, but at a minimum a fair estimate of the range of dose is possible in most instances. If it is not, then plaintiffs' exposures are likely so speculative and uncertain as to not merit recovery in any event.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 3, 2009, a true and correct copy of the foregoing **Brief Of *Amicus Curiae* Coalition For Litigation Justice, Inc., Chamber Of Commerce Of The United States Of America, American Insurance Association, And American Chemistry Council** and **Appendix** was served on the following counsel of record by Federal Express:

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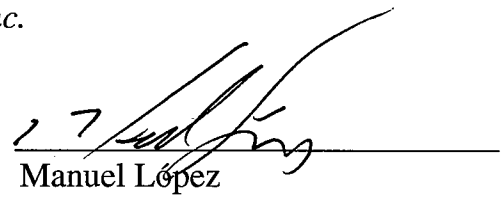

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