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DRI Brief Seeks High Court Review in *Exxon Mobil Corporation et al v. State of New Hampshire*

Constitutional Rights of Due Process At Issue in Representative Actions

CHICAGO – (February 24, 2016)—DRI – The Voice of the Defense Bar has filed an amicus brief with the United States Supreme Court in support of Exxon Mobil Corporation and ExxonMobil Oil Corporation in the case of *Exxon Mobil Corporation et al v. State of New Hampshire*. The brief was filed through DRI’s Center for Law and Public Policy.

The United States Constitution’s Due Process Clause grants those who have been sued the right to present every available defense. This due process right applies with full force in representative actions. (Representative actions are lawsuits in which the named plaintiff sues in a representative capacity in order to represent the interests of those who were not named as parties in the lawsuit.)

As a result, defendants in representative actions have the right to raise individualized challenges and defenses to the claims against them. Too often, however, courts permit plaintiffs suing in a representative capacity to eviscerate such individualized defenses by employing a “Trial by Formula” in which the plaintiffs rely on statistical evidence to prove their case based on extrapolations drawn from a subset of the individual interests they represent.

In this case, the State of New Hampshire brought a *parens patriae* lawsuit, suing as a representative on behalf of its residents to seek damages for alleged groundwater contamination. The lawsuit proceeded to trial on claims for design defect, failure to warn, and negligence. Under New Hampshire law, individuals asserting these claims must demonstrate they were injured. Consequently, parties have the right to defend themselves against these claims by demonstrating the individuals suing them have not met their burden to show injury. But instead of requiring the State to demonstrate that each of the individual interests it represented were allegedly injured by the defendants, the New Hampshire courts permitted the State to use a Trial by Formula in the form of statistical evidence and extrapolation to prove injury and damages.

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the United States Supreme Court recently disapproved of Trial by Formula in *federal* representative actions where the plaintiffs’ reliance on statistical evidence threatened to frustrate the defendant’s right to litigate individualized defenses in a class action. Although this prohibition has helped circumscribe the unchecked use of statistics in class actions, it did not end the debate over the role of aggregate proof methods in representative actions. The defendants in this case have now asked the Supreme Court to resolve one of the most significant questions that *Dukes* did not definitively

settle: whether the Due Process Clause permits a party suing in a representative capacity in *state* court to use statistical evidence and extrapolation to prove its case where doing so prevents the defendants from presenting their individualized defenses.

DRI's brief explains that lower courts disagree over whether, and the extent to which, Due Process bars Trial by Formula in state court representative actions. The brief calls on the United States Supreme Court to grant certiorari and end these disagreements, especially given the critical importance of due process protections in our legal system. Finally, the brief explains that although the representative action in this case takes the form of a *parens patriae* action rather than the class action at issue in *Dukes*, this consideration in no way detracts from the need for review. Both types of actions involve nothing more than a procedural mechanism that permits a plaintiff to sue in a representative capacity, without permitting this procedural device to abridge or modify any of the substantive rights afforded to the defendants.

Brief co-authors David M. Axelrad, John A. Taylor, Jr., Felix Shafir, and John F. Querio of Horvitz & Levy LLP (Encino, California) are available for interview or expert comment through DRI's Office of Public Policy.

For the full text of the amicus brief, click [here](#).

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