



## News Release

For Immediate Release

For more information, contact:

**Tim Kolly** 312-698-6220 | [tkolly@dri.org](mailto:tkolly@dri.org)

### **DRI Submits Supreme Court Amicus Brief Urging Review of What Could Be the Largest Class Action in History**

*Question Revolves Around Certification of Two Classes in Polyurethane Foam Antitrust Litigation*

**CHICAGO – (January 6, 2014)**—DRI – The Voice of the Defense Bar has urged the U.S. Supreme Court to review a Sixth Circuit ruling that left intact a federal district court’s certification of two classes in the *Polyurethane Foam Antitrust Litigation*. DRI’s amicus brief, submitted by DRI’s Center for Law and Public Policy, focuses on the Supreme Court’s jurisdiction to review the district court’s class-certification ruling prior to trial even though the court of appeals denied the defendants’ petition for interlocutory review under Federal Rule of Civil Procedure 23(f). In addition to arguing that the Court should exercise its certiorari jurisdiction to hear the case, DRI’s urges the Court to provide guidance to the courts of appeals on consideration and disposition of Rule 23(f) petitions.

The case, *Carpenter Co. Et Al v. Ace Foam Inc. Et Al and Greg Beastro Et Al*, involves allegations of decades-long price-fixing among numerous polyurethane foam manufacturers. Polyurethane foam is a ubiquitous material used in, among other products, mattresses, pillows, and upholstered furniture. The district court certified two sweeping classes that collectively cover potentially hundreds of millions of class members with nothing in common other than the fact that they purchased products containing polyurethane foam. Plaintiffs seek massive damages of over \$9 billion.

In its decision, the district court relied on plaintiffs’ flawed “aggregate damages” models, minimized the relevance of individualized damages issues to the class certification inquiry, and held that uninjured persons could be included within a certified class.

At issue are several questions on which the various Circuits are split. One is the standing of uninjured parties. The Second, Eighth, and Ninth Circuits have held that all class members must have standing under Article III. The Seventh, Tenth, and Third Circuits have ruled that the requirements of Article III are met as long as one class member has been injured and has standing. The district court relieved absent class members of the obligation to establish standing.

On another issue, the circuits are also split on whether a single damage figure for the class can be determined without any inquiry into the actual amount of damages each individual class member

sustained, if any. The district court said it could be. The Circuits are also split regarding whether individualized issues relating to damages are relevant to class certification. The district court said they are not.

The Sixth Circuit not only denied a Rule 23(f) petition to review the lower court's decision, but issued a substantive decision that essentially affirms the district court's class-action determination. DRI is supporting review of those decisions by the U.S. Supreme Court, maintaining that courts of appeal should not be permitted to block Supreme Court review simply by incorporating into a Rule 23(f) denial order, what is tantamount to a decision to affirm a class-certification ruling.

In its brief, DRI states: "No aspect of federal class-action litigation is more consequential to both plaintiffs and defendants than a certification determination under Federal Rule of Civil Procedure 23(c). Such an order may ring the "death knell" of the litigation either for the plaintiffs, who may not be able to afford to proceed if class action status is denied, or for the defendants, who may feel compelled to settle for enormous sums prior to trial if certification is granted."

DRI brief author Lawrence S. Ebner of McKenna Long & Aldridge LLP, in Washington, DC is available for interview or for expert comment through DRI's Communications Office.

To read DRI's brief in its entirety, [click here](#).

###

### **About DRI – The Voice of the Defense Bar**

*For more than fifty years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel and defending the integrity of the civil judiciary. A thought leader, DRI provides world-class legal education, deep expertise for policy-makers, legal resources, and networking opportunities to facilitate career and law firm growth. For more information, log on to [www.dri.org](http://www.dri.org)*