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October 14, 2008

Honorable Chief Justice Ronald M. George,
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4783

RE: *Foster Wheeler LLC v. Superior Court (Galassi)*
(Petition for Review Filed September 22, 2008)
Supreme Court, Case No. S166899
First Appellate District, Div. 1, No. A122645
San Francisco Superior Court, No. 436144

Dear Chief Justice George and Associate Justices:

Amici curiae Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and American Chemistry Council write pursuant to Rule 8.500(g)(1) to support Foster Wheeler LLC's Petition for Review.

QUESTION PRESENTED FOR REVIEW

> Whether the negation of a manufacturer's duty to warn sophisticated purchasers under *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, extends to the purchaser's employees?

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in California and their insurers. *Amici* have a substantial interest in assuring that the legal rules applied to asbestos and other toxic tort cases are consistent with this Court's holdings and promote sound public policy. *Amici* interpret the negation of a manufacturer's duty to warn sophisticated purchasers under *Johnson* to extend to the purchaser's employees. Petitioner points out, however, that lower courts have struggled in applying *Johnson* to cases such as this one. The question presented affects hundreds of pending asbestos-related cases, among other cases. For these reasons, this Court should grant Foster Wheeler LLC's Petition for Review.

WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION

In *Johnson*, this Court held that a manufacturer has no duty to warn "members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession." *Id.* at 67. The Court included employees of purchasers within the defense:

> Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular

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> product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by *the buyer's employees or downstream purchasers*.' This is because the user's knowledge is the equivalent of prior notice.
>
> *Id.* at 65 (internal citations omitted) (emphasis added).

The Court also cited a number of decisions finding that the defense extends to employees of sophisticated purchasers. For example, in *Fierro v. International Harvestor Co.* (1982) 127 Cal. App. 3d 862, the Court of Appeal noted that International Harvestor, the manufacturer of a truck, had no duty to warn plaintiff's decedent of the hazards of the truck's fuel tank design where the truck's features were known or readily observable to Luer, the decedent's employer. In dictum, the court said, "there was nothing about the International unit which required any warning to Luer. A sophisticated organization like Luer does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition." *Id.* at 866.

In another case cited by the *Johnson* Court, Air Force employees injured while cleaning jet engine parts due to low-level, chronic exposure to defendants' chemicals sued the chemicals' manufacturers claiming that the defendants breached their duty to warn plaintiffs of the chemicals' dangerous propensities. *Akin v. Ashland Chemical* (10th Cir. 1998) 156 F.3d 1030, *cert. denied*, (1999) 526 U.S. 1112. The Tenth Circuit, applying Oklahoma law, concluded: "Because of the wealth of research available, the ability of the Air Force to conduct studies, and its extremely knowledgeable staff, we find that the Air Force easily qualifies as a 'knowledgeable purchaser' that should have known the risks involved with low-level chemical exposure." 156 F.3d at 1037. The court added: "Employees of the Air Force are also deemed to possess the necessary level of sophistication, so that defendants had no duty to warn the Air Force *or its employees* of the potential hazards." *Id.* (emphasis added).

The *Johnson* Court also cited *In re Related Asbestos Cases* (N.D. Cal. 1982) 543 F. Supp. 1142, an early asbestos case, where defendants argued that "the Navy was a 'sophisticated user' of asbestos products – that is, that the Navy, as an employer, was aware of the dangers of asbestos as were defendants and that the Navy nonetheless misused the products, thereby absolving the defendants of liability for failure to warn the Navy's employees of the products' danger." *Id.* at 1151. The federal court, correctly predicting *Johnson*, held that the defendants could assert the sophisticated user defense. *See id.*

In addition, the *Johnson* court cited *Strong v. E.I. du Pont de Nemours Co., Inc.* (8th Cir. 1981) 667 F.2d 682, 686-87, where the court, applying Nebraska law, held that a natural gas pipe manufacturer had no duty to warn a natural gas utility, or the utility's employee, of well-known gas line dangers.

Numerous other decisions are in agreement that the sophisticated user defense extends to a sophisticated purchaser's employees. *See*, e.g., *Goodbar v. Whitehead Bros.* (W.D. Va. 1984) 591 F. Supp. 552, 560-61 ("if the danger related to the particular product is clearly known to the purchaser/employer, then there will be no obligation to warn placed upon the supplier."), *aff'd sub nom. Beale v. Hardy* (4th Cir. 1985) 769 F.2d 213; *Davis v. Avondale Indus., Inc.* (5th Cir. 1992) 975 F.2d 169, 173 ("Many courts hold that the supplier of a product to an employer discharges any duty to warn the purchaser's employees by warning their employer, and that no warning to either is required if the employer is already aware of the hazard."); *Cook v. Branick Mfg., Inc.* (11th Cir. 1984) 736 F.2d 1442, 1448 ("we view the law of Alabama to require only that an inspector notify the employer that a workplace hazard exists."); *Littlehale v. E.I. du Pont de Nemours & Co.* (S.D.N.Y. 1966) 268 F. Supp. 791, 799 ("If no warning is required to be given by the manufacturer to a purchaser who is well aware of the inherent dangers of the product, there is no duty on the part of the manufacturer to warn an employee of that purchaser."), *aff'd* (2d Cir. 1967) 380 F.2d 274.

Furthermore, these decisions represent sound public policy. If sophisticated purchasers are able to externalize the costs of injuries to their employees, there is less incentive for those employers to take proper precautions to protect their workers. In addition, as a practical matter, product manufacturers often lack the ability to convey appropriate warnings directly to workers. As leading commentators have explained:

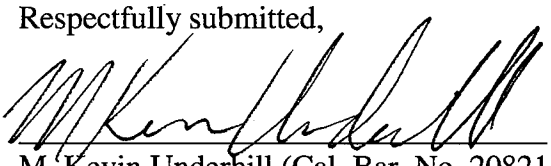
> The extension of workplace warnings liability unguided by practical consideration has the unreasonable potential to impose absolute liability in those situations where it is impossible for the manufacturer to warn the product user directly. In the workplace setting, the product manufacturer often cannot communicate the necessary safety information to product users in a manner that will result in reduction of risk. Only the employer is in a position to ensure workplace safety by training, supervision and use of proper safety equipment. Designating the manufacturer an absolute insurer of its product removes the economic incentives that encourage employers to protect the safety of their employees.

Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory* (1983) 52 U. Cin. L. Rev. 38, 43; *see also* Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging The Use of Intermediaries to Transmit Product Safety Information* (1996) 46 Syracuse L. Rev. 1185.

Nevertheless, despite the cases relied upon by this Court in *Johnson* and the sound policy basis for extending the sophisticated user defense to purchasers' employees, lower courts have struggled in applying *Johnson* to cases such as the instant litigation. The question presented affects hundreds of pending asbestos-related cases, among other cases.

For these reasons, this Court should grant Foster Wheeler LLC's Petition for Review.

Respectfully submitted,



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I also served a copy of the foregoing on each of the interested parties in this action by placing true and correct copy in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

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