

November 20, 2007

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**VIA FEDERAL EXPRESS**

Honorable Chief Justice Ronald M. George,  
and Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102-4797

Re: *Foster Wheeler LLC v. Superior Court of San Francisco County*  
*Jersey Gray, et al., Real Parties in Interest*  
Supreme Court, Case No. S158197  
Court of Appeal, Case No. A119429  
San Francisco County, Super. Ct. Nos. CGC 07-274042; CGC 05-4403282

Dear Honorable Justices:

*Amici curiae* Coalition for Litigation Justice, Inc.<sup>1</sup>, Chamber of Commerce of the United States of America<sup>2</sup>, National Association of Manufacturers<sup>3</sup>, National Federation of Independent Business Legal Foundation<sup>4</sup>, American Chemistry Counsel<sup>5</sup>, American Insurance Association<sup>6</sup>,

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<sup>1</sup> The Coalition for Litigation Justice, Inc. (“Coalition”) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment. The Coalition for Litigation Justice 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.

<sup>2</sup> 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.

<sup>3</sup> The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM’s mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America’s economic strength.

<sup>4</sup> The National Federation of Independent Business Legal Foundation (“NFIB”), a nonprofit, public interest law firm established to protect the rights of America’s small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation’s oldest and largest organization dedicated to representing

National Association of Mutual Insurance Companies<sup>7</sup>, and Property Casualty Insurers Association of America<sup>8</sup> write pursuant to Rules 8.200(c) and 8.1120(a) of the California Rules of Court in support of Foster Wheeler's request that the Court publish its decision requiring the Respondent trial court to vacate its order consolidating the cases above.

As Foster Wheeler correctly points out, there are clear and compelling reasons for publishing the Court's decision. Asbestos litigation is not isolated to San Francisco, but rather exists in counties throughout the State. Publication of this Court's clear rule for case consolidation will provide much-needed guidance to countless trial courts and litigants involved in asbestos cases. Furthermore, the usefulness of the Court's opinion is not limited to asbestos litigation. The criteria for consolidation enunciated by the Court would also apply in many other mass tort contexts, including those involving exposure to, among other things, silica, lead, or "mixed dusts."

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the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

<sup>5</sup> The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$520 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, 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.

<sup>6</sup> The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus curiae* briefs in cases before state and federal courts on issues of importance to the insurance industry.

<sup>7</sup> Founded in 1895, National Association of Mutual Insurance Companies ("NAMIC") is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

<sup>8</sup> The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for \$184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in California, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Here, this Court makes clear that Code of Civ. Proc. 1048 does not permit consolidating wholly dissimilar asbestos cases for trial. Finding Code of Civ. Proc. 1048(a) to be “virtually identical” to Federal Rule of Procedure 42(a), this Court found it appropriate to employ eight criteria first articulated by federal courts to determine whether a trial court had properly consolidated asbestos cases: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether injured workers are living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs are represented by the same counsel; and (8) type of cancer alleged.<sup>9</sup>

Providing clear case management rules also will help California trial courts faced with an ever-growing asbestos docket. By way of background, commentators long-recognized the substantial burdens faced by California trial courts handling asbestos litigation.<sup>10</sup> For example, in 2004, one San Francisco Superior Court judge stated at a University of San Francisco Law School symposium that asbestos cases were a “growing percentage” of the court’s ever-increasing caseload and that they take up a large share of the court’s scarce resources.<sup>11</sup> Another San Francisco judge at the symposium noted that asbestos cases take up twenty-five percent of the superior court’s docket and that, as of May 2004, 526 asbestos cases were set for jury trial.<sup>12</sup> The situation has even been described as “chaos” and “an administrative nightmare.”<sup>13</sup>

More recently, an influx of filings from out-of-state plaintiffs has significantly increased the burden on California trial courts. Indeed, in 2006, of a sample of 1,047 asbestos plaintiffs for whom address information was available, over three hundred – or an astonishing thirty percent – had addresses outside California.<sup>14</sup> Many of these plaintiffs have almost no connection to California, having lived most of their lives outside of the State and alleging asbestos exposure that ostensibly occurred elsewhere. And with plaintiff firms from Texas and elsewhere opening offices in California,<sup>15</sup> there is no doubt that even more asbestos cases are on their way to the state.

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<sup>9</sup> See *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993).

<sup>10</sup> For a full discussion of the types of issues faced by California trial courts in connection with asbestos litigation, see Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1 (2004) [hereinafter Anderson & Martin]; Steven D. Wasserman, et al., *Asbestos Litigation In California: Can It Change For The Better?*, 34 Pepp. L. Rev. 883 (2007); Victor E. Schwartz, et al., *Litigation Tourism Hurts Californians*, 2-201 Mealey’s Litig. Rep. Asb., 20 (Nov. 15, 2006).

<sup>11</sup> *Judges Roundtable: Where is California Litigation Heading?*, HarrisMartin’s Columns, July 2004, at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Anderson & Martin at 2-3.

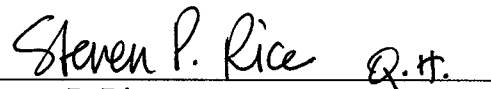
<sup>14</sup> See the Coalition for Litigation Justice’s Amicus Letter, dated August 16, 2006, in *Fisher Scientific v. Superior Court (Martin)*, No. S144795 (petition for review filed in the California Supreme Court July 3, 2006).

<sup>15</sup> See, e.g., Ford Gunter, *Houston Law Firm To Open L.A. Office*, Houston Bus. J., October 16, 2007 (detailing move by Lanier Law Firm to Los Angeles).

To address large numbers of asbestos filings, many well-intentioned and hard-working trial judges, both in this State and elsewhere, have focused on promoting efficiency in asbestos cases with the hope the overcrowded dockets would dwindle and ultimately disappear. As a result, trial judges have often adopted case management techniques that almost certainly would not have been countenanced outside the context of asbestos litigation.<sup>16</sup> Indeed, the goals of efficiency and docket reduction have led some judges to overlook the merits of individual cases and to further trespass on the rule of law and fundamental legal principles.

In other types of personal injury cases, judges would not consolidate or join cases where plaintiffs bear absolutely no relation to one another. And there is no reason to deviate from the rule of law simply because asbestos is at issue. Not only are asbestos cases no different than any other physical injury case in terms of requiring a plaintiff to prove injury and causation, it is plain that treating asbestos cases aberrantly has had the opposite result of that intended by trial judges: it has invited the filing of more asbestos cases. This Court's opinion warrants publication because it makes clear that traditional rules concerning consolidation should be applied in all contexts, *including* asbestos litigation.

Respectfully submitted,

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<sup>16</sup> See, e.g., Victor E. Schwartz and Leah Lorber, *A Letter To The Nation's Trial Judges: How The Focus On Efficiency Is Hurting You And Innocent Victims In Asbestos Liability Cases*, 24 Am. J. of Trial Advoc. 246 (2000).

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