

November 26, 2007

Shook,
Hardy &
Bacon LLP
www.shb.com

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

M. Kevin Underhill

333 Bush Street, Suite 600
San Francisco
California 94104-2828
415.544.1900
415.544.1923 DD
415.391.0281 Fax
kunderhill@shb.com

RE: *Eileen Honer v. Merck & Co., Inc.*
(Petition for review filed Nov. 26, 2007)
Supreme Court, Case No. _____
Court of Appeal, Case No. B189160
Los Angeles Superior Court, Case No. BC 323 721

Dear Chief Justice George and Associate Justices:

Amici curiae Coalition for Litigation Justice, Inc.,¹ Chamber of Commerce of the United States of America,² National Association of Manufacturers,³ National Federation of Independent Business Legal Foundation,⁴ Association of California Insurance Companies,⁵ American Chemistry Council,⁶ and National Association of Mutual

¹ The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment. 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.

² 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.

³ 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.

⁴ 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 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.

RECEIVED
NOV 26 2007

CLERK SUPREME COURT

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

Insurance Companies⁷ write pursuant to Rule 8.500(g)(1) to support Merck & Co., Inc.'s petition for review in the referenced matter.

QUESTION PRESENTED FOR REVIEW

November 26, 2007
Page 2

Whether the Court of Appeal erred by holding that the trial court improperly granted summary judgment to Merck & Co., Inc. (Merck) when it ruled that Merck, a premises owner, owed no duty to the Plaintiff for mesothelioma she allegedly developed as a result of off-site "household" exposure to asbestos through her father's and brother's work at a Merck facility.

INTEREST OF AMICI CURIAE

Amici are organizations that represent California companies that are frequently involved in asbestos litigation as defendants, and their insurers. *Amici* are well suited to provide a broad perspective to this Court and explain why this Court should accept the subject petition and hold that Merck & Co., Inc. owed no duty to Plaintiff for secondhand exposure to asbestos away from Merck's premises.

WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, (3d Cir. 2005) 391 F.3d 190, 200. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, (1997) 521 U.S. 591, 597, described the litigation as a "crisis." By 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005). In August 2006, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases in state and federal courts. *See* Am. Acad. of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims and Trends* 5 (Aug. 2007). So far, the litigation has forced an estimated eighty-five employers into bankruptcy. Over 8,500 defendants have been named. *See* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5. One well-known plaintiffs' attorney has described the

⁵ The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.9% of the property/casualty insurance in California, including 56.1% of personal automobile insurance, 42.8% of commercial automobile insurance, 39% of homeowners insurance, 32.5% of business insurance and 46% of private workers' compensation insurance.

⁶ 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.

⁷ 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.

litigation as an “endless search for a solvent bystander.” *Medical Monitoring and Asbestos Litigation*—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs); see also Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”).

California has not escaped these problems. See Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883 (2007); 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); see also Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, 21:20 Mealey’s Litig. Rep.: Asbestos 41 (Nov. 15, 2006). In fact, the asbestos litigation in California appears to be worsening.⁸

Now in its fourth decade, the litigation has been sustained by the plaintiffs’ bar search for new defendants, coupled with new theories of liability. As the litigation continues to evolve, the connection to asbestos-containing products is increasingly remote and the liability connection more stretched.

Premises owner liability for off-site asbestos exposures is a newer issue in the litigation. See Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for “Take Home” Exposure Claims*, 21:11 Mealey’s Litig. Rep.: Asbestos 32 (July 5, 2006). In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing products, often called “traditional defendants.” After most of those companies were forced to seek bankruptcy court protection, plaintiffs’ lawyers began to target “peripheral defendants,” including premises owners, for alleged harms to independent contractors exposed to asbestos. Plaintiffs’ lawyers are now targeting “peripheral defendant” property owners for alleged harms to secondarily exposed “peripheral plaintiffs.” Like the subject petition, these claims involve workers’ family members who have been exposed to asbestos off-site, typically through contact with a directly exposed worker or that worker’s soiled work clothes.

Since the beginning of 2005, a growing number of courts have decided whether premises owners owe a duty to “take home” exposure claimants. These claims have been rejected by the highest courts in Georgia,⁹ New York,¹⁰ and Michigan,¹¹ a Texas appellate court,¹² and a federal court applying Kentucky law.¹³ A Maryland appellate

⁸ See Wasserman, *supra*, 34 Pepp. L. Rev. at 885 (“With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.”).

⁹ See *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208.

¹⁰ See *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.)* (N.Y. 2005) 840 N.E.2d 115.; see also *In re Eighth Jud. Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.)* (N.Y. Sup. Ct. 2006) 12 Misc. 3d 936, 815 N.Y.S.2d 815.

¹¹ See *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)* (Mich. July 25, 2007) 2007 WL 2126516.

¹² See *Alcoa, Inc. v. Behringer* (Tex. App.-Dallas 2007) 235 S.W.3d 456; see also *Exxon Mobil Corp. v. Altimore* (Tex. App.-Hous. Apr. 19, 2007) 2007 WL 1174447 (withdrawn Aug. 9, 2007).

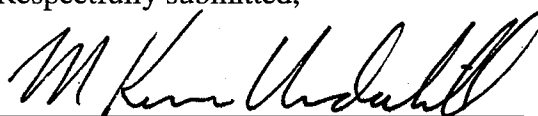
court reached the same conclusion.¹⁴ The New Jersey Supreme Court is the only court of last resort to go the other way.¹⁵ Other decisions finding a duty in some circumstances have come out of appellate courts in Tennessee (now on appeal to the Tennessee Supreme Court),¹⁶ Louisiana,¹⁷ Washington State,¹⁸ and in two California unpublished cases, including this one.

The issue of premises owner liability for “household” asbestos exposure is likely to be litigated repeatedly in California, with perhaps diverse and conflicting results in the lower courts, unless this Court provides guidance as to whether premises owners owe a duty to persons who have never been to their work sites. Left undecided, the issue will only increase in importance and lead to more extensive litigation in California, which has, for many years, been “overburdened with asbestos litigation” *Hansen v. Owens-Corning Fibreglas Corp.* (1996) 51 Cal. App. 4th 753, 760. This Court should take this opportunity now to provide clarity with respect to California’s premises owner liability law, reduce the potential for a patchwork of confusing lower court rulings, and head off costly and needless litigation.

Furthermore, the issue of premise owner liability for “take home” asbestos exposure has significant practical importance. A broad new duty requirement for landowners could allow countless scores of employers and other landowners to be named directly in asbestos and other toxic tort suits. The impact would be to augment these litigations, and would have significant negative consequences for employers (and homeowners) in California.

For all of these reasons, this Court should grant Merck’s petition for review.

Respectfully submitted,



Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON, L.L.P.
33 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281
Attorney for *Amici Curiae*

¹³ See *Martin v. General Elec. Co.* (E.D. Ky. Sep. 5, 2007) 2007 WL 2682064 (unpublished).

¹⁴ See *Adams v. Owens-Illinois, Inc.* (Md. Ct. Spec. App. 1998) 705 A.2d 58.

¹⁵ See *Olivo v. Owens-Illinois, Inc.* (N.J. 2006) 895 A.2d 1143.

¹⁶ See *Satterfield v. Breeding Insulation, Inc.* (Tenn. App. Apr. 19, 2007) 2007 WL 1159416, *appeal granted* (Tenn. Sept. 17, 2007).

¹⁷ See *Chaisson v. Avondale Indus., Inc.* (La. App. 2006) 947 So. 2d 171; *Zimko v. American Cyanamid* (La. App. 2005) 905 So. 2d 465, *writ denied*, (La. 2006) 925 So. 2d 538.

¹⁸ See *Rochon v. Saberhagen Holdings, Inc.* (Wash. App. Aug 13, 2007) 140 Wash. App. 1008, 2007 WL 2325214 (unpublished).

Mark A. Behrens
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
Tel: (202) 783-8400
Counsel for the Coalition for Litigation
Justice, Inc.

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Counsel for the Coalition for Litigation
Justice, Inc.

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER,
INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT
BUSINESS
LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 314-2061

Jeffrey J. Fuller
ASSOCIATION OF CALIFORNIA
INSURANCE COMPANIES
1415 L Street, Suite 670

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

Sacramento, CA 95814
Tel: (916) 449-1370

November 26, 2007
Page 6

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
Tel: (703) 741-5000

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
Tel: (317) 875-5250

Of Counsel

Dated: November 26, 2007

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

November 26, 2007
Page 7

I certify that on November 26, 2007, I filed an original of this letter and eight copies with the California Supreme Court. I also served a copy of the letter on each of the interested parties in this action by placing true and correct copies in sealed envelopes sent by first-class U.S. Mail, postage-prepaid, addressed to the following:

Paul C. Cook
Michael B. Gurien
WATERS & KRAUSE LLP
222 N. Sepulveda Blvd., Suite 90245
El Segundo, CA 90245
Counsel for Plaintiff Eileen Honer

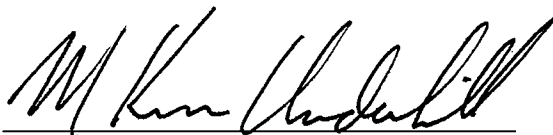
James Colgan
JACKSON & WALLACE
55 Francisco Street, 6th Floor
San Francisco, CA 94133
Counsel for Petitioner Merck & Co., Inc.

Kevin Jamison
POND NORTH
350 S. Grand Avenue, Suite 2850
Los Angeles, CA 90071
Counsel for Defendant Ford Motor Co., Inc.

In addition, I mailed a copy of the letter to the Court of Appeal and to the Los Angeles Superior Court, addressed as follows:

California Court of Appeal, Clerk's Office
Divisions 1-5 and 7-8
300 South Spring Street, Room 2217
Los Angeles, CA 90013

Los Angeles Superior Court
Hon. David Minning
Dept. 61
111 N. Hill Street
Los Angeles, CA 90012



Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON, L.L.P.
33 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.