No. 80728-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals 57293-8-I)

RONALD LUNSFORD and ESTER LUNSFORD,

Respondents

v.

SABERHAGEN HOLDINGS, INC.,

Petitioner.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Of Counsel

James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

(Additional *Of* Counsel Listed on Next Page)

Of Counsel

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

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

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive
Suite 1100
Chicago, IL 60606
Counsel to the National Association of Wholesaler-Distributors

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

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

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

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The Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Federation of Independent Business Legal Foundation, National Association of Wholesaler-Distributors, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Insurance Association – collectively "*amici*" – hereby move for leave to file the accompanying brief in support of Petitioner.

The issue presented is whether this Court's decisions adopting Restatement (Second) of Torts § 402A (1965) strict product liability as to manufacturers, *see Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), and sellers, *see Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), may be applied retroactively. Division One held that Section 402A strict product liability is not limited to post-*Ulmer/Tabert* asbestos exposures; rather, strict liability retroactively applies to *all* litigants whose claims are not otherwise barred, including the Lunsford's claim for asbestos exposure in 1958 – even though strict product liability did not exist in Washington (or anywhere) at the time and would not come into existence in Washington for sellers for another seventeen years.

As organizations that represent Washington companies and their insurers, *amici* have an interest in ensuring that Washington's product liability law is fair and reflects sound public policy. We believe Division One's opinion violates these principles.

First, Division One's holding is inconsistent with rulings from this Court. *See* RAP 13.4(b)(1). This Court stated in *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), that it will look to the three-part test adopted by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to determine whether a state law decision, such as the adoption of strict liability, is to be given retroactive,

prospective, or selectively prospective effect. The fair and flexible *Chevron Oil* approach to retroactivity determinations has been employed by this Court with the exception of *Robinson v. City of Seattle,* 119 Wn.2d 34, 77, 830 P.2d 318, 343, *cert. denied*, 506 U.S. 1028 (1992), where the Court announced that it would not apply the selective prospective analysis. More recently, however, this Court has ignored *Robinson* and has, instead, continued to employ a *Chevron Oil* analysis to determine whether to give selectively prospective effect to state-law decisions. *See In re Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006); *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001); *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 926 P.2d 923 (1996); *see also In re Marriage of Anderson*, 134 Wash. App. 506, 141 P.3d 80 (2006). The Court's approach is in accord with the rule in many state courts. Here, however, Division One chose to follow the outlier *Robinson* opinion, concluding that this Court's recent decisions applying *Chevron Oil* were "erroneous." *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 344, 160 P.3d 1089, 1094 (2007).

Second, this appeal raises an issue of substantial public importance that should be determined by this Court. *See* RAP 13.4(b)(4). The retroactive application of Section 402A would subject Washington businesses to devastating liability in asbestos and other latent injury cases.

Litigation against small and medium sized businesses would proliferate in Washington.

* * *

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.[1] 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 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.

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[1] 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.

Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

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.

The National Association of Wholesaler-Distributors (NAW) is a national trade association that represents the wholesale distribution industry. NAW is comprised of direct member companies and a federation of more than 100 national, regional, state and local associations and their member firms which, collectively, total approximately 40,000 companies operating at some 150,000 locations throughout the nation. NAW's members are a constituency at the core of the U.S. and Washington's economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end-users. While industry firms vary widely in size, wholesaler-distributors generally are small to medium-size, closely-held

businesses providing stable, well-paying jobs to more than 5 million Americans. As product sellers subject to strict liability in tort, NAW's members in Washington State (or located elsewhere in the United States and selling products for use in Washington) have a vital interest in this case.

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.

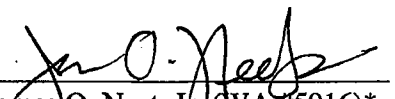
The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $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 Washington, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

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* briefs in cases before state and federal courts on issues of importance to the insurance industry.

For these reasons, *amici* request that the Court grant their Motion for Leave to file a brief in this case.

Respectfully submitted,



James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

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

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(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
(202) 463-5337

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

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive, Suite 1100
Chicago, IL 60606
Counsel to the National Association of
Wholesaler-Distributors

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

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Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW, Suite 1000
Washington, DC 20036
(202) 828-7100

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Of Counsel

Dated: November 20, 2007

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Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Of Counsel

James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*
* Counsel of Record

(Additional *Of Counsel* Listed on Next Page)

Of Counsel

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

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

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive
Suite 1100
Chicago, IL 60606
Counsel to the National Association of Wholesaler-Distributors

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

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

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Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW
Suite 1000
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Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

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STATEMENT OF INTEREST

As organizations that represent Washington companies and their insurers, *amici* have an interest in ensuring that Washington's product liability law is fair and reflects sound public policy. As described below, the appellate court's decision below violates these principles.

STATEMENT OF FACTS

Amici adopt Petitioner's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

At issue is whether this Court's decisions in *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), and *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), adopting Section 402A strict product liability as to manufacturers and sellers, respectively, may be applied retroactively. Division One held that Section 402A strict product liability is not limited to post-*Ulmer/Tabert* asbestos exposures; rather, strict liability retroactively applies to *all* litigants whose claims are not otherwise barred, including the Lunsford's claim for asbestos exposure in 1958 – even though strict product liability did not exist in Washington (or anywhere) at the time and would not come into existence in Washington for sellers for another seventeen years. The decision is inconsistent with rulings from this Court and raises an issue of substantial public importance that should be determined by this Court. *See* RAP 13.4(b)(1), 13.4(b)(4).

ARGUMENT

I. DIVISION ONE'S HOLDING IS INCONSISTENT WITH PAST PRECEDENT FROM THIS COURT

This Court stated in *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), that it will look to the three-part test adopted by the U.S. Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to determine whether a state law decision, such as the adoption of strict liability, is to be given retroactive, prospective, or selectively prospective effect.[1] The *Chevron Oil* analysis has been employed by this Court with the exception of *Robinson v. City of Seattle,* 119 Wn.2d 34, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992), where the Court announced that it would not apply the selective prospective analysis. 119 Wn.2d at 77, 830 P.2d at 343. More recently, however, this Court has ignored *Robinson* and has, instead, continued to employ the *Chevron Oil* analysis to determine whether to give selectively prospective effect to state-law decisions. *See In re Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006); *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001); *Jain v. State Farm Mut. Auto. Ins. Co.*,

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[1] Under *Chevron Oil*, the court must determine whether: (1) the decision established a new rule of law by overruling clear past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed; (2) retroactive application would further or retard the purposes of the rule; and (3) retroactive application would be inequitable. *See Taskett*, 86 Wn.2d at 448, 546 P.2d at 86-87 (quoting *Chevron Oil*, 404 U.S. at 106-07).

130 Wn.2d 688, 926 P.2d 923 (1996); *see also In re Marriage of Anderson*, 134 Wash. App. 506, 141 P.3d 80 (2006) (Division 2).

The Court's approach is in accord with the rule in many state courts, which continue to apply the *Chevron Oil* test for retroactivity determinations because of the "harsh results that might follow if they abandon *Chevron* and completely disallow prospective decisions." *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 217, 104 P.2d 483, 488 (2004).[2] Here, however, Division One chose to follow the outlier *Robinson* opinion, concluding that this Court's recent decisions applying a *Chevron Oil* analysis were "erroneous." *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 344, 160 P.3d 1089, 1094 (2007).

II. APPLICATION OF THIS COURT'S PRECEDENT SUPPORTS PROSPECTIVE OR SELECTIVELY PROSPECTIVE TREATMENT OF THIS COURT'S DECISIONS ADOPTING STRICT PRODUCT LIABILITY

The *Chevron Oil* approach to retroactivity determinations provides courts with reasonable guideposts to reach equitable results in cases such

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[2] *See also Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 393, 881 P.2d 1376, 1378 (1994); *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 414 n.5 (Minn. 2007); *Findley v. Findley*, 280 Ga. 454, 460, 629 S.E.2d 222, 228 (2006); *Wenke v. Gehl Co.*, 274 Wis.2d 220, 268, 682 N.W.2d 405, 429 (2004); *Justice v. RMH Aero Logging, Inc.*, 42 P.3d 549, 554 (Alaska 2002); *Citicorp N. Am., Inc. v. Franchise Tax Bd. of Cal.*, 83 Cal. App. 4th 1403, 1423 (2000), *cert. denied*, 533 U.S. 963 (2001); *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 89, 679 N.E.2d 1224, 1227 (1997), *Fischer v. Canario*, 143 N.J. 235, 244, 670 A.2d 516, 520 (1996); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 112 n.7 (Colo. 1992).

as this one. Here, application of the *Chevron Oil* factors supports prospective or selectively prospective treatment of *Ulmer* and *Tabert*.

A. ***Adoption of Strict Liability Was a New Rule Not Clearly Foreshadowed***

The *Chevron Oil* test supports prospective or selectively prospective application of *Ulmer* and *Tabert* because the adoption of Section 402A strict product liability was not "clearly foreshadowed," *Taskett*, 86 Wn.2d at 448, 546 P.2d at 86; *Chevron Oil*, 404 U.S. at 106, in 1958, the year of Lunsford's alleged asbestos exposure.

Until *Ulmer* and *Tabert*, persons injured by defective products generally had two paths to recovery: negligence and warranty. Negligence required fault, but not privity. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Warranty required privity, but not fault. *See Kasey v. Suburban Gas Heat*, 60 Wn.2d 468, 374 P.2d 549 (1962). In very limited situations, courts allowed plaintiffs to recover in warranty without privity, namely for express representations, *see Baxter v. Ford Motor Co.*, 168 Wn. 456, 12 P.2d 409 (1932), and in implied warranty cases involving bad food, *see Mazetti v. Amour & Co.*, 75 Wash. 622, 135 P. 633 (1913), or products intended for intimate bodily use, such as cosmetics, *see Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 378 P.2d 298 (1963), or clothing, *see Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 239 P.2d 848 (1952).

Nothing in Washington law in 1958 would have "clearly foreshadowed" the rapid changes in product liability law that would take place in the coming years. *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1103, 1110-11 (1960) (sellers of food had been held to a "special responsibility" from ancient days, but "most courts which accept[ed] strict liability without privity as to food still refuse[d] to apply it to things as...*insulating materials*....") (emphasis added). Time would pass before the start of "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 690 (5th ed. 1984) (discussing extension of implied warranty beyond food without privity and development of strict liability).

In 1963, the California Supreme Court's issued its landmark decision in *Greenman v. Yuba Power Prods. Inc.*, 377 P.2d 897 (Cal. 1963), adopting strict liability in tort (rather than in contract) for *all* products.[3] The American Law Institute adopted the Restatement (Second)

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[3] *Greenman* further demonstrates how quickly the law was developing after 1958 in the minds of the judges and academics at the forefront of tort law's development. *Greenman* was authored by Justice Roger Traynor who served as Advisor to the American Law Institute in the development of Section 402A. "Section 402A was drafted three different times. When the first draft appeared in 1961, it was applicable only to food and drink. The second draft, in 1962, extended 402A to include products for 'intimate bodily use.'" Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability – The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 746 (1998).

of Torts § 402A in 1964 and published the new rule in 1965. At the time, *Greenman* was the only decision of its kind, not the majority approach. Thus, Section 402A represented a jump in tort law, not a true "restatement" of generally accepted doctrine. *See Tabert*, 86 Wn.2d at 147, 542 P.2d at 775 (noting "[t]he rapidity of the change in this area of the law" from the initial drafts of Section 402A to the final version). Moreover, Section 402A went further than even *Greenman*, applying to manufacturers and to any seller of a defective product who is regularly engaged in such sales. Several more years would pass before this dramatic change in prior law would be adopted by this Court in *Ulmer* (1969) and *Tabert* (1975).

B. Retroactive Application of Strict Liability Would Not Further the Purposes of the Rule

The second prong of the *Chevron Oil* test supports prospective or selectively prospective application of *Ulmer* and *Tabert* because retroactive application of Section 402A would retard, not further, the purposes of the rule. *See Taskett*, 86 Wn.2d at 448, 546 P.2d at 86-87 (quoting *Chevron Oil*, 404 U.S. at 106-07). Strict product liability developed from the key assumption that manufacturers and sellers are better able to spread and absorb the risks and costs of such liability by insuring themselves and by adjusting the costs of the product. That assumption is entirely absent, however, when strict liability is sought to be

imposed retroactively. The risk of strict liability did not exist and was not foreseeable in 1958. It could not have been "priced into the product" or insured against. Furthermore, there is no meaningful way for asbestos defendants to protect themselves now by spreading the risks contemplated by the doctrine because the "use of new asbestos essentially ceased in the United States in the early 1970's," James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 227 (2006) (internal citations omitted), and insurance policies typically include asbestos exclusions.

C. Retroactive Application Would Be Inequitable

Finally, *Chevron Oil* supports prospective or selectively prospective application of *Ulmer* and *Tabert* because retroactive application of strict liability would be inequitable. *See Taskett*, 86 Wn.2d at 448, 546 P.2d at 87 (quoting *Chevron Oil*, 404 U.S. at 107). A manufacturer or seller would not have been on notice that it could be held strictly liable for failing to warn purchasers of the hazards of asbestos back in 1958. Furthermore, retroactive imposition of strict liability could have devastating consequences for Washington businesses.

III. DIVISION ONE'S HOLDING RAISES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT SHOULD BE DETERMINED BY THIS COURT

The retroactive application of Section 402A to pre-*Ulmer/Tabert* events would subject Washington businesses to devastating liability in

asbestos and other latent injury cases - an issue of substantial public importance that should be determined by this Court. *See* RAP 13.4(b)(4).

First, if Division One's holding is allowed to stand, asbestos litigation against small and medium sized businesses will proliferate.[4] Now that an estimated eighty-five employers have been forced into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, "including nearly all major manufacturers of asbestos-containing products," Am. Acad. of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims and Trends* 5 (Aug. 2007), "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314. One well-known plaintiffs' attorney has described the 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

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[4] This concern is heightened by Division One's other dramatic expansions of asbestos liability, *see Braaten v. Saberhagen Holdings, Inc.*, 137 Wash. App. 32, 151 P.3d 1010 (2007) (component supplier liable for another's finished product); *Simonetta v. Viad Corp.*, 137 Wash. App. 15, 151 P.3d 1019 (2007) (same); *Sales v. Weyerhaeuser Co.*, 138 Wash. App. 222, 156 P.3d 303 (2007) (restricting forum non conveniens), while other courts are working to improve the litigation environment. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

Mr. Scruggs). The trend of plaintiffs' targeting solvent suppliers and other "peripheral defendants" will be fueled if a claim can easily be brought. Strict liability causes a seller to defend the product of a manufacturer, whereas absent a strict liability claim, the supplier/distributor defendant is defending a negligence claim, which is based upon that company's own conduct. Negligence claims against sellers are rarely pursued at trial because of the difficulty of proving that suppliers or distributors independently engaged in conduct that would subject them to liability.

Second, retroactive application of strict liability offends notions of fundamental fairness. Businesses must be able to make decisions based upon the law that exists at the time or, as an equitable matter, given some protection from future harm resulting from their reliance on that law. If changes in the law are applied retroactively, businesses are substantially prejudiced because they cannot alter their own past risk-based decisions. For example, a seller cannot buy more insurance for prior years, cannot charge more for products that have been sold, and cannot avoid liability altogether by foregoing a sale that has occurred. Here, the retroactive creation of new "covered" risks decades later is particularly unfair because it will put potentially bankrupting liability on faultless defendants. *Chevron Oil* allows a court to consider such equitable matters.

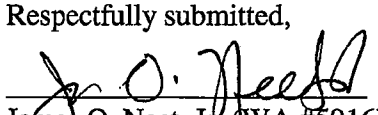
Third, Division One's reasoning is based on a false premise. The court may have been driven to facilitate compensation for plaintiffs where many at-fault companies have declared bankruptcy. Trusts, however, have been created to pay these claims. In fact, one recent study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006).

Finally, the devastating consequences of Division One's holding will not be limited to asbestos cases. If the decision stands, strict liability claims could be brought for any pre-*Ulmer/Tabert* events that may have contributed to a latent injury. Countless Washington businesses would face liability beyond any amount they reasonably could have anticipated at the time. This would be manifestly unjust.

CONCLUSION

For these reasons, *amici curiae* ask this Court to review this case and overturn Division One's decision.

Respectfully submitted,



James O. Neet, Jr. (WA #5916)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
Attorneys for *Amici Curiae*

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

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(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
(202) 463-5337

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

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive, Suite 1100
Chicago, IL 60606
Counsel to the National Association of
Wholesaler-Distributors

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

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Of Counsel

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PROOF OF SERVICE

I certify that on November 20, 2007, an original and one copy of the foregoing Motion and Brief were sent by overnight mail to:

Ronald Carpenter, Clerk
Supreme Court of Washington
415 Twelfth Avenue SW
Olympia, WA 98504-0929
(360) 357-2077

I further certify that a copy of the foregoing Motion and Brief were sent via the United States Postal Service in a first-class postage-prepaid envelope addressed to the following:

Zachary B. Herschensohn
BRAYTON PURCELL
The American Bank Building
621 S.W. Morrison, Suite 950
Portland, OR 97205

William Rutzick
SCHROETER, GOLDMARK & BENDER
500 Central Building
810 Third Avenue
Seattle, WA 98104

Timothy K. Thorson
CARNEY BADLEY SPELLMAN
701 Fifth Avenue, #3600
Seattle, WA 98104

James O. Neet, Jr. (WA #5916)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550