November 12, 2009

Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
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RE: *Barbara O'Neil v. Crane Co. and Warren Pumps, LLC,*
Petitions for Review Filed October 28, 2009
Supreme Court Case No. S177401
Court of Appeal Case No. B208225

Dear Chief Justice George and Associate Justices:

Amici curiae National Association of Manufacturers, Coalition for Litigation Justice, Inc.,[1] Chamber of Commerce of the United States of America, Association of California Insurance Companies, American Insurance Association, National Association of Mutual Insurance Companies, NFIB Small Business Legal Center, and American Chemistry Council write pursuant to Rule 8.500(g)(1) to urge this Court to grant the Petitions for Review filed in the above-referenced matter.

INTEREST OF *AMICI CURIAE*

Since asbestos litigation emerged over three decades ago, lawyers who bring asbestos cases have perpetuated the litigation by seeking out new defendants or raising new theories of liability. An emerging theory being pursued by some plaintiffs' counsel is that makers of nondefective products, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing products, including replacement gaskets, external thermal insulation, and flange gaskets, made by others and attached post-sale, e.g., by the U.S. Navy. It is easy to see what is suddenly driving this novel theory. Most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy enjoys sovereign immunity. As a substitute, plaintiffs seek to impose liability on solvent equipment manufacturers for harms caused by products they never made, sold, installed, or profited from.

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. They also have a strong interest in uniform and predictable application of tort law throughout California. The clash between the Second District's decision here and the First District's contrary decision in *Taylor v. Elliott Turbomachinery Co.* (1st Dist. 2009) 171 Cal. App. 4th 564, *review denied* (Cal. June 10, 2009), assures litigants of inconsistent results on similar facts, requiring further guidance from this Court.

[1] The Coalition is a nonprofit association formed by insurers to address 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.

WHY REVIEW SHOULD BE GRANTED

I. A Direct Conflict Between Appellate Districts

Review should be granted to resolve a clear conflict between two key Courts of Appeal and secure uniformity of decision with respect to an important question of law that substantially impacts asbestos litigation in California. *See* Cal. Rules of Court, Rule 8-500. This year, the First District in *Taylor* held that makers of products supplied to the Navy for use in a ship's propulsion system had no duty to warn of the dangers in asbestos-containing products supplied by other manufacturers. As the court recognized "overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution." *Taylor,* 171 Cal. App. 4th at 577. The *Taylor* decision is consistent with traditional tort law principles. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products* (2008) 37 Sw. U. L. Rev. 595.

In the decision below, however, the Second District rejected the reasoning in *Taylor* on essentially identical facts and, instead, relied on one of its own decisions to conclude that equipment manufacturers may be held liable for failure to warn about asbestos-related hazards in replacement gaskets or exterior and flange gaskets made by others and affixed post-sale.

II. A Significant Expansion of Negligence and Strict Liability Principles

This Court should grant review and reverse the broad new duty rule created by the Second District that requires manufacturers to warn about risks in products made by others. Plaintiffs' theory is contrary to California law, as well as persuasive authority from other states. *See Taylor,* 171 Cal. App. 4th at 571; *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127; *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493; *Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488; *Ford Motor Co. v. Wood* (Md. Ct. Spec. App.) 703 A.2d 1315, *cert. denied,* (Md. 1998) 709 A.2d 139, *abrogated on other grounds* (Md. 2002) 800 A.2d 727; *Rumery v. Garlock Sealing Tech., Inc.* (Me. Super. Ct. Apr. 24, 2009) 2009 WL 1747857; Henderson, *supra.*

Plaintiffs' justification for this radical expansion of asbestos liability is "foreseeability." But their theory overlooks the fundamental threshold requirement in tort law that there must be a duty owed by the defendant to the plaintiff. Also, foreseeability can be a slippery slope that has no end. Courts must draw a reasonable line, and that line has been in place for the entire history of asbestos litigation and going back in time through the common law.

In negligence, a plaintiff must establish the existence of a duty owed directly to the injured person. Duty questions involve policy-laden judgments in which a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. Courts make duty determinations by balancing several factors. *See Rowland v. Christian* (1968) 69 Cal. 2d 108, 113. Under California law – and contrary to Plaintiffs' theory – "foreseeability is not coterminous with duty." *Sakiyama v. AMF Bowling Centers, Inc.* (2d Dist. 2003) 110 Cal. App. 4th 398, 407, *reh'g denied* (Aug. 6, 2003), *review denied* (Cal. Sept. 24, 2003); *Thing v. La Chusa* (1989) 48 Cal. 3d 644, 656, 659. The *Rowland*

factors do not support a duty owed here, as the First District held in *Taylor,* 171 Cal. App. 4th at 596.

Moreover, public policy dictates that manufacturers be held liable for defects in their *own* products, or in the use of their *own* products – not those of others. In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that may be anticipated, if courts are willing to extend foresight far enough. Such a duty rule would lead to "legal and business chaos – every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product,* Toxic Torts & Env'tl L. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005).

Likewise, the expansion of strict product liability recognized by the Second District poses an important question for this Court. The underlying policy of strict product liability is one of risk distribution. The text and comments to the Restatement (Second) of Torts § 402A repeatedly refer to the selling of the product that caused the harm as the touchstone, threshold requirement for liability to be imposed. Following this reasoning, California law restricts the duty to warn to entities in the chain of distribution of the defective product. *See Rutherford v. Owens-Illinois* (1997) 16 Cal. 4th 953, 958 (a plaintiff in an asbestos case "must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant,* to which he became exposed" causes injury) (emphasis added); *Peterson v. Superior Court* (1995) 10 Cal. 4th 1185, 1188 ("manufacturers, retailers, and others *in the marketing chain* of a product are strictly liable in tort for personal injuries caused by a defective product.") (emphasis added); *Daly v. General Motors Corp.* (1978) 20 Cal. 3d 725, 739 (the basis for imposing strict liability on a particular defendant is that "he has marketed or distributed a defective product").

California courts have repeatedly recognized that a manufacturer cannot be held liable for risks that did not come from their own equipment, but that came entirely from products made and sold by others. *See, e.g., Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal. App. 4th 513, 524; *Lee v. Electric Motor Div.* (1985) 169 Cal. App. 3d 375, 385; *Powell v. Standard Brands Paint Co.* (1985) 166 Cal. App. 3d 357, 362-63; *Blackwell v. Phelps Dodge Co.* (1984) 157 Cal. App. 3d 372, 378. One appellate court has referred to such a theory as "semantic nonsense." *Garman v. Magic Chef, Inc.* (1981) 117 Cal. App. 3d 634, 638. The Second District's decision in this case does not comport with these and other California holdings. Instead, the Second District relied on authorities that "are distinguishable." *Taylor,* 171 Cal. App. 4th at 586; *compare Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2d Dist. 2004) 129 Cal. App. 4th 577, *DeLeon v. Commercial Mfg. & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336; *Wright v. Stang Mfg. Co.* (2d Dist. 1997) 54 Cal. App. 4th 1218, *review denied* (Cal. Aug. 13, 1997).

III. A New and Potentially Substantial Burden on California's Judicial System

The Court should also grant review because the novel new theory adopted by the Second District would worsen asbestos litigation in California.[2] If allowed to stand, the decision will invite a surge of new asbestos cases into California. Hundreds of companies made products that, one could argue, would foreseeably be used around asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (e.g., manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under Plaintiffs' theory.

Judges in California have acknowledged the ever-increasing burden placed on the judicial system by the state's asbestos docket. For example, San Francisco Superior Court Judge James McBride has said that the length of asbestos trials causes hardship for jurors, leaving many citizens unable to serve and forcing the courts to "use jurors at an absolutely abominable rate." *Judicial Forum on Asbestos*, HB Litigation Conferences, New York City, June 3, 2009 (quoting Judge McBride), *available at* http://litigation conferences.com/?p=6669. Judge McBride said that the rate at which asbestos litigation depletes potential jurors from the overall pool could lead the jury system to "collapse" if the economy worsens significantly; these impacts would be most likely to occur in areas, such as Los Angeles County, which tend to have lower response rates on summonses. *See also Judges Roundtable: Where Is California Asbestos Litigation Heading?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, July 2004, at 3 (San Francisco Superior Court Judge Ernest Goldsmith stating that asbestos cases constitute twenty-five percent of the court's docket); Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis* (2004) 45 Santa Clara L. Rev. 1, 2 ("The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket."). If the decision below is left to stand, and equipment manufacturers are potentially liable for others' products, such defendants are highly likely to fully defend themselves at trial, logically concluding that they did not the manufacture asbestos-containing product to which the plaintiff was exposed and thus were not the cause of the plaintiff's harm. This will only serve to increase the strong probability of more cases going to trial with increasing numbers of seemingly non-culpable defendants.

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[2] *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 599 ("[P]laintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases."); Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview* (2008) 37 Sw. U. L. Rev. 459, 462 ("[T]here is a sense locally among the bar that Southern California may be in the midst of a surge."); Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 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.").

The broad new duty rule created by the Second District would worsen the litigation and fuel claims against defendants, such as Petitioners. Claimants are already drawn to California courts because of the belief that the state's asbestos litigation rules will give them an advantage. *See* Victor E. Schwartz et al., *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006) (stating that, in a 2006 sample of 1,047 California asbestos plaintiffs for whom address information was available, an astonishing *thirty percent* had addresses outside California). If Plaintiffs prevail here, the decision will reinforce this perception and signal to plaintiffs throughout the country that they should file in California because they can obtain judgments based on a novel theory that has been rejected elsewhere.

The increase in new filings which could be expected to flow into California courts would further strain the state's judicial system. As this Court knows, the state's court system is facing serious challenges due to the unprecedented statewide fiscal crisis. The Judicial Council has ordered ALL California courts to close the third Wednesday of each month, starting September 16, 2009 and running through the fiscal year, which ends June 30, 2010. As the enabling statute for these extreme actions explains: "The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch." Cal. Govt. Code § 68106(a).

Furthermore, it is important to note that while Plaintiffs seek to impose liability on solvent manufacturers as a substitute for proper entities that are now bankrupt, trusts have been established to pay claims involving those companies' products. In fact, one study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." *See* Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006); *see generally* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 Norton J. Bankr. L. & Prac. 257.

Conclusion

For these reasons, this Court should grant review of the decision below.

Respectfully submitted,

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I certify that on November 12, 2009, I 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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