April 15, 2009

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Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
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RE: ***Vickie L. Taylor v. Elliott Turbomachinery Co., Inc. et al.***
Petition for Review Filed April 7, 2009
Supreme Court Case No. S171931
Court of Appeal Case No. A116816 and A117648
City & County of San Francisco Superior Court Case No. 438516

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, American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and Association Chemistry Council write pursuant to Rule 8.500(g)(1) to urge this Court to deny the Petition for Review filed in the above-referenced matter.

Amici believe that the Court of Appeal's unanimous decision correctly states California law, is consistent with fundamental legal principles, strongly supported by persuasive out-of-state authorities that are very closely on point, and represents sound public policy. It is unnecessary for this Court to expend judicial and party resources to review the Court of Appeal's well-reasoned decision.

QUESTION PRESENTED FOR REVIEW

Whether the First District Court of Appeal, Division Five, erred by holding that California law imposes no duty on respondent component part manufacturers to warn of the hazards inherent in asbestos-containing products manufactured or supplied by third parties and affixed to respondents' components post-sale.

INTEREST OF *AMICI CURIAE*

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. *Amici* believe that the Court of Appeal's decision is consistent with these principles and should be left to stand.

[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.

ARGUMENT

I. Overview: The Background in Which the Subject Petition Should be Considered

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). Since the litigation emerged over three decades ago, lawyers who bring asbestos cases have kept the litigation going by seeking out new defendants and raising 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. 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 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").

An emerging theory being promoted by some plaintiffs' counsel is that makers of nonhazardous component parts, such as pumps or valves, should be held liable for asbestos products made by others and attached to the components post-sale, such as by the Navy. In essence, those advocating for this new duty rule seek to impose rescuer liability on the component supplier, which tort law is traditionally reluctant to do. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 602 (2008) ("Every student of American tort law knows that American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render."). 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. Component part makers are being targeted simply because they happen to be solvent and subject to suit.

II. The Petition Should Be Denied Because The Court of Appeals Based Its Decision On Well-Settled Principles of California Law That Do Not Need To Be Reviewed

Here, both the Superior Court and a unanimous panel of the Court of Appeal rejected Petitioner's invitation to take California law in an unprecedented, expansive, and unsound direction. Both courts followed well-established California precedent to hold that component part manufacturers have no duty to warn, under either a strict liability or negligence theory, for products manufactured or supplied by third parties. The Court of Appeal based its decision on several rationales of duty.

First, the Court of Appeal correctly applied California law to restrict 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.").

The Court of Appeal wisely observed the basis for the bright-line rule that ties liability to the injury-producing product: "manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate." *Taylor v. Elliott Turbomachinery Co., Inc.* (Cal. App. 1st Dist. 2009) 90 Cal.Rptr.3d 414, 422-423. The Court added, "[t]his legal distinction acknowledges that overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution. And California cases have acknowledged the need for this restraint." *Id.* at 423.

The Court of Appeal concluded that, because Respondents "were simply 'not part of the manufacturing or marketing enterprise of the allegedly defective product[s] that caused the injury in question,'" *Id.* at 425 (quoting *Peterson*, 10 Cal.4th at 1188), Respondents could not be held strictly liable for others' products. There is no reason for this Court to review this straightforward application of settled California law.

Second, the Court of Appeal correctly applied California law in concluding that Respondents could not 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 Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 524 (no liability where there was no evidence that defendant "played any role in the design, manufacture, distribution, or marketing" of the products that allegedly caused plaintiff's harm); *Lee v. Electric Motor Div.* (1985) 169 Cal.App.3d 375, 385 ("We have found no case in which a component part manufacturer who had no role in designing the finished product and who supplied a nondefective component part, was held liable for the defective design of the finished product."); *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, 362-63 ("To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else."); *Blackwell v. Phelps Dodge Co.* (1984) 157 Cal.App.3d 372, 378 ("The product alleged to have been dangerous and hence defective, for lack of warnings and instructions was not the acid supplied by defendant, but the tank car in which the acid was shipped by defendant to [plaintiff's employer]...under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the acid allegedly caused by the defective design of the tank car..."); *Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634, 638 ("To say that the absence of a warning [about defects] in other products makes the [defendant's product] defective is semantic nonsense."). There is no reason for this Court to review such a straightforward application of settled law. California cases "uniformly support Respondents' position." *Taylor,* 90 Cal.Rptr.3d at 426.

Third, the Court of Appeal correctly applied the component supplier doctrine as yet another basis to reject Petitioner's claims. *See* Restatement Third, Torts: Products Liability § 5 (1997); *see also id.* at Comment *a* (1997) ("As a general rule, component sellers should not be liable when the component itself is not defective."). Comment *a*

specifically identifies "*valves*" as a component for which liability should not attach unless the product itself is defective. *Id.*

Finally, the Court of Appeal held that Respondents could not be held liable under a negligence theory for harms caused by products made or sold by others. The Court engaged in a thoughtful and sound application of the factors this Court set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 for determining the existence of a duty. There was no error in the Court of Appeal's reasoning that would support the need for review by this Court.

III. The Petition Should be Denied Because the Court of Appeal's Decision is Strongly Supported by Persuasive Out-of-State Authorities That Are On Point

The Court of Appeal's decision is not only consistent with settled California law but is also "strongly supported by other persuasive out-of-state authorities that are very closely on point." *Taylor,* 90 Cal.Rptr.3d at 436; *see also* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595 (2008).

For instance, in two very recent companion cases directly on point, *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127, and *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493, an en banc panel of the Washington Supreme Court rejected component maker liability for failure to warn of asbestos-related hazards in products made by others. In *Simonetta*, the court held that a manufacturer may not be held liable in common law negligence or strict liability actions for failure to warn of the dangers of asbestos exposure resulting from another manufacturer's insulation applied to its products after sale of the products to the Navy. Like the Court of Appeal in the present case, the Washington Supreme Court held that the defendant, an evaporator manufacturer, was only responsible for the "chain of distribution" of its product, and that the addition of asbestos-containing insulation manufactured by another company represented a separate chain of distribution. *See Simonetta*, 197 P.3d at 138. In *Braaten*, the court rejected failure to warn claims against pump and valve manufacturers relating to replacement packing and replacement gaskets made by others. In both cases the court rejected plaintiffs' claims that the foreseeability of harm gave rise to a duty owed.

In addition, the same type of liability issue was addressed in *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, where a plaintiff with alleged asbestos-related mesothelioma sued several manufacturers of products used in conjunction with other manufacturers' asbestos products. The central issue in *Lindstrom* was causation as it related to component parts rather than the existence of a duty. The court found no causation, concluding that a manufacturer cannot be held responsible for asbestos contained in another product. *See id.* at 496. For example, the court affirmed summary judgment for pump manufacturer Coffin Turbo, which did not manufacture or supply the asbestos products used to insulate its pumps. The court found that Coffin Turbo could not be held responsible for the asbestos contained in another product, though the asbestos was attached to a Coffin Turbo product. *See id.* It was those asbestos products, not Coffin Turbo's pumps, that caused injury.

Most recently, a Pennsylvania trial court held that "to the extent that Plaintiff may have been exposed to replacement packing supplied by a third party, there is no authority that Crane can be held liable for such exposure as a matter of law. To the contrary, the authority relied upon by Crane in support of its Motion for Summary Judgment indicates that Crane is not subject to such liability." *Milich v. Anchor Packing Co.*, A.D. No. 08-10532, at 9 (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009) (Memorandum Opinion and Order of Court).[2]

IV. The Petition Should be Denied Because the Court of Appeal's Decision Promotes Sound Public Policy

The Court of Appeal's opinion also represents sound public policy. As the Court explained, "Defendants whose products happen to be used in conjunction with defective products made or supplied by others could incur liability not only for their own products, but also for every other product with which their product might foreseeably be used." *Taylor,* 90 Cal. Rptr. 3d at 439.

The new duty rule promoted by Petitioner 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*, HarrisMartin's Columns—Asbestos, Aug. 2005, at 2, 5. "For example, a syringe manufacturer would be required to warn of the dangers of any and all drugs it may be used to inject, and the manufacturer of bread would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another*, HarrisMartin's Columns—Asbestos, May 2007, at 4, 6. Packaging companies might be held liable for hazards regarding contents made by others. This Court no doubt appreciates there are many other examples.

Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products. *See* Restatement, Third § 5 Cmt. *a.;* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

V. Petitioner's Novel Theory Would Worsen the Asbestos Litigation

Finally, the novel new theory being promoted by Petitioner should be rejected because it would worsen asbestos litigation in California.[3] Judges in California have

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[2] At the time of this filing, an appeal relating to the same duty issue was pending in the Second District Court of Appeal, *see Merrill v. Leslie Controls, Inc.*, No. B200006 (Cal. App. 2d Dist. filed July 14, 2007).

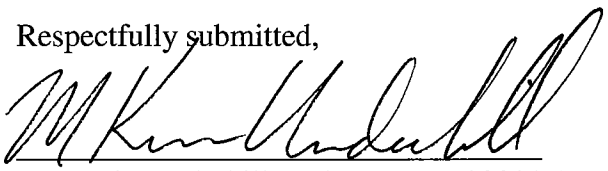
3. *E.G.*, Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 599 (2007) ("[P]laintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important 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*, 37 Sw. U. L. Rev. 459, 462 (2008)

acknowledged the ever-increasing burden placed on the judicial system by the state's asbestos docket. For example, in 2004 one San Francisco Superior Court judge stated that asbestos cases take up twenty-five percent of the court's docket. *See Judges Roundtable: Where Is California Asbestos Litigation Heading?*, HarrisMartin's Columns—Asbestos, July 2004, at 3 (Judge Ernest Goldsmith of the San Francisco Superior Court speaking on a panel at a symposium hosted by the University of San Francisco School of Law). Another judge noted 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. *Id.* (Judge Tomar Mason of the San Francisco Superior Court); *see also* STEVEN WELLER ET AL., POLICY STUDIES, INC., REPORT ON THE CALIFORNIA THREE TRACK CIVIL LITIGATION STUDY (2002), www.clrc.ca.gov/pub/BKST/BKST-3TrackCivJur.pdf ("The San Francisco Superior Court seems to be a magnet court for the filing of asbestos cases."); 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, 2 (2004) ("The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket.").

Conclusion

For these reasons, this Court should decline review and allow the decision below to stand.

Respectfully submitted,



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("[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?*, 34 Pepp. L. Rev. 883, 885 (2007) ("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.").

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