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November 15, 2019

Hon. Jim Humes, Administrative Presiding Justice  
Hon. Sandra L. Margulies, Associate Justice  
Hon. Gabriel P. Sanchez, Associate Justice  
Court of Appeal, State of California  
First Appellate District, Division One  
350 McAllister Street  
San Francisco, CA 94102

**Re: A154245**

***Berg v. Colgate-Palmolive Co.***

**Amici Curiae Letter Supporting Publication of Opinion**

Honorable Justices:

Amici curiae Chamber of Commerce of the United States of America (Chamber), Civil Justice Association of California (CJAC), Pharmaceutical Research and Manufacturers of America (PhRMA), and Product Liability Advisory Council, Inc. (PLAC) support respondent's request for publication of the opinion filed by the Court in this case on October 28, 2019.<sup>1</sup> (See Cal. Rules of Court, rule 8.1120(a).)

An opinion "should be certified for publication in the Official Reports" if it meets *any* of the listed criteria in California Rules of Court, rule 8.1105(c). The Court's opinion here, which affirms summary judgment in a talcum powder case based on the lack of evidence to support causation, squarely meets three criteria for publication:

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<sup>1</sup> The interests of these organizations are stated following the end of this letter. The parties to this appeal and their counsel have not authored this letter in whole or in part, nor have they made a monetary contribution for the preparation of this letter. Other than the amici curiae, their members, and their counsel, no person or entity has made a monetary contribution for the preparation or submission of this letter.

- (i) It “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions”;
- (ii) It “explains . . . an existing rule of law”; and
- (iii) It “[i]nvolves a legal issue of continuing public interest.”

(Cal. Rules of Court, rule 8.1105(c)(2)–(3), (6).)

**I. The Opinion applies an existing rule of law to a significantly different set of facts (rule 8.1105(c)(2)).**

The Court’s opinion should be published because it provides useful guidance to courts and litigants for analyzing whether evidence is sufficient to prove causation. Importantly, the opinion provides this guidance in a newly addressed context: asbestos product-liability cases where asbestos is alleged to be present in the product as a contaminant rather than as an intended constituent. Guidance in that context is needed as the number of such cases, particularly those involving allegations of asbestos contamination in cosmetic talcum powder products used by consumers, has been expanding rapidly.

The importance of proving causation with evidence satisfying the more-probable-than-not standard was addressed in premises-liability cases such as *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763. (See *id.* at pp. 775-776 [affirming summary judgment because “[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant” (emphasis omitted)]; see also *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 480–488.) After those cases, the standard was addressed in product-liability cases alleging exposure to asbestos, where defendants made certain products and equipment that contained asbestos as an intended component, such as *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1105, *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252, and *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108, cited by the Court here.

This Court’s opinion in *Berg* now provides valuable guidance for applying the threshold standard for proving causation in the talc context. Among other things, the Court explained it “was not enough for plaintiffs to produce some evidence that Berg was exposed to a product that possibly contained asbestos.” (Opn. at p. 7.) Rather, “[t]he evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment’ . . . .” (*Id.*, quoting *McGonnell*, *supra*, 98 Cal.App.4th at p. 1105.) Ultimately, the Court required Berg to show that it was “more likely than not that the containers [he] used contained asbestos.” (*Id.* at pp. 6–7, footnote omitted.) This

Court's analysis, if published, will help guide future disputes with analogous causation issues.

**II. The Opinion explains an existing rule of law (rule 8.1105(c)(3)).**

This Court's opinion also warrants publication because it explains the evidentiary standards necessary for surviving summary judgment in this context. Plaintiffs' overarching theory, rejected by the Court, was that their expert's declaration created a triable issue of fact. (Opn. at p. 6.) The Court concluded that the deficiencies in the factual foundation supporting the expert's conclusions were apparent and that the declaration, therefore, could not defeat summary judgment. (*Id.* at pp. 6–7.) The Court's ruling explains that it was not enough for plaintiffs to produce *some* evidence that Berg was exposed to a product that *might* possibly have contained asbestos. (*Id.* at p. 7.)

The Court's opinion provides analysis complimentary to but distinguishing *Lyons v. Colgate-Palmolive Co.* (2017) 16 Cal.App.5th 463. *Lyons* held that summary judgment was precluded because a genuine issue of material fact existed in that case as to whether the talcum powder the plaintiff allegedly used was contaminated with asbestos, and where objections to the expert declaration had been waived. (See opn. at pp. 6–7.) Here, the Court's ruling shows that summary judgment can still be appropriate in a talc case where the evidence submitted by the plaintiff does not support a finding that it is more likely than not that the talcum powder the plaintiff used was contaminated with asbestos and caused the plaintiff to develop cancer. The analysis by this Court in *Berg* will be helpful to courts and litigants addressing similar issues in other cases.

**III. The Opinion involves a legal issue of continuing public interest (rule 8.1105(c)(6)).**

California courts regularly adjudicate asbestos-related litigation. The legal issue of what evidence is sufficient to prove causation at the summary judgment stage is crucial for weeding out claims that are not viable. Publication would afford substantial benefit by furthering certainty and consistency in the law, avoiding future disputes, and preventing repeated litigation of similar issues.

The Court's thoughtful treatment of the subject and the clear rule it applies will afford substantial guidance if published, especially as the circumstances here, or closely analogous ones, are likely to recur. If published, the opinion will help resolve cases sooner rather than later, thereby lessening unnecessary litigation burdens on the courts and containing litigants' legal expenses. And, it will help parties understand their rights and burdens before they even cross the judicial threshold.

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For these reasons, the Chamber, CJAC, PhRMA, and PLAC respectfully support publication of this Court's opinion in *Berg v. Colgate-Palmolive Co.*

Respectfully,

King & Spalding LLP

By /s/ Paul R. Johnson

*for amici curiae*

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## Interests of the Amici Curiae

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Civil Justice Association of California (CJAC) is a nonprofit organization representing businesses, professional associations and financial institutions dedicated to achieving and maintaining civil liability laws that are fair, efficient, economical and certain.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested more than \$900 billion in the search for new treatments and cures, including an estimated \$79.6 billion in 2018 alone. PhRMA frequently files amicus briefs on issues that affect its members.

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, emphasizing the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective arises from experiences of corporate members in diverse manufacturing industries. In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,100 briefs as amicus curiae in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the law affecting product risk management.

PROOF OF SERVICE

*Berg v. Colgate-Palmolive Co.*, A154245 (Div. 1)  
Alameda County Super. Ct. No. RG17849298

I am a citizen of the United States, over 18 years of age, and not a party to this matter. My business address is: King & Spalding LLP, 633 W. 5th Street, Suite 1600, Los Angeles, California 90071.

On November 15, 2019, I caused true copies of the within letter to be served on counsel for the parties interested in this proceeding as follows:

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BY U.S. MAIL, FIRST-CLASS POSTAGE PREPAID: I am readily familiar with the firm's practice in this office of processing correspondence for mailing. Under that practice, such correspondence is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

ELECTRONIC SERVICE THROUGH TRUEFILING: This letter is being submitted for filing through the Court of Appeal's TrueFiling service, with designation that an electronic copy be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2019, at Los Angeles, California.

\_\_\_\_\_  
/s/ Susan Sarff  
SUSAN SARFF

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