June 22, 2009

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Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
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RE: ***Crane Co. v. Superior Court of the State of California, for the County of Los Angeles (Helen P. Washington et al., Plaintiffs and Real Parties in Interest)***
Petition for Review Filed May 22, 2009
Supreme Court Case No. S173141
Court of Appeal Case No. B215652
County of Los Angeles Superior Court Case No. BC 376529

Dear Chief Justice George and Associate Justices:

Amici curiae Coalition for Litigation Justice, Inc.,[1] Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, and American Chemistry Council write pursuant to Rule 8.500(g)(1) to urge this Court to grant the Petition for Review filed in the above-referenced matter.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a California personal injury plaintiff can intentionally circumvent California discovery and summary judgment procedures by filing a lawsuit in Texas that plaintiff does not intend to pursue solely to take advantage of deposition time limits in place there and, then, dismissing the Texas action, but avoiding summary judgment and forcing settlement in a later-filed California lawsuit, on the premises that, due to restrictions imposed by Texas law, the defendant did not conduct the extensive deposition examination purportedly required to obtain summary judgment under California law.

2. Whether California courts should address the burdensome length of depositions in California asbestos claims (and remedy what the trial court described as the "grisly game of asbestos litigation") by imposing an appropriate burden of production upon California asbestos defendants seeking summary judgment.

[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.

INTEREST OF *AMICI CURIAE*

The *amici* organizations represent companies that are named as asbestos defendants in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's asbestos litigation environment is fair and reflects sound public policy. Both of those principles were violated in this case.

As the trial court recognized, plaintiff's counsel in this case – and reportedly in at least nine other cases – purposefully manipulated Texas and California procedures to prevent defendant from obtaining summary judgment in California in an attempt to force an extortionate settlement. *Amici* have a strong interest in promoting the integrity of the civil justice system and working to prevent their members from being subject to such abuse.

Furthermore, *amici* have a strong interest in addressing the summary judgment practice in California to reduce the burdensome length of depositions and the enormous costs they impose on all litigants. *Amici* also have an interest in removing incentives for plaintiffs to engage in forum shopping, as here, to seek an unfair advantage in their cases.

This case presents the Court with an excellent opportunity to confront these issues. Accordingly, we strongly support the Petition for Review.

WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION

I. The "Grisly Game of Asbestos Litigation"

Here, plaintiff's counsel has taken advantage of the dramatic differences in deposition practice and summary judgment procedures in Texas and California to "game the system," create an unfair litigation advantage, and force defendants into blackmail settlements.

By way of background, this case started in Texas. Under Texas summary judgment practice, a defendant need only point to the absence of evidence supporting an essential element of a party's claim or defense; the burden then shifts to the non-moving party to produce evidence raising a genuine issue of material fact. *See Saenz v. Southern Union Gas Co.* (Tex. App.-El Paso 1999) 999 S.W.2d 490. Asbestos defendants, therefore, shift the burden of production on summary judgment by showing that a plaintiff failed to identify a defendant's product in interrogatory answers or in general deposition questioning. Consequently, if the plaintiff fails to identify a defendant's product, it is unnecessary – indeed, unwise – for that defendant to ask more specific follow-up questions and run the risk of "coaching" the plaintiff to change his or her testimony. Because there is no need for a defendant to engage in a detailed examination of a plaintiff that has failed to identify its product, Texas asbestos defendants often are not prejudiced by the six-hour-per-side limit on depositions imposed by the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 159(c). Texas, thus, protects all litigants from having to sit through lengthy and costly depositions. Texas also provides an opportunity for defendants to obtain an early exit from cases in which they do not belong.

The practice in California is quite different. First, there are generally no time limits on depositions in California except in some circumstances (i.e., Los Angeles and

San Francisco Counties) where a time limit on the defense examination – which is multiples of the Texas six-hour rule and which can be modified by the trial court upon a showing of good cause – has been set by general order. Second, a defendant cannot rely on plaintiff silence as to product identification to obtain summary judgment. As the 1992 and 1993 amendments to California's summary judgment statute have been interpreted in California asbestos cases, each of the many named defendants must ask defendant-specific "close out" questions as to any exposures to a defendant's product(s) that a plaintiff may have had. *See Weber v. John Crane, Inc.* (2006) 143 Cal. App. 4th 1433, 1435. Thus, unlike in Texas, depositions in California asbestos cases can be quite lengthy and burdensome on both plaintiffs and defendants.

Here, plaintiff's counsel in this and other actions is trying to take advantage of the differences between Texas and California practice in a creative, yet unfair, manner. As stated, this case was filed in Texas, which has strict time limits for depositions and where defendants have no reason to undertake an extensive inquiry as to defendant-specific exposures if the plaintiff failed to identify any such products in answers to interrogatories or in general deposition questioning. Following the plaintiff's abbreviated deposition, plaintiff dismissed the Texas case. The case was then filed in California, and the plaintiff refused to appear for deposition prior to his death from mesothelioma.

As a result, the defendant is now left with a Texas deposition transcript in which the plaintiff failed to identity its product, but the defendant is nevertheless unable to obtain summary judgment in California because specific product identification questions were never answered. Thus, the defendant's options are to go to trial or pay an extortionate settlement for a case that should, and ordinarily would, have resulted in a grant of summary judgment for the defendant had the case remained in Texas.

II. Review is Necessary to Correct a Tremendous Injustice

The procedural maneuvering in this action and others by plaintiff's counsel is designed to keep defendants in asbestos cases as long as possible, drive up their costs, and force settlements from defendants that have not been positively identified by the plaintiff as potentially at fault. As the trial court concluded, "the filing of the Texas action was deliberately done to prevent the defendants from having adequate discovery and to prevent the filing of motions for summary judgment because of the California rule requiring specific questions about product identification."

In light of this deliberate manipulation of the differing Texas and California practices, this Court should exclude the plaintiff's Texas deposition. Otherwise, a great injustice will be done to the defendant. Had the defendant been aware that the general deposition questioning in Texas would be used as the sole basis for a subsequent lawsuit in California, defense counsel surely would have conducted a more comprehensive inquiry in order to meet California's summary judgment requirements.

This Court has clear authority "to prevent the taking of an unfair advantage and to preserve the integrity of the judicial system" by excluding the admission of unfair and prejudicial evidence that is improperly buoying this case. *See Peat, Marwick, Mitchell & Co. v. Superior Ct.* (1st Dist. 1988) 200 Cal. App. 3d 272, 289, *cert. denied*, (1989) 490

U.S. 1086. This Court should grant review here and send a message that gaming of the civil justice system will not be tolerated in California.

III. The Court Should Take This Opportunity to Reevaluate California's Deposition and Summary Judgment Practices

The "procedural ploy" used in this case and others speaks to the broader issue that California is out of step with Texas and other states in its deposition practices and summary judgment procedures. By requiring extensive inquiries by every defendant in asbestos actions that typically involve numerous defendants, California imposes an undue burden on all parties. Counsel for the plaintiff and counsel for all of the many defendants are effectively forced to sit through days of deposition questions while each defendant asks a comprehensive list of questions aimed at identifying whether that particular defendant was a potential cause of the alleged harm. The cost of having so many "clocks running" around the table is enormous. The practice wastes resources that could be used more productively and is detrimental to plaintiffs, who are often in poor health and may be physically challenged to undergo days of questioning. Indeed, it would appear that the main beneficiaries of California's deposition system are defense attorneys working on an hourly basis, and not the plaintiffs nor the defendants themselves. California can do better.

This case provides the Court with an opportunity to reevaluate the costs and benefits of California's current deposition practices and summary judgment procedures. The Court should grant review to improve California's practices and join other states that have taken important steps to more effectively and efficiently manage asbestos litigation. *See, e.g.*, Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883 (2007).

IV. Allowing Plaintiffs' Attorney Gamesmanship to Continue Will Adversely Impact California Courts and Worsen the State's Asbestos Litigation

Review of this case is also important to discourage "forum shoppers" and avoid adding to the burdens on California courts that are already stretched as a result of the demands of lengthy asbestos trials.

As this Court knows, 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). "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."

California has not escaped these problems. In fact, the litigation in California appears to be worsening. In 2004, one California Superior Court judge stated at a University of San Francisco Law School symposium that asbestos cases take up twenty-five percent of the court's docket. *See Judges Roundtable: Where is California Litigation Heading?*, HarrisMartin Columns: Asbestos, July 2004, at 3. Another Superior Court 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. *See id.* One practitioner has described the litigation in San Francisco as "chaos" and "an

administrative nightmare." 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, 2-3 (2004).

The abusive tactics employed by plaintiff's counsel here will only make matters worse. The trial judge below already identified at least nine other instances of the same ploy being used. As the trial court explained, "what is accomplished is a waste of the court's time, [and] the burning of numerous jurors because of the one day one trial rules."

Furthermore, the tactics used here are likely to be replicated by other asbestos plaintiffs' firms, particularly by the Texas-based firms that seem to be flocking to Southern California. For example, Dallas-based Baron & Budd opened up in Beverly Hills in 2007. Dallas' Waters & Kraus, which had opened a small Los Angeles office in 2001, has been described as having a new, prominent presence given its merger in 2006 with the plaintiffs' firm Paul & Janofsky. Also opening up offices in California are the Texas-based firms The Lanier Law Firm, Brent Coon & Associates, and Simon Eddins & Greenstone. As one San Francisco practitioner recently commented, "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." Wasserman *et al.*, 34 Pepp. L. Rev. at 885. "California is positioned to become a front in the ongoing asbestos litigation war." Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *available at* 2006 WLNR 4514441.

Already, an influx of filings from out-of-state plaintiffs has significantly increased the burden on California courts. In a 2006 sample of 1,047 asbestos plaintiffs for whom address information was available, over three hundred – or an astonishing *thirty percent* – had addresses outside California. *See* Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006). Many of these plaintiffs had almost no connection to California, having lived most of their lives outside of the State and alleging asbestos exposure that ostensibly occurred elsewhere. *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 599 (2007) ("plaintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases."). A predictable consequence of this law firm mobilization effort will be additional burdens on California courts.

For these reasons, this Court should grant the Petition for Review.

Respectfully submitted,

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Dated: June 22, 2009

PROOF OF SERVICE

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I certify that on June 22, 2009, I sent an original and 8 copies of the foregoing by overnight delivery to:

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I also 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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