PACIFIC LEGAL FOUNDATION

September 2, 2015

The Honorable Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Sherman v. Hennessy Industries, Inc.*, Supreme Court Case No. S228087

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Donor-supported Pacific Legal Foundation (PLF) is the most experienced public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and the District of Columbia. Pursuant to Rule of Court 8.500(g)(1), *amicus curiae* Pacific Legal Foundation respectfully requests the Court to grant the petition for review in this case, to ensure uniform application of this Court's decision in *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012), and limit the scope of the exception announced in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*, 129 Cal. App. 4th 577, 579-81 (2004). *See* Rule of Court 8.500(b)(1).

The question in this case is whether the manufacturer of a safe product that is used in conjunction with a dangerous product (asbestos) has a duty to warn of the dangers of asbestos dust on clothes worn home from work where the safe product is used, frequently but not always, with an injury-producing product made and supplied by others—specifically, where the manufacturer derives an "indirect economic benefit" from the existence of the injury-producing product and when the injury-producing product is dangerous even when not used with defendant's product? In conflict with this Court's decision in *O'Neil*, 53 Cal. 4th at 361 ("California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together."), and in conflict with courts nationwide confronting alleged liability of safe products used with dangerous ones, the court below held that the manufacturer has such a duty. *See Sherman v. Hennessy Industries, Inc.*, 237 Cal. App. 4th 1133, 1148-49 (2015).

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This Court should grant review and reverse. Extending product liability to defendants outside the chain of commerce of the injury-producing product significantly increases potential liability for manufacturers of benign products at great potential cost to the productive economy. Such liability would not further the policies underlying strict liability or negligence because the manufacturer of the benign product has no ability to alter the injury-producing product or to warn purchasers or users of the injury-producing product and because the expansion of the duty obligates manufacturers of benign products to compensate for injuries caused by the dangers of others' products.

The Decision Below Conflicts With the Fundamental Principle that Tort Duties are Limited to Those Who Actually Create a Reasonably Foreseeable Danger of Harm

The law of torts is about line-drawing. Courts formulate rules that take into account public policy and balance those policies against the interests of freedom and of injured plaintiffs. *See, e.g., Koehrer v. Superior Court,* 181 Cal. App. 3d 1155, 1165 (1986) ("'[T]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy.'") (quoting William Lloyd Prosser, *et al.*, Law of Torts 613 (4th ed. 1971)). Courts have long understood that the line of potential liability must be drawn somewhere. *See, e.g., Shin v. Kong,* 80 Cal. App. 4th 498, 506 (2000) ("In cases of negligence, a plaintiff's action must be founded on a duty owed to the plaintiff; not a duty owed only to some other person. 'Negligence in the air, so to speak, will not do.'") (citations omitted); *Romito v. Red Plastic Co., Inc.*, 38 Cal. App. 4th 59, 67 (1995) (a manufacturer owed no duty to protect against unforeseeable and accidental misuse of a product: "Any product is potentially dangerous if accidentally misused or abused, and predicting the different ways in which accidents can occur is a task limited only by the scope of one's imagination.").

In drawing that line, courts rely on the concepts of duty, foreseeability, and proximate cause. The duty to use care to avoid injury to others arises from the foreseeability of the risk created. *Lugtu v. Cal. Highway Patrol*, 26 Cal. 4th 703, 716 (2001). But in each case, public policy considerations—not the single factor of foreseeability—are paramount. *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 472 (1997) ("'[D]uty' is not an immutable fact of nature 'but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'") (citations omitted).

Here, the issue is whether or not the manufacturer of a safe product had a duty to warn. Beyond foreseeability, courts balance many factors in finding whether a duty exists, including the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendants' conduct and the plaintiff's injury; the moral blame attached to the defendants' conduct; the policy goal of preventing future harm; the burden to the defendants and consequences to the community of imposing a duty of care; and broader consequences including the availability, cost, and prevalence

of insurance for the risk involved. *See Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968). Thus, courts define duty with "policy-based, multi-factor balancing tests," *Adams v. City of Fremont*, 68 Cal. App. 4th 243, 286 (1998), and will not permit plaintiffs to "bootstrap[] into tort liability" a defendant who otherwise owes no duty. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994).

Public policies are drawn from two main functions of tort law. The first is compensation. Negligence law seeks to make whole those who have been injured by people who fail to live up to their social and personal responsibilities. *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 146-47 (1991) ("In tort actions, damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring the plaintiff as nearly as possible to his or her former position, or giving the plaintiff some pecuniary equivalent." (citation omitted)). Second, tort law imposes liability to deter conduct that creates an unreasonable risk of injury to others. *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 1191 (1993). *See also* Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. Rev. 121, 180-81 (1992) ("To the extent that tort law seeks to deter personal injury, a doctrine that encourages manufacturers to spend their dollars and energy effectively to avoid product-related harms is far better suited to consumer interests than one which compensates some consumers generously after the fact, but which does little beforehand to reduce product risk for all consumers.").

Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. "At some point," therefore, "it is generally agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982). Courts will not impose liability when there is a serious risk of discouraging worthwhile conduct. Moreover, courts recognize that generously imposed liability on manufacturers for failure to warn provides "an incentive to sellers to overwarn about product risks, which undermines the effectiveness of product warnings to the ultimate detriment of consumers." Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. Mich. J.L. Ref. 309, 310 (1997). This incentive is heightened because "companies are penalized for underwarning but not for overwarning." W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 Rutgers L. Rev. 625, 666 (1996).

All these public policy considerations counsel against a tort duty in this case, and the decision below disregards them.

The Decision Below Imposes a Duty on a Party Unable to Fulfill It

Taken to its logical conclusion, and ignoring manufacturers policy as shown above, the decision below would, as a practical matter, require all manufactures to warn against *any* possible materials that, when used in conjunction with theirs, could result in harm. This places the onus on the defendant who has no control to prevent the harm from occurring and offers the warning from a place where the user is neither expecting to see it nor likely to notice it. *See, e.g., Sperry v. Bauermeister, Inc.*, 4 F.3d 596, 598 (8th Cir. 1993) (holding supplier of spice grinding and dust control component parts of milling system not liable because no evidence existed of defects in the component part); *Kealoha v. E.I. du Pont de Nemours & Co., Inc.*, 82 F.3d 894, 900-01 (9th Cir. 1996) (holding that a supplier of raw materials cannot be liable for defects in the ultimate product); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir. 1986) (holding that a supplier of nondefective component part was not liable when incorporated into larger system).

Modern industrial society is full of potential hazards, and imposing severe costs on parties with only tenuous connections to the harm runs the risk of stifling important economic activity. *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, 616 (2008) (If a court holds that a seller of a safe product is strictly liable for injuries caused entirely by other, more dangerous, products, the users and consumers of the safe product "end up compensating (and thereby subsidizing) the users and consumers of the dangerous products, thereby generally discouraging use and consumption of relatively safe products and encouraging use and consumption of relatively dangerous ones.").

Liability rules "will normally raise the cost of production, or, what amounts to the same thing, reduce over-all productivity." Friedrich A. Hayek, *The Constitution of Liberty* 224 (1960). Courts should therefore presume against imposing liability because the "over-all cost is almost always underestimated." *Id.* at 225. This underestimation occurs because expanded tort law has the potential of stifling entrepreneurial activity, driving away investors, and depriving society of jobs, as well as goods and services, that otherwise might have existed. *See Stone v. Center Trust Retail Properties, Inc.*, 163 Cal. App. 4th 608, 618 (2008) (Egerton, J., dissenting) (creation of a new tort duty applicable to shopping mall owners removes from the Legislature the choice to balance the "considerable" costs of the new inspection duty that will be borne by the owners and, ultimately, consumers, against the savings, if any, in accident costs). All of these intangibles defy easy calculation.

For these reasons, California courts are particularly reluctant to impose liability on a defendant who lacks the ability to prevent the harm. *See, e.g., Chee v. Amanda Goldt Property Mgmt*, 143 Cal. App. 4th 1360, 1369 (2006) (landlord owes no duty of care to prevent a third party from injuries

caused by a tenant's dog unless the landlord has the "ability to control or prevent the harm); *Lewis v. Chevron U.S.A., Inc.*, 119 Cal. App. 4th 690, 697 (2004) (predecessor landowner owes no duty to protect against defective copper pipes because, once it sold the property, the previous owner had no ability to inspect or test the pipes or to warn workers coming onto the property); *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377, 414 (2000) (church owed no duty under premises liability theory to prevent molestation of scout by adult scout troop volunteer who was neither screened, trained, nor supervised by the church).

An "Indirect Economic Benefit" Is Too Tenuous To Draw a Defendant into an Orbit of Liability

The court below held that the manufacturer of the arcing machine should owe a duty to warn against asbestos because it sold the machines to businesses that were likely to use them to cut materials containing asbestos. Having sold them, presumably for a profit, the court concluded that the manufacturer bears responsibility for dangers created by the future use of the machine. *Sherman*, 237 Cal. App. 4th at 1149. The court's decision results only in wealth distribution, by tapping a solvent defendant to compensate for injuries caused by long-bankrupt defendants. As Professor Jeffrey L. Rensberger explains:

> The source of payment to asbestos victims today comes in large part from a "tax" that has been laid on the second and third tier defendants, users of other non-asbestos products made by all categories of defendants, other creditors of bankrupt defendants, and the employees of those defendants. As a tax goes, it is arbitrary and uneven. But it is better seen as a tax than as a consequence of tort liability because it is so unrelated to any tort policy. It does not serve corrective justice or loss distribution. At best it serves a naked loss spreading and bearing rationale, without the normal underlying fault requirement.

Asbestos and the Limits of Litigation, 44 S. Tex. L. Rev. 1013, 1031 (2003).

This aspect of the decision conflicts with this Court's decision in *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370 (1992), which refused to extend liability merely because the defendant profited by its allegedly negligent actions. Specifically, this Court held that accountants, paid by clients to perform various financial services, who conducted an audit of a client's financial statements owed a duty *only* to the client, and not to investors who foreseeably relied on a negligently prepared audit opinion. *Id.* at 376-78. The accountants indirectly benefit from the investors' reliance on financial statements because the more people who use the accountants' work as a resource, the better they can justify a higher fee. But the accountants' receipt of payment in exchange for their services, a payment enhanced by investors referencing the audits, did not alter the duty analysis. Instead, the Court expressed particular concern that expanding a duty in that case would result in liability "far

out of proportion to its fault," *id.* at 398, particularly because the audits were conducted in a "client-controlled environment." *Id.* at 399. *See also Sanchez v. Lindsey Morden Claims Services, Inc.*, 72 Cal. App. 4th 249, 251 (1999) (an independent claims adjuster hired by an insurer to investigate and adjust losses owes no duty of care to the insured to prevent business losses). In *Bily* and *Sanchez*, the defendants received more direct economic benefit than the court below relied upon in this case, yet that benefit played no role in the determination of whether public policy would permit an expansion of tort liability.

To resolve these conflicts, and bound tort liability as required by public policy, the petition for review should be granted.

Respectfully submitted,

DEBORAH J. LA FETRA, No. 148875

Attorney for Amicus Curiae
Pacific Legal Foundation

DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On September 2, 2015, true copies of AMICUS CURIAE LETTER BRIEF were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 2nd day of September, 2015, at Sacramento, California.

_____
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