NO. S209927

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM B. WEBB AND JACQUELINE V. WEBB,
Plaintiffs and Appellants,

v.

SPECIAL ELECTRIC COMPANY, INC.,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division One
Case No. B233189

Superior Court of the County of Los Angeles, Case No. BC436063,
Hon. John Shepard Wiley

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-RESPONDENT

Mark A. Behrens (*pro hac* pending)
Christopher E. Appel (*pro hac* pending)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211

Patrick Gregory (#206121)
(COUNSEL OF RECORD)
SHOOK, HARDY & BACON L.L.P
One Montgomery Tower, Suite 2700
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281
Attorneys for *Amici Curiae*

INDEX

TABLE OF CASES AND AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Is it a tort for a broker or supplier of a raw material not to warn a sophisticated manufacturer of hazards the manufacturer already knows?

2. It is a tort for a broker or supplier of a raw material not to provide warnings to end users of the manufacturer's finished products when the broker or supplier has no reasonable means of communicating with those end users?

3. It is a tort for a broker or supplier of raw materials not to impose a contractual duty on a manufacturer of finished products to provide warnings that the manufacturer was already obligated to give to end users?

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in California and their insurers. *Amici*'s members include both suppliers of raw materials and component parts, and manufacturers of finished products. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, reflective of sound public policy, and predictable for all companies in the supply chain who must be able to manage and allocate risks. *Amici* will show that the majority opinion below violated these principles by holding that it can be a tort for a raw material broker or supplier to fail to warn a manufacturer of finished products about a risk that the manufacturer should have known about already, and that it can also be a

tort for a raw material broker or supplier to fail to impose on a finished product manufacturer a contractual duty to provide warnings to its own customers (something the manufacturer already had a tort law duty to do).

STATEMENT OF THE CASE

Amici adopt Defendant-Respondent's Statement of the Case to the extent relevant to *amici*'s arguments in this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

There appears to be no dispute between the parties that California should allow a supplier or broker to discharge its duty to warn through a sophisticated intermediary in some cases. The dispute focuses on the circumstances in which the defense might apply, and whether the application of the defense could be decided by a trial court (at least in some cases) or must always be decided by the jury.

The Restatement (Second) of Torts § 388 cmt. *n* (1965) and Restatement (Third) of Torts: Products Liability § 2 cmt. *i* (1998) apply a standard of reasonableness in the circumstances to determine whether one supplying a product through an intermediary may rely on the intermediary to warn the ultimate product user. *Amici* believe it is reasonable for a raw material supplier or broker to rely on a manufacturer of finished products to warn about risks that should be known to the manufacturer where, as here, the manufacturer already has a tort law duty to provide such warnings and there is no feasible way for the supplier or broker to communicate directly

with users of the manufacturer's finished products. In many cases, such as this one, judges are well-equipped to decide these issues as a matter of law.

For these reasons, this Court should reverse the decision below.

ARGUMENT

I. A BROKER OR SUPPLIER SHOULD NOT HAVE A TORT LAW DUTY TO WARN A MANUFACTURER ABOUT A RISK THAT IS AT LEAST AS READILY KNOWN TO THE MANUFACTURER

A threshold issue in sophisticated intermediary cases is the intermediary's knowledge of the risk to be warned about. One way an intermediary may learn about a risk is through an adequate warning by the supplier or broker. In other cases, the intermediary should have known of the risk already, obviating the supplier's need to warn. For instance, this Court has said that a "manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113 n.3. Tort law should not impose a duty on a supplier or broker to tell an intermediary something the intermediary should already know.

This Court reached a similar conclusion in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, where the Court adopted a "sophisticated user defense" to exempt manufacturers "from their typical obligation to provide product users with warnings about the products'

potential hazards." *Id.* at 65. The Court held that "sophisticated users need not be warned about dangers of which they are already aware or should be aware." *Id.*[1] The Court explained that the sophisticated user defense evolved out of the Restatement (Second) of Torts § 388 and the obvious danger rule, "an accepted principle and defense in California." *Id.* (citing *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51; *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930); *see also Billiar v. Minnesota Mining & Mfg. Co.* (2d Cir. 1980) 623 F.2d 240, 243 ("[N]o one needs notices of that which he already knows."); *Haase v. Badger Mining Corp.* (Wis. 2003) 669 N.W.2d 737; *Phillips v. A-Best Prods. Co.* (Pa. 1995) 665 A.2d 1167.

The same principles apply here. In the panel below, the majority focused on a lack of certainty as to whether all of the bags of asbestos that Defendant Special Electric brokered or supplied to Johns-Manville contained adequate warnings, and ignored the fact that Johns-Manville, one of the most knowledgeable entities in the world concerning asbestos, did not require warnings *at all* and should have been fully relied upon to communicate warnings to its own customers. "From the 1920s to the

---

[1] The court in *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 29, held that a sophisticated intermediary defense, "where it applies at all, applies only if a manufacturer provided adequate warnings to the intermediary." This reasoning was followed by the majority below in this case. These statements cannot be reconciled with *Johnson*. This Court should make clear that warnings are not required to be given to sophisticated intermediaries and that the determination of an intermediary's "sophistication" is generally a matter of law.

1970s, Manville was, by most accounts, the largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States." *Travelers Indem. Co. v. Bailey* (2009) 557 U.S. 137, 140.[2] The Court of Appeal below even acknowledged, "No one in this appeal doubts that Johns-Manville was a sophisticated user of asbestos, who needed no warnings about its dangers." 153 Cal.Rptr.3d 882, 895.[3]

---

[2] Trust payments are available to compensate plaintiffs for harms caused by asbestos products from debtor companies such as Johns-Manville. Trust recoveries in individual cases can be substantial. For example, it is estimated that mesothelioma plaintiffs in Oakland may receive $1.2-$1.6 million from trusts. *See* Charles E. Bates et al., *The Naming Game* (Sept. 2009) 24:15 Mealey's Litig. Rep.: Asbestos 1; Charles E. Bates et al, *The Claiming Game* (Feb. 2010) 25:1 Mealey's Litig. Rep.: Asbestos 27. Most recently, in a significant ruling, *In re Garlock Sealing Tech., LLC* (W.D.N.C. Bankr. 2014) 504 B.R. 71, a typical plaintiff's recovery was estimated to be $1-$1.5 million with "an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *Id.* at 96.

[3] *See also Humble Sand & Gravel, Inc. v. Gomez* (Tex. 2004) 146 S.W.3d 170, 184 ("flint suppliers like Humble had no duty to warn its customers like Spincote and Sivalls, abrasive blasting operators, that inhaling silica dust can be disabling and fatal and that workers must wear air-fed hoods, because that information had long been commonly known throughout the industry"); *Newsom v. Monsanto Co.* (E.D. Mich. 1994) 869 F. Supp. 1255, 1262-63 ("Ford knew that heating PVB [polyvinyl butyryl used in automobile windshields] posed a health hazard in spite of the lack of direct manufacturer warnings.... Based on information available in the public domain, Ford was a sophisticated user of PVB."); *O'Neal v. Celanese Corp.* (4th Cir. 1993) 10 F.3d 249, 252 ("The defense is available not only when the supplier actually warned the intermediary, but also when the supplier shows that it was reasonable to believe that a warning was unnecessary because the intermediary was already well aware of the danger."); *Davis v. Avondale Indus. Inc.* (5th Cir. 1992) 975 F.2d 169, 172 ("A manufacturer or distributor is not compelled to warn knowledgeable users or buyers of dangers which the user or buyer either knows or should be aware of based upon his or her knowledge or experience.").

There are also sound policy reasons for not requiring warnings in situations where an intermediary is "sophisticated" and should not need to be warned about a risk in a supplier's product. As the Court appreciated in *Johnson*, not all warnings promote safety. "[R]equiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally." 43 Cal.4th at 70 (quoting Restatement (Third) of Torts: Products Liability § 2 cmt. *j* (1998)).

In most cases, a trial court should be able to decide as a matter of law whether an intermediary was "sophisticated" and thus should have needed no warning from the supplier or broker. This case is an example. As the trial court explained, "Telling Johns-Manville about asbestos is like telling the Pope about Catholicism." 153 Cal. Rptr. 3d 882, 889. There is no reasonable disagreement that Johns-Manville had at least as much knowledge as Special Electric, a small firm, with regard to the hazards of asbestos.

Again, *Johnson* is instructive. *See Johnson*, 43 Cal.4th at 65 ("Because ... sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the *legal cause* of any harm that product may cause.") (emphasis added). The Court in that case affirmed the trial court's grant of summary judgment to the defendant, holding: "For all these reasons, we conclude that there is no

triable issue of fact regarding applicability of the sophisticated user defense in this case." *Id.* at 75.

II. A BROKER OR SUPPLIER SHOULD BE PERMITTED TO RELY ON A MANUFACTURER TO CONVEY WARNINGS THE BROKER OR SUPPLIER HAS NO REASONABLE MEANS TO CONVEY

Raw material suppliers or brokers should be able to rely on manufacturers of finished products to convey warnings to end users that the broker or supplier has no reasonable means of communicating itself. In these situations, a sophisticated intermediary defense "is not only logical but necessary." *Kennedy v. Mobay Corp.* (Md. Ct. Spec. App. 1990) 579 A.2d 1191, 1199, *aff'd* (Md. 1992) 601 A.2d 123; *see also Persons v. Solomon N. Am., Inc.* (1990) 217 Cal.App.3d 168, 178 ("When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning.") (citing Restatement (Second) of Torts § 388 cmt. *n*); *Stevens v. Cessna Aircraft* (1981) 115 Cal.App.3d 431, 433 (aircraft manufacturer had no duty to warn passengers as to load capacity where warnings were provided to the pilot in the owner's manual).

The issue is analogous to the bulk supplier doctrine, where a bulk supplier of a material that is repackaged and sold has no means of providing the ultimate consumer with a warning about risks of use. *See*

Artiglio v. General Elec. Co. (1998) 61 Cal.App.4th 830;[4] *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal. App. 3d 372; *Walker v. Stauffer Chem. Corp.* (1971) 19 Cal. App. 3d 669; *see also* Restatement (Third) of Torts: Products Liability § 5 cmt. *c* (1998); *Bergfeld v. Unimin Corp.* (8th Cir. 2003) 319 F.3d 350; *House v. Armour of Am., Inc.* (Utah 1996) 929 P.2d 340; *Jacobs v. E.I. du Pont de Nemours & Co.* (6th Cir. 1995) 67 F.3d 1219; *Forest v. E.I. DuPont de Nemours & Co.* (D. Nev. 1992) 791 F. Supp. 1460; *Smith v. Walter C. Best, Inc.* (3d Cir. 1990) 927 F.2d 736; *Sara Lee Corp. v. Homasote Co.* (D. Md. 1989) 719 F. Supp. 417; *Goodbar v. Whitehead Bros.* (W.D. Va. 1984) 591 F. Supp. 552, *aff'd sub nom. Beale v. Hardy* (4th Cir. 1985) 769 F.2d 213; *Shell Oil Co. v. Harrison* (Fla. Ct. App. 1982) 425 So. 2d 67; *Jones v. Hittle Serv., Inc.* (Kan. 1976) 549 P.2d 1383. The component part supplier doctrine provides additional support. *See* Restatement (Third) of Torts: Products Liability § 5 cmt. *i* (1998).

---

[4] The precise application of the bulk supplier doctrine when the raw material is allegedly defective has not been decided by this Court. Courts of Appeal have declined to apply the defense to asbestos design defect cases. *See Jenkins v. T & N PLC* (1996) 45 Cal.App.4th 1224, 1231; *Arena v. Owens-Corning Fiberglass Corp.* (1998), 63 Cal.App.4th 1178. *Cf. Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 85 ("The only California cases we have found that impose liability on suppliers of raw materials ... involve asbestos."). Other courts have rejected this approach. *See, e.g., Cimino v. Raymark Indus., Inc.* (5th Cir. 1998) 151 F.3d 297, 331 ("ordinary raw asbestos sold to a sophisticated and knowledgeable manufacturer of such products is not of itself defective or unreasonably dangerous") (applying Texas law). In any event, there is no reason these limitations should apply to failure to warn cases like this one.

Both the Restatement (Second) of Torts § 388 cmt. *n* (1965) and Restatement (Third) of Torts: Products Liability § 2 cmt. *i* (1998) also recognize that it may be reasonable for a supplier to rely on an intermediary to convey warnings to ultimate users when it would not be feasible or effective for the supplier to do so. "Cases which have imposed a duty on the manufacturer to warn the ultimate consumer have typically involved tangible items that could be labeled, or sent into the chain of commerce with the manufacturer's instructions...." *Groll v. Shell Oil Co.* (1983) 148 Cal. App. 3d 444, 449. Courts should be able to decide such issues in many cases as a matter of law.

Liability would, in effect, become absolute for suppliers or brokers if they are under a duty to provide warnings to end users of others' finished products and there is no feasible way for the supplier or broker to carry out that duty. *See* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory* (1983) 52 U. Cin. L. Rev. 38, 43 ("The extension of workplace warnings liability unguided by practical consideration has the unreasonable potential to impose absolute liability in those situations where it is impossible for the manufacturer to warn the product user directly.").

Here, for example, what is missing from the majority opinion below is an analysis is how a raw materials supplier such as Defendant Special Electric could have possibly communicated effective warnings to Johns-

Manville's customers, such as Plaintiff. *See generally* Victor E. Schwartz & Christopher E. Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials* (2008) 73 Mo. L. Rev. 1, 10-17 (discussing the elements of effective warning communications). After the raw material was removed from bags, the bags with warnings discarded, and the materials used in the manufacture of various products, it became virtually impossible for Special Electric to either know who to warn or how to warn effectively. For instance, even if Special Electric, a company of roughly twenty-five people, somehow managed to trace the manufacturing use of all of its raw materials and obtain a complete listing of all of Johns-Manville's customers purchasing those products, it would still not have been permitted to unilaterally include a warning at the point of sale of those products.

In effect, the majority below established a liability standard in which a raw material supplier, with no control over the manufacture of the asbestos products alleged to have caused injury, can be discharged from its duty to warn the entity it dealt with directly, Johns-Manville, but owe a duty to warn the universe of Johns-Manville's customers it never dealt with directly nor would be able to readily identify. It is a conclusion that places a duty to warn with the entity in perhaps the worst position to communicate an effective warning that reduces a risk of harm.

As a manufacturer of a finished product, Johns-Manville owed a tort law duty to warn its customers about risks with its products. That should be sufficient for a supplier or broker in cases such as this one where direct warnings to ultimate users were not feasible. As explained in Comment *n* of the Restatement (Second) of Torts § 388 (1965), "Modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so."

III. A BROKER OR SUPPLIER SHOULD NOT BE REQUIRED TO CONTRACTUALLY OBLIGATE A MANUFACTURER TO WARN ABOUT RISKS THE MANUFACTURER ALREADY HAS A TORT DUTY TO CONVEY

In essence, Plaintiffs' desired holding would create a dilemma. Suppliers or brokers could *stop selling* materials that are useful but could conceivably injure a third party, hardly a realistic or desirable outcome from a policy perspective. Alternatively, suppliers or brokers could accept the *unreasonably burdensome* duty of monitoring and controlling the infinite ways that their intermediate customers incorporate those materials into finished products and warn, a task that is undesirable from a business perspective and likely impossible in any event.[5] Indeed, the established limitations on a manufacturer's or supplier's duty to directly warn end users are well-grounded in public policy considerations.

---

[5] Even if a supplier tried to "warn the world" somehow, that warning itself would probably be challenged as inadequate.

As Restatement (Third) of Torts: Products Liability § 5 cmt. *c* (1998), explains, the raw material supplier and component part doctrines are grounded, in part, on the reality that the imposition of a duty to directly warn end users "would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control." Courts that have adopted these doctrines have recognized the extreme hardships that imposing such obligations on upstream businesses would cause. *See, e.g. Hoffman v. Houghton Chem. Corp.* (Mass. 2001) 751 N.E.2d 848, 857 (describing the imposition of a duty to warn of downstream uses of a supplier's product as "crushingly burdensome").

Plaintiffs seek to minimize the policy implications of their absolute liability theory by suggesting that sellers of raw materials may contractually bind their customers to place particular warnings on the customers' finished products and to cease selling if the customer does not agree to the seller's position.[6] The proposed "contractual solution" completely ignores business reality and would impose the unreasonable burdens that Courts have refused to impose.

---

[6] *See McConnell v. Union Carbide Corp.* (Fla. Ct. App. 2006) 937 So. 2d 148, 156 (*dicta* suggesting support for contractual solution based on misguided belief that such a duty would impose "almost no burden" on suppliers with respect to sales to "learned intermediaries.").

Selling component parts and raw materials, including inherently dangerous raw materials, for incorporation in products manufactured by others is a core activity of American business. Raw material suppliers could contractually bind their customers to provide particular warnings on the customers' finished products *only if* the supplier first put in place procedures for learning *how* its components or raw materials were incorporated in their customers' final products; *whether* the final products were safely designed and could be safely used without warnings; and *whether* the intermediaries were providing any necessary warnings.

This would mean that all raw material suppliers in California – and indeed potentially anywhere in the country if the raw material is incorporated in finished products sold or used in California – would be expected "to become experts in the infinite number of [conceivable] finished products." *In re TMJ Implants Prod. Liab. Litig.* (8th Cir. 1996) 97 F.3d 1050, 1057 (recognizing that suppliers "cannot be expected" to develop such expertise). As the Third Restatement of Torts makes clear, "[c]ourts *uniformly* refuse to impose such an onerous duty to warn." Restatement (Third) of Torts: Products Liability § 5 cmt. *c* (1998) (emphasis added).

As a matter of sound policy, courts have recognized that manufacturers of finished products are in the best position to warn *their* customers of the hazards, and to instruct in the safe use of their own

products. Requiring suppliers to monitor and oversee safety decisions about finished products that incorporate their component parts or other raw materials would impose enormous burdens and additional costs on the sale of such component parts and raw materials. It would create friction between the sellers of the component parts and raw materials and the manufacturers who purchased them. It would disrupt the commercial expectations of sellers and buyers of component parts and raw materials, adding a vast new potential for litigation. Some component parts or other materials suppliers could decide to withdraw from the market rather than face open-ended litigation risks.

The compelling policy reasons for limiting the warning duties of suppliers explain why no state has ever adopted Plaintiffs' extreme theory that suppliers of raw materials have rigid duties to warn end users of finished products directly or to monitor finished products and contractually bind their manufacturers to take particular safety measures.

CONCLUSION

For these reasons, this Court should reverse the decision below.

Respectfully submitted,

Patrick Gregory (Cal. Bar. No. 206121)
(COUNSEL OF RECORD)
SHOOK, HARDY & BACON L.L.P
One Montgomery Tower, Suite 2700
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

Mark A. Behrens (*pro hac* pending)
Christopher E. Appel (*pro hac* pending)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211

Attorneys for *Amici Curiae*

Dated: April 18, 2014

CERTIFICATE OF COMPLIANCE

I, Patrick Gregory, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae,* certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2000."

Patrick Gregory (Cal. Bar. No. 206121)
(COUNSEL OF RECORD)
SHOOK, HARDY & BACON L.L.P
One Montgomery Tower, Suite 2700
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

Dated: April 18, 2014

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF SAN FRANCISCO)

I am a California resident over the age of 18 and not a party to this action. I filed an original and copy of the foregoing by hand delivery with:

Clerk, Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

I also served a copy on the following by placing true and correct copies in sealed envelopes sent by U.S. Mail first-class mail, postage pre-paid, to:

Edward R. Hugo
James C. Parker
Jeffrey Kaufman
BRYDON HUGO & PARKER
135 Main Street, 20th Floor
San Francisco, CA 94105

Lisa Perrochet
Curt Cutting
Jason R. Litt
HORVITZ & LEVY LLP
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436

Dean A. Hanley
Anthony Vieira
PAUL & HANLEY LLP
1608 Fourth Street, Suite 300
Berkeley, CA 94710

Ted W. Pelletier
LAW OFFICE OF TED W. PELLETIER
22 Skyline Road
San Anselmo, CA 94960

CALIFORNIA COURT OF APPEAL
Second District, Division One
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Hon. John Shepard Wiley, Jr.
LOS ANGELES SUPERIOR COURT
Civil Central West Courthouse
600 South Commonwealth Avenue
Los Angeles, CA 90005

William H. Armstrong
ARMSTRONG & ASSOCIATES
1 Kaiser Plaza, Suite 625
Oakland, CA 94612

Patrick Gregory

Dated: April 18, 2014