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January 26, 2015

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

Re: *Izell v. Union Carbide Corporation*
Supreme Court Case No. S223511
Second Appellate District, Division 3, Case No. B245085

Dear Chief Justice and Associate Justices:

In *Izell v. Union Carbide Corporation,* the Second Appellate District held, in a published decision, that an asbestos plaintiff need only demonstrate that he inhaled some amount of asbestos from the defendant's product—regardless of how small the dose—in order to establish causation and hold a defendant liable for damages. If left to stand, the *Izell* decision will deepen the confusion among the lower courts interpreting the asbestos causation standard that this Court outlined in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, placing California out of step with both traditional causation principles and the law of other states. It will also accelerate the trend in asbestos litigation toward lawsuits that target defendants with an increasingly remote connection to the plaintiff's asbestos injury. With many of the principal asbestos manufacturers now bankrupt, plaintiffs and their counsel have stretched tort causation standards in California past the breaking point in order to capture new defendants. By holding that *any* product identification evidence, no matter how insubstantial, suffices to establish causation, the decision below invites yet more litigation against remote defendants. The Chamber of Commerce of the United States (the "Chamber") therefore urges this Court to grant review to restore a meaningful causation standard under *Rutherford.*

I. Interest of the Chamber of Commerce of the United States

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including in California. Many of the Chamber's members in California are defendants in strict products liability litigation, and thus have an acute interest in the proper and predictable application of the law of strict products liability.

II. The Court Should Grant the Petition

Union Carbide's petition raises important questions of statewide concern warranting this Court's review. In the years since this Court clarified the proper standard for causation in asbestos cases in *Rutherford*, the lower courts have applied that standard inconsistently. Some courts take a disciplined approach to *Rutherford*'s two-part test, which requires a showing that defendant's product was both an exposure source and a substantial contributor to the plaintiff's total disease risk. Others have distorted the test so that *any* exposure to asbestos fibers from a defendant's product, no matter how small the dose, suffices to prove that exposure to the defendant's product was a cause of the plaintiff's disease. Although this "any-exposure" or "single-fiber" theory has been widely criticized by commentators and the courts of other states, the Court of Appeal took this very approach in its published decision in this case. If the lower courts are permitted to continue misapplying *Rutherford* in this way, asbestos plaintiffs relying on an "any-exposure" theory are likely to flood into California, burdening its courts and saddling defendants with liability for the illness of plaintiffs with whom they have had only the most glancing contact.

a. The *Rutherford* Causation Standard

In *Rutherford*, this Court formulated a new product liability standard specific to asbestos cases. Under this test—which itself relaxed traditional causation standards—asbestos claimants attempting to prove that a defendant's product caused their disease "must *first* establish some threshold exposure to the defendant's defective asbestos-containing products, and must *further* establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford*, *supra*, 16 Cal.4th at p.982, first two sets of italics added.) In other words, *Rutherford* imposes two separate requirements on asbestos plaintiffs: they must make a threshold showing of exposure to fibers from the defendant's products and then make an additional showing that the level of exposure was sufficient to make a substantial contribution to the risk of disease.

Rutherford's second prong, requiring proof of a substantial contribution to the risk of disease, aims to weed out claims against defendants whose products made only an insignificant contribution to disease risk. (*Rutherford*, *supra*, 16 Cal.4th at p.978.) It is not enough, the Court reasoned, that exposure to a particular product "theoretical[ly]" contribute to the plaintiff's

disease risk. (*Ibid.*) To satisfy the substantiality requirement, the plaintiff must present evidence of the relative "length, frequency, proximity and intensity of exposure" to the defendant's product, the peculiar properties of the individual product, and other factors allowing the fact-finder to assess the "comparative risk" associated with inhalation of the defendant's fibers. (*Id.* at p. 975.)

b. The Lower Courts Are Divided as to the Proper Application of *Rutherford*

The lower courts have applied the *Rutherford* standard inconsistently. Some courts have essentially dropped *Rutherford*'s substantiality requirement, collapsing this Court's two-factor test into a single requirement that the plaintiff prove that he had some exposure—*any* exposure—to fibers from the defendant's products. For example, in *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, the Second Appellate District accepted testimony that "if a worker were exposed to many different asbestos-containing products, each of those products would contribute to an increased risk of asbestos-related disease" as sufficient proof that the maker of each product caused the worker's disease. (*Id.* at p. 666.)

Other courts adhere to the two-part test established in *Rutherford*, properly requiring plaintiffs to present comparative risk evidence. *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, for example, held, under *Rutherford*, that "expert testimony regarding the size of the 'dose' or the enhancement of risk" specific to the defendant's products is required (*id.* at pp. 1286-1287). Although *Pfeifer* applied this standard in the context of comparative fault, it clearly held that *Rutherford* requires the party that "bore the burden of proof at trial" to present evidence relating to the defendant's "contribut[ion] to [plaintiff's] 'aggregate dose.'" (*Id.* at p. 1288.) Union Carbide's petition for review presents additional examples of the real split, and persistent confusion, among the lower courts on this issue. (Pet. at pp. 17-19.)

c. The Court of Appeal in this Case Improperly Converted *Rutherford*'s Causation Standard into an "Any-Exposure" Rule, Deepening the Split Among the Lower Courts

In this case, the Court of Appeal sided with those cases that have substantially watered down the *Rutherford* standard. The court held that the *Rutherford* test was satisfied by evidence that the plaintiff was exposed to asbestos fibers from many different defendants, and that "those asbestos fibers, all of them together in total, contributed to cause this disease." (Slip. op. at p. 14.) The *substantiality* of the plaintiff's exposure, the court held, was proven by expert testimony distinguishing between asbestos in a wet slurry, which cannot be inhaled, and "airborne" asbestos that can be inhaled. (*Id.* at p. 15.)

This reasoning strips the *Rutherford* substantiality requirement of any meaning, and constitutes a departure from the already-relaxed causation standard adopted in that decision. The Court below held that because the plaintiff had some unspecified level of exposure to the defendant's asbestos fibers in respirable airborne form, he had shown that this exposure

"substantial[ly] contribut[ed]" to his mesothelioma. (Slip. op. at p. 15.) But the purported distinction between exposure to wet asbestos and airborne asbestos is meaningless for a plaintiff who—like most asbestos plaintiffs—complains of *respiratory* harm from asbestos *inhalation.* Moreover, when, as in this case, the plaintiff did not himself use asbestos-containing product, but rather "visited and walked through the construction jobsites" where they were used (*id.* at p. 2), the plaintiff's only *possible* exposure to asbestos from products used at the sites will be airborne. Thus, by accepting the plaintiff's contention that all airborne exposures should be viewed as substantial, the Court of Appeal dropped *Rutherford*'s substantial factor requirement, reducing the test to a single requirement that plaintiffs demonstrate some sort of exposure to the defendant's asbestos, at any time and in any amount.

d. <u>The Any-Exposure Rule is at Odds with the Decisions of Other Courts and Threatens Serious Harms to Asbestos Defendants and the Court System</u>

By eliminating any meaningful causation requirement, the "any-exposure" rule adopted in *Izell* and other appellate decisions contradicts both fundamental tort principles and well-accepted science establishing that asbestos disease is dose-sensitive, and thus that exposure to asbestos "fortunately does not always result in disease." (*Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 770-771, quotation marks and citation omitted.) In California, as in virtually every other state, the substantial factor test is a black-letter requirement for tort causation. (Rest.2d Torts, § 431 [actor's conduct is "a legal cause of harm" if it is "a substantial factor in bringing about the harm"].) That test plays a critical role in asbestos cases, which generally recognize that the dose a person receives directly affects his or her disease risk. (See *Rutherford, supra,* 16 Cal.4th at p. 977 [resolving the question "of which exposures . . . contributed significantly enough to the total occupational dose to be considered 'substantial factors'"].) For these reasons, a number of courts, including the Supreme Courts of Texas and Pennsylvania, have rejected the any-exposure rule (see, e.g., *ibid*; *Gregg v. V-J Auto Parts, Co.* (Pa. 2007) 943 A.2d 216; *In re W.R. Grace & Co.* (Bankr. D. Del. 2006) 355 B.R. 462; *Bartel v. John Crane Inc.* (N.D. Ohio 2004) 316 F.Supp.2d 603, affd. sub nom. *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488; see also Pet. at 20 fn.10 [collecting additional cases]), and have stressed the necessity of maintaining a meaningful causation standard (see *Ford Motor Co. v. Boomer* (Va. 2013) 736 S.E.2d 724 [even "substantial contributing factor" test is at odds with tort principles; instead, defendant's conduct must, on its own, have been sufficient to cause the disease]).

Reducing the *Rutherford* test to an any-exposure causation standard, as the Court of Appeal did here, also threatens to clog the California courts with lawsuits that seek to impose liability on defendants with only a passing or remote connection to the plaintiff's asbestos injury. The any-exposure theory, also known as the "single-fiber" rule, "allows plaintiffs' counsel to sue thousands of defendants every year whose 'contribution' to disease is trivial and far below the type of doses actually known to cause disease." (Behrens & Anderson, *The "Any Exposure Theory: An Unsound Basis for Asbestos Causation and Expert Testimony* (2008) 37 Sw. U. L.R.

at pp. 479, 480.) As seen in this case, under the theory, *any* exposure to a defendant's product, regardless of duration or dose, can be targeted as the cause of mesothelioma. (See *id.* at p. 487.) As a result, plaintiffs may seek recovery for insignificant doses of asbestos that are likely only tenuously linked to their disease. For instance, in a 2005 Illinois case, a plaintiff's expert relying on the single-fiber theory testified that a single brake job on "'a set of brakes that contain brake dust where there is some percentage of untransformed chrysotile'" had a substantial contribution to plaintiff's mesothelioma. (*Id.* at p. 488, fn.51 [quoting *Lulich v. Rapid Am. Corp.*, No. 2005 L004323 (Cir. Ct. Cook County, Ill.) (Deposition of Arthur Frank, Feb. 1, 2005, at p. 111)].)

The single-fiber cases are part of a broader trend in which, over decades of asbestos litigation, plaintiffs have sought to expand tort liability to reach increasingly remote defendants. In the early years of asbestos litigation, plaintiffs primarily targeted large thermal insulation manufacturers such as Johns Manville Corporation, which had by far the largest share of the United States asbestos market. (*In re Garlock Sealing Techs., Inc.* (Bankr. W.D.N.C. Jan. 10, 2014) Case No. 10-31607, at p. 28.) After a wave of bankruptcies among the first- and second-generation defendants in the 1990s and early 2000s (*see id.* at p. 29), plaintiffs and their attorneys have shifted their focus to peripheral defendants who manufactured far less harmful products such as pumps, seals, and gaskets.

The continued crush of litigation has begun to bankrupt these more remote, third-generation defendants as well. For example, Yarway Corporation, which made asbestos gaskets and packing products in the 1920s through 1970s, filed for bankruptcy in 2013.[1] Based on filing data obtained by Navigant's PACE subsidiary from a review of public asbestos complaints, Yarway faced fewer than 10 total asbestos claims in 1997. The number of claims filed against it began to climb, however, as first-wave asbestos defendants continued to file for bankruptcy. In 1999, approximately 44 claims were filed. But that number surged to 482 in 2000, the same year that prominent defendants Babcock & Wilcox, Pittsburgh Corning, Owens-Corning/Fibreboard, and Armstrong World Industries left the litigation through bankruptcy. The very next year, Yarway was sued approximately 15,300 times, a tsunami-like wave of claims representing a greater than 3,000% increase over the prior year and a 34672% increase compared to 1999. The trend continued throughout the decade preceding Yarway's bankruptcy, with mesothelioma filings rising 182% from 2004 through 2012.

Bondex International Company, a producer of household patch and repair products, some of which contained asbestos, filed for bankruptcy in 2010 under the weight of a steadily growing

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[1] See Jason Cornell, Yarway Files for Bankruptcy, Citing Asbestos-Related Litigation (Apr. 25, 2013), <http://delawarebankruptcy.foxrothschild.com/2013/04/articles/bankruptcy-case-summary/yarway-files-for-bankruptcy-citing-asbestos-related-litigation/> [last visited Jan. 23, 2015].

load of mesothelioma claims.[2] Like Yarway, claims against Bondex skyrocketed in 2000-2001, rising from approximately 605 in 1999 to approximately 8,800 in 2001.

If California courts continue to adopt and apply the any-exposure theory of causation, they will drive California law away from the mainstream of asbestos liability law. This would make California courts the forum of choice for lawsuits that seek tort damages from manufacturers of asbestos products with only a passing or demonstrably insignificant connection to the plaintiff. The ever-expanding pool of defendants would lead to more bankruptcies and the loss of jobs in this State. This, despite the absence of any showing, under long-accepted standards, that the defendants actually caused the plaintiff's injuries and can fairly be held responsible for them. This Court should grant review to reject the Court of Appeal's single-fiber standard, and to steer the lower courts back to a meaningful causation standard under *Rutherford*.

***

For these reasons, the Chamber urges this Court to grant Union Carbide's petition. The Chamber thanks the Court for considering its views.

Respectfully submitted,

Fred A. Rowley, Jr. /EMR

Fred A. Rowley, Jr.

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[2] Cheryl Keely, Bankruptcy To Resolve Bondex Asbestos Liability (June 10, 2010), <http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2010/06/01/bankruptcy-to-resolve-bondex-asbestos-liability.aspx> [last visited Jan. 23, 2015].

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On January 26, 2015, I served true copies of the following document(s) described as on the interested parties in this action as follows:

AMICUS LETTER

See Attached Service List

BY FedEx: I enclosed the document(s) in a sealed Fed Ex envelope addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is schedule for pickup in the ordinary course of business with FedEx, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 26, 2015, at San Francisco, California.

Barbara G. Palomo

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