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By Hand Delivery

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

***David Johnson, et al. v. United States Steel Corporation*, No. S229935 (filed Oct. 13, 2015)**

Dear Chief Justice and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, the National Association of Manufacturers ("NAM") respectfully urges the Court to grant the petition of the United States Steel Corporation ("U.S. Steel") seeking review of the published decision of the First District, Division Three, in *Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22 (*Johnson*).

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. NAM's members have a strong and abiding interest in the development of tort law and the application of legal doctrines that place reasonable limits on strict product liability claims. NAM has frequently appeared as *amicus curiae* in this Court in cases of concern to NAM's members who do business in California or who may be subject to legal claims in California.

In *Johnson*, the Court of Appeal departed from settled principles of California law in two ways. First, the Court of Appeal failed to apply the legal framework established by *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830 (*Artiglio*) to evaluate the alleged liability of U.S. Steel as a supplier of a

raw material that was incorporated into the end product that purportedly caused Plaintiffs' injuries. Second, the Court of Appeal assumed that the "consumer expectations" test should be used to evaluate whether the raw material is defective. If allowed to stand, *Johnson* will have serious adverse consequences for manufacturing, commerce, and society as a whole—consequences that far outweigh any hypothetical protection that the decision might provide for consumers.

In California, those who supply raw materials for use in a manufacturing process and integration into an end product cannot be held liable for injuries caused by the end product when (1) the raw material is not defective; (2) the raw material is sold in bulk to a sophisticated manufacturer; (3) the manufacturer employs a manufacturing process that substantially changes the raw material; and (4) the supplier does not participate substantially in the design of the end product. (See *Artiglio, supra*, 61 Cal.App.4th at p. 839; *Walker v. Stauffer Chemical Corp.* (1971) 19 Cal.App.3d 669, 672-674(*Walker)*; see also *O'Neil v. Crane Co.* (2012) 53 Cal. 4th 335, 355 (citing Rest.3d Torts, Products Liability, § 5 (1998)).)

This rule recognizes that the manufacturers of end products generally are sophisticated, familiar with the raw materials that they purchase, and in control of the manufacturing and distribution processes whereby raw materials are integrated into end products and distributed to consumers with instructions and warnings. (See *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1554 ("finished product manufacturers know exactly what they intend to do with a … raw material and therefore are in a better position to guaranteed that the … raw material is suitable for their application"); see also Rest.3d Torts, Products Liability, § 5, cmt. a, c (1998) (same).) The rule also recognizes that suppliers of raw materials generally are *not* in a position to "scrutinize" end products that are designed, manufactured, and distributed by other businesses and "review" the decisions that others make. (*Ibid.*) In short, "it would be unjust and inefficient to impose liability [on a supplier of raw materials] solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective." (Rest.3d Torts, Products Liability, § 5, cmt. a (1998).) "Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing [and] review the decisions of the business entity that is already charged with responsibility for the integrated product." (*Ibid.*)

As courts have recognized, many raw materials may be potentially dangerous *depending* on how a manufacturer chooses to use the materials in its manufacturing process, to integrate the materials into its end product, and to package, label, and distribute the end product to consumers. (*Walker*, *supra*, 19 Cal.App.3d at p. 674 (sulfuric acid integrated into drain cleaning product); *Artiglio*, *supra*, 61 Cal.App.4th at pp. 839-841 (silicone integrated into breast implants); Rest.3d Torts, Products Liability, § 5, cmt. c (sand, gravel, kerosene).) Such potential dangers do not take the raw materials outside of the *Artiglio* framework. To the contrary, the *Artiglio* framework accounts for the potential dangers of raw materials and places legal liability for the decision to use potentially dangerous raw materials *squarely* on the manufacturers of the end products and *not* on suppliers who are selling materials that may be potentially dangerous but also are capable of being integrated safely into manufacturing process and end products.

As the trial court's decision in this case shows, the *Artiglio* framework is relatively easy to administer and produces clear, consistent, predictable, and practical results. The record shows that (1) U.S. Steel acted solely as a bulk supplier of a raw material—coal raffinate—to a sophisticated purchaser, Radiator Specialty Company ("Radiator"), who understood the natural characteristics of the raffinate (including the health risks associated with exposure to benzene naturally present in the raffinate); (2) the raffinate supplied by U.S. Steel was not defective in the conventional sense of the term; (3) Radiator developed the formula for its "Liquid Wrench" product, combined the raffinate with other ingredients to manufacture Liquid Wrench, and packaged and labeled with its own instructions and warnings; and (4) U.S. Steel played no role in the design, manufacturer, or distribution of Liquid Wrench. Under the *Artiglio* framework, these undisputed facts compelled summary judgment for U.S. Steel.

The Court of Appeal, however, side-stepped the *Artiglio* framework based on the supposition that coal raffinate might be "inherently" defective, akin to asbestos. Yet the record and legal authorities demonstrate that raffinate is not "inherently" defective as asbestos has been found to be. The courts have found asbestos to be unique and concluded it is inherently dangerous to human health whenever it is friable. Because of its inherent danger to human health whenever it is friable, the courts have held that asbestos generally *cannot* be used in manufacturing safely or incorporated into end products without

rendering the end products unreasonably dangerous and defective. This is why asbestos has been deemed an "inherently" defective raw material. (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1188-1191; *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661.)

Coal raffinate is different. It is a natural byproduct of the process whereby coal is converted to coke for use in steel production. As is relevant here, raffinate allegedly is "defective" *only* because it contains benzene. Yet, it is an undisputed fact that benzene-containing products, like coal raffinate, *can* be used safely in manufacturing and integrated into end products *without* making those end products unreasonably dangerous or defective. (Opn. 2-3; *Industrial Union Dept., AFL-CIO v. American Petroleum Institute* (1980) 448 U.S. 607, 615-617.) Benzene is present in numerous raw materials derived from coal and petroleum, including refined oil, gasoline, plastics, rubber, lubricants, and solvents. *Id.* Furthermore, benzene-containing materials and components are used in a wide variety of manufacturing processes and integrated into a wide variety of end products, including gasoline, detergents, glues, paints, paint thinners and removers, and pesticides. (*Ibid.*) In sum, benzene-containing products, including raffinate, are only potentially dangerous and generally can be integrated into manufacturing processes and end products without making the processes and products unreasonably dangerous.

Because the Court of Appeal failed to grasp this point, it reached the wrong result in *Johnson*. That error is likely to have significant consequences for those who supply raw materials containing benzene (which includes a significant number of NAM members) and those who use products containing benzene (which includes almost every person in the state). Under *Johnson*, the many businesses that supply benzene-containing materials to other manufacturers may be at risk of product liability actions by consumers for injuries allegedly caused by end products designed, manufactured, and distributed *by others* in which the they played *no substantial role*. Such a legal regime would make suppliers of benzene-containing products guarantors of the design, manufacturing, labeling, and distribution decisions of others. It would chill and increase the costs of manufacturing and commerce, resulting in reduced choice and increased costs for consumers.

Furthermore, the Court of Appeal's error is unlikely to be confined to benzene-containing raw materials and end products. As noted above, there are many, many raw materials that are potentially dangerous to human health depending on how the raw materials are used in manufacturing and integrated into end products. In future cases, plaintiffs undoubtedly will rely on *Johnson* to support product liability claims against many businesses that allegedly supply potentially dangerous raw materials for use by other businesses in manufacturing end products. At a minimum, *Johnson* will create confusion, uncertainty, litigation expense, and risk for suppliers who previously have not faced such challenges. If the Court of Appeal's decision is allowed to take root, many companies that supply raw materials for manufacturing processes and end products are likely to face claims of legal liability for end products that they did not design, manufacture, label, or distribute—disrupting manufacturing and commerce broadly.

The Court of Appeal made an equally serious error when it assumed the consumer expectations test to assess whether raffinate could be considered defective. (Opn. 8-9, 11-18.) As the Court of Appeal itself recognized, the consumer expectations test "is not suitable in all cases" and generally "is reserved for those cases where the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (Opn. 9 (internal quotations and citations omitted).) "Application of the consumer expectations test to raw materials that become an indistinguishable part of another product presents a … difficult conceptual problem, which is a the nub of the present case." (Opn. 12.) Yet, the Court of Appeal inexplicably ducked that conceptual problem in *Johnson*; it simply assumed the consumer expectations test would apply to raw materials supplied in bulk to sophisticated manufacturers. Indeed, the Court of Appeal seemed to suggest that the consumer expectations test should be used by default—a conclusion which (1) usurps the trial court's function of deciding which test to use based on the facts of the case and (2) is inconsistent with this Court's precedents respecting the consumer expectations test. This error also is likely to have significant implications for manufacturers and consumers, and it is likely to exacerbate the adverse effects of the Court of Appeal's failure to follow the *Artiglio* framework by making it even easier for plaintiffs to claim that potentially

dangerous raw materials are inherently defective like asbestos. This Court should grant review to clarify the proper legal framework for evaluating claims that raw materials are inherently defective.

For these reasons and the reasons stated by U.S. Steel, NAM urges the Court to grant U.S. Steel's petition.[1]

Very truly yours,

Margaret M. Grignon

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cc: All parties of record (*see attached service list*)

[1] No party or counsel for a party authored this letter, in whole or in part, or made a monetary contribution intended to fund either the preparation or submission of this letter. U.S. Steel is a member of NAM., but other than paying the same dues as any NAM member, U.S. Steel made no financial contribution to the preparation or submission of this letter.