A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

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June 3, 2016

AMICUS LETTER IN SUPPORT OF REVIEW
(California Rules of Court, rule 8.500(g)(1))

Honorable Tani G. Cantil-Sakauye, Chief Justice
Honorable Kathryn M. Werdegar, Associate Justice
Honorable Ming W. Chin, Associate Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Mariano-Florentino Cuéllar, Associate Justice
Honorable Leondra R. Kruger, Associate Justice

California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *T.H. v. Novartis Pharmaceuticals Corporation, No. S233898*
Petition For Review filed April 18, 2016

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to Rule 8.500(g)(1) of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada and the Association of Southern California Defense Counsel write in support of the petition for review of this decision.

Interest Of The Requesting Organizations

The Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") is an association of almost 900 attorneys primarily engaged in the defense of civil actions. ADC-NCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with product liability and pharmaceutical cases. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADC-NCN has appeared as amicus in numerous cases.

The Association of Southern California Defense Counsel ("ASCDC") is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members approximately 1000 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases before both this Court (see, e.g., *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) and the Courts of Appeal (see, e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524).

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on matters of shared interest, such as efforts to secure increased court funding, working with the legislature on statutory changes related to civil liability and procedure, and this letter supporting review.

Members of the Associations represent a wide variety of product innovators, manufacturers, and suppliers. These companies have engaged in the sales of corporate units or product lines or, given the fluidity of American corporate life, may be involved in such transactions in the future.

Why Review Should Be Granted

The appellate court's published decision, if left alone, casts endless and unpredictable liability on companies for products that they no longer control. The appellate decision finds a duty where one does not exist: namely, to consumers who purchase products manufactured and supplied by someone other than the defendant, ***after*** the defendant has divested its interest in the product line.

This ruling has far-reaching consequences. Although it arose in the pharmaceutical and medical device arena, it logically extends to any entity that ever made any product but then ceased doing so, as by selling off the product line.

Moreover, the appellate court decision completely warps traditional notions of duty and causation in the products liability context by eliminating the threshold requirement of exposure to a *defendant's* product. *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362. ("That the defendant manufactured, sold, or supplied the injury-causing product is a separate and threshold requirement that must be independently established.")

Review by this Court is necessary to course-correct the state of product liability law in California.

1. The Appellate Decision Creates Uncertainty In Products Liability Law In California

Businesses thrive in predictable environments. Predictability results when liability for negligence is properly limited in products liability cases to those in which a plaintiff can demonstrate exposure to a defendant's product. Further, a company who divests all ownership and interest in a product line must be able to have certainty that the successor company will be solely responsible for any alleged injury as a result of the successor company's future manufacture and sales of that product. To hold otherwise turns traditional concepts of allocation of fault on their head.

For decades, this Court has recognized that liabilities follow product lines. *Ray v. Alad Corp.* addressed this situation and held "that a party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired." *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 34. In the present case, no party has asserted that the defendants who actually sold the products alleged to have caused injury are in any way unable to bear the burden of liability, should any be found. There is no reason this rule should be changed.

2. The Appellate Decision Contradicts Current California Supreme Court Precedent

O'Neil v. Crane Co. (2012) 53 Cal.4th 335 analyzed the *Rowland v. Christian* factors when determining whether a negligence cause of action could be asserted against the defendants. *O'Neil* found that no duty existed from a product manufacturer to warn users of its product about hazards that may exist from replacement parts on the products that were manufactured by another entity.

In discussing the remoteness between the defendants' conduct and the decedent's injury, *O'Neil* noted that it was "extremely remote because defendants did not manufacture, sell, or supply any asbestos product that may have caused his mesothelioma. [The decedent] did not work around defendants' pumps and valves until more than 20 years after they were sold, and he did not develop an injury from the replacement parts and surrounding insulation until nearly 40 years after his workplace contact. All of these circumstances attenuate the connection between defendants' products and the alleged injury." *Id.* at 365.

In the appellate decision here, the court simply labeled the plaintiffs' injuries as foreseeable to Novartis without analyzing the closeness of connection between Novartis's conduct and the plaintiffs' alleged injuries. *T. H. v. Novartis Pharmaceuticals Corporation* (2016) 245 Cal.App. 4th 589, 602-603. Given that Novartis had divested any interest in the medicine at issue ***six years before*** the physician prescribed it to the plaintiffs' mother, any conduct by Novartis regarding warnings it transmitted to physicians via desk reference manuals, the FDA-approved label, or otherwise is too remote, as a matter of law, to support a finding of liability.

A review of the other factors fares no better. Regarding moral blame and prevention of future harm, *O'Neil* found that imposing liability against the manufacturers for failing to warn about another manufacturers' products would not prevent future harm, nor was the conduct morally blameworthy. *O'Neil, supra,* 53 Cal.4th at 365. Further, *O'Neil* noted that "it is doubtful that manufacturers could insure against the 'unknowable risks and hazards' lurking in every product that could possibly be used with or in the manufacturer's product." *Id.* The same policy factors apply with equal force in this case, but were largely ignored by the appellate court. How can a manufacturer of a product that divests its interest in that product be morally blameworthy for alleged harm that results from a consumer's future use of that product when it is manufactured by another? Similarly, how can a manufacturer prevent future harm that results from a different manufacturer's production and supply of a product, after the original manufacturer divested its interest in that product? It cannot.

Moreover, *O'Neil* recognized "[t]hat the defendant manufactured, sold, or supplied the injury-causing product is a separate and threshold requirement that must be independently established." *O'Neil,* supra, 53 Cal.4th 335, 362. In a products liability action, "the plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury." *Bockrath v. Aldrich Chem. Co., Inc.*, 21 Cal. 4th 71, 79 (1999) (quoting *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968 (1997)). The appellate court completely disregarded the threshold requirement of exposure, and in doing so, blasted open the flood gates of potential and unpredictable liability in all industries where products are designed, manufactured, and distributed.

This Court should grant review to establish the appropriate statewide standard for such cases and to clarify the law in this important area for litigants, trial courts, and reviewing courts alike.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

By: Don Willenburg (CMB)
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cc: See attached Service List

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Venable LLP, 2049 Century Park East, Suite 2100, Los Angeles, California.

On June 3, 2016, I served a copy of the foregoing document(s) described as **AMICUS LETTER IN SUPPORT OF REVIEW** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☒ By placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above.

☒ **BY OVERNIGHT DELIVERY (CCP §1013(c)&(d)):** I am readily familiar with the firm's practice of collection and processing items for delivery with Overnight Delivery. Under that practice such envelope(s) is deposited at a facility regularly maintained by Overnight Delivery or delivered to an authorized courier or driver authorized by Overnight Delivery to receive such envelope(s), on the same day this declaration was executed, with delivery fees fully provided for at 2049 Century Park East, Suite 2100, Los Angeles, California, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 3, 2016, at Los Angeles, California.

Jan Contreras

Jan Contreras

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