

January 25, 2008



Honorable Chief Justice Ronald M. George,  
and Associate Justices  
California Supreme Court  
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**RE: *Mary Hutton Snyder v. Superior Court (Caterpillar, Inc.)***  
**(Petition for review filed January 25, 2008)**  
**Supreme Court, Case No. \_\_\_\_\_**  
**Court of Appeal, Case No. B197993**  
**Los Angeles Superior Court, Case No. BC343305**

Dear Chief Justice George and Associate Justices:

*Amici curiae* Coalition for Litigation Justice, Inc.,<sup>1</sup> Chamber of Commerce of the United States of America,<sup>2</sup> National Association of Manufacturers,<sup>3</sup> National Federation of Independent Business Legal Foundation,<sup>4</sup> Association of California Insurance Companies,<sup>5</sup> American Insurance Association,<sup>6</sup> and National Association of Mutual

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<sup>1</sup> The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment. The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

<sup>2</sup> The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

<sup>3</sup> The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. 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 and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

<sup>4</sup> The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

<sup>5</sup> The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies

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Insurance Companies<sup>7</sup> write pursuant to Rule 8.500(g)(1) to support Caterpillar, Inc.'s petition for review in the referenced matter.

## **QUESTION PRESENTED FOR REVIEW**

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Whether the Second District Court of Appeal, Division Two, erred by holding that Second Amended General Order No. 29 (G.O. 29), adopted by the Los Angeles Superior Court on May 12, 2005,<sup>8</sup> conflicts with the C.C.P. § 2018.030.

## **INTEREST OF AMICI CURIAE**

*Amici* are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in the adoption of procedures for the handling of asbestos cases in a manner that is fair, efficient, and consistent with sound public policy. *Amici* are well suited to provide a broad perspective as to the overall impact of asbestos litigation, which *amici* believe will provide useful background to the Court in considering the subject petition. *Amici* intend to show that G.O. 29 is an appropriate and legal response to the burdens that asbestos litigation imposes in California. For these reason, we believe the petition should be granted and the appellate court's decision should be reversed.

## **WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION**

### **I. An Overview of the Current Asbestos Litigation Environment**

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997)

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doing business in California. ACIC member companies write 40.9% of the property/casualty insurance in California, including 56.1% of personal automobile insurance, 42.8% of commercial automobile insurance, 39% of homeowners insurance, 32.5% of business insurance and 46% of private workers' compensation insurance.

<sup>6</sup> The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

<sup>7</sup> Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

<sup>8</sup> The original version of G.O. 29 was adopted nearly two decades ago; the first amended version was entered in June 1995.

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521 U.S. 591, 597, described the litigation as a “crisis.”<sup>9</sup> Through 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* <http://www.rand.org/publications/MG/MG162> [hereinafter RAND Rep.]. In August 2006, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases in state and federal courts. *See* American Academy of Actuaries Mass Torts Subcomm., *Current Issues in Asbestos Litigation* 5 (Aug. 2007), *available at* [http://www.actuary.org/pdf/casualty/asbestos\\_aug07.pdf](http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf).

So far, the litigation has forced an estimated eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy.<sup>10</sup> Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin Columns: Asbestos, Aug. 2004, at 5, as “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314; *see also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. One well-known plaintiffs’ attorney has described the litigation as an “endless search for a solvent bystander.” ‘*Medical Monitoring and Asbestos Litigation*’—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs); *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”). Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND, *supra*, at 94.

California has not escaped these problems. In fact, the litigation in California appears to be worsening. In 2004, one San Francisco Superior Court judge stated at a University of San Francisco Law School symposium that asbestos cases take up twenty-five percent of the court’s docket. *See Judges Roundtable: Where is California Litigation Heading?*, HarrisMartin Columns: Asbestos, July 2004, at 3. Another San Francisco Superior Court judge noted that asbestos cases were a “growing percentage” of the court’s ever increasing caseload and that they take up a large share of the court’s scarce resources. *See id.*; *see also* Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 Santa Clara L. Rev. 1, 2-3 (2004).

<sup>9</sup> *See also* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat’l Legal Center for the Pub. Interest June 2002); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

<sup>10</sup> *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

More recently, an influx of filings from out-of-state plaintiffs has significantly increased the burden on California courts. In a 2006 sample of 1,047 asbestos plaintiffs for whom address information was available, over three hundred – or an astonishing *thirty percent* – had addresses outside California. See Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006). Many of these plaintiffs had almost no connection to California, having lived most of their lives outside of the State and alleging asbestos exposure that ostensibly occurred elsewhere. See Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 599 (2007) ("plaintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases.").

Unsurprisingly, the firms that manage these claims are moving to California. See Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883, 885 (2007) ("With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state."); Ford Gunter, *Houston Law Firm To Open L.A. Office*, Houston Bus. J., Oct. 16, 2007 (detailing move by Lanier Firm to Los Angeles).

As a result of these developments, "California is positioned to become a front in the ongoing asbestos litigation war." Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), available at 2006 WLNR 4514441.

## **II. Los Angeles General Order 29**

"Litigation tourists" are drawn to California by the belief that the state's asbestos litigation procedures and practices, formal and informal, will give them an advantage. Indeed, complaints routinely name scores of defendants, making case management difficult. G.O. 29 attempts to deal with this problem by providing a fair and efficient means of determining early in the litigation whether a defendant has been properly named. It seeks to prevent the Los Angeles asbestos docket from being exploited by plaintiffs with weak or meritless claims. The Order is a sensible way to clear defendants from a docket on which they do not belong.

G.O. 29 requires the plaintiff to serve and file a "Case Report" within eight months after the complaint is filed. The Case Report must include basic information about the claim, including medical information, exposure history, and evidence relating to plaintiff's exposure to asbestos-containing products (i.e., product identification), as well as supporting documentation. For nonproduct identification based causes of action, such as conspiracy, fraud, and market share, the Case Report must also state a witness's expected testimony. Of course, this is information that the plaintiff will have to produce sooner or later, since the plaintiff has the burden of proof. See *Rutherford v. Owens-Illinois* (1997) 16 Cal. 4<sup>th</sup> 953, 958 (a plaintiff in an asbestos case "must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant*, to which he became exposed" causes injury) (emphasis added). Indeed, it is information the plaintiff should have had before filing his or her complaint.

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A defendant may bring a “motion to dismiss” if the Case Report does not identify witnesses or documents linking the defendant to the plaintiff’s exposure.<sup>11</sup> The motion shall contain a notice of hearing in accord with the standard sixteen-court-day notice requirement of C.C.P. § 1005. The plaintiff may move to supplement the Case Report up to ten days before the motion is heard. If the motion is granted, any or all claims dismissed as to the moving defendant are *without prejudice*.

G.O. 29 is not a summary judgment procedure which can result in a judgment on the merits. As stated, a claimant who fails to identify any evidence to support his or her claim is subject only to dismissal without prejudice under the G.O. 29. The dismissal does not constitute a final judgment on the merits and has no preclusive effect. A plaintiff may re-file his or her claim against a previously dismissed defendant if and when the claimant comes forward with evidentiary support for the claim.

As Caterpillar’s brief describes in more detail, the subject petition involves the very type of case G.O. 29 was adopted to discourage. They sued real party in interest Caterpillar Inc. and approximately seventy-five other defendants claiming that plaintiff’s death was caused by exposure to defendants’ asbestos-containing products. Yet, more than eight months after filing suit, plaintiffs were unable to point to any evidence to support their claims against Caterpillar, and their action was dismissed without prejudice pursuant to G.O. 29.

It is hard to see why a case of this kind - which never should have been filed to begin with if evidence linking the plaintiff to defendant’s product does not exist - should be allowed to continue consuming resources, clogging the docket, and delaying the cases of others.

### **III. This Court Should Review the Court of Appeal’s Decision**

It is “well established” that courts have fundamental inherent powers, including the “inherent power to control litigation before them.” *Rutherford*, 16 Cal. 4<sup>th</sup> at 967; *Volkswagen of Am., Inc. v. Superior Court* (2001) 94 Cal. App. 4<sup>th</sup> 695, 705-06; *Cottle v. Superior Court* (1992) 3 Cal. App. 4<sup>th</sup> 1367, 1388; *Fire Ins. Exch. v. Superior Court* (2004) 116 Ca. App. 4<sup>th</sup> 446, 451-52. “That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation, *including discovery matters*, in order to insure the orderly administration of justice.” *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal. App. 3d 9, 19 (emphasis added). The Legislature has also recognized the authority of courts to manage their proceedings. *See* C.C.P. §§ 128, 187, 575.1, 575.2, 583.150; Govt. Code § 68070. The Judicial Council’s recommended standards for processing complex litigation presuppose the existence of these inherent managerial powers.

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<sup>11</sup> The motion may be filed no sooner than 45 days and no later than 75 days after service of the Case Report.



Here, however, the Court of Appeal struck down G.O. 29 in its entirety, holding that the identity of nonexpert witnesses to be called at trial is information entitled to *qualified* work product protection, and that *absolute* work product protection applies to the selection of product-identification documents and the summary of expected witness testimony. See *Snyder v. Superior Court (Caterpillar)* (2007) 69 Cal.Rptr.3d 600, 604 (citing *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 79)). The Court of Appeal's decision was wrongly decided and represents unsound public policy.

First, if permitted the stand, the Court of Appeal's decision will limit the ability of trial courts to efficiently and fairly manage complex litigation, including the asbestos docket, while allowing claimants to waste the resources of courts and defendants on claims for which support is lacking.

Second, plaintiffs will be encouraged to file weak or meritless claims against peripheral asbestos defendants, because they will no doubt appreciate that many defendants - that do not actually belong in the case - will nevertheless choose to pay settlements to avoid the expensive cost of protracted litigation.

Third, the Court of Appeal's decision would bring back "trial by ambush." If the identity of fact witnesses and product-identification documents are not subject to pre-trial discovery, neither party would know which fact witnesses would be called, what they might say, or what documents would be used, until the evidence is presented at trial (thus waiving work product protection). California's work product doctrine should not be used as a curtain to keep parties in the dark regarding the basic facts to be mustered against them until the evidence is presented at trial. See *In re Jeanette H.* (1990) 225 Cal.App.3d 25, 35-57 (holding disclosure of certain forms of work product before trial was justified partly because it would necessarily be disclosed at trial anyway).

Fourth, the Court of Appeal went too far to apply the *absolute* work product protection to a document list and a summary of expected witness testimony. G.O. 29 requires only production of the list and summary, it does not force the attorney to provide his or her "impressions, conclusions, opinions, legal research or theories" about those items. Again, this information would be required at trial, and at most should be entitled only to qualified work product protection. If G.O. 29 could be construed to seek absolute work product, the court still should have considered limiting it to avoid that problem, rather than striking the Order altogether.

Fifth, if qualified work product protection did apply to the information sought by G.O. 29, there would be ample reason to compel it under the facts here. *Long Beach* expressly recognized that in appropriate cases qualified work product can be compelled upon a showing of unfair prejudice or injustice. See *City of Long Beach*, 64 Cal.App.3d at 79 ("We recognize that there may be special circumstances under which the identity of persons with knowledge of the relevant facts will not suffice to avoid injustice and a party may require additional information. Disclosure with respect to the intended availability of a particular witness at the trial might be justified by special circumstances relating to such witness.).

The circumstances described above, such as the need to control expanding case dockets, as well as the need to prevent California from becoming the next front in the asbestos wars, justify a procedure like G.O. 29. The real problem in asbestos litigation is not that privileged information about plaintiffs' claims is being disclosed, it is that virtually no information about their claims can be obtained at all. G.O. 29 simply requires that the bare minimum be shown to exist, which, especially after eight months to a year have passed, is not asking much.

This Court should grant Caterpillar Inc.'s petition for review. Doing so would afford the Court a chance not only to consider G.O. 29, but also to provide guidance to courts elsewhere in California that are struggling with crowded dockets and limited budgets. Given that a wave of asbestos litigation may already be on its way to the State, it would be prudent for this Court to give lower courts guidance now with respect to the availability of procedures such as those set forth in G.O. 29.

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that on January 25, 2008, I sent an original and 4 copies of the foregoing by overnight mail to:

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I also served a copy of the foregoing on each of the interested parties in this action by placing true and correct copy in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

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