NATIONAL ASSOCIATION OF Manufacturers

April 24, 2014

Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: No. 13-0961; *Occidental Chemical Corporation v. Jason Jenkins*

To the Honorable Members of the Texas Supreme Court:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amici curiae* National Association of Manufacturers, American Coatings Association, American Petroleum Institute, National Shooting Sports Foundation, Inc., Precision Machined Products Association, Texas Association of Manufacturers, and The Vinyl Institute file this *amicus* letter in the above referenced case. This *amicus* letter was prepared in-house, as such no legal fees were incurred.

SUMMARY OF REASONS FOR REVIEW

This case presents issues that urgently merit review and pose a significant concern to the competitiveness of US manufacturing. The Houston Court of Appeals decision to impose liability on a previous owner of real estate, fourteen years after designing and installing a permanent improvement and eight years after the sale of the facility with full disclosure, notwithstanding statutes of repose for design and construction limiting liability, if left to stand would have significant and prejudicial impact on the many companies that do business in Texas.

First, the Court of Appeals decision upends settled premises liability law in Texas and causes Texas to be out of step with the national mainstream of tort law in this area. This decision imposes liability on former owners for disclosed conditions and carves out unintended exceptions to Texas' statutes of repose.

Because of the dramatic extension of liability, manufacturers faced with these unpredictable conditions will be incentivized to leave Texas for more predictable regimes in other states.

Second, the Court of Appeals imposition of liability for an innovative improvement with a perfect fourteen years safety record will have negative consequences for companies conducting business in Texas. Manufacturers in Texas may determine that the potential liability associated with allocating capital for improvements to Texas-based facilities is too great.

Third, the Court of Appeals construction of TEX. CIV. PRAC. & REM. CODE § 16.008, a statute of repose for design, is inconsistent with well-established Texas jurisprudence and detrimentally impacts manufacturing firms who employ licensed engineers.[1] The Court of Appeals carved out from the protection of section 16.008 a class of common conduct where manufacturers employ teams of engineers, including trainees, working under the supervision of licensed engineers.

Fourth, the Court of Appeals interpretation of TEX. CIV. PRAC. & REM. CODE § 16.009, a statute of repose for construction, is also incorrect. Texas jurisprudence has uniformly held that a company that hires a third party contractor to construct an improvement on its real property is protected by section 16.009.[2]

Granting review of this case offers an important opportunity for this Court to clarify whether forever liability can be imposed on former owners of real property.

THE INTEREST OF AMICI

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM represents a vast array of businesses and industries whose success depends on the

[1] For example, its construction undermines the decisions of other Texas courts which have held that companies whose licensed engineers supervise the design of an improvement are entitled to the protections afforded by § 16.008. *See Texas Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28, 30-33 (Tex. App.—Texarkana 1991, writ denied); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

[2] *See Reames v. Hawthorne-Seving, Inc*., 949 S.W.2d 758, 763 (Tex. App.—Dallas 1997, pet. denied); *see also Fuentes v. Cont'l Conveyor & Equip. Co.*, 63 S.W.3d 521, 521-22 (Tex. App.—Eastland 2001, pet. denied); *McCulloch v. Fox & Jacobs, Inc*., 696 S.W.2d 918, 922-23 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

stability provided by the rule of law. Manufacturing employs nearly twelve million men and women, contributes more than $1.8 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. Manufacturing is a major component of the Texas economy. The NAM represents over 1,500 member companies doing business in Texas. In 2012, there were 22,787 manufacturing establishments in Texas, accounting for 93% of exports from the state.[3] In 2011, manufacturers employed 893,871 Texans with an average annual compensation in the Texas manufacturing sector of $79,351.[4] The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Accordingly, the NAM has a substantial interest in ensuring a uniform and predictable application of tort law to foster economic growth and opportunity in Texas.

The American Coatings Association is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors.

The American Petroleum Institute ("API") represents over 590 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The National Shooting Sports Foundation, Inc. ("NSSF") is the trade association for America's firearms industry. NSFF's mission is to promote, protect, and preserve hunting and the shooting sports. NSSF's members include businesses such as firearms manufacturers and owners and operators of shooting ranges.

[3] National Association of Manufacturers, "Texas Manufacturing Facts," sourced from U.S. Bureau of Economic Analysis, U.S. Census Bureau, International Trade Administration (2011 & 2012), available at <http://www.nam.org/~/media/C8C851D2A5CF4A8BAF408D7496C2AC5E.ashx>.
[4] *Id*.

The Precision Machined Products Association (PMPA) is a national trade association representing over 440 member companies involved in the production of highly engineered, precision machined components used in advanced automotive, aerospace, electrical, construction, and medical technologies. PMPA's members include metal producers, machining and manufacturing companies, machine tool builders, and producers of tooling, accessories, and metalworking fluids. The precision machining industry is best described by NAICS code 332721, and accounts for over 78,070 jobs with payrolls of $3.6 billion and shipments of over $13.3 billion. The mission of the PMPA is to provide the information, resources and networking opportunities to advance and sustain its members while advocating for manufacturing throughout the United States.

The Texas Association of Manufacturers represents the legislative and regulatory interests of approximately 450 member companies who span the diverse manufacturing sector of the state. Texas manufacturers contribute $192 billion (2011 data) to the Texas economy, and pays one-third of all corporate taxes collected by state and local governments.

The Vinyl Institute is the U.S. trade association for leading manufacturers of vinyl plastic, vinyl chloride monomer, and vinyl additives and modifiers.

WHY THE COURT SHOULD GRANT REVIEW OF THIS OPINION

The Court of Appeals Decision Discourages Manufacturers from Investing in Texas.

The Court of Appeals decision to impose forever liability in this case marks a stark departure from prior precedent and makes Texas an outlier from the national mainstream. The Court of Appeals recasts a premises liability issue in a negligent design theory, notwithstanding that the "product" was a permanent real estate improvement. Moreover, the Court of Appeals disregarded the protections afforded by the Texas legislature to the premises improver, Occidental Chemical Corporation ("Occidental"), by failing to give meaning to Texas' statutes of repose. The Court of Appeals decision creates instability in the Texas legal system for anyone who constructs, improves, or operates a manufacturing facility in Texas. Manufacturers need predictable legal systems that foster investments and

economic growth. If left to stand, this case will have a significant negative impact on economic opportunities in Texas.

The Court of Appeals Decision Negatively Impacts Companies Conducting Business in Texas.

The impact of the Court of Appeals decision is exacerbated because this case involves a common set of facts.

This case involves a common set of facts faced by manufacturers and other businesses across the country. Despite the Court of Appeals characterization of the factual setting of this case as "unusual," this case involves an all-too-common set of facts capable of repetition.[5] While the particular injury suffered by Mr. Jenkins may be rare, the ruling in this case will have widespread impacts. Manufacturers frequently make permanent improvements to their facilities, which increase the value of the land. Complete facilities are regularly sold to other companies in similar lines of business.

Manufacturers have expert technical capacity to design safety improvements without engaging outside firms and often manage complex design projects in-house. Moreover, manufacturing facilities are highly specialized and oftentimes the production processes are highly interconnected, such that a change in specifications in one part of a facility can impact seemingly remote aspects. As such, employees often use their specialized knowledge and experience to identify and design appropriate improvements. There are also many other reasons for proceeding internally, from protecting proprietary information to efficiency and avoiding added expense. These circumstances illustrate the widespread impact of the decision in this case.

Former owners of improved facilities sold with full disclosure owe no duty to third party employees.

Occidental owed no duty to Mr. Jenkins because his employer purchased, controlled, and operated the facility after receiving complete disclosure of all conditions. Because Occidental retained no control, it could do nothing to alter the

[5] *Jenkins v. Occidental Chem. Corp.*, No. 01-09-01140-CV (Tex. App. —Houston [1st Dist.] Nov. 17, 2011) (withdrawn), Slip Op. at 34.

condition of the subsequent owner's, Equistar's, facility. A prior owner, without more, cannot independently enter, inspect, or maintain a formerly owned facility. Moreover, prior owners cannot mandate proper training and safety protocols for future owners and their employees. Over time, any permanent real estate improvement will require upkeep, and the more time that passes the more likely maintenance will be required. Imposing liability on Occidental contradicts established Texas law without any increase in workplace safety.

The Court of Appeals decision retroactively creates risks for former owners of real property. Former owners of real property are not liable for fully disclosed conditions on real property after conveyance.[6] Here, the case concerns a pH-balancing system that was a permanent improvement to the real property, bolted to the ground and concreted in place. Not only was the condition of the premises fully disclosed, but the property was sold to a purchaser with expertise in operating and maintaining this particular type of real estate improvement. The Court of Appeals has imposed perpetual liability for a real estate improvement after the property was sold with complete disclosure, even to a sophisticated buyer, in direct contradiction with the majority rule of *caveat emptor*.[7]

Forever liability creates significant additional costs that stifle growth in the manufacturing sector.

The Court of Appeals decision, if left to stand, would impose significant additional costs on manufacturers through increased liability exposure and insurance costs, if insurance would even be available. These costs are significant and without any offsetting societal benefits because they do nothing to encourage corrective action to prevent future injuries. Instead, countless prior owners of

[6] *See Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 367-68 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (former owners of real property are generally not liable after conveyance for injuries caused by condition they created); *First Fin. Dev. Corp. v. Hughston*, 797 S.W.2d 286, 289-92 (Tex. App.—Corpus Christi 1990, writ denied) (former owner of real property not liable for injury where plaintiff alleged that former owner created the condition and caused the injury); *see also Beall v. Lo-Vaca Gathering Co.*, 532 S.W.2d 362, 364-66 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (former possessor of real property not liable for dangerous condition it created before transferring possession); *see also* RESTATEMENT (SECOND) OF TORTS § 352 (1965).

[7] *See* Restatement (Second) of Torts § 352 cmt. a ("In the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force.")

improved real estate across the state will face previously unforeseen litigation risks under the expansive negligence theory created by the Court of Appeals.

This Court should fully consider the implications of imposing forever liability on job creators. A prior owner may seek to avoid liability for the uncontrollable conduct of a future owner by refusing to sell an old production facility or destroying useful improvements. Either scenario limits the alienability of property or creates waste. Such a policy deprives communities of economic opportunity by increasing the cost of putting land to productive use.

The Court of Appeals has created a new category of risks for businesses to insure against: forever liability for any improvement to real property, even after sale and complete relinquishment of control. Under the Court of Appeals ruling, businesses would be forced to wait in perpetuity without any ability to protect the third parties they would ultimately be liable to in the event of future harm. Although a business may be able to purchase insurance that protects against the new risks created by the Court of Appeals, the unlimited temporal component is likely to present a major factor in the expense of such policies. Increased insurance costs can impact the ability of a business to raise capital, continue operations, or upgrade facilities, particularly small and medium sized enterprises.

Innovation and improvements that increase worker safety should not be discouraged.

The Court of Appeals holding discourages manufacturers from implementing new safety technology. Innovative businesses, like manufacturers, regularly make improvements to their production processes. Often times, these improvements make processes safer as knowhow and technology evolve. In this case, Occidental replaced an old manual process with a safer mechanical system. The new system was not only designed by licensed engineering professionals, but it was operated safely for fourteen years before Mr. Jenkins' injury. It is critical that the law and public policy encourage, or at least do not discourage, the implementation of new technological solutions that increase safety.

Occidental is Protected from Forever Liability by Texas Statutes of Repose.

Untimely actions are disfavored by Texas law.

The Court of Appeals rejected the Texas legislature's decision to restrict Mr. Jenkins' recovery. Statutes of limitations and statutes of repose limit the time when liability can be imposed on a party. However, a statute of repose relates to the time a condition is created, not when an injury occurs. Statutes of repose are intended to protect parties who have no control of or authority to inspect for unsafe conditions after they design or construct an improvement to realty.[8] These statutes are expressly intended to end unlimited liability and provide certainty.[9]

As time passes and memories fade, evidence reduces in quality and quantity. Older claims are fraught with increased risks of error in light of lesser evidentiary resources. Moreover, society and technology evolve to change the level of acceptable risk. In light of these considerations, policy makers have struck a delicate balance limiting recoveries for plaintiffs like Mr. Jenkins. These limitations of liability provide critical predictability that is relied on by businesses investing in Texas.

Statutes of repose encourage safety by protecting those who design and construct customized safety improvements from untimely claims.

Texas statutes of repose incentivize manufacturers to create safer working conditions. The statute of repose for design limits liability for customized safety systems created under the supervision of licensed engineers to ten years following completion of the design.[10] The Texas statute of repose for construction, like the design statute, limits the time to impose liability for improvements to real estate to ten years following construction.[11] After ten years of safe operation the acceptability of design and construction is well demonstrated. However, the burden of proof to establish the elements necessary to benefit from repose is on the

[8] *See Hernandez v. Koch Machinery Co.*, 16 S.W.3d 48, 52 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (explaining that purpose of statutes of repose is to end unlimited liability).
[9] *See Brown v. Kellogg Co.*, 743 F.2d. 265, 268 (5th Cir. 1984) (explaining that statutes of repose are entitled to liberal construction to end perpetual liability).
[10] *See* Tex. Civ. Prac. & Rem. Code § 16.008(a).
[11] *See* Tex. Civ. Prac. & Rem. Code § 16.009(a).

proponent of the statute.[12] In this case, Occidental met its burden. Moreover, the pH-balancing system benefitted countless Occidental and Equistar employees because it replaced a riskier manual process. This improvement is precisely what Texas law should continue to encourage, but the Court of Appeals decision discourages safety innovations.

Manufacturers are protected from forever liability when licensed engineers supervise design teams, even when a trainee is part of the team.

This Court should clarify that Texas law permits invocation of the statute of repose for design where an unlicensed engineer participates in a collaborative design process with adequate supervision by a licensed engineer. The Court of Appeals denied Occidental the protections of the statute of repose for design because one unlicensed engineer participated in the design of the pH-balancing system, despite working with and under the supervision of other licensed engineers. Working in collaborative settings is critical to the growth and development of junior engineers. Without such opportunities, the engineering profession cannot grow to meet the needs of manufacturers, who rely on them for countless needs in addition to improving worker safety. Additionally, modern businesses are designed to function efficiently through a management system of sharing work. Often times, this includes delegating and supervising tasks. Although the vast majority of manufacturers are not licensed as an organization, they employ licensed engineers. The Court of Appeals restrictive reading of the Texas statute of repose for design denies protection to a manufacturer that includes any engineering trainee on a project design team, while a licensed engineering firm would not face a similar disqualification for having an unlicensed engineer work on a project. This double standard fails to recognize the important relationship between manufacturers and engineers and deprives manufacturers from safe and efficient management structures.

[12] *See Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 121 (Tex. 1996); *see also Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980) (a party who asserts an affirmative defense bears the burden of proof).

Manufacturers who construct improvements to realty by hiring third party contractors rely on the limitations of liability in the statute of repose for construction.

Occidental is entitled to protection under the Texas statute of repose for construction for its construction of the pH-addition system because it designed the system, procured the parts, set project specifications, and paid for installation of the system on its premises. Texas law has uniformly protected parties, like Occidental, from unlimited liability where they construct an improvement to real property by hiring a third party contractor.[13] The Court of Appeals reading of the statute of repose for construction deprives manufacturers of the protections created by the Texas legislature. Manufacturers regularly construct improvements to their realty and rely on the predictability provided by the statute of repose.

[13] *See Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 760-63 (Tex. App.—Dallas 1997, pet. denied) (premises owner entitled to statute-of-repose defense even "it did not 'hammer the nails and turn the screws'" because it designed the system, arranged for its construction, paid the party who physically installed the system, and had a relationship with the annexation of the system to the realty); *Fuentes v. Cont'l Conveyor & Equip. Co.*, 63 S.W.3d 518, 521-22 (Tex. App.—Eastland 2001, pet. denied) (manufacturer entitled to protection under statute of repose where it contracted for a system to be installed by a third party, and supervised and assisted in the installation); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 922-23 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (property developer protected by statute of repose for a pool it hired a third party contractor to "actually construct" because the it developed guidelines for the pool, designated the location, created a conceptual layout, and approved dimensions)

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant review in the case. The issues presented are very important to manufacturers doing business in Texas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains no more than 4,500 words in the portions of the document that are subject to the word limits of the Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ Thomas C. Kirby

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing amicus letter has been served by electronic mail to the following attorneys of record listed below on April 24, 2014.

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