

MUNGER, TOLLES & OLSON LLP

560 MISSION STREET  
SAN FRANCISCO, CALIFORNIA 94105-2907  
TELEPHONE (415) 512-4000  
FACSIMILE (415) 512-4077

355 SOUTH GRAND AVENUE  
THIRTY-FIFTH FLOOR  
LOS ANGELES, CALIFORNIA 90071-1560  
TELEPHONE (213) 683-9100  
FACSIMILE (213) 687-3702

April 4, 2016

RONALD L. OLSON<sup>1</sup>  
ROBERT E. DENHAM  
JEFFREY I. WEINBERGER  
CARY B. LERMAN  
GREGORY P. STONE  
BRAD D. BRIAN  
BRADLEY S. PHILLIPS  
GEORGE M. GARVEY  
WILLIAM D. TEMKO  
STEPHEN M. KRISTOVICH  
JOHN W. SPIEGEL  
TERRY E. SANCHEZ  
STEVEN M. PERRY  
MARK B. HELM  
JOSEPH D. LEE  
MICHAEL R. DOYEN  
MICHAEL E. SOLOFF  
GREGORY D. PHILLIPS  
KATHLEEN M. McDOWELL  
GLENN D. POMERANTZ  
THOMAS B. WALPER  
PATRICK J. CAFFERTY, JR.  
JAY M. FUJITANI  
O'MALLEY M. MILLER  
SANDRA A. SEVILLE-JONES  
MARK H. EPSTEIN  
HENRY WEISSMANN  
KEVIN S. ALLRED  
BART H. WILLIAMS  
JEFFREY A. HENTZ  
JUDITH T. KITANO  
KRISTIN LINSLEY MYLES  
MARC T.G. DWORSKY  
JEROME C. ROTH  
STEPHEN D. ROSE  
GARTH T. VINCENT  
TED DANE  
STUART N. SENATOR  
MARTIN D. BERN  
DANIEL P. COLLINS  
ROBERT L. DELL ANGELO  
BRUCE A. ABBOTT  
JONATHAN E. ALTMAN  
MARY ANN TODD  
MICHAEL J. O'SULLIVAN  
KELLY M. KLAUS  
DAVID B. GOLDMAN  
KEVIN S. MASUDA  
HOJJOON HWANG  
PETER A. DETRE  
DAVID H. FRY  
LISA J. DEMSKY  
MALCOLM A. HEINICKE  
GREGORY J. WEINGART

SUSAN E. NASH  
TAMERLIN J. GOOLEY  
JAMES C. RUTTEN  
RICHARD ST. JOHN  
ROHIT K. SINGLA  
LUIS LI  
CAROLYN HOECKER LUEDTKE  
C. DAVID LEE  
BRETT J. RODDA  
FRED A. ROWLEY, JR.  
KATHERINE M. FORSTER  
BLANCA FROMM YOUNG  
RANDALL G. SOMMER  
MANUEL F. CACHAN  
ROSEMARIE T. RING  
TODD J. ROSEN  
MELINDA EADES LEMOINE  
SETH GOLDMAN  
GRANT A. DAVIS-DENNY  
JONATHAN H. SLAVIN  
DANIEL B. LEVIN  
MIRIAM KIM  
MISTY M. SANFORD  
KATHERINE KU  
HAILYN J. CHEN  
BETHANY W. KRISTOVICH  
JACOB S. KREILKAMP  
JEFFREY Y. WU  
LAURA D. SMOLOWE  
ANJAN CHOUDHURY  
KYLE W. MACH  
HEATHER E. TAKAHASHI  
ERIN J. COX  
BENJAMIN J. HORWICH  
E. MARTIN ESTRADA  
KIMBERLY A. CHI  
ADAM R. LAWTON  
AARON SEUJI LOWENSTEIN  
MATTHEW A. MACDONALD  
MARGARET G. MARASCHINO  
BENJAMIN J. MARO  
JOEL M. FURLES  
KYLE A. CASAZZA  
CLAIRE YAN  
SELYN A. EVERITT  
MARK R. SAYSON  
JEREMY A. LAWRENCE  
BENJAMIN E. FRIEDMAN  
CHRISTOPHER M. LYNCH  
RAY S. SEILIE  
ADAM I. KAPLAN  
AMELIA L.B. SARGENT  
KENNETH M. TRUJILLO-JAMISON  
BRYAN H. HECKENLIVELY

LAURA WIRTH  
JASMINE M. FLORES  
LAURA K. LIN  
JEFFREY M. OSOFSKY  
GREGORY M. SERGI  
ACHYUT J. PHADKE  
DAVID A. TAYLOR  
MARI OVERBECK  
JESSE MAX CREED  
JOHN M. GILDERSLEEVE  
ERIC K. CHIU  
SARAH L. GRAHAM  
JESSICA BARCLAY-STROBEL  
ZACHARY M. BRIERS  
JENNIFER M. BRODER  
SAMUEL T. GREENBERG  
CAROLINE M. CUNNINGHAM  
EMILY B. VIGLIETTA  
KEVIN L. BRADY  
EMILY R. D. MURPHY  
ELLEN MEDLIN RICHMOND  
JORDAN D. SEGALL  
VICTORIA A. DEGTAREVA  
WESLEY T.L. BURRELL  
CHRISTA L. CULVER  
ANYA J. GOLDSTEIN  
KAREN A. LORANG  
KURUVILLA J. OLASA  
KEVIN H. SCOTT  
JUSTIN P. RAPHAEL  
HANNAH E. SHEARER  
CRAIG A. LAVOIE  
ROBERT W. GRAY, JR.  
THOMAS P. GLANCY  
JOSHUA PATASHNIK  
ERIC C. TUNG  
GUHA KRISHNAMURTHI  
JOSHUA S. MELTZER  
SARA E. CROLL  
ANDREW G. PROUT  
THANE REHN  
ADAM B. WEISS  
ROSE LEDA EHLER  
AMY L. GREYWITT  
ANDREW Z. WOLSTAN  
NASSIM NAZEMI  
CATHLEEN H. HARTGE  
JOON S. HUR  
MARIA JHAI  
ADAM P. BARRY  
JENNIFER L. BRYANT  
JUSTIN T. HELLMAN  
ANDREW CATH. RUBENSTEIN  
RIO PIERCE

JEFFREY A. PAYNE  
YARUO  
HANNAH L. DUBINA  
ADAM GOTTESFELD  
NICHOLAS D. FRAM  
JOSHUA L. BENESH  
JOHN F. MULLER  
BRIONNA N. NED  
LAURA C. ZARAGOZA  
JOHN L. SCHWAB  
SARA N. TAYLOR  
ALEXANDER D. TEREPA  
MAXIMILIAN L. FELDMAN  
SAMUEL T. BOYD  
PETER E. BOOS  
SETH J. FORTIN  
DAVID T. RYAN  
ANKUR MANDHANIA  
J'ME K. FORREST  
ASHLEY D. KAPLAN  
JESSICA REICH BARIL  
JULIANA M. YEE  
JEREMY K. BEECHER  
MATTHEW K. DONOHUE  
ALLYSON R. BENNETT  
ARIEL GREEN  
ELIZABETH A. LAUGHTON  
EMILY CURRAN-HUBERTY  
TIMOTHY J. MOON  
JORDAN X. NAVARRETTE  
JOHN B. MAJOR  
BRYN A. WILLIAMS  
DAVID J. FEDER  
LAUREN C. BARNETT  
NICHOLAS R. SIDNEY  
C. HUNTER HAYES  
KIMBERLY D. OMENS  
EMILY BUSSIGEL  
BRADLEY E. MARKANO

OF COUNSEL  
ROBERT K. JOHNSON<sup>1</sup>  
ALAN V. FRIEDMAN<sup>1</sup>  
MARK H. KIM  
ALLISON B. STEIN  
BRAD SCHNEIDER  
ERIC P. TUTTLE  
PETER E. GRATZINGER

E. LEROY TOLLES  
(1922-2008)

<sup>1</sup>A PROFESSIONAL CORPORATION

Writer's Direct Contact  
(415) 512-4066  
(415) 644-6966 FAX  
Ben.Horwich@mto.com

VIA ELECTRONIC FILING

Presiding Justice Barbara J.R. Jones  
Associate Justice Henry E. Needham, Jr.  
Associate Justice Terence L. Bruiniers  
California Court of Appeal  
First Appellate District, Division Five  
350 McAllister Street  
San Francisco, California 94102-7421

Re: *DePree v. BASF Catalysts LLC*, No. A140681

Dear Justices:

On behalf of the Chamber of Commerce of the United States, the California Chamber of Commerce, and the Civil Justice Association of California (collectively, the "Organizations"), we write pursuant to California Rules of Court, rule 8.1120(a), to urge this Court to certify for publication its March 15, 2016 opinion in this case (the "Opinion").

The Opinion reflects a thoroughgoing and thoughtful application of existing California summary judgment standards to a recurring fact pattern. If published, it would serve as a useful benchmark in a relatively specialized field of litigation where courts, plaintiffs, defendants, and insurers place special value on certainty and efficiency. As explained in greater detail below, the Opinion meets

Presiding Justice Jones and  
Associate Justices Needham and Bruiniers  
Re: *DePree v. BASF Catalysts LLC*, No. A140681  
April 4, 2016  
Page 2

the standard for certification for publication under California Rules of Court, rule 8.1105(c)(2), (3) and (6).

### **I. Interest of the Organizations**

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.

The California Chamber of Commerce (“CalChamber”) is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state’s economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing *amicus curiae* briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

The Civil Justice Association of California (“CJAC”) is long-standing, non-profit corporation representing businesses, professional associations and financial institutions. CJAC’s principal purpose is to educate the public about ways to make our civil liability laws more fair, economical, efficient and clear. Toward this end, CJAC regularly petitions our co-ordinate and co-equal branches of government for redress when it comes to determining who gets, how much, and from whom when the conduct of some occasions harm to others. This opinion implicates CJAC’s primary purpose and, if published, will further the public interest and administration of justice.

As asbestos-related litigation has expanded beyond cases of direct occupational exposures from products known to contain asbestos, so too has the number of the Organizations’ members facing increasingly attenuated and uncertain claims of latent asbestos injury. Benchmark precedents addressing what

Presiding Justice Jones and  
Associate Justices Needham and Bruiniers  
Re: *DePree v. BASF Catalysts LLC*, No. A140681  
April 4, 2016  
Page 3

evidence does and does not show a triable issue of fact regarding exposure are vital reference points for all parties and courts tasked with adjudicating those claims.

## **II. Reasons that the Opinion Should Be Certified for Publication**

The Opinion should be certified for publication because it applies existing law to a fact pattern not previously addressed by any California appellate authority, and in so doing explains the summary judgment standard by offering a precise and proper application of that standard. (See Cal. Rules of Court, rule 8.1105(c)(2) & (3).) Moreover, due to the significant volume of asbestos litigation—and in particular, litigation over alleged exposure through products that were not intended to contain asbestos—the quantum of evidence required to create a triable issue of exposure in this context is a legal issue of continuing public interest. (See *id.*, rule 8.1105(c)(2).)

As an initial matter, publication is warranted simply in the interest of ensuring like outcomes in like cases. As the Opinion itself recognizes, the plaintiff here, like the plaintiffs in “a number of prior actions alleging asbestos injury,” relied on testimony from a particular Engelhard official about Emtal talc products. (Opinion, at p. 17 n.11.) No reason exists to believe this is the last case about a product containing Emtal talc. Publishing the Opinion would ensure that cases with materially identical evidentiary records are resolved in the same manner as this case.

The particulars of Emtal talc aside, the critical legal issue here—how to analyze claims of exposure to products (like Bondo) that may never have contained asbestos—is a recurring one. Although the result in this case flows naturally from the authorities on which this Court relied, none of those authorities squarely addresses a fact pattern in which the dispute centered on whether the product at issue (i.e., Bondo) contained asbestos at all. As the Opinion explains, although “some tests performed on Emtal talc ... showed the presence of asbestos,” “there is no evidence any particular batch or shipment of talc supplied to the makers of Bondo contained asbestos.” (Opinion, at p. 21.) By contrast, in most of the asbestos cases discussed in Part I of the Opinion, the subject product concededly contained asbestos (at least at some time). (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953; *Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582; *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96; *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098; *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409.) Although *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1093 briefly “note[d]” doubts about whether a subset of the

Presiding Justice Jones and

Associate Justices Needham and Bruiniers

Re: *DePree v. BASF Catalysts LLC*, No. A140681

April 4, 2016

Page 4

product at issue (insulation) contained asbestos, it did not resolve the case on those grounds. And as this Court pointed out (Opinion, at p. 20), there was evidence in *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222 from which the products' asbestos content could be inferred. If published, this case would stand for the important proposition that the analysis here (where the Bondo did not concededly contain asbestos) harmonizes with the analyses in prior cases, even though in each of those cases, the gaps in the plaintiff's theory of exposure lay elsewhere. The Opinion would therefore be a useful precedential complement to the discussions in the published cases it cites.

The difference between this case and previous cases is salient for contemporary asbestos litigation. This case is 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 shifted their focus to peripheral defendants who manufactured far less harmful products such as pumps, seals, and gaskets. This litigation bankrupted a number of these more remote, third-generation defendants as well, such as Yarway Corporation, which made asbestos gaskets and packing products in the 1920s through 1970s, and filed for bankruptcy in 2013. (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 Apr. 4, 2016].)

This case is thus part of yet another wave of litigation against still more remote defendants—those whose predecessors in interest made products that were not intended to contain (and, as this Court recognized, in all likelihood did not cause human exposure to) asbestos. The cost of litigating those claims is substantial, both in dollars and judicial resources. When these cases involve latent disease allegedly caused by long-ago exposures to products of uncertain origin, they often involve numerous defendants and require discovery reaching back decades. Precedents giving clear guidance on what evidence creates a triable issue of exposure allow the parties and courts to focus their resources on key issues and reach fair and efficient resolutions.

Presiding Justice Jones and  
Associate Justices Needham and Bruiniers  
Re: *DePree v. BASF Catalysts LLC*, No. A140681  
April 4, 2016  
Page 5

This is a matter of considerable importance to trial courts managing asbestos dockets. As the Respondents pointed out, asbestos litigation places a considerable strain on the judicial system. (Resps. Br., at pp. 62-63.) Indeed, this Court hears appeals from two Superior Courts (San Francisco and Alameda) that have adopted special rules to manage the unique challenges and volume of asbestos litigation. Published precedents are essential tools that allow trial courts to predictably and efficiently decide cases and manage those enormous dockets.

Finally, the Opinion as drafted explains the summary judgment record before this Court in a thorough and accessible manner typical of published opinions. For that additional reason, if published, it is likely to be a useful guidepost for litigants and courts.

\* \* \*

Presiding Justice Jones and  
Associate Justices Needham and Bruiniers  
Re: *DePree v. BASF Catalysts LLC*, No. A140681  
April 4, 2016  
Page 6

For the foregoing reasons, the Organizations urge this Court to certify  
its March 15, 2016 opinion for publication.

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP



Benjamin J. Horwich  
Attorneys for the Chamber of Commerce  
of the United States



Heather Wallace  
California Chamber of Commerce



Fred J. Hiestand  
General Counsel  
Civil Justice Association of California

cc: All parties via TrueFiling

**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 April 4, 2016, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY EMAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoftTrueFiling (TrueFiling) as indicated on the attached service list.

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

Executed on April 4, 2016, at San Francisco, California.

  
\_\_\_\_\_  
Susan B. Ahmadi

**SERVICE LIST**  
***DePree et al. v. BASF Catalysts***  
**Case No. A140681**

Michael Brian Gurien  
222 North Sepulveda Boulevard  
Suite 1900  
El Segundo, CA 90245

Attorneys for Plaintiffs and Appellants  
**John J. DePree and Rosalinda DePree**

Steven James Boranian  
Karen Ann Braje  
Reed Smith LLP  
101 2<sup>nd</sup> Street, Suite 1800  
San Francisco, CA 94105

Attorneys for Defendant and Respondent  
**BASF Catalysts**

Daniel A. Bress  
Kirkland & Ellis LLP  
655 15<sup>th</sup> Street NW  
Washington, DC 20005-5793

Attorneys for Defendant and Respondent  
**BASF Catalysts**

Lance D. Wilson  
Ferlin P. Ruiz  
Kelly M. Breen  
Tucker Ellis LLP  
135 Main Street, Suite 700  
San Francisco, CA 94105

Attorneys for Defendant and Respondent  
**NMBFil, Inc.**

Curt Cutting  
Robert H. Wright  
Horvitz & Levy LLP  
15760 Ventura Boulevard, Suite 1800  
Encino, CA 91436

Attorneys for Amicus Curiae  
**HONEYWELL INTERNATIONAL INC.**