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CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

February 5, 2018

Hon. Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Amici Curiae* Letter Brief in Support of Review in *People v. ConAgra Grocery Products Co., et al.*, S246102. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Civil Justice Association of California ("CJAC"), the California Chamber of Commerce ("CalChamber") and the California Manufacturers & Technology Association ("CMTA") urge, as *amici curiae*, the Court to grant review of this case to resolve conflicts the appellate opinion creates with existing law and settle issues of statewide importance.

After 20 years of litigation, the opinion here held petitioners, three paint manufacturers, liable under the doctrine of "public nuisance" and ordered them to jointly and severally pay close to $1 billion into a judicially created abatement fund for the removal of paint containing lead pigments from the interiors of millions of residential homes built throughout California before 1951. To reach its unprecedented holding, the opinion mangles existing California law and creates new law in ways that warrant this Court's review.

Specifically, the opinion glosses over conflicts with California appellate opinions on the scope of public nuisance law, ignores opinions from the majority of other jurisdictions addressing this same issue as well as scholarly legal commentary on the subject, adopts a speculative "causation" standard

lacking in logic and common sense, and contravenes the defendants' constitutional rights to free expression and association by linking public nuisance liability to petitioners' advertising of products that were lawful to sell at the time and for belonging to or contributing to trade associations that did not possess unlawful goals and for which petitioners had no specific intent to further any unlawful goals.

INTEREST OF AMICI AND IMPORTANCE OF ISSUES PRESENTED

Formed 40 years ago, CJAC's membership of businesses, professional associations and financial institutions is dedicated to making our civil liability laws more fair, economical, uniform and certain. Toward this end, CJAC regularly petitions the government for redress when it comes to determining who owes, how much, and to whom when some claim that the conduct of others occasions them harm. The issues presented by this case fall plainly within CJAC's principal objectives.

CalChamber is a nonprofit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California businesses. While CalChamber represents several of the largest corporations in California, 75% of its members are smaller businesses with less than 100 employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate on a broad array of legislative, regulatory, and legal issues that, like this one, threaten serious impositions.

The CMTA (formerly the California Manufacturers Association) works to improve and enhance a strong business climate for California's 30,000 manufacturing, processing and technology based companies. Since 1918, CMTA has worked with state government to develop balanced laws, effective regulations and sound public policies to stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA represents 400 businesses from the entire manufacturing community – an economic sector that generates more than $230 billion every year and employs more than 1.2 million Californians.

Amici, having read the petitions for review and plaintiffs' answer to them, are deeply distressed that, if left unchanged, the appellate opinion's peculiar construction of public nuisance law is so amorphous that it capaciously sweeps within its ambit numerous products that, while completely legal and proper for manufacture and sale at the time, are found in hindsight to be defective or cause hazards or harms to others. As a law review article astutely warned a decade ago:

> The vagueness of public nuisance jurisprudence is currently being exploited in new and unprecedented ways as a substitute for products liability claims by some public authorities and their private counsel. They are pursuing their claims against manufacturers under the guise of "public nuisance" to overcome obstacles and defenses that ensured fairness for products liability defendants and to sidestep comprehensive statutory schemes created by state and federal legislatures that address the alleged problem.

(Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation* (2007) *MICH. ST. L. REV.* 941, 948 (footnotes omitted).) This was not a "Chicken Little – 'The sky is falling'" alarm; as this case demonstrates, it has already happened. "From guns to lead paint to sub-prime mortgages to global climate change, use of the common law doctrine of public nuisance to recover damages [or, as here, abatement] allegedly caused by the actions of multiple parties over many years is rising." (Henry N. Butler & Todd J. Zywicki, *Expansion of Liability under Public Nuisance* (2010) 18 *SUP. CT. ECON. REV.* 1.)

Moreover, as the petitions for review and amici letters submitted in support of review attest, the opinion has imminently deleterious and likely unintended consequences for property owners and those seeking affordable housing. These include a drop in the value of properties to be abated during that process, burdens on those whose homes were constructed after 1951 to abate on their own the "public nuisance" if intact lead paint exists on their interiors, and a reduction in the amount of affordable housing already in short supply. (See, e.g., amici letters lodged in support of review by Reports on Housing, California Citizens Against Lawsuit Abuse, and the National Organization of African Americans in Housing.)

SPECIFIC REASONS WARRANTING REVIEW

1. The Opinion Unreasonably Expands the Doctrine of "Public Nuisance" By Confounding and Essentially Eliminating the Element of "Rights Common to the Public" with the Broader, Open-ended Criterion of "Public Health."

The opinion quotes approvingly from *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 that "public nuisances are offenses against, or interferences with, the exercise of *rights common to the public.*" (Opinion, p. 62 ("Opn."); emphasis added.) It then, echoing the trial court's reasoning, equates "rights common to the public" with a right to housing free from the taint of interior lead paint, and the right of children as inhabitants of such housing to "physical health;" hence a right to "public health" becomes a right "common to the public." "Interior residential lead paint interferes with the community's 'public right' to housing that does not poison children. This interference seriously threatens to cause grave harm to the *physical health* of the community's children. . . [L]ead exposure in residential housing threatens the public right to essential community resources." (*Id.* at 63; emphasis added.)

But, the court's verbal steps to arrive at this equivalency are not free from doubt. As one scholar astutely commented about the importance of the phrase "rights common to the public" in defining and limiting the scope of public nuisance doctrine:

> The essential nature of a "public right," may be illuminated by contrasting it with the "public interest." That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates "a public right." For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). *Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.* It follows, then, that "a public right" is to "the public interest" much as "an entitlement" is to "a benefit." [Thus] . . . a government recoupment action that may well be initiated to promote or protect the public interest, is not necessarily a legitimate vindication of the violation of a public right.

(Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 *U. CIN. L. REV.* 741, 815-816; emphasis added.) *A fortiori*, "public health" is more akin to the "public interest," an aspirational goal or objective rather than a right "common to the public," at least if one wants to define the reach of "public nuisance" to rational boundaries. Otherwise, it becomes exceedingly difficult, if not impossible, to restrain the purview of the "public nuisance" doctrine's extrapolation to the stars.

CJAC pointed out this crucial distinction to the appellate court in its amicus brief, along with a discussion of opinions by the majority of courts from other jurisdictions that have considered and rejected public nuisance law to manufacturers of lead paint. But, the appellate court blithely dismissed these arguments and authorities in support of the logic of imposing limiting distinctions by asserting that "California law is not based on the rulings of courts in other states . . ., nor would be it appropriate for us to reverse a judgment based on opinions expressed in journal articles." (Opn., p. 131.)

Perhaps the court felt constrained by its role as an intermediate appellate body from considering what other courts have done when confronted with similar controversies, or giving any weight to scholarly commentary on identical legal issues. Fortunately, this Court is not similarly constrained and has, in fact, recognized that what other jurisdictions and scholars have said and decided about the same issues is often informative and persuasive, even to the point of reversing its own precedents. (See, e.g., *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 297-299, reversing *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, and *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1192-1194, reversing *Becker v. IRM Corp.* (1985) 38 Cal.3d 454.)

Further, petitioner Sherwin-Williams showed in its appellate briefing and its petition here how this opinion was in conflict with other California appellate opinions, notably *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575 and *City of Modesto Redev. Agency v. Superior Court* (2004) 119 Cal.App.4th 28, both of which rejected public nuisance law as improper vehicles for product liability claims. The appellate court did not bother to address either of these cases in this opinion; and the answer to the petition for review simply asserts that the first appellate opinion in this litigation, *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292 ("*Santa Clara I*"), showed that "its decision was consistent" with these authorities. (Answer to Petition,

p. 2 ("Answer").) Plaintiffs assert this Court unanimously denied review in *Santa Clara I* (Answer, p. 13), as if that denial affirmed this Court's view about the correctness on the merits of *Santa Clara I*'s view of the substantive reach of "public nuisance" law, when it is instead well-established that denial of review cannot be construed as an expression of opinion by the Court on the rightness of the court of appeal's opinion. (See, e.g., *Trope v. Katz* (1995) 11 Cal.4th 274, 287.)

The point of all this, of course, is that without a principled "bright line" cabining the scope of public nuisance, it becomes a stretchable wrong capable of redressing an infinite number of socio-economic problems best left to the legislature. Extending public nuisance abatement to lead paint in residential dwellings, makes public nuisance a "super tort," too amorphous to be applied fairly. If, for instance, there exists a "public" right to be free from the threat that others may use a lawful product to injure others, why would that right not logically include the right to drive upon the highways, free from the risk of injury posed by drunk drivers, or using fuel in vehicles containing and spewing lead into the air we breathe? Such a public right of safety on the highway or to breathe clean air in our cities would be the basis for "public nuisance" claims against gas stations, fossil fuel refineries, brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with that so-called public right to drive upon the roads and breathe the air free from hazards created or contributed to by others. Or why not also hold make-up and cell phone manufacturers liable under public nuisance for misuse of their products by purchasers of same who use those products while driving on the highway? Surely a distracted driver creates a risk of harm to other drivers, infringing on their alleged new public right to be free from the use of lawful products by others in ways that cause harm to the public.

Now that this case has, on the heels of *Santa Clara I*, traveled down the litigation ladder for trial and then back up again for review, it is a propitious time for this Court to clarify and make uniform the contours and limits of public nuisance law in the context of facts presented on a fully developed record.

2. The Opinion Creates a Conflict on the Proper Causation Standard for a Public Nuisance Claim.

Lacking any discernible boundaries limiting the substantive reach of "public nuisance" doctrine from the appellate court's first opinion in this case, defendants are left with only one element common to civil wrongs as a buffer to its omnivorous sweep—*causation*.[1]

But, the appellate opinion's "spin" on causation – both factual (cause-in-fact) and legal (proximate) – and what evidence is necessary to establish it, reduces the causality element to a virtual nullity. For instance, the opinion states "the parties agree that the causation element of a public nuisance cause of action is satisfied if the conduct of a defendant is a *substantial factor* in bringing about the result." (Opn., p. 49; emphasis added.) That statement, however, is belied by the briefs of the parties before the appellate court, which discuss both "cause in fact" and "legal" causation, the latter of which focuses on "the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." (See, e.g., brief of appellant Sherwin Williams in *Santa Clara II*, p. 52, citing and quoting from *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.)

The appellate court then describes the "substantial factor" standard as "a relatively broad one," citing *Bockrath v. Aldrich Chemical Co., Inc*. (1999) 21 Cal.4th 71, 79, for the proposition that "a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury . . . is not a substantial factor, but a very minor force that does cause harm is a substantial factor." (Opn., p. 49.) The opinion next links the fact that no amount of lead ingested by a person is good for that person's health, with the concomitant inference that *any* amount of lead pigment in paint causes harm to those who reside in residential buildings where it can be found; and any action by petitioners in making the paint and advertising it for sales combine to constitute a "substantial factor" contributing to the harm. Ergo, causation is satisfied!

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[1] Proof of causation is a fundamental requirement of not only public nuisance but of all tort law. (W. Page Keeton et al., Prosser and Keeton on the Law of Torts 269 (5th ed. 1984) ("A mere possibility of . . . causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."); citations omitted.)

This verbal legerdemain by the opinion to affirm its conclusion that causation is met here is highly suspect, an illation it seeks to bolster by reliance on the highly deferential "substantial evidence" review standard. Indeed, the appellate opinion's interpretation of what constitutes a "substantial factor" showing causation, combined with the "substantial evidence" review standard to support that finding, stands the ordinary, common sense meaning of the adjective "substantial" – *i.e.*, "essential;" "of ample or considerable amount;" "real" or "material" – on its head to mean the opposite—"feeble;" "weak;" or "flimsy." (Compare *THE OXFORD ENGLISH DICTIONARY XVII* (2001) "Substantial," p. 67 with *WEBSTER'S COLLEGIATE THESAURUS* (1976), "Insubstantial," p. 451.)

This opinion also runs afoul of *In re Firearm Cases* (2005) 126 Cal.App.4th 959, which rebuffed the public nuisance action against defendants for marketing and distributing firearms that became available to criminals because "there is *no causal* connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm. *Defendants manufacture guns according to federal law and guidelines*." (*Id.* at 989; emphasis added.) The appeal court's attempt to distinguish *In re Firearm Cases* by declaring in a footnote that "[t]he firearm manufacturers in [that case], unlike defendants [here], did not affirmatively promote their products for a dangerous use" is unpersuasive. (Opn., p. 52, fn. 44.) When petitioners made, sold and advertised their paint containing lead pigments it too was, like the guns manufactured and sold in *In re Firearms*, in compliance with "federal [and state] law and guidelines." The distinction made by the appellate opinion is, therefore, not a principled one, but a picayune or nit picking divergence, a distinction without a difference.

A number of courts around the country that have decided lead paint cases like this one have rejected attempts to establish causation for manufacturers of a product used, or misused, by consumers. The New Jersey Supreme Court, for instance, found causation lacking because the paint manufacturers no longer controlled the source of the harm, and the conduct that gave rise to the public health crisis was the "poor maintenance of premises where lead paint may be found by the owners of those premises." (*In re Lead Paint Litig.* (N.J. 2007) 924 A.2d 484, 486, 501.) The court noted, "Although one might argue that the product, now in its deteriorated state, interferes with the public health, one cannot also argue persuasively that the conduct of defendants in distributing it, at the time when they did, bears the necessary link to the current health

crisis." (*Id.* at 501-02.) The Rhode Island Supreme Court similarly refused to find paint manufacturers liable because the state had failed to allege that the defendant manufacturers were in control of the lead paint at the time it caused harm to the children.

3. The Opinion Violates Petitioners' Rights to Freedom of Speech and Association.

The federal and California Constitutions guarantee to petitioners the rights to freedom of expression and association. These rights are infringed here by the opinion's linking of petitioner's liability for "public nuisance" to advertisements they made for their products and their membership in trade associations for promotion of their business interests. The fear of damage awards or large abatement judgments "may be markedly more inhibiting [on freedom of expression] than the fear of prosecution under a criminal statute." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277.) Similarly, when it comes to membership in trade associations, "[c]ivil liability may not be imposed . . . by reason of association alone. [I]t is necessary to establish that the group itself possessed unlawful goals and that the individual [member] held a specific intent to further those illegal aims." *(NAACP v. Claiborne Hardware* (1982) 458 U.S. 886, 920.)

At all relevant times here the advertisements petitioners made were truthful and the paints subject to these advertisements were lawful to sell under federal and state law; and the trade association memberships were likewise lawful as the trade association did not exist to accomplish unlawful objectives and petitioners did not join with the specific intent to achieve any unlawful objective.

Nonetheless, the opinion affirmed petitioners' public nuisance liability because their "[p]romotion of lead paint for interior residential use *necessarily implied* that lead paint was safe for such use." (Opn., p. 37; emphasis added.) Say what? The opinion's "necessarily implied" test for misrepresentation or false advertising is taken from "products liability" and "unfair competition" cases, both of which claims were voluntarily dismissed by plaintiffs. (*Santa Clara I* , *supra,* 137 Cal.App.4th at 331.) Absent a specific statute or court decision applicable to implied representations that are false or misleading, there is and cannot constitutionally be liability under the guarantee to freedom of expression for advertisements that are other than *expressly* false. In no case has the Court even suggested that an ad was misleading for failing to disclose

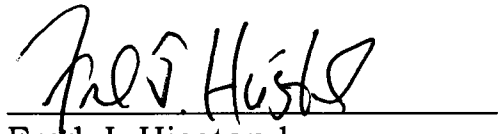
potential health risks. (See, e.g., *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 504 [no liability for advertisements on beer discounts even though the ads did not disclose the health consequences of consuming alcohol]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476 [striking down ban on disclosing alcohol content on beer labels as violative of guarantee to commercial speech that concerns lawful activity and is not expressly misleading].)

The appellate opinion's reliance on alleged "implied representations" in commercial advertisements promoting petitioners' paints that failed to disclose potential health hazards from the paints, and their memberships in a trade association to promote their lawful business interests as indicia of "public nuisance" liability runs roughshod over their rights to freedom of expression and association. This Court should grant review to provide clarity and certainty as to whether these factors may be considered in determining public nuisance liability.

CONCLUSION

For all the aforementioned reasons, *amici* ask the Court to grant review and provide needed guidance on the scope and application of public nuisance law, its causation requirements, and the constitutionality of using evidence of petitioners' advertising and membership in a trade association to establish public nuisance liability.

Respectfully submitted,



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Proof of service attached

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I, David Cooper, am employed in the city of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On February 5, 2018, I served the foregoing document(s) described as: CJAC/Cal Chamber/CMTA *Amici Curiae* Letter Brief in Support of Review in *The People of the State of California v. ConAgra Grocery Products Co., et al.*, S246102 on all interested parties in this action by transmitting via TrueFiling **(except where indicated)** to the following:

See Attached Service List

[X](BY ELECTRONIC COPY or MAIL) I am readily familiar with the practice of this Law Office for electronic submission, as well as the collection and processing of correspondence for mailing with the U.S. Postal Service and, where indicated, such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand.

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

Executed this 5th day of February 2018 at Sacramento, California.

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