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October 27, 2010

VIA FEDEX

The Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Saller v. Crown Cork & Seal Co., Inc.***
Supreme Court Case No. S187072
Letter in Support of Petition for Review

Dear Honorable Chief Justice Ronald M. George and
Honorable Associate Justices:

Amici curiae Chevron U.S.A. Inc. ("Chevron"), Shell Oil Company ("Shell"), and the International Association of Defense Counsel ("IADC") respectfully request that the court grant the petition for review filed by Defendant Crown Cork & Seal Company, Inc. ("Crown") in the above-referenced case. The Court of Appeal's opinion is reported at *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220 (*Saller*).

Chevron and Shell are energy companies, engaged in every aspect of the crude oil and natural gas industry. IADC is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. IADC members represent the largest corporations around the world, including the majority of companies listed in the Fortune 500. Since 1920, IADC has been dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system.

Chevron, Shell, and IADC are vitally interested in this case because Chevron, Shell, and IADC's members are involved in litigation in which the applicability of the consumer expectations test is a recurring issue, the resolution of which may affect the outcome of numerous pending and future products liability cases involving millions of dollars.

As we discuss below, not only does the petition for review present an important question of law, review is also necessary to secure uniformity of decision because the courts of appeal are irreconcilably split on the issue of when the consumer expectations test applies in a design defect case.

I.
BACKGROUND

William Saller alleged his exposure to asbestos-containing pipe covering at a refinery where he worked was a substantial factor in causing his mesothelioma. During trial, the court refused to give a jury instruction based on the consumer expectations test, concluding it did not apply. The jury returned a defense verdict. Plaintiffs appealed, arguing the trial court's refusal to give a consumer expectations instruction was prejudicial error. The Court of Appeal agreed and reversed. Crown now petitions for review of the Court of Appeal's published decision.

II.
THE COURT SHOULD GRANT REVIEW TO CLARIFY THE LIMITED SCOPE OF THE CONSUMER EXPECTATIONS TEST

A. This court has previously attempted to define the consumer expectations test, but further definition is clearly needed.

More than thirty years ago, in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432, this court established two alternative tests for determining whether a product is defectively designed. Under the "risk-benefit" test, a product is defective if the risk of danger inherent in the product's design outweighs the benefits of that design. (*Ibid.*) Under the "consumer expectations" test, a product is defectively designed if it fails "to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Ibid.*)

Since *Barker*, the consumer expectations test has been "repeatedly and widely criticized." (McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II* (1997) 17 Miss. C. L.Rev. 277, 286-287.) Commentators have noted that consumers "are often ill-equipped to formulate reasoned expectations about safety" and that the test "'is so open-ended and unstructured, that it provides almost no guidance to the jury [in] determining whether a defect existed.'" (*Ibid.*; see also Henderson & Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts* (1992) 77 Cornell L.Rev. 1512, 1534.) Commentators have also described the test as an "incoherent basis upon which to measure producer responsibility." (Henderson & Twerski, *Achieving Consensus on Defective Product Design* (1998) 83 Cornell L.Rev. 867, 880.)

This court sought to address some of these criticisms in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 (*Soule*). *Soule* began by noting that, under *Barker*, the consumer expectations test would *not* be appropriate "when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit." (*Id.* at p. 562.) The court concluded that the consumer expectations test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design.*" (*Id.* at p. 567.)

Soule provided several examples of situations in which the facts "may permit an inference that the product did not perform as safely as it should." (*Soule, supra*, 8 Cal.4th at p. 566.) For example, "ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions." (*Id.* at p. 566, fn. 3.) The court explained, "The crucial question in each individual case is whether *the circumstances of the product's failure* permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Id.* at pp. 568-569, emphasis added.) The court believed that if the test were limited in this manner, as *Barker* intended, it would remain "a workable means of determining the existence of design defect." (*Id.* at pp. 569-570.)

B. Further clarification of the consumer expectations test is necessary, particularly in those cases where the "product's failure" involves exposure to a substance that produces complex biological effects.

Since *Soule*, the lower courts have struggled to apply the consumer expectations test to a variety of different product failures, with inconsistent results.

In *Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1568, for example, Division Two of the Second Appellate District held that the consumer expectations test would apply to assess whether an automobile's air bag had defectively deployed in a minor collision. Four years later, in *Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1484-1485 (*Pruitt*), Division Six of the Second Appellate District expressly disagreed with *Bresnahan* in a case involving similar facts. The *Pruitt* court held that the deployment of an air bag was not part of the "'everyday experience' of the consuming public," and that "[m]inimum safety standards for air bags are not within the common knowledge of lay jurors." (*Id.* at p. 1483.) At the same time, the *Pruitt* court recognized that the consumer expectations test might be appropriate in an

obvious case of extreme product failure, such as "air bags inflating for no apparent reason while one is cruising down the road at 65 miles per hour." (*Id.* at p. 1484.)

A few years later, in *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1125, Division Seven of the Second Appellate District found sufficient evidence to support the application of the consumer expectations test in a case involving the *non*deployment of an air bag in a high speed collision. The court cited with approval language from *Pruitt* suggesting that the consumer expectations test was reserved for "'res ipsa-like cases that do not require the application of a general standard to determine defective design.'" (*Id.* at p. 1126, fn. 7, citing *Pruitt, supra*, 72 Cal.App.4th at p. 1484.)

In *Morson v. Superior Court* (2001) 90 Cal.App.4th 775 (*Morson*), Division One of the Fourth Appellate District considered a more complex product failure—latex gloves that caused allergic sensitivity. The court recognized the difficulty of "reconciling products liability law that has developed in the context of merchandise, such as soda bottles and automobiles, with the body of knowledge that deals with medical and allergic conditions and their genesis." (*Id.* at p. 791.) Guided by *Soule*, *Morson* observed that the consumer expectations test could be applied to complex products, "but only where the circumstances of the product's failure are relatively straightforward." (*Id.* at p. 792.) The court concluded that the test could not be applied to the latex gloves because "the alleged circumstances of the product's failure involve technical and mechanical details about the operation of the manufacturing process, and then the effect of the product upon an individual plaintiff's health." (*Ibid.*) The court also observed that consumer expectations should not "ordinarily play a determinative role in determining defectiveness" except in those instances noted by *Soule* involving the "extreme type of product failure that may readily be evaluated by lay persons." (*Id.* at pp. 794-795.)

Morson's careful application of *Soule* stands in stark contrast to the approach the courts of appeal have taken in asbestos cases. In those cases, the courts have effectively concluded that the consumer expectations test applies regardless of the particular circumstances of the product's failure and the resulting injury.

In *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 474-476 (*Sparks*), for example, Division Two of the First Appellate District held that the consumer expectations test applied to determine whether asbestos-containing insulation was defectively designed. Reasoning that there "were neither 'complicated design considerations,' nor 'obscure components,' nor 'esoteric circumstances' surrounding the

'accident,'" *Sparks* summarily concluded that the emission of fibers "capable of causing a fatal lung disease after a long latency period" was "a product failure beyond [an ordinary consumer's] 'legitimate, commonly accepted minimum safety assumptions.'" (*Id.* at pp. 474-475.) The court did not explain how the mechanics and complex biological impact of the claimed *product failure*—the emission of fibers producing a latent injury—was within the "everyday experience of the product's users." (*Soule, supra,* 8 Cal.4th at p. 567, emphasis omitted.) Without identifying any affirmative expectation that a lay consumer might have one way or the other regarding the characteristics of asbestos-containing products, the *Sparks* court in effect concluded that the test applied simply because a consumer would not *expect* to contract lung disease from using the product.

Division Two again held that the consumer expectations test applied to asbestos insulation in *Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1535-1536 (*Morton*). Several years later, in *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1185-1191, Division One of the First Appellate District applied the same reasoning to raw asbestos. In *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1001-1004, Division Three extended the analysis in *Sparks* to a situation that did not involve heavy industrial exposure to raw asbestos or insulation, but a more subtle product failure—the low dose release of asbestos fibers from asbestos packing enclosed in valves and pumps. Citing *Sparks*, the *Jones* court held that there was "nothing complicated or obscure about the design and operation of the products" and that "'[t]he design failure was in [the products'] emission of highly toxic, respirable fibers in the normal course of [their] intended use and maintenance.'" (*Id.* at pp. 1002-1003.) Like *Sparks*, *Jones* did not explain how the claimed product failure—the emission of fibers cumulatively producing a latent injury—was within the everyday experience of ordinary consumers. By accepting the notion that the consumer expectations test applies whenever injury from use of a product is unexpected, these courts endorsed an analysis under which any product is "defective" if an unexpected injury occurs.

In the instant case, the Court of Appeal followed the First Appellate District's approach. Relying principally on *Sparks* and *Jones*, the court concluded that "[t]he use of asbestos insulation is a product that is within the understanding of ordinary lay consumers" and "the jury could infer that the ordinary consumer of the product, namely refinery workers, would assume that the use of the product was safe." (*Saller, supra,* 187 Cal.App.4th at p. 1236.) The court also rejected the contention that the consumer expectations test does not apply in cases where the product's dangers were unknown to consumers, reasoning that "[i]f knowledge of the hazardous nature of the

product were a prerequisite for the test to apply, then no product would ever fail to meet the safety expectations of the reasonable consumer." (*Ibid.*)

The Court of Appeal's approach in this case is problematic for several reasons.

First, this case poses the same difficulty noted in *Morson*—reconciling traditional product liability law "with the body of knowledge that deals with medical . . . conditions . . . and their genesis." (*Morson, supra*, 90 Cal.App.4th at p. 791.) The circumstances of contracting mesothelioma from exposure to asbestos involves extensive technical expertise in such fields as epidemiology, pathology, pulmonology, materials science, and risk assessment—all of which are beyond the everyday experience of ordinary consumers. (The same is true of any number of chemical products that may cause cancer through the complex interplay of separate biological systems after a long latency period.) Just as the medical workers who regularly wore latex gloves in *Morson* had no expectations about the gloves' chemical properties with respect to skin reactivity, workers exposed to asbestos-containing insulation would have no expectations about whether the insulation would release asbestos fibers, much less any expectations as to whether any released fibers would be of the type and quantity that could raise the relative risk of asbestos-related illness.

Second, like the other asbestos cases discussed above, this decision reduces the consumer expectations test to the simplistic and legally incorrect question of whether the person using the product expected to be injured—a question to which a jury would almost always answer "no." If liability may attach whenever a consumer reasonably but incorrectly assumes a product is safe, then any product that causes injury would be defective. Such a construction of the consumer expectations test is precisely what this court sought to avoid in *Soule*, when it emphasized that "the jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses" and that, in cases beyond a consumer's everyday experience, "the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*." (*Soule, supra*, 8 Cal.4th at p. 568.)

Third, the court's analysis is inconsistent with the approach advanced by the Restatement (Third) of Torts. As *Morson* observed, the Restatement (Third) of Torts, like *Soule*, supports a "narrow view of the use of the consumer expectations test." (*Morson, supra*, 90 Cal.App.4th at p. 794.) The Restatement embraces the risk-benefit test for design defect claims and relegates consumer expectations to one factor to be considered in weighing a design's risks and benefits. (See Rest.3d Torts, Products Liability § 2.) But the Restatement also provides that a plaintiff need not rely on the

risk-benefit test where "common experience teaches that an inference of defect may be warranted under the specific facts," including circumstances surrounding the product's failure. (*Id.* at p. 17.) As the reporter's notes observe, this approach is indistinguishable from cases like *Soule*, which speak in terms of "reasonable consumer expectations" and "allow a res-ipsa type of inference of defect" where a product fails in a "catastrophic fashion and the inference of defect . . . is manifest." (*Id.* at p. 74; see also *id.* at pp. 75-76 [observing that *Soule* is "completely consistent with this Restatement"].)

Finally, the instant decision goes even further than *Sparks* and *Morton*—the other published insulation cases—by concluding that a consumer expectations instruction should be given even if the record contains no evidence of consumer expectations. (See *Saller, supra,* 187 Cal.App.4th at p. 1236, fn. 11.) *Sparks* and *Morton* relied on testimony in the record about the safety expectations of the plaintiff and other workers to conclude that a consumer expectations theory was properly submitted to the jury. In *Sparks*, for example, the plaintiff and his co-workers testified that they manipulated asbestos-containing insulation and assumed it was innocuous to do so. (*Sparks, supra,* 32 Cal.App.4th at pp. 475-476.) Similarly, in *Morton*, the plaintiff and others testified that they believed the insulation products were safe and had no expectation that exposure to those products would make them ill. (*Morton, supra,* 33 Cal.App.4th at pp. 1535-1536.) Here, by contrast, plaintiffs presented *no evidence* of any consumer expectations regarding the safety of the insulation used at the refinery. (See *Saller, supra,* 187 Cal.App.4th at p. 1236, fn. 11.) By allowing a consumer expectations theory to proceed under these circumstances, the Court of Appeal has effectively erased *any* limits to the applicability of the consumer expectations test. If this decision is allowed to stand, almost *every* case will require a consumer expectations jury instruction, a result that is clearly contrary to *Soule*.

In sum, the applicability of the consumer expectations test has split and confused the courts of appeal. The issue will unquestionably arise again in the future, in asbestos and non-asbestos cases alike. The approach adopted in this case only adds

further confusion to this troubled area of law. The court should grant review to provide sorely-needed guidance to the lower courts on this important issue.

Respectfully submitted,

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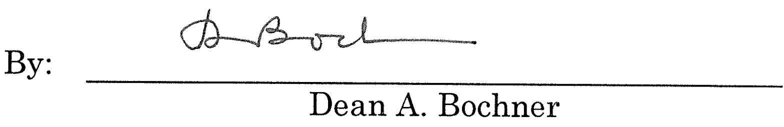
By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

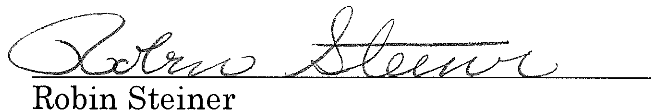
On October 27, 2010, I served true copies of the following document(s) described as **LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 27, 2010, at Encino, California.



Robin Steiner

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Supreme Court Case No.: S187072
Court of Appeal Case No.: B206763
LASC Case No.: BC342363

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