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April 23, 2014

Supreme Court of Texas
P.O. Box 12248
Austin, Texas 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, *amicus curiae* Texas Civil Justice League files this *amicus* letter in the above-referenced cause.

Statement of Interest

The Texas Civil Justice League (“TCJL”) is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair and balanced civil justice system. Since its inception in 1986, TCJL has consistently striven, through legislative advocacy and participation in important matters before the Court, to achieve a fair and balanced tort liability system that provides access to judicial remedies for legitimate claims, while encouraging capital investment and job creation in this state. TCJL’s membership includes numerous manufacturers and other businesses that own and make

improvements to real property and that frequently sell such property to another manufacturer or business. Its membership also includes engineers and contractors that design and construct improvements to real property and that do business with the reasonable expectation that statutes of repose will operate effectively in our state. The outcome of this case is of critical importance to these businesses and to their employees. It is equally important to the jurisprudence of this state. This letter has been prepared in the ordinary course of TCJL's operations.

Summary of Argument

The First District Court of Appeals erred in reversing the trial court's determination that the Respondent's claim was barred by Texas's ten-year statute of repose for engineers who design, plan, and inspect improvements to real property. If the Court of Appeals' decision is permitted to stand, it will effectively nullify the statute and subject engineers to continuing and indefinite liability for alleged design defects. In addition to having the potential to substantially raise the cost of engineering services and insurance, the decision is so far out of step with the national mainstream of tort law that businesses, especially those that must allocate capital investment to facilities located both within and outside of Texas, may decide that the potential costs of investing in improvements to real property in Texas are too great.

Argument

The First Court of Appeals' refusal to apply the statute of repose in this case is grossly erroneous and places Texas well outside the national mainstream of tort law.

Like many states, the Texas Legislature has enacted a ten-year statute of repose that applies to claims against registered and licensed engineers, architects, and other professionals that design, plan, and inspect improvements to real property. TEX. CIV. PRAC. & REM. CODE § 16.008. The present case involves a project to enhance the efficiency and safety of a manufacturing process through applied engineering. The project was supervised by a Texas-licensed engineer and carried out by a team of engineers, one member of which had not yet been licensed but who worked under the direct supervision of a licensee. There is no dispute about any of these facts.

The Court of Appeals appears to have based its decision on the slenderest of rationales: that the supervised participation of an unlicensed engineer in a project undertaken by a team of licensed engineers blows the statute of repose for everyone. If this interpretation of the statute is correct, then the common business practice of training appropriately credentialed but unlicensed engineers under the direct supervision of licensed engineers will almost certainly cease. Such a result makes no sense under any reasonable

understanding of the language or policy objectives of the statute of repose and must be corrected.

If the Court of Appeals' interpretation of the statute of repose is a correct reading of the law, it leads to the absurd result that an owner of real property that employs its own engineers may be sued without temporal limitation (even if the owner has long since sold the property), but an owner that contracts with an independent third party for the same services may not. If the Texas Legislature had intended for the statute to have this meaning, it certainly would have said so explicitly. Contrary to the Court of Appeals' reasoning, Texas law makes no distinction between engineering services provided by employees of an owner and those provided by an independent contractor, nor should it.

TCJL further concurs with *amicus* Texas Chemical Council that the Court of Appeals' decision radically undermines longstanding Texas law governing premises liability by adopting a "negligent activity" theory never before applied in Texas. If allowed to stand, this radical new theory will subject property owners in Texas to temporally indefinite and unlimited liability for conditions on real property that has been conveyed to another owner. TCJL urges the Court to grant review and correct this erroneous interpretation of Texas law as well.

There is no question that Texas' overall economic resilience has much to do with the robust innovation of its manufacturing sector. TCJL has said this before (and will undoubtedly keep saying it), but a fundamental part of this economic success story has been a steady and long-term improvement in the civil justice system. Such improvement is anchored both in judicious and carefully considered legislative policy choices and in this Court's consistent and beneficial judicial restraint with respect to expanding tort liability by *fiat*. The statute of repose at issue in this case is only one of these important policy choices, but the certainty it imparts is particularly vital to the stability of the whole tort liability system.

This Court needs no reminder that the First District Court of Appeals exercises jurisdiction over one of the most densely industrialized regions of the United States, if not the world. If the Court of Appeals' outlier decision is not corrected, the law in this jurisdiction will change radically and inflict a severe shock upon Texas' manufacturing economy. This Court can prevent that from happening.

Conclusion and Prayer

TCJL respectfully requests this Court to grant review in this cause, reverse the Court of Appeals' decision, and reinstate the trial court's order.

Respectfully submitted,

/s/ George S. Christian

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,014 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus* letter has been served by electronic mail to all attorneys of record as listed below on August 19, 2013.

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