LAW OFFICES OF
STEPHEN GARDNER

August 25, 2004

Mr. Andrew Weber
Clerk, Supreme Court of Texas
210 W. 14th Street, Room 104
Austin, Texas 78701

Re: No. 01-0346
PPG Industries, Inc. v. JMB/Houston Center Partners Partnership

Dear Mr. Weber:

I am writing on behalf of the National Association of Consumer Advocates as *amicus curiae,* to address issues arising from the Court's opinion in this appeal, *PPG Industries, Inc. v. JMB/Houston Center Partners Partnership,* 47 Tex. Sup. J. 822 (July 9, 2004) ("*PPG*").

Please bring this *amicus* letter brief to the attention of the Court at your earliest convenience. Twelve copies are enclosed for that purpose.

Interest of *Amicus Curiae*

The National Association of Consumer Attorneys ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of over 1000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA has established itself as one of the most-effective advocates for the interests of consumers in this country. Its advocacy takes many forms, including the publication of guidelines for the appropriate use of the class action device in the consumer context.

Pursuant to Texas Rule of Appellate Procedure 11, I affirm that neither NACA nor I have been paid any fee for preparing this letter brief, nor will any fee be paid in the future.

Summary of Points

The Court's opinion in *PPG Industries, Inc. v. JMB/Houston Center Partners Partnership,* 47 Tex. Sup. J. 822 (July 9, 2004) ("*PPG*"), raises three significant concerns for Texas jurisprudence in the future:

1. *PPG* unnecessarily extended its opinion in *Amstadt v. U.S. Brass,* an implied warranty case—in a case that does not involve implied warranties and in which no implied warranty issues were raised or briefed—in a manner that abandons well settled principles of warranty and Deceptive Trade Practices Act law.

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2. *PPG* directly contradicts the language and objective of the Legislature's recent amendments to the Product Liability Act that are designed to protect innocent sellers from product liability claims when the manufacturer is ultimately responsible for the alleged defect.

3. The Court should have found a twenty-year warranty as a matter of law because PPG did not establish by clear affirmative proof that it had taken the warranty out of the transaction.

Point 1.

The Court unnecessarily extended its opinion in *Amstadt v. U.S. Brass.*

The *PPG* opinion contains several references to *Amstadt v. U.S. Brass, 919 S.W.2d 644 (Tex. 1996),* and the ability of a consumer to maintain a DTPA implied warranty claim against a manufacturer that NACA concludes is an unnecessary extension of the law.

Specifically, on page 12 (of the slip opinion) the Court states: "Thus we have established a clear distinction between DTPA and warranty claims: A downstream buyer *can* sue a remote manufacturer for breach of an implied warranty, but *cannot* sue under the DTPA." *PPG* slip op. (emphasis added).

As the Court recognizes in footnotes 27 and 37, this holding is an apparent extension of *Amstadt* that overrules an earlier Texas Supreme Court case, *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983). However, *PPG* fails to acknowledge or offer any justification for such a drastic change in public policy.

In *Gupta,* this Court said, "The effect of the latent defect on the subsequent owner is just as great as on the original buyer and the builder is no more able to justify his improper work as to a subsequent owner than to the original buyer. The public policy upon which the *Humber* decision was based applies equally to both situations." *Id.* at 169. The *PPG* opinion does not offer any reason for abandoning the public policy the Corut recognized twenty years ago in *Gupta,* nor does it explain why the need for the protections provided by *Gupta* is any less compelling today.

The *PPG* opinion imposes a privity requirement for an implied warranty claim asserted through the DTPA. This is also contrary to the mandate of DTPA § 17.50(a)(2), and more than twenty years of case law recognizing that whether a warranty claim is pled through the DTPA does not affect the nature or applicability of the warranty.

Section 17.50(a)(2) of the Deceptive Trade Practices Act provides that a consumer may maintain an action under the Deceptive Trade Practices Act for "breach of an express or implied warranty." In *La Sara Grain Co. v. First National Bank of Mercedes,* 673 S.W.2d 558 (Tex. 1984), the court made it clear that the DTPA does not create any warranties, but that any existing warranty may form the basis for a claim under section 17.50(a)(2).

As the court further noted in *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991), all issues relating to the warranty, such as waiver, disclaimers and limitations, are also dealt with by non-DTPA state law.

In *Nobility Homes of Texas v. Shivers, 557 S.W.2d 77 (Tex. 1977)* and *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980), this Court held that privity is *not* required for maintaining a claim for breach of an implied warranty. As the court recognizes in its

opinion in *PPG Industries*, Texas law clearly authorizes a buyer to sue the manufacturer for breach of implied warranty. Under *La Sara Grain*, that claim should be actionable through section 17.50(a)(2) of the DTPA.

The Court bases the imposition of a new form of privity with respect to implied warranty claims, and the reversal of its consistent DTPA jurisprudence, based on its opinion in *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996). However, the issue in *Amstadt*—whether a consumer may maintain a DTPA misrepresentation or unconscionability claim against a remote party—differs significantly from the issue presented in *PPG Industries*.

Amstadt did not involve or discuss DTPA warranty claims. The analysis in *Amstadt* is not relevant to the facts of *PPG*. Moreover, even assuming the applicability of *Amstadt*, its requirements are satisfied. In *Amstadt*, this Court held that a consumer must show that the defendant's conduct occurred "in connection with the plaintiff's transaction in goods or services." As discussed above, long-standing, well settled, Texas jurisprudence makes it clear that implied warranties in the sale of goods run to all subsequent purchasers. Thus, the implied warranties made by PPG extended to JMB at the time of its "transaction," and, as a matter of law, were clearly made "in connection with" JMB's purchase.

If the Court feels it is necessary to extend *Amstadt* to implied warranties, *PPG* is not the appropriate case to do so. *Amstadt* was not cited in any of the briefs before this Court. No implied warranties were even at issue in this case. Any extension of *Amstadt* and reversal of *Gupta* should be done in the context of a case that involves an implied warranty claim and provides an opportunity for the parties to properly brief and argue this point of law.

Point 2.

The Court's opinion directly contradicts the language and objective of the Legislature's recent amendments to the Product Liability Act.

Furthermore, the *PPG* language regarding implied warranties is contrary to the legislative mandate of Chapter 82 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, as amended in 2003. In *PPG*, the Court holds that an implied warranty DTPA claim cannot be brought directly against a manufacturer, and requires it to be brought against the seller, who, in appropriate cases, may seek indemnification against the manufacturer. *See* footnote 56 and accompanying text.

However, Section 82.003 of the Product Liability Act provides in relevant part that: "A seller that did not manufacturer a product is not liable for harm caused to the claimant by that product...." Therefore, the Court's decision requires that a claim be brought against an entity that the Legislature has declared should not be liable.

Chapter 82 is designed to take innocent sellers out of product liability litigation and place liability where it belongs, on those who manufactured the defective product. Judicial economy mandates that law be structured to avoid unnecessary litigation and promptly impose liability on the party that will ultimately bear responsibility.

Chapter 82 is consistent with this notion of judicial economy. The *PPG* decision, however, will result in liability for that same innocent seller that the Legislature, as well as judicial economy, attempt to exempt from liability. The Court's decision imposes unnecessary burdens on sellers by requiring them to defend lawsuits where they are not

the party who will bear ultimate responsibility, and requires manufacturers to bear additional costs in forms of indemnification to the seller.

Point 3.

The Court should have found a twenty-year warranty as a matter of law.

In *PPG*, the Court mistakenly remands JMB/Houston Center's warranty claim for a re-trial on the issue of whether the 20-year warranty was a "basis of the bargain." There appears to be no dispute that the warranty at issue was published by PPG with the intent that it be relied on by purchasers of its products. Evidence established that HCC was aware of the warranty at the time of the purchase of the Twindows, and the warranty was a factor in its decision to purchase. This evidence should be sufficient as a matter of law to establish the warranty unless PPG proves by clear and affirmative proof that it was expressly negated by PPG.

Under the UCC, once a seller has made a warranty, "clear, affirmative proof" is required to *take the warranty out* of the agreement. As defined by section 1.201 of the Business and Commerce Code, agreement "as distinguished from 'contract' means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade...." The Official Comments to the UCC further provide:

> In actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. ***Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.*** The issue normally is one of fact.

TEX. BUS. & COM. CODE ANN. § 2.313, comment 3.

The Court points to no evidence that the 20-year warranty, once made, *was taken out of* the agreement. The Court should recognize what the Official Comments and commercial reality make clear—as a matter of law, all published warranties become part of the basis of the bargain, unless clear evidence shows otherwise. Retrying the issue of basis of the bargain in this case will result in nothing more than needless time and expense.

Request

For these reasons, NACA respectfully requests that the Court grant JMB/Houston Center's motion for rehearing and (1) delete any reference to *Amstadt* in its opinion, (2) refrain from imposing any limitations upon the assertion of a DTPA implied warranty claim against a remote manufacturer, and (3) affirm the judgment for JMB on the twenty-year warranty.

Certificate of Service

I certify that a copy of this letter brief has been served on all parties by copy of this letter.

Thank you for your courtesies.

Sincerely,

Stephen Gardner, for the

National Association of Consumer Advocates

Cc: parties