17-3941(L)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

17-3943 (CON), 17-3944 (CON), 17-3945 (CON), 17-3946 (CON), 17-3947 (CON), 17-3948 (CON), 17-3949 (CON), 17-3950 (CON), 17-3952 (CON), 17-3953 (CON), 17-3954 (CON), 17-3955 (CON), 17-3956 (CON), 17-3957 (CON), 17-3958 (CON)

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Plaintiffs-Appellees,

-versus-

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL, INC. f/k/a/ ALLIED SIGNAL. INC., and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC.,

Defendants-Appellants.

On Appeal (by permission) from the United States District Court of the Northern District of New York (Kahn, J.)

MOTION OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. & NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Product Liability Advisory Council, Inc. has no parent corporation and no company owns 10% or more of its stock.

Amicus Curiae National Association of Manufacturers is a not for profit 501(c)(6) corporation, and has no corporate affiliations with any of the parties involved in the litigation.

MOTION OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. & NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), the Product Liability Advisory Council, Inc. ("PLAC") and the National Association of Manufacturers ("NAM") respectfully move this Court for leave to file the attached *amicus curiae* brief in support of Defendants-Appellants. The Chamber has received Defendants-Appellants' consent for the filing of this motion. Plaintiffs-Respondents have also advised the Chamber that they consent to this motion as well.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to improvement and reform of the law in the United States and elsewhere, particularly that governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries throughout the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of

[1] See https://plac.com/PLAC/AboutPLACAmicus.

PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law affecting product risk management, including appearing in Dummit v. Crane Co., APL-2014-00209 (N.Y. filed Oct. 1, 2015), and Caronia v. Philip Morris, USA, Inc., CTQ-2013-00004 (N.Y. filed Oct. 5, 2013).

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

This interlocutory appeal by permission involves claims that New York would allow plaintiffs with no present physical injury to person or property to sue for "medical monitoring" costs and/or purely economic losses. These are significant issues that directly affect the membership of PLAC and the NAM.

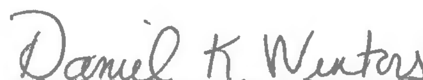
DESIRABILITY AND RELEVANCE OF AMICUS CURIAE BRIEF

As Judge Kahn recognized, the decision being appealed raises significant issues concerning of what constitutes cognizable tort injury and damages under New York law. Only plaintiffs who were actually injured should bring tort cases. The law does not, and should not, allow persons lacking present physical injury or property damage to sue over mere exposure to allegedly hazardous substances. This appeal also concerns the proper role of federal courts predicting state law when sitting in diversity jurisdiction. Federal courts exercising diversity jurisdiction should not embrace novel expansions of state common-law liability.

CONCLUSION

For these reasons, and those more fully expressed in their brief, PLAC and the NAM respectfully request leave to file this amicus curiae brief in support of Defendants-Appellants.

Respectfully submitted,



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Dated: March 1, 2018

Attorneys For Amici Curiae Product Liability Advisory Council, Inc. and National Association Of Manufacturers

DECLARATION OF DANIEL K WINTERS IN SUPPORT OF MOTION OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. & NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Daniel K. Winters, hereby declares, pursuant to 28 U.S.C. §1746, as follows:

1. I am a member of the firm Reed Smith LLP and counsel to the Product Liability Advisory Council, Inc. (PLAC) and the National Association of Manufacturers ("NAM"). I am duly admitted to practice before this Court.

2. I submit this declaration in support of the motion by PLAC and the NAM to submit the attached brief as *amicus curiae*. PLAC and NAM have received Defendants-Appellants' consent for the filing an amicus curiae brief. Plaintiffs-Appellants have advised that they do not consent to the filing of the annexed *amicus curiae* brief. I do not know whether the Plaintiffs-Appellants intend to file a response. A copy of the proposed brief is annexed to this Motion.

3. The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to improvement and reform of the law in the United States and elsewhere, particularly that governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries

throughout the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC.

4. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law affecting product risk management, including appearing in Dummit v. Crane Co., APL-2014-00209 (N.Y. filed Oct. 1, 2015), and Caronia v. Philip Morris, USA, Inc., CTQ-2013-00004 (N.Y. filed Oct. 5, 2013).

5. The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation.

6. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

7. Members of PLAC and NAM, have a strong interest in preserving state authority over state law. Federal courts exercising diversity jurisdiction should not embrace novel expansions of state common-law liability. Further, PLAC and NAM believe that only plaintiffs who were actually injured should bring tort cases. The law does not, and should not, allow persons lacking present physical injury or property damage to sue over mere exposure to allegedly hazardous substances. PLAC and NAM thus oppose creation of claims solely for "medical monitoring" or for purely economic loss absent present physical injury.

8. Accordingly, PLAC and NAM respectfully request that the Court grant then leave to appear as *amicus curiae* in order to submit the accompanying brief.

9. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Respectfully submitted,

Daniel K. Winters

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system and by U.S. mail to:

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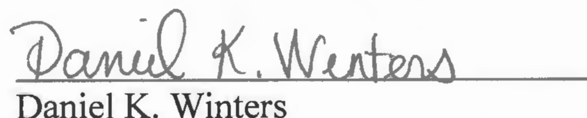

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BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. & NATIONAL ASSOCIATION OF MANUFACTURERS SUPPORTING DEFENDANTS-APPELLANTS

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Daniel K. Winters

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INTEREST OF *AMICI CURIAE*[1]

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[1] No person or entity, including the parties and their counsel, other than *amici curiae* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

[2] See https://plac.com/PLAC/AboutPLACAmicus.

U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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This brief is respectfully submitted to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

SUMMARY OF ARGUMENT

Plaintiffs improperly ask this Court to diverge from established New York law, which flatly rejects tort litigation by persons, such as them, who have suffered neither present physical injury nor actual property damage. Specifically, the New York Court of Appeals has refused to recognize medical monitoring claims by

otherwise uninjured persons, and has enforced the economic loss doctrine to bar claims for purely economic loss. Under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ("Erie"), federal courts may not predict the sort of expansion of state tort liability that plaintiffs here seek.

The U.S. Supreme Court and most other courts have declined to extend traditional causes of action to allow recovery for medical monitoring expenses absent present physical injury. They recognize that abandoning the foundational present injury element of tort law would result in exactly what is being attempted here – mass recovery of speculative medical monitoring expenses by uninjured persons, the vast majority of whom will never suffer any actual harm.

Finally, New York's economic loss doctrine sits squarely in the mainstream of nationwide precedent as not only the majority rule – but the better rule. Promoting broad recovery of purely economic loss in common-law tort actions is costly, unnecessary, and unwise.

INTRODUCTION

The issues here are already decided by New York's highest court. See Caronia v. Philip Morris USA, Inc., 22 N.Y.3d 439, 982 N.Y.S.2d 40, 5 N.E.3d 11 (2013); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280, 727 N.Y.S.2d 49, 750 N.E.2d 1097 (2001). The ultimate authority on New York common law has rejected both of these liability theories – medical monitoring and purely economic (reputational) loss to property – and its policy-

laden decisions should not be second-guessed by federal courts obligated to apply New York law as it is, and not as some might wish it to be. Chief Judge Cardozo, while sitting on the New York Court of Appeals, aptly described the basis of jurisprudence:

> A judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.

Benjamin N. Cardozo, "Nature of the Judicial Process," at 141 (1921). His successors on the Court of Appeals have carefully set the relevant boundaries of liability.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED THE PROPER BOUNDS OF ITS DIVERSITY JURISDICTION.

As the defendants discuss in great detail, both medical monitoring and reputational harm to property have been soundly rejected by the New York Court of Appeals – medical monitoring in Caronia by a 4-2 vote, and purely reputational loss to property in 532 Madison, by a unanimous court. That court has shown no inclination to revisit either of these holdings.

Thus, the decision below violates accepted federal practice. As New York law does not recognize – indeed rejects – tort recovery of medical monitoring and economic loss to property absent present physical injury, this Court need look no

further to reverse the decision below. In this diversity case, creation of new, expansive liability theories is beyond the pale of Erie prediction:

> A federal court in diversity is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975). Federal "courts must give the fullest weight to pronouncements of the state's highest court." Runner v. New York Stock Exchange, Inc., 568 F.3d 383, 386 (2d Cir. 2009) (citation and quotation marks omitted). Here, in relatively recent opinions, solid majorities of the New York Court of Appeals have rejected both of plaintiffs' theories.

Federal courts sitting in diversity are supposed to rule conservatively. "In addressing unsettled areas of state law, we are mindful that '[o]ur role as a federal court sitting in diversity is not to adopt innovative theories that may distort established state law.'" Travelers Insurance Co. v. Carpenter, 411 F.3d 323, 329 (2d Cir. 2005) (quoting National Union Fire Insurance Co. v. Stroh Cos., 265 F.3d 97, 106 (2d Cir. 2001)).[3] These theories' disregard of the foundational present injury requirement is precisely why New York's highest court rejects them.

Caronia recognized that "[t]he legislature is plainly in the better position to study the impact and consequences of creating such a cause of action." 22 N.Y.3d at 452, 982 N.Y.S.2d at 48, 5 N.E.3d at 19. In New York, expansive liability

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[3] Accord, e.g., City of Johnstownv. Bankers Standard Insurance Co., 877 F.2d 1146, 1153 (2d Cir. 1989).

theories "are best and more appropriately explored and resolved by the legislative branch of our government ... particularly where ... there are competing interests at stake." Hall v. United Parcel Service, Inc., 76 N.Y.2d 27, 34, 556 N.Y.S.2d 21, 25, 555 N.E.2d 273, 277 (1990). Plaintiffs' arguments are better directed to policy-making bodies, not federal courts exercising only diversity jurisdiction.

II. THE LAW PROPERLY REJECTS ACTIONS FOR MEDICAL MONITORING EXPENSES IN THE ABSENCE OF PRESENT PHYSICAL INJURY.

In Caronia the court rejected an indistinguishable liability claim, that "increased risk" of possible future physical harm allows recovery of medical monitoring expenses, despite a plaintiff "not claim[ing] to have suffered physical injury or damage to property." 22 N.Y.3d at 446, 982 N.Y.S.2d at 43, 5 N.E.3d at 14. Caronia expressly retained the "physical harm requirement" for tort cases:

> The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.

Id. "[M]edical monitoring [a]s an element of damages ... may be recovered only after a physical injury has been proven." Id. at 45, 983 N.Y.S.2d at 45, 5 N.E.3d at 16.

The Caronia plaintiffs "asked [the Court of Appeals] to follow ... Donovan[4] in particular." Id. at 450, 982 N.Y.S.2d at 47, 5 N.E.3d at 17.

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[4] Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891 (Mass. 2009).

Donovan is a Massachusetts decision that allowed recovery of medical monitoring based on "subcellular changes that substantially increased the risk" of future injury – precisely what plaintiffs claim here. Donovan, 914 N.E.2d at 902. Instead of starting New York down that slippery slope, the Caronia court recognized:

- "[T]hat there has been an interference with an interest worthy of protection has been the beginning, not the end, of our analysis."
- "[T]he potential systemic effects of creating a new, full-blown, tort law cause of action cannot be ignored."
- "[D]ispensing with the physical injury requirement could permit tens of millions of potential plaintiffs ... effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage."
- "[I]t is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease."

Caronia, 22 N.Y.3d at 451, 982 N.Y.S.2d at 46-47, 5 N.E.3d at 17-18 (citations and quotation marks omitted). Thus, the court "conclude[d] that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring." Id. at 452, 982 N.Y.S.2d at 47, 5 N.E.3d at 18.

Caronia placed New York law squarely in the judicial mainstream. The United States Supreme Court held in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997) ("Buckley"), that medical monitoring was not recoverable without present physical injury. Like the court in Caronia, Buckley was "troubled" by the implications of abandoning the present injury requirement including: (1) a "flood" of claims based on fear and speculation; (2) allowing

claims that are "unreliable and relatively" trivial; (3) "diminish[ing]" resources available to who are actually injured; (4) unpredictable and unlimited liability; and (5) "higher prices" born by the public. Id. at 435-36, 443-45. After canvassing state-law medical monitoring precedents, Buckley concluded that such claims were "beyond the bounds of currently evolving common law." 521 U.S. at 439-40.

The Supreme Court reiterated its determination that medical monitoring claims absent present injury were neither good policy nor good law in Norfolk & Western Railway Co. v. Ayers, 538 U.S. 135 (2003):

> Metro-North stressed that holding employers liable to workers merely exposed to [an alleged toxin] would risk "unlimited and unpredictable liability" … [and] sharply distinguished exposure-only plaintiffs from "plaintiffs who suffer from a disease." … The categorical approach endorsed in Metro-North serves to reduce the universe of potential claimants to numbers neither "unlimited" nor "unpredictable." Relevant here, and as [defendant] recognizes, of those exposed …, only a fraction will develop [actual injury].

Id. at 156-57 (citations omitted).[5]

Similarly to Buckley and Norfolk & Western, numerous state high courts reject medical monitoring claims based on only supposed "injurious exposure to a toxic substance" or an "increased risk of developing cancer."

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[5] While Buckley and Norfolk & Western both interpreted a specific statute, federal courts have extended those holdings to other federal causes of action. See June v. Union Carbide Corp., 577 F.3d 1234, 1249-51 (10th Cir. 2009); In re Hanford Nuclear Reservation Litigation, 534 F.3d 986, 1009 (9th Cir. 2007); Syms v. Olin Corp., 408 F.3d 95, 105 (2d Cir. 2005).

Oregon. Lowe v. Philip Morris USA, Inc., 183 P.3d 181 (Or. 2008), rejected medical monitoring recovery where "[t]his is not a case in which plaintiff has alleged that she has suffered any present physical harm as a result of defendants' negligence." Id. at 183. The law established that "[o]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property." Id. at 186 (citations omitted). The same policy issues raised in Caronia and Buckley "d[id] not provide a basis for overruling [the jurisdiction's] well-established negligence requirements." Id. at 187.

Michigan. In Henry v. Dow Chemical Co., 701 N.W.2d 684 (Mich. 2005), a class action seeking monitoring for alleged environmental exposure to toxins failed. While "the common law is an instrument that may change as times and circumstances require," Henry declined "plaintiffs' invitation to alter the common law of negligence liability to encompass a cause of action for medical monitoring." Id. at 686. "Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns," which was beyond the resources and the capacity of the court to perform. Id. ("plaintiffs have asked this Court to effect a change in Michigan law that, in our view, ought to be made, if at all, by the Legislature").

Nevada. In Badillo v. American Brands, Inc., 16 P.3d 435, 440-441 (Nev. 2001), the Nevada Supreme Court rejected class action claims asserting an independent claim for medical monitoring absent present physical injury, holding

that such a novel cause of action "is generally a legislative, not a judicial, function," and that it always exercises its inherent judicial powers to develop common law and equity "narrowly" and "cautiously." A cause of action for medical monitoring absent present physical injury was novel, contrary to law, and raised many complex and difficult issues of law and policy. *Id.* at 440-41 (noting that "lack of consensus in other jurisdictions" concerning the elements of the proposed cause of action and complex issues of legal causality and proof concerning increased risks or future harm).[6]

Alabama. Hinton v. Monsanto Co., 813 So.2d 827 (Ala. 2001), refused to permit a class alleging environmental pollution to recover medical monitoring costs without there being a "manifest, present injury." Id. at 829. "To recognize medical monitoring as a distinct cause of action … would require this Court to completely rewrite [the] tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide. We are unprepared to embark upon such a voyage." Id. at 830. Following Buckley, Hinton "f[ou]nd it inappropriate … to stand Alabama tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what **might** occur in the future. … That law provides no redress for a plaintiff who has no present injury or illness." Id. at 831-32

[6] In Sadler v. PacifiCare, Inc., 340 P.3d 1264, 1270-71 (Nev. 2014), the same court permitted medical monitoring as damages in a traditional negligence claim.

(emphasis original). See Houston County Health Care Authority v. Williams, 961 So. 2d 795, 810-11 (Ala. 2006) (reaffirming Hinton).

Kentucky. In Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849, 851 (Ky. 2002), another class of plaintiffs sought a court-supervised medical monitoring fund. The court rejected any cause of action absent present physical injury. Id. "In the name of sound policy," the Kentucky court declined "to depart from well-settled principles of tort law." Id. at 857. The court agreed with Buckley and "a persuasive cadre of authors from academia" that recovery for bare increased risk could create "significant public policy problems." Id. "[H]aving weighed the few potential benefits against the many almost-certain problems of medical monitoring," the court was "convinced" that there was "little reason to allow such a remedy without a showing of present physical injury." Id. at 859. "Traditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles." Id.

Mississippi. Paz v. Brush Engineered Materials Inc., 949 So.2d 1 (Miss. 2007), held that recovery for medical monitoring required a present physical injury. "Recognizing a medical monitoring cause of action would be akin to recognizing a cause of action for fear of future illness. Each bases a claim for damages on the possibility of incurring an illness with no present manifest injury."

Id. at 5. The court found support in its survey of state and federal court decisions regarding medical monitoring claims. Id. at 6 nn. 3-5 (collecting cases).

Louisiana. The Louisiana experience demonstrates the wisdom of leaving recognition of medical monitoring claims to legislative action. In Bourgeois v. AP Green Industries, 716 So. 2d 355, 360-61 (La. 1998), the court took upon itself to resolve the many sensitive and complex issues in favor of allowing medical monitoring recovery with no other injury. Less than a year later, the Louisiana legislature overruled Bourgeois with a statute requiring proof of present physical injury. La. Civ. Code Ann. art. 2315 (excluding costs for medical treatment or surveillance unless directly related to a "manifest physical or mental injury or disease"). See Bonnette v. Conoco, Inc., 837 So. 2d 1219, 1230 n.6 (La. 2003) (recognizing abolition).

Numerous other decisions agree with these courts' reasoning that recovery of medical monitoring by uninjured plaintiffs raises many questions that are beyond the competence of courts to address.

Arkansas: In re Prempro, 230 F.R.D. 555, 569 (E.D. Ark. 2005).

Connecticut: McCullough v. World Wrestling Entertainment, Inc., 172 F. Supp.3d 528, 567 (D. Conn. 2016); Goodall v. United Illuminating, 1998 WL 914274, at *10 (Conn. Super. Dec. 15, 1998); Bowerman v. United Illuminating, 1998 WL 910271, at *10 (Conn. Super. Dec. 15, 1998) (identical opinions).

Delaware: Merganthaler v. Asbestos Corp. of America, 480 A.2d 647, 651 (Del. 1984); M.G. v. A.I. Dupont Hospital for Children, 393 F. Appx. 884, 892-93 & n.7 (3d Cir. 2010) (improper for federal court to make Erie prediction allowing medical monitoring).

Georgia: Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005), aff'd, 230 F. Appx. 878, 883 (11th Cir. 2007).

Illinois: Jensen v. Bayer AG, 862 N.E.2d 1091, 1100-01 (Ill. App. 2007) (medical monitoring claim "lacked merit"); Lewis v. Lead Industries Ass'n, Inc., 793 N.E.2d 869, 877 (Ill. App. 2003) (rejecting independent claim for medical monitoring); Campbell v. A.C. Equipment Services Corp., 610 N.E.2d 745, 748 (Ill. App. 1993) (decision "should not be construed as recognizing" medical monitoring).

Indiana: Pisciotta v. Old National Bancorp, 499 F.3d 629, 639 & n.10 (7th Cir. 2007); Hunt v. American Wood Preservers Institute, 2002 WL 34447541, at *1 (S.D. Ind. July 31, 2002); Johnson v. Abbott Laboratories, 2004 WL 3245947, at *6 (Ind. Cir. Dec. 31, 2004).

Kansas: Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1523 (D. Kan. 1995).

Minnesota: Thompson v. American Tobacco Co., 189 F.R.D. 544, 552 (D. Minn. 1999); Paulson v. 3M Co., 2009 WL 229667 (Minn. Dist. Jan. 16, 2009); Palmer v. 3M Co., 2005 WL 5891911 (Minn. Dist. April 26, 2005).

Nebraska: Trimble v. ASARCO, Inc., 232 F.3d 946, 962-63 (8th Cir. 2000),[7] aff'g, 83 F. Supp. 2d 1034 (D. Neb. 1999); Schwan v. Cargill, Inc., 2007 WL 4570421, at *1-2 (D. Neb. Dec. 21, 2007); Avila v. CNH America LLC, 2007 WL 2688613, at *1 (D. Neb. Sept. 10, 2007).

North Carolina: Curl v. American Multimedia, Inc., 654 S.E.2d 76, 81 (N.C. App. 2007); Carroll v. Litton Systems, Inc., 1990 WL 312969, at *51-52 (Mag. W.D.N.C. Oct. 29, 1990), adopted, 1991 WL 187277, at *2 (W.D.N.C. July 15, 1991), aff'd in part and rev'd in part on other grounds mem., 47 F.3d 1164 (4th Cir. 1995) (table).

North Dakota: Mehl v. Canadian Pacific Railway Ltd., 227 F.R.D. 505, 518-19 (D.N.D. 2005).

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[7] Abrogated on other grounds Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005) (federal supplemental jurisdiction).

Oklahoma: McCormick v. Halliburton Co., 895 F. Supp. 2d 1152, 1155-56 (W.D. Okla. 2012); Cole v. Asarco, Inc., 256 F.R.D. 690, 695 (N.D. Okla. 2009).

Ohio: Elmer v. S.H. Bell Co., 127 F. Supp.3d 812, 825 (N.D. Ohio 2015).

Rhode Island: Miranda v. DaCruz, 2009 WL 3515196 (R.I. Super. Oct. 26, 2009) ("patently unfair to saddle [d]efendants with the cost of indefinite monitoring considering [plaintiff] does not exhibit any present harm").

South Carolina: Rosmer v. Pfizer, Inc., 2001 WL 34010613, at *5 (D.S.C. March 30, 2001).

Tennessee: Bostick v. St. Jude Medical, Inc., 2004 WL 3313614, at *14 (W.D. Tenn. Aug. 17, 2004); Jones v. Brush Wellman Inc., 2000 WL 33727733, at *8 (N.D. Ohio Sept. 13, 2000) (applying Tennessee law).

Texas: Norwood v. Raytheon Co., 414 F. Supp.2d 659, 664-668 (W.D. Tex. 2006).

Virginia: Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (4th Cir. 1991); In re All Pending Chinese Drywall Cases, 2010 WL 7378659, at *9-10 (Va. Cir. March 29, 2010) ("creation of such a program is one for the legislature").

Virgin Islands: Purjet v. Hess Oil Virgin Islands Corp., 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986); Louis v. Caneel Bay, Inc., 2008 WL 4372941, at *5-6 (V.I. Super. July 21, 2008).

Washington: DuRocher v. Riddell, Inc., 97 F. Supp.3d 1006, 1015-1016 (S.D. Ind. 2015) (applying Washington law); Krottner v. Starbucks Corp., 2009 WL 7382290, at *7 (W.D. Wash. Aug. 14, 2009), aff'd in part on other grounds, 628 F.3d 1139 (9th Cir. 2010); Duncan v. Northwest Airlines, 203 F.R.D. 601, 607-09 (W.D. Wash. 2001).

Wisconsin: Alsteen v. Wauleco, Inc., 802 N.W.2d 212, 221 (Wis. App. 2011) (citing "concerns regarding the difficulty of assessing

damages, unlimited and unpredictable liability, and secondary sources of payment").[8]

No basis thus exists to believe that the New York Court of Appeals would overrule its 2013 decision in Caronia and permit mass recovery of claimed medical monitoring expenses by persons with no present physical injury. Caronia expressly left that task to the legislature, 22 N.Y.3d at 452, 982 N.Y.S.2d at 48, 5 N.E.3d at 19, which has also declined to authorize such claims.

III. NEW YORK'S ECONOMIC LOSS DOCTRINE, BARRING TORT RECOVERY OF PURELY ECONOMIC DAMAGES, IS RIGHTLY THE MAJORITY RULE.

Historically, New York has played a leading role in articulating the jurisprudential basis for the economic loss doctrine. See Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931) (rejecting "liability in an indeterminate amount for an indeterminate time to an indeterminate class" for purely economic losses) (Cardozo, C.J.). The Court of Appeals reiterated New York's adherence to a strong economic loss doctrine in 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center., Inc., 96 N.Y.2d 280, 727 N.Y.S.2d 49, 750 N.E.2d 1097 (N.Y. 2001). Indeed, "[t]his restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act." Id. at 289, 727 N.Y.S.2d at 53, 750 N.E.2d at 1101

[8] See Barraza v. C. R. Bard Inc., 322 F.R.D. 369, 374 (D. Ariz. 2017) ("only 16 states permit claims for medical monitoring").

> In such circumstances, limiting the scope of defendants' duty to those who have, as a result of these events, suffered personal injury or property damage – as historically courts have done – affords a principled basis for reasonably apportioning liability.

Id. at 291-92, 727 N.Y.S.2d at 55, 750 N.E.2d at 1103; see id. at 294, 727 N.Y.S.2d at 57, 750 N.E.2d at 1105 ("economic loss ... common to an entire community" cannot be a basis for a nuisance claim).

Not surprisingly, New York's economic loss doctrine – the law's insistence that tortious conduct have caused more than merely economic loss to be actionable – represents the overwhelming majority rule nationwide.

This doctrine is also reflected in United States Supreme Court precedent. In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), the plaintiff's tort claims failed under the economic loss doctrine "since by definition [when] no person or other property is damaged, the resulting loss is purely economic." Id. at 870. "Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product." Id. at 874. See Robins Dry Dock & Repair Company v. Flint, 275 U.S. 303, 308-09 (1927) (rejecting liability for "unintended injuries inflicted upon the [property] by third persons who know nothing of the" plaintiff's interest; "The law does not spread its protection so far").

East River Steamship relied on the economic loss doctrine as formulated by the California Supreme Court in Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965). 476 U.S. at 867-69. Seely held that, while purely economic losses may be recovered in contract or warranty actions, they are unrecoverable in tort:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary.... A consumer should not be charged ... with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations.... Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and **there is no recovery for economic loss alone.**

403 P.2d at 151 (citations omitted) (emphasis added). See McMillin Albany LLC v. Superior Court, 408 P.3d 797, 799 (Cal. 2018) ("the economic loss rule bars homeowners … from recovering damages where there is no showing of actual property damage or personal injury"); Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co., 41 P.3d 548, 554 (Cal. 2002) ("[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law") (citation and quotation marks omitted).

Illinois sees the issue the same way, for the same reasons. It follows "the vast majority of commentators and cases ... against allowing recovery in negligence for economic losses." Moorman Manufacturing Co. v. National Tank Co., 435 N.E.2d 443, 451 (Ill. 1982) (citations omitted). Since "[w]e have already

concluded that plaintiff, in this case, has suffered solely economic loss ..., it cannot recover damages under a negligence theory." Id. at 452.

> At common law, solely economic losses are generally not recoverable in tort actions. The economic loss rule, as a general proposition, is the prevailing rule in America.... One of the policies behind the economic loss rule is the recognition that the economic consequences of any single accident are virtually limitless.

In re Chicago Flood Litigation, 680 N.E.2d 265, 274 (Ill. 1997) (citations and quotation marks omitted). Accord, e.g., Fattah v. Bim, 52 N.E.3d 332, 337 (Ill. 2016) ("a plaintiff may not recover for solely economic loss in tort"); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1143 (Ill. 2004) (economic loss doctrine addresses "concerns regarding speculativeness and potential magnitude of damages").

New Jersey also "embraced" the economic loss doctrine, as explicated by East River Steamship, first in "commercial transaction[s] between sophisticated business entities," and ultimately "applying it to transactions involving individual consumers." Dean v. Barrett Homes, Inc., 8 A.3d 766, 772 (N.J. 2010). "The economic loss rule is therefore firmly established as a limitation on recovery through tort-based theories, not only because of this Court's longstanding common law precedents differentiating between remedies sounding in tort and contract, but also through the pronouncement of our Legislature." Id. at 773. Under New Jersey law, "whether or not plaintiffs now have a contract remedy is irrelevant to whether they have a cause of action" in tort for economic losses. Id. at 776.

Connecticut also follows a broad economic loss doctrine in tort cases:

> [U]nder the economic loss doctrine ... the primary purpose of the rule is to shield a defendant from unlimited liability for all of the economic consequences of a negligent act.... [T]he foreseeability of economic loss, even when modified by other factors, is a standard that sweeps too broadly ... portending liability that is socially harmful in its potential scope and uncertainty.

Lawrence v. O & G Industries, Inc., 126 A.3d 569, 583 (Conn. 2015) (dismissing wage loss claims from explosion closing plaintiffs' employer) (citations and quotation marks omitted).

Texas also follows the majority rule precluding recovery of purely economic loss in tort, absent personal injury or physical damage to property.

> [T]he physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended. As Cardozo put it in a passage often quoted, liability for these consequences would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

LAN/STV v. Martin K. Eby Construction Co., 435 S.W.3d 234, 239 (Tex. 2014) (quoting, *inter alia*, Ultramares, supra).

In Pennsylvania "[t]he economic loss doctrine [i]s well-established in tort law." Excavation Technologies, Inc. v. Columbia Gas Co., 985 A.2d 840, 842 (Pa. 2009). "[P]ublic policy weighs against imposing liability" for purely economic loss because "liability for [the plaintiffs'] economic losses … would inevitably be

passed on to the consumer." Id. at 844. If purely economic loss is to be recoverable, "the legislature will say so specifically." Id.[9]

Ohio law likewise precludes purely economic loss claims from being brought in tort litigation:

> The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.

Corporex Development & Construction Management, Inc. v. Shook, Inc., 835 N.E.2d 701, 704 (Ohio 2005) (citations and quotation marks omitted).

Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000), reached the same result, that "[a]n individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship" with the defendant. Id. at 579, Syllabus #9. After an extensive discussion of nationwide precedent, the court concluded that the "necessity of imposing a line of demarcation on actionable theories of recovery serves as another rationale for the denial of purely economic damages" since "economic chaos ... would result from permitting theoretically

[9] Pennsylvania recognizes a "narrow exception" to the economic loss doctrine only against "those in the business of supplying information to others for pecuniary gain." Id. at 842-43 (discussing Bilt-Rite Contractors, Inc. v. Architectural Studio, 866 A.2d 270, 285-86 (Pa. 2005)).

limitless recovery of economic injury." Id. at 586. "The common thread which permeates the analysis of potential economic recovery in the absence of physical harm is" that "there simply is no duty." Id. at 590.

In Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445 (Md. 2017), Maryland's highest court likewise held that "injecting a tort duty is not in the public interest." Id. at 462. Rather, "[w]e apply the economic loss doctrine and decline to impose tort liability on [a defendant] for purely economic injuries alleged by [a plaintiff] that was neither in privity nor suffered physical injury or risk of physical injury." Id. at 462-63.

Thus, the economic loss doctrine is an integral part of the common law in the overwhelming majority of states. Accord also: **Delaware**: Danforth v. Acorn Structures, Inc., 608 A.2d 1194, 1200-01 (Del. 1992); **District of Columbia**: Aguilar v. RP MRP Washington Harbour, LLC, 98 A.3d 979, 982-83 (D.C. 2014); **Georgia**: General Electric Co. v. Lowe's Home Centers, Inc., 608 S.E.2d 636, 638-39 (Ga. 2005); **Idaho**: Path to Health, LLP v. Long, 383 P.3d 1220, 1226 (Idaho 2016); **Indiana**: Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 731-32 (Ind. 2010); **Iowa**: Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 506 (Iowa 2011); **Kentucky**: Giddings & Lewis, Inc. v. Industrial Risk Insurers, 348 S.W.3d 729, 738-43 (Ky. 2011); **Louisiana**: PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058, 1061-62 (La. 1984); **Maine**: In re Hannaford Brothers Co. Customer Data Security Breach

Litigation, 4 A.3d 492, 498 (Me. 2010); **Massachusetts**: FMR Corp. v. Boston Edison Co., 613 N.E.2d 902, 903-04 (Mass. 1993); **Nevada**: Halcrow, Inc. v. Eighth Judicial Dist. Court, 302 P.3d 1148, 1152-54 (Nev. 2013); **North Dakota**: Leno v. K & L Homes, Inc., 803 N.W.2d 543, 550 (N.D. 2011); **Oregon**: Paul v. Providence Health System-Oregon, 273 P.3d 106, 112 (Or. 2012); **South Carolina**: Sapp v. Ford Motor Co., 687 S.E.2d 47, 51 (S.C. 2009); **South Dakota**: Diamond Surface, Inc. v. State Cement Plant Comm'n, 583 N.W.2d 155, 161-62 (S.D. 1998); **Tennessee**: Lincoln General Insurance Co. v. Detroit Diesel Corp., 293 S.W.3d 487, 489-92 (Tenn. 2009); **Vermont**: Long Trail House Condominium Ass'n v. Engelberth Construction, Inc., 59 A.3d 752, 755-56 (Vt. 2012); and **Wisconsin**: Wisconsin Pharmacal Co., LLC v. Nebraska Cultures, Inc., 876 N.W.2d 72, 81-82 (Wis. 2016).[10]

In sum, as with New York's rejection of medical monitoring claims in the absent of present physical injury, the state's refusal, for many of the same reasons, to abandon the present injury requirement with respect to claims of purely economic loss is likewise representative of the distinct majority rule. There is no basis to suggest that New York law would change its longstanding hostility to claims, like these, that would allow "unlimited liability to an indeterminate class of

[10] There are a few outliers. Compare Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., 110 So.3d 399, 407 (Fla. 2013) (limiting economic loss doctrine to product liability cases); Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 832-33 (Ark. 2011) (not recognizing any economic loss doctrine).

persons conceivably injured" economically by a defendant's allegedly tortious conduct. Ultramares, supra.

CONCLUSION

For all of the above reasons, *amici curiae* Product Liability Advisory Council and National Association of Manufacturers respectfully submit that the decision of the district court, holding that the New York Court of Appeals would recognize causes of action for medical monitoring and reputational harm to property, despite the absence of any present injury, should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that this Brief of *Amici Curiae* Product Liability Advisory Council, Inc. and National Association of Manufacturers Supporting Defendants-Appellants complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. According to the word count of Microsoft Word, the brief contains 5,646 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

I further certify that this brief has been scanned for viruses and that it is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system and by U.S. mail to:

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