

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 173 MAP 2002 & 176 MAP 2002

**COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF GENERAL SERVICES,
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, PENNSYLVANIA
PUBLIC UTILITY COMMISSION, PENNSYLVANIA EMERGENCY MANAGEMENT
AGENCY, and PENNSYLVANIA DEPARTMENT OF STATE,**

v.

**UNITED MINERAL PRODUCTS COMPANY, CERTAINTEED CORPORATION,
COURTAULDS AEROSPACE, INC., CHEMREX, INC., PHILIPS ELECTRONICS
NORTH AMERICA CORPORATION, ADVANCE TRANSFORMER COMPANY, and
MONSANTO COMPANY**

Appeal of: Monsanto Company

**BRIEF OF *AMICI CURIAE* PENNSYLVANIA CHAMBER OF BUSINESS AND
INDUSTRY, PENNSYLVANIA CHEMICAL INDUSTRY COUNCIL, PENNSYLVANIA
MANUFACTURERS' ASSOCIATION, NATIONAL ASSOCIATION OF
MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, NATIONAL
FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND
NATIONAL BLACK CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT
URGING REVERSAL**

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STATEMENT OF INTEREST

Pennsylvania Chamber of Business and Industry

The Pennsylvania Chamber of Business and Industry (the “Pennsylvania Chamber”) is a non-profit corporation devoted to representing the interests of the business community throughout the Commonwealth of Pennsylvania. The Pennsylvania Chamber has more than 10,000 member corporations, trade associations, and local chambers of commerce. The Pennsylvania Chamber’s members employ more than half of the private workforce in Pennsylvania. The Pennsylvania Chamber strives to provide a competitive business climate for all Pennsylvania companies in an effort to create and maintain jobs in the Commonwealth. Government laws, regulations, and policies that impose undue burdens and additional regulatory requirements on employers dramatically increase the cost of doing business in Pennsylvania and lessen the ability of local businesses to compete.

Pennsylvania Chemical Industry Council

The Pennsylvania Chemical Industry Council (“PCIC”) was created in 1980 to work toward the continuous improvement of the chemical industry through public policy advocacy, communication, education, and promotion of the principles of Responsible Care®. As a partnership member in the Responsible Care® program, PCIC has committed itself to fully support both the responsible management of chemicals and other ethical means by which the chemical industry can benefit society, the environment, and the economy. The business of chemistry in Pennsylvania directly employs 72,300 people, representing 7.7 percent of the Commonwealth’s manufacturing workforce. Moreover, for every job in Pennsylvania’s chemical industry, 3.5 other jobs are created in the Commonwealth. The other sectors of Pennsylvania’s economy that are the most dependent on the business of chemistry are trade

(48,600 jobs), manufacturing (38,600 jobs), business services (38,300 jobs), transportation (17,500 jobs), and agriculture (8,100 jobs). Likewise, the products of chemistry, including life-saving medicines and plastics and synthetic rubber used in medical equipment and supplies, support Pennsylvania's health care industry, which employs 560,431 workers to care for the Commonwealth's 12 million residents.

Pennsylvania Manufacturers' Association

Since its founding, the Pennsylvania Manufacturers' Association ("PMA") has served Pennsylvania workers and employers by defending free enterprise and fighting for lower taxes, reasonable regulation, and sensible labor laws. The PMA remains dedicated to promoting the general prosperity of the Commonwealth and its citizens by improving the competitiveness of Pennsylvania's business climate. The PMA has never ceased to champion free markets and a favorable business climate as the keystones of Pennsylvania's future.

National Association of Manufacturers

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing 14,000 members and 350 member associations serving manufacturers and employees in every industrial sector and all fifty states. NAM's mission is both to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media, and the general public of the importance of manufacturing to America's economic strength.

American Chemistry Council

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a \$450 billion enterprise and a key element of the nation's economy.

ACC members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier, and safer. ACC is committed to improved environmental, health, and safety performance through its Responsible Care® program, to common-sense advocacy designed to address major public policy issues, and to health and environmental research and product testing.

National Federation of Independent Business Legal Foundation

The National Federal of Independent Business Legal Foundation (“NFIB Legal Foundation”), a 501(c)(3) public interest law firm, is the legal arm of the National Federation of Independent Business (“NFIB”), the nation’s oldest and largest organization dedicated to representing the interests of small-business owners in all 50 states. Of NFIB’s approximately 600,000 members, over 2,000 own manufacturing firms in Pennsylvania.

National Black Chamber of Commerce

The National Black Chamber of Commerce (“NBCC”) is a non-profit, nonpartisan business association dedicated to the economic empowerment of African-American communities through entrepreneurship and capitalistic activity. Incorporated in 1993, the NBCC’s membership includes 190 affiliated chapters throughout the nation representing 64,000 Black-owned businesses. Affiliated chapters are also located in the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

STATEMENT OF SCOPE AND STANDARD OF REVIEW AND STATEMENT OF THE CASE

Amici curiae the Pennsylvania Chamber, PCIC, the PMA, NAM, ACC, NFIB Legal Foundation, and NBCC hereby incorporate by reference the Statement of Scope and Standard of Review and Statement of the Case of Appellant Monsanto Company.

SUMMARY OF ARGUMENT

Pennsylvania products liability law rests on the premise that its purpose is not merely to apply the law but to further beneficial social policies. *See Azzarello v. Black Bros. Co.*, 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978). The system adopted by the Commonwealth Court, in which manufacturers face liability based on the “capacity [of their products] to expose individuals to potentially life-threatening safety risks,” *Commonwealth v. U.S. Mineral Prods. Co.*, 809 A.2d 1000, 1020 (Pa. Commw. Ct. 2002), stands in direct contradiction to that purpose because it imposes absolute liability in two respects. First, given the right circumstances, every product — from water that can drown to paper that can burn — has the capacity to create such a risk. Second, an absolute liability regime equates a mere risk of harm with the existence of a defect, thus essentially requiring manufacturers to become insurers of their products. For both of those reasons, absolute liability would produce severe economic consequences for a wide range of business entities and their customers, from increased insurance costs to stifled innovation to actual disincentives for improved safety efforts. Likewise, absolute liability would also result in significant negative social consequences for individual citizens as companies either shift liability costs to workers and consumers through decreased wages and increased prices or allow such costs to impact profitability, thus lowering investment returns and potentially eliminating job opportunities through bankruptcies and relocations. Against this backdrop, reversal of the Commonwealth Court’s decision upholding the jury’s imposition of liability in this case is not only consistent with the law but also furthers social policy.

ARGUMENT

I. THE COMMONWEALTH COURT'S DECISION SHOULD BE REVERSED

Affirmance of the Commonwealth Court's decision upholding the jury's imposition of liability in this case as the result of a purported defect related to Monsanto Company's ("Monsanto") polychlorinated biphenyls ("PCBs") would ratify an unprecedented extension of Pennsylvania products liability law, with profound impacts for manufacturers, consumers, and any other group interested in ensuring a balanced approach to legal, social, and economic development in this Commonwealth. In the products liability arena, the court has an important responsibility to apply the law while remaining conscious of its social policy implications. *See Azzarello*, 480 Pa. at 558, 391 A.2d at 1026 ("Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? . . . When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy. . . . It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified[.]"); *Riley v. Warren Mfg., Inc.*, 455 Pa. Super. 384, 390, 688 A.2d 221, 224 (1997) ("The question of whether a product is unreasonably dangerous is a question of law. In answering this question a court is essentially making a social policy determination and acting as both a social philosopher and a risk-utility economic analyst.") (citations omitted); *Dambacher by Dambacher v. Mallis*, 336 Pa. Super. 22, 56, 485 A.2d 408, 426 (1984) ("[W]hat the term 'unreasonably dangerous' *does* do is to impose on the trial court the responsibility of deciding, as a matter of law and by resolving considerations of 'social policy', whether 'the risk of loss should be placed upon the supplier.'") (emphasis in original) (quoting *Azzarello*, 480 Pa. at 556, 391 A.2d at 1025). Thus, in applying the law to define the concept of risk, for example, the court must also recognize that it is influencing the behavior of manufacturers who will then attempt to design their products to avoid

liability; if the resulting definition of risk is so broad that manufacturers cannot possibly eliminate the “risks” posed by their products, they have no incentive to improve the safety performance of those products and may in fact remove useful products from the marketplace. Precisely because the Commonwealth Court’s decision in this case would result in just such negative social and economic consequences, reversal is more than appropriate.

A. The Imposition of Absolute Liability in This Case Represents an Unprecedented Extension of Pennsylvania Products Liability Law

The result reached in the Commonwealth Court in this case stands in direct contrast to the longstanding principle that, although manufacturers are the guarantors of their products’ safety, they are not insurers of all injuries caused by such products. *See, e.g., Davis v. Berwind Corp.*, 547 Pa. 260, 267, 690 A.2d 186, 190 (1997) (“[I]t is not the purpose of [products liability law] to impose absolute liability. A manufacturer is a guarantor of its product, not an insurer.”) (citing *Azzarello*, 480 Pa. at 553, 391 A.2d at 1023-24); *Riley*, 455 Pa. Super. at 397, 688 A.2d at 228 (“[T]he term ‘unreasonably dangerous’ was included in [the test for products liability] specifically to obviate any contention that a manufacturer of a product with inherent possibilities of harm would become automatically responsible for every harm that could conceivably happen from the use of the product.”) (emphasis added) (citing *Dambacher*, 336 Pa. Super. at 53, 485 A.2d at 425); *Nickel by Nickel v. Pa. Ave. Bar, Inc.*, 29 Phila. 276, 288 (1995) (“Pennsylvania [l]aw has long been wary to allow the manufacturer of a product alleged to possess a design defect to become the insurer of that product. Rather, the manufacturer is only the guarantor of the product’s safety.”). By upholding liability based only on the purported capacity of Monsanto’s PCBs to expose individuals to allegedly life-threatening safety risks without any finding that such risks outweigh the product’s utility — and, therefore, without any evidence of a design defect — the court below cast Monsanto in precisely the role that Pennsylvania’s

judiciary has always found inappropriate: that of insurer against any harm from the use of its product.¹ *U.S. Mineral Prods. Co.*, 809 A.2d at 1020 (“PCBs may be considered defective because of their capacity to expose individuals to potentially life-threatening safety risks.”); *see Dambacher*, 336 Pa. Super. at 62-63, 485 A.2d at 429 (“An insurer of a product is responsible if the user . . . of the product is injured by the product in some way. But a guarantor is responsible only if the user of the product is injured as a result of a defect in the product.”); *see generally* Brief of *Amicus Curiae* Atlantic Legal Foundation (urging reversal because the court failed to conduct a risk-utility analysis in this case and because such a balancing would have shown that Monsanto’s PCBs were not defective when sold). Indeed, the fundamental flaw in the Commonwealth Court’s decision to uphold the jury’s verdict is the court’s reliance on concepts of absolute — as opposed to strict — products liability.

The Commonwealth Court’s decision also lacks merit because contemporary society has accepted risk as an ever-present aspect of daily life. In that context, any expectation that manufacturers act as insurers of their products in every conceivable circumstance is inappropriate. Indeed, the acknowledged role of the legal system is to provide for recovery only in those exceptional circumstances in which risk exceeds background levels. In *re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 461 (3d Cir. 1997) (holding that plaintiffs “must prove that their exposure to contaminants exceeded that which they would normally encounter in their daily lives”); *Redland Soccer Club, Inc. v. Dep’t of the Army*, 548 Pa. 178, 195, 696 A.2d 137, 145 (1997) (explaining that a plaintiff must prove “exposure greater than normal background

¹ In addition to the Commonwealth Court’s failure to require any evidence of a design defect before imposing liability on Monsanto in this case, the court also failed to require any expert evidence or testimony that the alleged defect at issue in fact caused the plaintiffs’ damages; the court, over Defendants’ objections, instead allowed lay testimony of Secretary Crowell to suffice in that regard. This misreading of the relevant evidentiary requirements renders the court’s expansion of the substantive law all the more dangerous for manufacturer-defendants.

levels”). The legal system is not designed to provide individuals with a mechanism for obtaining compensation based on every possible encounter with risk. For example, Pennsylvania law does not recognize a cause of action based on the enhanced risk of a future health effect where disabling consequences or physical impairment are absent, precisely because such damages are so inherently speculative. *Simmons v. Pacor*, 543 Pa. 664, 679, 674 A.2d 232, 240 (1996) (holding that “awarding damages for the increased risk and fear of cancer is contrary to the established jurisprudence of this Commonwealth”). Rather, the issue “central in all toxic tort cases” is “the requirement that the alleged wrong create some significant risk of harm to the plaintiff.” *Redland Soccer Club, Inc. v. Dep’t of the Army*, 55 F.3d 827, 846 (3d Cir. 1995) (applying Pennsylvania law) (emphasis added). Accordingly, the plaintiff “must not only show exposure, but must prove that he was exposed beyond what would normally be encountered by a person in everyday life, so that the plaintiff’s risk of being injured from the exposure is greater, in some way, than the normal risks all of us encounter in our everyday lives.” *Id.* (emphasis added). Any relaxation of that standard would transform every toxic tort defendant in the Commonwealth into “a health care insurer for medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life. It would convert toxic torts into a form of specialized health insurance.” *Paoli*, 113 F.3d at 461-62 (quoting *Redland Soccer*, 55 F.3d at 846 n.8). That same reasoning applies to products liability cases in general and to this case in particular and thus renders untenable the Commonwealth Court’s decision to uphold the jury’s verdict below.

As stated, the Commonwealth Court deemed PCBs defective merely “because of their capacity to expose individuals to life-threatening safety risks.” *U.S. Mineral Prods. Co.*, 809 A.2d at 1020. The plaintiffs presented no evidence that PCB levels in the blood of individuals

exposed to the alleged contamination in Pennsylvania's Transportation and Safety Building (the "T&S Building") were of a magnitude greater than the levels in the members of the general public or, put another way, "greater, in some way, than the normal risks all of us encounter in our everyday lives." *Redland Soccer Club*, 55 F.3d at 846. In fact, the only evidence of PCB blood levels in building occupants, even in those individuals with the greatest potential exposure, were well within background. R. 2867a; R. 1507a, 1510a-11a. Likewise, the theoretical "worst-case-scenario" risk to T&S Building occupants from potential PCB exposure, at levels even in excess of those found in the T&S Building after the fire, was one hundred to one thousand times lower than background risks calculated by the Environmental Protection Agency with respect to such everyday activities as eating food, drinking tap water, and breathing the air in an individual's own home, R. 1517a-26a, 1535a-42a; R.1450a-53a, R. 1457a-63a), and thus could not provide a proper basis for relief in this case.

Further, established precedent holds that a product is deemed defective when proven "[un]safe for its intended use." *Azzarello*, 480 Pa. at 559, 391 A.2d at 1026. A fire — such as the catastrophic fire in the T&S Building — cannot, however, constitute an intended use as a matter of Pennsylvania law. *Pegg v. Gen. Motors Corp.*, 258 Pa. Super. 59, 82, 391 A.2d 1074, 1085 (1978) (en banc) (ruling that fire is abnormal use of product); *see also Delk v. Holiday Inns, Inc.*, 545 F. Supp. 969, 971 (S.D. Ohio 1982) ("The product liability case law speaks of foreseeable uses[,] and "does not speak of foreseeable disaster."); *Coleman v. Cintas Sales Corp.*, 40 S.W.3d 544, 549 (Tex. Ct. App. 2001) (holding that uniform was not defectively designed due to fact that it had caught on fire because there was "no foreseeable risk of exposure to fire associated with the product's clearly intended use"). Thus, the Commonwealth Court's finding that fire was an intended use of Monsanto's PCBs represents an expansion of products

liability law in the Commonwealth, the proportions of which are extraordinary and in fact immeasurable.² Indeed, unrebutted evidence presented at trial demonstrated that virtually every conceivable product — from pens and pencils to rubber-soled shoes — emits potentially toxic chemicals when burned.³ R. 3060a. If manufacturers like Monsanto “are liable for the performance of their respective products in a disaster . . . , then they have become, in fact, insurers of the safety of their products under every and all conceivable situations.” *Delk*, 545 F. Supp. at 972 (“The failure of a product to perform under disaster conditions which were not the intended nor reasonably foreseeable uses of the product does not render an otherwise nondefective product defective under [Restatement (Second) of Torts] § 402A.”), and, once again, longstanding judicial intent to avoid just such an outcome would be thwarted.

As a result, the Commonwealth Court’s decision cannot stand. It represents an unprecedented expansion of Pennsylvania’s products liability law with potentially dire consequences. This Court should therefore overturn that decision.

² Although the Commonwealth Court attempted to distinguish the decision in *Pegg*, stating that it “is confined to the specific facts of that case,” *U.S. Mineral Prods. Co.*, 809 A.2d at 1019, the court in *Pegg* in no way suggested that the conditions of the fire at issue circumscribed its holding.

³ In full, the relevant affidavit states as follows:

I would expect the following items to release carcinogens and/or other toxic substances if burned in a residential or office fire setting: wood, particle board, rubber mats, paper, pens & pencils, adhesives & tapes, plastic cups, computers, computer disks, phones, the wiring for phones and electrical appliances, linoleum, paints, wallpaper, curtains/blinds, chairs, desks & desk accessories, carpets & carpet padding, rugs, lamps, hair-dryers, countertops, cabinets, ceiling tiles, synthetic clothes or fabrics, rubber soled shoes, washing machines/dryers, kitchen appliances, kitchen utensils, plastic plumbing, toys, and sports equipment.

R. 3060a.

B. Absolute Products Liability Would Have a Profound, Adverse Impact on Pennsylvania’s Continued Economic Development

By abandoning the social policy constraints that have guided the Commonwealth’s courts for more than thirty years, the decision below — if it is allowed to stand — would set a new course in products liability law that would have negative and profound economic impact on manufacturers, consumers, and all Pennsylvanians.

The underlying rationale for the tort system in general and the law of products liability in particular is the recognition that an efficient allocation of injury costs not only compensates the injured party but also shifts those costs to the injuring party, which is usually better able to bear that expense and gains an incentive to conform its behavior — or its products — more fully to expected norms. *See, e.g.*, COUNCIL OF ECON. ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM (2002) [hereinafter “ECON. ADVISERS ANALYSIS”] 2 (“[T]he existing system protects consumers by making firms responsible for damages caused by their products and services. Indeed, the underlying notion that firms are induced to recognize the full social cost of their products is one economic rationale for an *efficient* tort system.”) (emphasis in original); *Azzarello*, 480 Pa. at 553, 391 A.2d at 1023 (“The realities of our economic society as it exists today force the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business.”).⁴ Any inefficiencies in the allocation of injury costs, however, threaten to eliminate these beneficial

⁴ *See also* ECON. ADVISERS ANALYSIS at 4-5 (“In a textbook example, recognition of the expected costs from the liability system causes the provider to undertake the extra effort or care that matches the customer’s desire to avoid the risk of harm. This process is what economists refer to as ‘internalizing externalities.’ In other words, the liability system makes persons who injure others aware of their actions, and provides incentives for them to act appropriately.”)

results and thus to undermine the rationale of the tort system itself. ECON. ADVISERS ANALYSIS at 3 (“If claims are excessive and fail to provide proper incentives, then these claims are a drain on resources that can deter the production of desired goods and services and reduce economic output.”). Because the outcome in the Commonwealth Court promotes just such inefficiencies on a massive scale, it cannot stand.

Pennsylvania is already at a competitive disadvantage with respect to its economic policies affecting business growth and development. For example, the Commonwealth imposes the highest state tax on corporate income of all the fifty states or the District of Columbia. Ralph R. Reiland, *Pennsylvania’s Competitive Disadvantage*, 2 COMMONW. COMMENT. 17 (2002). Moreover, on a per capita basis, health care costs in Pennsylvania are the seventh highest in the nation. *Id.* Likewise, Pennsylvania workers’ compensation costs are the country’s ninth highest when calculated as a percentage of wages. *Id.* Finally, the Commonwealth ranks forty-fifth out of the fifty states in overall economic freedom, with much of that ranking related to the state of its civil justice system. JOHN BYARS ET AL, ECONOMIC FREEDOM IN AMERICA’S 50 STATES (Ctr. for Policy & Legal Studies, Clemson, S.C.), Mar. 1, 1999.

Indeed, as suggested by that last statistic, Pennsylvania’s competitive disadvantage extends to the courtroom:

- The amount of civil damages awarded to successful plaintiffs in Pennsylvania ranked seventh in the nation in 2000, Reiland, *Pennsylvania’s Competitive Disadvantage*;
- A reported fifteen to twenty percent of the compensatory civil damage awards recovered in Pennsylvania exceed \$1 million. The national average is ten percent, *id.*; and
- In 2000, Pennsylvania medical malpractice liability awards totaled \$1.35 million on average per workday, the second largest such total in the nation, *id.*

Expanding the scope of products liability in the Commonwealth to impose absolute rather than merely strict products liability would only exacerbate these damaging trends and produce further inefficiencies in Pennsylvania's tort liability system. If any user harmed — or even just subjected to a “potentially life-threatening safety risk[]” — during the use of a product can recover damages as a result of the Commonwealth Court's decision in this case, the number of successful plaintiffs and thus the amount of civil damages awarded in Pennsylvania's courts would only increase.

Such an outcome has very real consequences not only for the companies directly involved in litigating such matters, but also for all other industrial entities as well as members of the general public. For example, in light of the above-cited information with respect to medical malpractice liability awards, liability premiums for all physicians and hospitals in the Commonwealth have risen by 80 to 147 percent in recent years.⁵ ROGER F. MECUM, *NEW HEALTH THREAT: LITIGATION* (The Heartland Inst.), Apr. 1, 2002. The total cost of medical liability insurance coverage for Pennsylvania hospitals increased 86 percent in 2002 alone, and 23 percent of hospitals reported premium increases exceeding 200 percent. AN OVERVIEW OF THE MEDICAL LIABILITY ENVIRONMENT IN PENNSYLVANIA (The Hosp. & Healthsys. Ass'n of Pa.), Dec. 2002, at 2. In 2000, Pennsylvania led the nation in medical liability costs per physician, and Pennsylvania's medical liability payments per capita were the second highest in the nation. *Id.* at 2-3. If Pennsylvania manufacturers — or, indeed, any manufacturers whose products are marketed or otherwise come to be used in Pennsylvania — must now become insurers rather than just guarantors of their products' safety, similar trends in those

⁵ Rates for obstetrician-gynecologists have increased 125 percent in the last five years. *MEDICAL LIABILITY MONITOR 2002 REPORT* (Sept. 24, 2002); Editorial, *Pennsylvania Tort Song*, *WALL ST. J.*, Jan. 17, 2003, at A10.

manufacturers' own general liability and products liability insurance rates seem sure to follow. Such a result would only exacerbate the eight to ten percent general liability insurance rate increase that businesses have experienced nationally, with rates rising at two to three times the rate of inflation.⁶ STEPHEN FOREMAN ET AL, PROJECTED ECONOMIC IMPACT OF LAWSUIT ABUSE REFORM ON THE PENNSYLVANIA ECONOMY (Inst. of Pol'y Research & Evaluation of the Pa. State Univ.), Jan. 1999; *see also* ECON. ADVISERS ANALYSIS at 8 (noting that the September 11, 2001 terrorist attacks "increased the uncertainty surrounding legal liability claims," with the result that insurance companies, "uncertain how to assess new liability risks, are raising premiums and capping or denying coverage").

Likewise, higher levels of expected liability costs do not encourage innovation or the introduction of safer products to the marketplace. *See* ECON. ADVISERS ANALYSIS at 6. Indeed, according to the Council of Economic Advisers, industry-specific studies — including studies of the chemical and pharmaceutical sectors that would most likely be the first to feel the effects of an absolute liability regime — have empirically demonstrated that excessive liability has a negative impact on innovation and have also shown that "[t]he evidence of direct linkages between liability and safety [is] weak." *Id.* Thus, in addition to dampening innovation, an inefficient liability scheme overly weighted against dubiously identified "injuring parties" also threatens — if not eliminates — one of the main beneficial purposes of the tort system for the

⁶ Such a result is particularly troubling in light of the fact that products liability principles extend not only to manufacturers but to second, third, and fourth generation entities in the stream of commerce who may have only the most tangential of relationships to the product at issue. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 5, 8, 12 (1998). Thus, the economic impact of an absolute liability scheme is even more profound than it might initially appear.

public as a whole: providing incentives to the so-called “injuring parties” to conform their behavior and their products to expected norms.⁷

Against this backdrop of increasing competitive disadvantage, manifested in escalating insurance premiums, stifled innovation, and stagnant safety efforts, the liability scheme established by the Commonwealth Court’s imposition of absolute liability not only undermines this Court’s efforts to prevent manufacturers from becoming insurers of their products but is, from an economic perspective, the antithesis of beneficial policymaking as envisioned in *Azzarello*. As a result, this Court should reverse the Commonwealth Court’s decision.

C. The Imposition of Absolute Products Liability Would Also Produce Significant Negative Social Consequences

The impact of inefficiencies in the tort liability system is not limited to the realm of manufacturers and other business entities engaged in the stream of commerce; an imbalanced liability scheme also produces profound effects on individuals. Although perhaps financial in nature, such effects nonetheless qualify as social in their capacity to cause severe displacement in the ordinary lives of average employees, consumers, and everyday citizens. The reason for these impacts is that, as noted by the Council of Economic Advisers, “[P]eople pay taxes; firms are legal entities that can bear no real burden.” ECON. ADVISERS ANALYSIS at 3. In other words, employees, consumers, and investors experience the true impact of excessive liability on their wages, employment opportunities, and investments. Because absolute products liability would result in the shifting of such impacts to an inappropriate degree, this Court should reverse the Commonwealth Court’s decision.

⁷ As a practical matter, by allocating a disproportionate share of risk to the seller of a product, an inefficient liability scheme also promotes a lack of personal responsibility on the part of the buyer by, again, eliminating incentives for individuals to conform their behavior to expected — and socially beneficial — norms of safety and thus turning the tort system on its head.

As in the area of economic growth and development, even without an absolute liability scheme, Pennsylvanians already face a number of obstacles to financial growth on an individual level:

- The Commonwealth ranked forty-seventh out of fifty states in job creation over the last decade, CORP. FOR ENTER. DEV., DEVELOPMENTAL REPORT CARD FOR THE STATES (2001).
- Compounding the problem of job creation, Pennsylvania's rate of economic growth averaged 2.8 percent for the years 1992 through 1999, the eighth worst average growth rate in the nation and thirty percent below the national average, Martin Crutsinger, *State Was Laggard in the 1990s*, PITTSBURGH POST-GAZETTE, June 5, 2001, at E1 (reviewing results of Pennsylvania Department of Commerce's report on economic growth).
- Lawsuits cost each Pennsylvanian an estimated \$1,200 per year; and
- In 1996, the tort-related costs borne by the Commonwealth and its citizens totaled \$7.8 billion or 2.5 percent of the gross state product for that year.⁸

Again, expanding the scope of Pennsylvania's products liability scheme from strict to absolute liability would only further disadvantage the Commonwealth's citizens. Studies have shown that existing inefficiencies in the United States tort system already result in a 1.3 to 3.4 percent "tax" on personal consumption when companies shift costs forward in the form of increased prices. ECON. ADVISERS ANALYSIS at 15-18. Alternatively, shifts backward in the form of decreased wages "tax" workers at a rate of 2.1 to 5.7 percent. *Id.* Finally, even if

⁸ As a point of reference, the annual direct cost of the United States tort system as a whole, including awards for economic and non-economic damages, administration, claimants' attorney fees, and the costs of defense, has been conservatively estimated at \$180 billion, or 1.8 percent of the gross domestic product, for 2000. ECON. ADVISERS ANALYSIS at 1, 2, n.1 (citing TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2000, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM (2002)). The annual per-citizen cost is therefore approximately \$650.00. *Id.* at 2.

companies refrain from actively shifting tort costs and instead allow those costs to affect profitability, individuals nonetheless feel their effects in the form of a 3.1 to 9.2 percent “tax” on pension plan, stock, and mutual fund investment returns. *Id.* Heightened inefficiencies would only compound these burdens.

Beyond price, wage, and investment effects, however, absolute liability — and the heightened systemic inefficiencies that it would produce — would also undoubtedly have a negative impact on employment rates in the manufacturing, chemical, and pharmaceutical sectors most likely affected by the Commonwealth Court’s expansion of the law. One need only look to the current asbestos litigation crisis, which has resulted in approximately eighty bankruptcy filings eliminating at least 60,000 jobs, for an example of the type of job displacement that excessive tort costs can engender.⁹ JOSEPH E. STIGLITZ ET AL., *THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS* (Sebago Assocs.), Dec. 2002; *see also* Jeff Weinstein, *Jefferson Hospital Cuts 179 Positions*, PHILA. INQUIRER, May 21, 2002, at D1 (citing rising malpractice insurance costs as the reason for these layoffs). Indeed, studies have shown that each worker laid off as a result of asbestos litigation lost \$25,000 to \$50,000 in wages and an average of \$8,300 in pension benefits.

Finally, even absent job elimination through bankruptcy, Pennsylvania’s adoption of an absolute products liability regime would most assuredly disadvantage the Commonwealth on the issue of job retention in relation to other states without such a system. The recent exodus of physicians from the State of West Virginia as a result of exorbitant malpractice insurance rates provides a telling illustration of the practical impact of an imbalanced liability scheme for

⁹ Significantly, moreover, bankruptcies directly undercut another of the main beneficial purposes underlying the tort system as a whole — compensation of legitimately injured parties — by eliminating the source of that compensation, the “injuring party.”

Pennsylvania. Gavin McCormick, *Doctors' Protest Suspends Surgeries*, PHILA. INQUIRER, Jan. 2, 2003, at A9; *see also* ECON. ADVISERS ANALYSIS at 8 (characterizing “doctors deciding not to practice certain specialties or in particular communities for fear of being sued” as a hidden cost of the American tort system). For this reason, as well as the other profoundly negative social and economic consequences of an absolute liability system, reversal of the Commonwealth Court’s decision upholding the jury’s verdict in this case would, from a policy perspective, represent the soundest outcome in this case and is therefore justified.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully request that this Court reverse the decision of the Commonwealth Court.

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DATED: May , 2003