IN THE COURT OF APPEALS OF MARYLAND

September Term, 2008

No. 94

KELLY GREEN, *et al.*

Appellants,

v.

N.B.S., INC., *et al.*,

Appellee.

On Writ of Certiorari to the Court of Special Appeals of Maryland

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AMICI CURIAE BRIEF OF MARYLAND CHAMBER OF COMMERCE, AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES SUPPORTING APPELLEES AND AFFIRMANCE

Mark A. Behrens (*pro hac*)
Cary Silverman*
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, D.C. 20005-2004
(202) 783-8400
Counsel for Amici Curiae
**Counsel of Record*

Of Counsel

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Allan J. Stein
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW, Suite 400
Washington, DC 20037
(202) 828-7158

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT OF SPECIAL APPEALS PROPERLY RULED THAT THE LIMIT ON NONECONOMIC DAMAGES APPLIES TO ALL CASES INVOLVING PERSONAL INJURIES 4

II. THE ROOT OF CONFUSION IN THIS CASE STEMS FROM THE PLAINTIFF-APPELLANTS' IMPROPER ATTEMPT TO RECOVER FOR PERSONAL INJURIES THROUGH A CONSUMER PROTECTION ACTION AND THE MERGING OF NEGLIGENCE AND CONSUMER PROTECTION CLAIMS 8

A. The Origin and Purpose of Consumer Protection Statutes 9

B. Damages Under the Maryland CPA Compensate Consumers for the Value They Reasonably Expected, But Did Not Receive, When Purchasing a Product or Service, or Leasing Property, Due to the Seller's Misrepresentation 13

1. Damages for CPA Violations Include Out-of-pocket Expenses or the Lost Benefit of the Bargain 13

2. In CPA Claims Involving Rental Property, Recovery of Rent and Consequential Damages, Such as Moving Costs, Are Proper Measures of Damages 14

C. Previous Lead Paint Cases Decided by Maryland Courts Do Not Support Personal Injury Damages for CPA Claims 16

III. THE CASE FALLS IN THE BROADER NATIONAL CONTEXT OF MISUSE OF STATE CONSUMER PROTECTION CLAIMS 20

A. The Incentive to Tack on Consumer Protection Claims 20

B. Other Courts Have Held the Line 22

CONCLUSION 27

STATEMENT OF RULE 8-504 COMPLIANCE 27

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

CASES **Page**

Ambach v. French, 173 P.3d 941 (Wash. Ct. App. 2007) 23

Beerman v. Toro Mfg. Co., 615 P.2d 749 (Haw. Ct. App. 1980) 22

Benik v. Hatcher, 358 Md. 507, 750 A.2d 10 (2000) 17

Berg v. Byrd, 124 Md. App. 208, 720 A.2d 1283 (1998) 18, 19

Blowers v. Eli Lilly & Co., 100 F. Supp. 2d 1265 (D. Haw. 2000) 22

Brooks v. Lewin Realty III, 378 Md. 70, 835 A.2d 616 (2003) ..... *passim*

CitaraManis v. Hallowell, 328 Md. 142, 613 A.2d 964 (1992) 12, 15

Craig v. Gen. Fin. Corp. of Illinois, 504 F. Supp. 1033 (D. Md.1980) 8

Crowder v. Master Fin., Inc., 176 Md. App. 631, 933 A.2d 905 (2007) 19

Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) 4, 5

Galola v. Snyder, 328 Md. 182, 613 A.2d 983 (1992) 15

Gennari v. Weichert Co. Realtors, 691 A.2d 350 (N.J. 1997) 24

Golt v. Phillips, 308 Md. 1, 517 A.2d 328 (1986) ..... *passim*

Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315 (S.D.N.Y. 2006), *aff'd*, 279 Fed. Appx. 40 (2d Cir. 2008) 24

Green v. N.B.S., Inc., 180 Md. App. 639, 952 A.2d 364 (2008) 7, 8

Gross-Haentjens v. Leckenby, 589 P.2d 1209 (Or. Ct. App. 1979) 23

Hall v. Lovell Regency Homes Ltd. P'ship, 121 Md. App. 344, 708 A.2d 344 (1998) 14

Hoffman v. Stamper, 385 Md. 1, 867 A.2d 276 (2005) 16, 21

Lee v. Cline, 384 Md. 245, 863 A.2d 297 (2004) 7

Lloyd v. General Motors Corp., 397 Md. 108, 916 A.2d 257 (2007) 13

Luskins, Inc. v. Consumer Protection Div., 353 Md. 335, 726 A.2d 710 (1999) 10

Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102 (1992) 4, 6

Oaks v. Connors, 339 Md. 24, 660 A.2d 423 (1995) 6, 7

Pecarina v. Tokai Corp., No. 01-1655,
2002 WL 1023153 (D. Minn. May 20, 2002) 23

Polakoff v. Turner, 155 Md. App. 60, 841 A.2d 406 (2004) 19, 20

Quimby v. Fine, 724 P.2d 403 (Wash. Ct. App. 1987) 23

Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 645 A.2d 1147 (1994) ..... *passim*

Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002) 26

Sacks v. Phillip-Morris, Inc., No. Civ. A. WMN-95-1840, 1996 WL 780311
(D. Md. Sept. 19, 1996) (unpublished), *aff'd*, 139 F.3d 842 (4th Cir. 1998) 25

Shreve v. Sears, Roebuck & Co., 166 F. Supp.2d 378 (D. Md. 2001) 25

Sternberger v. Kettler Bros., Inc., 123 Md. App. 303, 718 A.2d 619 (1998) 19

Stevens v. Hyde Athletic Indus., Inc., 773 P.2d 871 (Wash. Ct. App. 1989) 22

T.W.M. v. Am. Med. Sys., Inc., 886 F. Supp. 842 (N.D. Fla. 1995) 24

United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993) 8

University of Md. Med. Sys. Corp., 143 Md. App. 327, 795 A.2d 107 (2001) 7

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
858 P.2d 1054 (Wash. 1993) 23

White River Estates v. Hiltbruner, 953 P.2d 796 (Wash. 1998) (en banc) 23

Williams v. Purdue Pharma Co., 297 F. Supp.2d 171 (D.D.C. 2003) 26

Zanakis-Pico v. Cutter Dodge, Inc., 47 P.3d 1222 (Haw. 2002) 22

STATUTES

Fla. Stat. § 501.212 24

Haw. Rev. Stat. ch. 480 22

Md. Code, Com. Law § 13-301 ..... *passim*

Md. Code, Com. Law § 13-406 12

Md. Code, Com. Law § 13-408 ..... *passim*

Md. Code, Cts. & Jud. Proc. § 11-108 ..... *passim*

N.J. Stat. Ann. § 56:8-19 24

Wash. Rev. Code § 19.86.090 23

OTHER AUTHORITIES

Blacks Law Dictionary (7th ed. 1999) 7

Comment, *Maryland's Consumer Protection Act: A Private Cause of Action for Unfair or Deceptive Trade Practices*, 38 Md. L. Rev. 733 (1979) 11, 12

Council of State Gov'ts, 1967 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law (1966) 9

Council of State Gov'ts, 1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law – Revision (1969) 10, 11

Revised Uniform Deceptive Trade Practices Act (1966) 9

David A. Rice, *Consumer Transaction Problems*, 48 Boston U. L. Rev. 559 (1968) 11

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts,* 54 Kan. L. Rev. 1 (2005) 9, 21

INTEREST OF *AMICI CURIAE*

As organizations that represent Maryland companies and their insurers, *amici* have an interest in supporting laws that foster a system of predictability and limit outlier damage verdicts. *Amici*'s members also have an interest in ensuring that the civil litigation environment in Maryland is fair and balanced, and reflects sound policy. Application of the statute placing a finite limit on noneconomic damages in all cases, and ensuring that the Maryland Consumer Protection Act is not misused as a universal tort claim in order to circumvent otherwise applicable law, furthers these goals.

It is the *amici*'s position that the Court of Special Appeals decision below applying the statutory cap on non-economic damages to all claims for personal injury should be affirmed. In addition, *amici* urge this Court to clarify that noneconomic damages are not available for violations of the Maryland Consumer Protection Act and, therefore, any noneconomic damages awarded by the trial court in the case at bar are related to Plaintiffs-Appellants' cause of action for negligence.

STATEMENT OF THE QUESTION PRESENTED

Whether the statutory cap on non-economic damages, Md. Code, Cts. & Jud. Proc. § 11-108(b), applies to all civil personal injury actions, including common law, statutory, and constitutional tort claims, and specifically including actions brought under Maryland's Consumer Protection Act, Md. Code, Com. Law § 13-408(a).

STATEMENT OF CASE

Amici curiae adopt Defendants-Appellees' statement of the case.

STATEMENT OF FACTS

Amici curiae adopt Defendants-Appellees' statement of facts.

SUMMARY OF ARGUMENT

The Court of Special Appeals reached the correct conclusion that Maryland's statutory limit on noneconomic damages applies to all civil personal injury claims. As the court below recognized, neither the text of the statute nor the legislative history remotely indicate any intent to apply the cap to damages for personal injuries sounding in common law torts, but not statutory or constitutional tort actions. Given the concern of the General Assembly and Governor with unpredictable awards and rising insurance premiums, such a distinction would be contrary to the purpose of the statute.

There is, however, a broader, underlying issue that the courts below appear to have overlooked. The source of the confusion in this case, and why it reaches this Court, stems from a fundamental misunderstanding of the purpose and relief provided by the Maryland Consumer Protection Act (CPA), Md. Code, Com. Law §§ 13-101 *et seq.* Maryland, like many other states, enacted the CPA to provide a means for consumers to recover their costs or losses when misled into purchasing a good or service. The statute permits consumers to recover damages without meeting each of the traditional elements of a common law fraud action, such as an intent to deceive, and to allow recovery even when there is no binding contract. In addition, CPA claims provide consumers with the ability to recover attorneys' fees in what might otherwise be a prohibitively small claim.

A CPA claim is not a "catch all" tort and it is not intended as an alternative basis to recover for personal injuries. Maryland's negligence and product liability laws already

provide adequate means, subject to appropriate proof requirements, for those who become ill or develop a medical condition as a result of exposure to a dangerous product. Nevertheless, in recent years, lawsuits have increasingly included CPA claims in what are personal injury actions in an attempt to circumvent longstanding elements of tort law, such as causation, and qualify for an award of attorneys' fees

Longstanding Maryland jurisprudence consistently recognizes that the appropriate measure of damages in CPA actions is the consumer's out-of-pocket costs or the lost benefit of the bargain, not an award to remedy a personal injury. At its essence, the CPA action in this case is that the plaintiff paid rent for a habitable apartment that was, in fact, not fit for habitation. In cases involving rental of uninhabitable or substandard apartments, Maryland courts recognize that CPA relief consists of recovery of rent paid during the tenancy, moving expenses, and the difference in cost between substitute housing of similar quality and the rent provided for the remainder of the term of the lease. Moreover, noneconomic damages are not an available form of relief under the consumer protection statutes of the vast majority of states.

Here, the trial court inappropriately merged causes of action for common law negligence and a violation of the CPA into a single action. After the court granted summary judgment in favor of the plaintiff on both counts, the sole question submitted to the jury was whether the plaintiff's child was injured due to the defendant's alleged wrongful conduct and, if so, the amount of the noneconomic damages she suffered. While that instruction may have been appropriate on a negligence count, for which it is undisputed that the statutory limit on noneconomic damages applies, it does not

accurately instruct the jury on the measure of damages for a CPA violation. Damages for past or future pain and suffering are grounded in a negligence, not a CPA, action. As stemming from negligence, these damages are subject to the noneconomic damage limit irrespective of whether the cap would apply to damages under the CPA.

Therefore, this Court should affirm the decision of the court below, finding that the noneconomic damage limit applies to any action awarding damages for personal injury, whether arising under common law or otherwise. The Court should also clarify that damages for pain and suffering stemming from personal injury are not available under the CPA. Since the plaintiff did not offer evidence of loss resulting from the lost value of the rental agreement at trial, this Court should construe the entire award as based in negligence and subject to the noneconomic damage cap.

ARGUMENT

I. THE COURT OF SPECIAL APPEALS PROPERLY RULED THAT THE LIMIT ON NONECONOMIC DAMAGES APPLIES TO ALL CASES INVOLVING PERSONAL INJURIES

In 1985, the Governor and General Assembly established two task forces, the Governor's Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Insurance, in response to a crisis in the availability of insurance in Maryland. *See Murphy v. Edmonds*, 325 Md. 342, 369-70, 601 A.2d 102, 115-16 (1992); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1327-28 (D. Md. 1989). After close consideration, including hearings, meetings, and substantial research, both task forces recommended a statutory limit on noneconomic damages. *See id.* As the Governor's Task Force concluded:

> [T]he civil justice system can no longer afford unlimited awards for pain and suffering.
>
> The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lead to more settlements, and enable insurance carriers to set more accurate rates because of the greater predictability of the size of judgments. The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters.
>
> A substantial portion of the verdicts being returned in liability cases are for noneconomic loss. The translation of these losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.
>
> A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.

Franklin, 704 F. Supp. at 1328 (quoting report of the Governor's Task Force to Study Liability Insurance issued Dec. 20, 1985). Soon after issuance of the task forces' reports, the General Assembly enacted legislation that limited any award for noneconomic damages in a personal injury action to $350,000. *See* Md. Cts. & Jud. Proc. § 11-108(b).[1]

The Governor's Task Force report speaks in broad terms. The concern of its members was the "civil justice system" and "liability cases"; the report did not distinguish between common law and statutory-based claims. *See id.* As this Court recognized, "[a] cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to

[1] The maximum was adjusted to $500,000 in 1994 and increased by an additional $15,000 on October 1 of each year beginning in 1995. *See id.*

reduced premiums, making insurance more affordable for individuals and organizations performing needed services." *Murphy*, 325 Md. at 369-70, 601 A.2d at 115. The lack of predictability, outlier awards, greater liability exposure, and higher settlement values that the legislature sought to address through a noneconomic damages cap would all be lost if the limit applied to some types of claims, but not others. Insurance premiums would increase to reflect higher liability and variability, frustrating the legislative purpose. *See Oaks v. Connors*, 339 Md. 24, 34-35, 660 A.2d 423, 428 (1995) ("One of the primary purposes in enacting this statutory limit was to promote the availability and affordability of liability insurance in Maryland.").

This Court's decision in *Oaks v. Connor*, 339 Md. at 36, 660 A.2d at 429, also indicates that the noneconomic damages cap was intended to apply to all damages arising from a personal injury. In *Oaks*, the question before the Court was whether the cap should be separately applied to noneconomic damages awarded for a wife's injuries and a separate count for damage to their marital relationship through a loss of consortium claim stemming from a single car accident. The Court concluded that the cap applied to all claims stemming from the personal injury, finding that the phrase "*[i]n any action*" in Section 11-108(b) means "that in each personal injury action, which include the injured individual's underlying claims arising therefrom, a single award ("*an* award") of noneconomic damages should be made and should be subject to the statutory cap." *Id.* (emphasis in original). The noneconomic damages claim must apply to "the whole action" because allowing noneconomic damages in excess of the cap "would circumvent the legislative intent." 339 Md. at 38, 660 A.2d at 430; *see also University of Md. Med.*

Sys. Corp., 143 Md. App. 327, 354, 795 A.2d 107, 122-23 (2001) (again emphasizing that the cap applies to "*any* action for damages for personal injury"). Similarly, in the case before this Court, the entire award stems from a personal injury, and the cap should therefore apply.

The Court of Special Appeals' decision recognized this legislative history and judicial precedent holding that the noneconomic damages cap applies to any case involving personal injury, regardless of whether the "tortuous conduct" derives from statutory, constitutional, or common law. *See Green v. N.B.S., Inc.*, 180 Md. App. 639, 646-47, 952 A.2d 364, 369-70 (2008). Its ruling represents a logical and well-reasoned statutory interpretation that this Court should affirm.

As the Court of Special Appeals recognized, a "tort" is broadly defined as "[a] civil wrong for which a remedy may be obtained, usually in the form of damages." 180 Md. App. at 647, 952 A.2d at 369; *see also* Blacks Law Dictionary 1496 (7th ed. 1999). Further, while no other Maryland case has previously interpreted "tortious conduct" for the purposes of the cap, prior decisions by this Court "at least suggest[] that the term 'tortious conduct' includes more than conduct that constituted a tort at common law." 180 Md. App. at 647-49, 952 A.2d at 369-70 (discussing the inclusion of constitutional torts as "tortious acts" in *Lee v. Cline*, 384 Md. 245, 261, 863 A.2d 297, 307 (2004)). In the context of Maryland's long-arm statute, the fact that a cause of action is statutory is irrelevant to the issue of whether the defendant committed a "tortious act" in Maryland. 180 Md. App. at 650-51, 952 A.2d at 371-72 (citing *Craig v. Gen. Fin. Corp. of Illinois*, 504 F. Supp. 1033, 1037 (D. Md.1980)).

Moreover, the Court of Special Appeals recognized that the very purpose behind the General Assembly's inclusion of the phrase "tortious conduct" was to correct what it viewed as an overly narrow interpretation of the noneconomic damages cap by this Court's ruling in *United States v. Streidel*, 329 Md. 533, 620 A.2d 905 (1993), that wrongful death actions fell outside of its scope. *See* 180 Md. App. at 652-53, 952 A.2d at 372. This led the Court of Appeals to conclude that "in light of the reasons for the original cap statute, and its amendment, it is impossible to believe that the legislature intended to narrow the statute . . . so that insurers would now have to cover non-economic damages awards that exceeded the cap so long as the personal injury action arose out of the violation of a statute or a constitutional provision." 180 Md. App. at 660, 952 A.2d at 377. This Court should affirm the Court of Special Appeals' sound ruling on this issue, and make clear that the noneconomic damages cap was intended to apply to any civil action involving a personal injury.

II. THE ROOT OF CONFUSION IN THIS CASE STEMS FROM PLAINTIFFS-APPELLANTS' IMPROPER ATTEMPT TO RECOVER FOR PERSONAL INJURIES THROUGH A CONSUMER PROTECTION ACTION AND THE MERGING OF NEGLIGENCE AND CONSUMER PROTECTION CLAIMS

While the Court of Special Appeals properly recognized that the noneconomic damages limit applies to all claims, the source of confusion in this case stems from a faulty assumption that noneconomic damages are available in CPA actions. Consumer protection statutes are intended to provide recovery for losses incurred when a consumer buys a product or service that is worth less than he or she was led to believe. Such "benefit of the bargain" laws were not intended to provide a means to circumvent

traditional elements of negligence or product liability actions or to permit recovery of noneconomic or other personal injury damages.

A. The Origin and Purpose of Consumer Protection Statutes

State consumer protection acts serve a distinct purpose. States adopted such statutes to provide a remedy when traditional elements of misrepresentation claims and contract actions rendered it difficult and financially infeasible for consumers to obtain relief when misled into purchasing everyday goods and services. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 6-7, 15-16 (2005).

In the 1960s, the Federal Trade Commission, joined by the Council of State Governments (CSG) and National Conference of Commissioners on Uniform State Laws (NCCUSL), encouraged states to adopt consumer protection statutes as a means of supplementing federal enforcement. *See* Council of State Gov'ts, 1967 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law at A71-A78 (1966); Revised Uniform Deceptive Trade Practices Act (1966) (reprinted in Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Seventy-fifth Year (1964)). These model acts focused on stopping deceptive practices before they misled consumers. The original FTC/CSG model legislation provided only for injunctive relief through state attorney general enforcement, while the NCCUSL version authorized private injunctive relief. *See id.* Maryland was one of the first states to adopt legislation based on the 1967 FTC/CSG model. *See* Council of State Gov'ts, 1970 Suggested State Legislation, Unfair Trade

Practices and Consumer Protection Law – Revision, at 2 (1969) (noting adoption of the 1967 model by Maryland and nine other states); *see also Luskins, Inc. v. Consumer Protection Div.*, 353 Md. 335, 353, 726 A.2d 710, 710-11 (1999) (noting Maryland's first Consumer Protection Act was provided for by Chapter 388 of the Acts of 1967 and codified in Maryland Code (1957, 1969 Repl. Vol.) as Article 83, §§ 19 through 27).

In 1970, the CSG amended its model act to provide a private right of action and, for the first time, authorized monetary damages as well as recovery of attorneys' fees. *See id.* § 8. Professor David A. Rice, whose ideas were credited by the CSG in explaining the 1970 changes to the model act, found that a private right of action was an "illusory measure" without availability of attorneys' fees because of the smaller losses in consumer actions compared with personal injury claims:

> The significance of the typically small provable claim for damages in a direct consumer versus seller dispute is apparent when one pauses to consider the costs of going to court to remedy an unadjusted or rejected complaint. Unless the consumer's claim is for personal injury on a products liability count, there can be no effective legal redress through the courts by an action seeking damages for unlawful conduct in connection with typical purchases for consumption or use. As a matter of fact, there can be no effective relief in keeping with the reparative concept of the action for damages where the claim is for one hundred or two hundred dollars. The cost of litigation in terms of attorney's fees alone is just too great to make such an action feasible, but the theoretically fee-producing character of the cause of action is sufficient to prevent representation of the poor consumer by many legal service agencies in almost all of these cases.

David A. Rice, *Consumer Transaction Problems*, 48 Boston U. L. Rev. 559, 569 (1968). Thus, the solution to this problem was not to provide recovery for personal injury or product liability through a consumer protection claim, but to make recovery of attorneys'

fees available to plaintiffs in cases ordinarily involving small losses stemming from consumer transactions.[2]

In this environment, Maryland adopted the current form of its Consumer Protection Act in 1973. *See* Comment, *Maryland's Consumer Protection Act: A Private Cause of Action for Unfair or Deceptive Trade Practices*, 38 Md. L. Rev. 733, 733-37 (1979) (citing ch, 704, 1974 Md. Laws 1484 (codified at Md. Code, Com. Law §§ 1301 to -501)). The Maryland Consumer Protection Act (CPA) recognized that the state's tort action for deceit, which required knowledge of the falsity of the statement, and contract actions for breach of express and implied warranties, which also had significant limitations, left many duped consumers without a sufficient remedy. *See generally* Comment, 38 Md. L. Rev. at 733-37 (discussing legislative intent); *see also Golt v. Phillips*, 308 Md. 1, 8, 517 A.2d 328, 331 (1986) (examining legislative purpose).

The CPA's private right of action provides that "any person may bring an action to recover for injury or loss sustained by him as a result of a practice prohibited by this title." Md. Code, Com. Law § 13-408(a). While not originally included in the Act, the law was later amended to authorize courts to award prevailing plaintiffs reasonable attorneys' fees.[3] This amendment recognized that "[t]he relatively small amount of damages ordinarily suffered in consumer transactions continue[d] to render a cause of

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[2] Rice also viewed providing for minimum statutory damages or multiple damages as additional means of addressing the small value of damages in consumer claims. Rice, *supra*, at 573-76. These alternative approaches are not reflected in the Maryland CPA.

[3] The General Assembly also amended the CPA to explicitly include unfair and deceptive practices in the rental of consumer realty within its prohibited practices in 1976. *See CitaraManis v. Hallowell*, 328 Md. 142, 150, 613 A.2d 964, 968 (1992) (citing Ch. 907 of the Acts of 1976).

action under the Act uneconomic." Comment, 38 Md. L. Rev. at 764 (recommending amendment of the Act to permit recovery of attorneys' fees); *see also* 1970 Suggested State Legislation, *supra*, at 4 (noting amendment of the model act to provide a private right of action and attorneys' fees because "thousands of consumers suffer small losses, without remedy or relief being available"). Clearly, in enacting and amending the CPA, the General Assembly envisioned providing consumers with practical means of recovering money spent on product and services that they would not have otherwise purchased or that had a lower value than reasonably anticipated due to reliance on a seller's misrepresentation. This understanding is further confirmed by the court's explicit authority to "[r]estore to a person any money or real or personal property acquired from him by means of any prohibited practice." Md. Code, Com. Law § 13-406(c)(2) (providing available remedies in CPA actions brought by the Attorney General).

This legislative history and context instructs that the General Assembly did not anticipate personal injury-type damages in the hundreds of thousands of dollars stemming from individual CPA claims. Even more certainly, when the law was enacted, the General Assembly never envisioned the availability of damages for pain and suffering, or other noneconomic relief, through a CPA action.

B. Damages Under the Maryland CPA Compensate Consumers for the Value They Reasonably Expected, But But Did Not Receive, When Purchasing a Product or Service, or Leasing Property, Due to the Seller's Misrepresentation

While Maryland courts have considered numerous CPA claims, there is an absence of case law considering the appropriateness of an award of noneconomic

damages in such cases. That is likely because consumer protection laws have their origin in tort actions for misrepresentation and contract claims for breach of warranty. In such cases, the measure of damages is ordinarily the purchaser's out-of-pocket cost or the lost benefit of the bargain. Maryland law repeatedly reaffirms that this is the proper scope of damages in CPA claims.

1. Damages for CPA Violations Include Out-of-Pocket Expenses or the Lost Benefit of the Bargain

This Court recently considered the measure of actual loss under the CPA in *Lloyd v. General Motors Corp.*, 397 Md. 108, 916 A.2d 257 (2007). In *Lloyd,* a class of automobile owners claimed a defect caused seats to collapse in a collision. This Court recognized that, under the CPA, a consumer must show an objectively identifiable loss "measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers' misrepresentation." 397 Md. at 143, 916 A.2d at 277. In that case, the loss for class members would be "measured by the amount it will cost them to repair the defective seatbacks." 397 Md. at 149, 916 A.2d at 281. The Court recognized that damages under the CPA would "constitute no more than the amount it would take to remedy the loss they incurred as a result of the respondents' alleged deceptive practices." 397 Md. at 150, 916 A.2d at 281. The class in *Lloyd* did not allege personal injuries, nor were such injuries required under the CPA, because the purpose of the statute is to provide a means for consumers to receive the value of a product, service, or agreement for which they paid when they were misled into purchasing an inferior product.

In cases alleging misrepresentations in the quality of home construction that have similarities to the case at bar, Maryland courts recognize that the purchaser is entitled to the lost fair market value of the property, out-of-pocket damages, or the lost benefit of the bargain, if shown. *See Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 344, 708 A.2d 344 (1998). If the owner had fallen down a poorly built stairway in that same home, then his or her remedy for personal injuries would lie in negligence or product liability, not in a CPA claim.

2. In CPA Claims Involving Rental Property, Recovery of Rent and Consequential Damages, Such as Moving Costs, Are Proper Measures of Damages

Maryland CPA jurisprudence involving the rental of property follows these basic principles for quantifying loss under the statute. For example, in *Golt v. Phillips*, 308 Md. 1, 517 A.2d 328 (1986), this Court considered the measure of damages in a CPA action brought by an elderly, disabled retiree who entered a lease for an apartment with the understanding that the landlord would clean and repair the unit before he moved in. After the tenant contacted the city to inspect the unit, which revealed numerous housing code violations, the landlord evicted the tenant, claiming it could not rent to him since the apartment was not properly licensed. The Court found a violation of the CPA because, in renting the apartment, the landlord made an implicit representation that the unit was habitable and licensed. *See* 308 Md. at 13, 517 A.2d at 334. The Court recognized that the proper measure of damages under the CPA stemming from an uninhabitable apartment "is comprised of restitutionary and consequential damages," namely, rent paid during the tenancy, moving expenses, and the difference in cost between substitute

housing of similar quality and the rent provided for the remainder of the term of the lease. *See id.*

Six years later, this Court addressed a similar CPA action in *CitaraManis v. Hallowell*, 328 Md. 142, 613 A.2d 964 (1992). In that case, tenants brought an action seeking reimbursement of rent for their unlicensed rental properties. Unlike the situation in *Golt*, the CitaraManises lived in their apartment without any significant problem during the period for which they sought reimbursement of rent. The Court found that the CitaraManises failed to state a CPA claim because unlike the tenant in *Golt*, they did not allege actual loss or injury as required by the statute. *See* 328 Md. at 157-58, 613 A.2d at 972. The Court recognized that if the CitaraManises could show the house was unsafe or uninhabitable during their tenancy, then they would be entitled to reimbursement of rent. *See* 328 Md. at 149, 613 A.2d 967. A companion decision issued by this Court further explained that a tenant can recover restitution of rent under the CPA if the tenant shows that she was provided less than what she had bargained for in the lease due to undisclosed defects in the property. *See Galola v. Snyder*, 328 Md. 182, 185-86, 613 A.2d 983, 985-86 (1992).

Taken together, these cases stand for the proposition that the proper measure of damages in a CPA claim stemming from an uninhabitable, dangerous, or substandard rental property, is the amount overpaid in rent and any consequential damages such as moving costs, or the cost of repairing the property to bring it up to the expected standard.

Maryland courts do not appear to have considered awarding damages for personal injuries, including pain and suffering, in an action under the CPA.[4]

C. Previous Lead Paint Cases Decided by Maryland Courts Do Not Support Personal Injury Damages in CPA Claims

Maryland courts have considered several CPA claims alleging injuries stemming from peeling or flaking of lead paint in homes. Only the case at bar and a single decade-old case have confusingly permitted personal injury damages for CPA claims.

In the first lead paint case to come before this Court, *Richwind Joint Venture 4 v. Brunson*, 335 Md. 661, 686-87, 645 A.2d 1147, 1159-60 (1994), the Court emphasized that the CPA does not create a new remedy in strict liability. Rather, "[t]he CPA applies to a lease at the time the consumer enters into it, and the Act is intended to govern deceptive trade practices which induce the prospective tenant to enter into such a lease." 335 Md. at 683, 645 A.2d at 1158. In *Richwind*, as in the case at bar, the trial court had awarded a single measure of damages for both the CPA and negligence counts. Nevertheless, the Court appropriately recognized that the action was "fundamentally a personal injury action," not a CPA claim, and that the damages awarded were rooted in

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[4] In *Hoffman v. Stamper*, 385 Md. 1, 867 A.2d 276 (2005), the Court found that plaintiffs who alleged a fraudulent conspiracy property flipping scheme could recover noneconomic emotional harm damages if they showed an objectively ascertainable accompanying or consequential physical injury. The court's analysis of the availability of noneconomic damages, however, was related solely to the fraud claim and did not relate to the defendants' CPA violation. *See* 385 Md. at 33-41, 867 A.2d at 295-300. Fraud, however, is an intentional tort, subject to liability by clear and convincing evidence. Moreover, the *Hoffman* Court recognized that the CPA claim is distinct from a fraud action in finding that an award of attorneys' fees under the CPA could not reflect a contingency fee reflecting, in part, punitive damages, which are impermissible under the CPA. 385 Md. at 48-49, 867 A.2d at 304-05.

negligence, thus making it "questionable" whether attorneys' fees would be available through addition of the CPA claim. 335 Md. at 687, 645 A.2d at 1159-60.

The two cases that followed *Richwind*, *Benik v. Hatcher*, 358 Md. 507, 750 A.2d 10 (2000), and *Brooks v. Lewin Realty III*, 378 Md. 70, 835 A.2d 616 (2003), recognized the lower threshold for a misrepresentation claim brought under the CPA compared with a negligence claim. In neither case, however, did this Court find that a plaintiff could receive the same personal injury damages available in a negligence claim when bringing an action under the CPA's more liberal requirements.

In *Benik*, this Court found that proof of scienter is not a prerequisite for a claim alleging a violation of the CPA regarding a landlord's rental of an apartment with flaking, loose or peeling paint to a tenant. The specific holding in *Benik* was that the trial court erred in instructing the jury that the landlord had to be aware of deteriorated lead-based paint on the premises in order to constitute a violation of the CPA. *See* 358 Md. at 532-33, 835 A.2d at 24. Thus, the plaintiff could recover even when evidence indicated that the apartment had passed a housing inspection and was inspected by the tenant before the tenant moved in. *See* 358 Md. at 512-13, 835 A.2d at 12-13. Such knowledge on the part of the landlord might be required to meet the foreseeability element of a negligence action. *See Richwind*, 335 Md. at 672-77, 645 A.2d at 1152-54 (recognizing that a landlord is liable in negligence for a defective condition on his or her property, such as lead-based paint, if the landlord either knows or has reason to know of the condition and has a reasonable opportunity to correct the condition).

Brooks overruled *Richwind* with respect to the need to show more than the presence of flaking, loose or peeling paint in violation of the housing code during tenancy to establish a prima facie claim sounding in negligence. *See* 378 Md. at 89, 835 A.2d at 627. It is important to note, however, that *Brooks* did *not* disturb the *Richwind* Court's finding that there is a distinction between negligence actions, in which the plaintiff receives compensation for personal injuries, and CPA claims, which are meant to provide restitution for economic loss. In fact, *Brooks* solely involved a premises liability action and did not consider lead paint claims under the CPA.

The only case that appears to have permitted an award for personal injury damages stemming from a CPA case, aside from the case before this Court, is *Berg v. Byrd*, 124 Md. App. 208, 720 A.2d 1283 (1998). The Court of Appeals in *Berg* considered whether the noneconomic damages cap applied to negligence and CPA claims in a lead paint exposure case. The jury had returned a verdict of $1,000,000 on the negligence count and $500,000 on the CPA count. The trial court reduced the verdict on the negligence count to $350,000 reflecting the cap, but declined to reduce the verdict on the CPA count, holding that the CPA claim accrued prior to the effective date of the cap. It entered a total verdict of $500,000, finding that anything more would result in duplicate recovery. The appellate court considered the "novel question of when a personal injury claim brought under the CPA arises for purposes of applying the statute." 124 Md. App. at 212, 720 A.2d at 1284-85. The appellate court's decision, however, is flawed because it improperly framed the question. It presupposes that a personal injury claim may be

brought as a CPA claim. Such an analysis confuses the fundamental distinction between the nature of remedies available through tort actions and CPA claims.

The appellate court ultimately concluded that the CPA claim arose when the plaintiff "sustained a legally compensable injury, i.e. personal injury non-economic damages." 124 Md. App. at 215-16, 720 A.2d at 1286. What the appellate court should have found, and in accord with longstanding Maryland jurisprudence, is that a CPA action arises when the plaintiff knew, or should have known, that he or she was misled into paying for something that was not received, i.e., that the tenant paid rent for housing that was not habitable and safe. *See Sternberger v. Kettler Bros., Inc.*, 123 Md. App. 303, 307, 718 A.2d 619, 620 (1998) (finding statute of limitations for CPA claim alleging faulty construction of homes began to run once homeowner was notified of potential problem with roofing materials); *see also Crowder v. Master Fin., Inc.*, 176 Md. App. 631, 655-57, 933 A.2d 905, 920 (2007) (finding that CPA claim brought against lenders regarding illegal fees and closing costs accrued as of closing, "when the borrowers knew all facts necessary to pursues their claims under the CPA"), *cert. granted* (Oct. 7, 2008).

This Court should follow such reasoning in the case at bar and hold that the entire award should be construed as damages related to the negligence action subject to the noneconomic damages cap. Such an interpretation would be in line with relief awarded for similar injuries. For example, in *Polakoff v. Turner*, a jury awarded $500,000 to a minor child who experienced lead paint poisoning against the landlord and property management company. 155 Md. App. 60, 62-64, 841 A.2d 406, 408-09 (2004). The complaint originally included multiple counts, but the only claim ultimately submitted to

the jury was the negligence claim. The Court of Special Appeals found that the plaintiffs had made a prima facie case of negligence under *Brooks*, and upheld the trial court, which had reduced the judgment to $350,000 in accordance with the then-applicable noneconomic damages cap. *See* 155 Md. App. at 64, 841 A.2d at 409. *Polakoff* shows that the noneconomic damages awarded in the case at bar can and should be attributed to the plaintiff's negligence claim.

III. THE CASE FALLS IN THE BROADER NATIONAL CONTEXT OF MISUSE OF STATE CONSUMER PROTECTION CLAIMS

Though Maryland has not made it clear yet, other states have correctly held that consumer protection statutes are not intended to provide for non-economic personal injury damages but rather, given their relaxed burden of proof, are intended only to provide economic and benefit of the bargain damages, as well as attorneys' fees. Blurring these two separate bases for liability, consumer protection law and personal injury claims, has the potential to create a universal tort with consumer protection claims subsuming tort law.

A. The Incentive to Tack on Consumer Protection Claims

Consumer protection statutes, by their very nature, reduce the common law elements necessary to bring a tort claim for misrepresentation. Due to the broad range of conduct that falls within their scope, such laws often include sweeping language prohibiting unfair or deceptive practices. Maryland's CPA is no exception. *See* Md. Code, Com. Law § 13-301 (prohibiting a wide range of practices). The CPA does not require a showing that the defendant intended to deceive the consumer or that the

consumer actually relied on the representation. *See* Md. Code, Com. Law § 13-408. In addition, unlike the traditional "American rule" applicable in tort cases, a prevailing CPA plaintiff may recover his or her attorneys' fees. *See* Md. Code, Com. Law § 13-408(b). A plaintiff need only show an actual injury or loss resulting from the unfair or deceptive practice to recover damages. *See* Md. Code, Com. Law § 13-408(a).

Given the broad language of consumer protection statutes, the relaxed burden of proof, and the potential for significant recovery including attorneys' fees, consumer protection claims are frequently tacked on to what are ordinary negligence or product liability claims. Consumer protection actions are asserted when the plaintiff is unable to prove the fundamental elements of a tort claim, such as breach of duty or causation. In product liability cases, claimants unable to show a defective design have, in some cases, alternatively alleged that a manufacturer is liable for a CPA violation because it misrepresented a product design, feature, or level of safety, or did not disclose certain risks or dangers associated with the product. *See* Schwartz & Silverman, 54 Kan. L. Rev. at 63-66. They are also brought in the hopes of receiving an award of attorneys' fees in what is essentially a negligence action. *See, e.g., Hoffman v. Stamper*, 385 Md. 1, 48-49, 867 A.2d 276, 304-05 (2005) (recognizing that a fee award under the CPA may not be based on additional recoveries under other causes of action). This Court should hold the line against the merging of CPA and personal injury claims.

B. Other Courts Have Held the Line

Despite suits of this nature, many courts have maintained clear separation between product liability and consumer protection law, including federal courts applying Maryland law.

For example, the Hawaii Supreme Court has recognized that Hawaii's deceptive trade practices act, Haw. Rev. Stat. ch. 480, "was not designed as a vehicle for personal injury actions, with respect to which the law already provides adequate remedies. Rather, the legislature has sought to regulate the conduct of trade and commerce by preventing unfair and deceptive acts and practices that are injurious to other businesses and consumer-participants in the marketplace." *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222, 1232 (Haw. 2002) (holding that damages for emotional distress were unavailable under consumer protection statute in case alleging misleading automobile advertisement); *see also Beerman v. Toro Mfg. Co.*, 615 P.2d 749 (Haw. Ct. App. 1980) (cautioning against permitting consumer protection laws to be "used as a vehicle for personal injury suits"); *Blowers v. Eli Lilly & Co.*, 100 F. Supp. 2d 1265, 1268 (D. Haw. 2000) (holding that Hawaii's consumer protection statute did not provide a remedy to parents of son who committed suicide after ingesting antidepressant medication manufactured by pharmaceutical manufacturer).

Washington courts have consistently maintained a division between personal injury and consumer protection claims. For example, a plaintiff who was severely injured when a cleat of her softball shoes got caught in the dirt during a game could not "come within [the Washington Consumer Protection Act] analysis by classifying her

personal injury damages into a pseudo-property structure." *Stevens v. Hyde Athletic Indus., Inc.*, 773 P.2d 871, 872-73 (Wash. Ct. App. 1989). In medical liability cases, while the "entrepreneurial aspects of the medical profession" might implicate the CPA, claims involving the actual competence of the medical practitioner did not constitute viable CPA claims. *Id.* at 872 (discussing *Quimby v. Fine*, 724 P.2d 403 (Wash. Ct. App. 1987).

In addition, the Washington Supreme Court has recognized that damages for pain and suffering are not available under Washington's Consumer Protection Act, Wash. Rev. Code § 19.86.090, but could be awarded if the plaintiff also states a viable product liability claim. *See Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1064 (Wash. 1993). Washington courts also recognize that plaintiffs may recover for pecuniary costs related to a misrepresentation through a CPA action, such as the cost of a surgery, but a negligence action is the proper means to recover for any pain and suffering related to a personal injury. *See Ambach v. French*, 173 P.3d 941, 945 (Wash. Ct. App. 2007). Nor are damages for emotional distress available under the Washington CPA, because the statute is not rooted in an intentional tort. *See White River Estates v. Hiltbruner*, 953 P.2d 796, 798 (Wash. 1998) (en banc).

Other states have reached similar conclusions regarding the scope of their CPA and available recovery. For instance, Oregon indentified and rejected the intrusion of personal injury claims into consumer protection law nearly thirty years ago. *See Gross-Haentjens v. Leckenby*, 589 P.2d 1209, 1211 (Or. Ct. App. 1979) ("[The Oregon Unlawful Trade Practices Act was not intended by the legislature to create such a new

cause of action for personal injuries."). More recently, a federal court rejected a claim for pain and suffering and emotional distress under Minnesota's Uniform Deceptive Trade Practices Act where "the essence of Plaintiffs' lawsuit is personal injury." *Pecarina v. Tokai Corp.*, No. 01-1655, 2002 WL 1023153 (D. Minn. May 20, 2002).

The Supreme Court of New Jersey has also ruled that noneconomic damages are not available under the state's Consumer Fraud Act, N.J. Stat. Ann. § 56:8-19. *See Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 369 (N.J. 1997). In considering a claim involving alleged misrepresentations in the sale of homes, the court ruled that such damages might be available under a claim for intentional or negligent infliction of emotional distress, but the plaintiff had not satisfied the elements of such claims. *See id.*

In Florida, the legislature has removed any doubt as to the interplay of consumer protection law and personal injury claims by expressly stating that its Unfair and Deceptive Trade Practices Act does not apply to a "claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction" at issue. Fla. Stat. § 501.212(3); *see also T.W.M. v. Am. Med. Sys., Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995) (dismissing consumer protection claim seeking damages including pain and suffering and mental anguish). The Southern District Court of New York, applying Florida law, also made the connection between distinguishing personal injury cases from CPA claims for the purpose of rejecting non-economic damages. In *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp.2d 315 (S.D.N.Y. 2006), *aff'd*, 279 Fed. Appx. 40 (2d Cir. 2008), a dieter alleged consumer protection violations related to the Atkins Diet program, and sought noneconomic damages in addition to

economic damages. The court exposed the action as an attempt to inappropriately graft noneconomic personal injury damages onto CPA claims, stating, "The thrust of [plaintiff's] complaint is that had defendants not misled him into believing that the Diet was safe for everyone, he would never have followed the Diet and would never have suffered cardiac blockage and, consequently, severe pain, and physical and emotional distress. Thus, the true damages that [Plaintiff] seeks are for personal injury...." *Id.* at 329.

Federal courts interpreting Maryland's CPA have maintained a distinction between personal injury and consumer claims. For instance, in a case alleging a CPA violation for a manufacturer's failure to communicate that its snow thrower machine lacked an adequate safety guard and other alleged misrepresentations in the owner's manual, the court held that the mere sale of an allegedly defectively designed product was not a violation of the CPA. *See Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 417 (D. Md. 2001). A similar result occurred in an earlier federal case, applying Maryland law, alleging a CPA violation where a fire that allegedly started from a burning cigarette caused the deaths of the plaintiffs' decedents. *See Sacks v. Phillip-Morris, Inc.*, No. Civ. A. WMN-95-1840, 1996 WL 780311, at *1 (D. Md. Sept. 19, 1996) (unpublished), *aff'd*, 139 F.3d 842 (4th Cir. 1998). In addition to bringing product liability claims against the tobacco company, the plaintiffs asserted a CPA claim alleging that the defendant made misrepresentations and withheld information from the public on its ability to produce a "fire-safe" cigarette. *Id.* The court found a lack of causal connection between the alleged violation and the injury suffered. *See id.* at *1-2. The

court recognized that "if the Court were to accept Plaintiffs' theory, every product liability claim could also be converted into a claim under the MCPA." *Id.* at *2. The court also found no authority for such an expansive application of the statute. *See id.*[5]

In the present case, the plaintiff's lawsuit is based in a personal injury from her alleged exposure to lead-based paint, not damages stemming from the lease of consumer realty. *See* Md. Code, Com. Law § 13-301(2)(i) (defining types of injurious acts under the CPA). The sound rulings of Maryland's federal courts and other jurisdictions underscore the importance of maintaining a rational boundary between consumer protection and personal injury law. Merger of either product liability or other personal injury claims with consumer protection would dramatically expand the scope of the CPA, heightening potential recoveries while lowering traditional standards, and ultimately diminish the effectiveness of these other areas of law. This Court should, therefore, make explicit that the CPA is not a vehicle for personal injury claims.

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[5] Unlike the case at bar, some CPA claims sound in personal injury, but are brought by those who cannot show injury. For example, in *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171 (D.D.C. 2003), the United States District Court for the District of Columbia did not permit use of the District of Columbia's Consumer Protection Procedures Act (DCCPPA) to evade basic and well-reasoned requirements of product liability law. The lawsuit charged that the drug OxyContin did not live up to its advertising claims as providing "smooth and sustained" pain relief. *Id.* at 173. The complaint alleged a violation of the DCCPPA and sought statutory penalties, treble damages, and punitive damages, as provided by the District's statute. *See id.* at 172. As the defendant plainly observed, "[t]his is a product liability suit in which plaintiffs fail to allege any physical injury." *Id.* at 175-76. Relying on a similar Texas case in which a plaintiff who was not injured sued a pharmaceutical manufacturer for not including warnings of the potential for liver damage and on grounds that the drug was defective on its labeling, the court agreed and dismissed the claim. *See id.* at 177-78 (citing *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002)).

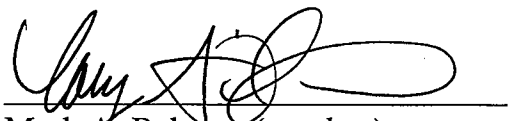
CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court affirm the decision of the Court of Special Appeals and clarify that noneconomic damages stemming from personal injury are not available under the Maryland Consumer Protection Act.

STATEMENT OF RULE 8-504 COMPLIANCE

Pursuant to Rule 8-504(a)(8), I certify that the foregoing *amici curiae* brief was styled in 13-point typeface and Times New Roman font.

Respectfully submitted,



Mark A. Behrens (*pro hac*)
Cary Silverman*
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, D.C. 20005-2004
(202) 783-8400
Counsel for Amici Curiae
**Counsel of Record*

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Allan J. Stein
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW, Suite 400
Washington, DC 20037
(202) 828-7158

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Dated: December 17, 2008