17-3941(L)

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

United States Court of Appeals for the Second Circuit

Thelma Benoit, David Benoit, Cynthia Bodenstab, Mary Schmigel, Michael Schmigel, Byran Schrom, Kary Schrom, Kevin Schrom, Nickolas Schrom, Margaret Sargood, Lisa Tifft, Ruth Tifft, Travis Conquest, Brett Ferraro, Steven Church, Sharon Church, Martha Campbell, Kenneth Cross, II, individually and as parent and natural guardian of R.D.C., Cielo Cross, individually and as parent and natural guardian of R.D.C., Suzanne I. Baker, Arnold Bullinger, individually and as Executor of the Estate of Edward Frommer, deceased, Janet Van Der Kar, Douglas Smith, Beverly White, Roger White, Christine Jensen, James Jensen, Patricia Ormsbee, Douglas Holmstedt, Debra Holmstedt, Randall Putnam, Cheryl Rios, Robert Rios,
Plaintiffs-Appellees,

v.

Saint-Gobain Performance Plastics Corp., Honeywell International Inc., FKA Allied-Signal Inc.,
Defendants-Appellants.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND THE BUSINESS COUNCIL OF NEW YORK STATE, INC., AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS, URGING REVERSAL

David Venderbush
ALSTON & BIRD LLP
90 Park Avenue, 15th Floor
New York, NY 10016
(212) 210-9400

Brian D. Boone
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000

Attorneys for Amici Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly held company holds ten percent or greater ownership in the organization.

The Pharmaceutical Research and Manufacturers of America (PhRMA) has no parent corporation and no publicly traded company owns ten percent or more of its stock.

The Business Council of New York State, Inc., is a non-profit business federation with no parents, subsidiaries, or affiliates. No publicly held company holds ten percent or greater ownership in the organization.

/s/ David Venderbush
David Venderbush
Counsel for Amici Curiae The Chamber of Commerce of the United States of America, Pharmaceutical Research and Manufacturers of America, and The Business Council of New York State, Inc.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 3

ARGUMENT 6

I. THE DISTRICT COURT MISINTERPRETED *CARONIA* AS REDEFINING "PHYSICAL INJURY." 6

II. THE DISTRICT COURT'S IMPROPER RULING WAS DRIVEN BY AN OVERLY OPTIMISTIC VIEW OF MEDICAL MONITORING THAT IS INCONSISTENT WITH *CARONIA* AND THE VIEWS OF OTHER COURTS AND REGULATORS 14

CONCLUSION 19

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases

Abusio v. Consolidated Edison Co. of N.Y., Inc.,
238 A.D.2d 454 (N.Y. App. Div. 2d Dep't 1997) 6, 7, 8

Allen v. Gen. Elec. Co.,
32 A.D.3d 1163 (N.Y. App. Div. 4th Dep't 2006) 3, 6

Askey v. Occidental Chem. Corp.,
102 A.D.2d 130 (N.Y. App. Div. 4th Dep't 1984) 16, 18

Baker v. Saint-Gobain Performance Plastics Corp.,
No. 16-cv-917, 2017 WL 486939 (N.D.N.Y. Feb. 6, 2017) ..... *passim*

Bendix Corp. v. Stagg,
486 A.2d 1150 (Del. 1984) 13

Bernier v. Raymark Indus., Inc.,
516 A.2d 534 (Me. 1986) 13

Caronia v. Philip Morris USA, Inc.,
22 N.Y.3d 439 (2013) ..... *passim*

Caronia v. Philip Morris USA, Inc., No. 06-cv-224 (CBA)(SMG),
2011 WL 338425 (E.D.N.Y. Jan. 13, 2011) 18

Caterinicchio v. Pittsburgh Corning Corp.,
605 A.2d 1092 (N.J. 1992) 13

Henry v. Dow Chemical Co.,
701 N.W.2d 684 (Mich. 2005) 2, 8, 12

Hollingsworth & Vose Co. v. Connor,
764 A.2d 318, 338 (Md. 2000) 13

In re Haw. Fed. Asbestos Cases,
734 F. Supp. 1563 (D. Haw. 1990) 13

In re Rezulin Products Liability Litigation,
61 F. Supp. 2d 268 (S.D.N.Y. 2005) 12

Metro-North Commuter R.R. Co. v. Buckley,
521 U.S. 424 (1997) 3, 10

Rainer v. Union Carbide Corp.,
402 F.3d 608 (6th Cir. 2005) 12

Schweitzer v. Consolidated Rail Corp.,
758 F.2d 936 (3d Cir.1985) 12

Simmons v. Pacor, Inc.,
674 A.2d 232 (Pa. 1996) 13

Staubley v. Electric Boat Corp.,
39 Fed. App'x 24 (2d Cir. 2011) 12, 13

Regulations

ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program under CERCLA, 60 Fed. Reg. 38,840 (July 28, 1995) 17

Other Authorities

W.K.C. Morgan, Medical Monitoring with Particular Attention to Screening for Lung Cancer, in Occupational Lung Disease (J. Bernard et al., eds. 1984) 17

Victor E. Schwartz, et al., Medical Monitoring: The Right Way and The Wrong Way, 70 Mo. L Rev. 349 (2005) 17

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents over 300,000 direct members, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's members are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. To that end, PhRMA supports public policies and legal outcomes that foster, reward, and protect innovation.

The Business Council of New York State, Inc. (Business Council) is a statewide organization dedicated to advancing the interests of both

[1] In accordance with Federal Rule of Appellate Procedure Rule 29(c)(5), the Chamber, PhRMA, and the Business Council certify that no party or party's counsel authored this brief in whole or in part and that no person except the Chamber, PhRMA, the Business Council, their members or their counsel funded the brief. All parties have consented to this filing.

large and small businesses in New York. The Business Council works for a healthier business climate, economic growth, and jobs.

These *amici* regularly file *amicus curiae* briefs in cases of concern to New York's and the nation's business communities. In many of those cases, one of the requested remedies is medical monitoring. The Chamber and PhRMA have filed *amicus curiae* briefs in many of the leading cases around the country rejecting expansions of medical monitoring claims. All three entities filed a joint *amici* brief in the governing case here, *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013). The Chamber filed an amicus brief in a similar case on which *Caronia* relied, *Henry v. Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005).

Important legal and policy considerations drove the *Caronia* court to limit medical monitoring. The District Court below misinterpreted *Caronia*, imposing its own policy views and its own inaccurate views on medical-monitoring's value. If allowed to stand, the District Court's decision will create precisely the policy problems that the New York Court of Appeals sought to avoid by rejecting an independent cause of action for medical monitoring. This Court should reverse the District Court's ruling that blood accumulation of perfluorooctanoic acid (PFOA) is sufficient under New York law to sustain a claim for negligence seeking medical-monitoring damages.

INTRODUCTION

In *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013), the New York Court of Appeals rejected any expansion of medical monitoring in New York. Instead, it limited medical monitoring based on "this State's long-held physical harm requirement."[2] It did so for reasons appearing under New York tort law,[3] but it also did so for significant policy reasons.[4] After years of plaintiffs' attempting to expand medical-monitoring recoveries, the Court of Appeals explained that medical monitoring—just like any other damages component—is available only after "the plaintiff establish[es] entitlement to damages on an already existing tort cause of action."[5]

The District Court below ignored *Caronia*'s holding and reasoning to rule that the mere accumulation of an alleged toxin—without any allegation of harm—"is sufficient to permit a claim for negligence

---

[2] *Id.* at 448.

[3] *Id.* ("The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system.") (citation omitted).

[4] *Id.* at 446 ("The physical harm requirement serves a number of important purposes: . . ."); *see also id.* at 451 ("[D]ispensing with the physical injury requirement could permit 'tens of millions' of potential plaintiffs to recover monitoring costs.") (quoting *Metro-North Commuter R.R Co. v. Buckley*, 521 U.S. 424, 442–44 (1997)).

[5] *Id.* at 452.

seeking medical monitoring damages."[6] That ruling creates the very sort of stand-alone medical-monitoring cause of action that the New York Court of Appeals rejected.

The District Court erred both by misreading *Caronia* and misunderstanding medical monitoring. In reading *Caronia,* the court fastened onto a few words cited by the Court of Appeals to describe New York's physical-injury requirement and then leapt to the conclusion that the Court of Appeals had somehow adopted an "accumulation-based" definition of "injury." That is wrong for three reasons. First, the Court of Appeals was not attempting in *Caronia* to define "injury" because that question was not before the court. *Caronia* addressed only whether medical monitoring was a separate cause of action, and the Court said no. Second, the Court of Appeals could not have adopted mere accumulation as the standard for medical-monitoring damages because that would have contradicted the harm requirement and public-policy imperatives that the Court of Appeals spent the entire *Caronia* opinion discussing. And third, the District Court's ruling runs counter to the nationwide judicial consensus that asymptomatic

[6] Memorandum-Decision and Order at 21 (JA286). The District Court's decision here relied heavily on its earlier decision in *Baker v. Saint-Gobain Performance Plastics Corp.*, No. 16-cv-917, 2017 WL 486939 (N.D.N.Y. Feb. 6, 2017) (JA1247–85). *See* JA277 (explaining that the *Baker* "decision controls many of the questions raised by Defendants' Motion [to Dismiss]").

biological markers and subcellular changes without adverse effects do not qualify as actionable injury.

The District Court's also erred in accepting a simplified and unfounded assumption that medical monitoring always "would detect a patient's disease *before* she manifests an obvious symptomatic illness, thus allowing earlier treatment that carries a better chance of success."[7] That is inconsistent not only with the Court of Appeals' skeptical view of medical monitoring but also with the views of other courts, regulators, and commentators who recognize the inherent limitations of medical monitoring as a legal and medical remedy. Strangely, the District Court's uncritical embrace of medical monitoring also clashes with its own musings about medical monitoring in the *Baker* decision, which seemed to recognize that medical monitoring is not a panacea for remedying environmental exposures.[8]

The District Court was wrong to think that *Caronia* defined medical-monitoring injury, much less that it had defined it to include accumulation without manifest harm. This Court should reverse the District Court's ruling permitting medical monitoring for asymptomatic plaintiffs.

---

[7] JA1276 (emphasis in original).

[8] *See* JA1281–82 (discussing numerous situations in which "no future medical surveillance testing should be performed and no damages awarded").

ARGUMENT

I. THE DISTRICT COURT MISINTERPRETED *CARONIA* AS REDEFINING "PHYSICAL INJURY."

The District Court recognized in *Baker* that "*Caronia* did not expressly define physical injury."[9] It should have stopped there. Instead, the District Court went on to define physical injury in a way that the *Caronia* court would reject. The District Court focused on *Caronia*'s recitation of language from *Abusio v. Consolidated Edison Co. of N.Y., Inc.*, 238 A.D.2d 454, 454 (N.Y. App. Div. 2d Dep't 1997), a twenty-year old case involving a claim for "fear of contracting disease," in which the Appellate Division *denied* medical monitoring damages.[10] The District Court wrongly concluded that the Court of Appeals had "adopt[ed] *Abusio*'s reasoning" and that the purported "adoption . . . strongly indicates that [the physical injury] definition at least includes the accumulation-based injury described in that case."[11] Overreading *Caronia* as adopting an accumulation-based definition of physical injury

---

[9] JA1275.

[10] Thus, the District Court was wrong to state in *Benoit* that "[i]n *Abusio* and *Allen*, the injury that supported medical monitoring was the 'clinically demonstrable presence of [toxins] . . . .'" (JA285–86). In *Allen*, the Appellate Division's only holding was to affirm the denial of summary judgment on the sole ground of defendants' proof problems, and did not rule on the strength of plaintiffs' medical-monitoring injury. *See Allen v. Gen. Elec. Co.*, 32 A.D.3d 1163, 1165–66 (N.Y. App. Div. 4th Dep't 2006).

[11] JA1275

violated the District Court's duty under *Erie* to take a conservative view when interpreting state law. But it was also wrong for three other reasons.

First, *Caronia* did not adopt a definition of physical injury because the very premise of that decision was that no physical injury existed in that case. Pursuant to this Court's certified questions, the New York Court of Appeals in *Caronia* addressed the single issue of whether a smoker with no diagnosed or physician-suspected disease may "pursue an *independent* cause of action for medical monitoring for such a disease."[12] *Caronia's* holding was to "answer the first certified question in the negative," rejecting "a judicially-created independent cause of action for medical monitoring."[13] *Caronia* could not have addressed the issues involved in a medical monitoring claim coupled with a physical injury because the Plaintiffs in *Caronia* "alleged no physical injury."[14] Accordingly *Caronia* did not answer what qualifies as physical injury, and the Court of Appeals did not give an unsolicited advisory opinion on that hypothetical question.

Caronia cited *Abusio* only to confirm New York's physical-injury requirement, not to define that requirement. *Caronia* has two parts:

---

[12] 22 N.Y.2d at 446 (emphasis added).

[13] *Id.* at 452.

[14] *Id.*

(1) confirming New York's "physical harm requirement" to rebut plaintiffs' suggestion that "an equitable medical monitoring cause of action . . . is consistent with existing New York law"[15]; and (2) analyzing the "policy reasons [that] militate against a judicially created independent cause of action for medical monitoring."[16] The *Caronia* court's discussion of *Abusio* falls into the first category; the Court of Appeals used *Abusio* to show that in all cases involving medical monitoring, New York courts require plaintiffs to first establish a physical injury consistent with the State's "long-held physical harm requirement."[17] The Michigan Supreme Court conducted that same analysis of Michigan state law when it rejected a medical-monitoring cause of action.[18] As in *Henry,* the New York Court of Appeals in *Caronia* was not asked to define physical harm, and it did not define physical harm. The *Erie* doctrine obligated the District Court not to go beyond *Caronia*'s holding. It failed that duty.

---

[15] *Id.* at 446–49.

[16] *Id.* at 450–52.

[17] *Id.* at 448–49.

[18] *See Henry*, 701 N.W.2d at 690 ("While the courts of this state may not have always clearly articulated this injury requirement, nor finely delineated the distinction between an 'injury' and the 'damages' flowing therefrom, the injury requirement has always been present in our negligence analysis.").

Second, the District Court's conclusion that *Caronia* adopted an accumulation-based definition of injury is wrong because the *Caronia* court embraced New York's longstanding physical-injury requirement and its attendant policy justifications. By focusing on the phrase "clinically demonstrable presence" in *Caronia*, the District Court disregarded that the complaints here and in *Baker* never actually allege that blood accumulation is itself a harm as required by New York law. The *Benoit* complaint, for example, alleges only that each plaintiff "has elevated levels of PFOA in her blood and is at an increased risk of several health effects."[19] Similarly, the *Baker* class complaint says that residents have "PFOA in their blood at alarming concentrations," but the reason given for that alarm is that they are "at significant risk of developing health conditions linked to PFOA exposure"—in the future.[20] Thus, the gravamen of these complaints for asymptomatic plaintiffs is merely a "threat of future harm," which *Caronia* confirmed "is insufficient to impose liability against a defendant in a tort context."[21] No asymptomatic plaintiff is alleged to have a manifested PFOA-related illness, and the proposed class in *Baker* explicitly excludes people (like those in the *Benoit* consolidated action) who have filed "a lawsuit for

[19] JA239

[20] JA756, ¶ 9.

[21] 22 N.Y.3d at 446.

personal injury for a PFOA-related illness."[22] Ultimately, the *Baker* complaint reveals that the blood serum tests—which purport to show the allegedly critical accumulation—are merely "evidence[]" of "exposure," not evidence of injury.[23]

Without a manifest harm, treating the blood accumulation alleged here as an injury violates all "the policy reasons" that caused *Caronia* to reject a medical monitoring cause of action.[24] Just as in *Caronia* and *Buckley*, this consolidated action involves "asymptomatic plaintiffs."[25] Indeed, the District Court identified only 12 of the 35 plaintiffs as "Symptomatic Plaintiffs."[26] For the 23 asymptomatic plaintiffs here, "it is speculative, at best whether [they] will ever contract a disease."[27] Thus, "allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of

---

[22] JA778, ¶ 137.

[23] JA779, ¶ 141 ("Further, Plaintiffs, like the Biomonitoring Class, have been exposed to drinking water contaminated with PFOA, as evidenced by blood serum tests and/or documentation of an increased opportunity for exposure.")

[24] 22 N.Y.3d at 452

[25] *Id.* at 451.

[26] JA275; *see also* JA284 (finding that "only twelve of the thirty-five plaintiffs allege current manifestation of disease or symptoms associated with PFOA exposure").

[27] *Id.* at 451. For example, the *Benoit* complaint alleges merely that plaintiffs are "at an increased risk of several health effects." JA239, ¶¶ 8, 9.

money away from those who have actually sustained an injury [allegedly] as a result of the exposure," such as is alleged by the "Symptomatic Plaintiffs."[28]

The District Court's proposed injury—blood accumulation—fails *Caronia*'s "harm" test because it does not "define" the group of plaintiffs seeking medical monitoring. [29] That group includes "Nonaccumulation Plaintiffs," who "do not allege any heightened blood concentration of PFOA."[30] So the District Court's broad ruling here opens the door to anyone who has visited Hoosick Falls for years, threatening, as the *Caronia* Court feared, "flooding the courts" with resource-depleting claims.[31] And plaintiffs here provide "no framework concerning how . . . a medical monitoring program would be implemented and administered."[32] They simply ask the court for "an order establishing a biomonitoring protocol for Plaintiffs."[33] But as *Caronia* recognized,

---

[28] *Id.*

[29] *Id.* at 446 ("The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action . . . .").

[30] JA274–75.

[31] *Id.*

[32] 22 N.Y.3d at 452.

[33] JA259, Prayer for Relief.

courts "lack 'the technical expertise necessary to effectively administer'" a biomonitoring program.[34]

Third, the District Court's ruling is wrong because it is out of step with the strong nationwide consensus that asymptomatic biological markers and subcellular changes without any manifest adverse effects do not qualify as actionable injury. Courts around the country agree that, in the context of physical injuries sustained as a result of exposure to toxic substances, subcellular change produced by exposure to toxic chemicals is not a compensable "injury" unless accompanied by manifested symptoms of a disease or actual impairment. In *Schweitzer v. Consolidated Rail Corp.*, for instance, the Third Circuit recited the same tort principles and policy reasons that *Caronia* relied on to hold that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law."[35] In *Rainer v. Union Carbide Corp.*, the Sixth Circuit did the same.[36] In *In re Rezulin Products Liability Litigation*, the court held that "an asymptomatic subcellular injury is not a compensable physical injury."[37] And in *Staubley v. Electric Boat Corp.*,

[34] 22 N.Y.3d at 452 (quoting *Henry*, 701 N.W.2d at 698–99).

[35] 758 F.2d 936, 942 (3d Cir.1985).

[36] 402 F.3d 608, 620–22 (6th Cir. 2005).

[37] 361 F. Supp. 2d 268, 273–278 (S.D.N.Y. 2005).

this Court affirmed the denial of workers' compensation because "asymptomatic . . . pleural plaques [do] not demonstrate impairment."[38] The federal and state reporters are filled with similar decisions.[39]

The New York Court of Appeals did not and would not adopt asymptomatic accumulation as a physical injury. The District Court was wrong to rule that it had.

---

[38] 439 Fed. App'x 24, 28 (2nd Cir. 2011).

[39] *See, e.g.*, *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996) (holding that either symptoms or physical impairment is required to state a cause of action for damages thus denying recovery for asymptomatic pleural thickening); *Caterinicchio v. Pittsburgh Corning Corp.*, 605 A.2d 1092 (N.J. 1992) (holding that the court had found no case supporting the proposition that asymptomatic pleural thickening or pleural plaques constitutes a compensable injury as a matter of law and noting the substantial authority to the contrary); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 543 (Me. 1986) (holding that a judicially recognizable claim does not arise until there has been a manifestation of physical injury to a person, sufficient to cause him actual loss, damage, or suffering from a defective, unreasonably dangerous product in an action involving asbestos-related injuries); *Bendix Corp. v. Stagg*, 486 A.2d 1150, 1151 (Del. 1984) (holding that an injury in an asbestos case is sustained when the harmful effect first manifests itself and becomes physically ascertainable); *Hollingsworth & Vose Co. v. Connor*, 764 A.2d 318, 338 (Md. 2000) (holding that pleural plaques or thickening of blood or vessel walls caused by asbestos exposure is not a compensable injury; *see also In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990) (holding that, frequently, persons claiming damages from exposure to asbestos reflect no objectively verifiable disablement which is traditionally the basis of tort litigation).

II. THE DISTRICT COURT'S IMPROPER RULING WAS DRIVEN BY AN OVERLY OPTIMISTIC VIEW OF MEDICAL MONITORING THAT IS INCONSISTENT WITH *CARONIA* AND THE VIEWS OF OTHER COURTS AND REGULATORS.

The District Court's error stemmed in part from an overly optimistic view of medical monitoring and "the purpose of that remedy."[40] Defendants argued in both *Baker* and here (as they do in both appeals) that blood accumulation without allegation of current harm is "exposure without injury."[41] The District Court dismissed that position out-of-hand as "an absurdity."[42] In reality, it's the majority position across the country.

The District Court contended that "requiring plaintiffs to manifest physical symptoms before receiving medical monitoring would defeat the purpose of that remedy."[43] That reasoning, however, begs the question: whether medical monitoring is a permissible remedy in the absence of physical injury. On that question, relieving tort plaintiffs of the burden of establishing manifest symptoms (*i.e.*, proving actual injury) contradicts *Caronia*, which adopted the U.S. Supreme Court's policy arguments against medical monitoring using the language of

---

[40] *Baker* decision, JA1276.

[41] *Id.*

[42] *Id.*

[43] *Id.*

"asymptomatic plaintiffs" and plaintiffs who were "exposed to asbestos but had not manifested symptoms of disease."[44]

Second, the District Court's overly simplistic assessment of medical-monitoring's purpose also contradicts *Caronia*. The District Court suggested that "[t]he entire point of medical monitoring is to provide testing that would detect a patient's *before* she manifests an obvious symptomatic illness, thus allowing earlier treatment that carries a better chance of success."[45] Even if that were an accurate description of the "point" of medical monitoring, the New York Court of Appeals took that into account, acknowledging the "important public health interest in fostering access to medical testing . . . [that] could lead to early detection and treatment . . . mitigating future illness."[46] But *Caronia* held that the public policy championed by the District Court was outweighed by "the potential systemic effects" of permitting plaintiffs who "had not manifested symptoms of disease" to flood the courts, especially when "it is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease."[47]

---

[44] 22 N.Y.3d at 451.

[45] JA1276.

[46] *Caronia*, 22 N.Y.3d at 451.

[47] *Id.*

The District Court's assumptions about the "point" of medical monitoring contradict not only *Caronia* but also regulatory and legal views about the limits of medical monitoring. Medical monitoring is not, as the District Court seemed to believe, a panacea to be handed out easily. The consensus—in the case law, law-review articles, and government publications—is that before considering medical monitoring, careful consideration must be given to the characteristics of the exposure, the adverse human health effects, the screening test, the ability to detect the specific diseases of concern, and the natural history of the disease.

For example, an early New York case discussing medical monitoring advised that the remedy "could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures are 'reasonably anticipated' to be incurred by reason of their exposure."[48] Commentators have noted the opinions of medical professionals that "the assumption that early diagnosis is always beneficial is fallacious. . . . If it is not possible either to cure or substantially improve the prognosis of the condition, or failing that to delay morbidity and

[48] *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 137 (N.Y. App. Div. 4th Dep't 1984).

mortality in those affected, then early detection is futile."[49] The Agency for Toxic Substances and Disease Registry (ATSDR), on which plaintiffs rely, has promulgated seven criteria that a medical monitoring program must satisfy to qualify as an appropriate health activity under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[50] The District Court's rush to grant medical monitoring to plaintiffs who allege no physical harm strays far from the guidance of the legal, medical, and scientific community that medical monitoring is appropriate only when it will likely prove effective and its benefits outweigh its costs and potential harms.[51]

Indeed, the District Court itself was apparently aware of the legal and medical consensus about the remedy's limitations. The District Court noted in *Baker* the possibility that "Plaintiffs did not plausibly allege" sufficient exposure to and accumulation of PFOA to cause adverse health effects, and "Plaintiffs allegations fail to show how medical monitoring could successfully improve their health outcomes

---

[49] Victor E. Schwartz, et al., Medical Monitoring: The Right Way and The Wrong Way, 70 Mo. L Rev. 349, 354 (2005) (quoting W.K.C. Morgan, Medical Monitoring with Particular Attention to Screening for Lung Cancer, in Occupational Lung Disease at 157 (J. Bernard et al., eds. 1984)).

[50] *See* ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program under CERCLA, 60 Fed. Reg. 38,840 (July 28, 1995) (cited in District Court opinion at JA 880 n.10).

[51] *See* Schwartz, 70 Mo. L. Rev. at 362, 369.

following ingestion of PFOA."[52] Indeed, the District Court cited ATSDR's Final Criteria.[53]

And the District Court quoted numerous cases, including *Askey*, that highlighted the limited situations in which medical monitoring is possibly beneficial and permissible. For example, the District Court quoted the *Caronia* federal district-court opinion stating that medical monitoring damages "requires the availability of a monitoring procedure 'that makes early detection possible' and is different from the normal preventive care prescribed in the absence of exposure, and that this monitoring program be 'reasonably necessary according to contemporary scientific principles.'"[54] As the District Court itself suggested, the complaint here alleges none of those things.

The upshot is that the District Court had no legal or factual basis for its conclusion that "'[m]edical monitoring' provides small comfort to someone already suffering outwardly apparent symptoms if the only benefit is to track the continued advance of the disease."[55] As the above authorities make clear—and as the District Court apparently knew—if a medical-monitoring program could provide no health benefit other

---

[52] JA895.

[53] JA274 n.4.

[54] JA1281 (quoting *Caronia v. Philip Morris USA, Inc.*, No. 06-cv-224 (CBA)(SMG), 2011 WL 338425, at *7 (E.D.N.Y. Jan. 13, 2011)).

[55] JA1276.

than disease-course tracking, the program would never get off the ground.

The District Court also worried that if medical monitoring were limited to symptomatic plaintiffs, "the cost of testing necessary to provide treatment would already be recoverable as a component of damages arising from the illness itself."[56] But that is precisely the regime that *Caronia* established: Medical monitoring is "permitted in this State's courts as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action."[57] The District Court had no authority to override *Caronia* by creating a stand-alone remedy for asymptomatic plaintiffs with no present harm based on its own views of medical monitoring—particularly when that view runs counter to the authorities that the District Court purported to rely on, including the New York Court of Appeals case that already resolved this very issue.

CONCLUSION

This Court should reverse the District Court ruling that blood accumulation of PFOA is sufficient under New York law to permit a claim for negligence seeking medical monitoring damages.

---

[56] *Id.*

[57] 22 N.Y.3d at 452.

Dated: March 1, 2018

/s/ David Venderbush

David Venderbush
ALSTON & BIRD LLP
90 Park Avenue, 15th Floor
New York, NY 10016
(212) 210-9400
David.Venderbush@alston.com

Brian D. Boone
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000
Brian.Boone@alston.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local R. 32.1(a)(4)(B) because it contains 4,012 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font.

March 1, 2018

/s/ David Venderbush
David Venderbush

CERTIFICATE OF SERVICE

I certify that, on March 1, 2018, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit. I filed the brief using the CM/ECF filing system, which will send notification of the filing to counsel of record in the case, all of whom are registered on the CM/ECF system.

/s/ David Venderbush
David Venderbush