In The

Supreme Court of Pennsylvania

No. 43 WAP 2017

BARBARA A. DITTMAN, *et al.*, individually and on behalf of all others similarly situated,
Plaintiffs/Appellants,

v.

UPMC, dba THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER,
and UPMC McKEESPORT,
Defendants/Appellees.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA DEFENSE INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF APPELLEES

Appeal from Order of the Superior Court of Pennsylvania, Entered January 12, 2017 at No. 971 WDA 2015, Affirming the Judgment of the Court of Common Pleas of Allegheny County, Civil Division, at No. GD-14-003285

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Defense Institute ("PDI") was organized in 1969 as a non-profit association of defense attorneys and insurance company executives. PDI is a forum for developing public policy initiatives, for the exchange of ideas, and for the pursuit of its goals. These goals include prompt, fair, and just disposition of claims, preservation of the administration of justice, enhancement of the legal profession's services to the public, elimination of court congestion and delays in civil litigation, and promotion of other public-minded activities. To achieve these ends, PDI represents its members in a wide array of matters, including legislation and litigation.

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. Many of the Chamber's members are based or do business in Pennsylvania. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before state and federal courts, and the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the business community.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business association in Pennsylvania. Currently there are over 8,000 members of the PA Chamber, ranging from sole proprietors to Fortune 100 companies, and representing nearly 50% of the private sector workforce. The PA Chamber is not affiliated with any political party and is not a part of government. PA Chamber's mission is to act as a statewide voice of business and to advocate on those public policy issues that expand private sector job creation and lead to a more prosperous Commonwealth.

The members of these *amici*, and potential defendants generally, have a strong interest in preventing tort litigation from being diverted, as here, into a means of allowing large groups of persons to seek potentially limitless economic losses − based on the pecuniary ripple effects of a single alleged tort. This data-breach class action seeks purely economic damages on behalf of a putative class of 62,000 people – the vast majority having suffered no consequences − for criminal computer hacking. It is the epitome of the excessive potential liability that Pennsylvania's "well established" economic loss doctrine was created to prevent.

In Excavation Technologies, Inc. v. Columbia Gas Co., 985 A.2d 840 (Pa. 2009), this Court unanimously reaffirmed the economic loss doctrine's general applicability in common-law tort actions. Although Plaintiffs largely ignore Excavation Technologies in their briefing, the centrality of the Court's most recent

decision about the issues raised here cannot be doubted. As in Excavation Technologies, the Pennsylvania General Assembly has acted here, and rejected the type of unbounded liability award Plaintiffs seek. And just as in Excavation Technologies, the legislature should decide the extent to which purely economic losses from data breaches should be recoverable in light of the competing policy interests.

The *amici* respectfully submit this brief to the Court to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case.[1]

[1] Pursuant to Pa. R.A.P. 531(b)(2), *amici curiae* state that no person, other than the *amici*, their members, and their counsel, has paid for or authored the within *amicus curiae* brief, in whole or in part.

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STATEMENT OF THE QUESTIONS INVOLVED

The Court specified the questions presented in its September 12, 2017 order:

a. Does an employer have a legal duty to use reasonable care to safeguard sensitive personal information of its employees when the employer chooses to store such information on an internet accessible computer system?

b. Does the economic loss doctrine permit recovery for purely pecuniary damages which result from the breach of an independent legal duty arising under the common law, as opposed to the breach of a contractual duty?

This *amicus curiae* brief is directed solely to the second question.

SUMMARY OF THE ARGUMENT

In 2009, this Court unanimously confirmed that the economic loss doctrine (or "rule," as some courts call it) is "well-established in tort law" and applies broadly in tort litigation. Excavation Technologies, Inc. v. Columbia Gas Co., 985 A.2d 840, 842 (Pa. 2009). In Excavation Technologies, the Court rejected the same argument Plaintiffs make here, finding that the narrow exception allowing recovery against professional purveyors of information was just that, and not a harbinger of purely pecuniary damages becoming generally recoverable in tort actions.

Pennsylvania's economic loss doctrine is a common-law rule applicable to "independent" common-law tort actions. The doctrine was created to prevent extravagant liability claims like those asserted here − what Justice Cardozo disparaged as "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y 1931). As Excavation Technologies establishes, in independent, non-contractual tort actions like this one, the economic loss doctrine retains full vitality. So it should in this case.

A second pillar of this Court's rationale in Excavation Technologies was the legislature's decision, when it addressed the same issue, not to create an exception to the common law's prohibition against recovery of purely economic loss. The same is true here as well. A private right of action for data

breaches was removed from the Breach of Personal Information Notification Act when it was enacted in 2005.

Finally, contrary to Plaintiffs' assertions, Pennsylvania's economic loss doctrine sits squarely in the mainstream of nationwide precedent. It is, overwhelmingly, the majority rule – and the better rule. Promoting broad recovery of purely economic loss in common-law tort actions is costly, unnecessary, and unwise.

ARGUMENT

I. THE REASONS THAT PENNSYLVANIA LAW HAS LONG PROHIBITED TORT CLAIMS SEEKING PURELY ECONOMIC LOSS APPLY FULLY TO THIS CASE.

Plaintiffs-appellants ("Plaintiffs") seek to represent a class of all defendants' employees, over 62,000 persons, alleging that unknown third persons illegally obtained their confidential personal data when a criminal hacked into defendants' computer system. While the complaint alleges that some employees were victimized by fraudulent tax returns, none of these Plaintiffs allege any such actual injury (RR. 34-35a).

Plaintiffs' primary legal proposition, that the economic loss doctrine should not apply to any "independent" legal duty arising under the common law, Pl Br. at 10, 52, would be an unprecedented disavowal of Pennsylvania's "well-established" rule and directly contravenes this Court's holding in Excavation Technologies, Inc. v. Columbia Gas Co., 985 A.2d 840, 842 (Pa. 2009). This Court's prior decision, which Plaintiffs essentially ignore,[2] is dispositive, and demonstrates that Pennsylvania law follows a broad view of the economic loss doctrine that Plaintiffs concede is "common." Pl. Br. at 47. In Excavation Technologies, the defendants were "not in the business of

[2] Plaintiffs do not cite Excavation Technologies at all – except as being "quoted" by another case in a footnote. See Pl. Br. at 47 n.16.

supplying information for pecuniary gain." Excavation Technologies, 985 A.2d at 842.

That case did not involve any contractual relationship, direct or indirect, between plaintiffs seeking purely pecuniary damages and the defendant. Rather, the defendant utility company allegedly failed to mark its underground lines, as required, so that the plaintiff contractor suffered economic losses when an accident delayed its construction project. Id. at 841. The plaintiff brought a negligence action, purporting (as Plaintiffs argue here) to fit within the "narrowly tailored," exception to the economic loss doctrine recognized in Bilt-Rite Contractors, Inc. v. Architectural Studio, 866 A.2d 270, 285-86 (Pa. 2005). Without dissent, the Court applied the economic loss doctrine and denied liability.

Excavation Technologies held that the Bilt-Rite exception is limited to defendants in the information business, and does not reach other businesses that only incidentally deal with information. Bilt-Rite thus "only carved out a narrow exception to the economic loss doctrine for design professionals." Excavation Technologies, 985 A.2d at 842. As a result, Bilt-Rite's adoption of Restatement (Second) of Torts §552(1-2) did "not supplant the common law" and simply "clarif[ied] the elements of the tort as they apply to those in the business of supplying information to others for pecuniary gain." Id. at 843 (quoting Bilt-Rite, 866 A.3d at 280).

More fundamentally, this Court, in Excavation Technologies, refused to adopt the expansive view of Bilt-Rite that Plaintiffs advance here – that any "breach of duty arising independently of any contract duties"[3] should be outside of the scope of the economic loss doctrine. The Court should adhere to its constrained view. Almost every enterprise incidentally stores and uses some information about someone at some time in the conduct of its business. Plaintiffs' position would, as a practical matter, expose virtually every Pennsylvania business to potentially unlimited liability for purely economic losses, even when caused by a third-party's criminal computer hacking. The economic loss doctrine is intended to foreclose this undesirable result.

The economic loss doctrine originated with Robins Dry Dock & Repair Company v. Flint, 275 U.S. 303 (1927), a maritime lost-profits claim where a ship allegedly damaged by the defendant's negligence thereby became unavailable for the plaintiff's use. The plaintiff, who did not own the ship, sought purely economic loss. The Supreme Court rejected liability for "unintended injuries inflicted upon the [property] by third persons who know nothing of the" plaintiff's interest. Id. at 308.

> A tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. The law does not spread its protection so far.

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[3] Pl. Br. at 49 (quoting Bilt-Rite, 866 A.2d at 288).

Id. at 309 (citation omitted).

More than fifty years later, Aikens v. Baltimore & Ohio Railroad Co., 501 A.2d 277, 279 (Pa. Super. 1985), applied the doctrine in Pennsylvania to preclude wage-loss claims of numerous employees at a factory closed by a train derailment, allegedly caused by the defendant's negligence. Aikens adopted the "majority rule" in a non-contract situation that "no cause of action exists for negligence that causes only economic loss." Id. at 279. To permit negligence recovery for purely economic losses would impose "an undue burden" because it "would create a disproportion between the large amount of damages that might be recovered and the extent of the defendant's fault." Id.

> To allow a cause of action for negligent cause of purely economic loss would be to open the door to every person in the economic chain of the negligent person or business to [sue]. Such an outstanding burden is clearly inappropriate and a danger to our economic system.

Id.; accord General Public Utilities v. Glass Kitchens of Lancaster, Inc., 542 A.2d 567, 570 (Pa. Super. 1998) (following Aikens; rejecting mass recovery of economic losses arising from Three Mile Island nuclear accident).

Since Aikens, multiple Superior Court decisions have applied this doctrine, so that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." Adams v. Copper Beach Townhome Communities, L.P., 816 A.2d 301, 305 (Pa. Super. 2003) (barring factory employees' wage loss claims) (citations

omitted). These courts follow "Pennsylvania's strong, oft-stated public policy of barring recovery for economic losses sustained as a result of another's tortious conduct." Duquesne Light Co. v. Pennsylvania American Water Co., 850 A.2d 701, 705 (Pa. Super. 2004) (rejecting public nuisance exception).

REM Coal Co. v. Clark Equipment Co., 563 A.2d 128 (Pa. Super. 1989) (en banc), is typical. There, the economic loss doctrine limited the scope of damages available in strict products liability.[4] The court expressly refused to fashion an exception for purely economic harm caused by a product failure that could have caused physical injury, but did not:

> [A]llowing a cause of action in tort where the nature of the risk posed by the product is the determinative factor invites and indeed forces courts to enter into a difficult line-drawing process that can only yield inconsistent results. When precisely could it be concluded that a defect posed an unreasonable risk where the risk never materialized?

Id. at 133.[5]

This same risk of excessive liability existed in Moore v. Pavex, Inc., 514 A.2d 137 (Pa. Super. 1986), and the same result ensued. There, a contractor's

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[4] See Restatement (Second) of Torts §402A(1) (1965) (imposing strict liability only "for physical harm").

[5] Thus strict product liability is appropriate only where a plaintiff suffers actual damage to "other" property besides the product itself. Id. at 412-13; see Donaldson v. Davidson Brothers, Inc., 144 A.3d 93, 102 (Pa. Super. 2016). Plaintiffs here have not argued for, and have therefore waived, any analogous exception for actual financial harm to "other" property, that UPMC employees who actually had their identities stolen may have incurred.

accident caused the City of Harrisburg to lose drinkable water for several days, and various persons brought nuisance claims – by class action − for economic losses from the disruption. But the economic loss doctrine squarely applied and foreclosed the action:

> If any of the class had suffered direct damage to property . . . those unquestionably would be actionable. Such was not the case; "individual and familial suffering", "loss of wages", "replacement or bottled water" and operating losses are no more direct foreseeable damages, economic losses or **serious risks of health and safety** than are lost wages in Aikens and in Robins.

Moore, 514 A.2d at 139 (emphasis original).

As Moore underscores, adherence to the economic loss doctrine has the beneficial effect of avoiding "interminable chains of remote consequences and imponderable issues of liability and damages." Id. at 140. This salutary aspect resonated just as strongly in Excavation Technologies,[6] − and it does so again here, where purely economic damages allegedly were suffered by a class of tens of thousands who sustained no personal injuries or property damage as a consequence of the defendants' allegedly tortious conduct.[7]

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[6] Excavation Technologies and Moore both involved economic loss from allegedly negligent damage to underground utilities during construction activity, differing only in the identities of potential plaintiffs and defendants.

[7] Other Superior Court decisions that reiterate the economic loss doctrine are: Gongloff Contracting, L.L.C. v. L. Robert Kimball & Associates, Architects & Engineers, Inc., 119 A.3d 1070, 1076 (Pa. Super. 2015); Carlotti v. Employees of General Electric Federal Credit Union No. 1151, 717 A.2d 564, 567 (Pa. Super. 1998) (no negligent undertaking liability); Jones v.

This much is apparent from Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162 (3d Cir. 2008), a similar case alleging negligently facilitated computer hacking. The Third Circuit refused to abandon the policy rationale of the economic loss doctrine by resort to the exception permitted in Bilt-Rite. Mere "foreseeability" did not negate the "the thrust of the public policy rational explained in Aikens." Id. at 176. Bilt-Rite, as the court explained, "simply carved out a narrow exception when losses result from the reliance on the advice of professionals." Id. at 178. Plaintiff could not "leverage [an] excerpt from the majority opinion in Bilt-Rite" into a cause of action beyond the scope of Restatement §552(1-2). Id. at 177.

> [Bilt-Rite] did not . . . severely weaken the economic loss doctrine. Rather, the Court simply made an exception to the doctrine to allow a commercial plaintiff recourse from an "expert supplier of information" with whom the plaintiff has no contractual relationship, when the plaintiff has relied on that person's "special expertise". . . .

Id.[8]

General Motors Corp., 631 A.2d 665, 666 (Pa. Super. 1993); Spivak v. Berks Ridge Corp., 586 A.2d 402, 405 (Pa. Super. 1990); Lower Lake Dock Co. v. Messinger Bearing Corp., 577 A.2d 631, 635 (Pa. Super. 1990) (doctrine "has equal application in negligence cases"); Margolis v. Jackson, 543 A.2d 1238, 1240 (Pa. Super. 1988).

[8] For other Third Circuit decisions interpreting Pennsylvania law to prohibit purely pecuniary injuries from being recovered in tort actions, see: Werwinski v. Ford Motor Co., 286 F.3d 661, 679-80 (3d Cir. 2002); Duquense Light Co. v. Cleveland Electric Illuminating Co., 66 F.3d 604, 620 (3d Cir. 1995); Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 118-19 (3d Cir. 1987).

The paramount policy consideration motivating the economic loss doctrine has always been, as emphasized in Aikens, prevention of liability for purely economic losses that "create a disproportion between the large amount of damages that might be recovered and the extent of the defendant's fault." General Public Utilities, 542 A.2d at 570 (quoting Aikens, 501 A.2d at 279). Plaintiffs' action here – a putative class action on behalf of every one of the defendant's 62,000+ employees – is the epitome of the massive potential scope of pecuniary liability against which the economic loss doctrine is directed.

To address tort actions arising in the context of litigation between parties to contracts, Pennsylvania already recognizes a separate doctrine, "gist of the action," which precludes parallel tort litigation "when the gist or gravamen of the cause of action stated in the complaint, although sounding in tort, is, in actuality, a claim against the party for breach of its contractual obligations." Bruno v. Erie Insurance Co., 106 A.3d 48, 53 (Pa. 2014) (footnotes omitted). This gist-of-the-action doctrine, as well, "ha[s] long been an integral part of our Court's jurisprudence." Id. at 68. Plaintiffs would blur the lines between these two longstanding legal doctrines and effectively render them redundant.

Although both limit the scope of tort claims, the two doctrines serve different purposes. Where, as here, the parties are not linked by contract, both the policies of the economic loss doctrine and the precedents of this and other

Pennsylvania appellate courts preclude a class action seeking recovery of purely economic loss.

II. SINCE THE LEGISLATURE, AFTER CONSIDERING DATA BREACH LIABILITY, DECLINED TO CREATE UNLIMITED LIABILITY FOR PURELY ECONOMIC LOSS, THE COURTS SHOULD NOT INTERVENE TO DO SO.

A second aspect of Excavation Technologies independently justifies application of the economic loss doctrine to this case. There, as here, the General Assembly enacted a statute addressing the litigation's subject matter, and neither statute authorizes civil damages unknown to the common law.

Specifically, in Excavation Technologies, the so-called "One Call Act," 73 Pa. Stat. §§177, *et seq.*, governed construction activities in the vicinity of underground utilities. The Court "f[ou]nd it apparent our legislature did not intend [defendant] to be liable for economic harm caused by an inaccurate response under the Act, because it did not provide a private cause of action for economic losses." 985 A.2d at 842 (citation omitted). Since the economic loss doctrine was "well-established" when the statute was enacted, "[t]he legislature was presumably aware of the economic loss doctrine when it established the statutory scheme governing the relationship among the entities" at issue. Id. at 842-43. The plaintiff in Excavation Technologies was not within a protected "segment[] of the population" under Restatement (Second) of Torts §552(3) (1977), because "review of the Act reveals its purpose is not to protect against

economic losses." 985 A.2d at 844. "Public policy" therefore "weigh[ed] against imposing liability." Id.

> We recognize an excavator's breach of gas lines causes delay in completing projects, but if utility companies are exposed to liability for excavators' economic losses, such costs would inevitably be passed on to the consumer; if this is to be done, the legislature will say so specifically.

Id.; see also id. at 846 ("any remedy for economic loss associated with . . . breach of . . . duties under the One Call Act is best suited to legislative consideration") (Saylor, C.J., concurring).[9]

The same is true here. As both the Superior Court and Judge Wettick point out, the General Assembly addressed the question of internet hacking and data breaches in 2005, enacting the Breach of Personal Information Notification Act ("BPINA"), 73 Pa. Stat. §§2301, *et seq.* As initially proposed, the BPINA included "civil relief" − a private right of action for any "person" injured by a data breach:

> (b) Additional remedies. − In addition to any other remedy provided by law, a person bringing an action under this section may . . . (2) **Recover actual damages** arising from the violation of a failure to notify under this act. . . .[10]

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[9] In 2017 the General Assembly extensively amended the One Call Act, but again did not authorize private recovery of purely economic loss. See Act No. 2017-50 (approved Oct. 30, 2017).

[10] S.B. No. 712 §8(b) (Printer's No. 859, introduced June 3, 2005) (emphasis added), available at http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HT

The Pennsylvania Senate, however, quickly amended the BPINA to delete this private right of action, substituting "exclusive" enforcement by the Attorney General. The above language was deleted, and "civil relief" limited:

> A willful and knowing violation of this act shall be deemed to be an unfair or deceptive act or practice in violation of . . . the Unfair Trade Practices And Consumer Protection Law. The office of Attorney General shall have **exclusive** authority to bring an action under the unfair trade practices and consumer protection law for a violation of this act.[11]

This "exclusive" enforcement provision – with no private right of action – unanimously passed both houses of the General Assembly.[12] A House amendment struck the "willful and knowing" requirement, but likewise rested enforcement "exclusive[ly]" with the Attorney General.[13] The BPINA was

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M&sessYr=2005&sessInd=0&billBody=S&billTyp=B&billNbr=0712&pn=0859.

[11] S.B. No. 712 §9 (Printer's No. 898, amended June 13, 2005) (emphasis added), available at http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2005&sessInd=0&billBody=S&billTyp=B&billNbr=0712&pn=0898.

[12] The BPINA passed the Senate 50-0 and the House 191-0. See Bill Information – History, Senate Bill 712, available at http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2005&sind=0&body=S&type=B&bn=712.

[13] S.B. No. 712 §9 (Printer's No. 1410, amended Dec. 6, 2005), available at http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2005&sessInd=0&billBody=S&billTyp=B&billNbr=0712&pn=1410.

signed into law on December 22, 2005 as P.L. 474, No. 94, with "civil relief" codified as 73 Pa. Stat. §2308.

As this Court has recognized, "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest." Hall v. Amica Mutual Insurance Co., 648 A.2d 755, 760 (Pa. 1994) (citation and quotation marks omitted). Legislative activity is consequential where, as here, an overture to the courts is made to supplant, or even to countermand, what the legislation has provided:

> In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, . . . courts must be content to await legislative action.

Id. (citation and quotation marks omitted). Accord Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941) ("a court may constitute itself the voice of the community" "only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion").

Moreover, "where a remedy [is] statutorily provided, the directions of the legislation must be strictly pursued and such remedy is exclusive." Brunwasser v. Fields, 409 A.2d 352, 355 (Pa. 1979) (citations and quotation marks omitted). A provision such 73 Pa. Stat. §2308, expressly limiting enforcement to specified officials is "clear evidence that [the legislature] intended that the [statute] be enforced exclusively by the . . . Government."

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 352 (2001) (interpreting similar provision in federal statute).

Given the legislature's election not to provide recovery for private economic loss damages for data breaches, this Court should not take the contrary step of injecting expansive tort liability into the mix. The legislature, with its broader perspective for analyzing social policy goals, has declined to act, and this Court should follow suit. See Excavation Technologies, 985 A.3d at 844 ("if this is to be done, the legislature will say so specifically"). The unanimous Court recently expanded on the reasons for such caution, in language that also resonates in this case:

> [T]he Court must generally **show restraint in altering existing allocations of risk created by long-tenured common law rules** and resist the temptation of experimentation with untested social policies, especially where the individual record and the advocacy of the parties in the context of that record offer little more than abstract justifications. Thus, the Court is not in a position to upend risks and expectations premised upon broad-based arguments calling for a judgment about socially acceptable economic incentives; **the legislative setting is a preferable forum** for such an endeavor.

Tincher v. Omega Flex, Inc., 104 A.3d 328, 354 (Pa. 2014) (citations omitted) (emphasis added). So it is in this area as well.

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

Plaintiffs claim that their broad reading of Bilt-Rite as allowing recovery of purely economic loss anytime an "independent duty exists," is widely

accepted. Pl. Br. at 52-56. They are incorrect. Rather, as stated in Aikens, the "majority rule" is that "no cause of action exists for negligence that causes only economic loss." 501 A.2d at 279. Plaintiffs also put the rabbit in the hat, as the "narrow" Bilt-Rite/Restatement §552(1-2) exception for negligence by professional information purveyors is also widely followed.[14] In Excavation Technologies, however, this Court unanimously decided to go no further. Thus, the pertinent question is whether economic losses at issue here (and in Excavation Technologies, Moore, and Aikens) – untethered from any contract and not brought against the sort of defendants in Bilt-Rite − are generally allowed in other jurisdictions.

The answer is a resounding no.

In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), the plaintiff pursued only an independent tort claim. Id. at 861 (contract claims time-barred). That tort claim failed under the economic loss doctrine "since by definition [when] no person or other property is damaged,

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[14] See, e.g., Sachs v. Downs Rachlin Martin PLLC, ___ A.3d ___, 2017 WL 4700840, at *8 n.5 (Vt. Oct. 20, 2017); Dinsdale Construction, LLC v. Lumber Specialties, Ltd., 888 N.W.2d 644, 651-55 (Iowa 2016); Kreisers Inc. v. First Dakota Title Ltd. Partnership, 852 N.W.2d 413, 421-22 (S.D. 2014); Donatelli v. D.R. Strong Consulting Engineers, Inc., 312 P.3d 620, 625 (Wash. 2013); Rinehart v. Morton Buildings, Inc., 305 P.3d 622, 630-33 (Kans. 2013); Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann, P.C., 331 S.W.3d 648, 652 n.2 (Mo. 2011); U.S. Bank, N.A. v. Integrity Land Title Corp., 929 N.E.2d 742, 749 (Ind. 2010); Ossining Union Free School Dist. v. Anderson LaRocca Anderson, 539 N.E.2d 91, 94-95 (N.Y. 1989).

the resulting loss is purely economic." Id. at 870. Allowing recovery of purely economic loss "fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages." Id. at 870-71. "Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product." Id. at 874.

The Supreme Court in East River Steamship relied on the economic loss doctrine as formulated by the California Supreme Court in Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965). 476 U.S. at 867-69. Seely separated strict tort liability from traditional warranty law, and held purely economic losses are unrecoverable in tort:

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

403 P.2d at 151 (citations omitted) (emphasis added).[15] See Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co., 41 P.3d 548, 554 (Cal. 2002)

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[15] As discussed, this view has been followed by the Pennsylvania Superior Court since 1989. See, supra, at p.8.

("[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law") (citation and quotation marks omitted).

Historically, New York also has taken a leading role in articulating the jurisprudential basis for the economic loss doctrine. Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y 1931), refused on policy grounds to hold an auditor liable to anyone later left unpaid by the entity being audited.

> If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Id. at 444 (Cardozo, C.J.). New York enforces the strong economic loss doctrine to this day. E.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center., Inc., 750 N.E.2d 1097, 1103 (N.Y. 2001) ("limiting the scope of defendants' duty to those who have . . . suffered personal injury or property damage − as historically courts have done − affords a principled basis for reasonably apportioning liability").

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

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

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

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

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

have a contract remedy is irrelevant to whether they have a cause of action" in tort for economic losses. Id. at 776.[16]

Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000), involved facts similar to the Pennsylvania Superior Court decisions in Aikens and Moore – alleging commercial interruption claims from a bridge closure. "An individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship" with the defendant. Id. at 579, Syllabus #9. After an extensive discussion of nationwide precedent, the court concluded that the "necessity of imposing a line of demarcation on actionable theories of recovery serves as another rationale for the denial of purely economic damages" since "economic chaos . . . would result from permitting theoretically limitless recovery of economic injury." Id. at 586 (citing, *inter alia*, Aikens v. B&O Railroad, supra). "The common thread which permeates the analysis of potential economic recovery in the absence of physical harm is" that "there simply is no duty." Id. at 590.

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16 Plaintiffs cite a New Jersey case, G & F Graphic Services, Inc. v. Graphic Innovators, Inc., 18 F. Supp.3d 583, 590 (D.N.J. 2014), that did not involve negligence, but rather statutory and fraud causes of action.

Oregon, too, charts a similar path. In Paul v. Providence Health System-Oregon, 273 P.3d 106, 112 (Ore. 2012), the economic loss doctrine was one of several grounds precluding a data breach claim where, as here, the plaintiffs did not personally allege identity theft. Even more than actual economic harm, "to require defendant here to pay for credit monitoring because of the increased **risk** of a purely **economic** future harm would require an even greater departure from existing case law." Id. at 111 (emphasis original). Accord In re Hannaford Brothers Co. Customer Data Security Breach Litigation, 4 A.3d 492, 498 (Me. 2010) ("Maine law of negligence . . . does not recognize time and effort alone, spent in a reasonable effort to avoid or remediate reasonably foreseeable harm, as a cognizable injury in the absence of physical harm or economic loss or identity theft").

Plaintiffs misconstrue the law of several states in an effort to promote a contrary "majority" line of authority. Initially, they distort Texas law, Pl. Br. at 55, by citing a case involving property damage, not purely economic loss. See Chapman Custom Homes, Inc. v. Dallas Plumbing Co., 445 S.W.3d 716, 718 (Tex. 2014) (plaintiff alleged "an implied duty not to flood or otherwise damage [its] house"). Where purely economic loss is concerned, Texas follows the majority rule.

> [T]he physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended. As Cardozo put it

> in a passage often quoted, liability for these consequences would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

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

Plaintiffs also are wrong about Maryland law. Pl. Br. at 54. In Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445 (Md. 2017), that state's highest court refused even to adopt Restatement §552, holding instead that "injecting a tort duty is not in the public interest." Id. at 462. Rather, "[w]e apply the economic loss doctrine and decline to impose tort liability on [a defendant] for purely economic injuries alleged by [a plaintiff] that was neither in privity nor suffered physical injury or risk of physical injury." Id. at 462-63.

Plaintiffs similarly miscite Corporex Development & Construction Management, Inc. v. Shook, Inc., 835 N.E.2d 701, 705 (Ohio 2005), quoting language discussing Restatement §552, and ultimately distinguishing that situation.[17] Section 552 did not apply, so the economic loss claims in Corporex were barred:

> The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. The well-established general rule is that a plaintiff who has suffered only economic loss due to

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[17] Haddon View Investment Co. v. Coopers & Lybrand, 436 N.E.2d 212 (Ohio 1982).

> another's negligence has not been injured in a manner which is legally cognizable or compensable.

Id. at 704 (citations and quotation marks omitted).

Plaintiffs erroneously point to Connecticut law, which draws the same distinction as Ohio. The case Plaintiffs cite, Ulbrich v. Groth, 78 A.3d 76 (Conn. 2013), is the polar opposite situation, involving a statutory cause of action. Id. at 100. Where purely tort claims are at issue, Connecticut follows a broad economic loss doctrine:

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

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

In short, Plaintiffs' attempt to skew the legal landscape is a failure. The economic loss doctrine is an integral part of the common law in the overwhelming majority of states, and those states would apply the doctrine in cases where, as here, "independent" tort duties are asserted. Accord also: **Delaware**: Danforth v. Acorn Structures, Inc., 608 A.2d 1194, 1200-01 (Del. 1992); **District of Columbia**: Aguilar v. RP MRP Washington Harbour, LLC, 98 A.3d 979, 982-83 (D.C. 2014); **Georgia**: General Electric Co. v. Lowe's

Home Centers, Inc., 608 S.E.2d 636, 638-39 (Ga. 2005); **Idaho**: Path to Health, LLP v. Long, 383 P.3d 1220, 1226 (Idaho 2016); **Indiana**: Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 731-32 (Ind. 2010); **Iowa**: Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 506 (Iowa 2011); **Kentucky**: Giddings & Lewis, Inc. v. Industrial Risk Insurers, 348 S.W.3d 729, 738-43 (Ky. 2011); **Louisiana**: PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058, 1061-62 (La. 1984); **Massachusetts**: FMR Corp. v. Boston Edison Co., 613 N.E.2d 902, 903-04 (Mass. 1993); **Nevada**: Halcrow, Inc. v. Eighth Judicial Dist. Court, 302 P.3d 1148, 1152-54 (Nev. 2013) (rejecting Restatement §552); **North Dakota**: Leno v. K & L Homes, Inc., 803 N.W.2d 543, 550 (N.D. 2011); **South Carolina**: Sapp v. Ford Motor Co., 687 S.E.2d 47, 51 (S.C. 2009);[18] **South Dakota**: Diamond Surface, Inc. v. State Cement Plant Comm'n, 583 N.W.2d 155, 161-62 (S.D. 1998); **Tennessee**: Lincoln General Insurance Co. v. Detroit Diesel Corp., 293 S.W.3d 487, 489-92 (Tenn. 2009); **Vermont**: Long Trail House Condominium Ass'n v. Engelberth Construction, Inc., 59 A.3d 752, 755-56 (Vt. 2012); and

[18] Sapp refused to expand an "exception to the economic loss rule . . . well beyond the scope of real estate construction." Id. at 51. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85 (S.C. 1995), cited by plaintiffs, Br. at 53, is another professional information purveyor case.

Wisconsin: Wisconsin Pharmacal Co., LLC v. Nebraska Cultures, Inc., 876 N.W.2d 72, 81-82 (Wis. 2016).[19]

CONCLUSION

Applying Pennsylvania's economic loss doctrine to bar this class action seeking purely pecuniary damages for breach of a purported common-law tort duty fits squarely within the mainstream of nationwide precedent. Recovery of the solely economic loss asserted here for defendants' alleged negligence, exposed by intervening criminal acts of third persons, would allow unbounded and excessive liability that the doctrine is intended to prevent.

The sound policy basis of the economic loss doctrine also commands respect. There is no free lunch. This Court does not stretch tort principles "beyond the point of recognition [where] to do so will be to make liability endless." Witthoeft v. Kiskaddon, 733 A.2d 623, 630 (Pa. 1999). Excessive liability awards are paid by the public generally through higher costs. Businesses would face greater insurance costs, if insurance is available at all. Businesses that cannot effectively pass on such higher costs would have to cease operations. See Mazzagatti v. Everingham, 516 A.2d 672, 680 (Pa.

[19] There are some outliers. Plaintiffs identify Colorado, Nebraska, Utah, Virginia, and Washington as prohibiting economic losses only as between parties to contracts. Pl. Br. at 53-56. Compare Tiara Condomimium Ass'n, Inc. v. Marsh & McLennan Cos., 110 So.3d 399, 407 (Fla. 2013) (limiting economic loss doctrine to product liability cases); Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 832-33 (Ark. 2011) (not recognizing any economic loss doctrine).

1986) (discussing these issues) (Flaherty, J. concurring). None of these results is desirable, and permitting entire classes of uninjured persons to recover purely economic losses is not a jurisprudential tradeoff that should be made.

For all of the above reasons, the Court should answer the second question presented in the negative and hold that the economic loss doctrine bars the claims asserted in this litigation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 2135. Specifically, it contains 6,642 words based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief.

I hereby further certify that on November 27, 2017, I caused two true and correct copies of the foregoing Brief of Appellant to be served by via U.S. Mail upon the following counsel:

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