UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

NO. 14-31169

KALE FLAGG

Plaintiff-Appellant

versus

STRYKER CORPORATION; MEMOMETAL INCORPORATED, USA,

Defendants-Appellees

Appeal from the United States District Court
For the Eastern District of Louisiana
Civl Action No. 2:14-CV-852
Hon. Martin L.C. Feldman, Presiding

MOTION OF PRODUCTS LIABILITY ADVISORY COUNCIL, INC., *AMICUS CURIAE*, FOR LEAVE TO FILE A SHORT *AMICUS* BRIEF, IN SUPPORT OF APPELLEES

Products Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 103 corporate members interested in contribution to the improvement and reform of the law of the United States governing product liability. PLAC moves for leave, as *amicus curiae*, to file the attached *Amicus*

Brief in support of Appellees, and affirmance of the District Court's exercise of diversity jurisdiction.

1.

PLAC by no means seeks or intends by this motion for leave, or by the attached *amicus brief*, to burden this Court or its staff with unnecessary filings, or to repeat the thorough and cogent arguments made Appellees in support of the District Court's jurisdiction.

2.

PLAC believes, however, that the plaintiff's improper joinder of a medical malpractice claim before exhausting the administrative remedies under Louisiana's Medical Malpractice Act ("LMMA"), La. Rev. Stat. Ann. 40:1231.1, et seq., before presenting the claim to a medical review panel was made for the sole purpose of defeating diversity jurisdiction against the non-resident product manufacturer defendants and depriving them of a federal forum. This presents an issue of sufficient national scope to warrant adding PLAC's voice in support of removal to protect the right of all diverse product manufacturers, including PLAC members, to exercise their removal rights to federal court for resolution of product liability claims asserted against them.

3.

There are, at present, at least twelve states and one U.S. territory that have enacted statutes, similar to the LMMA, that require screening panels of malpractice claims before filing suit: Delaware (Del. Code Ann. tit. 18, §6803, et seq.); Hawaii (Haw. Rev. Stat. Ann. §671-11, et seq.); Idaho (Idaho Code Ann. § 6-1001, et seq.); Indiana (Ind. Code Ann. § 34-18-8-4, et seq.); Maine (Me. Rev. Stat. tit. 24, § 2851, et seq.); Massachusetts (Mass. Gen. Laws Ann. ch. 231, § 60B, et seq.); Montana (Mont. Code Ann. § 27-6-102, et seq.); Nebraska (Neb. Rev. Stat. Ann. § 44-2840, et seq.); New Hampshire (N.H. Rev. Stat. Ann. § 519-B:1, et seq.); New Mexico (N.M. Stat. Ann. § 41-5-14, et seq.); Utah (Utah Code Ann. § 78B-3-416, et seq.); Virgin Islands (§ 166i Medical Malpractice Action Review Committee, 27 V.I.C. § 166i); Wyoming (Wyo. Stat. Ann. § 9-2-1513, et seq.). This Court's *en banc* ruling could affect the removal rights of similarly situated defendant product liability manufacturers in the federal courts of those states by establishing precedent that might be followed by the respective appellate courts.

4.

PLAC respectfully requests that this motion for leave be granted to file the attached *amicus* brief in support of Appellees and to affirm the District Court's exercise of diversity jurisdiction by disregarding the citizenship of the resident

physician for plaintiff's failure to exhaust his administrative remedies under the LMMA.

Respectfully submitted,

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ATTORNEYS FOR Products Liability Advisory Council, Inc., Amicus Curiae

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on January 13, 2016, I electronically filed the foregoing Motion for Leave to file an *Amicus Brief*, on behalf of the Products Liability Advisory Council, Inc., in support of Appellees and the District Court's exercise of diversity jurisdiction, with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants in this matter.

/s/ Joseph L. McReynolds
JOSEPH L. MCREYNOLDS

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BRIEF OF PRODUCTS LIABILITY ADVISORY COUNCIL, INC., *AMICUS CURIAE*, IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The following corporations are current members of the Products Liability Advisory Council, Inc.

1. Altec, Inc.
2. Altria Client Services LLC
3. Astec Industries
4. Bayer Corporation
5. BIC Corporation
6. Biro Manufacturing Company, Inc.
7. BMW of North America, LLC
8. The Boeing Company
9. Bombardier Recreational Products, Inc.
10. Boston Scientific Corporation
11. Bridgestone Americas, Inc.
12. Bristol-Myers Squibb Company
13. C. R. Bard, Inc.
14. Caterpillar Inc.
15. CC Industries, Inc.
16. Celgene Corporation
17. Chevron Corporation
18. Cirrus Design Corporation
19. Continental Tire the Americas LLC
20. Cooper Tire & Rubber Company
21. Crane Co.
22. Crown Cork & Seal Company, Inc.
23. Crown Equipment Corporation
24. Daimler Trucks North America LLC
25. Deere & Company
26. Delphi Automotive Systems
27. Discount Tire

28. The Dow Chemical Company
29. E.I. duPont de Nemours and Company
30. Eisai Inc.
31. Emerson Electric Co.
32. Endo Pharmaceuticals, Inc.
33. Exxon Mobil Corporation
34. FCA US LLC
35. Ford Motor Company
36. Fresenius Kabi USA, LLC
37. General Electric Company
38. General Motors LLC
39. Georgia-Pacific LLC
40. GlaxoSmithKline
41. The Goodyear Tire & Rubber Company
42. Great Dane Limited Partnership
43. Harley-Davidson Motor Company
44. The Home Depot
45. Honda North America, Inc.
46. Hyundai Motor America
47. Illinois Tool Works Inc.
48. Isuzu North America Corporation
49. Jaguar Land Rover North America, LLC
50. Jarden Corporation
51. Johnson & Johnson
52. Kawasaki Motors Corp., U.S.A.
53. KBR, Inc.
54. Kia Motors America, Inc.
55. Kolcraft Enterprises, Inc.
56. Lincoln Electric Company
57. Magna International Inc.
58. Mazak Corporation
59. Mazda Motor of America, Inc.
60. Medtronic, Inc.
61. Merck & Co., Inc.
62. Meritor WABCO
63. Michelin North America, Inc.
64. Microsoft Corporation
65. Mine Safety Appliances Company
66. Mitsubishi Motors North America, Inc.
67. Mueller Water Products

68. Novartis Pharmaceuticals Corporation
69. Novo Nordisk, Inc.
70. NuVasive, Inc.
71. Pella Corporation
72. Pfizer Inc.
73. Pirelli Tire, LLC
74. Polaris Industries, Inc.
75. Porsche Cars North America, Inc.
76. RJ Reynolds Tobacco Company
77. Robert Bosch LLC
78. SABMiller Plc
79. The Sherwin-Williams Company
80. St. Jude Medical, Inc.
81. Stanley Black & Decker, Inc.
82. Stryker Corporation
83. Subaru of America, Inc.
84. Takeda Pharmaceuticals U.S.A., Inc.
85. TAMKO Building Products, Inc.
86. TASER International, Inc.
87. Techtronic Industries North America, Inc.
88. Teleflex Incorporated
89. TK Holdings Inc.
90. Toyota Motor Sales, USA, Inc.
91. TRW Automotive
92. U-Haul International
93. Vermeer Manufacturing Company
94. The Viking Corporation
95. Volkswagen Group of America, Inc.
96. Volvo Cars of North America, Inc.
97. Wal-Mart Stores, Inc.
98. Western Digital Corporation
99. Whirlpool Corporation
100. Yamaha Motor Corporation, U.S.A.
101. Yokohama Tire Corporation
102. Zimmer Biomet

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with over 100 corporate members that represent a broad cross-section of American and international product manufacturers, including manufacturers of medical devices and implants, such as those manufactured by Appellees.[1] All PLAC members are engaged in commerce in each of the 50 states, as well as commerce among several nations in both hemispheres.

Many PLAC members are or have been defendants in national class actions and federal multidistrict litigation, as well as defendants in competing or parallel state actions involving the same or similar claims for relief. All PLAC members seek to contribute to the improvement and reform of the law of the United States and elsewhere, with an emphasis on the law governing the liability of manufacturers of products sold in the United States and throughout the world. PLAC's perspective is derived from the experience of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector.

Since 1983, PLAC has filed over 1,000 briefs as *amicus curiae* in both state and federal courts, including the United States Supreme Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the

[1] No counsel for a party involved in this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this memorandum and motion for leave to file. No person other than A*micus Curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this memorandum or motion.

application and development of the law as it affects product liability. PLAC's interest in achieving uniformity of rulings in national litigation involving product liability claims asserted in each of the fifty states encompasses a similar interest in preserving as much as possible diverse manufacturers' rights to a federal forum for the adjudication of product liability claims, while preventing forum-shopping, as with the claims asserted here against non-diverse physicians, that state law requires to be vetted by medical review panels prior to suit.

PLAC supports all of the legal arguments advanced by Appellees, Stryker Corporation and Memometal Incorporated, USA. Mindful however of this Court's Rule 29.2 that briefs of *amicus curiae* "should avoid the repetition of facts or legal arguments contained in the principal brief," PLAC will not burden the Court with repetition of Stryker's or Memometal's legal arguments or the statement of the facts.

PLAC's brief is limited to addressing two points. First, PLAC will address panel majority's reasoning that the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-33(5) & - 33(11)(a)(1), in contrast to Louisiana's Medical Malpractice Act ("LMMA"), LA. REV. STAT. ANN. §40:1231.1 et seq.,[2] is a

[2] In the 2015 legislative session the Louisiana Legislature re-designated and renumbered the LMMA, formerly cited as LA. REV. STAT. ANN. 40:1299.41, *et seq.*, to LA. REV. STAT. ANN. 40:1231.1 through 1231.10. See House Concurrent Resolution No. 84 of the 2015 Regular Session.

"comprehensive (federal) statute that provided for adjudication of the plaintiffs' claim."[3]

Second, PLAC's brief shows that predicting the litigation outcome of a medical malpractice claim subject to the LMMA, when suit is filed before presenting the claim to a medical review panel, is entirely speculative, as correctly observed by the district court in *Bourne v. Eli Lilly & Company*:

> At the present time, the plaintiffs do not have a right to pursue a claim in any court against [the physician], and this action may well be concluded before such a right accrues. In addition, if a medical review board finds no wrongdoing on the part of the physician, the plaintiff may choose not to pursue the physician in litigation. On the other hand, if the medical review panel finds wrongdoing on the part of the physician, the physician may well choose to enter into a settlement with a plaintiff without the necessity of further litigation. Thus, it is speculative to assume that the physician, who is not presently subject to suit, will later be joined as a defendant in this action. Finally, the propriety of removal is to be judged as of the time of the removal, not as of some future time. Should the plaintiffs seek to add the physician at a later time, and should court [sic] allow the amendment, then this matter would be subject to remand. However, the possibility that a later joinder might defeat diversity and necessitate remand is not grounds to remand at present.[4]

Data compiled by the Louisiana Patient's Compensation Fund, mandated by the LMMA to be furnished in annual reports to the Louisiana Legislature, and found on its website, establishes that the vast majority of malpractice claims are resolved without litigation, either by dismissal or by settlement. As an administrative

[3] *Flagg v. Stryker Corp*., 801 F. 3d 456, 460 (5th Cir. 2015).
[4] 2005 WL 2998914, at *2 (W.D. La. 11/8/2005), as quoted in *Fontenot v. Johnson & Johnson*, 2010 WL 2541187, at *8 (W.D. La. 4/30/2010).

remedy, the medical review panel procedure works and, by and large, accomplishes the goals of the LMMA. Recognizing the citizenship of a non-diverse physician in a malpractice claim, in defiance of Louisiana law mandating dismissal, frustrates state law while defeating the diverse defendants' rights to a federal forum.

ARGUMENT

1. There Is No Practical Difference Between The National Childhood Vaccine Injury Act And The LMMA In The Adjudication Of A Claim.

The panel majority reasoned that because the National Childhood Vaccine Injury Act ("National Vaccine Act") provides for an "adjudication of the plaintiffs'' claim,"[5] it is a "comprehensive" statute that distinguishes remedies available under federal law from that available under the LMMA, citing *Holder v. Abbott Laboratories, Inc.*[6] In the panel majority's view, the LMMA is not a "comprehensive administrative scheme designed to adjudicate a plaintiff's malpractice claims."[7] Consequently, joinder of a malpractice claim against a non-diverse physician before presenting the claim to a medical review panel, despite its illegality under Louisiana law,[8] destroys diversity jurisdiction, depriving the

[5] *Flagg v. Stryker Corp.*, 801 F. 3d 456, 460 (5th Cir. 2015).
[6] 444 F. 3d 383 (5th Cir. 2003).
[7] *Id.*
[8] LA. REV. STAT. ANN. §40:1231.8(B)(1)(a)(i): "No action against a health care provider covered by this part, or his insurer, may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel . . . ."

diverse manufacturers of their right to remove the products liability claims against them to federal court. PLAC suggests that the distinction the panel majority draws between the federal and state statutory schemes is not valid or significant to warrant different jurisdictional treatment.

Actually, an adjudication by the Court of Federal Claims (the so-called "Vaccine Court") under the National Vaccine Act is no more binding on the plaintiffs than is an opinion rendered by the LMMA medical review panel. As with the LMMA, those seeking compensation for injuries resulting from vaccines must *first* petition for relief in the Vaccine Court.[9] If unsatisfied with that court's disposition, a Vaccine Act Claimant has the right to reject that judgment and litigate the claim in federal or state court.[10] In such a civil suit, state law applies to the action, except for the "standards of responsibility" set out in 42 U.S.C.A. §300aa-22 (b), (c) and (e).[11] Significantly, under 42 U.S.C.A. §300aa-23(e),

[9] 42 U.S.C. §300aa-11(a)(2): "No person may bring a civil action for damages . . . against a vaccine . . . manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death . . . unless a petition has been filed . . . and (i)(I) the United States Court of Federal Claims has issued a judgment . . . and (II) such a person elects under section 300aa-21(a) of this title to file such an action . . . ."

[10] 42 U.S.C. §300aa-21(a): "After judgment has been entered [by the claims court], the petition shall file . . . [either] (1) if the judgment awarded compensation, an election in writing to receive the compensation or to file a civil action for damages for such injury or death, or (2) if the judge did not award compensation, an election in writing to accept the judgment or to file a civil action for damages for such injury or death"; *see also Terran ex rel. Terran v. Secretary of Health and Human Services*, 195 F. 3d 1302, 1307, n.1 (Fed Cir. 1999); *Schafer v. American Cyanamid Co*., 20 F. 2d 1, 2-3 (1st Cir. 1994).

[11] *See Holmes v. Merck & Co., Inc*., 697 F. 3d 1080 (9th Cir. 2012) for a discussion of the preemptive effects on state law of the "standards of responsibility."

> any finding of fact or conclusion of law of the United States Court of Federal Claims or a special master in a proceeding on a petition filed under section 300aa-11 . . . and the final judgment of the United States Court of Federal Claims and subsequent appellate review on such a petition **shall not be admissible**.

(Emphasis added). Thus, Vaccine Act claimants are not bound by Vaccine Court determinations, may reject those determinations, and pursue civil relief in the ordinary fashion.

The LMMA, by contrast, has a far more lasting effect on civil litigation. Except for requests for expedited medical review panels,[12] in any suit filed after the medical review panel has issued its opinion either party may introduce the medical review panel's opinion and may call any panel member as a witness at trial.[13]

By virtue of the election procedure in the Vaccine Act, the adjudication by the Vaccine Court is even less binding on the petitioner than is the opinion of the medical review panel under the LMMA, although both statutory schemes provide great incentive to accept the administrative remedy. Viewed in the light of the election remedy, the National Vaccine Act is no more "comprehensive" than the LMMA, only different, in that preliminary fact-finding is conducted by something called a "court" as opposed to a panel of private medical experts. In either case, the statutory procedure is not final, unless the claimant accepts the finality. It is

[12] LA. REV. STAT. ANN. 40:1231.8(N)(7), formerly cited as LA. REV. STAT. ANN. 40:1299.47(N)(7).
[13] LA. REV. STAT. ANN. 40:1231.8(H), formerly cited as LA. REV. STAT. ANN. 40:1299.47(H)

difficult to discern then why a different jurisdictional result is mandated for the federal statute than the state statute, when both statutes prohibit suit until the administrative procedure has been exhausted.

The ruling in *Holder* disregarding the citizenship of defendants subject to administrative remedies ought to apply to LMMA claims to at least the same degree as it does to claims under the National Vaccine act.

2. Prediction Of Liability Is At Least As Speculative Under The LMMA As It Is Under Any Other Claim Requiring Exhaustion Of Administrative Remedies.

This Court explained in *McDonal v. Abbott Laboratories*[14] that under *Smallwood*[15] joinder of a resident defendant is proper "only when the common defense asserted would be equally dispositive as to all of the defendants," or when the removing defendant's "'showing . . . that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the non-resident defendant.'"[16] Stated conversely, if a defense available to the resident defendant is not equally available to a non-resident defendant, or if there is no reasonable basis for predicting the liability of the resident defendant, because the plaintiff must first

[14] 408 F. 3d 177 (5th Cir. 2005).
[15] *Smallwood. Ill. Cent. R.R. Co*., 385 F. 3d 568 (5th Cir. 2004**)**
[16] *McDonal*, 408 F. 3d at 183: "We have made plain in applying *Smallwood* that its central principle is implicated only when the common defense asserted would be equally dispositive as to all of the defendants."

exhaust against the resident defendant administrative remedies not equally applicable to the non-resident defendants, then the joinder is improper.

McDonal, as applied in *Holder*, thus established the rule that should apply here: Plaintiff's joinder of the resident malpractice defendant in this case, against whom plaintiff had not exhausted his administrative remedies under the LMMA at the time he brought suit, was improper, because the same defense – failure to exhaust administrative remedies -- is not available to the diverse manufacturers. Because the malpractice claims against the resident defendant must be dismissed since the plaintiff has failed to exhaust his remedies under the LMMA, the district court has no reasonable basis for predicting that the plaintiff will ever or even need to return to court after exhausting his administrative remedies. That prediction is just as speculative under the LMMA as it is for claims subject to the National Vaccine Act or for employment discrimination claims that must first be investigated by the EEOC, as Judge Davis correctly reasoned in his dissenting panel opinion. The citizenship of the resident physician subject to the LMMA should thus be disregarded for purposes of removal and diversity jurisdiction.

To elucidate this point, it is necessary to place the medical review panel procedure, which the panel majority's opinion correctly summarizes, in the larger context of the Louisiana legislature's overall medical malpractice statutory scheme that establishes limitations of liability to qualified health care providers and the

substantial role that the Patient's Compensation Fund ("PCF") plays in the recovery of those damages that are subject to limitation and those that are not.

Under the LMMA, the liability of a qualified health care provider whose malpractice caused or contributed to a patient's injuries is capped at one hundred thousand dollars;[17] while the "total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits . . . shall not exceed five hundred thousand dollars plus interest and costs."[18] Any damages that exceed the one hundred thousand dollar limitation against the individual physician (or other qualified health care provider), up to the statutory cap of five hundred thousand dollars, are recoverable only against the PCF, which is also responsible for all future medical costs and related benefits, which are not subject to any limitation.[19]

The PCF is thus integral to the functioning of the statutory cap and its liability is directly affected by the outcome of the medical review panel procedure. The panel majority's opinion summarizes the medical review panel's statutory obligation to render an opinion as to whether or not the defendant physician's treatment deviated from the applicable medical standard of care. But the majority decision does not mention the important right that each party has to select one

[17] LA. REV. STAT. ANN. 40:1231.2(B)(2).
[18] LA. REV. STAT. ANN. 40:1231.2(B)(1).
[19] LA. REV. STAT. ANN. 40:1231.2(B)(3) and 40:1231.4(C).

member of the panel and the consequences that the medical review panel's opinion may have in possible future litigation.[20]

If the panel's decision does not support the plaintiff's claim, it is equally likely that the plaintiff may choose to abandon his malpractice claim altogether as to proceed with litigation.[21] But the latter course requires the plaintiff, in addition to posting a forfeitable bond, to call another medical expert, at his own expense, who will provide testimony that contradicts the opinion of the panel, one of whose members the plaintiff himself chose, presenting a serious credibility problem for the plaintiff's expert. The defending physician, as discussed, would have the right to call any or all of the panel members at the trial, as well as introduce the medical review panel's opinion into evidence.

Likewise, if the panel's decision supports the plaintiff's claim of malpractice, the defending physician and his or her insurer may choose to settle for or within the statutory limit of liability. If the physician instead chooses trial, he or she faces the same risk of forfeiture and bears the same burden of producing testimony from another medical expert to contradict the opinions of the panel, one of whose members the physician selected.[22]

[20] LA. REV. STAT. ANN. 40:1231.8(C)(2).
[21] LA. REV. STAT. ANN. 40:1231.8(I)(2)(c).
[22] LA. REV. STAT. ANN. 40:1231.9(I)(2)(d).

In those situations where the medical review panel renders an opinion in plaintiff's favor and the defending physician chooses to settle for the statutory maximum, the only litigation left against the physician is a petition for court approval of the settlement.[23] Claims for any excess damages above the one hundred thousand limitation of liability, and for any future medical costs, is made against the PCF, who may challenge the damage amount or settle. In "approving a settlement or determining the amount, if any, to be paid from" the PCF, the "trier of fact shall consider the liability of the health care provider as admitted and established" where the statutory limits have been paid.[24]

Thus, at the time that a motion to remand is filed after removal of a products liability claim against non-resident defendants, to find a "proper" joinder under *Smallwood*, *McDonal* and *Holder*, a district court would have to prognosticate the following events:

> 1. After having his federal suit dismissed for failing to invoke a medical review panel, plaintiff will proceed with his malpractice claim by invoking a medical review panel, instead of foregoing the malpractice claim altogether;
>
> 2. The medical review panel will thereafter render a decision that does not support the plaintiff's malpractice claim, but the plaintiff will nonetheless decide to proceed with litigation anyway; or

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[23] LA. REV. STAT. ANN. 40:1231.4(C)(1).

[24] LA. REV. STAT. ANN. 40:1231.4(C)(5)(e); *see Stuka v. Fleming*, 561 So. 2d 1371, 1374 (La. 1990), explaining the procedure that after settlement for the physician's statutory limit, the PCF cannot contest liability: "The only issue between the victim and the Fund thereafter is the amount of damages sustained by the victim as a result of the admitted malpractice." The settling physician faces no further liability; *accord, Bijou v. Alton Ochsner Medical Foundation*, 679 So. 2d 893 (La. 1996).

> 3. The medical review panel will thereafter render a decision that supports the plaintiff's malpractice claim, but the defending physician will refuse to settle, forcing plaintiff to proceed with litigation.

As discussed, the district court's decision in *Bourne* recognized that predicting any one of these outcomes is inherently speculative; just as it would be inherently speculative for a court to predict that a petitioner under the National Vaccine Act might elect to reject the judgment of the Vaccine Court (*Holder*, *McDonal*), or the plaintiff might ignore or reject the recommendations of the EEOC to dismiss or mediate an employment discrimination claim (as discussed in Judge Davis' dissenting panel opinion).

Real world data compiled by the PCF in its annual report to the Legislature supports the view that most malpractice claims are in fact resolved by the medical review process itself, demonstrating that litigation of medical malpractice claims against physicians is the exception rather than the rule. This holds true even for claims for excess damages against the PCF, which are mostly resolved through claims settlements. Those claims that are litigated in most cases involve only the PCF, and not the physician, who has settled and whose liability is deemed "admitted and established."

The PCF's oversight board, created in 1990, is statutorily obligated to furnish quarterly and annual reports on the status of all claims pending against the

fund.[25] Those reports are published on the PCF's website and are open to the public for review.[26] Its most recent Annual Report, dated October 1, 2015, Exhibit 3, "Medical Review Panels," lists the number of requests for medical review panels for each year from 1994 to 2014. The Board's explanation of that data states that

> Overall, the number of requests filed and the number of individual providers named in requests have decreased during the last five years. Frequency seems to have leveled out at this time. In 2014 there were the fewest panels filed since 1994. The average annual panels filed over the last five years, is approximately 1500 per year.

Exhibit 4 contains "Claims" data, showing the "number of claims open, closed, closed without payment, pending by year and future medical claims by year." The accompanying chart shows that, of the 1107 total "claims closed," ***only 22*** resulted in any payment by the PCF (emphasis added). Pending claims from 2004 to 2015 have been reduced from 12,000 to "under 4500." Significantly, less than "5% of the PCF claims incur any defense costs."

Further, according to PCF data, it "generally takes about 2 years for a claim to complete the medical review panel process and an additional 2 to 3 years for a final conclusion of the claim." With only 5% resulting in any defense costs, this data suggests that most claims are resolved at the conclusion of the medical review process, without litigation, through effective claims adjustment and settlement.

[25] LA. REV. STAT. ANN. 40:1231.4(A)(5)(b), added by La. Acts 1990, No. 967, eff. Oct. 1, 1990..
[26] http://www.doa.la.gov/Pages/pcf/Index.aspx.

Indeed, Exhibit 5, showing "Claim Payments" data, states that "[t]o avoid such increased costs [of judicial interest], the PCF encourages mediations and joint settlements as a means of resolving claims expeditiously and reducing costs."

These published data indicate that as an administrative remedy, the medical review panel process actually works to accomplish the goal of the LMMA, which is to "provide coverage to private health care providers in Louisiana, ensuring that a stable and affordable market existed for malpractice insurance and thereby keeping practitioners in the state," and "to create a viable fund for compensating claimants."[27] The LMMA is working to resolve those claims outside of litigation, in most cases. The panel's majority decision encourages plaintiffs to violate this carefully crafted – and effective – state statutory scheme.

Allowing a plaintiff to assert a malpractice claim against a resident qualified health care provider before exhausting his remedies under the LMMA and to join that claim with product liability claims against non-resident manufacturers serves only to reward the plaintiff for violating Louisiana law by depriving the diverse defendants of their right to a federal forum. The malpractice claim will have to dismissed in every instance, as was done here; but under the panel majority's opinion, the diverse claims will also have to be remanded to state court, with no

[27] PCF Annual Report, October 1, 2015, p. 3; *see Sewell v. Doctor's Hosp*., 600 So.2d 577, 578 (La. 1992), recognizing that the goal and purpose of the LMMA, in limiting damages awards in malpractice cases in exchange for lower insurance costs, is to assure "accessible and affordable healthcare for the public."

"reasonable prediction" that the malpractice claim will ever or likely be re-joined after the medical review panel, if in fact one is invoked, has issued its opinion.

For the foregoing reasons, and for all of the reasons advanced by Appellees in their original and supplemental briefs, PLAC respectfully suggests and requests that the panel decision be reversed and the rule of *Holder*, *McDonal* and *Smallwood* be applied to uphold the district court's assertion of diversity jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and Local Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Local Rule 32.1 because:

   This brief has been prepared in a proportionally spaced typeface using Microsoft Office 2013 in 14 point Times New Roman font, except that the footnotes are in 12 point proportionally spaced typeface.

/s Joseph L. McReynolds
JOSEPH L. MCREYNOLDS

Dated: January 13, 2016

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on January 13, 2016, I electronically filed the foregoing *Amicus Curiae,* on behalf of the Products Liability Advisory Council, Inc., in support of Appellees and the District Court's exercise of diversity jurisdiction, with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants in this matter.

/s/ Joseph L. McReynolds
JOSEPH L. MCREYNOLDS