SUPREME COURT OF NEW JERSEY

DOCKET NO.73324

JOEL S. LIPPMAN, M.D., Plaintiff-Respondent, v. ETHICON, INC. and JOHNSON & JOHNSON, INC., Defendants-Petitioners.	On Certification from a Final Judgment of the Superior Court, Appellate Division Docket No. A-4318-10T2 Sat Below: Hon. Jose L. Fuentes, P.J.A.D. Hon. Jonathan N. Harris, J.A.D. Hon. Ellen L. Koblitz, J.A.D. CIVIL ACTION

BRIEF OF THE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION AND NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

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PRELIMINARY STATEMENT

Amici New Jersey Business & Industry Association ("NJBIA") and New Jersey Civil Justice Institute ("NJCJI") - whose members represent a wide cross-section of New Jersey's business community - respectfully submit that the Appellate Division's expansive interpretation of the Conscientious Employee Protection Act ("CEPA") in this case disregards the statute's language and design and creates several disincentives that would be contrary to good business practices and good public policy.

Based on "a mere glimpse into the pharmaceutical and medical products industry," Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 411 (App. Div. 2012), the appellate panel abandoned a well-established body of case law and expanded the scope of "protected employee actions" under CEPA to cover the performance of regular job duties. The panel did not adequately consider the role and structure of corporate safety and compliance programs or the counterproductive incentives its ruling will create to limit and downgrade these important functions.

The Legislature drafted CEPA in a way that limits "protected employee actions" to conduct that goes beyond the performance of regular job duties, as when an employee "objects" to a company's "activity, policy or practice . . . ." This legislative judgment allows companies to design safety and compliance programs that include robust discussion of a variety

of opinions, from employees with a range of perspectives, without fear of generating whistleblower litigation. The panel below substituted its own policy judgment, holding that CEPA should cover an expression of a safety concern about "an employer's proposed plan or course of action," id., 432 N.J. Super. at 410, in the course of the employee's regular duties, before a decision is reached, and even if the employee and the company ultimately agree on the appropriate course of action.

The NJBIA and NJCJI respectfully seek to assist the Court with a discussion of the good business and public policy reasons for well-developed safety and compliance programs, the reasons why CEPA's language is consistent with those business and policy reasons, and the reasons why the Appellate Division's ruling is not. If the ruling of the panel below is allowed to stand, it will discourage companies from creating positions in New Jersey in which employees examine, evaluate, and collaborate about potential safety and quality issues. This would be bad policy – bad for business and bad for consumers.

IDENTITY AND INTEREST OF THE AMICI

Founded in 1910, NJBIA is the nation's largest single statewide employer organization, with more than 21,000 member companies in all industries and in every region of our State. Its mission is to provide information, services, and advocacy for its member companies to build a more prosperous New Jersey. NJBIA's members include most of the top one hundred employers in the State, as well as thousands of small to medium-sized employers, from every sector of New Jersey's economy. One of NJBIA's goals is to reduce the costs of doing business in New Jersey, including unwarranted litigation burdens, in an effort to promote economic growth and benefit all of New Jersey.

NJCJI is an association of New Jersey's leading businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. NJCJI advocates in support of reforms that ensure New Jersey's civil justice system treats all parties fairly and discourages lawsuit abuse. NJCJI and its members believe that a fair civil justice system resolves disputes expeditiously, without bias, and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services while ensuring that truly injured people are compensated fairly for their losses.

The NJBIA and NJCJI believe that the unwarranted erosion of limitations that the Legislature has incorporated into statutory causes of action leads to excessive litigation and interference with legitimate business decisions, which imposes costs on us all: the businesses, sole proprietors, professionals, and organizations that are the targets of such suits; consumers who pay for excessive awards through higher prices; taxpayers who pay more when businesses leave the State; and plaintiffs with valid claims who find the court system clogged with unwarranted lawsuits.

NJCJI's and NJBIA's specific interests are directly implicated by this case because the Appellate Division's decision, if not overturned, will render New Jersey's businesses susceptible to increased employment-related litigation, particularly when they try to follow good business practices and establish robust safety and compliance programs. The ruling by the panel below would also have the deleterious effect of chilling the open and frank internal business discussions of important product safety and compliance issues because those discussions will serve to cloak every participant in potential whistle-blowing activity for future CEPA actions. NJCJI and NJBIA submit this brief as *amicus curiae* to provide a broader perspective regarding the effect that the Appellate Division's

opinion would have on New Jersey's economy and on the businesses that choose to reside here.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

NJBIA and NJCJI adopt and incorporate by reference the Procedural History and Statement of Facts set forth in the Appellate Division brief of Defendants-Petitioners.

ARGUMENT

I. EXPANDING WHISTLE-BLOWER PROTECTION TO THE PERFORMANCE OF REGULAR JOB DUTIES WOULD CREATE SEVERAL INCENTIVES THAT WOULD BE CONTRARY TO GOOD BUSINESS PRACTICES AND GOOD PUBLIC POLICY

A. Good Business and Legal Incentives Exist to Promote the Creation of Robust Safety and Compliance Programs

Without any legal obligation to do so, corporations such as Ethicon and Johnson & Johnson establish special internal boards and committees to deal with product quality, efficacy, research, and recalls. Companies have broad discretion as to whether and how to establish such boards and committees, including how many employees should be included, from which departments, and with what level of authority. See, e.g., T. White & R. Pomponi, *Gaining a Competitive Edge by Building Safety into Your Products*, reprinted in Consumer Product Safety Guide, ¶ 54363 "Best Practices Net Lower Recall Rates, Study Finds" (C.C.H.), at 38,807, available at 2009 WL 3626105 (2002). Companies of all sizes and in all types of industries have business and legal incentives to establish strong safety and compliance programs.

See Id., at 38,815, 38,819; see also A. Rink, J. Kuppens, J. Goodfellow, *Risk Management Tips for Consumer Product Manufacturers*, ACC Docket, December 2013 (Association of Corporate Counsel), at 59, 60. The best outcomes regarding quality, efficacy, and safety are reached when companies engage employees at high levels, with varied expertise and perspectives, to engage in a robust, deliberative evaluation of these issues. White & Pomponi, *Gaining a Competitive Edge*, Consumer Product Safety Guide, ¶ 54363, at 38,817; see also Rink, Kuppens & Goodfellow, *Risk Management Tips for Consumer Product Manufacturers*, supra, at 59. Strong safety and compliance programs are good business as well as good public policy.

Resolution of safety and compliance issues can require specialized technical knowledge and consideration of many competing considerations. In the pharmaceutical and medical products industries, decisions about product research, quality, and safety issues can require knowledge about medicine, biochemistry, medical engineering, clinical trials, production processes, and regulatory requirements. Decisions about whether to introduce, or withdraw, a product may require weighing the product's potential safety risks and its potential benefits to consumers, in additional to financial considerations such as potential revenues and costs of development and compliance.

Richard A. Epstein, *Regulatory Paternalism in the Market for Drugs: Lessons from Vioxx and Celebrex*, Yale Journal of Health Policy, Law, and Ethics, Vol. 5: Iss. 2, Art. 6, at 745, 751-754 (2005).

Companies use their business judgment and discretion when creating positions, committees, and boards responsible for evaluating and deciding these issues. Ethicon created (and appointed Dr. Lippman to serve on) "a number of internal review boards designed to provide an environment for senior management and policy makers to express their views and suggestions within their particular areas of expertise." Lippman v. Ethicon, 432 N.J. Super. at 388. For example, "Ethicon created the quality board to function as an autonomous, deliberative forum, where professionals could freely and openly discuss how best to address serious questions concerning the safety of pharmaceutical and medical products." Id., at 408. Ethicon also established positions such as the Worldwide Vice President of Medical Affairs and Chief Medical Officer, to which Dr. Lippman was promoted. Companies seek to fill such positions with employees who possess the appropriate technical knowledge and experience to evaluate potential safety concerns, discuss and debate them with others who share responsibility for such issues, provide advice, and participate in a deliberative decision-making process.

B. Expanding CEPA to Cover the Performance of Regular Job Duties Would Create Disincentives to Robust Safety and Compliance Programs

An expansion of the CEPA statute to cover such employees' performance of their job responsibilities would create powerful disincentives against the establishment of positions, boards, and committees responsible for reviewing and deciding safety and compliance issues. If every opinion, expression of concern, and debate about a safety or quality issue were considered protected activity under CEPA, then every employee whose duties include these issues could assert a CEPA claim in response to any adverse employment action. See Richard R. Carlson, *Citizen Employees*, 70 La. L. Rev. 237, 301 (Fall 2009) ("An employee whose job involves inspecting other work or reporting errors is in an especially advantageous position because he can nearly always recall at least one recent discovery of an error or quality control problem he described to an employer."). Such an expansive definition of protected activity would create a class of specially-protected employees, who would always be able to assert a CEPA claim in response to an adverse employment action. Id., at 302 (employees with such responsibilities "will always be in a position to assert retaliation as the cause of adverse action, and this may place them in a better position than most employees to assert meritless retaliation claims"); see also Huffman v. Office of Personnel Management, 263 F.3d 1341, 1352

n.4 (Fed. Cir. 2001) (rejecting expansive interpretation of protected conduct under Whistleblower Protection Act that would allow employees whose normal duties include investigation and reporting to "automatically" assert a whistleblower claim in response to any adverse action).

The potential litigation exposure from such CEPA claims would create incentives for companies to reduce the number of positions with responsibility for safety and compliance issues, to push these positions down to lower levels of compensation and authority, and to inhibit debate and discussion about these issues. The greater the number of employees in such specially-protected positions, the greater the likelihood that CEPA claims would be brought. The greater the compensation for an employee in such a specially-protected position, the greater the potential damages such an employee could seek in a CEPA claim. And, the more frequent the opportunities for such a specially-protected employee to express concerns about safety or compliance issues, the greater the likelihood such an employee could identify an instance of protected activity upon which to base a CEPA claim. All of these incentives would point in the opposite direction from good business practices and good public policy, encouraging companies to assign these duties to fewer employees, at lower levels, with fewer opportunities to participate in deliberative decision-making.

C. Expanding CEPA to Cover the Performance of Regular Job Duties Would be Likely to Skew Decisions About Products in Ways Not Intended by the Legislature

In addition, an expansion of the CEPA statute to cover the expression of safety or compliance concerns in the course of an employee's regular job duties would always tilt the balance in any deliberative decision-making process towards safety concerns and against other legitimate considerations. For example, the decision whether to introduce, or to withdraw, a drug or a medical device requires a weighing of, among other things, the potential safety risks and the potential benefits to patients who need new or better treatments. Epstein, *Regulatory Paternalism in the Market for Drugs*, Yale Journal of Health Policy, Law, and Ethics, at 755 ("There are no drugs that are uniformly safe, and there are none that are uniformly effective. All judgments about whether to let the drug on the market require a comprehensive kind of trade-off, which ultimately rests on questions of degree and extent."). Imbuing the expression of safety concerns with the status of protected activity under CEPA would always put extra weight on those concerns, at the expense of, among other things, the potential benefits to patients or consumers. Skewing the balance of relevant factors in the decision-making process in this manner could result in beneficial products being withdrawn from, or never being introduced to, the market.

For example, if one member of a product evaluation committee expresses a concern about potential safety issues, and another member advocates that the potential benefit to patients outweighs the safety concerns, an interpretation of CEPA that would cover the first member's expression of concern would skew the balance in the decision-making process. A decision to proceed with the product could lead to a whistleblower claim, whereas a decision not to proceed would avoid such exposure. In this way, the expansion of CEPA to cover the exercise of regular job duties would create incentives affecting the operation of corporate safety and compliance programs, including decisions about which potentially beneficial products should be on the market and which should not. While the benefits and risks of a particular product may be open to debate, there is no indication that the CEPA statute was intended to tilt the balance on such decisions on an across-the-board basis.

D. Expansion of CEPA to Cover the Performance of Regular Job Duties Would Deter Job Growth in Our State

An expansion of CEPA to cover the performance of regular job duties would magnify the litigation exposure to New Jersey businesses and further inhibit the growth of jobs and the economy in New Jersey. The CEPA statute is already widely recognized as the broadest whistleblower statute in the country. Carlson, *Citizen Employees*, 70 La. L. Rev. at 287; Carolyn

Dellatore, Note, *Blowing the Whistle on CEPA: Why New Jersey's Conscientious Employee Protection Act Has Gone Too Far*, 32 Seton Hall Legis. J. 375, 377 (2008); Richard A. West, Jr., *No Plaintiff Left Behind: Liability for Workplace Discrimination and Retaliation in New Jersey*, 28 Seton Hall Legis. J. 127, 128 (2003). Expanding CEPA to create a class of specially-protected employees would make CEPA even broader when compared to whistleblower statutes in other jurisdictions.

Companies consider the litigation climate when deciding whether to locate, or keep, business operations in New Jersey. Companies that operate in multiple states also consider the litigation climate when considering where to locate new jobs within the company. If New Jersey were to extend whistleblower protection to the regular duties of jobs involving safety and compliance issues – such as Dr. Lippman's position - it would create incentives for companies to locate such jobs elsewhere. Such a further expansion of the potential litigation exposure under CEPA would discourage companies from expanding their presence and creating jobs in New Jersey and encourage companies to relocate their operations to other states.

E. Expansion of CEPA to Cover the Performance of Regular Job Duties Would Inhibit Employers' Ability to Manage Their Employees

An expansion of the CEPA statute to cover the performance of regular job duties involving safety and compliance would also make it more difficult to manage the performance of employees with such responsibilities, intruding upon employers' managerial prerogatives. As described above, if an employee's performance of regular job duties were considered protected activity under CEPA, an employee whose duties include regularly evaluating safety and compliance issues could claim that any adverse employment action violates CEPA. The increased threat of such a claim would inhibit employers from managing and disciplining such employees in the same manner that employers manage and discipline other employees. See Carlson, *Citizen Employees*, 70 La. L. Rev. at 286 (noting criticism that whistleblower law can undermine managerial authority); see also Lawrence Rosenthal, The Emerging First Amendment Law of Managerial Prerogative, 77 Fordham L. Rev. 33, 59 (2008) (extending retaliation claims to duty-related speech would "limit[] managerial prerogative"); Huffman v. Office of Personnel Management, 263 F.3d at 1352 (broad interpretation of Whistleblower Protection Act "would be inconsistent with the WPA's recognition of the importance of fostering the performance of normal work obligations and subjecting employees to normal, non-retaliatory discipline").

The additional restraints on an employer's ability to manage employees with such responsibilities could lead to lower performance in these important positions and could create further incentives to downgrade or limit the number of such positions. This, too, would be contrary to good business, public policy, and economic growth in our State.

II. EXPANDING WHISTLE-BLOWER PROTECTION TO THE PERFORMANCE OF REGULAR JOB DUTIES WOULD BE INCONSISTENT WITH THE LANGUAGE AND DESIGN OF THE STATUTE

The Legislature defined an employee's protected conduct under CEPA in a way that describes conduct that goes beyond the performance of regular job duties. As relevant here, the Legislature provided that CEPA prohibits retaliation when an employee "objects to" an employer's "activity, policy or practice . . . ." N.J.S.A. 34:19-3(c). This incorporates two limitations: (1) the employee must "object"; and (2) the objection must be to an "activity, policy or practice."

When an employee's duties include evaluating, providing advice on, and debating the significance of safety concerns in comparison with a product's potential benefits to consumers, the performance of those duties does not constitute an "objection." Carlson, *Citizen Employees*, 70 La. L. Rev. at 300 ("Employees do not qualify as citizen employees by virtue of a debate, argument, or opinion."). Furthermore, when the employee performs those duties in the course of the company's decision-

making process, before the decision has been made, there is not yet an "activity, policy or practice" to which the employee may "object." These two important limitations reflect a legislative judgment to allow employers room to evaluate, consider, and debate potential courses of action before making significant business decisions, without being exposed to whistleblower litigation. If the Legislature had intended to cover evaluation, debate, and deliberation as protected activity, it could easily have said so. It certainly would not have used the phrase "objects to" … "an activity, policy or practice" to cover the different situation of an employee who states an opinion as to what the "activity, policy or practice" should be.

The appellate panel below substituted its policy judgments, based on concededly limited information, for the Legislature's judgment that protected conduct under CEPA should be circumscribed by these two important limitations. The panel conceded that its ruling was based on "a mere glimpse into the pharmaceutical and medical products industry" – a "flash of light." Lippman v. Ethicon, 432 N.J. Super. at 411. Based on its limited view, the Court did not adequately take into account the incentives that companies already have to create and establish robust, deliberative safety and compliance programs. It also did not consider that its expansion of the CEPA statute would create incentives for companies to downgrade these

programs, contrary to good business practices and public policy.

The panel below also based its expansion of the statute on the narrow view that product safety decisions involve a binary choice between two, diametrically opposed factors: "corporate profits" and "consumer safety." Id., at 406-407, 409. The panel did not consider, for example, that companies such as Ethicon also consider the potential benefits to patients needing effective treatments, which sometimes can outweigh potential safety risks. See Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 76 (1980) ("The public has an interest in the development of drugs, subject to the approval of a responsible management and the FDA, to protect and promote the health of mankind.") By choosing to protect an expression of concern about "consumer safety" over any other relevant consideration, the panel below made an ill-advised policy judgment without full consideration of all of the potentially relevant factors.

The panel below also seriously undervalued the benefits of a deliberative decision-making process when it expanded the definition of protected conduct to cover the expression of opinions about "an employer's proposed plan or course of action." Lippman v. Ethicon, 432 N.J. Super. at 410 (emphasis added). The Legislature, in contrast, confined protected conduct to an objection to "an activity, policy or practice," thus leaving room for companies to advocate and evaluate

competing viewpoints about a proposed plan or course of action without fear of increased exposure to whistleblower litigation. As the record in this case demonstrates repeatedly, employees may initially express different opinions about several potential courses of action and, after debating and considering alternative viewpoints, may reach a consensus on an appropriate course. The record shows that this is what happened here; discussion led to consensus. The panel below did not allow for this reality. Its holding would expand CEPA and have the courts supervise the interaction between employers and employees during this process, even when everyone involved ultimately agrees on an appropriate "activity, policy or practice."

The Legislature left room for such deliberative corporate decision-making processes to play out. Under its statutory definition, an employee whose responsibilities include evaluating and debating the significance of safety or compliance concerns in such a process does not engage in protected conduct unless and until an "activity, policy or practice" has been decided upon and the employee then "objects." By the Legislature's design, judicial supervision of the interaction between employers and such employees does not begin until the deliberative process is completed. This Court has similarly recognized that the courts should not interfere in such corporate decision-making, even about controversial products or

actions, unless and until an employee objects that a course of action would be illegal or contrary to public policy. Pierce, 84 N.J. at 76 ("Research on new drugs may involve questions of safety, but courts should not preempt determination of debatable questions unless the research involves a violation of a clear mandate of public policy. ") Extending the protection of CEPA prematurely, before an employee objects to an activity, policy, or practice, would give individual employees undue influence over important corporate decisions, leading to "disorder" that would be harmful to the development of beneficial products. Pierce, 84 N.J. at 75.

III. WHETHER CEPA SHOULD BE EXPANDED TO COVER THE PERFORMANCE OF AN EMPLOYEE'S JOB DUTIES IS A POLICY JUDGMENT THAT SHOULD BE LEFT TO THE LEGISLATURE

Since CEPA was originally enacted in 1986, the Legislature has acted three times to amend it, expanding its scope in specific ways on each occasion. As the briefs of the parties demonstrate, since at least 2008, the lower courts have consistently and repeatedly held that CEPA does not extend to an employee's performance of regular job duties. Yet, the Legislature has not acted to amend CEPA to cover such conduct. Presumably, if the Legislature believed that this well-established body of case law misinterpreted CEPA, the Legislature would have acted to amend and expand the statute, as it has done on three prior occasions.

Such policy decisions are the province of the legislative branch, not the judiciary. As discussed above, this issue involves a complex set of incentives and choices between multiple public policies that do not always point in the same direction. The Legislature is equipped to make such difficult policy choices with the benefit of as extensive a legislative record as may be necessary. The judiciary is not designed to make such broad policy decisions based on the record of a single case, and doing so here, based on a "mere glimpse" into one industry, would not afford the appropriate respect to the Legislature as a co-equal branch of our government.

The NJBIA and NJCJI respectfully submit that the question presented should be decided based on the limitations the Legislature incorporated into CEPA's definition of protected employee actions, in accordance with the body of case law that had consistently developed in the lower courts until the decision by the panel below in this case. If the Legislature determines that its definition of protected activity needs to be expanded, it can always do so, as it has done before. That would be a decision for the Legislature, not the judiciary.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the brief submitted by Defendants-Petitioners Ethicon, Inc. and Johnson & Johnson, the decision of the Appellate Division should be reversed.

Respectfully submitted,

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