No. 14-2892

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD PERRAS,

Plaintiff-Appellant,

v.

H&R BLOCK, INC. ET AL,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri

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

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Product Liability Advisory Council, Inc. has no parent corporation, and no company owns 10% or more of its stock.

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

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of appellees H&R Block, Inc., et al. (collectively, "H&R Block").[1]

STATEMENT OF INTEREST

PLAC is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (nonvoting) members of PLAC.

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[1] PLAC submits this brief in accordance with Federal Rule of Appellate Procedure 29. PLAC endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief but plaintiff-appellant indicated he would withhold consent until after he has had a chance to review the brief. PLAC certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity contributed money that was intended to fund preparing or submitting this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,000 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's members have an interest in this case because appellant and the Missouri Attorney General seek extraterritorial application of Missouri law to claims that have no link to Missouri, which would adversely affect manufacturers and other businesses by lowering the bar to class certification, disrupting settled expectations that each state is free to establish rules governing transactions occurring within their borders, and making it more difficult to structure the operations of companies with interstate businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant and the Attorney General urge a radical position: that the Missouri Merchandising Practices Act ("MMPA") governs all transactions between companies based in Missouri and their customers, no matter where those transactions take place or where their customers reside. Simply put: their position is that Missouri has the right to legislate for the nation the propriety of every Missouri corporation's conduct regardless of where that conduct actually occurs and where it affects consumers.

As the district court rightly recognized, such a sweeping doctrine would violate constitutional limitations on choice of law grounded in full faith and credit and due process. Where, as here, a transaction occurs entirely outside Missouri, Missouri cannot apply its laws extraterritorially. Rather, consistent with the expectations of the parties and the policy interests of the state in which the transaction occurred, that state's law governs.

A different rule would not only be contrary to law but would also undermine commercial activity in the United States. Each state adopts laws that strike a balance among several factors, and consumer protection is only one of them. While the Attorney General touts the MMPA as one of the strongest consumer protection laws in the nation, suggesting that this is a legitimate reason for applying it nationwide, other jurisdictions have chosen to strike a different balance between consumer interests on the one hand and economic development on the other. Businesses, meanwhile, plan their affairs based on the assumption that the law will work as it always has – with each state allowed to set the rules for transactions occurring with its borders. Changing the rules now would upset those expectations and frustrate careful business decisions made in reliance on the applicability of local law to transactions taking place entirely within another state's borders. For these reasons, as elaborated below, the Court should affirm the well-reasoned judgment of the district court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE MMPA COULD NOT BE APPLIED TO ALL PUTATIVE CLASS MEMBERS IN A CONSTITUTIONALLY PERMISSIBLE MANNER.

The Court should affirm the district court's denial of appellant's motion for class certification. Because all class members reside outside Missouri and allegedly engaged in transactions with H&R Block in states other than Missouri, basic constitutional principles of due process and full faith and credit preclude extraterritorial application of the MMPA to their claims, and common legal issues do not predominate.

The U.S. Supreme Court has held that where, as here, there is a material conflict between the law of the forum state and other states implicated in a class action, a court cannot apply a single state's law to an entire class unless that state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 819, 822-23 (1985) (internal quotation marks and citation omitted). A litigant's desire to achieve a sufficient commonality of issues to justify class treatment cannot overcome this principle; a court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" *Id.* at 821. Thus, an individualized analysis must

be applied to identify "the contacts between [the state] and each plaintiff class member's claims" before concluding that a state's law may apply across the board. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005).

The district court properly conducted this analysis, finding that "the entire transaction between H&R Block and the class member occurred in that member's home state, including payment of the allegedly deceptive fee." (Order at 7.) Indeed, "and in contrast to any case applying one state's law to a nationwide class, there is no evidence that the out-of-state class members had *any* contact with Missouri or any knowledge that H&R Block was headquartered in Missouri." (*Id.* (emphasis added).) Thus, if appellant and the putative class members were exposed to any allegedly deceptive representations about the compliance fee – the basis of their claims – that representation was made in an H&R Block office in the state in which their taxes were prepared. Based on this analysis, the district court

correctly held that Missouri law could not apply to the class members' claims in a constitutional manner.[3]

The Attorney General argues otherwise. In the State's amicus brief, the Attorney General asserts that "a domestic corporation is *always* subject to suit under the MMPA for its out-of-state conduct," relying principally on *State ex rel. Nixon v. Estes*, 108 S.W.3d 795 (Mo. Ct. App. 2003). (Br. of Amicus Curiae the Mo. AG in Supp. of Pl.-Appellant's Req. for Reversal ("AG Br.") at 2, 7.) The Attorney General is wrong. As an initial matter, *Estes* did not sweep nearly so far. Rather, the *Estes* court held that there was enough of a connection to Missouri for the MMPA to apply in that case because the defendant not only "established and operated his businesses in Missouri," but also "placed the newspaper advertisements *from* company offices *in Missouri*"; "made telephone sales calls

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[3] The district court's constitutional analysis was based on the Due Process and Full Faith and Credit Clauses of the U.S. Constitution. Notably, the Commerce Clause likewise precludes application of Missouri law to the claims of non-residents. The Supreme Court recognized in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), that the Commerce Clause prevents a state, through its courts, from "legislating" beyond its borders. Thus, "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the state." *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 228-29 (S.D. Fla. 2001) (internal quotation marks and citation omitted), *report and recommendation adopted*, 209 F.R.D. 221 (S.D. Fla. 2002). As in *Montgomery*, here too there is no evidence that any putative class members paid the compliance fee in Missouri or suffered injury there. *Id.* Neither H&R Block's headquarters in that state, nor any alleged decision-making that occurred there, changes the result because "[i]t is the effect on trade that must occur in [the state], not the actions giving rise to the effect

and mailed out information packets and purchase agreements for the [product] *from* company offices *in Missouri*"; "received the signed sales agreements *in Missouri*"; "received wire transfers for hundreds of thousands of dollars in payments from his victims *into Missouri bank accounts*"; "maintained a continuing commercial relationship with those victims from company offices *in Missouri*"; and sold the products to "*Missouri businesses* before they were shipped to the consumer victims." 108 S.W.3d at 801 (emphases added). Only after analyzing these contacts with Missouri did the *Estes* court hold that the MMPA could apply to the injuries of out-of-state residents. No such contacts were present in this case; rather, as the district court recognized, "the actual contact between H&R Block and each class member – including the commercial relationship, the charging of the fee, and the services transaction – occurred in that member's home state," and "each class member's alleged injury occurred in his or her home state." (Order at 5.)

In any event, *Estes* did not address the question presented here: whether the U.S. Constitution prohibits classwide application of Missouri law given the paucity of contacts between the State and the claims at issue. *See generally* 108 S.W.3d at 801 (declining to decide whether application of Missouri law would contravene the Commerce and Supremacy Clauses of the U.S. Constitution). Instead, its analysis

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on trade." *Id.* (internal quotation marks and citation omitted).

was strictly statutory, focusing on whether the language of the MMPA itself allowed application to non-residents. *See id.* at 798-801. For all of these reasons, *Estes* fails to provide support for the Attorney General's position that being headquartered in Missouri automatically exposes a defendant to application of Missouri law to all of its out-of-state conduct.

Ample other authority confirms that *Estes* cannot be construed in the manner urged by the Attorney General. Courts addressing the constitutional question of applying a state's laws to non-residents have made clear that the defendant's incorporation or headquarters in a particular state is *not* a sufficient contact. As these courts have explained, the proper analysis focuses not on the *defendant's* contacts, but on the *claim's* contacts with the state. *See, e.g.*, *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1027-28 (N.D. Cal. 2007) (insufficient contact with California to warrant application of its law to out-of-state citizens under *Shutts* even though plaintiffs alleged "that conduct in furtherance of the conspiracy took place in California," one of the defendants "is allegedly headquartered in California" and another "has at least some business operations" there); *Bruce v. Teleflora, LLC*, No. 2:13-cv-3279-ODW(CWx), 2013 U.S. Dist. LEXIS 134607, at *9-11 (C.D. Cal. Sept. 19, 2013) (California statutory fraud claims could not be applied to non-residents "[d]espite the fact [defendant's]

headquarters [was] in California" where defendant used local florists nationwide to fill plaintiffs' orders).

In *Montgomery*, for example, the plaintiff sued the manufacturers of an aircraft and engine under the Florida Deceptive and Unfair Trade Practices Act, claiming that the defendants falsely stated in their marketing materials that the engine at issue would operate 2,000 service hours before needing an overhaul. 209 F.R.D. at 228-29. The plaintiff sought to certify a class of owners of the same aircraft equipped with the same engine. *Id.* The court denied class certification after holding that Florida law could not be applied on a classwide basis, and that variations of law among the states regulating deceptive trade practices laws would therefore cause individual issues of law to predominate over any common ones. In so holding, the court determined that application of Florida law across the board would be unconstitutional. *Id.* While the plaintiff asserted that it would not be "a violation of due process to handle all claims under the laws of Florida" because that was "the home state of New Piper" and "some of the conduct alleged to be wrongful occurred in [that] state," the court disagreed. *Id.* As it explained, under *Shutts*, "a state must have a significant contact" to "the claims asserted by each member of the putative class." *Id.* "The relevant transactions in this case giving rise to possible damages [were] the putative class members' transactions in purchasing airplanes," most of which happened outside of Florida. *Id.*

Accordingly, the court held that Florida law could not be constitutionally applied classwide and denied class certification.

The same logic applies here. In order to prevail on their MMPA claims, plaintiff and the putative class members must prove that H&R Block misrepresented the compliance fee and that they were damaged as a result of the misrepresentations. *See* Mo. Rev. Stat. § 407.010, *et seq*. As noted above, however, all of the relevant contacts between H&R Block and the out-of-state class members, as well as the class members' alleged injuries, occurred in those class members' home states – not Missouri. (*See* Order at 5.) Accordingly, Missouri law cannot constitutionally be applied to these claims.

For all of these reasons, the district court properly held that it could not apply Missouri law on a classwide basis in a constitutionally proper manner.

II. APPLYING MISSOURI LAW TO NON-RESIDENTS WOULD UNDERMINE THE POLICIES OF THEIR HOME STATES AND UNFAIRLY HARM AMERICAN BUSINESSES.

The Court should also affirm the decision below to respect the policy decisions of the putative class members' home states and protect American businesses from unfair regulation of out-of-state conduct.

It is a basic principle of federalism that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

Thus, "states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers to create a more favorable business climate for the companies that the state seeks to attract to do business in the state." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 592 (9th Cir. 2012). "When a state adopts a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises, . . . the state ordinarily has an interest in having that policy of limited liability applied to out-of-state companies that conduct business in the state, as well as to businesses incorporated or headquartered within the state." *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010). This is because a "state has a legitimate interest in attracting out-of-state companies to do business within the state, both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered by out-of-state companies." *Id.*

Imposing the MMPA on H&R Block's out-of-state conduct in this case would undermine these interests, subjugating 49 states' policy calculations to those of the Missouri legislature. What one state considers an actionable representation may not hold true in another with different laws and economic objectives. Thus, while plaintiff and the Attorney General see no harm in applying the MMPA to the

entire class because it is purportedly "broader" or more comprehensive than other state's statutes (*see* Appellant's Br. at 52), it is precisely this aspect of the law that may upset another state's "valid interest in shielding out-of-state businesses from what the state may consider to be excessive litigation." *Mazza*, 666 F.3d at 592; *see Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 209 (3d Cir. 2013) ("Applying New Jersey law to every potential out-of-state claimant would frustrate the policies of each claimant's state.").

The Attorney General argues in its amicus brief that broad extraterritorial application of the MMPA is important to foster the collective efforts of attorneys general across the country to stop unfair business practices. (AG Br. at 16-18.) But this argument again presumes that all states have struck the same balance between regulatory interests on the one hand and economic interests on the other. They have not. Thus, the Attorney General has it backwards; far from promoting interstate harmony, its view that Missouri law should be permitted to supplant the laws of all the other states would disrupt those states' interests and undermine interstate comity by allowing the residents of those states to achieve an "end run" around the limitations on consumer rights set by their legislatures. *Cf. Knox v. Samsung Elecs. Am., Inc.*, No. 08-4308 (JLL), 2009 WL 1810728, at *4 (D.N.J. June 25, 2009) ("Although it is true that New Jersey seeks to prevent its corporations from defrauding out-of-state consumers, it is not clear to this Court

that New Jersey intended out-of-state consumers to engage in end runs around local law in order to avail themselves of collective and class remedies that those states deny."); Michael S. Greve, *Federalism's Frontier*, 7 Tex. Rev. L. & Pol. 93, 107-08 (Fall 2002) ("[A] 'federalism' without horizontal protections maximizes governmental access points and eliminates the veto points. An interest group that fails to get its way in one forum can turn elsewhere because some government is always open for business. Let trial lawyers collude with a handful of state attorneys general and a stampede results."); Greve, *supra*, at 100-01 ("When every jurisdiction can impose its rules on all other jurisdictions, the result is a race towards excessive liability levels – 'excessive' in the sense that the rules are stricter than the rules that the citizens of autarkic states would choose.").[4]

Blanket application of Missouri law to transactions taking place entirely in other states would also disrupt the efforts of American businesses to tailor their operations to the laws of the jurisdictions where they do business, imposing new costs and injecting significant uncertainty in the marketplace. As courts have recognized, companies that operate in interstate markets craft and tailor their

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[4] The Attorney General also argues that if the district court's order is affirmed, it would place "the proposition of out-of-state recovery" "in question" and threaten the "norm" of attorneys general sending each other complaints associated with their local businesses. (AG Br. at 17-18.) But the district court order did not hold that the MMPA could never be applied to out-of-state residents. Instead, it held that, under the facts of this case, the contact Missouri had with plaintiff's and the putative class members' claims was insufficient to permit application of Missouri

business based on the laws of the states in which they actually operate – for example, by "limit[ing] [their] sales according to variations in risk." *White v. Ford Motor Co.*, 312 F.3d 998, 1017-18 (9th Cir. 2002). Courts have thus admonished that it is important for a state to be able "to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *McCann*, 225 P.3d at 534. Businesses, in turn, have a due-process right, rooted in fundamental concerns of fair notice, to rely upon these assurances. *Cf., e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (explaining that the Due Process Clause is designed to allow orderly administration of the laws and provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit"); Edward D. Cavanagh, *The FTAIA and Claims by Foreign Plaintiffs Under State Law*, 26 Antitrust 43, 48 (Fall 2011) ("Just as due process protects a nonresident from unfair use of a state long-arm statute, due process also protects an individual or entity from the consequences of extraterritorial application of state law[.]") (citing *Gore*, 517 U.S. at 572-73). As such, extraterritorial application of a state's law should only be allowed "where the

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law to the non-residents. (Order at 5-7.)

transaction in question has a meaningful nexus with the . . . state and only where the defendant is fairly on notice that a given state's law will apply[.]" Cavanagh, *supra*, at 48. The call for universal application of the MMPA would transgress these limitations and impose significant and unfair costs on American companies based in Missouri that conduct business in other states.

For these reasons too, the Court should affirm the district court's denial of class certification.

CONCLUSION

For the foregoing reasons, as well as those set forth in H&R Block's brief, the district court's order denying class certification should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND EIGHTH CIRCUIT RULE 28A(h) FOR CASE NUMBER 14-2892

I certify that, pursuant to Fed. R. App. P. 29(d), the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less. In addition, I certify that a virus check has been performed on this electronic brief using Symantec AntiVirus, and that this electronic brief is free of viruses.

December 9, 2014

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the Brief of Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Appellees was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on December 9, 2014.

December 9, 2014

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APPENDIX A

Corporate Members of the Product Liability Advisory Council

as of 11/24/2014

Total: 105

3M
Altec, Inc.
Altria Client Services Inc.
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eisai Inc.
Emerson Electric Co.
Endo Pharmaceuticals, Inc.
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products

Corporate Members of the Product Liability Advisory Council

as of 11/24/2014

Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digitial Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.