No. 117687

IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH, Individually and on behalf of all others similarly situated,	)	On Petition for Leave to Appeal From the Illinois Appellate Court Fifth District, No. 5-13-0017
Plaintiffs-Respondents,	)	There Heard On Appeal From The Third Judicial Circuit Madison County, Illinois No. 00-L-112
v.	)	
PHILIP MORRIS INCORPORATED, a corporation,	)	The Hon. Dennis P. Ruth, *Judge Presiding.*
Defendant-Petitioner.	)	

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANT-APPELLANT PHILIP MORRIS USA INC.

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 105 corporate members representing a broad cross-section of American and international product manufacturers. PLAC's corporate members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. A number of PLAC corporate members are headquartered in Illinois, and many more have facilities in Illinois and employ Illinois residents. A list of PLAC's corporate members is shown in Appendix A to this brief.

PLAC's members seek to contribute to the improvement and reform of law in the United States and elsewhere, with a particular emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of its corporate membership, which encompasses a diverse group of industries in many different aspects of the manufacturing sector. In addition, several hundred of the nation's leading product liability defense attorneys are sustaining non-voting members of PLAC.

Since 1983, PLAC has filed over 1000 briefs as *amicus curiae* in both state and federal courts, including this Court, in order to present the broad perspective of product manufacturers seeking reasoned and balanced development of the law affecting product liability. In that context, PLAC and its members have a strong interest in the law concerning consumer fraud statutes and class actions central to the case before this Court. By submission of an *amicus* brief, PLAC hopes to assist the Court in its review of this case.

SUMMARY OF ARGUMENT

In the decision below, the Illinois Appellate Court reinstated a $10.1 billion judgment against the defendant under the Illinois Consumer Fraud and Deceptive Business

Practices Act, 815 ILCS 505/1 *et seq*. ("ICFA"). This extraordinary award, the largest in State history, was on behalf of a class of smokers who bought defendant's light cigarettes in Illinois between 1971 and 2001. This case does not involve recovery for personal injuries. In fact, the case does not involve *any* actual class-wide injury that is recognized by Illinois courts. Certainly the plaintiffs have not shown any economic injury; all that they have shown is their subjective disappointment with the product they purchased, which is not a basis for sustaining a consumer fraud claim. Moreover, plaintiffs' action has not overcome the problem of individualized questions of causation and injury, critical issues for a class action, which the plaintiffs would sweep aside despite a solid consensus in national case law that cases like this one are not suitable for class certification.

To sustain this case as a consumer fraud class action would fly in the face of Illinois' now-established approach, which requires proof of actual deception, injury and predominance of common questions. The large majority of other states also have adopted these same basic requirements. And there are good reasons for doing so: to maintain a consistent, principled approach to recovery in consumer fraud; to give Illinois businesses and Illinois citizens the security of known and reasonable principles of law on matters that have potentially far-reaching economic consequences; and to preserve the resources of Illinois courts for those actions and citizens that have meaningful claims.

ARGUMENT

I. Illinois, In Line With Many Other States, Has Consistently And Correctly Rejected Efforts To Side Step The Elements of Actual Deception, Actual Injury, and Commonality In Consumer Fraud Class Actions.

The 2003 *Price* judgment is an outlier, out of step with the law in Illinois as well as decisions across the United States concerning consumer fraud class actions. It gives credence to an ICFA class while failing to enforce such essential elements of a consumer

fraud class action as reliance, actual injury and predominance of common fact issues. As a result, the *Price* judgment flouts well-established Illinois principles of law, and unjustly bucks the trend in the majority of jurisdictions across the country.

A. The Rise of Consumer Fraud Statutes and the Rejection of Abusive Use of Such Statutes in No-Causation, No-Injury Class Actions.

State consumer fraud statutes, including the ICFA, arose out of the consumer protection movement of the late 1960s and early 1970s. *See* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 34 Harv. J. on Legis. 1, 14-20 (2006) (describing events leading up to multiple states' adoption of consumer fraud statutes before 1973). Prior to the late 1960s, consumer protection in the United States was entrusted to the Federal Trade Commission (FTC). In 1968, consumer advocate Ralph Nader recruited a group of law students led by Edward Cox, known as "Nader's Raiders," to produce a report detailing the FTC's shortcomings in the areas of consumer fraud and false advertising. Edward F. Cox et al., *"The Nader Report" on the Federal Trade Commission* (1969). The American Bar Association (ABA) soon followed with its own report concluding that the protection provided to consumers by the FTC was inadequate and piecemeal. Scheuerman, *supra*, at 12 (citing September 16, 1969 Report of the ABA Commission to Study the Federal Trade Commission). Then-Professor Richard Posner, in a statement attached to the ABA report, denounced the FTC as inefficient and ineffective and called for "greater reliance on market processes and on the system of judicial rights and remedies." Scheuerman, *supra*, at 12 n.74 (quoting Posner statement in 1969 ABA report).

In 1970, in response to these critics, the Council of State Governments proposed a model statute called the Unfair Trade Practices and Consumer Production Law

("UTP/CPL"), for the purpose of making consumer protection laws enforceable in state courts as an alternative to the FTC. Illinois was one of the states to adopt a variant of the UTP/CPL. *Compare* UTP/CPL *with* ICFA, 815 ILCS 505/2. By 1973, nearly every state had passed some form of proposed consumer protection law. Scheuerman, *supra*, at 17-18 & n.121 (describing the legislative history of consumer fraud statutes, including Illinois' decision along with 13 other states to adopt the "first version of the UTP/CPL"). For roughly the next two decades, consumer fraud claims largely were confined to redressing pure scams and were not used extensively or for particularly broad classes of consumers.

In the 1990s, however, courts began rejecting the use of class actions for product liability personal injury cases, pointing to the individualized inquiries necessary for proving reliance, causation and damages. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746-47 (5th Cir. 1995) (refusing to allow "nicotine addiction" personal injury class action against tobacco manufacturers and noting that "certification of mass tort litigation classes" is disfavored); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (declining to "experiment" with a mass tort negligence class action against pharmaceutical product manufacturer), *cert. denied*, 116 S. Ct. (1995). The plaintiffs' bar soon determined that they could "recast" their product liability cases as consumer fraud class actions, taking advantage of what was viewed as the statutes' relaxed standards for reliance and causation. *See generally* Craig C. Martin & Adam C.G. Ringguth, *Recasting Product Liability Claims as Consumer Fraud Cases – Defendant's Perspective*, in Product Liability Litigation: Current Law, Strategies & Best Practices Ch. 3 (Stephanie A. Scharf et al. eds. 2013).

In the 2000s, after some significant class plaintiffs' victories including the underlying verdict here, scholars and commentators began sharply to criticize the use of

consumer fraud statutes to produce bonanza judgments against corporations on a classwide basis without any meaningful showing of class-wide reliance or damages. *See, e.g,* Scheuerman, *supra,* at 1-3 n.16 and 25-35 (criticizing courts' abandonment of a reliance requirement in consumer fraud class actions and citing the then-recent $10 billion verdict here as one of several negative examples); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts,* 54 Kan. L. Rev. 1 (2006) (same); Am. Tort Reform (ATR) Found., *Private Consumer Protection Lawsuit Abuse: When Claims Are Driven By Profit-driven Lawyers And Interest Group Agendas, Not The Benefit Of Consumers* (2006) (same). *See also* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Public Litigation and Private Goals,* 2003 U. Chi. L. Forum 72, 138 (2003) (lamenting a trend toward a "bounty hunter" approach to class litigation where "uninjured private individuals are rewarded for ferreting out and judicially punishing corporate illegality," and arguing that this "furtive transformation of governing law . . . undermines the principles of accountability and representation that are so essential to any political system that views popular sovereignty as an important element.").

Moreover, the U.S. Senate, when passing the bipartisan Class Action Fairness Act of 2005 ("CAFA"), Pub L. 109-2, *codified in part at* 28 U.S.C. §§ 1332, 1453, cataloged a number of extremely problematic consumer fraud class settlements in the late 1990s and early 2000s. The Senate pointed to a long line of cases "in which most – if not all – of the monetary benefits went to the class counsel, rather than the class members." *See* Judiciary Report, S. Rep. 109-14, 109th Cong. (2005), at 15. The Senate cited examples of multimillion dollar settlements in deceptive advertising claims for products running the

gamut from tires, used video games, personal computer software, beer goblets, spring water, golf balls, airline and cruise ship tickets, television sets, apple juice, pipe fittings, and VHS tape rentals – all of which resulted in millions of dollars in fees to attorneys and minimal benefits in the form of coupons or vouchers to actual class members. *Id*. at 15-20 (collecting cases).

Thus, by the late 2000s, courts across the United States that might previously have permitted a relaxed approach to reliance and damages reconsidered the purported breadth of state consumer fraud statutes, including the viability of class actions under these laws. *See, e.g., Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1087 (N.J. 2007) (noting that, even though New Jersey's consumer statute is unusual in that it does not have a "reliance" requirement, the statute has a functionally identical "ascertainable loss" requirement that precluded a consumer fraud class action against a drug manufacturer); *White v. Wyeth*, 705 S.E.2d 828 (W. Va. 2010) (requiring class-wide proof of reliance in fraud claim against drug manufacturers); *see also* Michael B. Barnett, Note, *The Plaintiffs' Bar Cannot Enforce The Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 209 (2010) (describing how *Grovatt v. St. Jude Medical, Inc*., 522 F.3d 836 (8th Cir. 2008) held that individual problems of reliance precluded certification of a consumer fraud class, "despite significant authority" in prior rulings suggesting that no showing of reliance was required under the statute).

As a result of cases like these, "courts have largely declined the plaintiff's bar's invitation to use state consumer fraud statutes as a mechanism for dramatically expanding manufacturers' liability," Martin & Ringguth, *supra*, at 3-2, and "[c]onsumer fraud

jurisprudence in a product liability context, which in many jurisdictions presented cases of first impression as recently as 2004, is now a fairly well-settled field of law." *Id*. at 3-9.

In the years right before and since the underlying trial and 2003 judgment in this case, and consistent with the trend across the United States, this Court has made clear that actual deception and damages (not to mention commonality and predominance) are necessary and critical obstacles to permitting a consumer fraud class action in this State.

B. The *Price* Judgment Is Out Of Step With Illinois Consumer Fraud And Class Action Law.

The requirement that a plaintiff suffer an actual injury proximately caused by the defendant to recover in tort is fundamental to American law, tracing its roots to the seminal case of *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (1928) ("[w]hat the plaintiff must show is 'a wrong' to herself" and not merely "conduct 'wrongful' because unsocial, but not 'a wrong' to any one."). Illinois shares this long-standing view, as reflected, for example, in *Ney v. Yellow Cab Co*., 2 Ill. 2d 74, 80-81 (1954), where the Court described *Palsgraf* as "profoun[d]," and praised Justice Cardozo's "thorough study and analysis."

The principles elucidated in *Palsgraf* have direct application to the present case. In the context of modern consumer fraud class actions, there is no question that plaintiffs must show they were actually deceived, that they suffered an actual injury and that common issues of fact and law predominate for the class members. *First*, the ICFA expressly states that only a person "who suffers *actual damage*" may bring an action. 815 ILCS 505/10a(a) (emphasis added). *Second*, consistent with the statutory language, and in a line of carefully crafted decisions tracing back over 15 years, as discussed in detail below, this Court has clearly determined that the requirements for consumer fraud include actual deception and actual injury. And, of course, in the class action context, predominance of common

questions is essential, 735 ILCS 5/2-801(2).

The requirements of both actual injury and reliance have been firmly expressed by this Court for more than 15 years. In *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359, 373-74 (1998), this Court emphasized that causation and injury are essential elements of an ICFA claim, and rightly reinstated summary judgment against a plaintiff who admitted he was not deceived by a telemarketer's supposedly misleading direct mail campaign.

Four years later, in *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 150-55 (2002), a case in which PLAC appeared in this Court as an *amicus curiae*, this Court reinforced the rule that requires an ICFA plaintiff to prove both reliance and injury:

> [A] private cause of action brought under section 10a(a) requires proof of "actual damage" (815 ILCS 505/10a(a) (West 1996)). Further, a private cause of action brought under section 10a(a) requires proof that the damage occurred "as a result of the deceptive act or practice" (815 ILCS 505/10a(a) (West 1996)). . . . Thus, to adequately plead a private cause of action for a violation of section 2 of the Act, a plaintiff must allege: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception.

201 Ill. 2d at 250. *Oliveira* was decided shortly before the trial court's 2003 judgment certification ruling here, and notwithstanding the 2003 trial court's lip service to that decision (R. 1079), *Oliveira* was fatal to the class then and remains so today.

In *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517 (2004), this Court rejected another ICFA class action, which foundered after the plaintiffs could not show they relied on supposed deceptive marketing statements when purchasing home siding products. This Court rejected a so-called "market theory" of causation on the ground that "[t]he teaching of *Oliveira* and *Zekman* is that deceptive advertising cannot be the proximate cause of

damages under the Act unless it actually deceives the plaintiff." *Id*. at 525.

In *Avery v. State Farm Mutual Auto. Ins. Co*., 216 Ill. 2d 100, 152-57 (2005), the Court once again spoke to the important legal principles of *Zekman* and *Oliveira*, and reversed a more than $1 billion ICFA class-action judgment where the only Illinois named plaintiff admitted at trial that he did not rely on any of the defendant's allegedly deceptive statements. *See id*. at 153-54 (rejecting plaintiffs' attempt to "distinguish *Oliveira* and *Zekman*," pointing to the "important legal principle established in *Zekman*, *Oliveira* and *Shannon*," and holding that the record "categorically refuted" any notion that the Illinois plaintiff was deceived). Further, the Court held the plaintiffs' contract claims could not proceed as a class action under section 2-801's commonality and predominance requirements, *id.* at 126-35, citing material variances between the circumstances of different class members. *See id.* at 129 (noting possibility that the "successful adjudication of the claims of some class members would not necessarily establish a right to recovery in others.").

In 2007, this Court again reinforced the basic requirements of actual deception and injury in order to recover under ICFA, pointedly stating: "Under *Oliveira* and its progeny, plaintiffs must prove that each and every consumer who seeks redress actually saw and was deceived by the statements in question." *Barbara's Sales v. Intel Corp*., 227 Ill. 2d 45, 76 (2007) (holding plaintiffs failed to show any actual deceptive statements in Pentium 4 marketing and labeling).

In these various decisions, the Court spoke to class action claims that failed because individual class members either did not allege or did not prove that they relied on supposedly deceptive marketing. *See Avery*, 216 Ill. 2d at 199-203 (citing admission in

class member's deposition testimony); *Oliveira*, 201 Ill. 2d at 155 (citing omissions in complaint); *Zekman*, 182 Ill. 2d at 375-76 (citing admissions in class member's deposition testimony). *Accord Barbara's Sales v. Intel Corp.*, 227 Ill. 2d 45, 76 (2007).

In light of these well-established principles, it is evident that the 2003 *Price* judgment does not rest on the necessary elements that Illinois demands for a consumer fraud class action. *First*, regarding actual injury, there can be no economic injury because it was undisputed that no one paid a premium for light cigarettes, which cost the same as non-light cigarettes. (R. 11137.)

Second, regarding actual deception, no class member claimed that he or she would have smoked less (or quit) had they known the "truth" about the light cigarettes at issue. *See* Def. Summary of Testimony, R.C. 2447-2469.

Third, regarding a class of consumers, there could not be the required commonality given the range of individual differences in purchasing decisions and differing ways in which smokers inhaled the nicotine and tar in light cigarettes. Individualized inquiry would be necessary for such critical issues as whether a claimant actually purchased cigarettes in Illinois during the class period, how and whether a claimant relied on statements about the light cigarettes, claimants' smoking histories, claimants' reasons for smoking light cigarettes, whether those reasons had anything to do with a supposedly misleading product label, and whether claimants continued to smoke light cigarettes even after becoming aware of the supposed deception.

The expert proof offered by plaintiffs at trial actually highlights the problem. The plaintiffs' expert study of classwide phenomena did not involve surveying any actual class members. (R. 2874 (Ferune); R. 3097-99 (Benowitz); R. 3707 (Cummings); R. 4323-24

(Burns); R. 4804-10 (Cohen); R. 5038-39, 5418-19 (Cialdini); R. 5240-41, R. 6092-94 (Harris); R. 5585-86 (Dennis).) Instead, the experts relied on an Internet survey (R. 6017; PX74), a research method with myriad problems, including the validity of findings. *See, e.g.*, Wybo Wiersma, *The Validity of Surveys: Online and Offline*, *available at* http://papers.wybowiersma.net (last visited Jan. 2, 2015). The plaintiffs' method here fell far short of any reasonable survey standards, which include representative sampling, high response rates, non-leading questions, and follow-up interviews. *See, e.g.*, *Manual for Complex Litigation, Fourth* § 11.493 (2004 ed.) (setting forth general scientific criteria for surveys); Shari Seidman Diamond, *Reference Guide on Survey Research*, *in* FJC Reference Manual on Scientific Evidence at 229-76 (2d ed. 2000), available at http://www.fjc.gov/public/pdf.nsf/lookup/sciman04.pdf/$file/sciman04.pdf (last visited Dec. 26, 2014) (same). The advantages of internet surveys – that they are fast and cheap – lead at the same time to severe disadvantages for drawing meaningful conclusions: invalid sampling, low response rates, and improper questioning (including questions that call for guessing or pose hypothetical situations unrelated to the content at issue). *See generally* Diamond, *supra* at 245-54 (describing problems inherent in unscientific surveys including bias concerns). Likewise, some commentators have urged courts to reject or limit the controversial use of "contingent value" survey questions like those posed in the plaintiffs' survey. *See* John M. Heyde, Comment, *Is Contingent Valuation Worth the Trouble?*, 62 U. Chi. L. Rev. 331, 332 (1995); Note, *"Ask A Silly Question . . . ": Contingent Valuation of Natural Resource Damages*, 105 Harv. L. Rev. 1981 (1992).

As a result of these fatal factual defects, the 2003 *Price* judgment ends up resting on no more than an entirely inchoate injury – disappointment with a product – which is

not, and should not be a legally cognizable basis for relief. Other courts facing that arcane theory have rejected the notion that disappointment is enough to sustain a lawsuit. Thus, in *Mason v. Coca-Cola Co*., 774 F. Supp. 2d 699, 704 (D.N.J. 2011) (dismissing consumer fraud complaint), the court rejected purchasers' claims that they were defrauded by alleged health claims in the labeling on the defendant's diet soda cans. The *Mason* court reasoned that plaintiffs showed no "out-of-pocket loss because of their purchases, or that the soda they bought was worth an amount of money less than the soda they consumed. At most, plaintiffs simply claim that their expectations of the soda were disappointed." *Id*. at 704.

Likewise, in a recent multidistrict consumer fraud case, *In re Cheerios Mktg. & Sales Practices Litig*., MDL No. 294, 2012 U.S. Dist. LEXIS 128325 (D.N.J. Sept. 10, 2012), the court rejected purchasers' claims that they were defrauded by the marketing and labeling of defendants' cereal, which allegedly was labeled as "low fat" and as potentially useful to "lower your cholesterol." The court cited and applied *Mason*, holding that plaintiffs showed no "quantifiable loss" and their mere "disappointment" with the cereal's flavor and taste did not give them a cognizable multidistrict consumer fraud claim. *Id*. at *32-33 (quoting *Mason*).

Like the plaintiffs in the foregoing cases, the *Price* plaintiffs' claims are divorced from any financial harm, based on nothing more than "personal feelings of disappointment." *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 281 (2005) (Karmeier, J., concurring). That type of claim is not enough to sustain an action, much less a class action, under the ICFA.

In short, the Illinois Supreme Court's steady and consistent approach to the jurisprudence of consumer fraud class actions, which encompasses the ICFA's

requirements of proximate causation and injury and the class requirements of commonality and predominance, is now well-settled. Reinstating the 2003 *Price* judgment would have the court sweep away years of well-reasoned ICFA jurisprudence and reinstate the 2003 trial court's anachronistic class ruling. The Court should reject the invitation to do so.

C. Jurisdictions Across The United States Have Rejected The Approach Reflected In The 2003 *Price* Judgment.

Consistent with Illinois Supreme Court precedent, the majority of jurisdictions in the United States facing similar issues have reached the conclusion that cases like *Price* should not proceed as consumer fraud class actions. A critical issue has been the lack of common questions of fact that would predominate within the purported class, and indeed, courts readily have identified the plethora of individualized issues precluding class treatment of such litigation.

Not surprisingly, cases involving light cigarettes and founded on the same type of allegations and evidence here have consistently rejected the viability of consumer fraud class actions. *See, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223-29 (2d Cir. 2008) (holding stating that not all members of the class were actually deceived into believing light cigarettes were healthier); *Wyatt v. Philip Morris USA, Inc*., No. 09 C 0597, 2013 U.S. Dist. LEXIS 111943 at *19-20 (E.D. Wis. Aug. 8. 2013) (same); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 406 (D. Me. 2010) (same); *Cleary v. Philip Morris USA, Inc*. 265 F.R.D. 289, 293 (N.D. Ill. 2010) (same); *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668, 679-80 (D. Kan. 2007) (same); *Lawrence v. Philip Morris USA, Inc*., 53 A.3d 525, 532 (N.H. 2012) (same); *Philip Morris USA, Inc. v. Hines*, 883 So. 2d 292, 294 (Fla. Dist. Ct. App. 2004) (same); *Davies v. Philip Morris USA, Inc*., No. 04-2-08174-2, 2006 WL 1600067, at *3 (Wash. Super. May 26, 2006) (same); *see also*

Cocca v. Philip Morris Inc., No. CV 1999-008532, 2001 WL 34090200 at *5 (Ariz. Super. Ct. Jul. 24, 2001) (same); *Stern v. Philip Morris USA, Inc*., No. MID-L-2584-03, 2007 WL 4841057 at *13 (N.J. Super. Ct. Nov. 16, 2007) (same); *Oliver v. R.J. Reynolds Tobacco Co*., No. 9803-0268, 2000 WL 33598654 at *5 (Pa. Ct. C.P. Dec. 19, 2000) (same). *Accord Curtis v. Altria Group, Inc.*, 813 N.W.2d 891 (Minn. 2012) (rejecting light cigarette fraud claim on the ground that the private plaintiffs improperly attempted to usurp the enforcement function of the state's attorney general).

Only one state's high court, in Massachusetts, has ever bucked this clear national consensus and, in a controversial 4-3 decision, allowed certification of a light cigarette class action (although no trial ever took place). *See Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476 (Mass. 2004). However, as the well-reasoned dissenting opinion in *Aspinall* observed, Massachusetts had a fundamentally different statutory regime which, unique among the states, allowed consumer fraud class actions to proceed to trial even if there are predominant individual questions of fact. *Id*. at 495 n.32 (Cordy, J., dissenting) (collecting cases stating that, under Massachusetts consumer fraud statute, plaintiffs do not "need to demonstrate the predominance of common questions of fact or law"). Further, notwithstanding the *Aspinall* majority's claims to the contrary, *id*. at 490 n.23, that decision effectively permitted plaintiffs to proceed under a fraud-on-the-market theory rather than show actual deception – an interpretation of the ICFA squarely rejected by this Court.

Beyond the context of light cigarettes, many courts properly have decided that the class action device is unsuitable for consumer fraud claims involving individualized questions of causation or injury regarding a wide range of products. The products run the gamut from automobiles to drugs to diet cola. For example, in *Oshana v. Coca Cola Co.*,

472 F.3d 506 (7th Cir. 2006), the court rejected class certification of an ICFA claim against a soft drink manufacturer, on the ground that the plaintiff's proposed class included a huge number of members who were not deceived or injured. The plaintiffs alleged that the defendant failed to disclose its fountain Diet Coke product sold at restaurants is less healthy than the Diet Coke sold in stores, which does not contain saccharin. *Id*. at 506. The court rejected the plaintiff's proposed ICFA class on the ground that class membership was not ascertainable, and pointed to the different reasons individual consumers might have for purchasing the product:

> Membership in Oshana's proposed class required only the purchase of a fountain Diet Coke from March 12, 1999, forward. Such a class could include millions who were not deceived and thus have no grievance under the ICFA. Some people may have bought fountain Diet Coke because it contained saccharin, and some people may have bought fountain Diet Coke even though it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception. *See Oliveira*, 267 Ill. Dec. 14, 776 N.E.2d at 164 (holding that those who "knew the truth" do not have valid ICFA claims because they cannot claim to have been deceived).

Oshana, 472 F.3d at 513. The court also held that the named plaintiff was not an appropriate class representative because she could not show actual injury, having admitted that she never saw any deceptive advertisements and that she continued to drink fountain Diet Coke at restaurants even after learning of the alleged deception. *Id*. at 513-14.

Likewise, in a multidistrict consumer fraud case, *In re Ford Motor Co. Vehicle Paint Litig*., 182 F.R.D. 214 (E.D. La. 1998), the court rejected vehicle purchasers' class-action fraud claim involving an alleged common defect that caused the paint on a sports utility vehicle to flake more quickly. The court held that individual questions predominated over common ones, reasoning that there is "no escaping the reality that causation, reliance, damages and affirmative defenses relating to the state of plaintiffs' knowledge, mitigation

and the timing and nature of their paint problems require individualized determinations in order to establish that any plaintiff may recover." *Id*. at 220.

The high courts of West Virginia and New Jersey both have recently issued opinions highlighting the view that predominantly individualized questions of injury inherent in consumer fraud claims cannot be the basis for consumer fraud class actions. *White v. Wyeth*, 705 S.E.2d at 828 (requiring classwide proof of reliance in fraud claim against pharmaceutical drug manufacturer and expressing skepticism about viability of proposed class action); *Int'l Union of Operating Eng'rs*, 929 A.2d at 1087 (pointing to predominantly individualized decisions surrounding decision to make third-party payments for manufacturer's prescription drug). In both of these cases, the courts cited with approval Sheila Scheuerman's groundbreaking 2006 *Harvard Journal on Legislation* article – a comprehensive articulation of the serious policy and practical concerns inherent in allowing private litigants' class action consumer fraud claims to proceed against product manufacturers. *See White*, 705 S.E.2d at 833 (citing Scheuerman, *supra*); *Int'l Union of Operating Eng'rs*, 929 A.2d at 1086 (citing Scheuerman, *supra*).

Similar concerns have been expressed in the personal injury context, where courts consistently have refused to allow class relief because plaintiffs cannot satisfy the commonality elements. *See, e.g.*, *Castano*, 84 F.3d at 746-47 (same); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1297 (same); *accord Smith v. Ill. Cent. R.R. Co.*, 223 Ill. 2d 441, 457-58 (2006) (recognizing that personal injury claims are not suitable for class action treatment due to predominantly individualized questions of causation and injury).

In short, this Court's ICFA class action jurisprudence sits in the mainstream and comports with Illinois' statutory schemes for consumer fraud and class actions. There is

no reason why the *Price* plaintiffs should be treated differently, and the 2003 judgment should not be reinstated.

II. Allowing *Price* To Proceed As A Class Action Would Have A Sweeping And Deleterious Effect On Illinois Citizens, Businesses And The Courts.

Allowing an unwarranted consumer fraud class to proceed generates an untoward windfall to people who have no actual damages. The likely result will be a floodgate of litigation, singularly filed in Illinois, which will have unfortunate consequences for Illinois product manufacturers and those manufacturers whose products are sold to Illinois residents; to Illinois citizens employed by those manufacturers; and to the courts that will be faced with such litigation. On these grounds, as well, the 2003 judgment should not be reinstated.

A. The Court Should Not Sanction Conduct That Seeks Relief As A Windfall To Plaintiffs Who Were Not Actually Injured, Or To Their Counsel.

As discussed above, in reaction to courts' rejection of personal injury class actions in the 1990s and early 2000s, a number of plaintiffs' firms subsequently tried to use the vehicle of a consumer fraud class action as a substitute for traditional personal injury claims in cases involving allegedly defective products. At the peak of this activity around 2005, the American Tort Reform Foundation warned of private consumer protection claims being used as an "end-run around the rational requirements of product liability, tort and contract law," as "wreak[ing] havoc on large and small businesses alike without a real or sought benefit to the average consumer." ATR Found., *supra*, at 4-5; *see also id*. at 15 (praising this Court's ruling in *Avery* for overturning plaintiffs' "extraordinary attempt at regulation through litigation" and hoping that *Avery* would "send a strong message" against radical and "abusive" expansion of consumer fraud products claims).

Plaintiffs' attempts to recast traditional product claims as class-action lawsuits reached their "high water mark" about a decade ago, and today the law is "fairly well-settled" because "courts have largely declined the plaintiffs' bar's invitation to use state consumer fraud statutes as a mechanism for dramatically expanding manufacturers' liability." Martin & Ringguth, *supra*, at 3-2, 3-9 (collecting and discussing cases, and commenting favorably about this Court's prior 2005 opinion in *Price*).

Adherence to common law causation requirements represents a sound policy decision that should not be lightly overturned. *See* Martin & Ringguth, *supra*, at 3-9 (noting courts have, rightly, "by and large balked" at the prospect of awarding "multibillion-dollar judgments without having to prove that any consumers were actually damaged by defendants' fraudulent behavior."); Barbara A. Lukeman, *The Rise (and Fall) of Consumer Fraud Nationwide Class Actions: Recent Developments*, in ALM Law Journal Newsletters: Product Liability Law & Strategy (Jun. 2010) (citing "the element of reliance as a stumbling block" for plaintiffs attempting to recast "run-of-the mill product liability claims into consumer fraud actions").

The class action device, when taken to extremes as it was in this case, can result in a judgment award of outsized attorney fees to class plaintiffs' counsel. Such windfall transfers of wealth have no apparent benefit to the general public. For example, settlements of consumer fraud claims often result in large attorney fee awards to class counsel but only coupons to the class members – an outsized gain to the plaintiff's attorney that can result in true misrepresentations staying on the market with no real redress for the consumer. Scheuerman, *supra*, at 38-40 (collecting cases, noting potential for windfalls, and describing inequities and inefficiencies of class settlements). Further, in this case

specifically, commentaries about the trial court's $10.1 billion judgment, which included a $1.77 billion fee award, reflect a widespread perception that the award was an inappropriate windfall to plaintiffs' counsel. ATR Found., *supra*, at 14 (categorizing the lower court as a "Judicial Hellhole" in part based on perceived outrageousness of *Price* fee award). *Accord* Martin & Ringguth, at 3-39 (praising this Court's *Price* ruling for stopping future litigation based on an overly "expansive reading" of ICFA and other courts for "rein[ing] in the excesses of lawyer-driven consumer fraud litigation."); Scheuerman, *supra*, at 3 n.6 (noting lower court's *Price* judgment in arguing for courts to step in and stem the abuse of class action consumer fraud claims); *id*. at 39 (criticizing proposed class settlement in *Aspinall* as awarding "a sum greater than the harm caused by the misrepresentation," to the principal benefit of plaintiff's counsel in the form of contingent attorney fees).

In fact, in 2005, as noted in Part I.A above, the U.S. Senate specifically singled out the problem of windfall settlements when the CAFA passed both houses of Congress with a substantial majority, effectively removing most subsequently filed large consumer fraud cases to federal courts. Congress relied on a detailed, 96-page Senate Judiciary fact-finding report ("Judiciary Report"), which included dozens of examples of fee awards of millions of dollars to plaintiffs' counsel, while actual class members received no value apart from product coupons or very small amounts of cash. *See* Judiciary Report, S. Rep. 109-14, 109th Cong. (2005), at pages 15-18. And while CAFA removed many larger consumer fraud class actions from the state to the federal system, some commentators have stated that this has done little to curb the problem of plaintiffs seeking excessive fee awards in consumer fraud cases. *See* Stacey M. Lantagne, *A Matter of National Importance: The*

Persistent Inefficiency of Deceptive Advertising Class Actions, 8 J. Bus. & Tech. L. 117, 131-39 (2012) (arguing for increased gatekeeper function in approving large class settlements). This Court should not open the door to such future windfall settlements.

B. Affirming The *Price* Judgment Will Have A Deleterious Impact On Businesses in Illinois And Illinois Citizens.

If the 2003 judgment is reinstated, product manufacturers can safely bet on a flood of litigation against them in Illinois as a result of lowering the bar for class certification. The people who are jeopardized by such actions are not just businesses. Front and center are Illinois citizens who are employed by product manufacturers and who wish to purchase the many everyday goods that such manufacturers offer to the public.

One can readily imagine the untoward consequences of allowing actions to proceed without the need to prove reliance, actual injury and commonality of key factual issues. For one, manufacturers would have to radically curb their marketing efforts and include absurd product label disclaimers such as "CAUTION: this brand is no safer than our competitor's brands, and might actually be more dangerous." *See Avery*, 216 Ill. 2d at 193 (rejecting plaintiffs' overbroad view of the ICFA as logically requiring all products to "carry the disclaimer: 'Notice, our brand is not, on the whole, as good as our competitor's.'").

If this $10.1 billion judgment survives, no doubt other companies would be targeted and exposed to a new wave of high stakes consumer fraud litigation in Illinois. Companies wishing to do business in Illinois will face immense pressure to write large pre-trial settlement checks, after certification of overbroad classes, a practice that has "been referred to as judicial blackmail." *Castano*, 84 F.3d at 746. *See also* Redish, *supra*, at 138 (decrying "bounty hunter" approach to class litigation). In the face of potentially huge liabilities,

some companies could decide that it is no longer worth doing business in the State of Illinois.

And allowing a large number of purchasers who were not injured to enjoy the benefit of a multibillion-dollar judgment award hardly strikes an appropriate balance between deterrence of wrongful corporate behavior and the fundamental requirement that a plaintiff be actually injured. The historic purpose of private consumer fraud statutes, including the ICFA, was to allow private citizens defrauded by bad corporate actors to seek relief from the courts rather than relying solely on state attorneys general or the FTC. Scheuerman, *supra*, at 18-19 (describing legislative histories of state laws including the ICFA). That purpose is not served here, where plaintiffs would use the mechanism of a class action to punish corporate defendants *en masse* for alleged false advertising to all Illinois purchasers, including purchasers with no injury. *See* Scheuerman, *supra*, at 39 ("requiring manufacturers to pay compensation not simply to their actual victims but to all purchasers' results in over-deterrence and subjects defendants to excessive liability," leading "'not only to overbearing and discriminatory enforcement, but also a fearful and cautious society.'") (citation omitted). *See also* Barnett, *supra*, at 207 (collecting cases and noting that "many consumer fraud actions provide negligible relief to the plaintiff class").

The consequences of the *Price* judgment also would be harmful to consumers. Excessive over-deterrence of the sort represented by this case would leave manufacturers no choice but to raise prices and pass along the costs to consumers. In traditional product injury cases, the cost of a plaintiff's injury is typically "incorporated into the price of the product and spread among" all purchasers. *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991) (Wisdom, J.) (affirming summary judgment on product user's

claim of "fear and mental anguish"). But as the *Willett* court noted, the policy of passing the risk on to consumers has its natural limits, and allowing "loss-spreading" where not all consumers are injured has the harmful effect of a "higher price" that places the product out of the consumer's economic reach. *Id*. at 1100.

Thus, the loss-spreading concept breaks down in a case like this one, where gargantuan damages are awarded to a class including many consumers with either no injury or *de minimis* injury. Instead of helping Illinois consumers, the net effect is to harm them by forcing them to pay much higher prices for products so that the product seller can remain economically viable in light of the substantial risk of liability associated with doing business in this State.

For all of these policy reasons, this Court should reverse the Appellate Court's order directing the Circuit Court to reinstate the *Price* judgment – it is plainly inefficient, commercially unreasonable, and leads to inequitable results.

C. The *Price* Judgment Will Have An Untoward Impact On The Courts.

Plaintiffs' world is one of perverse incentives for litigants to flood the courts chasing windfall recoveries, simply because they used a product and later decided that the product disappointed them. The result would be to radically expand the civil justice system and engulf it in endless litigation. Such a system would crumble under its own weight and jeopardize manufacturers, and ultimately their employees, through unmanageable and unlimited litigation attacks on product manufacturers.

The *Price* judgment would no doubt lead to a wave of class action litigation in southern Illinois, with predictable problems for the people of this State. Some two decades ago, our Illinois court system faced a similar litigants' rush to southern Illinois, when asbestos plaintiffs came running into Madison County and St. Clair County courthouses

because of perceived lax venue standards. Only after this Court stepped in to enforce the applicable legal criteria did the flood of that untoward litigation subside.

The instant judgment threatens a similar problem: that once again private litigants will turn Illinois courts into ground zero for an attempt to effect radical changes in product litigation. This Court should reject plaintiffs' invitation to upend traditional product liability law notions of causation and injury.

CONCLUSION

For the foregoing reasons, the Product Liability Advisory Council ("PLAC") respectfully requests that this Court reverse the Appellate Court's order reinstating the 2003 judgment against defendant Philip Morris USA Inc.

Respectfully submitted,

By: */s/ Stephanie A. Scharf*

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No. 117687

IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH, Individually and on behalf of all others similarly situated,	)	On Petition for Leave to Appeal From the Illinois Appellate Court Fifth District, No. 5-13-0017
Plaintiffs-Respondents,	)	There Heard On Appeal From The Third Judicial Circuit Madison County, Illinois No. 00-L-112
v.	)	
PHILIP MORRIS INCORPORATED, a corporation,	)	The Hon. Dennis P. Ruth, *Judge Presiding.*
Defendant-Petitioner.	)	

APPENDIX TO BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANT-APPELLANT PHILIP MORRIS USA INC.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 23 pages.

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PHILIP MORRIS INCORPORATED, a corporation,	)	The Hon. Dennis P. Ruth, *Judge Presiding.*
Defendant-Petitioner.	)	

NOTICE OF FILING.

To: All Counsel of Record *(see Attached Service List)*

PLEASE TAKE NOTICE that, pursuant to Supreme Court Rule 345(a), on January 6, 2015, the Product Liability Advisory Council, Inc. ("PLAC") submitted the forgoing Brief as *Amicus Curiae* in Support of Defendant-Appellant Philip Morris USA Inc. for filing via the Court's e-filing system, along with a duly filed motion seeking leave *instanter* to file the brief.

Dated: January 6, 2015

PRODUCT LIABILITY ADVISORY COUNCIL.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for the Product Liability Advisory Council, Inc. ("PLAC") and that, on January 6, 2015, he served the foregoing BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNSEL, INC. IN SUPPORT OF DEFENDANT-APPELLANT PHILIP MORRIS USA INC. and NOTICE OF FILING on all counsel of record via U.S. mail, at the addresses listed on the attached Service List.

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