IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

APPEAL No. ED85142

DAYNA CRAFT, individually and on behalf of all others similarly situated,

Plaintiff-Respondent,

v.

PHILIP MORRIS COMPANIES, INC. AND PHILIP MORRIS INCORPORATED,

Defendants-Appellants.

Appeal from the Circuit Court of St. Louis City
Division 1
Hon. Michael P. David

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES TRIAL LAWYERS FOR PUBLIC JUSTICE TOBACCO CONTROL LEGAL CONSORTIUM CAMPAIGN FOR TOBACCO-FREE KIDS

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INTEREST OF THE *AMICI CURIAE*

The National Association of Consumer Attorneys ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of over 1000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. Its advocacy takes many forms, including the publication of guidelines for the appropriate use of the class action device in the consumer context. NACA STANDARDS AND GUIDELINES FOR LITIGATING AND SETTLING CLASS ACTIONS, 176 F.R.D. 375 (1997) (herein, "NACA Guidelines"). Courts have found the NACA guidelines to be "instructive,"*State v. Homeside Lending, Inc.*, 826 A.2d 997, 1009-11 (Vt. 2003), and "useful," *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1028-30 (N.D. Ill. 2000), and have referred to them in evaluating settlements.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

TLPJ is the only public interest law firm that both litigates class actions and fights class action abuse. *See* Bureau of National Affairs, *Class Action Litigation Reports*, "Prosecuting Class Actions, Fighting Their Abuse" (January 26, 2001). To date, TLPJ has employed the class action device in over 20 different cases in such matters as consumer rights, environmental protection, civil rights, mass torts, and workplace safety. Our experience has confirmed that class actions, properly utilized, can be a powerful tool for the vindication of victims' rights, especially in cases involving small monetary damages.

At the same time, TLPJ recognizes that, improperly utilized, class actions can be a powerful tool for the elimination or infringement of victims' rights. Through improper class action settlements, companies that have harmed millions are avoiding accountability, capping their liability, and depriving their victims of their day in court. Accordingly, in 1995, TLPJ launched a special project dedicated to monitoring, exposing, and fighting class action abuse nationwide. Through the project, TLPJ seeks to enforce class members' existing legal rights by objecting to illegal or unfair class action settlements (either on behalf of class members or as *amicus curiae*); developing the law by winning judicial recognition of additional protection against class action abuse; educating the plaintiffs' bar in particular, as well as lawyers, the judiciary, and the public generally, about class action abuse and possible ways to prevent it; and helping others to do all of the above.

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing technical assistance to public officials, health professionals and others

in addressing legal issues related to tobacco and health. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.[1] TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the Supreme Courts of California, Florida, Kentucky, Montana and Washington.

The Tobacco Control Resource Center, Inc. ("TCRC") begun in 1979 and a 501(c)(3) nonprofit since 1984, has experience in tobacco control issues generally, as well as longstanding and specific expertise in tobacco litigation and public health. TCRC's interest in this case arises from its mission to improve public health by reducing the use of and exposure to tobacco products in the United States.

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[1] TCLC is an unincorporated association and operates as a program of its coordinating center, the Tobacco Law Center, a nonprofit corporation located at the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey.

Campaign for Tobacco-Free Kids works to protect minors from tobacco by raising awareness that cigarette smoking is a pediatric disease, changing public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products. Among other activities, the organization has worked to counter public perception of "light," "low tar," and "lowered tar and nicotine" cigarettes as less dangerous than other cigarettes.

JURISDICTIONAL STATEMENT

Amicus respectfully adopts respondent's jurisdictional statement.

STATEMENT OF FACTS

Amicus respectfully adopts respondent's statement of facts.

POINT RELIED ON

ARGUMENT

THE TRIAL COURT CORRECTLY DECLINED APPELLANTS' INVITATION TO CREATE A NEW CAUSATION REQUIREMENT AND THEREBY EFFECTIVELY ELIMINATE THE ABILITY OF CONSUMERS TO BRING CLASS ACTIONS UNDER THE MISSOURI MERCHANDISING PRACTICES ACT.

A. The MPA's consumer-protection purpose would be undermined, and the legislature's intent thwarted, by a reliance requirement that would make class actions effectively impossible to bring under the MPA.

The MPA, whose purpose is to preserve fundamental honesty, fair play, and right dealings in public transactions, is intended to protect consumers. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 SW3d 828 (Mo. App. 2000); *State ex rel. Danforth v. Independence Dodge, Inc*., 494 SW2d 362, 368 (Mo. App. 1973). This protective purpose is evidenced, in part, by the Act's grant of a private right of action to consumers. R.S.Mo. §407.025(1).

The MPA explicitly allows consumers to bring class actions under the Act in cases where "the unlawful method, act or practice has caused similar injury to numerous other persons." R.S.Mo. §407.025(2). Such actions are to be brought in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri Rule of Civil Procedure 52.08, and are subject to further substantive and procedural requirements that are similar to those applied to class actions brought under other legal theories. R.S.Mo. §§407.025(2)-(6).

The Missouri legislature's provision of such detailed instructions on how class actions could be maintained under the Act is the clearest possible demonstration that the

legislature did not intend any construction of the Act that would undercut or eliminate the ability of consumers to bring class actions under the Act.

B. The reliance or multiple-causation requirement sought by Appellants is not supported by the statutory language or the legislative intent and would effectively eliminate MPA class actions.

Under the guise of an argument about whether reliance is required to show damages under the Missouri Merchandising Practices Act, Appellants are asking this Court to effectively eliminate the ability of consumers to bring class actions under the Merchandising Practices Act, despite the Act's consumer-protection purpose and the provisions of the Act that clearly allow class actions to be brought.

Appellants argue that under the MPA, plaintiffs should have to prove "transactional causation" as well as "loss causation." They would require a plaintiff under the MPA to show not only that the plaintiff suffered an economic loss because of the complained-of fraud, but also that the plaintiff entered into the transaction in the first place because of the complained-of fraud. In a class action, they would require the class plaintiff to show the same two types of causation for each class member. They note that this would require "multiple individual determinations" and argue that these would predominate over common issues, making the case unsuitable for class certification.

At the risk of restating the obvious, the requirement that Appellee demonstrate a causal link between the losses suffered by class members and Appellants' violation of the MPA does not preclude class certification. While §407.025(1) of the MPA requires that plaintiffs show an ascertainable loss as a result of an unlawful practice, the statute also

specifically allows for class actions. Accordingly, it is counterintuitive to argue that because plaintiffs must prove causation class certification is improper.

However, Appellants are asking this Court to go beyond the language of the MPA, and beyond the clear legislative intent behind the MPA, and impose an additional causation requirement. The MPA requires only that the plaintiff "purchases or leases merchandise...and thereby suffers an ascertainable loss of money or property, real or personal, as a result of" the unlawful practice. R.S.Mo. §407.025(1). Appellants, however, want the phrase "as a result of" to apply to both the "purchase" requirement and the "loss" requirement. In effect, they want this Court to rewrite the statute. As the trial court noted, "the Missouri statute **does not say 'any person who is induced to purchase or lease merchandise**...as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020 and thereby suffers an ascertainable loss..." Order of 9/13/04, at 37. (Emphasis added).

Missouri appellate courts have long held that the MPA eliminates the need for the Attorney General to prove reliance in order to show that a defendant has violated the Act. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 SW3d 828, 837 (Mo. App. 2000); *State ex rel. Webster v. Areaco Investment Co.,* 756 SW2d 633, 635-636 (Mo. App. 1988); *State ex rel. Ashcroft v. Marketing Unlimited of America, Inc*., 613 SW2d 440, 445 (Mo. App. 1981). Appellants, however, would impose a higher burden on private plaintiffs than on the Attorney General, a burden which appears no where in the statute.

The statutory rewrite sought by Appellants would add a new level of complexity (and burden for plaintiffs) in every case brought pursuant to the MPA. It would require

every defrauded plaintiff to prove not only loss as a result of a violation of the Act, but also that the plaintiff was induced to enter into the transaction itself because of the same violation. It would also insulate a wide range of violations from liability under the Act. The trial court offered as examples the buyer of a counterfeit watch who buys on a whim but pays an inflated price, the car buyer who fails to look at the rolled-back odometer but pays a price reflecting a fictitious rolled-back value, and the buyer of a 2-carat diamond ring falsely represented as 4 carats who buys because of the ring's beauty but pays a 4-carat price. These examples are well-taken. All of the buyers would have suffered harm as a result of an unfair practice. None of them, under Appellants' proposed "transaction causation" requirement, would have a remedy under the MPA.

In the class action context, such a rewriting would also essentially eliminate the possibility of class actions under the MPA, which appears to be the true goal of Appellants. They would require proof that each member of the proposed class entered into the transaction that gave rise to the loss because of the same unlawful practice that caused the loss. As a practical matter, this would make it next to impossible for a court to find that common questions of law or fact predominated over questions affecting only individual members, a finding necessary to class certification. R.S.Mo. §407.025(7).

Appellants have not shown good reason why this Court should ignore the plain language of the statute or the clear legislative intent expressed therein. They have not shown good reason why this Court should protect a significant segment of MPA violators from liability to private plaintiffs. They have not shown good reason why this Court

should impose a new causation requirement that would effectively end class actions under the MPA.

C. Class actions are an indispensable procedural device in cases, such as this one, involving relatively small money damages incurred by large numbers of people.

Class actions have provided just relief for millions of American consumers with valid claims that they could not and would not have received through any other means. Every court to consider the question has recognized that, without the ability to proceed on a class-wide basis, consumers with small claims have no realistic opportunity of receiving any justice. As the U.S. Supreme Court has explained:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation omitted). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[c]lass actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. [In such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("[t]he aggregation of individual claims in the context of a classwide suit is an

evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

In its Guidelines, NACA has echoed these conclusions:

> Consumer class actions serve an important function in our judicial system and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are usually impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable.

NACA GUIDELINES, 176 F.R.D. at 377.

Literally scores of courts at the federal and state level have reached the same conclusion—that if consumer class actions were not widely available, millions of consumers with valid claims would have no realistic remedy for those claims. *Canady v. Allstate Ins. Co.*, 1997 WL 33384270, *1 (W.D. Mo. 1997); *see also Beatty v. Metropolitan St. Louis Sewer Dist.*, 914 S.W.2d 791, 794 (Mo. banc 1994). "Class certification is a tool available to the Court to encourage judicial economy by allowing

one representative with similar claims to sue on behalf of a group of similarly situated people that is too large to practicably join in the litigation. More importantly, class actions provide motivation for individuals to pursue claims that they may not otherwise pursue because individual recovery would be too small to warrant [the cost of] litigation." *Hanoian v. Blue Cross and Blue Shield of Rhode Island*, 2002 WL 31097767, *3 (R.I. Super. 2002) (*citing Shutts*, *supra*). The Missouri Supreme Court has also recognized that class actions serve an important function in our legal landscape by allowing "the accumulation of many relatively small but meritorious claims into a single suit that would otherwise not be pursued." *Beatty*, 914 S.W.2d at 794.

Numerous courts from other jurisdictions have similarly recognized the important role of class actions in cases involving small money damages. S*ee Gunnels v. Healthplan Servs., Inc.*, 348 F.3d 417, 426 (4th Cir. 2003) ("class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action."); *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation."); *Coleman v. General Motors Acceptance Corp*., 296 F.3d 443, 449 (6th Cir. 2002) ("class treatment of claims is most appropriate where it is not 'economically feasible' for individuals to pursue their own claims."); *Local Joint Executive Bd. of Culinary/Bartender Trust*, 244 F.3d 1152, 1163 (9th Cir. 2001)("[i]f plaintiffs cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover.

'Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.'") (citation omitted); *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000) ("[o]ur concern in this regard is heightened by the importance of the class certification issue in TILA cases, where the small amounts of money involved and the difficult financial situations of many of the litigants may inhibit individualized litigation."); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. Cost spreading can also enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing.") (citations omitted); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 952 (Tex. 1996) ("[c]lass action suits furnish an efficient means for numerous claimants with a common complaint to obtain a remedy '[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages.'") (citations omitted); *Logsdon v. National City Bank*, 601 N.E.2d. 262, 272 (Ohio Ct. C. P. 1991) ("When a putative class is composed of consumers there is a possibility that the costs of individual actions would exceed individual recovery, thereby precluding relief other than on a class basis"); *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 218 (Minn. Ct. App. 1987) ("If this case does not go forward as a class suit, the injuries suffered by many members of the class will go unredressed."); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693, 697 (N.Y. App. Div. 1986) ("[I]t is notable that in determining whether a class action is

superior to other viable methods, it is clear that most of the individuals having claims averaging less than $31 would have no realistic day in court if a class action were not available."), *aff'd*, 516 N.Y.S.2d 652 (N.Y. 1987); *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d. 51, 57 (Cal. 1979) ("Because of the relatively small individual recovery at issue here, the court may find that a denial of class status in the present suit . . . would, as a practical matter, insulate defendant from any damage claim."); 4 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 21:1 at 386 (4th Ed. 2002) (hereinafter "NEWBERG") ("There are compelling reasons for bringing consumer protection class actions. A class-based effort is more effective than an individual consumer in getting a defendant to modify its conduct. Most individual consumers have claims which are too small to warrant representation by an attorney.")

The availability of the class action remedy is particularly important with respect to consumer protection claims, such as those involved in this case. As Newberg explains:

> The desirability of providing recourse for the injured consumer who would otherwise be financially incapable of bringing suit and the deterrent value of class litigation clearly render the class action a viable and important mechanism in challenging fraud on the public.

NEWBERG § 21.30 at 533.

Again, the NACA GUIDELINES echo this mainstream view of class actions:

> The class action device is particularly appropriate in consumer cases where individual recoveries are small, but which, in the aggregate, involve millions of dollars in damages. This is precisely the type of case which

> encourages compliance with the law and results in substantial benefits to the litigants and the court. Denial of class certification in such instances would result in unjust advantage to the wrongdoer. Class actions should be deemed appropriate precisely because individual damages are too small to warrant redress absent a class suit, so long as significant aggregate pecuniary and/or nonpecuniary benefits to the class are sought. This is particularly true in cases with claims for which a legislative body has provided a fee-shifting remedy to encourage private enforcement actions.

NACA GUIDELINES, 176 F.R.D. at 381-382. S*ee also Watkins v. Simmons & Clark, Inc*., 618 F.2d 398, 404 (6th Cir. 1980) ("Class action certifications to enforce compliance with consumer protection laws are 'desirable and should be encouraged.'").

These principles apply with full force in this case. This case involves precisely the sort of "small money damages" claims that could never economically be litigated on an individual basis. Simply put, the costs for an individual consumer to bring such an action, including the multiple experts necessary, would outweigh any potential recovery. Indeed, Philip Morris never attempts to contend otherwise. Thus, a class action is the *only* mechanism by which the plaintiffs in this case will ever have the ability to present their case, much less obtain any relief. Without the class action remedy, Philip Morris will not only be completely immunized from liability for wrongdoing that harmed millions of Missourians, but accountability as well. Plainly this will not do. This Court should therefore decline the invitation of Philip Morris to strip the class action device of its utility in the important area of small-money-damages class actions.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certify that two copies and a disk of the foregoing Brief of Amicus Curiae were served this 20th day of January, 2005 on:

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CERTIFICATE REQUIRED BY RULE 84.06 (c)

The undersigned hereby certifies that the foregoing brief includes the information required by Rule 55.03 and complies with the length limitations in Rule 84.06(b) and Local Rule 360 in that there are 3,645 words in the brief (excluding the cover, table of contents, table of authorities, signature block, certificate of service, certificate required by Rule 84.06(c), and appendix) according to the word count of the word-processing system used to prepare the brief. The undersigned further certifies that the disks containing the brief have been scanned for viruses and are virus-free.

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