NO. 96236

IN THE ILLINOIS SUPREME COURT

SHARON PRICE & MICHAEL FRUTH, *ET AL.*,

Plaintiffs-Appellees,

v.

PHILIP MORRIS INCORPORATED,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, MADISON COUNTY
HON. NICHOLAS BYRON, JUDGE PRESIDING

BRIEF OF TRIAL LAWYERS FOR PUBLIC JUSTICE, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND AARP AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Stephen Gardner
Law Office of Stephen Gardner, PC
6060 North Central Expy.
Suite 560
Dallas, TX 75206
214/ 800-2830
Fax: 214/ 800-2834

Eugene I. Pavalon
Pavalon, Gifford, Laatsch & Marino
2 North LaSalle Street
Suite 1600
Chicago, IL 60602
312/ 419-7400
Fax: 312/ 419-7408

Leslie A. Brueckner
F. Paul Bland, Jr.
Arthur H. Bryant
Trial Lawyers for Public Justice
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
202/ 797-8600
Fax: 202/ 232-7203

COUNSEL FOR *AMICI CURIAE*

POINTS AND AUTHORITIES

I. CLASS ACTIONS ARE AN INDISPENSABLE PROCEDURAL DEVICE IN CASES, SUCH AS THIS ONE, INVOLVING RELATIVELY SMALL ....MONEY DAMAGES FOR LARGE NUMBERS OF PEOPLE 5

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).............6

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)...........6

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980)..........6

NACA Standards and Guidelines for Litigating and Settling Class Actions, 176 F.R.D. 375 (1997)..6

Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981)..7

Avery v. State Farm Mut. Auto. Ins. Co., 321 Ill. App. 3d 269, 746 N.E.2d 1242 (2001)..............7

Gordon v. Boden, 224 Ill. App. 3d 195, 586 N.E.2d 461 (Ill. App. Ct. 1991), *appeal denied*, 144 Ill. 2d 633, 591 N.E.2d 21, *cert. denied*, 506 U.S. 907 (1992) 7

Eshaghi v. Hanley Dawson Cadillacs Co., 214 Ill. App. 3d 995, 574 N.E.2d 760 (1991).............7

Hoover v. May Dept. Stores Co., 62 Ill. App. 3d 106, 112, 378 N.E.2d 762 (1978), *rev'd on other grounds*, 77 Ill. 2d 93, 395 N.E.2d 541 (1979)...7

Gunnels v. Healthplan Servs., Inc., 348 F.3d 417 (4th Cir. 2003)..8

Smilow v. Southwestern Bell Mobile Systems, Inc., 323 F.3d 32 (1st Cir. 2003) .8

Coleman v. General Motors Acceptance Corp., 296 F.3d 443 (6th Cir. 2002)..8

Local Joint Executive Bd. of Culinary/Bartender Trust, 244 F.3d 1152 (9th Cir. 2001) 8

Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748 (7th Cir. 2000)...8

In re General Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768 (3d Cir. 1995)..8

General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996)......9

Logsdon v. National City Bank, 601 N.E.2d. 262 (Ohio Ct. C. P. 1991)..9

Streich v. American Family Mut. Ins. Co., 399 N.W.2d 210 (Minn. Ct. App. 1987)..9

Weinberg v. Hertz Corp., 499 N.Y.S.2d 693 (N.Y. App. Div. 1986), *aff'd*, 516 N.Y.S.2d
652 (N.Y. 1987)....................................9

Fletcher v. Security Pac. Nat'l Bank, 591 P.2d 51 (Cal. 1979)...9

4 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 21:1 at 386 (4th ed. 2002) 9

4 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 21:30 at 533 (4th ed. 2002)..10

NACA Standards and Guidelines for Litigating and Settling Class Actions, 176 F.R.D.
375 (1997)..10

Watkins v. Simmons & Clark, Inc. 618 F.2d 398 (6th Cir. 1980)..10

II. THE UNSUPPORTED CONTENTION THAT CLASS ACTIONS HARM CONSUMERS BY INCREASING THE COSTS OF GOODS AND SERVICES HAS NO BASIS IN FACT 11

Public Citizen, Six Common Transactions That Cost Less Because of Class Actions (Aug. 20, 2003), www.citizen.org/congress/civjus/class_action/articles.cfm?ID=10278 11

UMW, *AFL-CIO Website Exposes Skyrocketing CEO Pay*, www.umwa.org/journal/VOL112No3/May 4.shtml/ 12

III. NONE OF THE SO-CALLED CLASS ACTION "ABUSES" IDENTIFIED BY PHILIP MORRIS AND ITS *AMICI* HAS ANY BEARING ON THIS CASE, WHICH WAS FIRST CERTIFIED AND THEN LITIGATED TO JUDGMENT 12

Amchem Prods., Inc., v. Windsor, 521 U.S. 591 (1997)..................13

In re General Motors Corp. Pickup Truck Fuel Tank Litig., 55 F.3d 768 (3d Cir. 1995).............13

CONCLUSION...14

INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

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.

---

[1] The interest and expertise of *amici curiae* presented in this case are more fully set forth in the accompanying motion for leave to file this brief.

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 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.

AARP is a non-profit, nonpartisan organization with more than 35 million members, approximately 1.6 million of whom live in Illinois. As the largest membership organization representing the interests of Americans aged 50 and older, AARP is greatly concerned about widespread fraudulent and deceptive practices in a broad range of marketplace transactions since older Americans are disproportionately victimized by many of these practices. AARP thus supports laws and public policies designed to protect its members' rights and to preserve the means for them to seek legal redress when they are harmed in the marketplace.

In this case, defendant-appellant Philip Morris, Inc. ("Philip Morris") and its *amici* (in particular, the Chamber of Commerce of the United States of America and the Illinois Chamber of Commerce (collectively, the "Chambers")) have mounted a very broad attack on class actions, arguing that they are a mechanism for enriching class action lawyers at the expense of consumers and honest businesses, principally by blackmailing innocent companies into settling meritless cases. Philip Morris and its *amici* have urged this Court to hold that the trial court abused its discretion in certifying this consumer class action, and to interpret the class action rule in such a way that few, if any, consumer class actions could ever be certified in the State of Illinois.

Essentially, Philip Morris and its *amici* want the Court to hold that no class action can ever be certified if different individual consumers have suffered different levels of damages.

Any such holding would deal a disastrous blow to the interests of consumers in this State and undermine the letter and spirit of the Illinois class action rule. Contrary to the contentions of Philip Morris and its *amici*, this case is precisely the type of small-stakes-per-person consumer case that should be handled on a class action basis. Where – as here – the amount of damages per person would preclude individual litigation from being brought, class actions are the only viable mechanism for compensating the victims of widespread corporate misconduct. Without the availability of the class action remedy in such cases, corporate wrongdoers like Philip Morris could avoid all accountability for their harmful actions.

If Philip Morris and its *amici* have their way, not only will the plaintiffs in this case be deprived of any remedy, but few if any consumer class actions could ever be certified in the State of Illinois, leaving millions of consumers without recourse. As advocates for consumer rights, TLPJ, NACA, and AARP respectfully urge the Court to reject this unwarranted limitation on the use of the class action device.

STATEMENT OF THE FACTS AND SUMMARY OF THE ARGUMENT

This is an appeal from a $10.1 billion judgment against Philip Morris in a class action alleging consumer fraud relating to Philip Morris' sale of so-called "light" cigarettes. The plaintiffs allege that Philip Morris' use of such words as "light" and "lowered tar and nicotine" deceived them into believing that those cigarettes delivered less tar and nicotine, and were therefore less hazardous, than their regular counterparts. The plaintiffs seek economic damages in the form of a partial refund of the cigarettes' purchase price.

The trial court certified a class of an estimated 1.14 million consumers who purchased Philip Morris' "light" cigarettes in Illinois over a 30-year period. After a bench trial, the trial judge awarded $7.1 billion in compensatory damages and $3 billion in punitive damages.

In attempting to overturn that award, Philip Morris and its *amici* (in particular, the Chambers) argue that class actions are regularly abused, and that this Court should reverse the decision below in order to guard against class action abuse. The Chambers specifically charge that the failure on the part of the Illinois judiciary rigorously to enforce the "strictures" of Illinois' class certification rules has generated "enormous pressure" on defendants to agree to blackmail settlements. Chambers Br. at 28. This dynamic, argue the Chambers, is "bad not just for businesses forced to pay [blackmail settlements], but also for the customers of those businesses who may suffer higher prices as a result." *Id.* at 31. In light of these alleged social costs, the Chambers urge the Court to use this case as a vehicle "to join the highest courts of [other states] by enforcing appropriate limitations on class actions." *Id*. at 31.

The Chambers' attack on class actions is wholly unwarranted. First, as courts have long recognized, class actions are a legitimate and vitally important procedural device, especially in cases where – as here – the amount of damages per person would preclude individual litigation from being brought, thereby allowing the defendant to avoid all accountability for wrongdoing. In such cases, class actions are the only viable mechanism for deterring misconduct and compensating the victims of unfair or deceptive business practices. Restricting the use of class actions in such cases would deal a disastrous blow to consumer rights in this state.

Second, contrary to the Chambers' contention, class actions also often benefit consumers by reducing the prices that corporations charge for a range of goods and services.

Finally, none of the problems of class action abuse that arise in the context of class action *settlements* are present in this case, which was properly certified and fully litigated to a verdict. Thus, the generalized specter of "class action abuse" raised by the Chambers is wholly absent from this case and should not be given any credence by this Court.

For all these reasons, TLPJ, NACA, and AARP urge this Court to reject the appellant's generalized attack on the use of class actions in consumer cases and affirm the judgment below.

ARGUMENT

II. 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. For just a few of the decisions from this state, *see Miner v. Gillette Co.*, 87 Ill. 2d 7, 18, 428 N.E.2d 478, 484 (1981) (“[m]oreover, the object of the class action procedure is to adjudicate a large number of very small claims in one proceeding.”); *Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269, 278, 746 N.E.2d 1242, 1251 (2001) (“The policy objective behind the class action is to encourage individuals, who may otherwise lack incentive to file individual actions because their damages are limited, to join with others to vindicate their rights in a single action.”); *Gordon v. Boden*, 224 Ill. App. 3d 195, 204, 586 N.E.2d 461, 467 (1991) (“[i]n a large and impersonal society, class actions are often the last barricade of consumer protection . . . The consumer class action is an inviting procedural device to address frauds that cause small damages to large

groups."), *appeal denied*, 144 Ill. 2d 633, 591 N.E.2d 21, *cert. denied*, 506 U.S. 907 (1992); *Eshaghi v. Hanley Dawson Cadillac Co*., 214 Ill. App. 3d 995, 1004, 574 N.E.2d 760, 766 (1991) ("The alternatives to the class action – private suits or governmental actions – have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured, and deterrence of the wrongdoer."); *Hoover v. May Dep't Stores Co.*, 62 Ill. App. 3d 106, 112, 378 N.E.2d 762, 768 (1978), *rev'd on other grounds*, 77 Ill. 2d 93, 395 N.E.2d 541 (1979) ("[c]lass actions are particularly alluring in the area of consumer protection since it is often the case that the situations presented are ones where individual litigation of the underlying dispute is not feasible, usually because the costs of litigation greatly exceed the value of the potential relief which could be awarded.").

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. (Notably, neither Philip Morris nor the Chambers even attempts to contend otherwise.) Thus, a class action is the *only* mechanism by which the plaintiffs in this case will ever obtain any relief. And, without the class action remedy, Philip Morris will be completely immunized from liability for wrongdoing that harmed millions of Americans. Plainly this will not do. This Court should therefore decline the invitation of Philip Morris and the Chambers to strip the class action device of its utility in the important area of small-money-damages class actions.

III. THE UNSUPPORTED CONTENTION THAT CLASS ACTIONS HARM CONSUMERS BY INCREASING THE COSTS OF GOODS AND SERVICES HAS NO BASIS IN FACT.

Equally meritless is Philip Morris's and its *amici*'s contention that class actions actually

harm consumers by increasing the costs of goods and services. Not surprising, neither Philip Morris nor its *amici* offers any proof that this is so. In fact, a recent study has demonstrated that consumer class actions often *reduce* costs.

> Corporate lobbyists have long argued that lawsuits increase the costs of products. There is a germ of truth to this claim as it pertains to injury lawsuits, because the threat of lawsuits prevents manufacturers from cutting corners on safety to save a few dollars. But when it comes to class action lawsuits to remedy fraudulent practices, there is no question that litigation *reduces* the prices that consumers pay.
>
> Most class actions are aimed at undisclosed fees, markups, kickbacks, and other over charges that chisel consumers in small quantities. Often obscured by complicated billing statements, these hidden costs enable businesses to advertise one price, but secretly charge a higher amount. This undermines consumers' ability to comparison shop, and benefits unscrupulous businesses at the expense of more honest competitors.

Public Citizen, *Six Common Transactions That Cost Less Because of Class Actions* (Aug. 20, 2003), www.citizen.org/congress/civjus/class_action/articles.cfm?ID=10278.

The study gives a number of concrete illustrations of how consumer class actions have reduced prices that consumers pay for a range of goods and services. For example, FleetBoston Financial Corp. was charging $35 for a "No Annual Fee" credit card before a class action was brought against it, and $0 for such a card afterwards. MCI was charging $2.87 a minute for phone calls on Sundays (despite an advertisement promising that calls could be made for five cents a minute) before a class action was filed against it, and then charged the promised five cents per minute after the class action. HMO patients were being charged $496.26 as a "20%

copayment" for surgery before a class action (which challenged the HMO's method of calculating its copayments), and charged $222 for such a copayment after the class action. *Id.* at 1-3.

In addition, the proposition that enforcing consumer protection laws will drive up prices rests upon the faulty assumption that corporations pass on to their consumers all profits realized from breaking consumer protection laws. In fact, corporations do a great many things with such income other than pass it on to consumers. *See, e.g.*, UMW, *AFL-CIO Website Exposes Skyrocketing CEO Pay*, www. umwa.org/journal/VOL112No3/May 4.shtml/ ("Last year, America's chief executive officers (CEOs) earned – on average – a whopping $20 million in wages and benefits. . . ."). There is absolutely no evidence – and no reason to suspect – that allowing corporations, such as Philip Morris, to keep their ill-gotten gains when they violate consumer protection laws will cause them to pass on those gains to their consumers.

IV. NONE OF THE SO-CALLED CLASS ACTION "ABUSES" IDENTIFIED BY PHILIP MORRIS AND ITS *AMICI* HAS ANY BEARING ON THIS CASE, WHICH WAS FIRST CERTIFIED AND THEN LITIGATED TO JUDGMENT.

Finally, there is no merit to the Chambers' contention that the verdict below should be overturned in order to stem the tide of so-called class action abuse. The Chambers set forth a litany of alleged abuses of the class action mechanism. *See* Chambers Br. at 28-31. Based on these abuses, the Chambers vigorously urge this Court to restrict the use of class actions in consumer cases, suggesting that the device is ultimately bad for consumers and for society as a whole. In so arguing, however, the Chambers ignores one all-important fact: *each one of the supposed abuses cited by the Chambers occurred in cases that were settled and never subjected to the rigors of a trial*. This case, in contrast, was first *certified* as a class action and then *fully*

litigated to judgment before an impartial trier of fact.

This distinction is important because of the enormous potential for abuse in the context of class action settlements, which pose a risk of collusive "sweetheart" deals that provide little valuable relief for the class in exchange for often enormous fees for class counsel. *See generally Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 620 (1997) (noting that the protections of Fed. R. Civ. P. 23 "demand undiluted, even heightened, attention in the settlement context"); *In re General Motors Corp. Pickup Truck Fuel Tank Litig.*, 55 F.3d 768, 784-92 (3d Cir. 1995) (discussing risks of abuse in class action settlement context). Given this potential for abuse, both TLPJ and NACA have fought long and hard to prevent unwarranted class action settlements that seek unfairly to restrict class members' rights and/or provide inadequate relief for the class. *See infra* at 1-2.

None of these problems, however, occurs in a case where a class action is litigated to judgment:

- There is no way for the lawyers to "sell out" the class when the case is tried.
- There can be no "reverse auction" whereby a defendant deliberately seeks out other plaintiffs' lawyers who are willing to sell out the class for the least amount of money.
- The amount of the fees to be awarded, if any, will be determined by the court, not negotiated by the parties.

In short, in the context of a trial, there is simply no way for the kind of "abuses" identified by Philip Morris and its *amici* to occur. Thus, their arguments about class action abuse are a red herring designed to obscure the fact that this case was properly litigated to judgment.

* * *

The bottom line is that this case represents an entirely appropriate use of the class action

device. This case involves precisely the sort of small money damages claims that would never be litigated on an individual basis. If this class action is decertified and the jury verdict overturned, then Philip Morris will never be brought to judgment for its wrongdoing, and there will be nothing to deter its continued misconduct in the future. This Court should reject this result as poor public policy and contrary to law.

CONCLUSION

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

Respectfully submitted,

____
Leslie Brueckner
F. Paul Bland, Jr.
Arthur H. Bryant
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, NW
Suite 800
Washington, D.C. 20036
202/ 797-8600
202/ 232-7203 (fax)

____
Stephen Gardner
Law Office of Stephen Gardner, PC
6060 North Central Expy., Ste. 560
Dallas, TX 75206
214/800-2830
214/800-2834 (fax)

____

Eugene I. Pavalon
Pavalon, Gifford, Laatsch & Marino
2 North LaSalle Street
Suite 1600
Chicago, IL 60602
312/ 419-7400
312/ 419-7408 (fax)

NOTICE OF FILING

To: Service List of Counsel Below

PLEASE BE ADVISED that on July 12, 2004, the BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND AARP IN SUPPORT OF PLAINTIFFS-APPELLEES was filed (by mail) with the Clerk of the Supreme Court of Illinois.

By: ________________________________

Eugene I. Pavalon
Pavalon, Gifford, Laatsch & Marino
2 North LaSalle Street
Suite 1600
Chicago, IL 60602
312/ 419-7400
312/ 419-7408 (fax)

PROOF OF SERVICE

I, ______________________, certify that I served three (3) copies of the above-referenced document and a Notice of Filing to each of the counsel on the Service List below, by enclosing these documents in an envelope plainly addressed to these persons at the addresses listed below, by sealing this envelope, and affixing to the envelope the proper amount of U.S. postage for regular mail, and then by depositing the envelope with its contents in the United States mail at the United States Post Office in Chicago, Illinois, at or before the hour of 5:00 p.m. on July 12, 2004.

____

Eugene I. Pavalon
Pavalon, Gifford, Laatsch & Marino
2 North LaSalle Street
Suite 1600
Chicago, IL 60602
312/ 419-7400
312/ 419-7408 (fax)

CERTIFICATION

Under penalties of perjury, I certify that the statement set forth in the foregoing Proof of Service are true and correct.

____

Eugene I. Pavalon
Pavalon, Gifford, Laatsch & Marino
2 North LaSalle Street
Suite 1600
Chicago, IL 60602
312/ 419-7400
312/ 419-7408 (fax)