
CASE NO. A05-2148

State of Minnesota
In Supreme Court

Diane Lorig, individually and
on behalf of all others similarly situated,

Appellant,

vs.

Crompton Corporation, Uniroyal Chemical Company, Inc.
Uniroyal Chemical Company Limited, and Bayer Corporation,

Respondents.

**APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL APPENDIX**

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ARGUMENT

Respondents' arguments cannot change the underlying facts: the Minnesota legislature intended the scope of its amendment to Minn. Stat. § 325D.57 to be at least as broad as the gap in standing created by *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). In that case, plaintiffs did not purchase the price-fixed product, but rather, a finished product into which the price-fixed product was incorporated. *Id.* at 726. Appellant Lorix stands squarely in the same shoes as the *Illinois Brick* plaintiffs: she did not directly purchase the price-fixed rubber chemicals, but rather, paid too much for finished tires that contained those chemicals. Despite her acknowledged injury, the court of appeals created a sweeping rule that denies standing to the product she purchased contained components other than the price-fixed products. This finding merely restates the holding of *Illinois Brick*, which is precisely the result the legislature sought to avoid by amending Section 325D.57.

The court of appeals and respondents continue to ignore the well-pleaded allegations of the complaint, which demonstrate that Lorix was injured by Respondents' conspiracy.¹ Instead, based on a hypothetical "parade of horrors," the court of appeals concocted a bright-line rule that denies standing to persons injured by violations of the

¹In addition, the errors in the lower court's opinion are magnified by respondents' failures to support them. For example, Respondents do not contend that the language of the statute is vague or ambiguous, that Lorix does not have constitutional standing, that Lorix has not suffered injury in fact, or that *Associated Gen. Contractors v. California*, 459 U.S. 519 (1983) ("A.G.C.") can be reduced to a single factor.

Minnesota Antitrust Act. Under the court of appeals' ruling, even if the price of the price-fixed component made up 99.9% of the price of the product purchased by a consumer, that consumer *would not have standing*. This ruling contravenes the legislative intent of the amendment, the goal of antitrust law, and basic economic policies. Defendants in future antitrust cases will always assert that a middleman has added value to the price-fixed product, and therefore, the plaintiff is not a consumer in the restrained market. The effect of the court of appeals' holding will be to negate the legislature's amendment to Section 325D.57.

Neither Respondents nor the lower court establish that the legislature intended to amend the statute to confer standing upon certain types of indirect purchasers, but to deny it to indirect purchasers who, though injured by Respondents' conduct, occupy a different level of the distribution chain.

Though Respondents cannot show that the language of Minn. Stat. § 325D.57 is vague or ambiguous, they nonetheless contend that Minnesota courts must apply federal law to interpret the statute. Respondents inject these federal notions of standing through two theories: first, that prudential limitations on standing, created by federal courts, are applicable to Section 325D.57; and second, that the statute should be interpreted consistently with *Associated General Contractors v. California*, 459 U.S. 519 (1983) ("*A.G.C.*"). Both contentions require state courts to ignore the plain language of the statute and traditional analyses of standing under Minnesota law and instead, adopt federal policies that have been rejected by the Minnesota legislature.

Federal prudential limitations on standing are inapplicable to this issue. In this case, the legislature eliminated prudential limitations on standing by its amendments to the statute. Respondents' second theory is equally unavailing. The multi-factor test created by the United States Supreme Court in *A.G.C.* is not applicable to this state case, and even if it was (and was applied correctly), Ms. Lorix can satisfy that test. None of respondents' arguments compel a different conclusion.

If the court of appeals' overly-broad decision is allowed to stand, Minnesota's appellate courts would stand alone among indirect-purchaser states by holding that price-fixing defendants are insulated from antitrust liability as soon as the price-fixed product is combined with another component.

This Court acknowledged that the "legislature may, by statute, expand the connection between conduct and injury necessary to permit suit." *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 495 (Minn. 1996), and that the standing conferred by Minn. Stat. § 325D.57 is *broader* than standing under common law. *Epland v. Meade Ins. Agency Assoc's.*, 564 N.W.2d 203, 209 (Minn. 1997). The lower court's interpretation leads to a statutory construction that is narrower than under common law, and should be reversed.

I. STANDING IS DETERMINED BY TRADITIONAL MINNESOTA STANDARDS

Respondents ignore traditional standards of standing even though Minnesota courts have applied traditional standing analyses to determine whether a plaintiff has

standing under the Minnesota Antitrust Act. For example, in *Tremco, Inc. v. Holman*, No. C8-96-2139, 1997 WL 423575 (Minn. Ct. App. July 29, 1997), the court analyzed three factors: was the injury the type that the antitrust laws were designed to protect; was there a causal connection between the defendants' illegal acts and the harm suffered by the plaintiff; and is there a reasonable certainty to the damages. *Id.* at *2. This is an "injury in fact" analysis, and supports a grant of standing to Lorix. See App. Br. at 38 - 39, *In re Crown Coco, Inc.*, 458 N.W.2d 132, 135 (Minn. Ct. App. 1990) (citations omitted).

Other courts have held that states should apply their "traditional standing approach" rather than relying on federal standards, "detached from their federal statutory moorings," to determine whether an indirect purchaser has standing. *D.R. Ward Construction Co. v. Rohm & Haas Co.*, Case No. 2:05-cv-4157-LDD, at 9-10 (E.D. Pa. May 31, 2006). See also, *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 102 (Ariz. 2003), *Freeman Indus. LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 520 (Tenn. 2005).

A. Respondents Cannot Justify the Lower Court's Radical Interpretation of Statute

1. Respondents Fail to Demonstrate that Legislative Intent is Necessary to Interpret the Clear and Unambiguous Language of Minn. Stat. §325D.57

Respondents argue that the lower court's draconian interpretation of Minn. Stat. § 325D.57 is supported by the legislative intent. However, legislative intent is relevant *only if* the text of the statute is vague or ambiguous. Lorix demonstrated that the statute's

text is clear and plain, App. Br. at 6-8, and Respondents' arguments to the contrary are unpersuasive. No matter how thoroughly the text of the statute is scoured, it simply does not state that standing should be limited only to plaintiffs who purchase the price-fixed product before it is incorporated into a finished product.²

2. Respondents' Analysis of Legislative Intent Does Not Support The Lower Court's Restrictive Interpretation of the Statute

The testimony of Assistant Attorney General Steve Kilgriff is clear: the legislature intended the *Illinois Brick* repealer statute to confer standing upon plaintiffs who had standing prior to the *Illinois Brick* decision. App. Br. at 14.

Respondents allege that the absence of *A.G.C.* factors from the amended statute could indicate that the legislature intended to include those factors without expressly identifying them. Resp. Br. at 18 n.11. This inference is unwarranted. Kilgriff's testimony, which occurred after *A.G.C.*, makes *no mention* of *A.G.C.*, but states that the amendments "deal[t] with [*Illinois Brick*]." App. 62. The policies of *Illinois Brick* are also contained in the *A.G.C.* analysis – directness of the injury, complexity and

²Respondents do not directly contend that the legislature's amendment to Minn. Stat. § 325D.57 is vague, but impliedly argue so, relying on federal cases analyzing federal antitrust statutes to interpret the statute. See Resp. Br. at 19-20. These cases are the progeny of *Illinois Brick* and *A.G.C.*, and interpret standing through the principles embodied in those cases. The Minnesota legislature, in its amendments to Minn. Stat. § 325D.57, rejected the federal limits on indirect injury claims and the policies underlying those artificial limitations. See *Philip Morris*, 551 N.W.2d at 495-97. Therefore, these federal cases have no persuasive value.

speculativeness of damages; duplicative recovery – so the legislature’s “repeal” of *Illinois Brick* repealed those same policies in *A.G.C.*

3. Respondents’ Interpretation of the Statute Does Not Deny Standing to Lorix

Respondents contend that the legislature intended only to lift the bar against indirect purchasers that was created by *Illinois Brick*, see, e.g., Resp. Br. at 17.

Respondents then claim that the amendment to Minn. Stat. § 325D.57 did not address standing. *Id.* at 30. This statement was flatly contradicted by this Court in *Philip Morris*, 551 N.W.2d at 495-96. Respondents nonetheless conclude that Lorix would not have standing under pre-*Illinois Brick* law.

This flawed syllogism is, at best, an unfinished analysis. Respondents’ conclusion begs the question: what did the legislature intend by lifting the limitations? The clearest expression of this intent is demonstrated by pre-*Illinois Brick* law on indirect purchaser standing, because the legislature intended the amendment’s reach to be broad enough to “repeal” the gap in standing created by *Illinois Brick*.

Prior to *Illinois Brick*, courts granted standing indirect purchasers of product containing price-fixed components. See, e.g., *Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 208 (8th Cir. 1967) (state permitted to recover damages on its indirect purchasers of metal products used in highways); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973) (local governments permitted to sue as purchaser of asphalt, which contained price-fixed component), *In re Master Key Antitrust Litig.*, 528 F.2d 5, 12

n. 11 (2nd Cir. 1975) (builder-owners had standing for injuries resulting from purchases of “hardware building package,” which included hardware and lock and key systems, whose prices had been artificially increased by defendants’ conspiracy), *Carnivale Bag Co., Inc. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D.N.Y. 1975) (purchasers of zippers containing price-fixed component had standing).³ Indeed, the plaintiffs in *Illinois Brick* were purchasers of products (buildings) that contained price-fixed components (bricks). *Illinois Brick*, 431 U.S. at 726.

In light of this, Respondents’ oft-repeated theory that the legislature intended to lift the ban on indirect purchaser actions is an irrelevant and incomplete analysis. The “repeal” of *Illinois Brick* was a means to an end: to restore standing to its pre - *Illinois Brick* levels.

B. Respondents’ Reliance on Federal Prudential Limitations to Restrict Standing Conferred By a State Statute Is In Error

Respondents allege that Minnesota courts must exercise federal prudential limitations to deny standing to Lorix. This argument is a red herring – an attempt by

³Indeed, the United States Supreme Court in *California v. ARC America Corp.*, 490 U.S. 93 (1989) held that state statutes that granted standing to plaintiffs that purchased buildings that contained price-fixed concrete block – and thus, are analogous to Lorix – were not preempted by *Illinois Brick*. *Id.* at 101-02. The court of appeals’ interpretation, however, would preclude those plaintiffs from recovering.

Respondents to interject into the statute limitations on standing that were not included by the Legislature in its amendments to the Minnesota Antitrust Act.⁴

Federal prudential considerations are judicially-created restrictions on standing under Article III of the federal Constitution. Standing in Minnesota is conferred by statute, or by injury-in-fact. *Philip Morris*, 551 N.W.2d at 493. There is no basis to engraft these federal limitations onto state standing doctrines.⁵ The United States Supreme Court held that “Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies.” *ARC America*, 490 U.S. at 102. It would be inconsistent to allow federal antitrust standing policies to displace state antitrust policies.

⁴Respondents cite two cases to support their proposition that Minnesota considers prudential limitations on standing: *State v. Gray*, 413 N.W.2d 107 (Minn. 1987) and *Hanson v. Woolston*, 701 N.W.2d 257 (Minn. Ct. App. 2005). The value of these cases is minimal. *Gray* is a criminal case that discussed prudential standing in dicta. *Gray*, 413 N.W.2d at 113. *Hanson* is a court of appeals case that merely states that prudential standing limitations require that the plaintiff have a concrete interest and be in the zone of interests protected by the statute. *Hanson*, 701 N.W.2d at 262. These factors are included in a “injury in fact” test, and Ms. Lorix certainly satisfies them. App. Br. at 38-39. See also, *D. R. Ward*, 2006 WL 3921865, at *10 (purchaser of product containing price-fixed component in “zone of interest” protected by Vermont antitrust statute).

⁵Indeed, other courts have refused to apply federal prudential limitations to state antitrust statutes. In *D.R. Ward*, the court “reject[ed] as flawed the rationale provided by the *Fucile* Court for applying the *AGC* antitrust standing analysis: the *AGC* analysis, a gauge for determining prudential standing under federal antitrust statutes, is distinct from the inquiry into standing under Article III of the Constitution; and, although the Vermont Supreme Court applies the test for constitutional standing in other contexts, it has yet to apply the *AGC* factors to determine prudential standing under any state statute.” *D.R. Ward*, 2006 WL 3921865 at *9.

The jurisdiction of federal courts is limited under Article II of the federal Constitution. Federal courts use prudential limitations to protect that limited jurisdiction. *See Valley Forge v. Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982)(describing “close relationship” of prudential requirements to policies of Article III); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (constitutional and prudential requirements “founded in concern about the proper-- and properly limited -- role of the courts in a democratic society”). Minnesota’s courts, which are courts of general jurisdiction, Minn. Const. Art. VI, § 3, are not so restricted. “Whether a litigant has standing to sue may present a threshold issue for a federal court, but our doctrines of prudential standing are of no moment in a state court, the jurisdiction of which is not similarly limited to what is granted by an act of the legislature. *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 198 n.1 (D.C. Cir. 2002).

The cases cited by Respondents in support of the application of prudential limitations support plaintiff. In *Philip Morris*, this Court found standing under the plain language of the statute, and noted that the statute should be interpreted broadly. *Philip Morris*, 551 N.W.2d at 496-97. In *Tremco*, the court was not analyzing prudential considerations, but rather, applied a traditional analysis of standing akin to injury-in-fact, focusing on the injury and the connection between the injury and the harm. *Tremco*, 1997 WL 423575 at *2.

1. Illinois Brick and A.G.C., Which Incorporated Federal Prudential Limitations on Standing, Were Rejected By the Minnesota Legislature

These limitations are really just a re-packaging of the federal policies underlying *Illinois Brick*. See *Boos v. Abbott Lab's*, 925 F. Supp. 49, 56-57 (D. Mass. 1996) and *A.G.C.*,⁶ see, *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 264 (3d Cir. 1998). Regardless of whether prudential limitations were incorporated into *Illinois Brick* or into *A.G.C.*, those limitations are inapplicable. As the Supreme Court noted, “[l]ike any general rule, however, [prudential limitations] should not be applied where its underlying justifications are absent.” *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). The legislature, in its amendments to Section 325D.57, rejected the “underlying justifications” for these limitations, and the limitations should be rejected by this Court for the same reasons. See *Philip Morris*, 551 N.W.2d at 495-97.

2. Federal Prudential Limitations on Standing Are Inapplicable to An Analysis of Standing Under The Minnesota Antitrust Act

Prudential limitations on standing are a judicial creation, and therefore, can be abrogated or modified by the legislature. *Warth*, 422 U.S. at 501 (“Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules.”).

⁶Respondents seem to imply that these prudential limitations are the same as the *A.G.C.* factors. Resp. Br. at 10-11.

In this case, the legislature's amendments eliminated prudential considerations. Courts consider many factors in analyzing the applicability of prudential limitations. For example, courts have considered the legislative history and intent of statutes. *See, e.g., Association of Comm. Org's For Reform Now v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999). The legislative history of section 325D.57, *see* App. Br. at 10-20, and this Court's consistently expansive interpretation of the statute, *see Philip Morris*, 551 N.W.2d at 495-97, demonstrate that prudential limitations were negated by the 1984 amendments.

Courts also consider the subject matter protected by the statute. For example, the Supreme Court held that prudential considerations were negated in the Endangered Species Act because that Act protected the environment, an area in which everyone has "an interest." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Similarly, this Court's analysis of the Minnesota Antitrust Act confirms that its enforcement is a subject that is important to everyone. Minnesota's antitrust laws are intended to "protect Minnesota citizens from sharp commercial practices," and so, the antitrust statutes "are generally very broadly construed to enhance consumer protection." *Philip Morris*, 551 N.W.2d at 496. Because competition leads to lower prices, laws that promote competition benefit all citizens.

Language similar to the relevant language of Section 325D.57 supports a finding that the legislature intended to negate prudential limitations. In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), the Supreme Court held that the phrase "any person who claims to have been injured by a discriminatory housing practice" was broad enough to negate prudential limitations on standing. *Id.* at 209. Similarly, in

Fowler, the Fifth Circuit concluded that Congress intended the phrase “aggrieved person” to “cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which prudential standing traditionally rested.” *Id.* at 363-64 (citation omitted).

Finally, statutes allowing enforcement by private attorneys general demonstrate a legislative intent to expand standing to its constitutional limits. *Fowler*, 178 F.3d at 364-65 (citation omitted). The Minnesota legislature empowered injured persons to act as private attorneys general to enforce the Minnesota Antitrust Act. Minn. Stat. § 8.31, subd. 3(a) (2006). The legislative history of that section “emphasizes this expansion of enforcement opportunities.” *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 9 (Minn. 2001)(citing *Philip Morris*, 551 N.W.2d at 495).

The legislature recognized the enforcement of the Minnesota Antitrust Act benefitted everyone, and by amending the statute to allow injured plaintiffs to prosecute these actions, the legislature intended to “cast the standing net” beyond the limitations imposed by prudential standing limitations.⁷

C. Respondents’ Attempts to Support the Lower Court’s Novel Application of the Multi-Factor A.G.C. Test Must Fail

The court of appeals relied on the general practice of Minnesota courts to interpret state antitrust law in harmony with analogous federal provisions. Respondents now step

⁷*See, Philip Morris*, 551 N.W.2d at 497 (“After *Illinois Brick* was decided, however, Minnesota acted to change its law to allow anyone ‘anyone to sue in antitrust.’”) (citation omitted).

back, admitting that certain *A.G.C.* factors may be “less pronounced” in light of the statute’s amendment. Resp. Br. at 16. This concession is incompatible with the legislative intent to reject *A.G.C.*; there is no basis to permit a court to cherry-pick among *A.G.C.*’s factors.

If *A.G.C.* were incorporated into Minnesota law, a careful reading of that case demonstrates that it is not possible to reconcile the court of appeals’ application of the case with the legislature’s restoration of indirect purchaser standing in 1984. The court of appeals justified its reliance on *A.G.C.* with the Supreme Court’s observation the ability of indirect purchasers to sue is “analytically distinct” from the “question of which persons have sustained injuries too remote. . .to sue for damages.” App. 30; *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 (1984). This language, however, only supports Lorix’s position.

While the “analytically distinct” language originates in *Illinois Brick*, the Court first applied it in *McCready*, in which it held that a clinical-psychology patient could sue her employer-sponsored health insurer for allegedly conspiring to exclude clinical psychology services from coverage. *Id.* at 480-81 The Court rejected the defendant’s argument that plaintiff’s injury was too remote, reasoning that psychotherapy patients were beneficiaries of the competition that the defendants suppressed. *Id.* Thus, far from supporting the court of appeals’ reliance on *A.G.C.*, *McCready* and its “analytically distinct” language supports granting standing to Lorix and others who can prove that they were injured by a breakdown in competition.

1. Under the Multi-Factor *A.G.C.* Test, No Single Factor is Dispositive

Respondents effectively concede the error in the lower courts' analysis of standing, which collapsed the multi-factor *A.G.C.* test into a single-factor analysis.⁸ Instead of directly supporting this truncation, Respondents attempt to shore it up by claiming that the lower court considered the other *A.G.C.* factors through an "implicit recognition." Resp. Br. at 25-26.⁹ Respondents' after-the-fact re-interpretation of the court of appeals' silence merely demonstrates the failings of the lower court's opinion. *See also, A.G.C.*, 459 U.S. at 537 n.33 ("[I]t is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case.").

2. The *Visa* Cases Do Not Support the Application of *A.G.C.* to the Interpretation of a State Statute Because The *Visa* Cases Involve Inapposite Factual Predicates, Legal Theories, and Damages Theories

Respondents rely on a series of cases against *Visa USA, Inc.*¹⁰ to support their contentions regarding the application of *A.G.C.* to this matter. Those cases are inapposite.

⁸Interestingly, Respondents acknowledge that prior to Illinois Brick, courts "undertook a case-by-case analysis to determine standing in indirect-purchaser cases" Resp. Br. at 32, and that "it is difficult to articulate a 'precise test' for antitrust standing." Id. at 19, *quoting A.G.C.*, 459 U.S. at 535-36 & nn. 32 & 33. However, the court of appeals eliminated the "case-by-case" nature of standing analysis and attempted to formulate a "precise test."

⁹The weakness of Respondents' argument is further underscored by the fact that Respondents here rely upon a section of the opinion that analyzed the language of the statute, not the application of *A.G.C.*

¹⁰See Resp. Br. at 22 n.14 for a list of *Visa* cases.

The *Visa* cases allege that Visa imposed a tying agreement upon retailers, which increased the price of *every good* sold in that state. Thus, the *Visa* courts found that the injury was too remote because there were two different overcharges in two different markets. In the first market, merchants paid excessive fees to Visa for use of its debit/credit card services. This overcharge affected the market for debit card services. In the second market, the merchants reacted to these excessive fees by increasing prices on goods purchased by their customers, regardless of whether it was purchased with debit, credit, or cash; *i.e.*, the merchants instituted a new and different overcharge on completely different products and services in a completely different market.

The situation in the *Visa* cases is quite unlike the one present here. In this case, manufacturers fixed an excessive price for rubber chemicals that was passed on through the chain of distribution to customers. Lorix purchased (albeit indirectly) the rubber chemicals that are the subject of the initial price-fix, whereas, as *Visa* courts noted, the plaintiffs never *purchased* the alleged affected products. *See, e.g., Southard v. Visa U.S.A. Inc.*, No. LACV 031729, 2004 WL 3030028 at *3 (Iowa Dist. Ct. Nov. 17, 2004) (plaintiffs were not “indirect purchasers,” they were “derivative,” because they did not “end up” with a product that defendant supplied.). The *Visa* cases are inapposite.

D. Lorix Has Standing Under *A.G.C.*, Lorix

Respondents’ analysis of *A.G.C.* ignores cases holding that purchasers of products containing price-fixed components have standing. These cases are indistinguishable from

this matter. See, *Armstrong v. Bayer AG*, No. 66-05 CnC (Chittenden Cty, Vermont Oct. 10, 2006), *D.R. Ward*, --- F. Supp. 2d ----, 2006 WL 3921865, at *10-12.

Armstrong is particularly instructive. As in this case, the *Armstrong* plaintiff purchased a product containing a price-fixed component. *Armstrong*, at 2). As in this case, *Armstrong* was preceded by that state's dismissal of a *Visa* case. *Id.* at 4. Like the court of appeals, the *Armstrong* court relied on *A.G.C.* *Id.* However, and most significantly, the *Armstrong* court held that the plaintiff satisfied *A.G.C.* *Id.* at 5-6) (finding a "sufficiently direct causal chain" and that damages were neither too speculative nor too complex). The *Armstrong* court's application of *A.G.C.* to an analogous set of facts demonstrates the errors of Respondents' analysis.¹¹

¹¹Respondents' claim that "numerous courts" have dismissed claims in cases "virtually identical to this one" (Resp. Br. at 20-22) is disingenuous. Respondents cite to only three non-*Visa* cases, two of which are related. These cases have no persuasive value.

Two related cases are from North Carolina. *Crouch v. Crompton Corp.*, No. 02-cv5-4375, 2004 WL 2414027 (N.C. Super. Ct. Oct. 28, 2004), *Weaver v. Cabot Corp.*, No. 03 CV5 04760, 2004 WL 3406119 (N.C. Super. Ct. March 26, 2004). These are trial court cases. They have no precedential value in North Carolina, let alone in Minnesota.

Furthermore, North Carolina does not have a statute analogous to Minn. Stat. § 325D.57. In fact, North Carolina courts were **required** to make their state antitrust law consistent with the federal laws, including standing. *Crouch*, 2004 WL 2414027 at *12. The *Crouch* court held that state antitrust statutes "should be narrowly construed," *Id.* at *28, whereas Minnesota's statute is broadly construed. Finally, *Crouch's* analysis is predicated upon a misreading of a controlling appellate case. In North Carolina, indirect purchaser standing was created in *Hyde v. Abbott Laboratories, Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996). However, *Crouch* misinterpreted *Hyde*, transforming a sufficient fact (that the indirect purchaser was a consumer in the restrained market) into a necessary fact (that the indirect purchaser **must** be a consumer in the restrained market). *Crouch*, 2004 WL 2414027 at *11-12. *Hyde* itself does not contain this requirement.

Respondents' remaining case is *Luscher v. Bayer A.G.*, No. CV 2004-014835

1. **A.G.C. Does Not Require That A Plaintiff Must Be a “Consumer or Competitor in the Restrained Market”**

Respondents persist in their support for the incorrect statement that an antitrust plaintiff *must* be a consumer or competitor in the restrained market. Courts have refused to adopt this blanket requirement, see App. Br. at 29-33,¹² as Respondents previously conceded. (Resp. Ct. App. Br. at 15).

2. **Lorix is a Consumer In The Restrained Market**

Respondents argue that Lorix’s damages are too remote because she is not a consumer or competitor in the restrained market. Resp. Br. at 23-25. However, this simplistic labeling of Lorix’s claim is inaccurate, inconsistent with case law, and inconsistent with economic principles.

(Arizona Super. Court, September 14, 2005). Again, Respondents ask this court to rely upon a trial court decision from another state – a decision that is inconsistent with *Bunker’s Glass*, an Arizona Supreme Court decision that granted indirect purchaser standing. *Bunker’s Glass*, 75 P.3d at 108-09. Also, other courts confronting the *same conspiracy* found that plaintiffs have standing. See, e.g., *Anderson Contracting v. Bayer AG*, Case No. CL 95959, Polk Cty. Dist. Ct. at 14.

¹²Respondents cite to *Gutzwiller v. Visa U.S.A., Inc.*, No. C4-04-58 2004 WL 2114991 (D. Minn. Sept. 15, 2004), as further support for this proposition. *Gutzwiller* finds support for this proposition in the language of *A.G.C.* and in this Court’s opinion in *Philip Morris*. Neither of these sources supports *Gutzwiller’s* interpretation. See, App. Br. at 29-31 (regarding *A.G.C.*). *Philip Morris* merely states that *if* a plaintiff is a direct purchaser in the restrained market, plaintiff has standing. Resp. App. at 121. That statement is far different from the unwarranted conclusion that plaintiff *must* be a consumer or competitor.

The court of appeals erred by foisting *A.G.C.*'s "consumer or competitor" language – language directed toward peripheral players in the market – onto these facts to limit the number of links down the supply chain from which an indirect purchaser may sue price-fixers.¹³ The decision to deny standing in *A.G.C.* rested on the assumption that a labor union, in its role as collective-bargaining agent, would not benefit from competition among contracting firms. *A.G.C.* at 539. In Minnesota, however, the legislature amended state antitrust law to clarify that indirect purchasers such as Ms. Lorix are in fact beneficiaries of competition and are injured when competition breaks down and companies fix prices. Minn. Stat. § 325D.57. Thus, to the extent that Minnesota law requires that an antitrust plaintiff be a "consumer in the affected market," that "affected market" must include both direct-purchaser consumers and the indirect-purchaser consumers that are situated below the direct purchasers on the vertical supply chain.

The court of appeals' position is too simplistic to justify a per-se rule. A purchaser of a price-fixed good is a participant in the restrained market even if the good has been incorporated into another product. See, *D.R. Ward*, 2006 WL 3921865, at *10. In this case, the unlawful overcharge does not disappear when the rubber chemicals are used to manufacture a tire. See *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir. 1978)

¹³In *A.G.C.*, the damages were derivative of injury suffered by others, because the plaintiff union's injury -- diminished union membership -- was purely derivative of the lost wages suffered by union contractors wrongfully excluded from the labor market. *A.G.C.* 459 U.S. at 541. Lorix, on the other hand, seeks to be compensated for damages "passed on" to her in the chain of distribution.

(holding that plaintiffs that purchased candy from defendants that fixed sugar prices had standing, even though the sugar had been combined with other ingredients, because “just as the sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers”), accord *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159 (3d Cir. 2002) (holding that plaintiffs that purchased corrugated sheets or boxes from defendants that fixed linerboard prices had standing, even though “linerboard was a mere ingredient.”). See also, *Anderson Contracting*, Case No. CL95959 at 13-15, *Ciardi v. F. Hoffman-LaRoche Ltd.*, 762 N.E.2d 303, 306 nn. 3, 4 (Mass. 2002).¹⁴ It is sophistry to claim that even though Lorix paid more for her tires than she would have in the absence of Respondents’ conspiracy (App. 9, at ¶ 35), Respondents’ conspiracy did not “affect” or “restrain” the tire market. There is no doubt that the breakdown in competition engendered by Respondents’ conspiracy caused an injury to Lorix.

The court of appeals’ holding sets a dangerous policy, and is inconsistent with the complexity of today’s economy. By conferring standing only on middlemen who add no value, the holding attempts to draw a distinction between middlemen who add no value to the product and those who do. Of course, any defendant sued for an antitrust violation will now claim that some middleman added value to the product, and thus, plaintiff is not a consumer or competitor in the restrained market.

¹⁴The lower court’s analysis seems to imply a conspiracy can only affect one market. App. 30. But it is clear that an antitrust conspiracy can restrain multiple markets. See, e.g., *McCready*, 457 U.S. 465, 481-84 (conspiracy to restrain market for psychiatric services affected market for psychological services).

The example used by the court of appeals and Kilgriff to discuss standing – a price-fixed television – is instructive. Under the court of appeals' ruling, a purchaser of a price-fixed television could sue the television manufacturer, because the television was not incorporated into another product. This simplistic view of the today's economy ignores the realities of market economics. Though the television purchased by a consumer at a store appears the same as the television manufactured by the price-fixers, they are actually different products in the economic sense because the retailer, as well as any wholesalers, added value to the television before the consumer purchased it. The price paid by the consumer includes not only the cost of the television, but also the wholesaler's costs of storing, distributing, transportation and marketing, and the retailer's costs of marketing and selling the television.

Upon closer inspection, the difference between the price-fixed television and the price-fixed rubber chemicals is only that the rubber chemicals changed form before they were purchased by Lorix. But that is a distinction without a difference, because in both cases, the overcharge created by the price-fix is passed on to the consumer. In other words, there is no basis to distinguish between middlemen – whose customers could sue price-fixing manufacturers under the court of appeals' ruling – and firms like tire producers that physically alter the price-fixed product before selling. In both cases, the underlying economics are the same: the price-fixed product was passed through chains of manufacturing and distributing; each link in these chains added economic value; each link

passed on overcharges occurring as a result of the price-fixing; and consumer was injured.

Under the court of appeals' holding, price-fixers will argue that every middleman adds value, which would limit "consumers in the retrained market" to direct purchasers - which is precisely the result that the legislature sought to avoid by amending the statute. The "market participant" language imposed by the court of appeals can only be reconciled with the legislative intent if it includes indirect-purchaser consumers situated below direct purchasers on the vertical supply chain. This formulation of the lower court's opinion preserves the legislative intent to repeal *Illinois Brick*, but also grants courts flexibility to dismiss suits by taxpayers or garage sale junkies.

3. There is a Causal Connection Between Lorix's Injury and Respondents' Conspiracy

Respondents claim that Lorix cannot satisfy the "causal connection" factor. Resp. Br. at 25 n. 15. Respondents are incorrect. Many courts have found that purchasers of product containing price-fixed components establish a sufficient causal connection. For example, *Armstrong* held that the causal chain for a purchaser of a product containing price-fixed components:

is much more direct than the chain in *Fucile* [the Vermont *Visa* case]. Specifically, there is no causal jump like the one present in *Fucile*, where the overcharge for financial services allegedly caused the retailers to raise the prices of their goods. Here, the overpriced [component] flows through the causal chain from the Defendant to the Plaintiff.

Armstrong, at 5. See also *Investors Corp. v. Bayer AG*, No. CL95959, at 3 (May 31, 2005 Iowa Dist. Ct.); *Anderson Contracting*, at 15.

Gutzwiller, cited by Respondents, supports Lorix. In *Gutzwiller*, the plaintiff's claim was too remote because plaintiff did not allege that the restrained market "contributes in any way to the research, manufacture, production, distribution or advertising of the consumer goods for which Plaintiff contends he paid inflated prices." *Gutzwiller*, 2004 WL 2114991, at *7.¹⁵ Lorix, by contrast, alleged that the rubber chemicals were used in the "manufacture" and "production" of the consumer goods for which she paid an inflated price. (App. 2, ¶3, App. 9, ¶35).¹⁶

4. Respondents Failed to Establish That Lorix's Damages Are Too Speculative, Too Complex, or Duplicative

Although the lower court ignored several *A.G.C.* factors, Respondents nonetheless attempted to prop up that court's opinion by providing their own analysis of how that

¹⁵See also, *Smith v. Visa, Inc.*, No. C0-04-2096, 2005 WL 1936336, at *9 (D. Minn. July 12, 2005). Respondents often cite *Gutzwiller* and *Smith* in tandem. These cases alleged a tying agreement against the same defendant, were heard by the same judge, and were brought by the same plaintiffs' attorneys. Not too surprisingly, *Smith* was dismissed under the same analysis as *Gutzwiller*, and therefore is inapposite to this litigation.

¹⁶See also *Peterson v. Visa U.S.A., Inc.*, No Civ. A. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005) (plaintiff in *Illinois Brick* was an "indirect purchaser," even though it purchased product containing price-fixed component, because plaintiff was in the "chain of distribution." *Id.* at *3. Lorix, who stands in the same shoes as the *Illinois Brick* plaintiffs, is "within the chain of distribution."

court might have interpreted those factors. (Resp. Br. at 25-30).¹⁷ Respondents' arguments are unavailing.

Respondents noted the legislature allowed courts to "take any steps necessary to avoid such duplicative recovery against a defendant," but nonetheless fret that there is a "possibility" that they may have to pay duplicative recoveries. Resp. Br. at 28. In support of this contradictory position, Respondents rely on *Crouch*, 2004 WL 2414027, at *19. Given the mandate conferred upon Minnesota's courts by Section 325D.57, and that *Crouch* was decided in a state that did not entrust courts with such powers, *Crouch*, 2004 WL 2414027, at *18, Respondents' fears of a hypothetical multiple recovery should be given no credence.

Respondents rely on *Gutzwiller* to claim that damages are too complex. Resp. Br. at 29. Damages in these *Visa* cases "present unique damages issues . . . it is difficult to imagine a more complex damage case. Plaintiff's case would require an analysis of pricing of virtually every product sold at retail in North Carolina." *Crouch*, 2004 WL 2414027, at * 26-27.¹⁸ Furthermore, tying damages would "depend upon the specific

¹⁷One court recently held that an allegation that plaintiff "indirectly purchased" the price-fixed product was sufficient to deny a motion to dismiss for lack of standing under *A.G.C.*, and suggested that discovery could be used to more effectively apply *A.G.C.* to the facts. *Wrobel v. Avery Dennison*, Case No. 05CV1296, at 7 (Johnson Cty, Kansas, Feb. 6, 2006).

¹⁸Respondents may argue that because there are different types of tires, there will similarly be different elasticities of demand. Plaintiff respectfully suggests that such unsupported assumptions are irrelevant to the resolution of a Rule 12 motion.

elasticity of demand for . . . essentially every product of any kind sold to anyone in the State.” *Knowles v. Visa U.S.A., Inc.*, No. Civ.A. CV-03-707, 2004 WL 2475284, at *6 (D. Me. Oct. 20, 2004). Clearly, those concerns are far afield from this case, which concerns the pricing of one product – tires.

Finally, Respondents contend that Lorix’s damages are speculative because, “at best,” Lorix could show a “theoretical link” between the overcharge resulting from Respondents’ conspiracy and the price Lorix paid for tires. Resp. Br. at 27-28. Ironically, Respondents’ unsupported theory is the real “speculation.” It is basic economic theory that an increase in the price of a component will increase the price of the finished product. App. Br. at 19-20. *See also, Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432 at *10 (Minn. Dist. Ct., March 30, 2001) (collecting citations to economic writings explaining how alleged monopoly overcharge for Microsoft’s software was passed down the chain of distribution.).

II. RESPONDENTS’ OTHER CONTENTIONS ARE INCONSISTENT WITH TRADITIONAL MINNESOTA STANDING DOCTRINES

Respondents claim that Lorix never previously acknowledged limits on standing for indirect purchaser claims. Resp. Br. at 30. This is false. Lorix has consistently contended that the language of the statute confers standing, but alternatively, standing can be conferred upon her through other traditional standing doctrines. App. Br. at 35-45.

A. Respondents' Interpretation of BCBS Is Contradicted by the Facts

Respondents' selective parsings from *Philip Morris* do not alter the allegations from that case's complaint. App. Br. at 25-27. Contrary to Respondents' argument, this Court's opinion in *Philip Morris* demonstrates that a plaintiff can have standing even if it is in a separate market from the defendants.

B. The "Target Area" Doctrine Is Applicable To Antitrust Standing

Respondents claim that the target area doctrine of standing is invalid because it was subsumed into *A.G.C.*¹⁹ In an effort to support this theory, Respondents cite to pre-*A.G.C.* federal cases. Respondents fail to mention that the target area analysis has been applied by state courts *after A.G.C.* See, e.g., *Holder v. Archer Daniels Midland Co.*, No. 96-2975 1998 WL 1469620, at *2 (D.C. Super. Ct. Nov. 4, 1998); *Obstetrical & Gynecological Assoc. of Neenah v. Landig*, 384 N.W.2d 719 (Wis. Ct. App. 1986). In *Landig*, the Wisconsin Court of Appeals held that the target area analysis "offers a pragmatic and realistic alternative to resolve oftentimes difficult and troublesome questions raised by the rigid 'direct-indirect' test of standing, for it attaches more importance to the nature of the particular antitrust violation and the area of competition defendant knew or should have known would be adversely affected." *Id.* at 723 (citation omitted). Lorix has demonstrated that Respondents would have known that an increase in

¹⁹*Kilgriff* also acknowledged the target area test. See also, App. at 60 ("If you're outside that target area you cannot recover."). Interestingly, Respondents quote this for a different proposition, at the same time that Respondents allege that the target area doctrine is inapplicable. Resp. Br. at 13 n.8.

the price of rubber chemicals would increase the price of tires. Lorix was a foreseeable target of the conspiracy. She was in an area of the economy that was restrained as result of the breakdown in competition. Lorix falls within the target area.

The target area test provides flexibility needed to address standing in differing situations, and also addresses the legislative determination that federal antitrust standing limitations were too restrictive for the Minnesota Antitrust Act.

C. Lorix's Injuries Are Inextricably Intertwined with Respondents' Conspiracy

The *McCready* court considered “the physical and economic nexus between the alleged violation and the harm to the plaintiff, and . . . more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.” *McCready*, 457 U.S. at 478. The nexus between Lorix's harm and the conspiracy has been described, App.Br. at 41-43. There is no doubt that the Lorix's injury is the type of injury that the legislature sought to make unlawful.²⁰ Lorix's injuries were a necessary and foreseeable component of Respondents' conspiracy: the success of the conspiracy required consumers such as Lorix to pay supra-competitive prices for the tires. App. 9, ¶35. Thus, Lorix's injuries are so “inextricably intertwined”

²⁰“Injury caused by supracompetitive pricing is the type of injury which the antitrust laws were intended to prohibit.” *In re Air Passenger Computer Reservation Sys. Antitrust Lit.*, 694 F. Supp. 1443, 1466 (C.D.Cal. 1988).

with Respondents' intended injury to competition that they "flow from that which makes [Respondents'] acts unlawful." *McCready*, 457 U.S. at 482.

D. Lorix Has Standing Because She Alleged Injury-In-Fact

Respondents concede that Lorix has suffered injury-in-fact, but claim she lacks standing because she must also satisfy prudential limitations. Resp. Br. at 11 n.5. As discussed above, these federal cases – and their theory that prudential considerations must be considered – are irrelevant to this analysis.

CONCLUSION

For the reasons stated above, Lorix respectfully requests that the Court of Appeals' decision be reversed.

Respectfully submitted

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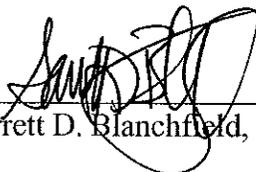
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Appellant complies with the word count limitations of Minn. R. App. P. 132.01, subd. 3(a) in that the brief contains 6,973 words.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).