

CASE NO. A05-2148

State of Minnesota
In Supreme Court

Diane Lorix, 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 BRIEF

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III. STATEMENT OF THE ISSUE

1. **When the text of a statute is plain and unambiguous, did the Court of Appeals err by departing from the plain meaning of the text and imposing its own unprecedented and unjustified interpretation?**

The court of appeals held that because application of the common meaning of the words in the statute led to absurd results, interpretation of the statute was necessary.

Minn. Stat. § 645.16

Olson v. Ford Motor Co., 558 N.W.2d 491 (Minn. 1997).

2. **When Minn. Stat. § 325D.57 allows plaintiffs to recover damages if they were injured “directly or indirectly” by a violation of the Minnesota Antitrust Act, did the court of appeals err by dismissing a claim for damages because the price-fixed product is incorporated into, and increases the price of, the product purchased by Plaintiff?**

The court of appeals held that a plaintiff who purchases a product containing a price-fixed component does not have standing under Minn. Stat. § 325D.57 because the plaintiff is not a consumer or competitor in the market restrained by the antitrust conspiracy.

Minn. Stat. § 325D.57

State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996).

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

IV. STATEMENT OF THE CASE AND THE FACTS

This appeal concerns whether a company that unlawfully fixes the price of a component that is incorporated into, and raises the price of, a product purchased by plaintiff, is absolved from liability as a matter of law under Minn. Stat. § 325D.57 of the Minnesota Antitrust Act. Appellant Diane Lorix (“Ms. Lorix” or “Lorix”)

filed this action in Hennepin County District Court, Honorable Robert J. Blaeser, alleging that she was injured by Respondents' Crompton Corp., Uniroyal Chemical Co., Inc., Uniroyal Chemical Company, Ltd., and Bayer Corporation ("Respondents") conspiracy to fix the price of rubber chemicals used in automobile tires. (App. 1, ¶¶ 2, 3, 34, 35, 51.) Respondents moved to dismiss the action for lack of standing under Minn. Stat. § 325D.57.

The District Court granted Respondents' motion on August 29, 2005, finding that an indirect purchaser "must be either a consumer or a customer in the particular industry . . ." (App. 19.) Ms. Lorix appealed the decision to the court of appeals, which affirmed the District Court's decision on August 22, 2006, holding that a consumer who is injured as a result of paying too much for a product containing a price-fixed component can *never* have standing. *Lorix v. Crompton Corp.*, 720 N.W.2d 15, 18 (Minn. App. 2006). The court of appeals did not address Ms. Lorix's other legal and factual arguments. This Court granted further review by Order dated November 14, 2006. (App. 31.)

V. STATEMENT OF THE FACTS RELEVANT TO THE GROUNDS URGED FOR REVERSAL.

Respondents are the dominant players in the highly concentrated \$900 million annual U.S. rubber processing chemical market. (App. 8, ¶¶ 29, 31.) These price-fixed chemicals are essential to the manufacture of automotive tires. (App. 8, ¶¶ 27, 30.) Beginning in approximately 1994, Respondents responded to low prices resulting from the consolidation of tire manufacturers by unlawfully

agreeing to raise the price of rubber processing chemicals. (App. 9, ¶ 32-34, 48.) These artificially-inflated prices were passed on to consumers, including Ms. Lorix, who paid more for her tires as a “direct and proximate result” of respondents’ price-fixing agreement. (App. 9, ¶ 35, App. 12, ¶51.)

VI. LEGAL STANDARDS

The standard of review of the legal sufficiency of the claims presented on appeal from a dismissal for failure to state a claim on which relief can be granted is *de novo*. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn.1997). “[T]he only question before [the reviewing court] is whether the complaint sets forth a legally sufficient claim for relief.” *Id.* at 749. Dismissals are generally disfavored; therefore, a reviewing court should not uphold a dismissal if it is possible on any evidence that might be produced to grant the relief requested. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000)(quotation omitted). The court is to presume that all of the alleged facts are true for purposes of deciding the motion. *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 111 (Minn.1977), and “[a]ll assumptions and inferences must favor the party against whom the [motion] is sought.” *Northern States Power Co. v. Franklin*, 265 Minn. 391, 396, 122 N.W.2d 26, 30 (Minn. 1963).

VII. ARGUMENT

In Minnesota, standing can be conferred in two ways: by an express grant of standing in a statute, or by “injury in fact.” *State by Humphrey v. Philip Morris*,

Inc., 551 N.W.2d 490, 493 (Minn. 1996). Ms. Lorix satisfies both of these well-established methods. First, Ms. Lorix satisfies the “express grant in statutory language” because she has standing under Minn. Stat. § 325D.57, which confers standing upon “any person, . . . injured directly or indirectly. . . .” Minn. Stat. § 325D.57 (2006). The language of the statute is plain and unambiguous. Interpretation beyond the plain text of this statute is not necessary; however, legislative history establishes that the legislature intended its amendment of the statute to confer an expansive grant of standing.

Ms. Lorix also satisfies the “injury in fact” test because her injury was foreseeable and direct, and she has a substantial concern in this litigation, because she has absorbed the artificial price increase.¹

Despite the procedural posture of this matter, in which Ms. Lorix’s allegations and all reasonable inferences from those allegations are taken as true, despite explicit allegations of injury in fact, and despite Minn. Stat. § 325D.57’s express use of plain language to grant standing to “any person, injured directly or indirectly” by a violation of the Minnesota Antitrust Act, the court of appeals held that a consumer who pays an artificially inflated price for a product into which a price-fixed component has been incorporated can *never* have standing, because the

¹ Although the court of appeals failed to analyze this issue, it was raised in the briefing both at the trial court and at the court of appeals.

consumer was not a consumer in the market restrained by the antitrust conspiracy. No other court has *ever* interpreted an *Illinois Brick* repealer statute² so narrowly.

The decision of the court of appeals is erroneous for several reasons. First, the court of appeals interjected its own restrictive interpretation into the plain and unambiguous test of Minn. Stat. § 325D.57:

Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

Second, after erroneously deciding to look beyond the plain text of the statute, the court of appeals ignored the clear intent of the Minnesota Legislature to restore indirect purchaser standing to pre-*Illinois Brick* levels; ignored a well-developed body of Minnesota law that had been used by this Court to grant standing to an indirect purchaser; and relied upon an inapposite federal case – a case that is contrary to the intent of the Minnesota Legislature – to determine the outcome in this matter.

The court of appeals' interpretation is unsupported in law, and will severely weaken the Minnesota Antitrust Act. This interpretation of the Minnesota

²In general, *Illinois Brick* repealer statutes provide that indirect purchasers may recover damages for violations of state antitrust laws where overcharges were passed on to them by direct purchasers. *A & M Supply Co. v. Microsoft Corp.*, 252 Mich. App. 580, 583, 654 N.W.2d 572 (2002). *See also*, footnote 7, *infra*.

Antitrust Act runs counter to this Court’s admonition that it is not the court’s “role to narrow the reach [of consumer protection statutes] where the legislature has spoken in unequivocally broad terms.” *Group Health Plans v. Philip Morris, Inc.*, 621 N.W.2d 2, 11 (Minn. 2001).

A. Ms. Lorix has Standing Under The Plain and Unambiguous Text of Minn. Statute §325D.57

Under longstanding rules of statutory construction, where language in a statute is clear, the court should simply apply the statute as written. Minn. Stat. § 645.16 (2006);³ *Gomon v. Northland Family Physicians*, 645 N.W.2d 413, 416 (Minn. 2002). The relevant language of Minn. Stat. § 325D.57 – “any person, injured directly or indirectly” – contains a plain and unambiguous grant of standing. Judge Fitzpatrick, the district court judge in the state tobacco antitrust litigation, concluded that “[b]ecause there is no specific language in [Minn. Stat. § 325D.57] that can be declared ambiguous, legislative history need not be examined to clarify ambiguities. The statute expressly allows those indirectly injured to proceed.” *State by Humphrey v. Philip Morris, Inc.*, 1995 WL 1937124, at *4.⁴

³Minn. Stat. § 645.16 provides, in pertinent part, “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. . . . When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”

⁴ Although the holdings of a district court are not binding upon this Court, they can be considered for their persuasive value. Here, Judge Fitzpatrick’s analysis of Minn. Stat. § 325D.57 is persuasive because it is consistent with Minnesota canons of statutory construction and the legislative intent of Minn. Stat. § 325D.57.

See also, *Mutual Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust*, 659 N.W.2d 755, 760 (Minn. 2003) (“[W]here the intention of the legislature is clearly manifested by plain and unambiguous language, we have neither the need nor the permission to engage in statutory interpretation.”). The court of appeals’ analysis should have begun, and ended, at this point. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.695, 701 (Minn. 1996).

This Court has recognized that “[o]ur adherence to the naturally broad meaning of the statutory authorization for *any person* to sue is also consistent with the reading that other courts have given similarly broad statutes.” *Group Health*, 621 N.W.2d at 10 (citation omitted) (emphasis added). Thus, it is important to note that many courts have found that similarly-worded statutes are plain and unambiguous. This Court specifically found that the phrase “any person” in consumer protection statutes (other than the Minnesota Antitrust Act) is “plain and unambiguous.” *Id.* at 8-9.

This expansive construction is not limited to Minnesota’s antitrust statutes. This Court has noted that “the word ‘any’ is given broad application in statutes, regardless of whether we consider the result reasonable.” *Hyatt v. Anoka Police Dept.*, 691 N.W.2d 824, 826 (Minn. 2005).⁵

Furthermore, this Court affirmed Judge Fitzpatrick’s order in *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996).

⁵ The court of appeals has reached the same conclusion. “When the word ‘[any]’ is used ‘[i]n the affirmative . . . it means “every,” or “all.”’ *In re Hildebrandt*, 701

As a result, the court of appeals' interpretation beyond this plain text was unnecessary. "[W]hen a statutory provision is clear on its face and consistent with the manifest purpose of the legislature, courts do not subject the statute to further analysis because without deference to clear statutory language, 'legislators will have difficulty imparting a stable meaning to the statutes they enact.'" *Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916, 923 (Minn. App. 2006) (citation omitted). The language of the statute is clear and plain. There is no need for construction or interpretation.

Finally, many other states have construed similar statutes to include suits by *all* indirect purchasers. *See, e.g., Comes*, 646 N.W.2d at 445 ("Given the clear, broad language of the state antitrust law, we conclude the Iowa Competition Law creates a cause of action for *all* consumers, regardless of one's technical status as a direct or indirect purchaser"); *Bunker's Glass Co. v. Pilkington, PLC*, 206 Ariz. 9, 12, 18, 75 P.3d 99, 102, 108. "In these antitrust cases, the ultimate consumers . . . may bring suit for damages." (internal citations omitted); *Freeman Industries*, 172 S.W.3d at 517 ("By providing a civil remedy to '[a]ny person who is injured or

N.W.2d 293, 299 (Minn. App. 2005) (citing Bryan A. Garner, *The Oxford Dictionary of American Usage and Style* 24 (2000)). Therefore, the court of appeals held that the Legislature intended the word "any" in a statute to mean "without limitation." *Id.* at 299. *See also, Cox v. F. Hoffman-La Roche*, No. 00 C 1890, at *2 (Kan. Dist. Ct. Oct. 10 2003) (holding that the language "any person damaged or injured" is plain, and rejecting Defendants' argument that the "legislature intended something other than what the language provides").

damaged' as the result of violations of the TTPA, the plain language of [the statute] provides a cause of action to indirect purchasers. . . . These statutes reflect a clear intent to protect and afford a remedy to ultimate consumers.”) (internal citations omitted); *Hyde*, 123 N.C.App. at 577-78, 473 S.E.2d at 684 (“As it is currently written, [the statute] provides standing to *any person* who suffers any injury, as well as for any business injury. By adding the above language, the General Assembly intended to provide a recovery for all consumers.”) (emphasis in original); and *Investors Corp. of Vermont v. Bayer AG*, No. S1011-04 CnC at 2 (Vt. Super. Ct., June 1, 2005). (App. 104.)

B. The Court of Appeals’ Interpretation of the Plain Text of Minn. Stat. § 325D.57 is Erroneous

Assuming, *arguendo*, that it is proper to look beyond the plain and unambiguous text of the statute, then the text must be interpreted according to the legislative intent. “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. . . .” Minn. Stat. § 645.16 (2006). A court can ascertain legislative intent by evaluating factors such as the occasion and necessity for the law, the circumstances under which the law was enacted, the mischief to be remedied by the law, and the contemporaneous legislative history. *Id.* These factors demonstrate that the legislature intended Minn. Stat. § 325D.57 to encompass plaintiffs who had standing prior to the United States Supreme Court’s decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977).

1. The Legislature Intended Minn. Stat. § 325D.57 to Repeal the Limitations on Standing in *Illinois Brick*

To ascertain the intent of the legislature in amending Minn. Stat. § 325D.57 to include the language “any person, injured directly or indirectly. . .” it is important to understand the developments in case law that prompted the amendment. Until 1977, both direct *and* indirect purchasers – that is, purchasers who bought a product whose price was raised as the result of a price-fixing conspiracy, even if the product in question is a component of another finished product – were permitted to sue under the antitrust laws. *See, e.g., Hyde v. Abbott Labs, Inc.*, 473 S.E.2d 680, 685 (N.C. Ct. App. 1996) (citing cases).

In 1977, the United States Supreme Court changed the rules of federal antitrust standing in *Illinois Brick*, a case that is factually analogous to the instant matter. In that case, the Supreme Court held that purchasers of products (buildings) that contained a price-fixed component (cement blocks which were incorporated into “masonry structures”) did not have standing to sue under the federal antitrust laws. In other words, standing under the federal antitrust laws was limited to direct purchasers of the price-fixed product.⁶

⁶Three Justices disagreed with the majority and wrote a dissenting opinion. *Id.* at 748, Brennan J., dissenting. Justice Brennan chastised the majority for ignoring the fundamental policy of the antitrust law: to compensate victims of antitrust violations. *Id.* at 754 (Brennan, J., dissenting). Justice Brennan noted that “in many instances, the brunt of antitrust injuries is borne by indirect purchasers, *often ultimate consumers of a product*, as increased costs are passed along the chain of distribution.” *Id.* at 749 (emphasis added).

The majority opinion was immediately and roundly criticized. For example, Donald Baker, the former head of the Antitrust Division of the Department of Justice, concluded “to say to a clear victim that ‘you don’t even have standing to make a claim and try to prove it’ is inconsistent with modern tort policy and appears unfair.” Donald Baker, *Hitting the Potholes on the Illinois Brick Road*, 17 Antitrust 14, 15-16 (2002). See also, *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 449 n.10 (Iowa 2002)(listing commentators criticizing the *Illinois Brick* majority opinion).

Despite its controversy, however, *Illinois Brick* never purported to limit individual states’ ability to allow indirect purchaser suits under their own antitrust laws. In fact, the United States Supreme Court specifically confirmed the viability of these *Illinois Brick* repealer statutes in *California v. ARC America Corp.*, 490 U.S. 93, 103, 109 S.Ct. 1661, 1666 (1989), holding that “nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.” *Id.* The Supreme Court reiterated that states could legislate **broader** antitrust standing as a matter of state law than that permitted under federal law, including situations such as *Illinois Brick*, in which the indirect purchaser bought a product that contained a price-fixed component. *Id.* at 97, 105-06. See also, *Illinois Brick*, 431 U.S. at 726 (“The block is purchased directly from [defendants] by masonry contractors and used by

them to build masonry structures; those structures are incorporated into entire buildings by general contractors and sold to respondents.”)

Against that backdrop, and as a “direct result” of *Illinois Brick*, the Minnesota legislature amended the damages portion of §325D.57 of the Minnesota Antitrust Act to expressly confer standing upon “any person, injured directly or indirectly. . .” by violation of the Minnesota Antitrust Act. *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. App. 1987);⁷ *State by Humphrey v. Philip Morris*, 551 N.W.2d 490, 497 (Minn. 1996)(“After *Illinois Brick* was decided, however, Minnesota acted to change its law to allow anyone ‘anyone to sue in antitrust.’”) (citation omitted). *See, also, Comes*, 646 N.W.2d at 447 (“Prior to *Illinois Brick*, most federal courts construed section four of the Clayton Act to allow suits to indirect purchasers.”). In fact, six of the seven circuit courts that had considered the issue prior to *Illinois Brick* held that indirect purchasers could recover damages for antitrust violations.⁸ Thus, *Illinois Brick* created a significant

⁷ Minnesota was not alone in reacting to the Supreme Court’s ban on litigation by indirect purchasers. Alabama, California, the District of Columbia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Mississippi, Nevada, New Mexico, New York, Oregon, Rhode Island, South Dakota, Vermont and Wisconsin have also enacted *Illinois Brick* repealer statutes. *See* Section of Antitrust Law, Am. Bar Ass’n, Antitrust Law Developments 811-12 & n.61 (5th ed. 2005). In total, nineteen states, the District of Columbia, and Puerto Rico have statutes that authorize indirect purchasers to bring suit. Seventeen other states permit such suits under consumer protection or unfair practice statutes. *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 448 (Iowa 2002) (citation omitted).

⁸ Cynthia Under Kassis, *The Indirect Purchaser’s Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick*, 32 Am. U. L.

barrier for injured antitrust plaintiffs. The legislature sought to repeal this judicial constraint by amending Minn. Stat. § 325D.57 to expressly confer standing upon consumers “injured directly or indirectly”.

To read the legislative amendment as a *restriction* on standing, rather than an expansion, is to ignore the clear legislative intent evidenced by the necessity “for the law,” the “circumstance of its enactment,” and “the mischief to be remedied.” Minn. Stat. § 645.16. *See also, Group Health*, 621 N.W.2d at 9 (“Our unwillingness to limit the plain meaning conveyed by the language of the statute . . . is fortified by the fact that naturally broad interpretation of ‘any person’ is consistent with the overall tenor of the statutes at issue to maximize the tools available to stop the prohibited conduct.”).⁹ It is clear that the legislature amended §325D.57 to overturn the restrictions on standing created by *Illinois Brick*.¹⁰

Rev. 1087, 1098 (1983) (citing cases)(hereinafter “Kassis”).

⁹ Furthermore, the United States Supreme Court, in *ARC America*, held that state statutes that granted standing to plaintiffs that purchased structures and products containing a price-fixed component – and thus, are analogous to Ms. Lorix – were not preempted by *Illinois Brick*. *California v. ARC America Corp.*, 490 U.S.93, 103, 109 S.Ct. 1661, 1666 (1989). The court of appeals’ current interpretation of Minn. Stat. § 325D.57, however, would have precluded these plaintiffs from recovering.

¹⁰In fact, the relationship between the price fixed product and the product purchased by the *Illinois Brick* plaintiffs is more remote and less direct than the relationship between rubber chemicals and tires. In *Illinois Brick*, the concrete blocks were first incorporated into masonry structures, and then, those were incorporated into buildings purchased by plaintiffs. *Illinois Brick*, 431 U.S. at 726.

The legislative intent in amending the statute is further corroborated by the testimony of the Assistant Attorney General (AAG) who was in charge of the State's antitrust division. (App. 53.) The AAG's testimony to a Senate Judiciary Committee considering Minn. Stat. §325D.57 establishes that the legislature intended the amendment to restore indirect purchaser standing to its pre-*Illinois Brick* levels.

As the AAG indicated, "[i]t is my impression that even by the use of the word indirect here, all you're doing is overcoming the *Illinois Brick* decision." Transcript at 10. Another speaker at the hearing states, "it seems to me you're calling upon the legislature to enact a piece of legislation that overturning [sic] a case . . ." to which the AAG responds:

Mr. Chairman, Senator, I would agree if you took directly and indirectly out of our statute I think that if you read it "any person injured by a violation shall recover three times the actual damages sustained." I think that's our message and we believe it, that absent this federal court case we will be clear and in fact it was clear under our state antitrust law that persons damaged or injured could come in and prove those damages actually sustained. The only purpose of the language directly or indirectly is specifically to deal with this case. Nothing else changes with respect to the law.

Transcript at 11. These statements clearly indicate that the intent of the amendment was to restore Minnesota law on standing back to its pre-*Illinois Brick* status.

The AAG's testimony provides additional evidence of legislative intent that contradicts the court of appeals' interpretation. The AAG explained the intent and

scope of the word “indirect” by referring to a “doctrine[] in the antitrust law” known as the “target area.” Transcript, page 9. Prior to *Illinois Brick*, the “target area” doctrine was a well-known and “widely accepted” test for determining standing under the federal antitrust laws. *See, e.g., Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting).

Justice Brennan’s *Illinois Brick* dissent is instructive in considering the intent of the legislature in amending Minn. Stat. § 325D.57. Confronted with a factual pattern virtually identical to this matter,¹¹ Justice Brennan considered the “target area” test, under which a plaintiff has standing if “the injury to the plaintiff is a reasonably foreseeable consequence of the defendant’s illegal conduct.” *Id.* at 760. Justice Brennan concluded by quoting one of the leading antitrust commentators: “it would indeed be ‘paradoxical to deny recovery to the ultimate consumer while permitting the middleman a windfall recovery.’ *Id.* (quoting P. Areeda, *Antitrust Analysis: Problems, Text, Cases* 75 (2d ed. 1974)).

The “target area” analysis was used by the Superior Court of the District of Columbia to hold that a statute that conferred standing on “any indirect purchaser” to sue for antitrust violations included consumers of products containing price-fixed components. *Holder v. Archer Daniels Midland Co.*, 1998 WL 1469620, at

¹¹ Justice Brennan specifically recognized that “the fact that the price-fixed product in this case (the concrete block) was combined with another product (the buildings) before resale [should not] operate as an absolute bar to recovery.” *Illinois Brick*, 431 U.S. at 759 (Brennan, J., dissenting).

*2. The *Holder* court held that the “target area” test “satisfies defendants’ position that the court should apply common law concepts ‘to limit the universe of person who may recover under the antitrust laws; even where, as here, the statutory language ‘broadly provides a remedy to ‘any person’ injured by an antitrust violation.’”” *Id.* at * 4. In fact, in this case, Ms. Lorix did in fact allege that Respondents’ conspiracy raised the price of the tires she purchased. (App. 2, ¶ 3, App. 9, ¶¶ 34-35.)¹² As the *Holder* court recognized, the “target area” will also satisfy the lower court’s concerns regarding the scope of standing conferred by the statute.

Thus, because the Minnesota legislature intended to restore standing to indirect purchasers as it existed prior to *Illinois Brick*, the “target area” doctrine provides a helpful tool to interpret the scope of Minn. Stat. § 325D.57. In this case, the ultimate consumer – who typically cannot pass on the illegal overcharge – is certainly in the “target area.” It is “reasonably foreseeable” that respondents’ illegal conduct – fixing the price of an ingredient predominantly used in the manufacture of tires – will injure purchasers of those tires.¹³

¹² See also William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 602 (1979) (recognizing that under economic analysis of price-fixing, an increase in the price of a component will increase the price of any product containing the price-fixed component).

¹³Courts in other states that have enacted *Illinois Brick* repealer statutes have noted that price fixing overage charges are ultimately absorbed by the consumer. *Holder*, 1998 WL 146920 at *4 (“Certainly, manufacturers who conspire to keep

Finally, legislative intent is demonstrated by the legislative history of Minn. Stat. § 325D.57. At the same time that Minn. Stat. § 325D.57 was amended to grant standing to indirect purchasers, it was also amended to permit a court to “take any steps necessary to avoid duplicative recovery against a defendant.” Minn. Stat. § 325D.57. This was one of the concerns in *Illinois Brick*, 431 U.S. at 730, and the legislature’s express inclusion of this language demonstrates that the legislature was fully aware of the various issues concerning indirect purchasers.

This language is also relevant because it demonstrates that the legislature considered potential problems arising from a broad application of the statute, and amended the statute to address those concerns.

The legislature could have included the limiting language subsequently interjected by the court of appeals. However, the legislature did *not* include the restrictive language, which is further evidence that the legislature did not intend the statute to be interpreted so narrowly.

The court of appeals’ role is not to legislate solutions to the concerns that it perceives in an unambiguous statute. Prior to *Illinois Brick*, Ms. Lorix would have had standing. Based on the legislative intent described above, it is clear that after

prices of a product at an artificially inflated level can foresee that consumers will pay more for the product down the line, whether it remains in its original form or is combined with other ingredients.”); *Anderson Contracting Inc. v. Bayer AG*, Case No. CL 95959, Polk Cty. District Court at 15 (May 31, 2005 Iowa Dist. Ct.) (“if defendants conspired to fix the prices of EPDM, such price-fixing would undoubtedly have an effect on the price of products purchased by Plaintiff. . . . The cost of the whole bears some relation to the cost of the ingredients or parts.”).

Illinois Brick, the legislature intended its amendment to Minn. Stat. § 325D.57 to restore standing to plaintiffs such as Ms. Lorig.

2. The Legislature Intended Minn. Stat. § 325D.57 to be Remedial.

This Court has acknowledged that the legislature can amend antitrust statutes to “expand the connection between conduct and injury necessary to permit suit.” *Philip Morris*, 551 N.W.2d at 495. This Court specifically recognized that the amendments to Minn. Stat. § 325D.57 create a broad, expansive grant of standing and should be very broadly construed to enhance consumer protection. *Id.* at 495-96. See also *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 892 (Minn. App. 1992), *aff’d*, 500 N.W.2d 788 (Minn. 1993)(stating that consumer-protection statutes are remedial in nature and are liberally construed in favor of protecting consumers.).¹⁴

The language of Minn. Stat. § 325D.57 is as clear and unambiguous as possible: “*any* person, injured directly or *indirectly*” can recover under the Minnesota Antitrust Act (emphasis added). At the time the Legislature was crafting this amendment, it could have chosen more restrictive language, or added limiting phrases, such as the “market participant” language advocated in this matter by the court of appeals; but the Legislature chose the most expansive language possible.

¹⁴ See also, *Toth v. Arason*, 722 N.W.2d 437, 446 (Minn. 2006); *State v. Indus. Tool & Die Works, Inc.*, 220 Minn. 591, 604, 21 N.W.2d 31, 38 (Minn. 1945).

The court of appeals' interpretation – which is far more restrictive than any other court's interpretation of an *Illinois Brick* repealer statute – severely curtails the ability of indirect purchasers to recover their injuries. As a result, it is likely that many conspiracies will not be challenged in the courts. Direct purchasers are often reluctant to challenge the conduct of their suppliers, because they rely upon those same suppliers for the lifeblood of their business. *See, e.g., Comes*, 646 N.W.2d at 450. Direct purchasers can frequently pass along the artificial price increase to the consumer. *Id.* Two prominent theorists have concluded that “passing on monopoly overcharges is not the exception; it is the rule.” Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 276 (1979). Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition and its Practice* 615 (2d ed. 1999).

Although this issue hasn't been analyzed frequently in this state, other courts analyzing indirect purchaser standing have come to the same conclusion. *See, e.g., Freeman Industries v. Eastman Chemical Co.*, 172 S.W.3d 512, 520 (Tenn. 2005) (indirect purchasers frequently are the “real victims of the antitrust violations”); *Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99 at 109 n. 9 (ultimate consumers are often the “truly injured party” because artificial

overcharges are simply passed down the chain of commerce).¹⁵ The court of appeals' narrow interpretation is not consistent with this Court's recognition that this remedial statute should be interpreted broadly.

3. The Court of Appeals' Interpretation Failed to Consider Legislative Intent

The court of appeals, though acknowledging that the statute was amended in "direct response" to the structures on standing imposed in *Illinois Brick*, held that "any person, injured directly or indirectly," should be interpreted as "any person, injured directly or indirectly, and *who is a consumer or competitor in the restrained market*," has standing. The lower court's opinion completely ignores a basic precept of statutory interpretation. This court has said that rules of statutory construction "forbid adding words or meaning to a statute that were intentionally or inadvertently left out." *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001); *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) (noting that courts should not read into statutes restrictions that the

¹⁵ Minnesota courts have also recognized the nature and effect of the artificial price increases. See *Gordon v. Microsoft Corp.*, 2001 WL 366432 at *10 (Minn. Dist. Ct. March 30, 2001), *interlocutory rev. denied*, 645 N.W.2d 393 (Minn. 2002). In *Gordon*, the court certified a class that included purchasers of computers or software into which the price-fixed product had been incorporated. *Id.* at *1. The court agreed with plaintiffs' expert that "the impact of a change in Microsoft's charge to the distribution channel would have the same impact as a comparable change in other costs faced by the distribution channel" and that plaintiffs could in turn show "how the overcharge damaged end users." *Id.* at *11.

legislature did not include). The lower court's opinion adds restrictions to the statute without even discussing – let alone, ascertaining – the legislative intent behind the amendments to indirect purchaser standing in Minn. Stat. § 325D.57.

The court of appeals decided, without support, that the Legislature did not intend to confer standing to plaintiffs who pay an artificially increased price for a product containing price-fixed components. However, the court of appeals cannot substitute its own interpretation in place of the Legislature's unambiguous language, even if the court has reservations about the Legislature's carefully chosen language. “[W]hile [a court] may find the result somewhat troubling . . . [a court's] function is not to second guess, but to give effect to, the legislature's will.” *Anker v. Little*, 541 N.W.2d 333, 338 (Minn. App. 1995); *McNeice v. City of Minneapolis*, 250 Minn. 142, 147, 84 N.W.2d 232, 237 (1957) (a court's interpretation of statutory language cannot “in effect rewrite a statute so as to accomplish a result which might be desirable and at the same time conflict with the expressed will of the legislature”). Nor can the court of appeals assume that the Legislature did not intend the results of its carefully chosen language. “We must presume that the legislature understood the effect of its words and intended the language of the statute to be effective and certain.” *Hans Hagen Homes*, 713 N.W.2d at 923 (citation omitted).

4. The Court of Appeals' Remaining Arguments in Support of its Restrictive Interpretation Are Unavailing.

The court of appeals found that the word “indirectly” is ambiguous, *Lorix*, 720 N.W.2d at 18 (App. 28), even though the Court acknowledged that the word was added to Minnesota Statute §325D.57 as a “direct response” to federal case law that barred indirect purchasers’ claims under the federal antitrust statute. *Id.*; *Keating*, 417 N.W.2d at 136. The court of appeals found that the scope of “indirectly” must be restricted, because the common usage of this word would confer standing upon any consumer who paid an artificially inflated price for a product containing a price-fixed component. *Lorix*, 770 N.W.2d at 18. This result, according to the court of appeals was “absurd,” and required judicial interpretation of a clear and plain statute. *Id.* at 18, (citing *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 494 (Minn. 1997)).

This analysis is erroneous for many reasons. First, “indirectly” is not ambiguous. “A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). “[W]ords and phrases are [to be] construed . . . according to their common and approved usage.” Minn. Stat. § 645.08(1)(2006). “Indirect” is defined as “not direct in relation or connection; . . . circuitous, not leading to aim or result by plainest course or method . . . not resulting directly from

an act or cause but more or less remotely connected with or growing out of it.”

Black’s Law Dictionary 773 (6th ed. 1990).¹⁶

The court of appeals may not agree with the scope of standing resulting from the common usage of the language in the statute, but that disagreement does not create ambiguity. Furthermore, at least one Minnesota District Court has held that the language of Minn. Stat. § 325D.57 is “clear and unambiguous.” *Philip Morris Inc.*, 1995 WL 1937124 at *4. In its review of the *Philip Morris* case, this Court likewise did not find the language of the statute to be ambiguous, and even referred to “indirect purchasers” as “those to whom the costs were *ultimately* passed.” *Philip Morris*, 551 N.W.2d at 497 (Minn. 1996) (emphasis added).¹⁷

¹⁶ Courts frequently look to references such as Black’s Law Dictionary to define contractual or statutory terms. Black’s Law Dictionary has been cited as relevant authority by the Minnesota Supreme Court, *see, e.g., State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006), the Eighth Circuit Court of Appeals, *see, e.g., Rain & Hail Ins. Service, Inc. v. Federal Crop Ins. Corp.*, 426 F.3d 976, 981 (8th Cir. 2005), and the United States Supreme Court, *see, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 732-33, 115 S.Ct. 2407, 2429 (1995), and *Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S.Ct. 1489, 1491 (2005).

¹⁷ Many courts have held that the term “indirectly” is not ambiguous. For example, one court explained that “[t]he terms ‘directly or indirectly’ may be broad, but they are not ambiguous” when analyzing the terms of an insurance contract. *Teague Motor Company, Inc. v. Federated Service Ins. Co.*, 73 Wash.App. 479, 484, 869 P.2d 1130, 1132 (Wash.App., 1994). In fact, courts have repeatedly found that the term “indirectly” is a commonly used word with a generally understood meaning, and is therefore not ambiguous. *Seabury & Smith, Inc. v. Payne Financial Group, Inc.*, 393 F.Supp.2d 1057, 1063 (E.D.Wash. 2005) (finding a non-compete covenant in an employment contract that contained the phrase “directly or indirectly” to be unambiguous). *See, e.g., Giangreco v. United States Life Ins. Co.*, 168 F.Supp.2d 417, 422 (E.D.Pa. 2001) (holding that the “phrase

Second, according to the case cited by the court of appeals, a court can only ignore the plain and unambiguous language of a statute if that language produced an absurd or unreasonable result that utterly departs from the legislature's purpose.¹⁸ *Olson*, 558 N.W.2d at 494. See also, *Mutual Serv. Cas. Ins. Co.*, 659 N.W.2d at 761. The court of appeals failed to satisfy this stringent test.

The allegedly "absurd" result set forth by the lower court – that consumers who paid more for a product due to a conspiracy that fixed the price of a component would have standing under the unambiguous Minnesota Antitrust Act – is not "absurd;" in fact, this is the result that the Legislature sought in its amendment of Minn. Stat. § 325D.57.¹⁹

'caused directly, indirectly, wholly or partly' consists of commonly used and generally understood words and is not ambiguous" when interpreting an insurance contract); *State v. Newton*, 59 Conn.App. 507, 516, 757 A.2d 1140, 1147 (Conn. App. Ct. 2000) (finding a criminal arson statute containing the phrase "either directly or indirectly" to be unambiguous).

¹⁸ As repeatedly acknowledged by this Court, it is a "rare case" in which a court can disregard the plain meaning of a statute. *Hyatt*, 691 N.W.2d at 827, *Mutual Serv. Cas. Ins. Co.*, 541 N.W.2d at 761. In fact, last year this Court recognized that there has only been one case in which an "absurdity analysis" was permitted to override "the plain meaning of a statute." *Hyatt*, 691 N.W.2d at 828. Nonetheless, the court of appeals in this matter relied on this "absurdity analysis."

The *Hyatt* case is very similar to this matter. In *Hyatt*, the respondent relied on *Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997), the same case, and indeed, the *same passage*, relied upon by the lower Court in this matter, as support for the proposition that a statute's plain language should be ignored because it would lead to an absurd result. In *Hyatt*, this Court labeled the *Olson* "holding" as "dicta." *Hyatt*, 691 N.W.2d at 828. Finally, even the *Olson* court found that it could not disregard the plain meaning of the statute. *Olson*, 558 N.W.2d at 495.

¹⁹ The rare instances in which Minnesota courts have found that a statute's language leads to an absurd result are instructive in this case. For example, in

Furthermore, the court of appeals does not even try to establish that the allegedly absurd result is at variance with the “policy of the legislation as a whole.” As discussed *supra*, section VII(B)(1), the Legislature *intended* Minn. Stat. § 325D.57 to restore indirect purchaser standing to its pre-*Illinois Brick* levels. This intent is incompatible with the court of appeals’ restrictive interpretation of the statute.²⁰

C. The Court of Appeals’ Interpretation of the Statute is Contrary to Minnesota Law.

The court of appeals went beyond the unambiguous language of the statute to limit standing to consumers or competitors who were in the restrained market. *Lorix*, 720 N.W.2d at 18-19. This radical restriction is contrary to well-established Minnesota law, and should be reversed.

1. This Court has Granted Standing Under Minn. Stat. § 325D.57 to Plaintiffs Who Were Not a Consumer or Competitor in the Restrained Market.

Wegener v. Commissioner of Revenue, 505 N.W.2d 612, 616 (Minn. 1993), this Court found that the result was “absurd” because it would bar tax assessors “from assessing relators’ property on the basis of its full and true market value . . .,” rendering a large part of a statute inoperative and giving it an unconstitutional effect. *Wegener*, 505 N.W.2d at 616. The alleged “absurdity” of the lower court’s analysis in this case, however, neither renders a statute inoperative, nor affects the constitutionality of the statute.

²⁰ The Court failed to support its interpretation of legislative intent. Such lack of support has been fatal to parties who allege that an interpretation of a statute leads to absurd results. *Anker*, 541 N.W.2d at 338.

In *State by Humphrey v. Philip Morris*, 551 N.W.2d 490 (Minn. 1996), this Court applied traditional Minnesota standing principles instead of federal direct purchaser law to determine antitrust standing under Minn. Stat. § 325D.57.

In that case, Blue Cross and Blue Shield of Minnesota (“BCBSM”) alleged that the defendant tobacco companies conspired to restrain trade “in the market for cigarettes.” (App. 39, ¶91.) To effectuate this conspiracy, the tobacco companies concealed information cigarette’s health risks. (Id. at ¶¶ 30, 92.) *See also, Philip Morris*, 551 N.W.2d at 492. As a result, BCBSM alleged the conspiracy “impacted the health insurance market” in Minnesota (App. 47, ¶ 92) – the market in which BCBSM was a consumer. BCBSM alleged that it paid more to health care providers for health care services as a result of defendant tobacco companies’ actions. (App. 35, ¶ 8(d)), *Philip Morris*, 551 N.W.2d at 492.

It is clear that BCBSM was not a direct purchaser, as this Court subsequently recognized in *Group Health*, 621 N.W.2d at 11. Furthermore, BCBSM was *not* a consumer or competitor in the market for cigarettes. BCBSM purchases health care services. The tobacco companies do not sell health care services. Thus, there were two distinct markets in *Philip Morris*: cigarettes, and health care services.

To the extent that these markets are connected, the connection is less direct than the connection between the markets for rubber chemicals used in tires and tires themselves. BCBSM’s indirect damages were not based on purchases of

defendant's product. This market-skipping scenario requires a very complicated analysis to prove damages for BCBSM; Ms. Lorix, on the other hand, who purchased a product containing a price fixed component, can establish damages by commonly-accepted economic principles. *See, e.g., Gordon*, 2001 WL 366432 at *10-12.

This Court held in *Philip Morris* that the statute's "expansive grant of standing reaches the injuries" suffered by BCBSM. *Philip Morris*, 551 N.W.2d at 495-96. BCBSM is a more remote plaintiff than Ms. Lorix. Nonetheless, in this matter, the court of appeals found that Ms. Lorix did not have standing because her injury was not in the restrained market.²¹

2. The Court of Appeals' Interpretation of the Statute Relied on an Inapposite Federal Case

The court of appeals held that a purchaser *must* be a consumer or competitor in the restrained market to have standing. *Lorix*, 720 N.W.2d at 18-19.

In support of this novel holding, the court relied on *Associated General*

²¹ The court of appeals' interpretation of the statute would have also denied standing to the plaintiff in *Illinois Brick* where the price-fixed product was incorporated into masonry structures and then the masonry structures were incorporated into buildings. *Illinois Brick*, 431 U.S. at 726.

The court of appeals' interpretation is also inconsistent with *Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432 (March 20, 2001, Henn. Cty. Dist Ct.), at *1. In that case, plaintiff alleged that a class of indirect purchasers were injured as a result of Microsoft's monopoly pricing of Windows 98. *Gordon*, 2003 WL 23105552 (March 14, 2003 Henn. Cty. Distr. Ct.) at *1. Significantly, the *Gordon* court certified a class that expressly included purchasers of products that *incorporated* defendant's software. *Id.* at *2 (certifying class consisting of "persons or entities who acquired for their own use, and not for further selling. . . software products in which MS-DOS or Windows has been incorporated in full or in part at any time during the Class Period.").

Contractors v. California State Council of Carpenters, which set out a multi-factor test for *direct* purchaser standing. 459 U.S. 519, 103 S.Ct. 897 (1983)(hereinafter “*A.G.C.*”). The court of appeals’ reliance on *A.G.C.* interpretation is erroneous for several reasons.

a. ***Associated General Contractors is Inapplicable to an Analysis of Indirect Purchaser Standing***

A.G.C. was designed and intended to be applied to determine the standing of plaintiffs under federal law. Thus, *A.G.C.* can be distinguished factually from this matter. In *A.G.C.*, plaintiff unions alleged that the defendant multi-employer trade association and some of its members coerced certain third-parties and some of the association’s members to enter into business relationships with nonunion firms, affecting the trade of some unionized firms and restraining the business activities of the unions. 459 U.S. at 520-21. The Supreme Court held that the plaintiff unions were not persons injured by reason of a violation of §4 of the Clayton Act. *Id.* at 545-46.

The court of appeals brushed away the fact that the *A.G.C.* test was created for analysis of direct purchasers. Other courts, however, have recognized this crucial distinction. For example, in a case involving price fixing of a component of roofing, an Iowa court held:

[*A.G.C.*] is distinguishable from the case at bar because it involved no product, no purchase, and consequently, no price fixing. Rather, *Associated General Contractors* dealt with competitors, not consumers, which were potentially injured from alleged antitrust activity. . . Thus, this Court finds that *Associated General*

Contractors is not as applicable to the present case [involving allegations of price fixing that injured indirect purchasers] as Defendants urge.

Anderson Contracting, Inc. v. Bayer AG, et al., Case No. CV 95959, Polk Cty. District Court (May 31, 2005 Iowa Dist. Court). Similarly, a federal district court sitting in diversity jurisdiction recently held that *A.G.C.* was inapplicable to the issue of standing of purchasers of products containing price-fixed plastic additives in the states of Vermont, Arizona and Tennessee, and that the states' respective "traditional" standing principles were applicable. *D.R. Ward Construction Co. v. Rohm & Haas Co.*, Case No. 2:05-cv-4157-LDD, at 8-21 (E.D.Pa., May 31, 2006).

b. *Associated General Contractors Does Not Require a Plaintiff to be a Consumer or Competitor in the Restrained Market.*

The court of appeals relies on *A.G.C.* to support its *per se* requirement that a purchaser of a product containing a price-fixed component can never have standing. *A.G.C.*'s underlying policies, however, demonstrate that a plaintiff may sue if it would benefit from the competition that is suppressed by Defendants' violation of the antitrust laws. In *A.G.C.*,

the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.

A.G.C., 459 U.S. at 539, 103 S.Ct. at 909. Thus, it was unclear whether greater competition would benefit the plaintiff; if that competition harmed the plaintiff, then that plaintiff would not have standing. In the instant matter, however, it is indisputable that Ms. Lorix would benefit from competition. Unlike the plaintiff union in *A.G.C.*, Ms. Lorix's goal (to pay competitive prices) and the result brought about by greater competition (lower, competitive pricing) are *the same*. In other words, the *A.G.C.* "consumer or competitor" factor relied upon by the court of appeals requires more than merely labeling a plaintiff as a "consumer" or "competitor" – it was designed to ensure that standing would be conferred upon plaintiffs such as Ms. Lorix who suffered an antitrust injury and would benefit from application of the antitrust laws. *See also, Ball Mem. Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (competition always benefits consumers, but may harm competitors). This factor is inapposite in a price-fixing context, because increased competition always leads to lower prices, which will benefit purchaser plaintiffs.

The United States Supreme Court has repeatedly affirmed that the protections afforded by the antitrust laws extend beyond consumers and competitors. In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328 (1948), the Court noted:

[T]he Sherman Act does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The Act is comprehensive in its terms and coverage, protecting all who are

made victims of the forbidden practices by whomever they may be perpetrated.

See also, Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 92 S.Ct 885, 31 L.Ed.2d 184 (1972); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318, 85 S.Ct. 1472, 14 L.Ed.2d 405 (1965); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (same). Indeed, Respondents acknowledged in their Brief to the court of appeals that a plaintiff need not be a consumer or competitor in the restrained market. (Ct. App. Resp. Br. At 15).

Federal Circuit courts are in agreement. *See, e.g. American Ad Mgmt. v. General Tel. Co. of Ca.*, 190 F.3d 1051, 1057 (9th Cir. 1999) (“The Supreme Court has never imposed a ‘consumer or competitor’ test but has instead held the antitrust laws are not so limited. . . . The [*A.G.C.*] Court did not find that fact [that plaintiff was neither a consumer or competitor] in any way dispositive, however, and concluded that antitrust inquiry of unions required case-by-case consideration.”) (citation omitted).

The court of appeals’ *per se* requirement that a plaintiff be a “consumer or competitor” is contrary to many other states’ interpretations of their antitrust acts. Many courts have conferred standing upon consumers who were not consumers or competitors in the restrained market, but who purchased products containing price-fixed components. *See, e.g., Anderson Contracting*, CL 95959 at 15-16 (App. 111.) (“The fact that EPDM was merely one of several ingredients in the products Plaintiff purchased does not lead to the conclusion that Plaintiff is not an indirect

purchaser of EPDM. . . . Plaintiff is clearly an indirect purchaser because it obtained the products containing EPDM through the stream of commerce.”²² Ms. Lorix, like the *Anderson* plaintiff, was in the relevant “stream of commerce.” *See also, Investors Corp.*, Case No. 51011-04 CnC at 3-4 (holding that a Rule 12(b)6 motion was not the appropriate vehicle to resolve these fact-intensive inquiries); *Holder*, 1998 WL 1469620 at *2 (The phrase “any indirect purchaser” does “not distinguish among indirect purchasers based on the number of hands through which the product has passed Nor does the statute distinguish between an indirect purchaser of a product that has changed its form and an indirect purchaser of a product that remains substantially unaltered.”).

Contrary to the court of appeals’ determination, Minn. Stat. § 325D.57 does *not* limit standing based on a hypothetical number of links in the chain of distribution of a price-fixed product. Adopting that court’s novel and unduly restrictive theory would eviscerate the mandate of the Minnesota Legislature to grant broad standing to persons injured by antitrust violations. Further, such a ruling would effectively immunize component/ingredient manufacturers from

²² Justice Brennan, in his dissent to *Illinois Brick*, stated that the amount of increase in price due to an ingredient being price-fixed “is a factual matter to be determined based on the strength of plaintiff’s evidence and is not appropriate to consider on a motion to dismiss for failure to state a claim.” *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 759 (Brennan, J. dissenting) (1977).

antitrust liability, leaving a substantial gap in the remedial coverage of the Minnesota Antitrust Act.²³

c. Legislative Intent Demonstrates that *Associated General Contractors* is Inapposite.

The United States Supreme Court decided *A.G.C.* in 1983, prior to the amendment of Minn. Stat. § 325D.57 in 1984; yet, there is no indication that the legislature intended the amendment of the statute to incorporate *A.G.C.*'s restrictions. The absence of any references to *A.G.C.*, especially in light of the numerous discussions of *Illinois Brick*, is very informative.

The lengthy testimony of the AAG regarding the intent and scope of the amendment to Minn. Stat. § 325D.57 repeatedly references *Illinois Brick*, but never even mentions *A.G.C.*, which had just been decided. No Minnesota case has held that *A.G.C.* is relevant to a determination of legislative intent of the statute. In short, none of the considerations of legislative intent – the history of the statute, the circumstances of its enactment, the AAG's testimony - indicate an intent to incorporate the restrictions on standing embodied in *A.G.C.*. *A.G.C.* is contrary to the legislative intent to restore standing to the pre-*Illinois Brick* levels, and should

²³ Respondents will likely argue that conspirators will still be subject to suit from indirect purchasers who are in the same exact market as the conspirators, but as many courts and commentators have recognized, those types of plaintiffs are far more unlikely to sue the conspirators. *Freeman*, 172 S.W.3d at 520; *Bunker's Glass*, 75 P.3d at 109, n.9; *Comes*, 646 N.W.2d at 450; *Hovenkamp, supra.*; *Harris & Sullivan, supra*, at 276; *Kassis, supra*, at 1116. Furthermore, the court of appeals' reliance on a singular market will certainly engender litigation over the appropriate definition of "restrained market."

not be considered when interpreting the statute's plain and unambiguous language of Minn. Stat. § 325D.57.

d. *Associated General Contractors Cannot Be Applied to Minn. Stat. § 325D.57 Because It Directly Conflicts With Minnesota Law.*

The court of appeals applied *A.G.C.* to determine a procedural issue under state law. Instead of supporting this reliance on federal law, the court of appeals simply stated, “[w]e will look to construction of federal antitrust law when applying the state statute.” *Lorix*, 720 N.W.2d at 17 (App. 26).

Federal antitrust law can be applied to state antitrust law, *unless there is a clear intent* for the state law to depart from the federal law. *Howard v. Minnesota Timberwolves Basketball Ltd.*, 636 N.W.2d 551 (Minn. App. 2001). The court of appeals’ application of federal antitrust law to state antitrust laws - commonly referred to as “harmonization” - is flawed, and should be rejected for at least two reasons.²⁴

First, harmonization is applicable only if the state law and federal law do not conflict. *Howard*, 636 N.W.2d at 556. In this case, where federal law precludes indirect purchasers, and the Minnesota Legislature enacted statutes specifically in response to the federal law, there is an express conflict. *Bunker’s Glass*, 75 P.3d at 106-07.

²⁴Indeed, no court that has fully considered whether harmonization is appropriate has ultimately applied it to this issue. *See, e.g., Bunker’s Glass*, 75 P.3d at 109; *Comes*, 696 N.W.2d at 446-47; *Anderson Contracting*, CL 95959 at 14 (App. 86).

Second, harmonization is applied to substantive issues of antitrust law - so that a corporation operating under federal and state antitrust laws can be assured that its actions are treated consistently under both. *Comes*, 646 N.W.2d at 446; *Bunker's Glass*, 75 P.3d at 109. The issue on appeal – standing – is a procedural issue. *See also*, App. 58 (AAG states, “but here we’re talking about a procedural problem.”) Harmonization is not applied to reconcile procedural issues. *Bunker's Glass*, 75 P.3d at 109.

D. Ms. Lorix Has Standing Under Traditional Minnesota Standing Analysis.

The court of appeals found that Ms. Lorix could not satisfy its restrictive interpretation of Minn. Stat. § 325D.57. The court of appeals failed to consider whether Ms. Lorix had standing under Minnesota’s traditional analysis of standing. *See, Philip Morris*, 1995 WL 1937124 at *2 (applying traditional under traditional Minnesota standing analyses), *D.R. Ward Construction Co. v. Rohm & Haas Co.*, Case No. 2:05-cv-4157-LDD, at 8-21 (E.D.Pa. May 31 2006) (finding traditional state analyses of standing, not the *A.G.C.* analysis, was appropriate method to determine standing in Vermont, Arizona and Tennessee).

1. Ms. Lorix’s Injuries are Inextricably Intertwined with the Injury Inflicted by Respondent.

The court of appeals’ holding is also contrary to the “inextricably intertwined” test, which has been used to determine antitrust standing by the United States Supreme Court, as well as courts in Minnesota.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), plaintiff subscribed to a health care plan purchased by her employer from defendant. The plan provided reimbursement for certain treatments by psychiatrists, but would not reimburse the same treatment from a psychologist unless the treatment was supervised by and billed through a physician. McCready sued under § 1 of the Sherman Act alleging a conspiracy to exclude and boycott psychologists from receiving compensation under the Blue Shield Health plan. The Supreme Court found that McCready's injury was "inextricably intertwined" with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. *Id.* See also, *A.G.C.*, 459 U.S. at 558 (discussing same). The Supreme Court held:

The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489, 97 S.Ct., at 697, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969).

McCready, 457 U.S. at 479.

McCready thus supports the proposition that a plaintiff whose injury is foreseeable and inextricably intertwined with the injury caused to a more direct victim of an antitrust conspiracy nevertheless has standing to sue.²⁵ Like

²⁵ Other courts have also applied this test. As recognized by the Sixth Circuit in *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983), a plaintiff whose injury is "inextricably intertwined" with the injury sought

McCready, Lorix stands in a vertical relationship to other victims in the conspiracy. *McCready*, 457 U.S. at 484. Like McCready, Lorix's injury was foreseeable²⁶ and inextricably intertwined with the injury Respondents sought to inflict. (App. 3, ¶ 3, App. 9, ¶¶ 34-35 (Lorix and the class were injured as a "direct and proximate result" of Respondents' illegal price-fixing agreement. App. 9 at ¶35, 51.)). Like McCready, Lorix suffered an injury that the antitrust laws seek to prevent. Like McCready, Lorix should have standing to seek recovery for those injuries.

The same analysis has been used to confer standing upon antitrust plaintiffs in Minnesota. The *Philip Morris* district court, analyzing the standing of BCBSM, found that "plaintiffs are not outside the chain of injured parties." *Philip Morris*, 1995 WL 1937124, at *3. The court held that the harm suffered by BCBSM, which sold health care services to member groups, was "inextricably intertwined" with harm suffered by smokers. *Philip Morris*, 1995 WL 1937124 at *3-4. Similarly, the harm suffered by Ms. Lorix is inextricably intertwined with the harm suffered by direct purchasers.

to be inflicted on the relevant market has standing. *See also, Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047, 1052 (6th Cir. 1986).

²⁶ *Anderson Contracting*, App. 73, ("[I]f defendants conspired to fix the price of EPDM, such price fixing would undoubtedly have an effect on the price of products purchased by plaintiff.") *See also, Holder*, 1998 WL 146920 at *4.

2. Ms. Lorix Alleged an Injury-In-Fact

In addition to standing conferred by Minn. Stat. § 325D.57, Ms. Lorix has standing because she has alleged an “injury in fact.” *Philip Morris*, 551 N.W.2d at 493. The “injury in fact” analysis has been interpreted expansively to require that a party have more than an abstract concern, and that its injury be more than “speculative” or “fairly can be traced to the challenged action.” *Snyder’s Drug Store, Inc. v. Minnesota State Bd. of Pharmacy*, 301 Minn. 28, 221 N.W.2d 162, 165 (1974).

Ms. Lorix easily satisfies these conditions. She has much more than an abstract concern in this litigation. She is the victim of a price-fixing scheme concocted and implemented by Respondents. (App. 2, ¶3, App. 9, ¶¶ 34, 35.) Unlike every other entity in the distribution chain, Ms. Lorix will bear the brunt of the price increase created by Respondent’s conspiracy. As the end-user, she cannot “pass through” the price increase. Her concern is direct and concrete.

Ms. Lorix’s injury is not speculative. *Epland v. Meade*, 564 N.W.2d 203, 209 (Minn. 1997). *See Snyder’s Drug Stores, Inc.*, 301 Minn. at 32, 221 N.W.2d at 165 (holding that “injury in fact” is the test for standing.) The Minnesota Court of Appeals noted, “[u]nder the standing requirement, a party must show ‘that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant’ and that the injury ‘fairly can be traced

to the challenged action' and 'is likely to be redressed by a favorable decision.'" *In re Crown Coco*, 458 N.W.2d 132, 135 (Minn. App. 1990) (citations omitted).

Lorix alleged that she suffered injury as a result of Respondent' price-fixing. (App. 3, ¶3.) ("As a direct and proximate result of the [Respondent' price-fixing] agreement, consumers, such as Plaintiff, have paid more for tires than they otherwise would have in the absence of the anticompetitive agreement").²⁷ This language also establishes the connection between Lorix's injury and Respondent's "challenged action." *See also*, App. 9, ¶¶ 34-35. Indeed, Lorix's injuries flow inexorably from Respondent' price-fixing scheme.

Significantly, at least one Minnesota district court has continued to use the "injury in fact" analysis to find that antitrust plaintiffs have standing, long after *A.G.C.* was decided. *See, e.g., Philip Morris*, 1995 WL 1937124 at *2-3. There is no reason to diverge from this analysis.

The *Philip Morris* court found the tobacco companies' representations about tobacco increased the cost of health services that Blue Cross purchased from health care providers. *Id.* at *3. As such, Blue Cross was a "link in the chain of interacting parties", and suffered injury in fact. *Id.*

²⁷ *See also*, Landes & Posner, *supra* at III(A)(1), (recognizing that consumer will pay more for a product if price of a product's component is increased). *See also, Anderson Contracting*, at App. 87) ("The cost of the whole bears some relation to the cost of the [price-fixed] ingredients or parts.").

Lorix stands in an analogous position. In this matter, Respondents, like the tobacco companies in *Philip Morris*, took actions that increased the price that Ms. Lorix paid for a product. Thus, as in *Philip Morris*, standing is appropriate because Ms. Lorix suffered an “injury in fact.”

E. The Court of Appeals Misapplied *Associated General Contractors*

1. *Associated General Contractors* Is Not A “Single Factor” Test

Under the best of circumstances, the multi-factor test set forth in *A.G.C.* is a complex judicial creation. Indeed, courts disagree on how many factors comprise the *A.G.C.* analysis.²⁸ The lone Minnesota District Court to apply *A.G.C.*, *Gutzwiller v. Visa U.S.A., Inc.*, 2004 WL 2114991 (Minn. Dist. Ct. Sept. 15, 2004), identified five factors,²⁹ and analyzed three of them. *Id.* at * 3-4.³⁰ However, no court has ever attempted to boil this complex, interrelated test down to a single

²⁸ Cf., *Knowles*, 2004 WL 2475284 at *5 (identifying seven factors), *Gutzwiller*, 2004 WL 2114991, at *5 (identifying five factors), with *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983)(identifying six factors).

²⁹The factors were: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market; (2) whether the injury alleged is a direct, first-hand impact of the restraint alleged; (3) whether there are more directly injured plaintiff with motivation to sue; (4) whether the damages claims are speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. 459 U.S. 519, 538-45, 103 S.Ct. 897, 74 L.Ed.2d 723.

³⁰The *Gutzwiller* court did not analyze whether the injury was direct, and whether there are more directly injured plaintiffs with motivation to sue.

factor. “These factors are to be balanced; no single factor is conclusive.” *Bodie-Ricket & Assocs. v. Mars, Inc.*, 957 F.2d 287, 290 (6th Cir. 1992) (citing *Peck v. General Motors Corp.*, 894 F.2d 844, 846 (6th Cir. 1990).) Indeed, even *A.G.C.* itself recognizes that no single factor is determinative for standing. *A.G.C.* 459 U.S. at 536-37. Appellants have not been able to locate any cases in which antitrust standing was reduced to an analysis of a single *A.G.C.* factor.

Nonetheless, perhaps recognizing that the *A.G.C.* test is inapposite because it was intended to be applied only against direct purchasers, the court of appeals truncated the *A.G.C.* test into a single factor: whether plaintiff is a consumer or competitor in the affected market, *Lorix*, 720 N.W.2d at 18-19, even though courts have specifically noted that a plaintiff's status in the market is *not* dispositive. “The standing inquiry turns on a balance of several factors, not simply plaintiff's status in the market or role as an economic fulcrum.” *Fallis v. Pendleton Woolen Mills, Inc.* 866 F.2d 209, 211 (6th Cir. 1989). The court of appeals, however, provided no guidance on how the *A.G.C.* factors should be applied, or how they should be weighed.

2. A Correct Application of the *Associated General Contractors* Factors Confers Standing Upon Ms. Lorix

Ms. Lorix satisfies each of the *A.G.C.* factors (which were not addressed by the court of appeals, even though fully briefed by the parties), and thus has standing.

a. The Court of Appeals Should Have Analyzed the “Causal Connection” between Ms. Lorix’s Injury and Respondents’ Conspiracy

The *A.G.C.* test was created by federal courts to determine standing under federal antitrust laws. In that context, the “consumer or competitor” factor used by the court of appeals may have relevance to analyzing standing of a party in a market that is horizontal to the restrained market. As the *A.G.C.* court recognized, it was unclear whether the plaintiff union had been injured, and even if the union was injured, it was unclear whether the union would benefit from application of the antitrust laws *A.G.C.* 459 U.S. at 539.

However, the concerns identified by *A.G.C.* are largely immaterial to an analysis of the standing of a downstream indirect purchaser under an *Illinois Brick* repealer statute. There is no doubt that these downstream indirect purchasers have been injured, and that this is the type of injury that the antitrust laws were designed to prevent. *Anderson Contracting Inc.*, at 15 (App. 87) (“if defendants conspired to fix the prices of EPDM, such price-fixing would undoubtedly have an effect on the price of products [containing EPDM] purchased by Plaintiff. . . . The cost of the whole bears some relation to the cost of the ingredients or parts.”).

Thus, instead of analyzing the “competitor or consumer” factor, some courts recently considered the “causal connection” between plaintiffs’ injury and the defendants’ acts. The “causal connection” analysis is more appropriate than the “consumer or competitor” analysis used by the court of appeals, because causal

connection is more akin to the definition of “antitrust injury” set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (“Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes Respondents’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be ‘the type of loss that the claimed violations . . . would be likely to cause.’”) (citation omitted).

The “causal connection” factor is expressly recognized in *A.G.C.*, 459 U.S. at 537, and has been recently applied in a variety of courts. One court recently held that an antitrust plaintiff who purchased a product containing a price fixed component satisfied this factor because the price increase could have raised the plaintiff’s price. *Investors Corp.* at 3. Courts have found that plaintiffs who didn’t purchase a product containing a price-fixed product satisfied this factor. For example, a plaintiff who alleged damages resulting from her purchase of retail goods whose price was increased by an alleged tying agreement of credit and debit cards had pleaded a causal connection. *Knowles v. Visa, U.S.A., Inc.*, No. Civ. A. CV-03-707, 2004 WL 2475284 at *5 (Me. Super. Ct. Oct. 20, 2004). *See also*, *Visa*, No. 03 cv 011323, 2005 WL 1403769, at *4 (Wis. Circ. Ct. Feb. 8, 2005).

It is clear that Ms. Lorix has established the necessary “causal connection.” Ms. Lorix alleged that she paid an artificially inflated price for her tires. (App. 2,

¶3.) She alleged that her injury was a “direct and proximate result of [respondents’] conspiracy.” (App. 9, ¶¶ 35, 51.) Ms. Lorix’s injury reflects the anticompetitive effects of the violation: the illegal conspiracy raised a component price which increased the price of the finished product. This is precisely the type of injury that the antitrust laws were designed to prevent.

b. Ms. Lorix’s Damages are Neither Too Complex Nor Duplicative

The court of appeals failed to analyze whether the damages suffered by Ms. Lorix are so complex or duplicative that she should be denied standing even though she was injured. Courts confronting this issue have held that concerns about complexity are not as fearsome as once believed. For example, the *Comes* court held that “[c]omplexity is not a foreign concept in the world of antitrust. . . . We also note there is an absence of cases in which the court was faced with the impossible task of apportioning damages.” *Comes*, 646 N.W.2d at 451 (citation omitted).³¹ The Arizona Supreme Court recently held that “our courts can resolve the complex damages issues that may arise.” *Bunker’s Glass*, 75 P.3d at 109. Ms. Lorix shares the same confidence in the abilities of Minnesota courts, and, based on Minn. Stat. § 325D.57, it appears that the Minnesota Legislature is

³¹ Furthermore, a United States House of Representatives Report (H.R. 11942) held that the *Illinois Brick* Court overstated the complexity of apportionment. Kassis, *supra*. at 1116 (1983) (citing H.R.Rep. No. 9501387 at 13) (1978)(other internal citations omitted).

similarly confident in the courts' abilities.³²

Furthermore, Respondents are not in any danger of paying out multiple recovery. Minn. Stat. § 325D.57 specifically authorizes a court to take any steps necessary to avoid “duplicative recovery against a defendant.” Minn. Stat. § 325D.57 (2005).³³ See also, *Bunker's Glass*, 75 P.3d at 108 (listing other state statutes that delegate duplicative damage issues to their courts). In fact, there has been no decision in which a defendant has paid out multiple recovery. *Comes*, 646 N.W.2d at 45.

c. Ms. Lorix's Damages Are Not Speculative

The court of appeals also failed to address the nature of the damages suffered by Ms. Lorix. This factor is not focused on whether damages are expensive or difficult to measure – that is true in any antitrust action – but rather whether the *existence of damage* is speculative. For example, in *A.G.C.*, the Court questioned whether the plaintiff union suffered *any* damages apart from its members, noting that the *A.G.C.* complaint lacked allegations that the

³² See also, *Gordon*, 2001 WL 366432 at *3 (“In enforcing various trade regulation statutes, Minnesota courts have construed remedial statutes broadly and rejected arguments based on complexity alone”) (citations omitted).

³³ Commentators have also found that this “danger” is purely illusory. See, Robert H. Lande, *Multiple Enforcers and Multiple Remedies: Why Antitrust Damages Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329, 334 (2004) (multiple recovery “is only a theoretical construct that has never occurred in the real world” and he could not find “even a single case where a cartel’s total payouts have ever exceeded three times the damages involved”).

complained-of harm was suffered by the plaintiffs. 459 U.S. at 543. Here, by contrast, the Complaint expressly alleges that Ms. Lorix paid more for her tires as a result of Respondents' conspiracy. (App. 2 at ¶ 3, App. 9 at ¶ 35). Ms. Lorix, as the ultimate consumer, absorbed the overcharge. Her damages are not speculative; they are real and concrete.³⁴

VII. CONCLUSION

Clearly, the ultimate consumer – the purchaser that actually uses the price-fixed product – is a foreseeable victim of a price-fixing conspiracy. Ms. Lorix paid an artificially inflated price for her tires as a result of Respondents' conspiracy. Yet the court of appeals interpretation of the statute would deny her

³⁴Ample authority demonstrates that speculativeness of damages is not a matter to be resolved on a motion to dismiss, particularly in antitrust cases where the uncertainty of the amount of damages is borne by the violator. *See, e.g., U.S. Network Serv., Inc. v. Frontier Comm., Inc.*, 115 F. Supp. 2d 353 (W.D.N.Y. 2000). The Supreme Court stated in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251j, 66 S. Ct. 574 (1946), that although a jury is not allowed to base its damages assessment on speculation or guesswork, it is entitled to:

make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. The most elementary conceptions of justice require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Id. at 264 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931)). Thus, just as courts have recognized that fears of complexity are misdirected, fears of "speculative damages" – especially at a pretrial stage, where no evidence or expert testimony has been presented – are similarly misdirected. *Bunkers Glass*, 75 P.3d at 108.

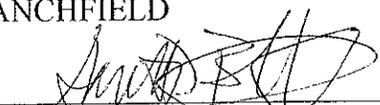
standing. This flawed and erroneous interpretation would permit a significant number of price-fixing conspirators – especially those companies that sell commodity products that are incorporated into consumer goods – to effect their conspiracies without legal challenge. This crippling interpretation is inconsistent with the remedial purpose of Minn. Stat. § 325D.57 and the Minnesota Antitrust Act.

The court of appeals' interpretation of Minn. Stat. § 325D.57 ignores the plain and unambiguous language of the statute, contravenes the clear legislative intent, and contradicts well-established Minnesota case law on standing. For the reasons stated above, Ms. Lorix respectfully requests that this Court reverse the Opinion from which the appeal is taken, and remand this matter to the District Court for further proceedings consistent with the relief sought in this appeal.

Respectfully submitted

Dated: December 14 2006

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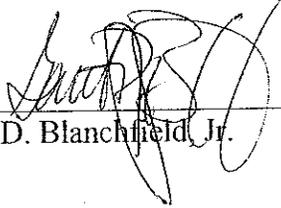
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CERTIFICATE OF COMPLIANCE

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 12,544 words. The brief was prepared using Corel WordPerfect 12.0.



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