

NO. A10-215

State of Minnesota  
**In Supreme Court**

OFFICE OF  
APPELLATE COURTS

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Gregory Curtis, et al., individually and  
on behalf of all others similarly situated,

*Respondents,*

vs.

Altria Group, Inc.,

*Dismissed Defendant,*

and

Philip Morris, Inc.,

*Appellant.*

**BRIEF OF AMICUS CURIAE**  
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## INTRODUCTION

The Chamber of Commerce of the United States of America (“the Chamber”) is the world’s largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector and from every region of the country.<sup>1</sup> An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.<sup>2</sup>

The Court of Appeals’ decision to uphold class certification threatens to strip the ability of companies that do business in Minnesota to fairly defend themselves against consumer-fraud allegations in class-action cases. In particular, the Court of Appeals’ ruling erroneously diluted the elements of the Minnesota Consumer Fraud Act (“CFA”), Minn. Stat. §§ 325F.68-.70, by allowing causation to be presumed on a classwide basis in proposed class actions where the plaintiff alleges that the defendant deceived the public through an “extensive” marketing campaign. If left undisturbed, the Court of Appeals’ ruling will encourage the filing of abusive class actions against Minnesota businesses and ultimately punish Minnesota consumers by making them pay higher prices for consumer

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<sup>1</sup> The Minnesota Chamber of Commerce was unable to file a timely motion for leave to appear as *amicus curiae* in this matter but endorses the arguments set forth herein, as set forth in the attached letter from David C. Olson.

<sup>2</sup> In conformity with Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, counsel for *amicus* state that they are not counsel in this case for any party; that they authored this brief in whole; and, that no person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

products. For these reasons, and those set forth in appellant's brief, this Court should reverse the Court of Appeals' order.

*First*, the Court of Appeals erred in holding that the Minnesota CFA allows an inference of causation where a defendant allegedly engaged in "extensive marketing" that was deceptive. Minnesota has never recognized such a presumption; nor should it. As nearly every other jurisdiction to consider the question has held, such a "fraud on the market" theory of causation makes no sense in the context of consumer products because people buy products for innumerable reasons, many of which have nothing to do with a defendant's marketing efforts. Indeed, the factual record in this case refutes any inference of causation because some of the plaintiffs at issue admitted that they smoke "Light" cigarettes because they prefer the taste – not because of advertising – and that they continued to buy "Lights" long after becoming aware of Philip Morris USA Inc.'s ("PMUSA's") alleged misrepresentations.

*Second*, the Court of Appeals' decision poses a significant threat to Minnesota businesses and consumers by substantially lowering the bar for class certification with respect to any product that was "mass marketed." As prior experiences have shown, lowering the bar to class certification will unleash a flood of class-action abuse, forcing settlements of frivolous suits and significantly raising the cost of doing business in Minnesota (a cost that will ultimately be borne by Minnesota consumers). Moreover, because the Court of Appeals' ruling is directed at mass marketing, its effects are likely to affect companies that offer everyday products and services used by millions of Minnesotans (many of whom cannot afford an additional litigation "tax" on basic

necessities simply because they are “extensive[ly]” marketed). In the end, the only “winners” under such a regime would be the plaintiffs’ bar, who stand to collect greater fees by bringing class actions involving “mass marketed” goods.

For these reasons, if the Court affirms the reinstatement of plaintiffs’ claims, it should reverse the Court of Appeals’ ruling on class certification and remand with instructions to decertify the class.

### **BACKGROUND**

Plaintiffs brought a class-action suit against defendants under the Minnesota CFA, alleging that defendants engaged in deception by implying in their advertisements that light cigarettes were safer than full-flavored cigarettes when, in fact, smokers of Marlboro Lights received the same amount of tar and nicotine as they would have received if they had smoked full-flavored cigarettes.<sup>3</sup>

The trial court initially denied certification of plaintiffs’ proposed class on the ground that adjudication of each class member’s claim would necessarily require an individual inquiry into at least three issues: (1) whether the class member received what was allegedly promised – i.e., less tar and nicotine – and was thereby injured by the defendant’s alleged misrepresentation; (2) whether the class member was deceived – i.e., believed that light cigarettes would deliver less tar and nicotine and were safer; and (3) whether this alleged “deception” caused the class member to purchase Marlboro Lights. *Curtis v. Philip Morris Cos. Inc.*, No. PI 01-018042, at 8, 10-11 (Minn. Dist. Ct. Jan. 16,

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<sup>3</sup> As appellant notes in its brief, the allegedly deceptive “light” descriptors are no longer used.

2004) (Addendum (“Add.”) 8, 10-11). The trial court reversed its ruling on rehearing and certified a class, agreeing with plaintiffs that “the lengthy course of misrepresentations concerning ‘light’ cigarettes, which affected a large number of Minnesota cigarette consumers,” allows the court to presume reliance for class-certification purposes. *Id.* at 3-4; Add. 18-20 (concluding that “it is probable that no smoker received the promised benefit of lowered tar and nicotine every time he or she smoked a Marlboro Lights cigarette”) (citation omitted). The trial court subsequently granted partial summary judgment to defendants on plaintiffs’ CFA claim and dismissed their unjust-enrichment claim. *Curtis v. Altria Grp., Inc. & Philip Morris, Inc.*, No. 27-CV-01-18042 (Minn. Dist. Ct. Oct. 21, 2009). Plaintiffs filed an appeal challenging the grant of summary judgment and dismissal of the unjust-enrichment claim, and defendants filed a cross-appeal challenging the class-certification decision.

The Court of Appeals of Minnesota reversed the trial court’s order granting summary judgment to Philip Morris on the CFA claim, affirmed dismissal of the unjust-enrichment claim, and upheld the ruling certifying a class. *See Curtis v. Altria Grp., Inc.*, 792 N.W.2d 836 (Minn. Ct. App. 2010). In its opinion, the Court of Appeals conceded that “[c]ausation is an element of a claim” under Minnesota’s CFA, and that a showing of individual reliance is generally required to prove the causation element in CFA actions. *Id.* at 857. Nonetheless, it found that this is not true in cases involving mass marketing of a product. *Id.* Citing this Court’s opinion in *Group Health Plan, Inc. v. Philip Morris Inc.*, the Court of Appeals held that, in a case in which “damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of

consumers,” the showing “that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of defendants’ products.” *Id.* (quoting *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 14-15 (Minn. 2001)). Instead, causation may be established in mass-advertising cases through “direct or circumstantial evidence that the district court determines is relevant and probative.” *Id.* (internal quotation marks and citation omitted).

In this case, the Court of Appeals concluded, “[i]t can be inferred from Philip Morris’s extensive marketing of Lights as a healthier alternative to traditional cigarettes that Philip Morris intended to convince consumers that its product was something other than Philip Morris allegedly knew it to be,” and that “all consumers of Lights were led by false advertising to believe that Lights were healthier than regular cigarettes when they were not.” *Id.* at 858-59. Moreover, while the Court of Appeals acknowledged that “Philip Morris has raised some questions that are unique to individual smokers,” it found that Philip Morris “has not . . . negated the common sense inference that its massive advertising campaign was successful in persuading consumers that Lights were healthier than regular cigarettes.” *Id.* at 859. As a result, the Court of Appeals affirmed the order certifying a class. *Id.*

## **ARGUMENT**

### **I. THE COURT OF APPEALS MISAPPLIED MINNESOTA LAW BY ADOPTING AN INFERENCE OF CAUSATION.**

The Court of Appeals erred in attempting to facilitate class certification by inventing an “inference” of causation any time a defendant engages in “extensive

marketing” of a product. There is no basis in Minnesota law for such an inference – and even if there were, it certainly would not apply where, as here, there is evidence in the record that many proposed class members *were not affected* by the defendant’s alleged misstatements.

It is beyond dispute that Minnesota’s CFA requires a plaintiff to demonstrate a “causal nexus” between a defendant’s allegedly deceptive advertising of a consumer product and the plaintiff’s alleged injury. *Grp. Health*, 621 N.W.2d at 13. As this Court has recognized, there must be proof that each plaintiff (and each member of the class) relied on the allegedly deceptive advertising in buying the product – and that he or she was harmed thereby. *Id.* (“where . . . the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes”).

The Court of Appeals acknowledged this precedent but held that causation could be “inferred” on a classwide basis in this case because of “Philip Morris’s extensive marketing of Lights,” which plaintiffs allege was “intended to convince consumers that its product was something” different from what it actually was. *Curtis*, 792 N.W.2d at 859. According to the Court of Appeals, there is a “commonsense inference that [Philip Morris’s] massive advertising campaign was successful in persuading consumers that Lights were healthier than regular cigarettes,” and the question of causation will thus be “common to all members of the class.” *Id.* In reaching this conclusion, the Court of

Appeals expressed its belief that this Court authorized such an “inference” in *Group Health*, citing its statement that where ““damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers,”” proof of a “causal nexus need not include direct evidence of reliance by individual consumers of defendants’ products.”” *Id.* at 857 (quoting *Grp. Health*, 621 N.W.2d at 14-15).

But in suggesting that “direct evidence of reliance” might be excused in certain circumstances, *Group Health* did not authorize a presumption or inference of causation any time a defendant engages in mass advertising. To the contrary, *Group Health* was circumspect in describing the mode of proof that would be competent to prove causation, observing that it “would be inappropriate in the context of a Rule 12 motion to dismiss to delineate in detail what proof is necessary for plaintiffs to recover on these particular claims,” and “declin[ing] to answer in any greater detail based solely on the pleadings what manner of proof will be necessary to establish” causation in the case before it. 621 N.W.2d at 14-15. Rather, *Group Health* only said that, in certain cases involving allegations of “a lengthy course of prohibited conduct that affected a large number of consumers,” evidence of reliance need not be “direct,” and “circumstantial” evidence might suffice instead. *See id.* As the decision itself articulated, the most this statement meant was that, in appropriate cases, a plaintiff *might* be able to satisfy his or her burden of proof on causation through “indirect” evidence like consumer surveys. *Id.* at 14 &

n.9.<sup>4</sup> This is a far cry from a rule that mere allegations of a “lengthy course” of conduct would give rise to a *presumption* that causation is established. Such a rule – erroneously adopted by the Court of Appeals in this case – would fundamentally alter the burden of proof and could not have been intended absent an express statement to that effect in the *Group Health* decision.

Other courts applying *Group Health* have reached the same conclusion. In *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917 (8th Cir. 2004), for example, the plaintiff alleged that the defendants misrepresented the safety of smokeless tobacco through the media for 40 years, resulting in her husband’s death. *Id.* at 923. But instead of adducing evidence that her husband ever relied on any representations, the plaintiff argued that under *Group Health*, she was entitled to a presumption of causation because she alleged “a lengthy course of prohibited conduct that affected a large number of consumers.” *Id.* at 927 (quoting *Grp. Health*, 621 N.W.2d at 14). The U.S. Court of Appeals for the Eighth Circuit disagreed. It explained that the plaintiff still had the burden of providing “some proof” – circumstantial or otherwise – that the defendants’ alleged conduct “caused consumers to continue using smokeless tobacco and to sustain physical injury in reliance on the defendants’ conduct.” *Id.* Because she had not presented any such evidence, no

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<sup>4</sup> Moreover, for the reasons set forth in appellant’s brief, it is far from clear that *Group Health* contemplated the use of “indirect” evidence in *class actions* like this one. *Group Health* itself was not a class action and did not pose the same risk (present here and in many other class actions) that uninjured persons would receive compensation solely by virtue of their membership in an improperly certified class.

presumption could save her claim.<sup>5</sup> The Court of Appeals should have recognized the same principle here.

But even if *Group Health* did support a finding that causation can be presumed in some cases, the Court of Appeals would have still erred in holding that such an inference applies where, as here, there is evidence that many plaintiffs' product purchases were not affected by the alleged misrepresentations at issue. The record in this case clearly establishes that PMUSA's advertising was not the sole – or even primary – reason that consumers chose to smoke Marlboro Lights. (*See, e.g.*, Br. of Appellant Philip Morris USA Inc. at 27-29.) Among other things, a number of the class representatives have testified that they smoke light cigarettes because they prefer the taste – and admitted that they continue to smoke light cigarettes today, irrespective of what they now think of PMUSA's advertising. Further, since PMUSA began to place information on packages of light cigarettes advising about the possibility that smokers may not receive less tar and

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<sup>5</sup> The Court of Appeals also erred in relying on *Peterson v. BASF Corp.*, 675 N.W.2d 57, 73 (Minn. 2004), for the proposition that a “class member[’s] awareness of advertisements may provide a sufficient causal nexus” where “the impact of the manufacturer’s conduct on consumers was designed by the manufacturer to be the same for all members of the class.” *Curtis*, 792 N.W.2d at 858. As the Court of Appeals admits, *Peterson* did not address the propriety of class certification; nor was the question of factual predominance challenged on appeal by the defendant in that case. *See id.* at 858 n.6. In addition, *Peterson* involved the New Jersey Consumer Fraud Act, not the Minnesota Consumer Fraud Act – and therefore is irrelevant to the showing of causation required under Minnesota law. Finally, *Peterson* is not even consistent with New Jersey law. New Jersey courts have explicitly held that New Jersey’s CFA requires individualized proof that each plaintiff – or proposed class member – was affected by the defendant’s alleged misstatements. *See, e.g.*, *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1087-88 (N.J. 2007); *Kleinman v. Merck & Co.*, Nos. ATL-L-3954-04, ATL-L-24-05, 2009 WL 699939 (N.J. Super. Ct. Law Div. Mar. 17, 2009).

nicotine, the relative market share and price of light cigarettes both nationally and in Minnesota has actually increased. (*Id.* at 28-29.)

As other courts have recognized in similar circumstances, “presumptions” like the one adopted by the Court of Appeals here cannot stand in the face of contrary factual evidence. For example, in *In re Neurontin Marketing, Sales Practices & Products Liability Litigation*, 618 F. Supp. 2d 96, 112 (D. Mass. 2009), the court refused to apply a presumption of causation in a case involving prescription drug manufacturers’ alleged off-label marketing of certain drugs. There, defendants moved to dismiss plaintiffs’ fraud claims on grounds that “plaintiffs fail[ed] to allege the connection, if any, between the physician’s decision to use Neurontin as a treatment for an off-label use with the extensive marketing or advertising campaigns alleged.” *Id.* at 111. In response, plaintiffs argued that “defendants’ off-label marketing efforts were so pervasive that even doctors who were not contacted directly by defendants were influenced in their prescription habits by the marketing campaign’s misrepresentations about [the drug’s] safety and effectiveness for off-label uses.” *Id.* The court disagreed, noting that plaintiffs’ “fraud on the market” theory is inapplicable in consumer cases involving products – like prescription drugs – that consumers purchase for a variety of reasons. According to the court, “[n]otwithstanding the alleged pervasive promotions, the prescription drug industry is too dissimilar from the securities market to support applying a ‘fraud on the market’ theory to establish a rebuttable presumption that physicians relied on a national drug marketing campaign.” *Id.* 112. Instead, plaintiffs were required to plead and prove that the defendants’ alleged misstatements caused each plaintiff’s use of the drug. *Id.*;

*see also In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1054 (N.D. Cal. 2009) (a “presumption of reliance does not work in non-efficient markets like prescription drug ‘markets’ (if individual patients purchasing drugs prescribed by individual doctors for personalized conditions can even constitute a ‘market’)” because doctors prescribe – and patients take – drugs for a variety of reasons based on different sources of information).

Courts have taken a similar approach – and refused to apply a presumption of reliance or causation – in cases involving other mass-marketed consumer products and services such as shampoo, *see Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 624 (S.D. Cal. 2007) (court could not presume reliance on allegedly deceptive advertising campaign because different consumers were exposed to different advertisements and statements); cars, *see Osborne v. Subaru of America, Inc.*, 198 Cal. App. 3d 646, 661, 243 Cal. Rptr. 815 (Cal. Ct. App. 1988) (no classwide presumption of reliance on national advertising campaign where evidence showed that some plaintiffs never saw any advertisements); credit cards, *Endres v. Wells Fargo Bank*, No. C 06-7019 PJH, 2008 U.S. Dist. LEXIS 12159, at \*22 (N.D. Cal. Feb 6, 2008) (even if plaintiffs had been exposed to the same statements about account overdraft fees, “it would not logically follow that they would have relied on such statements in opening their credit card accounts and in choosing overdraft protection”); and computer software, *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002) (while defendant “wanted purchasers to rely on its advertisements and other representations about its software products, as most marketers of any product would . . . there is no evidence that purchasers *actually did*

rely on [defendant's] statements so uniformly that common issues of reliance predominate over individual issues").<sup>6</sup>

In short, consumers buy products subject to mass advertising – from prescription drugs to computer software to cigarettes – for a variety of reasons, many of which have absolutely nothing to do with the statements made in the manufacturer's advertisements. As a result, it would be illogical to assume that, just because a manufacturer engaged in a nationwide marketing campaign, every single person who purchased that manufacturer's product did so because of that campaign – or would have made a different purchasing decision but for the campaign. Instead, whether each purchaser can prove causation will almost always depend on the specific circumstances of his or her purchase and the importance he or she placed on the alleged misstatements at issue, individualized issues that cannot be resolved in the context of a class action.

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<sup>6</sup> Consumer-fraud actions involving the sale of tobacco products are no different. As courts have recognized, consumers buy cigarettes for a variety of reasons, and there is thus no way to prove on a classwide basis that a cigarette manufacturer's alleged misstatements caused consumers to purchase the product. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223-225 (2d Cir. 2008) (refusing to adopt a presumption that all "plaintiffs relied upon the public's general sense that Lights were healthier than full-flavored cigarettes" because consumers "could have elected to purchase . . . for any number of [non-health-related] reasons, including a preference for the taste and a feeling that smoking Lights was 'cool'"), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *In re Light Cigarettes Mktg. & Sales Practices Litig.*, 271 F.R.D. 402, 417 (D. Me. 2010) (refusing to apply a presumption of reliance in proposed tobacco class action because "cigarette[] smokers were provided with a variety of information . . . in the media about the health risks associated with smoking light cigarettes," making it inappropriate to assume that all smokers were influenced by the manufacturer's alleged misstatements).

## **II. THE COURT OF APPEALS' DECISION WILL HAVE DETRIMENTAL CONSEQUENCES FOR BUSINESS AND THE PUBLIC AT LARGE.**

The Court of Appeals' decision also has troubling policy implications. By watering down the Minnesota CFA's causation requirement in cases involving mass marketing, the decision below stands to promote frivolous litigation, with unfairly detrimental effects on a broad range of businesses and their customers. Any time any business undertakes a mass marketing plan for its products (whether the product is cereal, insurance or cellular telephone service), plaintiffs' attorneys will have a new incentive to bring class actions over alleged infractions of the Minnesota CFA regardless of whether they actually deceive or affect any consumers. Such suits will increase the cost of doing business in Minnesota and raise consumer prices on widely used items, with no corresponding public-policy benefit.

Consumer-fraud statutes serve important functions, but they are also prone to abuse, particularly in the class-action context. Indeed, the "problem of consumer class action abuse has been well documented." Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs To Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 46 (2006). Abuse is common because the potential rewards are substantial. By virtue of their scale – especially in the context of mass-marketed products – consumer class actions often threaten "millions (or billions) of dollars in liability." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 57 (2005). Moreover, like Minnesota's CFA, many state consumer-fraud statutes offer attorneys' fees, contributing

to the incentive for lawyers “to bring non-meritorious claims.” Debra Pogrud Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney’s Fees Provisions in Consumer Fraud Statutes*, 56 Clev. St. L. Rev. 483, 487 (2008).

Lowering the bar for proving causation exacerbates these risks in two ways. First, it “fuel[s] class action abuse” by allowing classes to be certified in circumstances where the plaintiffs are not similarly situated. Scheuerman, *supra*, at 10. Second, it creates limitless liability for defendants by creating exposure without regard to whether their alleged misconduct had any effect on consumers. Linda S. Woolf, *Reliance Requirements in Consumer Fraud Actions: Courts Continue To Struggle To Strike the Proper Balance*, 60 Fed’n Def. & Corp. Couns. 81, 83 (2009) (reduced causation burdens encourage “frivolous lawsuits by fee-seeking attorneys” willing to “pounce[] upon technical and harmless violations” of the law). For these reasons, a number of commentators have observed that a robust causation requirement is an important “bulwark against a flood of fee driven lawsuits.” *Id.* at 90. So, too, have many courts, in a broad range of jurisdictions. As the highest court of West Virginia observed, a meaningful causation requirement is needed to prevent the development of “nuisance lawsuits which impede commerce.” *White v. Wyeth*, 705 S.E.2d 828, 837 (W. Va. 2010).

The commercial effects of relaxed causation standards – and the resulting uptick in class actions – cannot be overstated. It is widely recognized that “[c]lass actions place tremendous pressure on businesses to settle regardless of the merits or whether class certification is appropriate.” Schwartz & Silverman, *supra*, at 57. The result is that prudent defendants are often forced to settle class actions “at enormous sums of money

where there appears to be no substantive basis for defendant liability.” George L. Priest, *What We Know and What We Don’t Know About Modern Class Actions: A Review of the Eisenburg-Miller Study*, Manhattan Inst. Civ. Justice Rpt. No. 9 at 4 (Feb. 2005), [http://www.manhattan-institute.org/pdf/cjr\\_09.pdf](http://www.manhattan-institute.org/pdf/cjr_09.pdf). Causation presumptions dramatically increase the leverage already exercised by plaintiffs in class actions by abrogating the most challenging element of a consumer-fraud claim: proving that the defendant’s alleged misconduct affected consumers. *See, e.g.*, L. Brett Lockwood, *The Fraud-on-the-Market Theory: A Contrarian View*, 38 Emory L.J. 1269, 1291 (1989) (“Creating a presumption of reliance will probably increase the settlement value of the suit.”). Under the Court of Appeals’ approach, as long as a jury determines that a defendant should have used a different word or phrase in an advertisement, it can impose millions or billions in damages, regardless of whether any consumers were deceived.

Nor is there any corresponding public-policy benefit that makes these suits worthwhile. Litigation abuse forces businesses to raise prices, effectively resulting in “a tax on every good or service sold to consumers.” Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 44 (2010). Moreover, such suits could have the perverse effect of “creating an incentive for sellers to withhold socially valuable information from consumers” because they fear that anything they say will cause someone to sue. *Id.* at 49; *see also* American Tort Reform Association, *Private Consumer Protection Lawsuit Abuse: When Claims Are Driven by Profit-Driven Lawyers And Interest Group Agendas, Not The Benefit Of Consumers*, at 11 (2006), <http://www.atra.org/reports/consumers/>

consumer\_protection.pdf (“If anyone can bring a lawsuit against a business based on what it puts in print or says on television, then businesses will think twice before exercising their constitutional right to free speech about their products, business practices, or corporate citizenship.”). Even the class members themselves, the supposed “beneficiaries” of such suits, rarely recover more than a few dollars – and most do not bother to submit claims when these suits settle. As a result, it is widely conceded that class actions benefit one constituency only: lawyers. Scheuerman, *supra*, at 10.

The inference adopted by the Court of Appeals here is particularly troubling because it focuses on “mass marketing,” which almost invariably will involve manufacturers and sellers who are the “most stable and enduring in the marketplace,” Butler & Johnston, *supra*, at 47 – and who in turn reach the greatest number of consumers. In other words, the decision below essentially stands for the proposition that the more popular the product and the larger the class, the more class certification is appropriate. Of course, such classes will fast become the most attractive to plaintiffs’ lawyers, since they hold the potential for the biggest damages and fee awards. And, of course, the bigger the class action, the greater the threat it poses to a defendant’s continued viability. The mass-marketing class actions envisioned by the Court of Appeals will thus be particularly potent tools with which to bludgeon a defendant into a massive settlement – even in suits that are utterly without merit.

For all of these reasons, the Court of Appeals erred in holding that causation should be presumed in any case involving allegations of mass marketing. Such allegations are too easily made, and the class-action device too easily abused, to justify

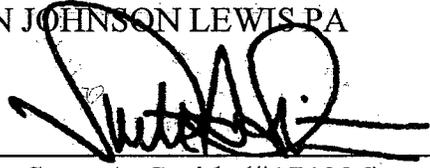
the significant costs to businesses and consumers that would inevitably follow. For this reason too, the certification order should have been reversed.

### CONCLUSION

For the foregoing reasons, and the reasons stated by appellant, the trial court erred in certifying the class. Accordingly, if the Court reinstates any of plaintiffs' claims, it should reverse the trial court's class-certification decision and remand with instructions to decertify the class.

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