

CASE NO. A05-2148

State of Minnesota
In Court of Appeals

Diane Loric, 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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STATEMENT OF THE ISSUES

- (a) Whether the District Court erred in its determination that a test, created to determine whether direct purchasers have standing under federal antitrust law, is appropriate to determine whether an indirect purchaser has standing under Minnesota antitrust law;

The District Court applied the *Associated General Contractors'* factors without an express determination that these factors constitute an appropriate basis to determine whether an indirect purchaser has standing under Minn. Stat. §325D.57.

- *Minn. Stat. §325D.57 (2005)*
- *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983)
- *Comes v. Microsoft*, 646 N.W.2d 440, 446 (Ia. 2002)

- (b) Whether the District Court erred in its determination that Appellant, who was injured by Respondent's conspiracy, did not have standing under *Associated General Contractors*?

The District Court held that Ms. Lorix did not have standing under *Associated General Contractors* because she did not allege she was a "consumer or competitor in the affected market" or that the rubber chemicals were "actual components" of the product she purchased.

- *Minn. Stat. §325D.57 (2005)*
- *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983)
- *Northern States Power v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)
- *Humphrey v. Philip Morris*, 1995 WL 1937124, *aff'd*, 551 N.W.2d 490 (Minn. 1996)
- *Gordon v. Microsoft*, 2003 WL 23105552 (March 14, 2003 Henn. Cty. Distr. Ct.)

- (c) Whether the District Court erred by failing to analyze an indirect purchaser's standing under the traditional "injury-in-fact" analysis.

The District Court held that Plaintiff lacked standing under the *Associated General Contractors* test and did not determine whether the "injury-in-fact" analysis conferred standing.

- *Minn. Stat. §325D.57 (2005)*
- *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982)
- *Humphrey v. Philip Morris*, 1995 WL 1937124, *aff'd*, 551 N.W.2d 490 (Minn. 1996)

STATEMENT OF THE CASE

Appellant Diane Lorix purchased tires in Minnesota during the class period. App. 3 at ¶9. The tires purchased by Lorix and other Minnesota consumers were manufactured using Respondents' rubber chemicals. App. 8 at ¶27. Respondents produce the majority of rubber chemicals sold in the United States, and engaged in a conspiracy to fix the price of rubber chemicals. App. 2 at ¶ 3 The majority of rubber chemicals are used in the manufacture of automobile tires. App. 8 at ¶30. Because the surcharge caused by the price fixing agreement was passed down to them, Lorix and the members of the class were injured in Minnesota by Respondent's price fixing conspiracy when they purchased their tires. App. 9 at ¶35.

Lorix filed her class action Complaint for Damages for Violation of the Minnesota Antitrust Act on November 4, 2002, alleging that she and other class members were injured as a result of an overcharge on tires resulting from Defendants' agreement to fix the price of rubber chemicals used in automobile tires. (App. 2 at ¶3, App. 9 at ¶35.)¹ Respondents Crompton Corp., Uniroyal Chemical Co., Inc., Uniroyal Chemical Company, Ltd., and Bayer Corporation moved to dismiss the Complaint, alleging that Ms. Lorix lacked standing to

¹All citations to "App." refer to the Appendix to Appellant's brief.

bring her claims as an indirect purchaser. After briefing and oral argument, the District Court, the Honorable Robert J. Blaeser presiding, granted Respondents' motion on August 29, 2005. Ms. Lorix timely filed a Notice of Appeal on October 28, 2005.

ARGUMENT

The District Court found that the injuries brought about by Respondents' illegal conduct were too speculative and too remote for Ms. Lorix to pursue. However, Respondents fixed prices of rubber chemicals, knowing full well that consumers would ultimately overpay for tires containing the price-fixed rubber chemicals.

Minnesota's antitrust act is remedial, and is intended to protect consumers, not competitors. Yet, the District Court's unduly restrictive interpretation of Minnesota Statute §325D.57 is so narrow that consumers are virtually excluded from the remedial protections that the legislature expressly provided to them. The District Court's interpretation contravenes the clear statutory language, legislative intent, relevant case law and long-established public policies supporting standing, and therefore, the District Court's ruling should be reversed.

Furthermore, if the District Court had considered all relevant facts and drawn appropriate inferences, Ms. Lorix would have standing even under the Court's restrictive interpretation. Ms. Lorix was also conferred standing because she can establish "injury in fact."

However, consumer claims arising from indirect purchases are the rule, not the exception. Respondents should not be permitted to escape liability simply because they fortuitously occupied the top of a distribution chain. Instead, Respondents should be required to defend themselves against Appellant's claims, because these are the exact type of claims that the Minnesota legislature encouraged under the Minnesota Antitrust Act.

The controlling statute in this case is Minn. Stat. §325D.57, which provides that:

Any person . . . injured directly or indirectly by a violation of [the Minnesota Antitrust Act] 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 also take any steps necessary to avoid duplicative recovery against a defendant.

Minn. Stat. §325D.57 (2005). As the Minnesota Supreme Court observed, this statute contains an "expansive grant of standing" was drafted "to abolish the availability of the pass through defense by *specific grants of standing* within statutes designed to protect Minnesota citizens from sharp commercial practices." *State by Humphrey v. Philip Morris Inc.*, No. C1-94-8565, 1995 WL 1937124, at * 4 (May 19, 1995 Minn. Dist. Ct.), *aff'd*, 551 N.W.2d 490, at 497 (Minn. 1996) (emphasis added).² Thus, the statute "contains [a] specific authorization[] for suit and . . . create[s] a private cause of action for *any party injured directly or indirectly* by violation of the statute." *Id.* at 485 (emphasis added). The Minnesota Supreme Court concluded that "[t]hese provisions reflect a clear legislative policy

²A principal purpose of antitrust laws is to prevent overcharges to consumers. *Premier Electrical Constr. Co. v. National Elec'l Contractors Assoc.*, 814 F.2d 358, 368 (7th Cir. 1987).

encouraging aggressive prosecution of statutory violations.” *Id.* at 495. The Minnesota Supreme Court affirmed the District Court in relevant part, which had held:

The language of the statute is clear and unambiguous. It expressly allows those injured indirectly to present their claims under the statute. Because there is no specific language in the statute that can be declared ambiguous, legislative history need not be examined to clarify ambiguities. The statute expressly allows those indirectly injured to proceed. ***Plaintiff and each of them complain of injuries due to the alleged conspiracy of Respondent and their industry. The Plaintiffs are not outside the chain of injured parties.***

Humphrey, 1995 WL 1937124, at * 4 (emphasis added).

The District Court largely ignored these principles; instead of following the standing analysis employed by Minnesota Courts, the District Court adopted a test for antitrust standing, based on a United States Supreme Court case that analyzed standing for a direct purchaser - an entirely different type of plaintiff. Then, without significant analysis, the District Court re-fashioned the test so that it would be applicable to indirect purchasers, and again, without explanation, analyzed only one factor. This analysis was based, in part, upon impermissible findings and inferences. As a result of these errors, the District Court found that even though Lorix was injured by Respondents’ conspiracy, she did not have standing to sue Respondents under Minnesota’s Antitrust Act.

The District Court’s analysis of standing would deny standing under Minn. Stat. § 325D.57 to the vast majority of consumers. Thus, the real victims of antitrust violations – consumers who cannot simply pass on the overcharge – will be deprived of the protections the Minnesota legislature intended to provide to them under Minn. Stat. § 325D.57. The intent of Minnesota’s Antitrust Act is to protect Minnesota’s public from anti-competitive

behavior. The District Court's ruling defeats that intent, and thus, the District Court's Order is premised upon a set of errors, and should be reversed.

I. LEGAL STANDARDS

Sufficiency of the complaint is a question of law. The court is to conduct an independent review of the record in light of the relevant law to determine whether the lower court made the proper legal conclusion. *Jadwin v. Minneapolis Star Tribune Co.*, 567 N.W.2d 476, 483 (Minn. 1985). All factual inferences are to be drawn in favor of the non-moving party, and the Court should not make any findings of fact. *Northern States Power v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

Statutory construction is a question of law reviewed *de novo*. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985). Therefore, the reviewing court is not bound by the lower court's decision. *Hamilton v. Commissioner of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999) (citations omitted).

In Minnesota, "[s]tanding is a low hurdle" *In re Appeal of Selection Process for the Position of Electrician*, 674 N.W.2d 242, 247 (Minn. Ct. App. 2004). Therefore, "courts appear hesitant to deny standing under circumstances which would prejudice the party whose standing would be found lacking." *Cochrane v. Tudor Oaks Condominium Project.*, 529 N.W.2d 429, 433 (Minn. Ct. App. 1995).

II. ASSOCIATED GENERAL CONTRACTORS IS INAPPLICABLE AND UNNECESSARY TO AN ANALYSIS OF STANDING OF INDIRECT PURCHASERS UNDER MINN. STAT. §325D.57

A. Minnesota Law Expressly Permits Indirect Purchasers to Sue.

The District Court found that Lorix did not have standing because she could not satisfy a multi-factor test first enumerated by the United States Supreme Court in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) (hereinafter “*A.G.C.*”),³ and subsequently adapted and applied by a lone Minnesota District Court in *Gutzwiller v. Visa U.S.A.*, No. C4-04-58, 2004 WL 2114981 (Minn. Dist. Ct. Sept. 15, 2004).⁴

³Different courts have analyzed *A.G.C.* and determined that there are differing numbers of factors. For example, the District Court in this matter identified three factors: (1) whether Ms. Lorix was a consumer or competitor in the restrained market; (2) whether damages are speculative; and (3) whether damages are complex or duplicative. (App. 92.) The only other Minnesota court that analyzed *A.G.C.* found five factors, but disregarded the second and third in its indirect purchaser analysis:

1. whether the plaintiff is a consumer or competitor in the allegedly restrained market;
2. whether the alleged injury is a direct, first-hand impact of the restrained market;
3. whether there are more directly injured plaintiffs with motivation to sue;
4. whether the damage claims are speculative; and
5. whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages.

Gutzwiller, 2004 WL 2114991 at *5, (citing *A.G.C.*, 459 U.S. at 538 - 45). However, other courts reviewing *A.G.C.*, have identified up to seven factors. See, e.g., *Knowles v. Visa U.S.A., Inc.* No. Civ.A. CV-03-707, 2004 WL 2475284 at *5 (Oct. 20, 2004 Me. Sup. Ct.).

⁴*Gutzwiller* is inapposite to this matter. The *Gutzwiller* court contrasted Gutzwiller's claim from that of an indirect purchaser who purchased “specific products or services which may have been the subject of artificially increased prices” due to antitrust violations. *Id.* at *8. Thus, the *Gutzwiller* court held, “[i]n this case, Plaintiff does not allege the original product (debit card services or any subsequent and/or modified debit card services) were indirectly purchased by him at an artificially inflated price.” *Id.*

Because Gutzwiller never purchased the price-fixed product or one into which it had been incorporated, the court considered his damage claim too remote. See also, *Anderson Contracting* at 18 (App. 114) (distinguishing *Southard v. Visa*, 2004 WL 3030028 (Iowa Dist. Ct. Nov. 17, 2004) [a sister case to *Gutzwiller*] on same basis.)

Of course, Plaintiff in the instant litigation expressly stated that she indirectly

The District Court's determination the *A.G.C.* is necessary to determine whether an indirect purchaser has antitrust standing is flawed and should be rejected for at least three reasons. First, Minnesota law on standing, including antitrust standing, is long-established and well-developed. There is no need, and indeed, no valid reason, to interpret and interject an inapposite federal direct purchaser case into the analysis of a state indirect purchaser statute. Second, *A.G.C.* is analytically distinct from the instant matter. *A.G.C.* was decided in the wake of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), which precluded indirect purchasers from suing under federal antitrust laws.⁵ Against that backdrop, the Supreme

purchased price-fixed products at artificially inflated prices. (App. 2, ¶ 3; App. 9, ¶¶ 34-35.)

⁵The underpinnings of *A.G.C.*'s legal analysis are suspect, at best. Though *A.G.C.* asserted that Congress must have intended that the same limiting principles used in tort law be applied to antitrust suits, *A.G.C.*, 105 S.Ct. at 906, contemporaneous records demonstrate an entirely different legislative intent.

Senator Sherman himself delineated the broad compensatory purpose of the first statutory authorization of the private action for treble damages. Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (current version at 15 U.S.C. § 15 (1982)). See 21 CONG.REC 2569 (Mar. 24, 1890) (statement of Sen. Sherman). The legislative history of § 4 of the Clayton Act, ch. 323, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1982))- - whose language was taken from § 7 of the Sherman Act but expanded to include the offenses newly condemned by the Clayton Act - - similarly fails to reveal any intent to limit antitrust standing. See, e.g., 51 CONG. REC. 12,939 (July 29, 1914) (statement of Sen. Reed) (§ 4 'means, for all practical purposes, that every man who is hereafter injured by any concern violating the antitrust statutes can bring suit'); 51 CONG. REC. 9185 (May 6, 1914) (statement of Rep. Helvering) ('It must be plain that few corporations will care to run the risk of pursuing illegal methods knowing that they will make themselves liable, not merely to dissolution, but for the payment of damages to all parties injured.').

Court fashioned a test with multiple interrelated factors for *direct purchasers*. By contrast, the Minnesota statute at issue here, the Minnesota Antitrust Act was specifically enacted to repeal the bar on indirect purchaser action in *Illinois Brick*, and to grant broad standing to those purchaser under Minnesota law.

The District Court does not explain how it transformed a test devised to enforce a ban on indirect purchaser actions under federal law into a test for applying a statute granting broad standing under state law to that very group of purchasers. As such, the District Court's decision usurps the role of the legislature by contradicting the legislative intent clearly expressed in the clear, unambiguous language of Minn. Stat. §325D.57.

No appellate court in Minnesota has utilized the *A.G.C.* factors. This is because Minnesota law based in part upon Minn. Stat. § 325D.57, is sufficiently developed so that *A.G.C.* is unnecessary.⁶ Though the District Court acknowledged the existence of Minn. Stat. § 325D.57 (App. 92), the District Court disregarded the statute's clear and plain language, as well as long-standing principles established by the Minnesota Supreme Court and instead relied on an inapposite federal court analysis of *direct purchaser* standing to determine whether appellant had standing to pursue her *indirect purchaser* claims.

Daniel C. Richmon, Antitrust Standing, *Antitrust Injury, and the Per Se Standard*, 93 Yale L.J. 1309, 1314 n.28 (1984).

⁶*See, e.g., Humphrey*, 1995 WL 1937124 (applying "injury in fact" standard to determine antitrust standing), discussed *supra* at Section IV.

In 1977, the Supreme Court held that indirect purchasers could not maintain an action under the Sherman Act when alleging that a conspirator's illegal overcharges had been passed on to them. *Illinois Brick v. Illinois*, 431 U.S. 720, 728 (1977). The Supreme Court's main bases for the decision were that lawsuits involving both direct and indirect purchasers might create the risk of multiple liability, and that these actions were overly complicated. *Id.* at 730-32.

In direct response to *Illinois Brick*, (which contradicted the law in seven of the then-nine circuits regarding the ability of indirect purchasers to maintain suits under the Sherman Act),⁷ the Minnesota Legislature enacted Minn. Stat. § 325D.57,⁸ which specifically permits

⁷The *Illinois Brick* bar to indirect purchaser actions has been denounced by leading antitrust commentators:

The obvious difficulty with denying damages for consumers buying from an intermediary is that they are injured, often more than the intermediary, who may also be injured but for whom the entire overcharge is a windfall. The indirect purchaser rule awards greatly overcompensates intermediaries and greatly undercompensate consumers in the same of efficiency in the administration of antitrust laws.

Phillip E. Areeda, Roger D. Blair & Herbert Hovencamp, *Antitrust Law*, 346 at 378 & n.13 (2000). Donald Baker, former head of Antitrust Division of the U.S. Department of Justice, stated that "the dissenters [to *Illinois Brick*] seem to have the better of it. 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).

⁸At least twenty-five states and the District of Columbia have *Illinois Brick* repealer statutes. In addition, fourteen states permit recovery on behalf of consumers under state consumer protection laws or state unfair trade practices statutes. *See, FTC v. Mylan Labs.*, 99 F.Supp.2d 1, 10-11 (D.D.C. 1999).

indirect purchasers to recover antitrust damages resulting from the conspirators' price-fixing schemes.⁹ *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987).

A.G.C. was decided in 1983. *A.G.C.* analyzed federal antitrust law, and therefore, this Court is not required to adopt *A.G.C.* under neither federal law nor the federal constitution. In fact, in the subsequent 22 years since *A.G.C.* was issued, no Minnesota appellate court has applied *A.G.C.* to determine standing. Nonetheless, with minimal analysis, the District Court needlessly interjected *A.G.C.*'s analysis into Minnesota's well-developed law on standing. The District Court's decision was in error.

B. The Concept of "Harmonization" Does Not Support Adoption of the *A.G.C.* Test.

The District Court failed to identify the rationale for its decision to displace established Minnesota law with federal law, though it appears the District Court applied the theory of "harmonization." Under this concept, "Minnesota antitrust law should be interpreted consistently with federal court interpretations of federal antitrust law unless Minnesota law clearly conflicts." *Howard v. Minnesota Timberwolves Basketball Ltd.*

⁹In 1989, six years after *Illinois Brick*, the Supreme Court unanimously held that state laws permitting indirect purchasers to recover damages caused by price fixing were not preempted. *California v. ARC America Corp.*, 490 U.S. 93, 101-01 (1989). The Court held that "[g]iven the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." *Id.* (internal citations omitted). The Court further explained that state indirect purchaser statutes are "consistent with the broad purposes of federal antitrust laws: deterring anti-competitive conduct and ensuring the compensation of victims of that conduct." *Id.* at 102. Thus, the Court concluded that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *Id.*

P'ship, 636 N.W.2d 551, 556 (Minn. Ct. App. 2001). See also, *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 446 (Ia. 2002); *Bunker's Glass v. Pilkington*, 75 P.3d 99, 105-06 (Az. 2003) (analyzing applicability of *A.G.C.* under "harmonization").

There are two reasons why "harmonization" does not compel a Minnesota court to adopt *A.G.C.* First, the Minnesota Legislature specifically and expressly chose to depart from "federal antitrust" law on the issue of standing: while federal law bars standing based on indirect purchasers, Minnesota law confers broad standing to indirect purchasers. Thus, Minnesota law "clearly conflicts" with federal law, and thus, Minnesota courts need not give any deference to federal court interpretations.¹⁰ See also *Maryland v. Philip Morris*, 1997 WL 540913 at *19 (Md. Cir. Ct. May 21, 1997)(holding that state harmonization statute "does not direct that Maryland Courts are to be bound [by federal courts' interpretations of federal statutes].")

Second, as many courts have recognized, "it is important to achieve and maintain a consistency *in defining the types of business activity that are to be prohibited as unlawful.* Harmonizing state law with federal law and its interpretation will achieve uniformity and predictability as to the practices that are prohibited." *Arthur v. Microsoft*, 676 N.W.2d 29, 35 (Neb. 2004) (emphasis added). Nebraska's harmonization statute was not designed to

¹⁰See also, *Holder v. Archer Daniels Midland Co.*, No. 96-2975, 1998 WL 146920, at *3 (D.C. Super. Ct. November 4, 1998) ("[s]ince the D.C. [Antitrust] Act was passed to distinguish D. C. Antitrust law from federal law with respect to standing for indirect purchasers, there is no "comparable" federal antitrust statute in this respect.")

delegate authority to the federal government, but rather, to achieve a uniform standard of conduct regarding monopolistic practices. *Id.* at 38.

Similarly, the Iowa Supreme Court recognized that harmonization is *not* concerned with “defining who can sue under our state antitrust laws.” *Comes*, 646 N.W.2d at 446. “The purpose behind both state and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct. To achieve this uniformity or predictability, *we are not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court.*” *Id.* (emphasis added).

As these courts have recognized, harmonization is not focused on the *procedural* issue of who has standing, but rather on the *substantive* issue of what conduct is permitted under the respective statutory antitrust schemes. *Bunker’s Glass*, 75 P.3d at 109 (legislative goal of uniformity with federal law “appears to be uniformity in the standard of conduct required, not necessarily procedural matters such as who may bring an action for injuries caused by violations of the standard of conduct.”).¹¹ Clearly, granting standing to Lorix would not create such a conflict because she was injured by the very price-fixing conduct that both federal and state law statues were designed to prevent.

¹¹*See also, Goodwin v. Anheuser-Busch*, No. BC310105, 2004 WL 3143579, at *5 (Dec. 13, 2004 Cal Sup. Ct.) (“There can be no question that standing is generally viewed as a procedural concern.”).

Finally, the District Court's decision to supplant Minnesota statutes with federal case law is flawed because it contradicts the clear legislative intent embodied in Minn. Stat. §325D.57, which plainly grants standing to "any person. . . injured directly or indirectly."¹² The object of the interpretation and construction of statutory law is to ascertain and effectuate the legislature's intention. Minn.Stat. § 645.16 (2002). *See also, Humphrey*, 1995 WL 1937124, at *4. In this case, 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 concern was one of the economic issues presented in *Illinois Brick*. *Illinois Brick*, 431 U.S. at 730. Thus, the Legislature purposely omitted the very restrictions on standing that the District Court read into the statute.

The Legislature, by expressly addressing one of the *Illinois Brick* issues, was clearly aware of other concerns addressed by the Supreme Court, but consciously chose not to address them. The District Court, by reading a limitation on standing into a plain and unambiguous statute, has improperly usurped the role of the Minnesota legislature.¹³

¹²Standing in Minnesota can be conferred by a statutory grant. *Humphrey*, 551 N.W.2d at 496. Though this position was argued on the briefs below, the District Court did not specifically address this issue.

¹³*See Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 108 (Fla. Dist. Ct. App. 1996) ("[I]ssues such as whether deterrence, compensation, or efficient judicial administration should be promoted by antitrust laws and whether and to what extent these goals can or should be harmonized are fundamental policy decisions for the legislature of

A court must give a plain reading to any statute it construes, and, when the language of the statute is clear, the court cannot engage in any further construction. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn.2002). Since this statute is obviously a remedial statute, ambiguity in the statutory language (if any) should be broadly construed to effectuate this remedy created by its enactment. *Humphrey*, 551 N.W.2d at 496 (citation omitted).

However, the District Court ignored these precepts, and instead, construed the statute narrowly. The District Court read language into Minn. Stat. §325D.57 that qualified the Legislature's clear and unambiguous words, even though a court is prohibited from adding words to a statute and "cannot supply what the legislature purposely omits or inadvertently overlooks." *Ullom v. Indep. Sch. Dist. No. 112, Chaska*, 515 N.W.2d 615, 617 (Minn. Ct. App.1994). The District Court's attempt to rewrite the statute should be reversed.

III. THE A.G.C. TEST IS INAPPOSITE TO DETERMINE WHETHER AN INDIRECT PURCHASER HAS STANDING IN A MINNESOTA DISTRICT COURT

A.G.C. is wholly inapplicable in this case. *A.G.C.* was decided after *Illinois Brick*, and thus, it was consciously designed to limit standing to "direct purchasers."¹⁴ Nonetheless,

each state." (internal footnote omitted)).

¹⁴The factors set forth in *A.G.C.* confirm this. The *A.G.C.* factors include whether the injury is a direct impact of the restraint, and whether there are more directly injured plaintiffs with motivation to sue. *Associated General Contractor of California, Inc. v. California State Council of Carpenters*, 495 U.S. 519, 545, 103 S.Ct. 897, 912 (1983). Both of these factors preclude any indirect purchaser case.

the District Court attempted to jerry-rig a makeshift test by simply disregarding these factors. Thus, the District Court only considered three factors: (1) whether Ms. Lorix was a consumer or competitor in the restrained market; (2) whether damages are speculative; and (3) whether damages are complex or duplicative. (App. 92.)¹⁵ However, neither the District Court, nor the *Gutzwiller* court,¹⁶ having constructed this unwieldy Rube Goldberg contraption, explained *how* to apply the test to determine whether an indirect purchaser has standing. Should the factors be weighed evenly? Is there a specific number of factors needed to confer standing? Is any single factor necessary? Rather than provide an analytical framework, the District Court simply made its decision based on its analysis of one factor. App. 92-93. It simply does not make sense to take a complicated, interrelated multi-factor test expressly designed to apply to one specific set of plaintiffs, lop off some of the factors,

¹⁵Similarly, *Gutzwiller*, the only other Minnesota court to utilize *A.G.C.*, amputated two factors, and then applied the remaining three factors. *Gutzwiller*, 2004 WL 2114991 at *6.

¹⁶The economic complexities raised by the District Court were first noted by *Illinois Brick*. As discussed above, Minn. Stat. § 325D.57 was passed to combat the ban on indirect standing created by *Illinois Brick*. In fact, the Legislature added the language: “In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.” That sentence demonstrates that the Minnesota Legislature was fully aware of the “economic complexity” issues raised now by the District Court, and dealt with these issues by permitting the Court to prevent duplicative recovery. Significantly, however, the legislature chose not to limit standing in any way - even though it was confronted by the same issues raised by the District Court. The District Court erred by interjecting itself into the Minnesota Antitrust Act when the state legislature has declined to do so. *See also, Holder*, 1998 WL 1469620 at *4.

and then proclaim that the test can now be applied to a different set of plaintiffs – in fact, plaintiffs who could not sue under federal statute – the original formulation of the test.

Furthermore, *A.G.C.* is factually distinguishable. *A.G.C.* involved disputes among direct competitors, not indirect purchasers, concerning a multi-employer collective-bargaining agreement. Unlike Plaintiff's complaint in the instant litigation, the *A.G.C.* plaintiff did not even allege antitrust violations:

[The Union's] most specific claims of injury involve matters that are not subject to review under the antitrust laws. The amended complaint alleges that the Respondent have breached their collective bargaining agreements in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to non-union divisions or firms that they actually control. Such deceptive diversion of business to the nonunion portion . . . might constitute a breach of contract, an unfair labor practice, or perhaps even a common-law fraud or deceit, but in the context of the bargaining relationship between the parties to this action, such activities are plainly not subject to review under the federal antitrust laws. Similarly, the charge that the Respondent "advocated, encouraged, induced, and aided nonmembers . . . to refuse to enter into collective bargaining relationships" with the Union . . . does not describe an antitrust violation.

A.G.C., 459 U.S. 519, 536-37 (1983). Thus, *A.G.C.* is distinguished on its facts from a state case with indirect purchasers. These critical differences have been recognized by other courts. For example, in a case involving price fixing of a component of roofing, an Iowa court held that *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). This analysis is equally applicable to the instant facts.

A. The District Court Erred in Transforming Interrelated Factors into *Per Se* Rules.

1. The District Court Erred in its Determination That Plaintiff Must Be a “Consumer or Competitor in the Affected Market.”

Under the best of circumstances, the multi-factor test set forth in *A.G.C.* is a complex creation. Courts cannot even agree on how many, or which, factors should be considered.¹⁷ However, courts have consistently held that no single factor is dispositive. *See, e.g., Province v. Cleveland Press Pub. Co.*, 787 F.2d 1047, 1050 (6th Cir. 1986)(“No single factor is dispositive of the issue; rather all factors must be carefully balanced”).

The District Court’s interpretation of this factor demonstrates that the *A.G.C.* test is inapposite to analysis of standing for indirect purchasers. According to the District Court, an indirect purchaser *must* be a “consumer or competitor in the affected market” to have standing. (App. 92.) However, this radical reconstruction of *A.G.C.* test is inappropriate under the Minnesota Antitrust Act because *by definition*, an indirect purchaser cannot be a “competitor.” Thus, the District Court’s restrictive interpretation of *A.G.C.* *requires* that a plaintiff purchase rubber chemicals to have standing. In other words, the District Court implemented a *per se* rule more stringent than the rules in *A.G.C.*, which allowed a non

¹⁷Cf., *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).

purchaser - i.e., a competitor - to have standing. The District Court's narrow interpretation is inconsistent with *A.G.C.* and the liberal, remedial policies embodied in Minn. Stat. § 325D.57.¹⁸

The United States Supreme Court has recognized that a plaintiff need not be "consumer or competitor and still have standing. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982),¹⁹ the Supreme Court emphasized:

[T]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The [Clayton] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

McCready, 457 U.S. at 472 (citation omitted). See also, *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. *A.G.C.*, 459 U.S. at 539, 103 S.Ct. 897.")

The District Court erred by finding that the "rubber chemical processing market is the "affected market." (App. 93.) At this stage, the District Court cannot make any factual findings, and must draw inferences in favor of Plaintiff. *Northern States Power*, 122 N.W.2d

¹⁸Even federal courts have found antitrust standing where a plaintiff is not a consumer, customer, competitor or participant in the relevant market. See, e.g. *Southland Land Co. v. Malone & Hyde*, 715 F.2d 1079, 1086-87 (6th Cir. 1983).

¹⁹*McCready* is discussed *infra* at Section IV. regarding "injury in fact."

26, 29 (Minn. 1963). The determination of a “market” in an antitrust case is a highly specialized and complex factual analysis. *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 881 F. Supp. 1309, 1321 (W.D. Wis. 1994)(“It is clear from a review of the relevant law that determination of the relevant market is an issue of fact for the jury”); *Murray v. National Football League*, No. Civ. A. 94-5971, 1996 WL 363911, at *24 (E.D. Pa. 1996) (“Whether Plaintiffs have alleged relevant markets for antitrust purposes is a question of fact for the jury.”).

The District Court mistakenly relies on *Humphrey* for support of its theory that an indirect purchaser must be a “consumer or competitor in the affected market,”²⁰ and that damages cannot be speculative or duplicative. (App. 93.) *Humphrey* simply supports none of these contentions. *Humphrey* does not state that an indirect purchaser must be a consumer or competitor. Instead, *Humphrey* actually supports a liberal interpretation of the statute. *Humphrey* states that the relevant statute is “broad” and “expansive,” *id.*, at 495, 496; that Blue Cross’ injuries are encompassed by the statute, *id.*; and, in a footnote, that “[e]ven absent the statutory grant of authority,” Blue Cross would have standing because it was a direct purchaser. *Id.* at 497, n.1. Finally, *Humphrey* never uses the word “speculative” and uses “duplicative” only to quote the relevant statute. *Humphrey*, 551 N.W.2d at 496. Thus, the District Court’s reliance on *Humphrey* is misplaced.

²⁰Interestingly, the District Court’s reference to *Humphrey* is identical to a reference made by the *Gutzwiller* court. In the briefing below, Ms. Lorix explained how the *Gutzwiller* Court citation to *Humphrey* was inapposite. (App. 67-68.)

The District Court's unilateral definition of "rubber chemical processing market" as an "affected market" is also contradicted by the facts. It is clear that an increase in the price of rubber chemicals increases the price of tires. *See, e.g.,* 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 flour will increase the price of bread). In this case, Ms. Lorix alleged that Respondents' conspiracy raised the price of the tires she purchased. (App. 2, ¶ 3, App. 9, ¶¶ 34-35.) Thus, it is clear that the market for tires was an "affected market." *See also, Holder*, 1998 WL 1469620, at *4 ("Certainly, manufacturers who conspire to keep 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.").

Furthermore, the District Court expresses a concern that Ms. Lorix's interpretation of Minn. Stat. § 325D.57 "would grant a remedy for any injury no matter how minor or remote, traceable to the anticompetitive action." (App. at 93.) This simply is not true.

Ms. Lorix's interpretation of the Minnesota Antitrust Act is consistent with the broad remedial policies underlying the Act as well as long established principles of Minnesota law on standing. It is clear that *not every* indirect purchaser would have standing under *A.G.C.* For example, as discussed at oral argument below, an "indirect purchaser" who *never* purchased the price-fixed product would not have standing. *See Trans.* at 19-20. *See also, Gutzwiller*, 2004 WL 2114991 at *7 ("There is no allegation in the Complaint that the [the

price-fixed product] contributes in any way to the research, manufacture, production, distribution, or advertising of the consumer goods for which Plaintiff contends he paid inflated prices.”). Here, the Complaint alleges that the price-fixed product *is used* in the manufacture and production of the goods for which Ms. Lorix paid an inflated price. (App. 2 at ¶ 3, App. 8 at ¶ 30, App. 9 at §§34- 35.)

The District Court’s finding is consistent with Respondents’ argument below that because the price-fixed product is a component of Ms. Lorix’s purchase, her injury is too remote to confer standing. (App. 93; App. 37-38.) However, this theory is inconsistent with prior litigation in Minnesota and other states,²¹ with the relevant statute, and with public policy.

In this regard, Ms. Lorix’s claim is analogous to the plaintiff’s claim in *Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 355432 (March 20, 2001, Henn. Cty. Dist Ct.), at *1. In that case, plaintiff alleged on behalf of a class of indirect purchasers that they were injured as a result of Windows’ monopoly pricing of Windows 98, which was purchased by plaintiff through various distribution channels, including indirect purchasers. *Gordon*, 2003 WL 23105552 (March 14, 2003 Henn. Cty. Distr. Ct.) at *1. In addition, the class definition

²¹For example, in Maryland, a statute provided that the state “may maintain an action. . . for damages or for an injunction or both regardless of whether it has dealt directly or indirectly with the person who has committed the violation.” Md. Stat. § 11-209(b)(2)(ii). In *Maryland v. Philip Morris, Inc.*, 1997 WL 540913 (Md. Cir. Ct. May 21, 1997), Maryland sought to recover money spent in Medicaid to treat citizens who suffered smoking related illness. *Id.* at *2. Philip Morris argued that Maryland was “too remote.” *Id.* at *19. The court strongly disagreed, finding that the relevant statutory language (which is similar to Minn. Stat. § 325D.57) gave the state standing to pursue its claims. *Id.* at *20.

expressly included purchasers of products that merely incorporated defendant's software.²²

Thus, it is clear that an indirect purchaser can have standing when she purchases a product containing a price-fixed component. This position is consistent with the positions taken by other courts. *See, e.g. Comes v. Microsoft*, 646 N.W.2d 440 (Ia. 2002); *Anderson Contracting Inc. v. Bayer*, Case No. CL 95959, at 15 (IA Dist. Ct. May 31, 2005) (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”); *Holder*, 1998 WL 1469620 at *2 (holding that 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.”).

It is clear that the injury suffered by Ms. Lorix was a direct and primary result of Respondents' conspiracy. Rubber chemicals are predominantly used in the manufacture of tires. (App. 8 at ¶ 30.) Thus, Respondents knew that the price of rubber chemicals affects the price of tires. Armed with this knowledge, Respondents conspired to raise the price of rubber chemicals, which in turn, inevitably increased the price of tires. (App. 2 at ¶ 3.)

²²*Gordon*, 2003 WL 23105552 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.”)

Contrary to the District Court's determination, Minn. Stat. §325D.57 does not limit standing based on a hypothetical number of chains of distribution of a price-fixed product. Adopting the District 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 antitrust liability, leaving a substantial gap in the remedial coverage of the Minnesota Antitrust Act.

The economic complexities raised by the District Court were first noted by *Illinois Brick*. As discussed above, Minn. Stat. § 325D.57 was passed to combat the ban on indirect standing created by *Illinois Brick*. In fact, the Legislature added the language: "In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant." That sentence demonstrates that the Minnesota Legislature was fully aware of the "economic complexity" issues raised now by the District Court, and dealt with these issues by permitting the Court to prevent duplicative recovery. Significantly, however, the legislature chose not to limit standing in any way - even though it was confronted by the same issues raised by the District Court. The District Court erred by interjecting itself into the Minnesota Antitrust Act when the state legislature has declined to do so. *See also, Holder*, 1998 WL 1469620 at *4.²³

²³In the briefing at the District Court, (App. 64-67), and at oral argument, (Trans. at 19), the parties and the court discussed a passage from Judge Posner, which was included in *Gutzwiller*.

Many producers do not sell directly to their ultimate consumers. The producer of a consumer good may, for example, sell it to a wholesaler who

2. The District Court Erred in its Determination That Rubber Chemicals Must Be “Actual Components” of the Tire.

The District Court faulted Ms. Lorix for failing to allege that the price-fixed product became an “actual component” of the tire. Order at 5. As described above, this apparent *per se* rule is inappropriate within the flexible, interrelated *A.G.C.* framework. In addition, the District Court misapplied the relevant standard on a motion to dismiss. All factual references must be drawn in Ms. Lorix’ favor. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). The complaint does not allege that the price-fixed rubber chemicals were not components of the tires purchased by Ms. Lorix; therefore, it was error for the District

will resell it to a retailer who in turn will resell it to the ultimate consumer, and even if there is no wholesale stage of distribution, the ultimate consumer will ordinarily be the direct purchaser from a retailer and only an “indirect purchaser” from the producer. The product may be used as an input into a final consumer good – for example, the flour sold to a baker who makes in into bread that is sold to a consumer. The product may not even appear physically in the final good. – for example, the oven used by the baker in make the bread. In these cases as well, *the ultimate consumer is only an indirect purchaser of the flour or the oven*, the cost of which will be reflected in the price of the bread.

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), *quoted in Gutzwiller*, 2004 WL 2114991 at *8. Posner, a noted jurist in the area of antitrust economics, understands that an increase in the price of a component will increase the price of the product containing the component. Just as an increase in the price of flour in Judge Posner’s example will result in an increase in the price of bread, so an increase in the price of rubber chemicals will result in an increase to the price of tires. *See also, Holder*, 1998 WL 1469620, at *4 (“Certainly, manufacturers who conspire to keep 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.”).

Court to assume that fact. Rather, the District Court should have drawn a factual inference in Ms. Lorix' favor - specifically, that rubber chemicals are actual components of the tires.²⁴

B. Ms. Lorix has Standing Under the A.G.C. Test

Even if, *arguendo*, A.G.C. is applicable to determine standing of an indirect purchaser under the Minnesota Antitrust Act, the District Court erred in finding that Ms. Lorix did not have standing. Because the A.G.C. test is a “balancing” test, *each* factor *must* be examined. A.G.C., 459 U.S. at 537. As discussed above, the District Court’s analysis of the “consumer/competitor” factor is flawed. In addition, the District Court failed to substantively analyze the other two factors: whether damages would be speculative, and whether damages would be too complex or duplicative. A careful analysis, taking into consideration all relevant facts and appropriate inferences, demonstrates that Ms. Lorix satisfies the remaining factors, and the District Court’s dismissal was in error.²⁵

1. Ms. Lorix’s Damages Calculations are Not Too Complex or Duplicative

Although this case is brought by an indirect purchaser, the damages are not so complex as to justify dismissal. Many other courts confronting this issue have held that

²⁴Further, as described *supra*, the fact that Ms. Lorix purchased a product containing price fixed products does not deny standing to her.

²⁵Interestingly, the District Court held that although Ms. Lorix may have suffered “economic repercussions” from Respondents’ conduct, it would not be “judicially manageable nor efficient” to extend standing to Ms. Lorix. However, judicial manageability and efficiency are not proper bases to determine standing – at best, they are relevant to class certification issues. *Streich v. American Fam. Ins. Co.*, 399 N.W.2d 210, 218 (Minn. Ct. App. 1987).

concerns about complexity are not as fearsome as once believed. For example, *Comes* 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. See also, *Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9-CV, 2003 WL 21780975, (July 31, 2003 Tenn. Ct. App) (“[C]oncerns over complexity and apportionment are less worrisome or inapplicable in the cases before them and [we are] sympathetic to the arguments that indirect purchasers usually suffer the real loss.”) (citation omitted). The Arizona Supreme Court recently reached the same result: “recent developments in multistate litigation show that plaintiff (in indirect purchaser cases) may be able to produce satisfactory proof of damages. We think our courts can resolve the complex damages issues that may arise.” *Bunker’s Glass*, 75 P.3d at 109.²⁶ Ms. Lorix shares the same confidence in the abilities of Minnesota Courts,²⁷ and, based on

²⁶*Cf. In re S.D. Microsoft Antitrust Litig.* 657 N.W.2d 668, 679 (S.D. 2003) (noting that seven of nine courts reviewing the issue in that litigation upheld class certification of indirect purchasers based on their proffered testimony regarding proof of pass-on damages.).

²⁷Furthermore, a United States House of Representatives Report (H.R. 11942) held that the *Illinois Brick* Court overstated the complexity of apportionment.

The House Report on H.R. 11942 . . . concluded that the Court had overstated the problem of complexity in *Illinois Brick*. The Senate Judiciary Committee, in its report of S. 1874, acknowledged the difficulty of proving pass-on damages but concluded that this difficulty did not justify ignoring the important rights of indirect purchasers. The Senate Committee also concluded that the court or the legislature could solve any procedural and judicial management problems. In its report on the Rodino-Kennedy bill, the Senate Committee again rejected the Supreme Court’s conclusion that apportioning damages between plaintiffs was too complex a task for

Minn. Stat. § 325D.57, it appears that the Minnesota Legislature is similarly confident in the courts' abilities.²⁸

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). *See also, Bunker's Glass*, 75 P.3d at 108 (listing other state statutes that delegate duplicative damage issues to their courts). Furthermore, “[e]ven assuming such danger of multiple liability exists, there is no federal policy against states imposing liability in addition to that imposed under the federal law.” *Comes*, 646 N.W.2d at 450.²⁹

The level of complexity inherent in this case is far less significant than in *A.G.C.*, where “the District Court would face problems of identifying damages and apportioning

courts to handle, based on their performance in the period between *Hanover Shoe* and *Illinois Brick*. The Committee observed that judicial functions in a wide variety of cases outside the antitrust area were no less complex than those inherent in pass-on cases.

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.Rev. 1087, 1116 (1983) (citing H.R.Rep. No. 9501387 at 13 (1978)).

²⁸*See also, Gordon v. Microsoft*, 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)).

²⁹Commentators 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”)

them among directly victimized contractors and sub-contractors and indirectly affected employees and union entities.” *A.G.C.*, 459 U.S. at 545. In the present case, however, Ms. Lorix seeks damages only for overcharges incurred as a direct and proximate result of Respondents’ conspiracy.

2. Ms. Lorix’s Damages are Concrete and Real, Not Speculative.

The District Court also noted that an antitrust plaintiff’s damages cannot be speculative, although the District Court offered no guidance on how to determine if damages are, in fact, speculative. App. 93. This factor is not, however, focused on whether damages are expensive or difficult to measure – that is true in any antitrust action – but rather whether the existence of *any damage at all is speculative*. In *A.G.C.*, the Court questioned whether the plaintiff union suffered *any* damages apart from its members. As the Court noted: “Other than the alleged injuries flowing from breaches of the collective-bargaining agreements – injuries that would be remediable under other laws – nothing but speculation informs the Union’s claim of injury by reason of the alleged unlawful coercion.” 459 U.S. at 543. Thus, the Complaint lacked allegations that the complained-of harm was suffered by the plaintiffs. 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).³⁰

³⁰This “issue” has not precluded other prices-fixers from compensating purchases in cases involving incorporated products. *See, e.g., Nicholson v. F. Hoffman LaRoche, Ltd.*, 576 S.W.2d 363 (N.C. App. 2003) (settlement of \$185,000,000 for indirect purchaser claims of 23 states for conspiracy involving price-fixing of vitamins).

Ample authority demonstrates that speculativeness of damages is not a matter to be resolved on a motion to dismiss. This is particularly true 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) (“[s]ince this case is only at the pleading stage, dismissal on the ground that plaintiffs alleged damages are too speculative is inappropriate”). The Supreme Court stated in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (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. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more egregious the wrong shown, the less likelihood there would be of a recovery. 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 108.³¹

³¹Ms. Lorix will produce expert testimony, at the appropriate time, to address these issues. Lorix is confident that Respondent will also have an expert to testify about these same issues. Concerns that Lorix cannot prove her damages are best directed toward her future economic expert at summary judgment or class certification.

IV. MS. LORIX HAS STANDING BECAUSE SHE SUFFERED AN INJURY-IN-FACT AS A RESULT OF RESPONDENTS' CONSPIRACY.

“Under Minnesota law, ‘injury in fact’ is the test” for standing. *Humphrey*, 1995 WL 1937124 at *2. (citation omitted). *See also, State ex rel. by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). *Humphrey* is an antitrust case. Thus, even if Lorix did not have standing conferred by the statutory grant of Minn. Stat. §325D.57, or under an analysis of *A.G.C.*, she would have standing because she alleged she has suffered an injury in fact. “It is clear that economic injury or the prospect of economic injury can satisfy the injury in fact requirement.” *Meadowbrook Women’s Clinic v. State of Minnesota*, 557 F.Supp. 1172, 1175 (D.Minn. 1983).

In Minnesota, 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 (Minn. 1974).

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. 3, ¶3, App. 9, ¶¶ 34, 35.) Unlike every other entity in the distribution chain, Ms. Lorix will bear the entire 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. The Minnesota Court of Appeals noted, “Under 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. Ct. App. 1990) (citations omitted). Lorix has shown 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").³² This language also establishes the connection between Lorix's injury and Respondent' "challenged action." See also, App. 9, ¶¶ 34-35. Indeed, Lorix's injuries flow inexorably from Respondent' price-fixing scheme.

Significantly, Minnesota courts have continued to use the "injury in fact" analysis to find that antitrust plaintiffs have standing, long after *A.G.C.* was decided. *Humphrey*, 1995 WL 1937124 at *2-3. There is no reason to diverge from this analysis, and indeed, though the District Court recognized "injury in fact," the Court ignored it in favor of an analysis under *A.G.C.*

In *Humphrey*, plaintiff Blue Cross provided health services to member groups through agreements it made with health care providers. The court found the tobacco companies' representations about tobacco increased the cost of health services that Blue Cross purchased from health care providers. As such, Blue Cross was a "link in the chain of interacting parties" *id.* at *3, and suffered injury in fact. Lorix stands in an analogous position.

³²See 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).

In this matter, Respondents, like the tobacco companies in *Humphrey*, took actions that increased the price that Ms. Lorix paid for a product. In fact, in the instant matter, the relationship between the conspirators' actions and the price increase is closer than the analogous in *Humphrey*. In *Humphrey*, Blue Cross alleged that representations about tobacco increased the cost of health care services which Blue Cross purchased and sold. In the instant matter, Respondent's conspiracy raised the price of a component of the tire purchased by Ms. Lorix.

This analysis is consistent with recent analysis of antitrust standing by the United States Supreme Court. 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). Thus, *McCready* held that:

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. Analogously, Lorix's injury was foreseeable and inextricably intertwined with the injury Respondent sought to inflict. (App. 3, ¶ 3, App. 9, ¶¶ 34-35.) Thus, as in *Humphrey*, standing is appropriate because Ms. Lorix suffered an "injury in fact."

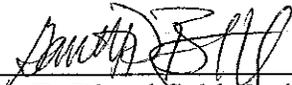
CONCLUSION

For the reasons stated above, Ms. Lorix respectfully requests that this Court reverse the Order 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 5 2005

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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 9,883 words. The brief was prepared using Corel WordPerfect 12.0.



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STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Case No. A052148
AFFIDAVIT OF SERVICE

Kathleen A. Schulte, being first duly sworn, deposes and says that on the 5th day of December, 2005, two copies of the following documents:

1. Appellant's Brief
2. Appellant's Appendix

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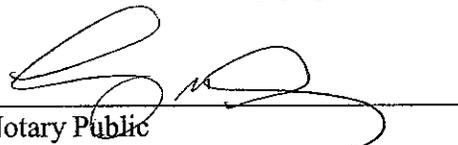
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Notary Public