February 28, 2006

Juleann Hornyak
Clerk, Supreme Court of Illinois
Supreme Court Building
200 East Capitol Ave.
Springfield, IL 62701

Re: No. 96236
Price v. Philip Morris Inc.

Dear Ms. Hornyak:

We are writing to urge the Supreme Court to request the views of the United States Federal Trade Commission ("FTC") before reaching any final decision in the above-referenced case as to the meaning and scope of that agency's consent orders.

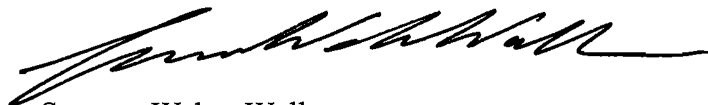
The undersigned are law faculty members specializing in consumer protection or antitrust law. Our collective experience includes substantial scholarly work relating to the FTC and the Federal Trade Commission Act. Many signatories have had experience at or before the FTC in connection with its enforcement of the FTC Act. We sign this letter on our own behalf and not on behalf of our schools that are listed below for identification purposes only. None of us represents, or has been retained by, any of the parties or their counsel in this case. Nor do we take any position as to the underlying question raised on the merits here, *i.e.*, whether the defendant's representations with respect to its "light" cigarettes were actionable under Illinois law. Our interest in this case derives solely from our concern that the majority's understanding and interpretation of FTC consent orders could well have a substantial negative impact on the interests of consumers not only in Illinois but also in over 30 other states with similar defenses in their consumer protection statutes.

The need for obtaining the FTC's own view on this question is underscored by the clear difference reflected in the Court's majority and dissenting opinions. Justice Freeman, for example, cites well-recognized principles of federal law to the effect that agency consent orders are the product of negotiations between the agency and a specific defendant. In such settlements, each party typically agrees to restrictions on its legal rights that may or may not reflect the scope of federal law had the case been litigated to conclusion – even with respect to the conduct of the specific defendant involved. Slip op. at 100-01. With respect to *other* parties, the FTC itself has taken the position that its consent orders have no legal force. In the only case of which we are aware in which the agency has addressed the question of the precedential value of permissive language in prior consent orders, the FTC ruled that a "consent agreement [with one party] is binding only between the Commission and [the party to that agreement]," and cannot be used as a

shield by another firm in the same industry found to have engaged in conduct permitted under another consent decree. *Trans Union Corp.*, 118 F.T.C. 821, 864 n.18 (1994), *aff'd,* 245 F.3d 809 (D.C. Cir. 2001). This view is hardly surprising, since Section 5 requires the agency to review, in each case, "the complete advertisement" in the "context" of the particular conduct involved. *See Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Since the issue here concerns the meaning of "the FTC's own published materials," slip op. at 57, it is most appropriate, even critical, for the Court to ask the FTC for its views on this question. That would be true if only to ensure that the Court correctly resolved the dispute in this case. But the question of whether an FTC consent order with one party can later be used as a shield by another party affects a myriad of other FTC consent decrees as well, in the context of both consumer protection and antitrust cases. The statutory defense relied upon by the majority under Section 10b(1) of the Illinois Consumer Fraud Act here is very similar to defenses contained in the consumer protection statutes of over 30 other states. Thus, the Court's decision on this question in this case will have far reaching implications for consumers everywhere.

Respectfully submitted,



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