No. 2017-0684

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 16-104211

CINDY SATTERFIELD, et al.,
Plaintiffs-Appellees,

v.

AMERITECH MOBILE COMMUNICATIONS, INC., et al.,
Defendants,

and

CINCINNATI SMSA LIMITED PARTNERSHIP,
Defendant-Appellant

BRIEF OF *AMICUS CURIAE* BETTY D. MONTGOMERY, FORMER ATTORNEY GENERAL OF OHIO, IN SUPPORT OF APPELLANT CINCINNATI SMSA LIMITED PARTNERSHIP'S MERIT BRIEF

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I. INTRODUCTION

At its core, this matter involves attempted profiteering from unrelated PUCO violations dating back 25 years that have already been settled with the actual aggrieved party. The lower courts expanded R.C. 4905.61 – and its treble damages penalty – beyond its intended purpose and to a place where speculation and theory result in nearly boundless liability for public utilities. For decades, this Court has opined that common pleas courts have no jurisdiction to award treble damages under R.C. 4905.61 unless the PUCO has first found a violation. **No such violation has been found.**

In 2001, the PUCO found that Appellant Cincinnati SMSA Limited Partnership ("Ameritech") engaged in rate discrimination in its transactions with one unaffiliated wholesaler of cellular services. Ameritech settled its claims with that wholesaler for $22 million. That should have been the end of the matter.

However, 11 years ago, **a defunct retail subscriber**, Appellee Intermessage Communications ("Intermessage"), represented by the same attorneys, filed this class action against Ameritech seeking treble damages under R.C. 4905.61. In an **extraordinary expansion of the scope of R.C. 4905.61**, the lower courts found that Intermessage and all other retail-level class members had claims for an "upstream" PUCO violation at the wholesale level.

Intermessage's theory is unprecedented. There is no legal authority that Intermessage can point to showing that it can recover under R.C. 4905.61 for injuries that, if there were any, were suffered by third parties. **In fact, in the analogous context of antitrust litigation, downstream injuries alleged by "indirect purchasers" have been prohibited by this Court and the U.S. Supreme Court.**

Finally, Ameritech's due process right to present available defenses has been violated by the lower courts' holdings. **Only the PUCO can adjudicate regulatory violations.** R.C. 4905.61 claims are premised upon a prior finding by the PUCO of a violation. As a result, public utilities cannot argue in a R.C. 4905.61 action that they did not violate a statute, regulation, or order. In this action, the **PUCO never found that Ameritech engaged in any violation at the retail level.** However, the lower courts ignored this foundational deficiency. In the process, they have prevented Ameritech from defending against alleged retail violations and violated its right to due process.

II. STATEMENT OF INTEREST OF *AMICUS CURIAE* BETTY D. MONTGOMERY

Amicus curiae Betty D. Montgomery served as a State Senator from 1989 to 1998, Ohio Attorney General from 1995 to 2003, and Auditor of State from 2003 to 2007. As Attorney General, Attorney Montgomery enforced Ohio's consumer protection laws, promulgated consumer protection rules, and represented the Public Utilities Commission of Ohio.

Attorney Montgomery's experience has shown that effective regulatory enforcement requires clarity in the laws to ensure that:

(1) businesses and utilities know what is required of them; and

(2) that real victims with real injuries are aware of their rights.

Legal uncertainty exemplified by the lower courts' decisions in this case will have a **chilling effect on utility and business development** due to unknown potential exposure. This chilling effect is exacerbated when, as in the instant case, the underlying events date back 25 years. Moreover, the overextension of standing in class actions, as the lower courts have done here, will undermine legal precedent, open the floodgates to baseless class

actions, overburden courts, and prevent effective and expedient adjudication of true victims' claims.

III. STATEMENT OF THE CASE AND FACTS

Attorney Montgomery adopts the statement of the case and statement of facts as articulated in Appellant Cincinnati SMSA Limited Partnership's Merit Brief.

IV. ARGUMENT

Proposition of Law 1:

> **A claimant lacks standing to sue under R.C. 4905.61 for "treble the amount of damages sustained in consequence of the violation" absent a prior determination by the Public Utilities Commission that the claimant's rights under a specific public utilities statute or commission order were violated.**

Standing is a jurisdictional requirement. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 80, 2014-Ohio-4275, 21 N.E.3d 1040. Both the U.S. Supreme Court and this Court require a litigant to prove standing by showing (1) an injury-in-fact that is (2) fairly traceable to the alleged unlawful conduct and (3) likely to be redressed by the requested relief. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 7, 13 N.E.3d 1101; *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 194 L. Ed. 2d 635 (2016). Any action brought without each of those elements is fundamentally flawed and must be dismissed. *Kuchta*, at 81.

A. Intermessage lacks standing under R.C. 4905.61 because there is no injury-in-fact that is traceable to a relevant PUCO violation.

R.C. 4905.61 provides a civil remedy for a PUCO violation to only "the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission."

Before there can be any liability under R.C. 4905.61, the PUCO must first find that the defendant violated a statute, PUCO rule, or order. *Milligan*, 56 Ohio St. 2d at 194; *State, ex rel. Northern Ohio Tel. Co. v. Winter*, 23 Ohio St. 2d 6, 260 N.E.2d 827 (1970). The PUCO has exclusive jurisdiction to adjudicate alleged violations of R.C. Chapter 4905. *Milligan v. Ohio Bell. Tel. Co.*, 56 Ohio St.2d 191, 194, 383 N.E.2d 575 (1978). **Common pleas courts have no jurisdiction over complaints for treble damages** under R.C. 4905.61 **unless PUCO has first found a violation** of a specific statute, regulation, or PUCO order. *Id. Accord*, *Westside Cellular v. Northern Ohio Cellular Tel. Co.*, 100 Ohio App. 3d 768, 654 N.E.2d 1298 (8th Dist. 1995) (the PUCO has sole jurisdiction, to the exclusion of common pleas courts, over public utility matters including rate schedules, rate discrimination, and adjudication of complaints.).

1. The PUCO has not found a relevant underlying regulatory violation which is a jurisdictional prerequisite to this action.

This action is based entirely on the result of a PUCO complaint from 1993. A reseller of cellular service, Westside Cellular, Inc. d/b/a Cellnet ("Cellnet") filed a complaint with the PUCO claiming that Ameritech engaged in unlawful rate discrimination at the wholesale level. *See, In re Westside Cellular, Inc. d/b/a Cellnet*, PUCO Case NO. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18 ("*Cellnet* Order"). Although Cellnet was not a buyer of Ameritech's services, it alleged that Ameritech discriminated against it by failing to offer capacity to Cellnet on a wholesale basis at the same rates Ameritech charged to its own retailers.

a. The *Cellnet* damages were based on a failure to keep records, not a finding of actual rate discrimination.

In 2001, the PUCO found that Ameritech failed to keep satisfactory records of the separation of its wholesale and retail operations in order to assess its internal rates. *Id.* at

*150. The PUCO therefore presumed that Ameritech's internal wholesale rate was zero. *Id.* at *150. Based on that internal zero-rate, the conclusion that Ameritech was charging other wholesalers (i.e., Cellnet) a higher rate was a foregone conclusion. *Id.* at *151 – 153.

b. The PUCO ruling was specifically limited to wholesale operations.

The PUCO unequivocally explained that the complaint and its Order relate only to wholesale rates, not end-user pricing. *Id.* at *93 – 94. The *Cellnet* Order also explained that it discussed retail rates only because it is related to the issue of whether or not Ameritech properly separated its wholesale and retail operations to enable the PUCO to ascertain the rates charged internally and externally. *Id.* at *94. Stated differently, "the Commission considers the current complaint to be predominantly centered around the respondents' capacity as wholesale providers." *Id.* at *93. It did so because the Federal Communications Commission (FCC) had ruled that the PUCO had no jurisdiction over retail user rates.

Nowhere in the *Cellnet* Order was there a finding that Ameritech charged higher rates to cellular end-users like Intermessage. That was not the issue in *Cellnet*. The violation involved rate discrimination to wholesalers. In fact, in explicit language, the PUCO stated:

> (1) "the primary regularly focus of the Commission is related to the wholesale operations of the regulated entities[;]" and,
>
> (2) its analysis of Ameritech's "retail operations is limited in context to the issue of whether or not [Ameritech has] properly separated their wholesale operations for the purpose of allowing the Commission to properly determine that [Ameritech has] afforded nonaffiliated resellers the treatment prescribed by the applicable statutory provisions and the applicable Commission orders."

Id. at *93 - *94.

c. The PUCO <u>could not</u> find a regulatory violation because the FCC has not permitted the PUCO to regulate retail cell phone rates.

Cellular service providers are subjected to many levels of regulation by different governmental bodies. In large part, Congress sought a national regulatory policy for mobile communications and **gave the Federal Communications Commission (FCC) general authority to regulate the mobile communications market** entry and rates charged. 47 U.S.C. § 332. States, on the other hand, were permitted to regulate "other terms and conditions" of service. § 332(c)(3)(A). However, States could petition the FCC to retain authority to maintain rate regulations that were in effect as of June 1, 1993. § 332(c)(3)(B).

d. PUCO efforts to regulate the retail market were rebuffed by the FCC.

In August 1994, the PUCO petitioned the FCC to retain state regulatory authority over rates for intrastate cellular services.[1] *In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C. Rcd. 7842 (1995). The FCC denied Ohio's Petition based on a lack of evidence that the market conditions fail to protect subscribers from unjust or unreasonable rates. *Id.* at 7851. The FCC clarified that the PUCO retains jurisdiction to regulate other terms and conditions so long as it "does not directly affect end-user rates." *Id.* at 7853.[2]

[1] Congress and the FCC use the term "commercial mobile radio services" and "private mobile radio services" in lieu of cellular or mobile telephone services. For ease of discussion, we are using the more common terminology.
[2] Reconsideration denied at 10 F.C.C. Rcd. 12427.

e. Case law supports the FCC's exclusive jurisdiction over retail rates.

An example of the functionality of FCC's authority can be seen in *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003). Ms. Orloff, an Ohio resident, represented by two of Intermessage's attorneys, filed a putative class action against Verizon Wireless, claiming that end-user rate discrimination by giving some consumers sales discounts and concessions. *Id.* at 418. The Northern District of Ohio referred the case to the FCC. *Id.* The FCC found that Cleveland's market was sufficiently competitive and market forces protected consumers from unreasonable discrimination. *Id.* On appeal, the D.C. Circuit affirmed, finding that the FCC did not err in finding that Verizon's concessions were reasonable and consumers were protected by market forces. *Id.*, cert. denied, *Orloff v. FCC,* 542 U.S. 937, 124 S. Ct. 2907, 159 L. Ed. 2d 813 (June 28, 2004). *See also, Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000) (holding that 47 U.S.C. § 332(c)(3) completely preempted the regulation of rates and allowing removal from state court under federal question jurisdiction), *and Aubrey v. Ameritech Mobile Communs.*, E.D. Mich. No. 00-cv-75080, 2002 U.S. Dist. LEXIS 15918 (June 17, 2002) (state law breach of contract claim was preempted and within the purview of the FCC).

Cases holding that the PUCO can review contracts between service providers and resellers are inapposite. *See, GTE Mobilnet v. Johnson*, 111 F.3d 469 (6th Cir. 1997) and *New Par v. PUCO*, 98 Ohio St. 3d 277, 2002-Ohio-7245, 781 N.E.2d 1008. The PUCO's jurisdiction ends, and the FCC's begins, at the point of end-user ratemaking. *In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C. Rcd. 7842 (1995). These cases involved resellers/wholesalers

of cellular services. Neither stands for the proposition that the PUCO (or, for that matter a common pleas court) can adjudicate questions of end-user cellular rates.

In short, the PUCO is prohibited from regulating end-user rates. End-users like Intermessage who claim to be victims of rate discrimination must file a complaint with the FCC under 47 U.S.C. § 208. Neither the PUCO nor a state court can usurp the FCC's authority. The PUCO acknowledged this is the *Cellnet* Order. The end result is that the *Cellnet* Order cannot be the basis for a R.C. 4905.61 claim by a retail consumer like Intermessage.

f. The trial court cannot substitute its opinions for matters within FCC and PUCO regulatory authority.

Intermessage could only have a claim under R.C. 4905.61 if it were injured by a PUCO-adjudicated violation. On the other hand, as shown by the cases above, retail subscriber complaints of rate discrimination are within the FCC's exclusive jurisdiction. The PUCO acknowledged that its *Cellnet* Order was limited to wholesale rate discrimination. The FCC rejected the PUCO's request to regulate retail rates. **Despite these clear limitations,** the trial court found that Intermessage could enforce the *Cellnet* Order.

2. The lower courts' decisions deprive Ameritech of Due Process.

Due process affords all litigants the right to proper notice and an impartial hearing with the opportunity to present a defense. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 749, 750 (6th Cir. 1979). R.C. 4905.61 imposes a penalty and, therefore, it must be strictly construed with all reasonable doubts resolved in favor of Ameritech. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St. 3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 19-20 (treble damages are designed to punish public utilities for violations); *Dean*

v. Seco Elec. Co., 35 Ohio St.3d 203, 206, 519 N.E.2d 837 (1988) (statutes which are penal in nature must be strictly construed).

The trial court assumed jurisdiction to impose penalties, thereby preventing Ameritech from presenting a defense to any alleged retail price discrimination. **Retail price discrimination was never found by the PUCO, nor could it have been since the PUCO had no jurisdiction over retail rates as determined by the FCC.** In fact, it was never even alleged. Compounding that problem is that R.C. 4905.61 is a strict liability statute imposing penalties.

As if that were not enough, the underlying wholesale violations were premised on legal fiction that punished Ameritech for lacking records. The PUCO found that Ameritech lacked records showing the separate rates charged to its wholesale-level affiliates and its retail customers. Based solely on a lack of records, the PUCO assumed a "zero-price" rate was charged to its internal wholesalers. And, because the PUCO applied a "zero-price" rate, Ameritech could not introduce evidence of its actual rates. Therefore, a finding of rate discrimination was virtually inevitable; bootstrapping a fictional rate into a massive treble damages award deprived Ameritech of its right to Due Process.

Proposition of Law No. 3

> **Where a plaintiff relies upon a damages model to establish that common issues would predominate, the model must demonstrate that injury-in-fact and damages can be proven on a class-wide basis.**

Intermessage fails to set forth substantiated evidence of class-wide damages arising from a PUCO violation. Even if there were an underlying PUCO violation (which there was not) and even if these retail plaintiffs had standing to enforce a wholesale-level violation (which they did not), this impossibly unwieldy class should not be certified. The trial court certified a class consisting of "all retail subscribers of [Ameritech] who purchased services

with an Ohio area code within geographic areas in which the PUCO decision found wholesale price discrimination during the period October 18, 1993 through September 8, 1995."

Moreover, damages must be quantified using a legitimate damages model. **A plaintiff seeking treble damages must prove an injury proximately caused by the violation**. *See, e.g., Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St. 3d 394, 400, 2007-Ohio-2203, 865 N.E.2d 1275 (plaintiffs in a R.C. 4905.61 action must prove "causation and damages flowing from the adjudicated violation.") Intermessage fails to provide such a model.

A. Identifying class members is impossible after 25 years.

Although there are several serious problems with this putative class (as discussed by Ameritech), perhaps the most fundamental flaw is Intermessage's **inability to identify and locate putative class members from a period beginning 25 years ago.** It took the PUCO 8 years to adjudicate a violation. It took Intermessage another 3 years to file this action. And, then, it took the trial court took another 7 years to decide the question of class certification.

Civ.R. 23(A) provides four prerequisites to class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Intermessage bears the burden of establishing that a cause of action merits treatment as a class action. *State ex rel. Ogan v. Teater*, 54 Ohio St. 2d 235, 247, 375 N.E.2d 1233 (1978). Among other things, a party seeking class certification must specify at the time of certification the means to identify whether a particular individual is a member of the class.

Planned Parenthood Ass'n of Cincinnati v. Project Jericho, 52 Ohio St. 3d 56, 63, 556 N.E.2d 157 (1990). The class definition must enable the trial court to identify class members with "reasonable effort." *Clark v. Park 'n Fly*, 8th Dist. No. 94379, 2011-Ohio-323, ¶ 24.

The trial court's analysis overlooked Intermessage's inability to reliably identify putative class members from 25 years ago. First, **relevant subscription information may not be in possession of the parties.** Intermessage closed its doors 17 years ago. If it still exists, information would be held by the non-party wholesalers (i.e., Cellnet) who sold retail cellular subscriptions. Because Cellnet and Ameritech settled those claims years ago, those records may have been destroyed. Service contract data may no longer exist, and what records Ameritech has are archived on microfiche in hundreds of boxes.[3] Further, due to the age of claims, **it is also very unlikely that retail consumers have knowledge and/or documents sufficient to determine and identify whether they have a claim**. The average consumer surely would not be likely to recall who his or her cellular service provider was 25 years ago, let alone to be able to submit a verifiable claim stating the consumer's price and service preferences in the early 1990s so that individualized damages calculations can be made.

Among the bedrocks of our legal system are certainty and timely adjudication of rights. Class actions are designed to recover damages for a group that could not support single actions. *See, Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St. 3d 56, 62, 556 N.E.2d 157 (1990). This case is based on events from over two decades ago. The named plaintiff is out of business. The class, if one can even determine

[3] Affidavit of Matthew Pohl, ¶ 15, 21.

who had cell service back then and what their current address is two decades later, is highly unlikely to be aware of any damages from a complex regulatory scheme that wasn't even supposed to regulate retail services. There is no longer a cognizant reason for this class action and its staleness and age should be another reason to decertify.

Quite simply, this litigation is not about the class members. Intermessage's counsel are using the *Cellnet* Order as a means to "double-dip" into Ameritech's pockets. With no realistic means to identify the class members, this action would only serve to benefit class counsel which would not further the policies behind Civ.R. 23.

B. Intermessage did not even sell cell phones to customers.

Moreover, although it is technically a retail customer, Intermessage's claims are **not typical of other class members**. Intermessage marketed backup panels for alarm systems. It contracted for the use of cellular phone numbers that were programmed into transceivers installed in the backup alarm panels. Unlike almost all of the class members, who were individual consumers, Intermessage was a **company capable of passing on the cellular contract pricing onto its customers.** Also, unlike most consumers, Intermessage had no price-sensitivity. Even assuming *arguendo* that Intermessage could prove that wholesale prices were passed on to retail customers (which it cannot), Intermessage concluded that **switching cellular providers was not worth the expense of reprograming its alarm panels.** As a result, Intermessage had no price sensitivity, making its circumstances and its damages higher than one may reasonably expect from most retail consumers. Typical consumers often switch cellular providers based on pricing. Intermessage is not a proper class representative.

The factual issues in even trying to define, locate, and determine the class after 25 years are insurmountable.

C. Intermessage failed to produce an actual damages model showing a reasonable methodology.

Class action suits "are the exception to the usual rule that litigation is conducted by and on behalf of only the individually named parties." *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, ¶ 33. Civ.R. 23 and its federal counterpart are not mere pleading standards; they set forth minimum mandates that proposed class plaintiffs must prove. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). Intermessage fails to provide an appropriate damages model because (1) it cannot establish causation and damages suffered from a PUCO violation and (2) it cannot identify class-wide impact resulting from such damages. **Retail consumers, like Intermessage, cannot reliably prove causation and damages suffered from a wholesale-level regulatory violation.**

Referring back to the statutory language, R.C. 4905.61 provides a private right of action for a PUCO violation to only "the person…injured thereby…." Recoverable damages must have been "sustained in consequence of the violation." R.C. 4905.61. Consistent with this limited statutory language, this Court has held that a plaintiff must prove an injury proximately caused by that specific, underlying PUCO violation. *See, e.g., Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St. 3d 394, 400, 2007-Ohio-2203, 865 N.E.2d 1275.

1. Legal precedent in analogous private antitrust jurisprudence establishes that indirect retail purchasers have no claim for a wholesale-level violation.

Private antitrust case law is instructive in this context. In private antitrust litigation, **retail consumers have been prohibited from recovery for wholesale-level violations for over 40 years.** *See, Illinois Brick Co. v. Ill.,* 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d

707 (1977). Courts have applied a traditional proximate cause analysis to determine whether a particular injury was too remote from an alleged violation. *See*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982). Under that analysis, the U.S. Supreme Court held that **"indirect purchasers'" claims are too remote to support a treble damages claim.** *Illinois Brick Co., id.*

Even broader than R.C. 4905.61, section 4 of the Clayton Act provides a treble damages remedy to "**any** person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added); compare with R.C. 4905.61 ("[T]he public utility or railroad is liable to **the** person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation…") (emphasis added). Comparing the two statutes, R.C. 4905.61 and its narrower language ("the person") cannot rightly be interpreted to be broader than section 4 of the Clayton Act ("any person").

Like Intermessage, the plaintiffs in *Illinois Brick* were "downstream" consumers alleging an injury from a higher level in the supply chain. *Id.* at paragraph one of the syllabus. There, the manufacturer was accused of price fixing in violation of the Sherman Act. *Id.* The manufacturer sold its bricks to masonry contractors who submitted bids to general contractors who, in turn, submitted bids to customers, including the plaintiff. *Id.* The only plausible theory of injury to the plaintiff was if all or part of the overcharge was passed on by the contractors it hired. The Court held that indirect purchasers could not use a "pass-on" theory to recover under section 4. To allow otherwise would create a **serious risk of duplicative recovery** and weigh down treble damages actions with the **"massive evidence and complicated theories" to prove such an injury.** *Id.* at 741.

a. The principles of *Illinois Brick* have been expanded to encompass cases involving utility consumers.

Illinois Brick has been extended to utilities cases. **Retail consumers of utilities have no cause of action against a utility supplier for alleged antitrust injuries suffered by their wholesalers.** *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990). In *Utilicorp*, a group of natural gas suppliers overcharged a public utility company for natural gas and the utility company passed those charges on to its customers. The utility companies, consumers, and a group of states filed a treble damages action against the gas suppliers. *Id.* at 204. The Supreme Court applied *Illinois Brick* and held that, **because the utility consumers were not the defendants' immediate buyers, they could not assert antitrust claims.** *Id.* at 207.

b. Ohio's Valentine Act also prohibits "indirect purchaser" actions.

Ohio follows the federal rule of **prohibiting an indirect purchaser from filing a private suit for an antitrust violation.** *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 2005-Ohio-4985, 834 N.E.2d 791. The plaintiff in *Johnson* bought a computer with Microsoft software pre-installed. Microsoft licensed its software to retailers who installed them in the computers. Retail customers, like the plaintiff, were therefore indirect purchasers. The Valentine Act, R.C. 1331.01, *et seq.*, is patterned after the federal laws. R.C. 1331.08 permits any "person injured in the person's business or property…by reason of anything forbidden or declared to be unlawful in [R.C. 1331.01 to .14]" to recover treble damages. Because the Valentine Act is similar to federal antitrust laws, Ohio has looked to federal case law for guidance. *Id.* at 281. Thus**, the Ohio Supreme Court has followed *Illinois Brick*** and held that "indirect purchaser of goods may not assert a Valentine Act claim for alleged violations of Ohio antitrust law." *Id.* at 284.

c. The same principles apply to PUCO findings.

R.C. 4905.61 and R.C. 1331.08 are similar in import. Both allow private parties to recover treble damages for statutory violations if they can show the violation proximately caused damages. In light of these similarities, **the "indirect purchaser" rule of *Illinois Brick, Utilicorp,* and *Johnson* should be applied** in this case to prohibit the Plaintiffs' claims. If allowed to proceed, this class action will be bogged down in – at best – illusory damages theories that are complicated and questionable in their application.

d. Duplicative liability results from the lower courts' decisions.

There is also a risk of incurring duplicative liability. Ameritech has already settled and paid $22 million for the claims of the wholesaler (i.e., direct purchaser). The plaintiffs' claims in this case overlap and are **duplicative of the amounts paid to the wholesalers.** The same law firm that represents Intermessage in the instant case filed six more lawsuits after that $22 million settlement with Cellnet. Only Intermessage's suit survived but it is seeking a second, duplicative payment based on the same underlying conduct. This duplicative liability, particularly when coupled with the questionable evidence of any injury to Intermessage, is exactly what *Illinois Brick*, *Utilicorp*, and *Johnson* prohibit.

2. The cases cited in Intermessage's brief on jurisdiction are inapposite and misstate the issues of law before the Court.

In its jurisdictional Memorandum in Response, Intermessage cites several cases and propositions of law that have no bearing on this appeal. For example, Intermessage goes to great lengths to convince the Court that "the pool of proper treble-damages claimants is not restricted to those parties participating in the PUCO proceeding." (Intermessage Memorandum in Response, p. 9). Relying on cases including *Cleveland Mobile Radio*

Sales, Inc. v. Verizon Wireless, 113 Ohio St. 3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, Intermessage argues that it is not required to prosecute an administrative PUCO complaint in order to recover under R.C. 4905.61.

The issue, however, is more complex than that. The issue is whether Intermessage, a retail customer, can revive a 25-year-old PUCO violation against a wholesaler—a completely different level of the supply chain—without proof of injury resulting therefrom, and without a reliable model for damages, such that it should be permitted to maintain a class action.

The *Cleveland Mobile* case, which involved three of Intermessage's counsel, simply held that the statute of limitations for R.C. 4905.61 claims is one year, not six years. All of the plaintiffs in that action were resellers/wholesalers of cellular services. *Id.* at ¶ 2. Those plaintiffs sought recovery under R.C. 4905.61 based on the *Cellnet* Order and this Court found that their claims were barred by the statute of limitations. The *Cleveland Mobile* decision does not further Intermessage's claim.

The same is true for the case of *Kanally v. Ameritech Ohio Co.*, 8th Dist. No. 89472, 2008-Ohio-4446, in which retail cable customers alleged PUCO violations from the use of coupons. The issue on appeal was whether the claim was barred by the statute of limitations, not whether the plaintiffs had standing.

Another case cited by Intermessage, *Meek v. Gem Boat Serv., Inc.*, 69 Ohio App.3d 404, 590 N.E.2d 1296 (6th Dist. 1990), actually involved a reversal of an excessive award. In that case, the PUCO found that a water and sewer company violated a public utility statute and the trial court awarded three-times the amount of all water and sewer charges paid by the plaintiff. Reviewing the language of R.C. 4905.61, the Court of Appeals held that a plaintiff can only recover three times the amount of its *actual* damages (i.e., an over-

charge). It is ironic that Intermessage would rely on this case when it has no evidence of actual damages.

The decision in *Ohio Edison Company v. PUCO*, 56 Ohio St.2d 419, 384 N.E.2d 283 (1978) is also unhelpful. In *Ohio Edison*, an electric company wanted to increase its rates for industrial service. The violation alleged was at the retail level and the attempted claims were by retail customers (completely unlike the present matter). The PUCO's conclusion that an administrative class should not proceed was based primarily on the conclusion that the PUCO could not award damages.

These cases are, at minimum, unrelated to the issue before the Court. In fact, some of those holdings work against Intermessage's claims in this action.

B. Intermessage cannot and does not establish class-wide impact or damages.

Among the class certification requirements is the duty to "adduce common evidence that shows all class members suffered *some* injury." *Felix, id.* at ¶ 33. When a proposed class plaintiff employs a model to demonstrate class-wide damages, the model must "establish that damages are susceptible of measurement across the entire class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2012). Rule 23 commands a "hard look at the soundness of statistical models" that attempt to show predominance. *In Re Rail Freight Fuel Surcharge Antitrust Litigation—MDL No. 1869*, 725 F.3d 244, 255 (D.C. Cir. 2013).

In the instant case, Intermessage's proffered expert, John M. Gale, did not even propose a model to identify class-wide impact and damages. The trial court acknowledged this failure but, nevertheless, certified the class under the erroneous belief that Intermessage's failure to produce a model could be fixed later. In so doing, the trial

court overlooked a fatal flaw to class certification. Under *Felix* and similar cases, a model that does not establish beyond a preponderance of the evidence that all class members suffered *some* injury does not suffice.

V. CONCLUSION

In summary, the judgments of the lower courts should be reversed on Proposition of Law No. 1 because Intermessage has failed to meet both steps required for recovery under R.C. 4905.61. There **has not been an underlying PUCO violation found** to support Intermessage's claim. Only the PUCO, not trial courts, can find violations of PUCO rules. Only the FCC can adjudicate retail cellular rates. The lower courts ignored all of these well-established principles of law.

Regarding Proposition of Law No. 3, the lower courts also erred by certifying a class without a reliable damages model. Before a class can be certified, the plaintiff must provide the means of identifying class members, nor can it establish causation and damages on a class-wide basis. In the instant case, where the class consists of people who had cellular phones 25 years ago and who were not customers of any party, the **likelihood of anyone having records and/or knowledge to identify potential class members is virtually impossible**.

For the reasons above, the undersigned *amicus curiae* respectfully requests that the judgments of the lower courts be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **Brief of *Amicus Curiae* Betty Montgomery, Former Attorney General of Ohio, in Support of Appellant Cincinnati SMSA Limited Partnership's Merit Brief** was served on the following persons by email and regular mail this 30th day of March, 2018:

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