STATE OF MINNESOTA

IN SUPREME COURT

No. CX-00-737

Ronald Peterson, et. al. individually and on
behalf of all others similarly situated,

Respondents

v.

BASF Corporation

Appellant.

REQUEST FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

Following Rule 129 of Minn. R. Civ. App. P., The AEI-Brookings Joint Center for Regulatory Studies ("AEI-Brookings"), requests leave to file a brief amicus curiae in support of Appellant BASF Corporation, and to suggest that this Court grant further review and reverse the decision of the Court of Appeals. Applicant's interest in this case reflects a broad public perspective. AEI-Brookings was established by the American Enterprise Institute ("AEI") and the Brookings Institution (two leading "think tanks") in 1998 to help improve economic regulation and the regulatory process.[1] It conducts studies of the costs and benefits of various regulatory initiatives and programs, as well as judicial proceedings that have regulatory implications, such as

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[1] The AEI, founded in 1943, sponsors original research relating to policy issues affecting the foundations of a free society, including competitive free enterprise in open markets. The Brookings Institution, founded in 1916, also promotes scholarship to improve the quality of U.S. public policies. Both are independent, non-partisan, non-profit organizations which support and publish the work of first rank scholars.

this case.[2]

AEI-Brookings is here concerned with the harm to competition resulting from a ruling that will allow a jury to substitute for competitive market forces its own idiosyncratic view of "fair" pricing, and "fair" disclosure when different prices are charged for allegedly virtually identical goods. Other issues raised by BASF on appeal will not be addressed.

AEI-Brookings believes that the Court of Appeals reached two wrong conclusions that carry the potential for enormous harm to consumers and to free markets. The first conclusion is that a jury could find under the New Jersey Consumer Fraud Act ("New Jersey Statute"), that BASF acted in an unconscionably deceptive manner by selling an herbicide product to farmers without disclosing that a cheaper but allegedly identical, product potentially could be sold to those farmers – if BASF sought and received state regulatory approval for such sales.[3] The jury would be free to find that BASF's price was unconscionable, unreasonably high, even though farmers who bought the product admitted that it worked more effectively than available alternatives, led to increased crop yields and therefore increased the plaintiff farmers' profits. (A-85-111.)

The second erroneous conclusion the Court of Appeals reached is that the New Jersey Statute permits a jury to decide that an alleged $4 price disparity between two herbicides constitutes an unconscionably "large profit," an "inflated fee" (A-7), which can be the "damages" from the alleged deception. Under the New Jersey Statute, damages are trebled and attorneys' fees are added. The certified class is national in scope. The dollar amounts at stake, therefore, are substantial. Allowing a jury to apply its own subjective view of what a reasonable profit should

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[2] The U.S. Supreme Court recently accepted an AEI-Brookings amicus brief regarding the costs and benefits of the EPA Clean Air Act regulations. For a complete guide to AEI-Brookings' publications and briefs, see aei.brookings.org.

[3] The cheaper product was available for use only on major crops (e.g., soybeans and cotton) and the more costly product was available for use on both major and minor crops (e.g., sugarbeets and sunflowers). The alleged price difference between the two herbicides was four dollars for the quantity needed to treat one acre under cultivation.

be and what information about cost and availability of product a supplier is obliged to disclose, is bad law, dependent on bad economics and resulting in bad policy.

This case deserves the Court's review because the Court of Appeals' application of the New Jersey Statute violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution under the 80-year-old precedent of United States v. L. Cohen Grocery Co. 255 U.S. 81 (1921). In Cohen, a seller of sugar was charged with violating a Missouri law making it unlawful for a merchant to set an unjust or unreasonable price for "necessaries" sold in the market. Without dissent, the U.S. Supreme Court found the statute unconstitutionally vague, leaving open "the widest conceivable inquiry, the scope of which no one can foreshadow or adequately guard against" as to what is a reasonable price (Id. at 89). A precondition for the justiciability of an issue is establishing satisfactory criteria for judicial determination. Baker v. Carr, 369 U.S. 186, 210 (1962). No such criteria are available here. The ruling gives a jury the unguided discretion to act as a price czar whose judgment supersedes market forces. BASF, and any other business subject to the New Jersey Statute, or another like it, would face penal sanctions for charging lawful prices without being able to guess what a particular jury would consider unreasonable pricing.

The bad law is based on bad economics because it substitutes a subjective judgment of reasonable price for the market's determination. It is law, based on standard economics, that a private seller has the right to set whatever price it wants, and to sell or not sell to whomever it chooses. If the price is too high, or the offer to sell excludes too many potential customers, other suppliers are likely to enter the market and offer more choice, more widely, at better prices. Supply and demand alone determine what are objectively reasonable prices -- not courts, price administrators, or juries. Federal and state antitrust laws, including those of New Jersey and Minnesota, have long recognized "the right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300, 307 (1919).[4] Extension below of The New Jersey Statute restricts this right.

The decision leads to bad policy -- that a price differential between different classes of customers in different markets is an undesirable and illegal marketing scheme. Any such decision would revolutionize what are now ubiquitous marketing and pricing strategies. This is easily shown in the context of private label retailing. Assume a soap manufacturer sells its trademarked detergent to a supermarket chain for $2 a box, and, further, that it makes that chain's private label detergent which is "virtually identical" to its trademarked brand, selling the private label to the chain for $1 a box. The chain then sells both products to the consumer at a 100% markup. Have the soap manufacturer and the chain violated the Court of Appeals' application of the New Jersey Statute by the undisclosed two-tiered pricing of these two detergents? Requiring disclosure of the product's alleged "virtual" identity would be tantamount to requiring sellers to sell their products at a single, unitary price, even where different prices to different customers based upon business strategic and market circumstances are otherwise entirely lawful. One inevitable result would be to deter sellers from discounting, because any discount to one customer would have to be offered to all.[5] Another result could be to discourage the availability of products to certain classes of customers at any price. The easiest course for the soap manufacturer, if sued in a case like this, would be to give up private labeling. This, in turn, would lead to higher prices and reduced consumer choice.

The Court of Appeals' expansion of the scope of the New Jersey Statute, referring to the "inflated fees" of higher prices even exposes to risk businesses selling products with great value,

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[4] See also Penthouse Int'l, Ltd. v. Eastman Kodak Co., 430 A.2d 971, 975 (N.J. Super. Ct. Ch. Div. 1980), aff'd, 445 A.2d 428 (N.J. Super. Ct. App. Div.1982) (quoting Colgate, 250 U.S. at 307); Hough Transit, Ltd. v. Nat'l Farmers Org., 472 N.W.2d 358 (Minn. Ct. App. 1991) (following federal law and recognizing legality of refusal to deal).

[5] Cf. Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1344 (7th Cir. 1986).

but low marginal production costs (after very high initial capital investment), including computer software companies. If, after hundreds of millions of dollars of development expenditures, IBM can produce marginal copies of CD-ROM disks and training materials that reflect the software technology of Lotus Notes for less than $100, is it unconscionable for IBM to charge a product fee of $300,000? Is IBM obligated to disclose its profit margin to customers (and necessarily to competitors), and justify that margin to avoid liability for unconscionable markups? Less competitive markets and a disincentive to innovation would surely result.

The mischief set afoot by letting juries judge the reasonableness of prices and the adequacy of disclosure of differential prices in deciding whether there has been deception in the marketplace is hard to overestimate. This is both radical economic policy and a departure from settled law so serious as to justify Supreme Court review.

For these reasons, AEI-Brookings respectfully urges this Court to grant the Petition for Review and to grant leave to AEI-Brookings to participate in proceedings before this Court as amicus curiae.

DATED: December 18, 2000

Respectfully submitted,

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DATE OF FILING OF COURT OF APPEALS DECISION
NOVEMBER 14, 2000

REQUEST FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

ON BEHALF OF AEI-BROOKINGS JOINT
CENTER FOR REGULATORY STUDIES

IN SUPPORT OF PETITIONER BASF CORPORATION

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