**STATE OF ILLINOIS JUDICIAL INQUIRY BOARD**
**REQUEST FOR INVESTIGATION OF JUSTICE LLOYD A. KARMEIER**

## I. COMPLAINANTS

1. Complainant, Common Cause, is a nonpartisan nonprofit advocacy organization with its main office at 1250 Connecticut Ave., NW, Suite 600, in Washington, DC 20036. Common Cause was founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Archibald Cox served on the Common Cause National Governing Board from 1976 to 2001, was Chairman of Common Cause from 1980 to 1992 and was its Chairman Emeritus until his death in 2004. Common Cause works for campaign finance reforms that will help bring government and the judiciary back to the people by reducing the influence of wealthy special interests, expanding public funding of campaigns and encouraging campaigns to seek funding from a broader base of small contributors. It has nearly 300,000 members and supporters and state offices throughout the United States, including the State of Illinois. Common Cause Illinois is located at 70 East Lake Street, Suite 1700, in Chicago, IL 60601. Common Cause remains committed to a honest, open and accountable government and judiciary.

2. Complainant, Business and Professional People for the Public Interest ("BPI"), is a public interest law and policy center located at 25 East Washington Street, Suite 1515, in Chicago, Illinois 60602. BPI is dedicated to social justice and to enhancing the quality of life for all people living in the Chicago region and the state of Illinois. BPI's staff of lawyers and policy specialists uses a variety of approaches, including policy research and development, advocacy and community organizing, litigation and collaboration with other organizations.

3. Complainant, Citizens Action/Illinois ("CAI"), is the largest public interest organization in the state of Illinois with its main office at 28 E. Jackson, Suite #605, Chicago, Illinois 60604. CAI was formed in 1997 to work on behalf of the public interest both in Springfield and Washington, DC and is built on a tradition of strong grassroots citizen organizations—in labor, the communities, and in the progressive movement. CAI's agenda includes Illinois Supreme Court election reform.

4. As detailed below, Complainants have information regarding conduct on the part of Illinois Supreme Court Justice Lloyd A. Karmeier that raises serious questions concerning violations of the applicable canons of judicial ethics and that could bring the Illinois Supreme Court into disrepute.

## II. STATEMENT OF FACTS RELATING TO CONDUCT ON THE PART OF ILLINOIS SUPREME COURT JUSTICE LLOYD A. KARMEIER THAT BRINGS THE ILLINOIS SUPREME COURT INTO DISREPUTE

5. On August 18, 2005, the Illinois Supreme Court issued its opinion in *Michael Avery et al., v. State Farm Mutual Automobile Insurance Company*, 216 Ill.2d 100, 835 N.E.2d 801 (2005). The *Avery* case reached the Illinois Supreme Court on October 2, 2002 after a $1.05 billion verdict against State Farm Mutual Automobile Insurance Company was unanimously upheld by the Illinois Appellate Court. The case was argued before and submitted to the Supreme Court of Illinois on May 14, 2003. Over two years passed between the time that the *Avery* case was submitted to, and the issuance of an opinion by, the Illinois Supreme Court. Justice Karmeier, who was not elected to the Illinois Supreme Court until November 2004 and did not commence his duties on the Court until December 2004, participated in the *Avery* decision.

6. On December 15, 2005, the Illinois Supreme Court issued its opinion in *Price v. Philip Morris Incorporated*, Case No. 76236 on direct appeal from the trial court verdict in favor of

Plaintiffs for $10 billion. This case reached the Illinois Supreme Court on direct appeal on September 16, 2003 based upon a motion by Philip Morris under Rule 302. The final brief in this case was filed on October 4, 2004 and it was argued before (and submitted to) the Illinois Supreme Court on November 10, 2004. Over one year passed between the time the PMUSA case was submitted to, and the issuance of an opinion by, the Illinois Supreme Court. Justice Karmeier participated in the PMUSA case – notwithstanding the fact he was not a member of the Illinois Supreme Court while the case was briefed and had not taken his seat (and did not participate) at the time of oral argument. The Avery and PMUSA cases constitute the two largest class action judgments in the history of Illinois.

7. *The Illinois Code of Judicial Conduct* states that a judge has an obligation to disqualify himself or herself in a proceeding where the judge's impartiality might reasonably be questioned. ILCS Code of Jud. Conduct, Canon 3, S.Ct. Rule 63(C)(1)(a). Disqualification is not limited to circumstances where there is actual bias or prejudice but is also required where there is an appearance of bias or prejudice. *People v. Bradshaw*, 171 Ill.App.3d 971, 975-76 (1st Dist. 1986). Similarly, a judge must avoid all impropriety as well as the appearance of impropriety. ILCS Code of Jud. Conduct, Canon, 2, S.Ct. Rule 62. Moreover, a judge must conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, including the Illinois Supreme Court. *Id.*

8. Justices of the Illinois Supreme Court must conform their conduct to the ethical guidelines set forth in the Illinois Code of Judicial Conduct and corresponding Illinois Supreme Court Rules. Illinois Supreme Court Rule 63 (Canon 3 of the Illinois Code of Judicial Conduct) provides in relevant part: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances

where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer ..." Illinois Supreme Court Rule 61 (Canon 1 of the Illinois Code of Judicial Conduct) entitled "A Judge Should Uphold the Integrity and Independence of the Judiciary" states: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Illinois Supreme Court Rule 62 (Canon 2 of the Illinois Code of Judicial Conduct) entitled "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Actions" states: "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These canons of legal ethics require the avoidance of any public perception of judicial impropriety, whether or not any impropriety actually exists. *See People v. Bradshaw*, 171 Ill.App. 3d 971, 975-76 (noting that a "judge further has an obligation of assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice"). *See Affidavit of Geoffrey C. Hazard, Jr. in Support of Complainants' Request for Investigation of Justice Lloyd A. Karmeier, attached as Exh A.* Even Justice Karmeier himself has recognized the importance of these principles.[1]

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[1] In response to a 2001 request by the then President of the Illinois State Bar Association to the Chair of its Bench and Bar Section Council, a subcommittee was appointed to develop standards defining an "excellent" judge. Justice Karmeier became Co-Chair of that subcommittee and co-authored the standards, which included the statement that, "A judge must always avoid even the appearance of bias or injustice because confidence in the entire system of justice is diminished when any single judge engages in conduct that lowers public trust in the fair and impartial administration of justice." (See Exhibit 10, Section VIII). Just as the authors further stated, " The bench and bar have a responsibility to respond to unjust and improper criticism or attack on judges" (*Id.)*, so too do they have a responsibility to raise issues concerning the Illinois Code of Judicial Conduct.

9. Complainants' Request for Investigation of Illinois Supreme Court Justice Lloyd A. Karmeier is based upon Justice Karmeier's violation of Canons 1, 2 and 3 of the Illinois Code of Judicial Conduct and Illinois Supreme Court Rules 61, 62 and 63 (C) (1) (a) by refusing to recuse himself from, participating in, and casting the decisive vote: (1) in favor of State Farm in the *Avery* case, and (2) in favor of Philip Morris Incorporated ("PMUSA") in the *Price* case. With respect to State Farm, records show Justice Karmeier directly received over $350,000 in donations for his election campaign from State Farm executives, State Farm's lawyers, and State Farm's *Amici* and their lawyers while the case was pending undecided before the Illinois Supreme Court. *See,* Exhibit 1 hereto, Supporting Memorandum at pp. 11-13. Records further show that State Farm was a member of the Illinois Chamber of Commerce, that one of State Farm's Vice Presidents sat on that organization's board, and that Justice Karmeier received almost $270,000 from the Illinois Chamber of Commerce and its PAC. *See,* Group Exhibit 8(c)-(f) and Par. 4 of Exhibit 1 to the Supporting Memorandum. Additionally, the records reflect that over $1.5 million in additional campaign donations for Justice Karmeier's election campaign came from the Illinois Republican Party, just days after it received similar contributions from the U.S. Chamber of Commerce, of which State Farm is a member and on whose board sits another senior executive of State Farm. *See,* Exhibit 32 to Supporting Memorandum and Group Exhibit 8(a)-(b). Similarly, with respect to PMUSA, records not only show that the U.S. Chamber of Commerce was an *amicus* party on behalf of PMUSA, but that thousands of dollars were contributed to Justice Karmeier's campaign by PMUSA attorneys and PMUSA *amici* lawyers. *See,* Group Exhibit 8 hereto and Paragraph 20 below. The details of conduct in violation of the

Illinois Code Of Judicial Conduct so as to bring the Illinois Supreme Court into disrepute are set forth in the following paragraphs of this Statement of Fact.

10. Under the Illinois Constitution, the Supreme Court of Illinois "shall consist of seven judges." Three are selected from the First Judicial District (comprising Cook County), the other four are selected from each of the other four judicial districts. *Ill. Const. Art. VI* §§ 2, 3. Absent the concurrence of four judges on the Supreme Court of Illinois, no Appellate Court opinions can be overturned. *Ill. Const. Art. VI*, § 3. Under the Illinois Constitution, judges on the Supreme Court of Illinois are nominated through partisan primary elections or by petition and then "shall be elected at general or judicial elections as the General Assembly shall provide by law." *Ill. Const. Art. VI*, § 12(a). Illinois places no limits on the amounts or sources of campaign contributions that a candidate, judicial or otherwise, may accept. Individuals, corporations, and groups, including political action committees, may all donate to judicial campaigns. The Illinois Election Code, 10 ILCS 5/9-1, et seq., imposes disclosure requirements on candidates and groups which accept contributions or make expenditures. This process puts a higher burden on judges to recognize, among other things, when unlimited campaign contributions raise a question of impropriety or the appearance of impropriety.

11. Between May 14, 2003, when the *Avery* case was submitted to the Illinois Supreme Court, and the issuance of a decision on August 18, 2005, the seat of the Justice representing the Fifth Appellate District came open as a result of the retirement of Justice Rarick. A judicial election was held in November 2004 for a vacant seat on the Illinois Supreme Court. One candidate for this open seat was then Washington County Circuit Court Judge Lloyd Karmeier. The other was Appellate Justice Gordon Maag, who: (1) had authored the underlying *Avery* Appellate Court opinion, and (2) participated in the appellate court proceedings on an appeal of

the amount of the bond in the *Price* case (and who therefore would not have been able to sit in further judgment on either of these matters had he been elected). In a race that was described by the press as one of the "most bitter" and "most expensive" judicial elections in United States history, then-Judge Karmeier raised and spent over $4.8 million and was elected on November 4, 2004 and began his duties as an Illinois Supreme Court Justice in December 2004.

12. After his election and prior to the August 18, 2005 issuance of the *Avery* opinion, on January 26, 2005, Justice Karmeier was asked to recuse himself from that case in a Conditional Motion for Non-Participation filed with the Illinois Supreme Court. *See,* Exhibit 1 hereto. The motion noted that, perhaps through oversight, Justice Karmeier had not recused himself, and it detailed with voluminous authenticated evidence the close connections between State Farm and Justice Karmeier's campaign that required recusal. Justice Karmeier was asked to recuse himself because (a) his impartiality might reasonably be questioned, (b) of an appearance of bias or prejudice and (c) of the appearance of impropriety.

13. The Conditional Motion and supporting materials established that, at the time of the November 2004 Illinois Supreme Court election won by Justice Karmeier, the outcome of the *Avery* and *Price* cases had become major issues that were widely anticipated to affect other parties facing similar litigation (including Allstate and other insurers that had also been sued over their use of non-OEM crash parts in similar suits and Brown & Williamson and R.J. Reynolds who had been sued over heir use of the term "lights" in similar suits to the *Price* case). Enormous sums of money would be won or lost based upon the outcome of these cases. The Conditional Motion demonstrated that Justice Karmeier, his supporters Ed Murnane and Bill Shepherd (both of whom were connected to State Farm) and a group of organizations Mr. Murnane founded, including the Illinois Civil Justice League, and JUSTPAC, were well aware of

the pendency of the *Avery* lawsuit. As shown by the Conditional Motion, State Farm lawyer and lobbyist Bill Shepherd was instrumental in the founding of these groups, and State Farm provided funding to them. As further shown by the Conditional Motion, Mr. Murnane in particular was aware of this case, felt it was unfair and should be overturned, and personally recruited Justice Karmeier to run for the Supreme Court of Illinois.

14. The Conditional Motion also established that once Mr. Murnane and his State Farm funded and supported groups had recruited Justice Karmeier to run, they financed his race with massive contributions. For example, JUSTPAC gave Justice Karmeier a total of $1,191,452.72 in donations. *See,* Group Exhibit 8(l)-(n). From the perspective of the donors to JUSTPAC, Justice Karmeier, and the public, these donations were the practical equivalent of contributions to Justice Karmeier's campaign because over 90% of all of JUSTPAC's 2004 contributions were made to Justice Karmeier's campaign. *Id.; see also,* Group Exhibit 11. Also notable was $269,338.32 from the Illinois Chamber of Commerce and its PAC (*see*, Group Exh. 8(c)-(f)), and over $1.6 million in total donations by the U.S. Chamber of Commerce to the Illinois Republican Party which, within days, contributed like sums to Judge Karmeier's campaign. *See,* Group Exhibit 8 (a)-(b), Illinois State Board of Elections Campaign Disclosures, 10-20-2004 US Chamber of Commerce $950,000.00 Contribution to the Illinois Republican Party (8a) and 10-22-04 Illinois Republican Party $911,282.00 Contribution to Citizens for Karmeier (8b); and 9-24-04 US Chamber of Commerce $750,000.00 Contribution to the Illinois Republican Party (8a) and 10-5-04 Illinois Republican Party $700,000.000 Contribution to Citizens for Karmeier (8b). The Conditional Motion established that State Farm was a member of both the U.S. Chamber of Commerce and the Illinois Chamber of Commerce (*see,* Exhibit 1 hereto, Supporting Memorandum, Exhibit 1, Wojcieszak Affidavit, Par. 4), that State Farm employees were

directors of both organizations (*id.; see also,* Exhibit 1 hereto, Supporting Memorandum, p.12 and Exhibit 32 thereto), and that both organizations were also members of and major supporters of JUSTPAC and through it, Justice Karmeier. *Id.; see also,* Exhibit 1 hereto, Supporting Memorandum, p. 13. Although the Conditional Motion acknowledged that most of the funds given to Justice Karmeier's campaign cannot be traced beyond their source to organizations of which State Farm is a member and contributor, it established that over $350,000 of the donations to Justice Karmeier's campaign could *be directly traced* to State Farm's employees, lawyers, or *amici* and lawyers representing *amici* in the *Avery* case. *See,* Exhibit 1 hereto, Supporting Memorandum at pp. 11-13.[2] In addition, the Conditional Motion established that many hundreds of thousands of dollars were given to Judge Karmeier's campaign by State Farm employees, agents, and *amici* through JUSTPAC, including $1000 given directly by Edward B. Rust, State Farm's Chairman and CEO and a witness at the *Avery* trial. *See,* Exhibit 1 at pp. 12-14 of the Supporting Memorandum.

15. The Conditional Motion further established that there is no doubt that the results of the race were perceived by the public as an election bought by big money. For example, on November 5, 2004, the *St. Louis Post Dispatch* (which endorsed Justice Karmeier) ran an editorial stating that "Big business won a nice return on a $4.3 million investment in Tuesday's election. It now has a friendly justice on the Illinois Supreme Court. * * *And anyone who believes in evenhanded justice should be appalled at the spectacle of a big-money effort to buy a Supreme Court seat." The editorial described the election as an "ugly, dispiriting, destructive,

[2] Citizens for Karmeier received a direct donation of $8,000 from the "Illinois Coalition for Jobs, Growth and Prosperity" or through the Coalition's political action committee. A complaint has been filed with the Illinois State Board of Elections, alleging that the Coalition or its political action committee gave $150,000 to Justice Karmeier by funneling it through JUSTPAC, thereby allegedly avoiding disclosure requirements under the Illinois Disclosure Act.

misleading, money drenched race." The article suggested that Justice Karmeier might be tempted to "do favors for the interests that lavished millions on his campaign" and that the average citizen must be "wondering if it's payback time."*Buying Justice*, St. Louis Post-Dispatch, November 5, 2004, at B06. A copy of the Conditional Motion and Supporting Materials, The Opposition, and the Memorandum in Response to the Opposition are attached to this Request for Investigation of Justice Lloyd A. Karmeier as Exhibits 1, 2 and 3, respectively.

16. On March 16, 2005, the Illinois Supreme Court issued an order ruling that the subject of Justice Karmeier's recusal was up to Justice Karmeier and was not subject to further review by the Court. On May 20, 2005, the Illinois Supreme Court issued a second order stating that, because Justice Karmeier had declined to recuse himself, the Conditional Motion was moot. As a consequence, it is clear that the Judicial Inquiry Board is the sole available authority when in an instance such as this (i) a recusal request is made to a Illinois Supreme Court Justice and the recusal request is ruled upon by the subject Justice, (ii) there is no mechanism for any review of the subject Justice by other members of the Court, and (iii) there is no explanation provided of the subject Justice's ruling in rejecting the request for recusal.

17. Justice Karmeier alone decided the conditional motion to recuse himself, declined to recuse himself from the *Avery* case, failed to provide any explanation for his denial of the motion to recuse himself, and then cast the decisive fourth vote overturning the Illinois Appellate Court decision against State Farm. Justice Karmeier's conduct as set forth above violates the Illinois Code of Judicial Conduct, and raises the issue of impropriety and the appearance of impropriety.

18. Although the Plaintiffs in *Price* did not file a conditional motion of non-participation seeking Justice Karmeier's recusal, Karmeier's participation in *Price* likewise violates the Illinois Code of Judicial Conduct. As noted above, Justice Karmeier's obligation to recuse

himself to avoid the appearance of impropriety is not dependent on a motion by the litigant. Further, as demonstrated by articles appearing in both the Chicago Tribune and the St. Louis Post-Dispatch shortly after the *Price* decision was issued, Justice Karmeier's participation and casting of the deciding vote in *Price* has brought the Illinois Supreme Court into further disrepute. *See* Chicago Tribune article dated December 16, 2005. (Exh. 4). This Tribune article noted the $1.2 million in campaign money from an *Amicus* party, $16, 800 from PMUSA attorneys and $1.2 million from the Illinois Civil Justice League (who filed an *Amicus* brief in support of PMUSA). As the article recorded: "'Karmeier's election changed the vote,' said Edward Murnane, president of the nonprofit Illinois Civil Justice League, which contributed $1.2 million to the judge's [sic] campaign and filed an amicus brief supporting Philip Morris."

19. Similarly, the St. Louis Post-Dispatch published two opinion articles within a week of the *Price* decision by the Illinois Supreme Court: (1) December 20, 2005 entitled "Buying Justice?" (Exh. 5), and (2) December 19, 2005 entitled "Call for Philip Morris: Off the Hook...For Now" (Exh. 6). Accompanying the December 20, 2005 "Buying Justice" article was a political cartoon depicting Justice Karmeier on a mule with sacks of money with Philip Morris' name on them. The cartoon was a parody of a magazine advertisement for Marlboro Lights and included a package of "Karmeier Lights" with the tagline "More freedom from class action lawsuits." *See* Exh. 7. The "Buying Justice" article noted that "[a]n ordinary citizen, jaded by Illinois' long history of government shenanigans, might wonder whether Mr. Karmeier was simply returning the favor [for millions of dollars in contributions to his campaign]. Considering that Mr. Karmeier never heard the arguments made in the Philip Morris case (he came on the bench a month after the case was argued) and the glaring appearance of conflict of interest, a decent argument for recusal could be made." *Id.*

20. As to the *Price* case, records show Justice Karmeier received over $1.6 million from the U.S. Chamber of Commerce, an *Amicus* party on behalf of PMUSA, through contributions to the Illinois Republican Party which in turn forwarded monies to the Karmeier campaign. *See,* Group Exhibit 8 (a)-(b), Illinois State Board of Elections Campaign Disclosures, 10-20-2004 US Chamber of Commerce $950,000.00 Contribution to the Illinois Republican Party (8a) and 10-22-04 Illinois Republican Party $911,282.00 Contribution to Citizens for Karmeier (8b); and 9-24-04 US Chamber of Commerce $750,000.00 Contribution to the Illinois Republican Party (8a) and 10-5-04 Illinois Republican Party $700,000.000 Contribution to Citizens for Karmeier (8b). Additionally, U.S. Chamber of Commerce affiliates, Illinois Chamber of Commerce, an *Amicus* party on behalf of PMUSA, Illinois Chamber PAC, and Chicagoland Chamber of Commerce PAC contributed $284,338.32 to Justice Karmeier's campaign. *See,* Group Exhibit 8 (c)-(f). Additionally, the records further show Altria (both in its own name and on behalf of PMUSA), its counsel, and its *Amicus* counsel contributed $22,000 to the Illinois Manufacturers Association (also an *Amicus* party in the *Price* case) through contributions to the Manufacturer's PAC. *See,* Group Exhibit 8 (g)-(k). As the attached exhibits show, the Manufacturer's PAC contributed similar sums to Karmeier's campaign. *See,* Group Exhibit 8 (k) (1)-(2). Altria subsidiary Kraft Foods is also a member of the Illinois Civil Justice League (who filed an *Amicus* brief in support of PMUSA that was rejected on other grounds). *See,* Group Exhibit 8 (o), (w)-(x).The ICJL's political action committee JUSTPAC contributed an additional $1,191,452.72 to the Karmeier campaign. *See,* Group Exhibit 8(l)-(n). Justice Karmeier's campaign also accepted donations from: trial counsel for PMUSA in *Price*, the law firms representing PMUSA at trial and on appeal, law firms and lawyers representing *Amicus* parties. *See*, Group Exhibit 8 (i)-(k), (aa) – (ee).

21. Three months after the issuance of the *Avery* decision, on November 17, 2005, the Illinois Supreme Court issued its opinion in *Christopher K. Gridley, et al vs. State Farm Mutual Automobile Insurance Company,* 2005 WL 307 17289 (Ill.). In *Gridley,* the Illinois Supreme Court unanimously reversed the Illinois Appellate Court and remanded with directions. Due to the unanimity among the voting Illinois Supreme Court justices (the Justices voted 6-0; four concurring votes are required under the Illinois Constitution to reverse an Illinois Appellate Court decision), unlike the *Avery* case, State Farm did not need Justice Karmeier's vote to obtain a reversal of the Illinois Appellate Court. Unlike *Avery*, where without his vote State Farm could not obtain a reversal of the Illinois Appellate Court, in *Gridley*, where his vote was not decisive, Justice Karmeier recused himself and did not participate in deciding the case. Justice Karmeier's refusal to recuse himself in the *Avery* case in light of his subsequent recusal in the *Gridley* case, particularly without any explanation, damages public confidence in the Illinois Supreme Court.

22. In the *Avery* decision, a majority opinion by then Chief Justice McMorrow and three other Justices reversed the award of $600 million in punitive damages under the Illinois Consumer Fraud Act, finding that the ICFA did not apply to the claims of Class members residing outside of Illinois. This portion of the Court's opinion was joined by a separate concurrence in part by Justices Freeman and Kilbride, thus making the decision as to this portion of the opinion unanimous. As to the breach of contract claims, these same four Justices overturned the award of $456,636,180 to the Class in its entirety on the grounds that the damages awarded were the result of "improper speculation," because, according to these four Justices, the term "like kind and quality" was unambiguous and did not require that any replacement parts be of OEM quality, and because, according to the majority, State Farm's contractual obligation varied such that the nationwide Class should not have been certified. Two Justices dissented as

to these breach of contract holdings. However, these two Justices believed that their interpretation of State Farm's contractual obligation might conflict with the rule in certain other states; they therefore would have "remand[ed] the cause to the circuit court to determine whether there exists any subclass of the nationwide class with respect to which the verdict may be upheld" under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (App. 142, 216 Ill.2d at 526, 835 N.E.2d at 879). Therefore, the portion of the Opinion addressing the Class's breach of contract claims had the four votes required by the Illinois Constitution only because it was joined by Justice Karmeier. Absent Justice Karmeier's participation, only those parts of the court's opinion joined by the two dissenting Justices would have had the four votes required by law and hence the force of law.

23. In the *Price* decision, there was no holding by a majority opinion – except for the disposition of the action (*i.e.,* that four Illinois Supreme Court Justices voted for reversal). Justice Garman (joined by Chief Justice McMorrow) wrote an opinion for reversal based upon a belief that the exemption provisions of the Illinois Consumer Fraud Act and Deceptive Trade Practices Act authorized PMUSA's otherwise fraudulent conduct. Justice Freeman and Justice Kilbride each wrote separate dissents (and joined the others' dissent) noting that both justices would have affirmed the verdict of the trial court. Justice Karmeier joined by Justice Fitzgerald specially concurred in the reversal based upon an opinion that Plaintiffs suffered no actual damages. *See Price* Slip Op. at 75-81. This is precisely the position advocated by the Manufacturers' Association *Amici* in their brief filed with the Illinois Supreme Court. *See* Brief of the National Association of Manufacturers and the Illinois Manufacturers' Association as Amici Curiae in Support of PMUSA. *See* Exh. 9.

24. Under the Illinois Constitution, Illinois Judges are elected in partisan elections by Illinois residents. Public confidence in the Illinois judicial system is undermined when parties and their *amici* allies are able to make substantial donations to the election campaign of a future Justice of the highest Court of the State, the Illinois Supreme Court, successfully elect such a Justice and then have such a Justice solely rule on a motion to recuse him from sitting on a case involving such a party, cast the decisive vote in a case where the party and its *amici* allies are involved and then provide no explanation for his decision to reject the motion to recuse or the facts and legal reasoning behind the rejection of the motion.

25. Based upon the facts identified herein, the public has been presented with the perception that parties (and their *amici*) to substantial matters pending before the Illinois Supreme Court can select a candidate, fund such a candidate's campaign by the payment of substantial contributions by interested parties and their *amici*, elect such a candidate as a Justice, and have such a Justice cast the decisive vote in such substantial matters pending before the Court. Such conduct raises the appearance of impropriety to the public, particularly when such an Illinois Supreme Court Justice refuses to offer any explanation of why such conduct does not present the appearance of impropriety.

26. Because this Request for Investigation to the Illinois Judicial Inquiry Board is the only mechanism available to Illinois residents to obtain review of conduct that threatens to undermine public confidence in the Illinois Supreme Court, it is more important than ever that the Board's inquiry be conducted in a fair and open way. A conflict exists for the Board's present counsel Sidley Austin due to its own contributions to the Karmeier campaign and contemporaneous involvement as counsel for one of the donor-*amici* participating in cases where Justice Karmeier participated in and cast the decisive vote reversing the judgment of the Court below. Due to this

conflict, the Judicial Inquiry Board must appoint counsel that is not conflicted to assist the Board in conducting this investigation.

27. The Complainants do not have any relationship to the *Avery or Price* cases.

COMMON CAUSE

BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST

CITIZENS ACTION/ILLINOIS

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**STATE OF ILLINOIS JUDICIAL INQUIRY BOARD REQUEST FOR INVESTIGATION OF JUSTICE LLOYD A. KARMEIER**

STATE OF _____ )
)
COUNTY OF ____ )

Affidavit of Geoffrey C. Hazard, Jr. in Support of
Complainants' Request for Investigation of Justice Lloyd A. Karmeier

Geoffrey C. Hazard, Jr., duly sworn, states as follows:

1. My name is Geoffrey C. Hazard, Jr. I currently serve as the Trustee Professor of Law at the University of Pennsylvania Law School, the Miller Professor of Law at the University of California Hastings College of the Law and Director Emeritus of the American Law Institute. I graduated from Swarthmore College (Phi Beta Kappa) in 1953 and received my LL.B. from Columbia University in 1954. I am a member of both the California and Pennsylvania State Bars. I am admitted to practice in Oregon, California, Connecticut and Pennsylvania.

2. I have been a professor of law since 1958 when I began my teaching career at the University of California, Berkeley (1958-1964). I have also served as a professor of law at: the University of Chicago (1964-71); Yale Law School (1971-94; Sterling Professor of Law Emeritus, 1994-present). I have been a visiting professor of law at Harvard University, Stanford University, University of Michigan, University of Arizona and Universite d'Aix-Marseille.

3. Over the course of my fifty year legal career, I have obtained experience and expertise in the areas of legal ethics, professional responsibility, civil procedure, comparative professional ethics and class action lawsuits. I have taught courses in legal ethics, civil procedure and federal jurisdiction.

Exhibit A

4. I am a member of the Board of Directors of the United States Supreme Court Historical Society. I am currently a Member of the Counsel of the American Law Institute and was its Director from 1984 to 1999. I have served as a Reporter, Consultant, Director and/or Member of various legal professional organizations that relate specifically to ethical standards, standards of judicial administration and judicial conduct. A copy of my current Curriculum Vitae is attached hereto as Exhibit A-1.

5. In 1985 I received the American Barr Foundation Research Award and received its William Keck Foundation Award in 1997. The Columbia University School of Law Association awarded me its Medal for Excellence in 1999. The American Bar Association of Legal Education awarded me its Kutak award in 2005. A full list of my professional awards and activities is included in my Curriculum Vitae. A full list of the books, reports and articles I have written during my career is also included therein.

6. I have reviewed Complainants' Request for Investigation of Justice Lloyd A. Karmeier submitted to the State of Illinois Judicial Inquiry Board. I have also reviewed the exhibits submitted therewith, and the case law cited therein, Illinois Supreme Court Rules and judicial canons cited therein. In forming the opinions contained in this Affidavit, I have also relied upon the body of research and knowledge regarding judicial ethics I have gained during my fifty-plus year career as a professor of law and author of books and articles related to legal ethics and judicial misconduct.

7. Based upon the information I have reviewed and the knowledge and expertise I have accumulated, it is my opinion and conclusion that Justice Lloyd A. Karmeier's participation in the decision of *Avery, et al. v. State Farm Mut. Automobile Ins. Co.*, 216 Ill.2d 100 (2005) and *Price v. Philip Morris Incorporated*, Case No. 76236 (December 15, 2005) violates the relevant

canons of the Illinois Code of Judicial Conduct. Justice Karmeier's participation in the two above-referenced cases unavoidably creates the public perception of judicial impropriety – whether or not any such impropriety may actually exist. Finally, Justice Karmeier's participation in these two cases (particularly in light of the fact that he cast the deciding vote in both cases) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

8. The relevant canons under the Illinois Code of Judicial Conduct include (but are not limited to) Canons 1, 2, 3 and 7. Canon 1 (entitled "A Judge Should Uphold the Integrity and Independence of the Judiciary") states that "an independent and honorable judiciary is indispensable to justice in our society." Canon 1 also instructs that "a judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." *See* Il.S.Ct.R. 61. Canon 2 of the Illinois Code of Judicial Conduct (entitled "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities") provides that "a judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *See* Il.S.Ct.R. 62. Canon 3 enumerates the standards applicable to a judge's judicial duties. *See* Il.S.Ct.R. 63. Additionally, Canon 7 addresses the propriety of judicial political activity including fundraising. *See* Il.S.Ct.R. 67 ("A judge or judicial candidate shall refrain from inappropriate political activity").

9. It is clear from a review of the Canons of Judicial Conduct applicable to Justice Karmeier that the activities identified in the Request for Investigation of Justice Lloyd A. Karmeier and the exhibits submitted therewith violate these canons and threaten the integrity of the Illinois judicial system in the eyes of the public. It is important to note that the issue is not

necessarily whether Justice Karmeier is (or would be) actually biased in favor of either State Farm or Philip Morris. Rather, the issue is whether Justice Karmeier's impartiality may be reasonably questioned by his participation in the decision of these cases. *See e.g., People v. Bradshaw*, 171 Ill.App.3d 971, 975-76 (1st Dist. 1988) (noting that a "judge further has an obligation of assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would the actual presence of bias or prejudice").

10. The participation of Justice Karmeier in the State Farm and Philip Morris decisions also violates the Due Process rights under the Fourteenth Amendment to the United States Constitution of the plaintiff class representatives and class members in both cases. As the United States Supreme Court observed in Aetna *Life Ins. Co. v. Lavoie*, 475 U.S. 813: "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.'" *Id.* at 825 (quoting *In re Murchison*, 349 U.S. 133 (1955)).

11. In *Aetna*, the United States Supreme Court held that Justice Embry's participation in a decision by the Alabama Supreme Court violated the appellant's rights under the Due Process Clause of the Fourteenth Amendment where Justice Embry failed to recuse himself in circumstances that created an appearance of potential bias. *See Aetna*, 475 U.S. at 825-26. The United States Supreme Court concluded that Justice Embry should have been disqualified from participation in the case. As a consequence of Justice Embry's vote being decisive in the 5-to-4 decision, the court "conclude[d] that the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings." *Id.* at 828.

12. Similarly, in both the cases of State Farm and Philip Morris, the facts enumerated in the Request for Investigation and exhibits thereto clearly establish that Justice Karmeier cast the deciding vote in both cases under circumstances wherein he should have recused himself or otherwise been disqualified. Justice Karmeier should have been disqualified based upon the inescapable appearance of impropriety resulting from the unprecedented amount of campaign contributions made by defendants' attorneys and/or *amicus* parties' attorneys in both litigations and contributions directly and indirectly made by political action committees supported and/or controlled by such parties. In addition, Justice Karmeier's review of the intermediate appellate court decision rendered by his "bitter" adversary in the Illinois Supreme Court election also creates the inescapable appearance of bias.

13. The circumstance surrounding Justice Karmeier's participation in these two cases appear to me to be unprecedented in the judicial decision-making history of the United States - for several reasons. First, the aggregate amount of campaign contributions made to Justice Karmeier's campaign is unprecedented in any judicial election in American history. Second, the size of the trial court verdicts in both the State Farm and Philip Morris cases are unprecedented in Illinois judiciary history. Based upon these two facts, the public awareness of these two judicial decisions was significantly increased. Further, as a consequence of this increased public awareness, the appearance of impropriety from Justice Karmeier's participation in the decision in these two cases has had a significant negative impact on the public perception of the integrity of the Illinois judicial system. This negative impact on the public perception of the Illinois judiciary is demonstrated by the representative newspaper articles identified in the Request for Investigation.

14. Based upon the reasons stated herein and the facts identified in the Request for Investigation, it is my opinion that it was improper for Justice Karmeier to participate in the decision in either the State Farm or Philip Morris cases. Justice Karmeier should have recused himself or otherwise have been disqualified from participating in the decision of these two cases. Justice Karmeier's participation in these judicial decisions not only violates the relevant canons of the Illinois Code of Judicial Conduct but also violates the litigants' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

FURTHER AFFIANT SAYETH NAUGHT

_____
Geoffrey C. Hazard, Jr.

Subscribed and Sworn to me
On this ____ day of January, 2006

_____
Notary Public

My commission expires: _____