

A10-0215

STATE OF MINNESOTA

IN COURT OF APPEALS

Gregory Curtis, Joni Kay Hanzal, Josephine Leonard and Randy Hoskins, Individually,
and on Behalf of All Others Similarly Situated,

Appellants,

vs.

Altria Group, Inc. and Philip Morris, Inc.,

Respondents.

AMICUS CURIAE BRIEF OF THE STATE OF MINNESOTA

KAY NORD HUNT
Atty. Reg. No. 138289
EHRICH L. KOCH
Atty. Reg. No. 159670
VALERIE SIMS
Atty. Reg. No. 30556X
Lommen Abdo Cole King
& Stageberg, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

MARTHA K. WIVELL
Sheller, P.C.
219 River Street, #105
P.O. Box 339
Cook, MN 55723
(218) 666-0250

STEPHEN A. SHELLER
Sheller, P.C.
1528 Walnut Street
Philadelphia, PA 19102
(215) 790-7300

LORI SWANSON
Attorney General
State of Minnesota

ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678
BENJAMIN J. VELZEN
Assistant Attorney General
Atty. Reg. No. 0388344

Bremer Tower, Suite 1400
445 Minnesota Street
St. Paul, Minnesota 55101
(651) 757-1235

**Counsel for *amicus curiae* State of
Minnesota**

[Continued on next page]

ESTHER E. BEREZOFSKY
Williams Cuker Berezofsky
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002
(856) 667-0500

Counsel for Appellants

WILLIAM P. STUDER
DAVID P. GRAHAM
Oppenheimer Wolff & Donnelly, LLP
Plaza VII, Suite 300
45 South Seventh Street
Minneapolis, MN 55402
(612) 607-7000

GUY MILLER STRUVE
JUSTIN GOODYEAR
Davis Polk & Wardwell, LLP
450 Lexington Avenue, Room 3030
New York, NY 10017
(212) 450-4192

**Counsel for Respondent Altria
Group, Inc.**

CHARLES A. BIRD
Atty Reg. No. 8345
Bird, Jacobs, Stevens P.C.
300 Third Avenue SE, Suite 305
Rochester, MN 55904
(507) 282-1503

**Counsel for *amicus curiae*
Minnesota Association for Justice**

GREGORY P. STONE
SEAN ESKOVITZ
Munger Tolles & Olson, LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
(213) 683-9100

MARY VASALY
Maslon Edelman Borman & Brand LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-82

**Counsel for Respondent Philip Morris
USA, Inc.**

PRENTISS COX
Atty. Reg. No. 0218844
Attorney at Law
4633 Colfax Avenue South
Minneapolis, MN 55419
(651) 235-1413

**Counsel for *amicus curiae* Tobacco Control
Legal Consortium**

[Continued on next page]

SCOTT A. SMITH
Atty. Reg. No. 174026
Nilan Johnson Lewis PA
400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 305-7500

JOHN H. BEISNER
JESSICA D. MILLER
Skadden, Arps, Slate Meagher &
Flom LLP
1440 New York Avenue NW
Washington, DC 20005

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation
Center, Inc.
1615 H Street NW
Washington, DC 20062

Counsel for *amicus curiae*
Chamber of Commerce for the
United States of America

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INTRODUCTION

The district court erroneously concluded that the Office of the Minnesota Attorney General's ("Attorney General" or "Office") settlement agreement ("Settlement") resolving its earlier tobacco litigation against Respondents prevents Appellants from enforcing their rights under Minnesota consumer-protection laws. The decision is deeply flawed because it misinterprets the plain language of the Settlement, and the relevant statutory authority. It also fails to recognize the basic difference between a public, governmental enforcement action and a private lawsuit. In fact, the district court's mistaken reasoning that private plaintiffs can "step into the shoes" of the Attorney General and legally "represent" the State of Minnesota could undermine this Office's authority to protect Minnesota consumers by potentially binding it to the outcome of scores of private lawsuits to which it was not a party and over which it had no control. Accordingly, the State of Minnesota, by its Attorney General, presents this brief in the public interest, and urges this Court to reverse the decision of the district court.¹

STATEMENT OF THE FACTS

Appellants' principal brief sets forth the facts underlying their appeal. However, because the issue addressed in this *amicus* brief involves the Attorney General's 1994 enforcement action against Respondents, below is important background information regarding this earlier lawsuit.

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the Attorney General certifies that it solely authored, prepared, and paid for this brief.

A. THE ATTORNEY GENERAL'S ACTION AGAINST THE TOBACCO COMPANIES.

In 1994, the Attorney General filed an action against a number of tobacco companies, including Respondents. Appellants' Appendix ("AA") 56-111 (second amended complaint). The State of Minnesota, by its Attorney General, and Blue Cross & Blue Shield of Minnesota were the only plaintiffs in this action. AA 56. The complaint alleged that Respondents and other tobacco companies knowingly engaged in a decades-long conspiracy of fraud, deception, false advertising, restraint of trade, monopolization, and breach of duty related to their researching, marketing, and sale of tobacco products in violation of various Minnesota statutes and common law. AA 67-107.

Importantly, the Attorney General sought no individual-specific monetary relief on behalf of Minnesota citizens harmed by their exposure to tobacco products in its action against Respondents. As explained in the complaint, the Attorney General sought monetary relief only on behalf of various Minnesota governmental entities/programs:

. . . The Attorney General brings this action to protect the citizens and public health of the State of Minnesota by seeking declaratory and equitable relief and civil penalties. The Attorney General also brings this action to vindicate the State's *proprietary interest* in enforcing the State's right to damages *for economic injures to the State* which were caused by the unlawful actions of the cigarette industry. Such damages include but are not limited to increased expenditures for:

- a. Minnesota's Medicaid plan, Medical Assistance
- b. General Assistance Medical Care
- c. Minnesota Care
- d. The State Employee Group Insurance Program. . . .
- e. The State of Minnesota has expended and will expend substantial sums of money to fund and promote wellness and healthy lifestyle programs in order to reduce health care costs, including smoking cessation. In addition, the State of Minnesota operates a program of preventative health services for state employees. These expenditures have been and will be increased by the unlawful actions of the cigarette industry.

AA 58-61 (emphasis added). In other words, the Attorney General's 1994 action sought to recover monies on behalf of the State *only in its proprietary capacity* as the provider of certain health-care services to its citizens, and *did not* seek to recover any monies on behalf of individual Minnesotans.

B. THE ATTORNEY GENERAL'S SETTLEMENT WITH THE TOBACCO COMPANIES.

On May 8, 1998, shortly before the case was to be submitted to the jury, the Attorney General settled with Respondents and the other tobacco companies. AA 117-57. The Settlement was complex, and secured both injunctive and monetary relief. In regard to injunctive relief, the Settlement permanently enjoined the tobacco companies from (1) selling or offering promotional items (t-shirts, hats, etc.) bearing the brand name or symbol of any tobacco product; (2) making any material misrepresentations about tobacco products or their health effects; (3) conspiring to suppress information about the health effects of tobacco products; and (4) targeting tobacco products toward Minnesota children. AA 119-20. The Settlement also required the tobacco-industry-backed Council for Tobacco Research to be dissolved, and for most internal documents produced during the litigation to be made public. AA 120-23.

In addition, Respondents and the other tobacco companies agreed to compensate the State for the costs it incurs related to the use of tobacco products in Minnesota. Specifically, the Settlement required large annual payments to the State in perpetuity intended to defray the State's ongoing costs of treating the smoking-related illnesses of its citizens. AA 135-36. These annual payments are adjusted each year based on a

complex formula, but to date have totaled in excess of \$1.77 billion. The Settlement also required the payment of \$100 million toward additional tobacco research, AA 123-24, and six one-time payments totaling approximately \$1.2 billion to be used for smoking-cessation efforts. AA 133-35. In total, Respondents and the other tobacco companies have remitted more than \$3 billion to the State of Minnesota under the Settlement.

In Paragraph III.B. of the Settlement, the “State of Minnesota”—defined therein as “the State of Minnesota acting by and through its Attorney General”—released its claims against the “Defendants,” which include “Philip Morris Incorporated” and any of its parents and affiliates. AA 130, 138-39. Paragraph III.B. states in pertinent part:

State of Minnesota’s Release and Discharge. Upon Final Approval, the *State of Minnesota* shall release and forever discharge all Defendants . . . from any and all manner of civil claims, demands, actions, suits and causes of action, [and] damages whenever incurred . . . that the *State of Minnesota* (including any of its past, present, or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, as follows:

- a. for past conduct . . . ; and
- b. for future conduct, only as to monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products[.]

AA 138-39 (emphasis added).

Consistent with the release, Paragraph V.M. of the Settlement states that any person who was not a party to the lawsuit is neither a beneficiary of, or bound by, the Settlement:

Intended Beneficiaries. This action was brought by the State of Minnesota, through its Attorney General, . . . to recover certain monies and to promote the health and welfare of the people of Minnesota. No portion of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is neither a party hereto nor a person encompassed by the releases provided in paragraphs III.B. and C. of this Settlement Agreement. Except as expressly provided in this Settlement Agreement, *no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity. . . .*

AA 151 (emphasis added).

Notwithstanding this clear language, in October 21 and December 4, 2009 orders the district court concluded that the State of Minnesota's release of claims against Respondents in the Settlement also released Appellants' claims. Appellants' Addendum ("AAdd") 1-27 .

ARGUMENT

THE STATE'S 1998 SETTLEMENT WITH THE TOBACCO COMPANIES DID NOT RELEASE APPELLANTS' CLAIMS

This *amicus* brief focuses on whether the release provision in the Attorney General's Settlement of the prior tobacco litigation bars Appellants' private action.² The

² While the Attorney General has chosen to focus on the claims-release issue in this *amicus* brief, this Office believes that the district court's resolution of the separate "public benefit" issue to also be erroneous. This Office believes that Appellants' private action does provide an ancillary and/or residual benefit to the public regardless of the Attorney General's earlier lawsuit against Respondents. Thus, the Attorney General's

district court committed two distinct errors in ruling against Appellants on this issue: (1) it incorrectly interpreted the plain language of the Settlement; and (2) it misconstrued the relevant statutory authority, Minn. Stat. § 8.31 (2008).

I. THE PLAIN LANGUAGE OF THE SETTLEMENT BINDS ONLY THE STATE OF MINNESOTA, AND APPELLANTS DO NOT “STAND IN THE SHOES” OF THE ATTORNEY GENERAL IN BRINGING THEIR LAWSUIT.

The plain language of the Settlement releases only the claims that the “State of Minnesota” possessed against Respondents, and excludes “any non-party” from its terms. AA 138-39, 151. This unambiguous language is consistent with the Attorney General’s intention not to release *any* claim under the Settlement other than those held by the State of Minnesota. Indeed, the Attorney General did not even possess the authority to release Appellants’ claims against Respondents under the Settlement, and the district court’s conclusion that such release was permissible because Appellants “stepped into the shoes” of this Office directly contravenes controlling case law of this Court.

A. The plain language of the settlement excludes Appellants’ claims.

Minnesota courts “consider [a] settlement agreement as a contract.” *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006). “[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties.” *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323-24 (Minn. 2003). “Unambiguous language in the settlement agreement is to be given its plain and ordinary meaning,” *Philip Morris*, 713 N.W.2d at 355, and a settlement

decision not to address the issue more fully herein should not be interpreted as agreeing with the district court’s resolution of the matter.

agreement “must manifest an intent to release, discharge, or relinquish a right, claim, or privilege by a person in whom it exists to a person against whom it might have been enforced to be a release.” *Dykes v. Sukup Mfg. Co.*, -- N.W.2d --, 2010 WL 1904538, *3 (Minn. May 13, 2010). This Court reviews a district court’s interpretation of a settlement agreement de novo. *Philip Morris*, 713 N.W.2d at 355.

Here, the plain language of the claims-release provision in Paragraph III.B. releases *only* the claims possessed by the “State of Minnesota,” AA 138-39, defined therein as the “the State of Minnesota acting by and through its Attorney General.” AA 130. The intent of the parties to exclude Appellants’ claims is further demonstrated by the language in Paragraph V.M., which states that “no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity.” AA 151. This language unambiguously establishes that the Attorney General and Respondents did not release the claims of non-parties such as Appellants.

This conclusion is supported by this Court’s decision in *In re Welfare of M.R.H.*, 716 N.W.2d 349 (Minn. App. 2006). In that case, after being assaulted by M.R.H. and suffering serious injuries, the child plaintiff sued and subsequently settled the matter for \$50,000. *Id.* at 350-51. Plaintiff’s parents later attempted to recover restitution from M.R.H. concerning the losses they sustained as a result of their son’s injuries. *Id.* at 351. This Court held that the parents’ request for restitution was not barred by the earlier settlement agreement because they “were not parties to [plaintiff son’s] civil action or to the settlement agreement. . . . As nonparties, [the] parents were neither entitled to

compensation nor bound to the release of liability.” *Id.* at 352. Accordingly, “settlement of the civil action did not require the district court to limit the amount or restitution awarded to them.” *Id.*; *see also Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 439 (Minn. App. 2004) (“nonparties to a contract acquire no rights or obligations under it”).

Neither does the district court’s characterization of Appellants as “private attorney generals”—discussed in more detail below—change the Settlement’s plain language excluding their claims. Indeed, the court in *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), expressly rejected the notion that plaintiffs acting as so-called “private attorneys general” could have their claims released by a prior settlement resolving litigation by actual attorneys general. In *Exxon*, the dispute concerned whether a prior federal government/State of Alaska settlement securing compensatory relief based on the now-infamous oil spill precluded a later private action for punitive damages. *Id.* at 1224-25. Exxon’s argument was “essentially that the [federal government and Alaska] released plaintiffs’ private claims, even though plaintiffs did not consent to any such release, because the governments were acting as *parens patriae* for the private claimants[.]” *Id.* at 1227. Exxon contend that the “plaintiffs act[ing] as ‘private attorneys general’ [is] a prohibited exercise when the actual public attorneys general have already discharged the claims.” *Id.*

The Ninth Circuit Court of Appeals rejected this argument, stating that “the plaintiffs sued to vindicate harm to their private land and their ability to fish commercially and fish for subsistence. The consent decree was expressly not ‘intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.’”

Id. at 1228 (quoting the government consent decree). The court also rejected Exxon's "private attorney general" metaphor as justification to preclude plaintiffs' claims: "The metaphor is faulty here. The consent decree in the case at bar explicitly covered payments that are 'compensatory and remedial in nature,' not punitive, so there can be no serious claim that the actual attorneys general already obtained the punishment that the plaintiffs obtained in the case at bar." *Id.*

Various other courts have held similarly, finding that the settlement of a governmental action generally does not preclude an analogous private action based on the same underlying facts but seeking different or an extension of the relief secured by the government. *See, e.g., Satsky v. Paramount Commc'n, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (settlement entered into by the State of Colorado and a polluting corporation to vindicate public claims pertaining to illegal pollution did not bar plaintiffs from bringing subsequent, private action seeking relief based on their distinct injuries); *Sw. Airlines Co. v. Tex. Int'l. Airlines, Inc.*, 546 F.2d 84, 98 (5th Cir. 1977) (noting that "this Court has recently held that litigation by a government agency will not preclude a private party from vindicating a wrong that arises from related facts but generates a distinct, individual cause of action"); *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F.Supp.2d 1166, 1181 (N.D.Okla. 2009) (stating that a "*parens patriae* suit . . . does not bar a subsequent suit by private individuals").

B. The Attorney General had no authority to release Appellants' claims against Respondents under the Settlement.

Reinforcing the plain language of the Settlement is the simple fact that the Attorney General had no authority to release Appellants' private claims in the first place. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607, 102 S.Ct. 3260, 3268 (1982) (“In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party.”); *Satsky*, 7 F.3d at 1470 (“The State could not have recovered under either [applicable federal law] or the *parens patriae* doctrine for injuries to Plaintiffs' private interests.”); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 551 (Ga. 2006) (“The State . . . , as *parens patriae*, . . . may not represent its citizens' private interests.” (citing *Snapp*)).

No Minnesota statute authorizes the Attorney General to bring a claim for monetary relief solely on behalf of private parties and their individual interests. Accordingly, the Attorney General could not and did not release Appellants' claims against Respondents under the Settlement.

C. Appellants do not “stand in the shoes” of the Attorney General in bringing their claims against Respondents.

The district court's disregard for the Settlement's plain language was largely based on its conclusion that Appellants were acting as “private attorney generals” in

prosecuting their action against Respondents.³ As a result, the district court reasoned that Appellants “stood in the shoes” of the Attorney General and were subject to the release:

. . . To the extent [Appellants’] claims provide a public benefit, [Appellants] necessarily stand in the shoes of the Attorney General and act on behalf of the State. Therefore, [Appellants] here, to the extent they assert claims as Private Attorneys General who must act for the benefit of the public, necessarily bring their claim “indirectly, representatively, or derivatively” on behalf of the State and fall within the bar of the [Settlement’s] Release.

AAdd 19 (citation omitted).

The fallacy in the district court’s reasoning, however, is its literal treatment of the “private attorney general” metaphor. As the Ninth Circuit noted in *Exxon*, “the ‘private attorneys general’ metaphor, it is just that, a metaphor, and metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Exxon*, 270 F.3d at 1228 (quotation omitted).

Moreover, this Court has already rejected the notion that private individuals and the Attorney General can “step into” each other’s shoes. In *State by Hatch v. Cross Country Bank*, 703 N.W.2d 562 (Minn. App. 2005), the Attorney General brought an action on behalf of certain Minnesota credit-card holders alleging various violations of Minnesota consumer-protection laws by Cross Country Bank. *Id.* at 566. Cross Country Bank moved to compel arbitration based on an arbitration clause in the underlying card holders’ credit-card contracts, claiming that the Attorney General “has stepped into the

³ The district court’s conclusion that Appellants were acting as “private attorney generals” was founded on its interpretation of Minn. Stat. § 8.31, subd. 3a, which is sometimes called the “private attorney general” statute. The district court’s erroneous interpretation of section 8.31 is discussed in Part II of this brief.

shoes of [the] card holders and therefore is subject to the arbitration agreement contained in [its] contracts with card holders.” *Id.* at 567, 569. According to Cross Country Bank, “because the facts underlying the state’s claim are the same facts that would permit private relief, the state is necessarily seeking to protect only private interests.” *Id.* at 569. In response, the Attorney General argued that Cross Country Bank’s position “reflects a fundamental misunderstanding” of the Attorney General’s law enforcement role, and *parens patriae* authority. *Id.* This Court agreed.

Relying on the United States Supreme Court decision of *EEOC v. Waffle House, Inc.*,⁴ this Court stated that the Attorney General and private parties are not fungible, that is, they cannot “step into” each other’s shoes:

Just as the state does not step into the shoes of victims of crime when it acts in its prosecutorial role, the state does not step into the shoes of individual [consumers] in this case but acts as an independent party. The state is asserting a state interest that is based on the facts involving the individual [consumers].

Similar to the EEOC [in *Waffle House*], the attorney general has the authority to investigate and prosecute statutory violations, as well as to assert other claims on behalf of the state to protect public rights. It is not dispositive that the attorney general seeks victim-specific relief or that the claim is based on the facts that would permit an individual to obtain relief through a private tort claim. That was the situation in *Waffle House* as well. The state’s purpose in bringing the claim is to secure protection of a public interest.

⁴ 534 U.S. 279, 297-98, 122 S.Ct. 754, 766 (2002) (recognizing that the EEOC “does not stand in the employee’s shoes” in bringing an enforcement action against the employer engaging in the alleged discrimination).

Id. at 570. Accordingly, this Court held that the Attorney General was not bound by the arbitration clause contained in the credit-card contracts of the underlying consumers at issue. *Id.* at 571.

Cross Country Bank does not stand alone in holding that private parties and the government cannot “step into” each other’s shoes in any legal or substantive sense. Other courts have also soundly rejected the principle, even when the plaintiff purports to act as a metaphorical “private attorney general.” See *Sierra Club v. Otter Tail Corp.*, 608 F.Supp.2d 1120, 1129 (D.S.D. 2009) (rejecting the argument “that citizens who file citizen enforcement actions act as a ‘private attorney general’ and stand in the shoes of the government” for statute of limitations purposes; such citizens “do not represent the public at large in the same way that the government does when it brings suit,” and there is “no compelling authority that citizens may stand in the shoes of the [government]”); *Lyons v. Ryan*, 756 N.E.2d 396, 406 (Ill. App. 2001) (private plaintiff could not “stand in the shoes” of state attorney general for standing purposes).

Thus, just as the Attorney General did not “step into the shoes” of the consumers in *Cross Country Bank* and was not bound by their credit-card contracts, neither can Appellants “step into the shoes” of the Attorney General here and be bound by the Settlement. The Attorney General and private citizens are simply not interchangeable.

II. THE DISTRICT COURT ERRED IN INTERPRETING MINN. STAT. § 8.31 AS “DEPUTIZING” APPELLANTS AS AGENTS OF THE ATTORNEY GENERAL.

In addition to contravening the plain language of the Settlement, the district court also misinterpreted Minn. Stat. § 8.31 and its provision that authorizes private causes of

action, subdivision 3a. Contrary to the district court’s decision, section 8.31, subdivision 3a does not “deputize” a private plaintiff as a legal “representative” of the State of Minnesota. This Court reviews the district court’s interpretation of Minn. Stat. § 8.31, subd. 3a, and case law relating to the subdivision, de novo. *In re Estate of Eckley*, 780 N.W.2d 407, 410 (Minn. App. 2010).

A. The plain language of Minn. Stat. § 8.31, subd. 3a does nothing more than authorize private causes of action.

The language of Minn. Stat. § 8.31, subd. 3a—entitled “private remedies”—is unambiguous, and even a cursory review of its text reveals that it provides no support for the conclusion that a private party suing under its terms morphs into legal proxy for the Attorney General. To the contrary, the subdivision authorizes *private* causes of action, *not* for private plaintiffs to bring actions on behalf of the State of Minnesota. *See Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 6 (Minn. 2001) (“Subdivision 3a of section 8.31 creates private remedies for violations of the statute enumerated in subdivision 1[.]”); *see also Dafter Sanitary Landfill v. Mich. Dep’t of Natural Res.*, 499 N.W.2d 383, 384-85 (Mich. App. 1993) (in interpreting an analogous statute, stating that “[t]o accept plaintiff’s argument would mean that a private citizen would be able to step into the shoes of the attorney general and bring an action on behalf of the public. This could not be what the legislature intended.”). The district court’s far-reaching conclusion about the transformative nature of subdivision 3a simply has no basis in its plain language. *See Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (if a

statute's text is clear and unambiguous, "statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning").

B. The district court's interpretation of Minn. Stat. § 8.31, subd. 3a contravenes fundamental principles of statutory construction.

Even assuming *arguendo* that there is some sort of ambiguity to be found in subdivision 3a's clear language, the district court's interpretation of the provision contravenes well-established principles of statutory construction. First, the final sentence of subdivision 3a differentiates the Attorney General from private parties, stating that this Office has available to it all remedies listed therein with respect to separate actions brought under section 8.31 on behalf of the State of Minnesota. This distinction would be rendered superfluous if a plaintiff "becomes" the Attorney General under subdivision 3a. *See* Minn. Stat. § 645.17(2) (2008) ("the legislature intends the entire statute to be effective and certain"); *State v. Spence*, 768 N.W.2d 104, 108 (Minn. 2009) ("we avoid statutory constructions that render words superfluous").

Second, and even more importantly, interpreting subdivision 3a to permit private parties to unilaterally "deputize" themselves as agents of the Attorney General produces absurd and unreasonable results. *See* Minn. Stat. § 645.17(1) (2008) (legislature does not intend absurd or unreasonable results). Under well settled law, it is the sole prerogative of the Attorney General to decide what legal actions are initiated on behalf of the State. *E.g.* Minn. Stat. § 8.01 (2008); *State by Humphrey v. McLaren*, 402 N.W.2d 535, 539 (Minn. 1987); *State By Spannaus v. Nw. Bell Tel. Co.*, 304 N.W.2d 872, 877 (Minn. 1981); *Head v. Special Sch. Dist. No. 1*, 288

Minn. 496, 503, 182 N.W.2d 887, 892 (1970); *State ex rel. Peterson v. City of Fraser*, 191 Minn. 427, 431-32, 254 N.W. 776, 778-79 (1934).

Yet, according to the district court, private plaintiffs can “step into the shoes” of the Attorney General and become legal “representatives” of the State of Minnesota. Such an interpretation of subdivision 3a has the potential of severely undermining the ability of the Attorney General to protect the public interest. For example, if private plaintiffs can transform into legal “representatives” of the State of Minnesota under the statute, then arguments may well be made that the Attorney General is bound through claim preclusion and/or contract-law principles to legions of judgments, settlements, and other court orders pertaining to litigation over which it had no control, will often have been unaware, and that do not secure the public interest. Such a result could seriously inhibit the Attorney General’s responsibility to independently enforce Minnesota’s consumer-protection laws, an unreasonable and absurd result that the legislature clearly did not intend.

C. The district court’s decision fails to appreciate the differences between an Attorney General public enforcement action and a private party lawsuit.

For well over a century the Minnesota Supreme Court has recognized that the Attorney General is the chief legal officer of the State of Minnesota, and therefore its exercise of authority is a government function undertaken to protect the public interest. *See State ex rel. Young v. Robinson*, 112 N.W. 269, 272 (Minn. 1907) (as “the chief law officer of the state” the Attorney General may “exercise all such power and authority as public interests from time to time may require,” including maintaining “all such suits and

proceedings as [the Attorney General] deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights”). To this end, section 8.31 authorizes the Attorney General to investigate violations of state consumer-protection laws, Minn. Stat. § 8.31, subd. 1, issue pre-lawsuit civil investigative demands, *id.* subd. 2, enter into pre-lawsuit settlements, *id.* subd. 2b, sue wrongdoers for injunctive relief and civil penalties, *id.* subd. 3, and distribute any monetary relief obtained to injured consumers. *See id.* subds. 2c, 3c.

Accordingly, section 8.31 authorizes the Attorney General to engage in wide-ranging law-enforcement activities of the kind which a private party is not permitted to engage. By contrast, subdivision 3a only authorizes private causes of action. The provision does not, for example, allow private parties to seek civil penalties or institute pre-litigation investigations (both of which are distinctly public law enforcement remedies reserved for the Attorney General). The district court’s holding that private plaintiffs can legally “step into the shoes” of the Attorney General fails to appreciate this differentiation in section 8.31.

Many other courts have recognized the important differences between an action by an attorney general on behalf of a state, and a private action authorized by similar law. For example, the California Supreme Court held long ago that state attorneys general unique law enforcement role distinguish them from private plaintiffs bringing claims based on similar underlying facts:

An action filed by the People . . . is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. The purpose of injunctive relief is to prevent continued violations of law and to

prevent violators from dissipating funds illegally obtained. Civil penalties, which are paid to the government are designed to penalize a defendant for past illegal conduct. . . .

Furthermore, an action by the People lacks the fundamental attributes of a consumer class action filed by a private party. The Attorney General or other governmental official who files the action is ordinarily not a member of the class, his role as a protector of the public may be inconsistent with the welfare of the class so that he could not adequately protect their interests, and the claims and defenses are not typical of the class.

People v. Pacific Land Research Co., 569 P.2d 125, 129 (Cal. 1977) (footnotes and citations omitted); *see also State ex rel. Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198, 202-03 (La.App. 1988) (rejecting the argument that the attorney general's action was "a disguised private action" because "the Attorney General is primarily acting in his capacity in enforcing the consumer protection law for the benefit of the public, a government function.").

In sum, section 8.31 was meant to *preserve* the different roles of the Attorney General acting as a law enforcement officer, and a private party acting solely under subdivision 3a. The district court ignored this difference, and concluded that private parties can become legal "representatives" of the State of Minnesota under Minn. Stat. § 8.31, subd. 3a. However, "to assume that private individuals can properly be viewed as representative of a particular government is a . . . daring analytical leap." *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181 n.4 (7th Cir. 1987).

D. The *Ly* public-benefit test does not function to "deputize" private plaintiffs as a government actor.

Finally, the district court relied on *Ly v. Nystrom*, 651 N.W.2d 302 (Minn. 2000), in concluding that section 8.31, subdivision 3a "transforms" a private party into a

government actor. In doing so, it cited a single sentence from *Ly* in which the supreme court stated that “the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws must define the limits of the private claimant” under the Minn. Stat. § 8.31, subd. 3a. AAdd 18 (quoting *Ly*, 615 N.W.2d at 313). This sentence, however, simply acknowledges that the Attorney General’s role in enforcing Minnesota’s consumer-protection laws informs the supreme court’s interpretation of the statute. As a result, the *Ly* court adopted a “public benefit” standard for private causes of action. *Ly*, 651 at 313-14. Other portions of *Ly* specifically recognize that subdivision 3a does nothing more than authorize plaintiffs to act as “a supplemental force of private enforcement to address unlawful trade practices.” *Id.* at 313. Thus, *Ly* does not stand for the proposition that section 8.31, subdivision 3a “deputizes” private plaintiffs and permits them to act as legal “representatives” of the State of Minnesota.

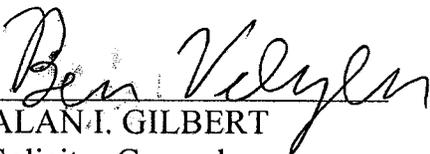
CONCLUSION

For all of the foregoing reasons, the Office of the Minnesota Attorney General respectfully urges this Court to reverse the decision of the district court.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678
BENJAMIN J. VELZEN
Assistant Attorney General
Atty. Reg. No. 0388344

Bremer Tower, Suite 1400
445 Minnesota Street
St. Paul, MN 55101
(651) 757-1235

Attorneys for State of Minnesota

**CERTIFICATE OF COMPLIANCE
WITH MINN. R. CIV. APP. P. 132.01**

Pursuant to Minn. R. Civ. App. P. 132.01, subd. 1, this brief was prepared using 13-point proportional spaced font. The undersigned further certifies that the brief submitted herein, exclusive of the table of contents, tables of citations, and any appendix, contains 5,300 words in compliance with the type/volume limitations of the Minn. R. Civ. App. P. 132.01, subd. 3. The word count is stated in reliance on Microsoft® Word 2003, the word processing system used to prepare this Brief.


BENJAMIN J. VELZEN

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