

No. A10-0215

---

STATE OF MINNESOTA  
IN SUPREME COURT

---

Gregory Curtis, et al., individually and on behalf  
of all others similarly situated,

*Respondents,*

vs.

Altria Group, Inc.,

*Defendant,*

Philip Morris, Inc.,

*Appellant.*

---

**AMICUS CURIAE BRIEF OF THE STATE OF MINNESOTA**

---

LORI SWANSON  
Attorney General  
State of Minnesota

ALAN I. GILBERT (#0034678)  
Solicitor General  
BENJAMIN VELZEN (#0388344)  
Assistant Attorney General  
Bremer Tower, Suite 1400  
445 Minnesota Street  
St. Paul, Minnesota 55101  
(651) 757-1450

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

*[continued on next page]*

KAY NORD HUNT  
EHRICH L. KOCH  
PHILLIP A. COLE  
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. SELLER  
Sheller, P.C.  
1528 Walnut Street  
Philadelphia, PA 19102  
(215) 790-7300

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 Respondents Curtis et al.**

GEORGE W. SOULE  
NATHAN J. MARCUSEN  
Bowman & Brooke LLP  
150 South Fifth Street, Suite 3000  
Minneapolis, MN 55402  
(612) 339-8682

DAVID F. HERR  
Maslon Edelman Borman & Brand LLP  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 672-8200

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

**Counsel for Appellant Philip Morris,  
Inc.**

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  
Davis Polk & Wardwell, LLP  
450 Lexington Avenue, Suite 3030  
New York, NY 10017  
(212) 450-4000

**Counsel for Dismissed Defendant  
Altria Group, Inc.**

*[continued on next page]*

CHARLES A. BIRD  
Bird, Jacobsen, & Stevens, P.C.  
300 Third Avenue SE, Suite 305  
Rochester, MN 55904  
(507) 282-1503

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

ROBIN S. CONRAD  
National Chamber Litigation  
Center, Inc.  
1615 H Street NW  
Washington, DC 20062  
(202) 463-5337

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  
(202) 371-7000

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

WILLIAM A. CROWDER  
VILDAN A. TESKE  
MARISA C. KATZ  
Crowder Teske, PLLP  
222 South Ninth Street, Suite 3210  
Minneapolis, MN 55402  
(612) 746-1558

PRENTISS E. COX  
Attorney at Law  
4633 Colfax Avenue South  
Minneapolis, MN 55419  
(651) 235-1413

**Counsel for *amicus curiae* National  
Association of Consumer Advocates**

BRUCE JONES  
Faegre & Benson LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 766-7000

**Counsel for *amicus curiae* Product  
Liability Advisory Council, Inc.**

THOMAS H. BOYD  
KRISTOPHER D. LEE  
Winthrop & Weinstine, P.A.  
225 South Sixth Street, Suite 3500  
Minneapolis, MN 55402  
(612) 604-6805

**Counsel for *amicus curiae* Minnesota  
Defense Lawyers Association**

---

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
THE STATE'S INTEREST.....	1
INTRODUCTION.....	1
STATEMENT OF THE FACTS.....	2
A.    The Attorney General’s Action Against the Tobacco Companies. ...	2
B.    The Attorney General’s Settlement With the Tobacco Companies...	3
ARGUMENT .....	5
I.    The Plain Language of the Settlement Binds Only the State of Minnesota, and Respondents are Not Acting as Agents of the Attorney General in Bringing Their Lawsuit.....	5
A.    The Plain Language Of The Settlement Does Not Release Respondents’ Claims Against Philip Morris. ....	5
B.    Minn. Stat. § 8.31, Subd. 3a Does Not “Deputize” Respondents As Agents Of The Attorney General, Or Otherwise Allow Them To Bring Claims On Behalf of The State. ....	7
1.    The plain language of Minn. Stat. § 8.31, subd. 3a does nothing more than authorize private causes of action. ....	7
2.    In any event, interpreting Minn. Stat. § 8.31, subd. 3a to “deputize” private plaintiffs contravenes fundamental principles of statutory construction. ....	8
3.    Respondents do not “stand in the shoes” of the Attorney General in bringing their claims against Philip Morris. ....	9
4.    The “private attorney general” metaphor provides no basis to release Respondents’ claims under the Settlement.....	12
II.    Respondents’ Action Clearly Provides A “Public Benefit” Under <i>Ly v. Nystrom</i> and <i>Collins v. Minnesota School of Business</i> . ....	14

A.	<i>Ly</i> And <i>Collins</i> Require Examination Of The Scope Of The Alleged Fraud At Issue—Not The Remedies A Plaintiff Is Seeking—In Determining Whether The Action Provides A “Public Benefit.” ....	14
B.	Multiple Courts Have Misconstrued <i>Ly</i> And <i>Collins</i> , And Therefore Clarification Of The Public Benefit Doctrine By This Court is Warranted.....	16
C.	The Attorney General’s Prior Lawsuit Against Philip Morris Supports The Conclusion That Respondents’ Action Provides a Public Benefit.....	17
CONCLUSION .....		18

## TABLE OF AUTHORITIES

### Federal Cases

EEOC v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754 (2002) .....	9, 10
In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) .....	12, 13
In re Levaquin Products Liability Litigation, 752 F. Supp.2d 1071 (D. Minn. 2010) .....	16
Satsky v. Paramount Commc'n, Inc., 7 F.3d 1464 (10th Cir. 1993) .....	11
Sierra Club v. Otter Tail Corp., 608 F. Supp.2d 1120 (D.S.D. 2009) .....	11

### State Cases

Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309 (Minn. 2001) .....	8
Collins v. Minn. Sch. of Bus., Inc., 655 N.W.2d 320 (Minn. 2003) .....	2, 14, 15, 16, 18
Curtis v. Altria Group, Inc., 792 N.W.2d 836 (Minn. App. 2010) .....	5, 7, 17
Dafter Sanitary Landfill v. Mich. Dep't of Natural Res., 499 N.W.2d 383 (Mich. App. 1993) .....	11
Dykes v. Sukup Mfg. Co., 781 N.W.2d 578 (Minn. 2010) .....	6
Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2 (Minn. 2001) .....	7
Head v. Special Sch. Dist. No. 1, 288 Minn. 496, 503, 182 N.W.2d 887 (1970) .....	9
Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987) .....	9

Lorix v. Crompton Corp., 736 N.W.2d 619 (Minn. 2007) .....	16, 17
Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000) .....	passim
Martinco v. Hastings, 265 Minn. 490 N.W.2d 631 (1963) .....	17
Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320 (Minn. 2003) .....	5
People v. Pacific Land Research Co., 569 P.2d 125 (Cal. 1977).....	10, 11
State By Spannaus v. NW. Bell Tel. Co., 304 N.W.2d 872 (Minn. 1981) .....	9
State ex rel. Guste v. Orkin Exterminating Co., Inc., 528 So.2d 198 (La. App. 1988) .....	11, 12
State ex rel. Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350 (Minn. 2006) .....	5, 6
State ex rel. Peterson v. City of Fraser, 191 Minn. 427, 431-32, 254 N.W. 776 (1934).....	9
State ex. rel. Hatch v. Cross Country Bank, 703 N.W.2d 562 (Minn. App. 2005) .....	10
State v. Spence, 768 N.W.2d 104 (Minn. 2009) .....	8
Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988) .....	6
<b>State Statutes</b>	
Minn. Stat. § 8.31 (2010) .....	passim
Minn. Stat. § 645.17(1) (2010).....	8, 9
Minn. Stat. § 645.17(2) (2010).....	8

## THE STATE'S INTEREST

The Minnesota Attorney General (“Attorney General” or “Office”) submits this *amicus* brief on behalf of the State of Minnesota and in the public interest.<sup>1</sup> The public clearly benefits from an honest marketplace, and therefore, the public interest is served through the proper application of the State’s consumer protection laws. The Attorney General seeks to provide assistance to the Court in interpreting Minnesota consumer protection statutes with which she is very familiar and frequently enforces.

## INTRODUCTION

The court of appeals correctly held that the Attorney General’s settlement agreement resolving its earlier tobacco litigation against Appellant Philip Morris (“Settlement”) does not bar Respondents’ claims. Philip Morris misinterprets the plain language of the Settlement. Furthermore, Philip Morris’s argument, if accepted, would result in private plaintiffs having the ability to unilaterally “deputize” themselves as agents of the Attorney General and legally represent the State of Minnesota. Such a holding could potentially undermine this Office’s independent authority to protect Minnesota consumers by binding it to the outcome of private lawsuits to which it was not a party, and over which it had no control.

The court of appeals also correctly held that Respondents’ prosecution of their claims provides a “public benefit” within the meaning of Minn. Stat. § 8.31, subd. 3a (2010), as interpreted by this Court. Philip Morris’s argument misconstrues *Ly v.*

---

<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, the Minnesota Attorney General’s Office certifies that it solely authored, prepared, and paid for this brief.

*Nystrom*, 615 N.W.2d 302 (Minn. 2000), and *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320 (Minn. 2003). *Ly* and *Collins* instruct that a public benefit exists based on the scope of the allegedly deceptive conduct at issue, not the remedies a plaintiff seeks. Philip Morris's argument to the contrary is also inconsistent with the plain language of section 8.31, subdivision 3a, which expressly allows private parties to "bring a civil action and recover damages."

## STATEMENT OF THE FACTS

### **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 Philip Morris. Appellant's Appendix ("AA") 576-632 (second amended complaint). The State of Minnesota, by its Attorney General, and Blue Cross & Blue Shield of Minnesota were the only plaintiffs in the action. AA 576. The Complaint alleged that Philip Morris and other tobacco companies knowingly engaged in a decades-long conspiracy which violated various Minnesota statutes and common law. The allegations included claims of fraud, deception, false advertising, restraint of trade, monopolization, and breach of duty related to the defendants' researching, marketing, and sale of tobacco products. AA 588-628.

Importantly, the Attorney General requested no monetary relief on behalf of individual Minnesota citizens harmed by their exposure to tobacco products in its lawsuit. The Attorney General sought monetary relief only on behalf of various Minnesota governmental entities and programs, as explained in the Complaint:

. . . 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 579-82 (emphasis added). The State therefore sought to recover monies *only* in its proprietary capacity as the provider of certain health-care services to Minnesota citizens, and not on behalf of individual consumers.

**B. The Attorney General's Settlement With the Tobacco Companies.**

On May 8, 1998, the Attorney General settled with Philip Morris and the other tobacco companies. AA 671-713. The Settlement was complex, and secured both injunctive and monetary relief. In regard to injunctive relief, the Settlement restricted, *inter alia*, various advertising and promotional efforts related to tobacco products in Minnesota. AA 706-10 It also required the tobacco companies to cease certain other improper business practices, such as suppressing information about the health effects of tobacco. *Id.* In regard to monetary relief, the Settlement required the tobacco companies to make large annual payments to the State to defray the State's ongoing costs of treating the smoking-related illnesses of its citizens. AA 679-80. The Settlement also required

payments to further tobacco research and smoking-cessation efforts in Minnesota. AA 677-78, 710-11.

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 included “Philip Morris Incorporated.” AA 674, 682-

83. This release language 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 682-83 (emphasis added).

Consistent with the release, Paragraph V.M. 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 695 (emphasis added).

## ARGUMENT

### **I. THE PLAIN LANGUAGE OF THE SETTLEMENT BINDS ONLY THE STATE OF MINNESOTA, AND RESPONDENTS ARE NOT ACTING AS AGENTS OF THE ATTORNEY GENERAL IN BRINGING THEIR LAWSUIT.**

The court of appeals correctly held that the plain language of the Attorney General's Settlement releases only the claims that the State of Minnesota possessed against Philip Morris, and excludes non-parties such as Respondents. *Curtis v. Altria Group, Inc.*, 792 N.W.2d 836, 851-52 (Minn. App. 2010). Indeed, the Settlement's unambiguous language is consistent with the Attorney General's intention not to release *any* claims other than those held by the State. The court of appeals also properly rejected the district court's erroneous conclusion that Minn. Stat. § 8.31, subd. 3a essentially "deputizes" private parties to act on behalf of the State. *Id.* at 852.

#### **A. The Plain Language Of The Settlement Does Not Release Respondents' Claims Against Philip Morris.**

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

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.*, 781 N.W.2d 578, 582 (Minn. 2010).

The plain language of the claims-release provision in Paragraph III.B. releases *only* the claims possessed by the “State of Minnesota,” AA 682-83, which is defined therein as the “the State of Minnesota acting by and through its Attorney General.” AA 674. Paragraph V.M. of the Settlement further 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 695.

It is undisputed that Respondents were not party to the State’s enforcement action against Philip Morris, and are not the “State of Minnesota.” The Settlement’s clear language therefore unambiguously establishes that the claims of non-parties such as Respondents were not released.<sup>2</sup>

---

<sup>2</sup> The proposed findings of fact referenced by Philip Morris in its brief, *see* Appellant’s Brief (“AB”) 23, do not support a contrary conclusion. First, these proposed findings were not part of the record before the district court and should therefore be disregarded. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Second, as the court of appeals noted in refusing to consider the proposed findings, they “pertain to disputed matters and are not conclusive of any issue.” AA 93. Third, the issue in the case in which the proposed findings were submitted did not concern construction of the Settlement’s release provision, but whether the Settlement barred the Legislature from levying a further “health impact fee” on tobacco products. *See Philip Morris*, 713 N.W.2d at 352-54. In any event, as previously discussed, the controlling plain language of the Settlement does not release the claims of private parties such as Respondents. *See supra* at 4-5.

**B. Minn. Stat. § 8.31, Subd. 3a Does Not “Deputize” Respondents As Agents Of The Attorney General, Or Otherwise Allow Them To Bring Claims On Behalf of The State.**

Finding no support in the Settlement’s plain language, Philip Morris asserts that Minn. Stat. § 8.31, subd. 3a essentially functions to “deputize” private plaintiffs bringing suit pursuant to the provision. *See* AB 22-24. By Philip Morris’s reasoning, this results in Respondents being brought within the release provision of the Settlement. *See id.* The court of appeals rightly rejected this argument, holding “there is no legal basis or binding authority requiring conversion of an action by private individuals into state action” under subdivision 3a. *Curtis*, 792 N.W.2d at 852.

**1. 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. Even a cursory review of its text reveals that it provides no support for the conclusion that a private party suing under its terms is somehow transformed into an agent of the Attorney General. To the contrary, the subdivision authorizes *private* causes of action, not private 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 statutes enumerated in subdivision 1[.]”). Philip Morris’s argument that the provision “transforms” private parties into State actors is inconsistent with subdivision 3a’s plain language,<sup>3</sup> and must be

---

<sup>3</sup> Philip Morris acknowledges this fact in its brief. *See* AB 23 (noting how the court of appeal’s based its decision on the fact that subdivision 3a “does not expressly state that a private plaintiff bringing a claim thereunder becomes a representative of the State”).

rejected for this reason alone. *See, e.g., Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (when a statute’s text is clear, “construction is neither necessary nor permitted and courts apply the statute’s plain meaning”).

**2. In any event, interpreting Minn. Stat. § 8.31, subd. 3a to “deputize” private plaintiffs 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, Philip Morris’s proffered interpretation violates well-established principles of statutory construction. First, the final sentence of subdivision 3a specifically differentiates the Attorney General from private parties. *See* Minn. Stat. § 8.31, subd. 3a. It states that the Attorney General has available to it all remedies listed therein pursuant to this Office’s distinct authority under other portions of the statute. *See id.* This separate reference to the Attorney General would be rendered superfluous if a private plaintiff simply “becomes” the Attorney General under subdivision 3a. *See State v. Spence*, 768 N.W.2d 104, 108 (Minn. 2009) (“we avoid statutory constructions that render words superfluous”); *see also* Minn. Stat. § 645.17(2) (2010) (“the legislature intends the entire statute to be effective and certain”).

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) (2010) (stating that the Legislature does not intend absurd or unreasonable results). Under well-settled precedent of this Court, it is the sole prerogative of the Attorney General to decide what legal actions are initiated on behalf of the State. *E.g., 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). Accordingly, private parties simply do not have the authority to initiate a lawsuit on behalf of the State under subdivision 3a as Philip Morris suggests. *See* Minn. Stat. § 645.17(1).

Third, a contrary conclusion could result in private parties binding the Attorney General to a private judgment or settlement, even though the Attorney General had no control over the litigation, and will often be unaware that the case even existed. This would seriously inhibit the Attorney General's authority and responsibility to independently enforce Minnesota's consumer-protection laws, another absurd and unreasonable result that the Legislature could not have intended. *See id.* A private party action under section 8.31, subd. 3a is separate from the Attorney General's authority to enforce section 8.31.

**3. Respondents do not “stand in the shoes” of the Attorney General in bringing their claims against Philip Morris.**

Philip Morris ignores the plain language of subdivision 3a and erroneously asserts that private parties and the Attorney General are essentially fungible under Minn. Stat. § 8.31. Numerous courts have rejected similar contentions, including the United States Supreme Court in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002).

In *Waffle House*, the EEOC filed a discrimination lawsuit against Waffle House on behalf of an employee who had agreed to arbitrate any disputes relating to his employment. *Id.* at 282-83. The question was whether the EEOC could bring a judicial action at all, or whether it stepped into the shoes of the employee and must arbitrate the dispute. *Id.* at 283-85.

After discussing the EEOC's statutory authority and how it was "master of its own case" despite seeking victim-specific relief, *id.* at 287-92, the Court concluded that "it simply does not follow...that the employee's conduct may affect the EEOC's recovery [or] that the EEOC's claim is merely derivative." *Id.* at 297-98. The EEOC is an independent agency that "does not stand in the employee's shoes" and is not "a proxy for the employee." *Id.* Accordingly, the EEOC was not bound by the arbitration clause in pursuing a discrimination claim on behalf of the employee. *Id.*; *see also State ex. rel. Hatch v. Cross Country Bank*, 703 N.W.2d 562 (Minn. App. 2005) (applying *Waffle House* in holding that the Attorney General does not "step into the shoes" of defrauded consumers even when the Office seeks victim-specific relief).

The California Supreme Court has also recognized that state attorneys general occupy a unique law enforcement role distinguishing them from private plaintiffs, even when 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).

Many other courts have reached the same conclusion. *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); *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”; 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]”); *Dafter Sanitary Landfill v. Mich. Dep’t of Natural Res.*, 499 N.W.2d 383, 384-85 (Mich. App. 1993) (“[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.”); *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.”). The same analysis applies to the Attorney General’s earlier lawsuit against the tobacco companies. The Attorney General and private citizens are simply not interchangeable.

**4. The “private attorney general” metaphor provides no basis to release Respondents’ claims under the Settlement.**

Minn. Stat. § 8.31, subd. 3a is referred to as the “private attorney general” statute. In *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), the court considered circumstances similar to this case, and rejected a urged literal application of this metaphor. There, the issue was whether a federal government/State of Alaska settlement securing compensatory relief for the now-infamous oil spill precluded a later private action for punitive damages. *Id.* at 1224-25. Exxon’s argument was “essentially that the [governments] 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 contended that “plaintiffs act[ing] as ‘private attorneys general’ [is] a prohibited exercise when the actual public attorneys general have already discharged the claims.” *Id.*

The court found the argument to be unavailing, and stated that “the plaintiffs sued to vindicate harm to their private land and their ability to fish . . . . 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 noted that “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.” *Id.* The metaphor was “faulty” because 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.* (original alterations deleted).

The same analysis applies here. This Office’s Settlement with Philip Morris secured monetary relief *only* on behalf of the State in its proprietary capacity, and not on behalf of individual consumers harmed by Philip Morris’s alleged fraud.

Finally, Philip Morris’s reliance on *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000), for the proposition that section 8.31, subdivision 3a functions to “deputize” private plaintiffs is misplaced. *See* AB 22-23. *Ly* simply recognized that subdivision 3a authorizes plaintiffs to act as “*a supplemental force of private enforcement to address unlawful trade practices.*” *Ly*, 615 N.W.2d at 313 (emphasis added). *Ly* does not hold or otherwise stand for the proposition that subdivision 3a “deputizes” private plaintiffs and permits them to act on behalf of the State of Minnesota.

**II. RESPONDENTS’ ACTION CLEARLY PROVIDES A “PUBLIC BENEFIT” UNDER *LY V. NYSTROM* AND *COLLINS V. MINNESOTA SCHOOL OF BUSINESS*.**

Respondents’ action clearly provides a “public benefit” under *Ly* and *Collins*, and does so regardless of this Office’s earlier lawsuit and Settlement with Philip Morris.

**A. *Ly* And *Collins* Require Examination Of The Scope Of The Alleged Fraud At Issue—Not The Remedies A Plaintiff Is Seeking—In Determining Whether The Action Provides A “Public Benefit.”**

In *Ly*, defendant Nystrom misrepresented to plaintiff Ly the viability of a restaurant Nystrom ultimately convinced Ly to purchase from her. *Ly*, 615 N.W.2d at 304-6. Ly relied on Minn. Stat. § 8.31, subd. 3a to sue Nystrom for consumer fraud. *Id.* at 307. Nystrom responded by arguing that section 8.31, subdivision 3a should apply only to consumer fraud actions “where the fraud has the potential to deceive more than the single claimant and the lawsuit benefits the public.” *Id.* at 313.

Drawing on the Attorney General’s role as a protector of public and not private interests, this Court agreed. *Id.* at 313-14. It reasoned that “[Ly] was defrauded in a single one-on-one transaction in which the fraudulent misrepresentation . . . was made only to [Ly]. A successful prosecution of his fraud claim does not advance state interests and enforcement has no public benefit.” *Id.* at 314. The Court therefore held that section 8.31, subd. 3a “applies only to those claimants who demonstrate that their cause of action benefits the public.” *Id.*

In adopting the “public benefit” requirement, this Court did not express any concerns about defrauded private plaintiffs being awarded damages, despite acknowledging that Ly sought damages against Nystrom. *See id.* at 307, 312-14.

Accordingly, Philip Morris’s characterization of *Ly* as turning on the fact that Ly sought damages is simply erroneous. See AB 14. It was the fact that the deceptive representations were narrow in scope—i.e., that they were made during a series of one-on-one transactions—that was dispositive. See *Ly*, 615 N.W.2d at 314; see also *Collins*, 655 N.W.2d at 330 (summarizing *Ly* as turning on this point, and not the fact that damages were sought).

The only post-*Ly* case in which this Court has further considered the public benefit doctrine is *Collins*. In that case, Collins and 17 other students sued the Minnesota School of Business (“MSB”) over the allegedly deceptive advertising of an educational degree MSB offered. *Collins*, 655 N.W.2d at 322. The district court concluded that because only a small number of persons were actually injured, no public benefit existed. *Id.* at 330. This Court reversed. It explained that the district court had “misapplied the holding in [*Ly*] by ignoring the fact that MSB misrepresented the nature of its program to the public at large.” *Id.* This Court then held that plaintiffs’ claims benefited the public due the fact that MSB’s allegedly deceptive conduct was made to “the public at large.” *Id.* As in *Ly*, *Collins* did not suggest that the remedy sought therein—damages—had any bearing on whether or not the public benefit requirement was satisfied. See *id.* at 329-33.

*Collins* thus confirms what *Ly* first held: the focus in determining if a private consumer fraud action provides a “public benefit” is the scope of the alleged fraud, *not* the remedy sought. It is undisputed here that the fraudulent conduct Respondents allege on the part of Philip Morris was undertaken in regard to the public at large. If such

alleged misconduct does not satisfy the *Collins* standard, it is hard to imagine a type of consumer fraud that would.

**B. Multiple Courts Have Misconstrued *Ly* And *Collins*, And Therefore Clarification Of The Public Benefit Doctrine By This Court is Warranted.**

Philip Morris cites several cases in its brief for the proposition that a private action for damages cannot provide a public benefit. AB 15-16. These cases are directly contrary to the holdings of both *Ly* and *Collins*, as even one federal court has recognized. *In re Levaquin Products Liability Litigation*, 752 F. Supp.2d 1071, 1078 (D. Minn. 2010) (“although federal courts in Minnesota have focused the public benefit inquiry on whether plaintiff is seeking only money damages[,] . . . after *Collins*, it seems reasonable to infer that the Minnesota Supreme Court is as much if not more concerned with the **degree** to which defendants’ alleged misrepresentations affect the public” (footnote omitted, emphasis original)). The Court should make clear that the public benefit standard involves examining the scope of the allegedly deceptive conduct, *not* the remedy a plaintiff seeks.

Philip Morris’s argument urging this Court to focus on the remedies Respondents seek is inconsistent with the clear language of Minn. Stat. § 8.31, subd. 3a. This subdivision explicitly authorizes private actions to “recover damages,” and also obtain “equitable relief.” Minn. Stat. § 8.31, subd. 3a. Any holding by this Court that either damages or equitable relief do not provide a “public benefit” would contravene the Legislature’s express intention that private plaintiffs be able to seek such remedies under the statute. *See Lorix v. Crompton Corp.*, 736 N.W.2d 619, 628 (Minn. 2007) (stating

that even valid policy concerns are not “risk[s] that our court may remedy by restricting Minnesota . . . law in ways that our legislature has not”); *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963) (“If there is to be a change in the statute, it must come from the legislature” and not the courts.).

Proper application of *Ly* and *Collins* avoids these concerns because, as discussed above, the public benefit analysis does not involve the requested remedy, but rather the scope of the alleged wrongdoing. The court of appeals recognized this point in correctly rejecting Philip Morris’s argument. *See Curtis*, 792 N.W.2d at 851.

**C. The Attorney General’s Prior Lawsuit Against Philip Morris Supports The Conclusion That Respondents’ Action Provides a Public Benefit.**

Contrary to Philip Morris’ contention, *see* AB 16, the Attorney General’s prior law enforcement action against Philip Morris actually *supports* the conclusion that Respondents’ action provides a public benefit. The Attorney General—acting in the public interest—sought and recovered damages on behalf of the State of Minnesota in its earlier action against Philip Morris. Respondents’ action is based on the same alleged fraud that was the basis of the Attorney General’s prior consumer fraud case on behalf of the State. Respondents properly seek relief on behalf of individual Minnesota consumers.

## CONCLUSION

For all of the foregoing reasons, the Minnesota Attorney General's Office respectfully urges this Court to affirm the court of appeal's determinations that Respondents' action is not precluded by the State's earlier Settlement with Philip Morris, and provides a "public benefit" under *Ly* and *Collins*.

Dated: 5/23/11

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota

  
ALAN I. GILBERT (#0034678)

Solicitor General  
BENJAMIN VELZEN (#0388344)  
Assistant Attorney General

Bremer Tower, Suite 1400  
445 Minnesota Street  
St. Paul, MN 55101  
(651) 757-1450

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 4,805 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.

 5/23/11  
ALAN I. GILBERT