MINNESOTA STATE LAW LIBRARY

NO. A10-215

State of Minnesota
In Supreme Court

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

Respondents,

vs.

Altria Group, Inc.,

Dismissed Defendant,

and

Philip Morris, Inc.,

Appellant.

BRIEF AND APPENDIX OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

William H. Crowder (#20102)
Vildan A. Teske (#241404)
Marisa C. Katz (#389709)
CROWDER TESKE PLLP
222 South Ninth Street, Suite 3210
Minneapolis, Minnesota 55402
(612) 746-1558

Prentiss E. Cox (#0218844)
4633 Colfax Avenue South
Minneapolis, Minnesota 55419
(651) 235-1413

Attorneys for The National Association of Consumer Advocates

[Counsel for Appellants, Respondents and other Amici listed on the following two pages]

2011 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Attorneys for Appellant, Philip Morris USA, Inc.
George W. Soule (#103664)
Nathan J. Marcusen (#386875)
BOWMAN AND BROOKE LLP
150 South Fifth Street, Suite 3000
Minneapolis, MN 55402
(612) 339-8682

David F. Herr (#44441)
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
335 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
(213) 683-9100

Attorneys for Respondents, Gregory Curtis, et. al.
Kay Nord Hunt (#138289)
Margie R. Bodas (#172376)
Diane M. Odeen (#284142)
LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Martha K. Wivell (#128090)
SHELLER, P.C.
P.O. Box 339
Cook, MN 55723
(218) 790-7300

Stephen A. Sheller
SHELLER, P.C.
1528 Walnut Street
Philadelphia, PA 19102

Attorneys for Dismissed Defendant Altria Group, Inc.
William P. Studer (#106781)
David P. Graham (#185462)
OPPENHEIMER WOLFF & DONNELLY LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402
(612) 607-7000

Guy Miller Struve
Justin Goodyear
450 Lexington Avenue
New York, NY 10017
(212) 450-4192

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America
Scott A. Smith (#174026)
NILAN JOHNSON LEWIS PA
400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402

John H. Beisner
Jessica D. Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue NW
Washington, D.C. 20005

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street NW
Washington, D.C. 20062

Attorneys for Amicus Curiae Product Liability Advisory Council, Inc.
Bruce Jones (#179553)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

Hugh F. Young, Jr.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, VA 20191
(703) 264-5300

Attorneys for Amicus Curiae Minnesota Defense Lawyers Association
Thomas H. Boyd (#200517)
Kristopher D. Lee (#389269)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
(612) 604-6505

Attorneys for Amicus Curiae State of Minnesota
Lori Swanson (#254812)
Attorney General
Alan I. Gilbert (#34678)
Solicitor General
Benjamin J. Velzen (#388344)
Assistant Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MM 55101
(651) 296-3353

Attorneys for Amicus Curiae Minnesota Association for Justice
Charles A. Bird (#08345)
BIRD, JACOBSEN & STEVENS, P.C.
300 Third Avenue Southeast
Rochester, MN 55904
(507) 282-1503

Gary L. Wilson (#179012)
ROBINS, KAPLAN, MILLER & CIRESI, LLP
288 LaSalle Plaza
800 Lasalle Avenue
Minneapolis, MN 55402
(612) 349-8500

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

Table of Contents

Table of Authorities iii

INTRODUCTION 1

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE "PUBLIC BENEFIT" RESTRICTION SHOULD BE OVERTURNED 2

A. Individuals Should Have a Right to Sue for Statutory Fraud. 2

1. Individual Suits Are Routinely Dismissed Under the Public Benefit Restriction. 2

2. Eliminating Access to the Courts for Individual Plaintiffs is Inconsistent with Section 8.31. 4

3. The Public Benefit Restriction Creates Inefficient Litigation Incentives. 5

B. The Public Benefit Restriction is Not Grounded in a Supportable Legal Principle. 6

1. The Language of Section 8.31 is Unambiguous. 7

2. Attorney General Authority Cannot Support The Public Benefit Restriction. 8

3. Ancillary Sources of Law were Misapplied in *Ly*. 12

a. Prior Case Law Does Not Support the Doctrine. 12

b. Common Law Limits Do Not Support the Doctrine. 13

II. THIS COURT SHOULD NOT ELIMINATE CLASS ACTIONS IN STATUTORY FRAUD CASES BY ADOPTING AN INDIVIDUAL RELIANCE REQUIREMENT. 14

A. Imposing an Individual Reliance Requirement Would Eliminate Class Action Cases For Violations of Minnesota Statutory Fraud Law 14

B. Minnesota Courts Properly and Cautiously Apply Rule 23 in Statutory Fraud Class Actions. 18

1. There is No Evidence of Class Action Abuse in Statutory Fraud Cases in Minnesota Courts. 19

2. The Chamber's Sources Citing "Class Action Abuse" Do Not Relate to Minnesota Courts. 20

C. Eliminating Statutory Fraud Class Actions Would Hurt Consumers. 22

1. Class Actions are an Important Device to Vindicate the Rights of Those Who Otherwise Would be Denied Access to the Courts. 22

2. The Myths About Class Actions Are Without Substantial Merit. ... 24

CONCLUSION 26

Table of Authorities

Cases

Behrens v. United Vaccines, Inc., 228 F.Supp.2d 965 (D.Minn. 2002)..... 7

Boubelik v. Liberty State Bank, 553 N.W.2d 393 (Minn. 1996)..... 5

Castano v. American Tobacco, 84 F.3d 734 (5th Cir.1996)..... 15

Eager v. Siwek Lumber & Millwork, Inc., 392 N.W.2d 691 (Minn.App. 1986)..... 3

Elgharbawi v. Selly, 483 N.W.2d 490 (Minn.App. 1992)..... 3

Group Health Plan, Inc., v. Philip Morris Inc., 621 N.W.2d 2 (Minn. 2001)..... passim

Head v. Special School Dis. No. 1, 182 N.W.2d 887 (Minn. 1970)..... 10

Humprhey on Behalf of State v. McLaren, 402 N.W.2d 535 (Minn. 1987)..... 10

In re Hartford Sales Practic Litig., 192 F.R.D. 592 (D.Minn. 1999)..... 15

In re Lutheran Brotherhood, 201 F.R.D. 456 (D. Minn. 2001)..... 15

In Re Woodward & Lothrop Holdings, Inc., 205 B.R. 365 (Bankr. S.D.N.Y. 1997)..... 15

Kronebusch v. MVBA Harvestore Sys., 488 N.W.2d 490 (Minn.App. 1992)..... 3

Laysar, Inc. v. State Farm Mut. Auto Ins. Co., 2005 WL 2063929 (D.Minn. Aug. 25, 2009)..... 5

LeSage v. Norwest Bank Calhoun-Isles, N.A., 409 N.W.2d 536 (Minn.App. 1987)..... 3

Liess v. Lindmeyer, 354 N.W.2d 556 (Minn. App. 1984)..... 12,13

Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000)..... passim

Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88 (N.J. 2006)..... 23

Overen v. Hasbro, Inc., 2007 WL 2695792 (D.Minn. Sept. 12, 2007)..... 7

Parkhill v. Minnesota Mut. Life Insur. Co., 188 F.R.D. 332 (D.Minn. 1999)..... 15

Peterson v. B.A.S.F. Corp., 675 N.W.2d 57 (Minn. 2004)..... 16,17,18

State by Humphrey v. Alpine Air Products, Inc., 500 N.W.2d 788 (Minn. 1993)..... 5

State v. Anderson, 683 N.W.2d 818 (Minn. 2004) 8

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006) 20

Untiedt v. Grand Lab, Inc, 1994 WL 714308 (Minn.App. Dec. 27, 1994) 12

Weigand v. Walser Automotive Groups, Inc., 683 N.W.2d 807 (Minn. 2004) 5

Wexler v. Brothers Entertainment Group, Inc., 457 N.W.2d 218 (Minn.App. 1990) 12

Yost v. Millhouse, 373 N.W.2d 826 (Minn. App. 1985) 3

Zutz v. Case Corp., 2003 WL 22848943 (D.Minn. Nov. 21, 2003) 6

Statutes

Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1) (2005) 23

Minn. Stat. § 8.01 9,10

Minn. Stat. § 8.31 ..... passim

Minn. Stat. § 325D.45 21

Other Authorities

Carolyn Carter, *Consumer Protection in the States: A 50 State Report on Unfair and Deceptive Acts and Practices Statutes* 22 (N.C.L.C. 2009) 3

Centers for Disease Control and Prevention, "*State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004*," (MMWR) (January 2009) 24

Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U.L. Rev. 1357 (Oct. 2003) 25

Debra Pogrund Stark and Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 Clev. St. L. Rev. 483, (2008) 21

Donna Halvorson, *Dealer Resells Lemon, Must Buy It Back*, Star Tribune (July 17, 1996) 11

Federal Trade Commission, *Consumer Fraud in the United States* ES-6, 80-81 (Aug. 2004) 24

Prentiss Cox, *Consumer Fraud and Deceptive Trade Regulation in Minnesota* § 4.1C2(a) (M.S.B.A. 2009) 2,19

Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws,* 33 W. Mitchell L. Rev. 163 (2006) 12

Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. of Legis. 1 (2006) 22

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591 (2006) 25

Thomas E. Willging *et al.*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Fed. Judicial Ctr. 1996) 25

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 22 (2005) 21

INTRODUCTION

Complaints by individual plaintiffs are almost universally dismissed under Minnesota statutory fraud laws, and class actions claiming violations of these laws can be certified in a limited range of cases. That is the current state of the law for private actions brought under Minnesota statutory fraud laws. The National Association of Consumer Advocates ("NACA") respectfully submits this brief in support of the Respondent class. NACA urges this Court to restore the right of individuals to bring an action for statutory fraud and to retain the possibility of statutory fraud class actions under the existing requirement that plaintiffs must prove a causal nexus between alleged deception and injury.

INTEREST OF AMICUS CURIAE

NACA is a nationwide non-profit association of more than 1,500 attorneys representing hundreds of thousands of consumers victimized by fraudulent and predatory business practices.[1] Our members are legal services attorneys, other private sector attorneys, public attorneys and law professors who focus on the representation of consumers' interests. A key element of consumer protection law is allowing individuals meaningful access to the courts in statutory fraud cases.

---

[1] Pursuant to Minn. R. Civ. App. P. 129.03, NACA states that no counsel for any party has authored any part of this brief, and that no person or entity other than NACA, its members, or its counsel have made any monetary contribution to the preparation or submission of this request.

ARGUMENT

I. THE "PUBLIC BENEFIT" RESTRICTION SHOULD BE OVERTURNED.

This Court should overturn the "public benefit" restriction created in *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000). That decision required private plaintiffs to demonstrate that the alleged deceptive conduct was broadly disseminated and required dismissal of statutory fraud violations that arise solely in a "one-on-one transaction." *Id.* at 314. The public benefit restriction has effectively ended private actions under statutory fraud laws for individuals, farmers and other small business purchasers subject to marketplace deception. Because the public benefit restriction was vaguely rendered and never grounded in a supportable legal principle, it also has morphed into a vehicle for lower courts to dismiss class actions and joinder suits that the legislature clearly intended to allow when it authorized private actions for statutory fraud violations.

A. Individuals Should Have a Right to Sue for Statutory Fraud.

The routine dismissal of suits brought by individual plaintiffs is inconsistent with the statute authorizing such suits and fosters inefficient litigation strategies.

1. Individual Suits Are Routinely Dismissed Under the Public Benefit Restriction.

More than a decade after *Ly*, the practical consequence of the decision is clear. The public benefit restriction amounts to an almost blanket prohibition on statutory fraud claims by individual consumers and family farmers. *See* Prentiss Cox, *Consumer Fraud and Deceptive Trade Regulation in Minnesota* § 4.1C2(a) (M.S.B.A. 2009) (listing statutory fraud actions available in electronic search databases bought by individual or

family farm plaintiffs and showing dismissal of 22 of 23 cases in which defendant raised the public benefit restriction). Similarly, suits by a small business or nonprofit corporation alleging fraud in the purchase of merchandise will rarely satisfy the public benefit restriction. *Id. at* § 4.1C2(b). A national report on state statutory fraud laws concluded that the public benefit restriction has resulted in "[s]ome Minnesota courts impos(ing) a barrier so high that no consumer is ever likely to meet it." Carolyn Carter, *Consumer Protection in the States: A 50 State Report on Unfair and Deceptive Acts and Practices Statutes* 22 (N.C.L.C. 2009).

Most of the reported decisions interpreting Minnesota statutory fraud laws prior to *Ly* were cases brought by individuals or small business purchasers. *See, e.g., Kronebusch v. MVBA Harvestore Sys.*, 488 N.W.2d 490 (Minn.App. 1992) (farmer purchased grain storage silos); *Elgharbawi v. Selly*, 483 N.W.2d 490 (Minn.App. 1992) (individual hired a household goods moving company); *LeSage v. Norwest Bank Calhoun-Isles, N.A.*, 409 N.W.2d 536 (Minn.App. 1987) (siblings made an investment); *Eager v. Siwek Lumber & Millwork, Inc.*, 392 N.W.2d 691 (Minn.App. 1986) (contractor purchased a "garage kit"); *Yost v. Millhouse*, 373 N.W.2d 826 (Minn.App. 1985) (individual purchased a horse). These cases almost surely would be dismissed by Minnesota courts today, as none of them involved broad dissemination of the proven fraud.

2. Eliminating Access to the Courts for Individual Plaintiffs is Inconsistent with Section 8.31.

The routine dismissal of UDAP suits brought by individuals flows directly from the "broad dissemination" requirement enunciated in *Ly*. The text of the statute offers no hint that suits by individuals should be highly disfavored. Instead, it provides a private remedy for "*any person* injured by a violation" of the statutory fraud laws. Minn. Stat. § 8.31, subdiv. 3a (2010) (emphasis added).

As discussed below, however, the *Ly* decision was not premised on the statutory text. Rather, the public benefit restriction was grounded in legislative history that suggested private remedies were meant to bolster the work of the attorney general. Yet the legislative history central to the reasoning of this Court in *Ly* expressly refers to anticipated suits by individuals. The *Ly* decision cites testimony in the Minnesota Senate describing the goal of enacting subdivision 3a as "allow[ing] the individual person to bring a civil action for the damages." *Ly*, 615 N.W.2d at 311 (citing comments of Senator Borden). The decision also cites Minnesota House testimony stating that subdivision 3a should be enacted so "a private citizen may take the person to court...when the citizen has been defrauded and he may recover damages plus reasonable attorney's fees or injunctive relief." *Id.* (citing comments of Representative Seiben). These legislative comments are at odds with the practical consequence of the *Ly* decision, which is the routine dismissal of suits brought by individuals.

Indeed, a business acting as a seller of merchandise may now have greater access to statutory fraud claims than individual consumers purchasing merchandise. Unlike

small business purchasers, companies injured by the effect of consumer fraud on their marketplace position have sometimes found a basis for satisfying the public benefit restriction. In *Laysar, Inc. v. State Farm Mut. Auto Ins. Co.,* No. 04-4584, 2005 WL 2063929 (D.Minn. Aug. 25, 2009), for instance, the court permitted a suit brought by an automobile glass repair company alleging an insurer violated the statutory fraud laws in its representation of its insurance policies to customers of the plaintiff business.

Allowing competing businesses access to private enforcement of statutory fraud laws while dismissing the claims of individual consumers is an outcome that is difficult to square with the purposes of these laws. In particular, this result contradicts the function of statutory fraud laws to address the problem of "unequal bargaining power in the marketplace." *Weigand v. Walser Automotive Groups, Inc.,* 683 N.W.2d 807, 812 (Minn. 2004). Nor does this result reflect "liberal construction in favor of consumers," *Boubelik v. Liberty State Bank*, 553 N.W.2d 393 (Minn. 1996), or the use of statutory fraud laws to reduce the burden of proving common law fraud and "make it easier to sue for consumer fraud." *State by Humphrey v. Alpine Air Products, Inc.*, 500 N.W.2d 788,790 (Minn. 1993).

3. The Public Benefit Restriction Creates Inefficient Litigation Incentives.

The public benefit restriction forces attorneys representing individual consumers and small business purchasers into inefficient litigation choices. Attorneys counseling consumers who allege deception in a transaction are forced to make a choice about investing resources in the fact development of the case in hopes of obtaining enough

information to meet the broad dissemination requirement. Disputes that do not concern enough money for the plaintiff to bear attorney's fees either will be dropped by the plaintiff's attorney or turned into larger, costly actions in a search for wider dissemination of representations.

This dilemma facing plaintiffs and their attorneys implicates the unresolved issue of whether the public benefit restriction is a question of fact or law. If the restriction is a question of law, the plaintiff will rarely have the opportunity to do discovery and obtain sufficient facts to prove broad dissemination, thus unfairly eliminating any realistic chance that an individual plaintiff could produce sufficient facts. The door to the courthouse would truly be closed. If the restriction is a question of fact, a few risk-taking attorneys or plaintiffs might conduct wide-ranging discovery on the underlying business practice at substantial cost to themselves and the defendant. This is a false choice necessitated by the judicial creation of a doctrine with no principled basis in law.

B. The Public Benefit Restriction is Not Grounded in a Supportable Legal Principle.

While individual cases of statutory fraud violations can be critical to the person injured, the most widespread and socially costly consumer deception usually involves class action cases challenging business practices that cause losses to a large number of people, although at often comparatively small losses per person. Such matters typically concern broad dissemination of the alleged deception, but the public benefit restriction has evolved into a doctrine also used to dismiss these cases.

Lower court decisions have expanded the doctrine to require dismissal of cases based on the type of relief requested by or available to the plaintiff. *Zutz v. Case Corp.*,

No. 02-1776, 2003 WL 22848943 (D.Minn. Nov. 21, 2003) (stating that "[t]o determine whether a lawsuit is brought for the public benefit the Court must examine not only the form of the alleged misrepresentation, but also the relief sought by the plaintiff."). These courts have imposed requirements that the plaintiff seek injunctive relief, *Behrens v. United Vaccines, Inc.*, 228 F.Supp.2d 965, 972 (D.Minn. 2002), and dismissed cases because the defendant no longer engaged in the conduct at issue, *Overen v. Hasbro, Inc.*, No. 07-1430, 2007 WL 2695792 (D.Minn. Sept. 12, 2007). The trial court in this case dismissed the statutory fraud claims of the *Curtis* class by relying on a similar line of cases, holding that prior attorney general action against a defendant suggests a lack of public benefit.

The public benefit restriction has become a blank slate on which lower courts write restrictive rules without reference to the basic tools of statutory interpretation. Such decisions are possible because the doctrine created in *Ly* is grounded neither in the text of the statute nor in any other supportable legal principle.

1. The Language of Section 8.31 is Unambiguous.

Understandably, neither the Philip Morris brief nor the brief of *Amicus* Minnesota Defense Lawyer's Association quote the actual text of the statute at issue in this case. Philip Morris does not even mention the statute in its statement of the issue and apposite authority. (PM Br. at 1). Subdivision 3a of Section 8.31 states:

> In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable

> attorney's fees, and receive other equitable relief as determined by the court.

How could the legislature have drafted subdivision 3a more clearly to allow an individual deceived in a "one-on-one" transaction or seeking only damages to bring a statutory fraud action? It is difficult to imagine a legislator voting for a statute providing that "any person injured by a violation of (the laws) may bring a civil action" and understanding this language to mean routine one-on-one consumer transactions do not give rise to a right to sue for violations of the statutory fraud laws. Similarly, a legislator is unlikely to be able to envision that a statute unequivocally stating that a person subject to a statutory violation may "bring a civil action and recover damages...and receive equitable relief" means that a plaintiff must prove that her likely remedy in the case must include meaningful injunctive relief in order to bring a civil action and recover damages.

The *Ly* decision did not identify any ambiguous language in this text. Instead, the opinion leaped directly to the legislative history for its key holding that private plaintiffs are limited to actions that could be brought by the attorney general. *Ly*, 615 N.W.2d at 311. This Court has consistently held that statutory interpretation starts with the plain meaning of the text and ends when the text is unambiguous. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004). On that basis alone, this Court should overturn *Ly*.

2. Attorney General Authority Cannot Support The Public Benefit Restriction.

Even accepting the notion that the *Ly* decision need not have identified an ambiguity in the statute, the decision lacks a supportable legal basis. The guiding principle of *Ly* was found in the legislative history. It is 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 statute." *Ly*, 615 N.W.2d at 313. This Court stated:

> The interest of the legislature in creating a supplemental force of private enforcement to address unlawful trade practices is clear from the testimony at committee hearings, but it is equally clear that the sweep of the statute can be no broader than the source of its authority- that of the attorney general - whose duties are to protect *public* rights in the interest of the state. Conversely, it is not the responsibility of the attorney general to protect private or individual interests independent of a public purpose.[22]
>
> [22] The dissent makes the point that if the legislature intended to require a showing of public benefit under the Private AG Statute then it would have said so, but our analysis is based on the statutory authority of the attorney general. If the attorney general is not authorized to commence a proceeding because it would not result in a public benefit, then a claimant under the Private AG Statute is similarly constrained.

Id. at 313, 314 n.22 (citations omitted).

The authority of the attorney general cannot be the limiting principle for private rights of action because that authority is discretionary and plenary.

First, the authority of the attorney general is subjective and discretionary. The attorney general can appear in civil actions "whenever, in the attorney general's opinion, the interests of the state require it." Minn. Stat. § 8.01. As to statutory fraud laws, the attorney general can seek judicial relief "[o]n becoming satisfied that any of those laws has been or is being violated, or is about to be violated." Minn. Stat. § 8.31, subdiv. 3 (2010). The obvious, inherent problem with equating the private right of action with the attorney general's authority is that courts and litigants will rarely know the opinion of the attorney general as to the public interest in a given private action. It also necessarily

means that the limits of the private right of action can change with the opinion of the attorney general. If an attorney general publicly states that a particular statutory fraud suit is or is not in the public interest, are the courts constrained by that judgment in application of the public benefit restriction?

Second, the authority of the attorney general is plenary, and thus the Court in *Ly* incorrectly concluded that the attorney general could not enforce the statutory fraud laws in any case involving only one-on-one consumer transactions. As this Court explained in *Head v. Special School Dis. No. 1*, 182 N.W.2d 887 (Minn. 1970):

> As the chief law officer of the state, the attorney general possesses all of the powers inherent in that office at common law. He possesses original discretion which he may exercise in instituting proper proceedings to secure the enforcement of law. The attorney general may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of this state, the preservation of order, and the protection of legal right.

Id. at 892. *See also Humprhey on Behalf of State v. McLaren*, 402 N.W.2d 535 (Minn. 1987) (holding that the attorney general has broad common law authority).

Accordingly, there is no support for the proposition that the attorney general cannot bring an action unless she proves that the alleged deceptive conduct was broadly disseminated. For example, neither section 8.01 nor the prior decisions of this court suggest that the attorney general is prohibited from bringing an action under statutory fraud laws to assist an elderly homeowner defrauded by a contractor based on oral representations made only to that homeowner. Or that the attorney general could not have brought a case against Ms. Nystrom for her "reprehensible conduct." *Ly*, 615

N.W.2d at 314. In fact, the attorney general has brought actions involving isolated cases of fraud that would not meet the "broad dissemination" requirement. *See, e.g.,* Donna Halvorson, *Dealer Resells Lemon, Must Buy It Back*, Star Tribune (July 17, 1996) (describing a case in which the attorney general obtained a civil penalty and other relief against a car dealer when the purchaser of a particular vehicle later discovered that the dealer failed to disclose that the car had previously been returned under the lemon law).

It is undoubtedly true that the attorney general typically focuses on cases of mass deception. Suits involving widely disseminated deceptive statements are a means of targeting limited enforcement resources. Or the attorney general may have any number of reasons for generally bringing suits that impact a large number of citizens. Yet there is absolutely no case law or other legal support for the proposition that the attorney general lacks authority to sue in cases where the statutory fraud laws were violated in a transaction involving one individual or one small business.

Another troubling aspect of the equation of public and private actions is that the authority of the attorney general is strikingly different from that of the private plaintiff. The attorney general has broad rights to issue a Civil Investigative Demand commanding pre-complaint discovery. Minn. Stat. § 8.31, subdiv. 2 (2010). She can obtain civil penalties of up to $25,000 per statutory violation (*id.* at subdiv. 3), and seek appointment of an administrator over a defendant's affairs (*id.* at subdiv 3c). None of this enforcement authority, nor other powers of the attorney general, is available to a private litigant. Equating the authority of the attorney general and the private litigant makes no

sense when section 8.31 clearly distinguishes between public and private enforcement authority and remedies.

3. Ancillary Sources of Law were Misapplied in *Ly*.

The *Ly* decision also cited prior decisions of the Court of Appeals and common law principles as support for the public benefit restriction. Neither of these sources supports judicial creation of the doctrine.[2]

a. Prior Case Law Does Not Support the Doctrine.

The *Ly* decision found support for the public benefit restriction in prior Minnesota Court of Appeals decisions referencing "public benefit" in relation to statutory fraud cases. The court cited *Liess v. Lindmeyer,* 354 N.W.2d 556 (Minn. App. 1984), *Wexler v. Brothers Entertainment Group, Inc.*, 457 N.W.2d 218 (Minn.App. 1990) and *Untiedt v. Grand Lab, Inc,* Nos. C4-94-772 and C0-94-851, 1994 WL 714308 (Minn.App. Dec. 27, 1994). But these cases employed the public benefit concept for exactly the opposite purpose. Each of these cases concerned an individual plaintiff for which the court awarded attorney's fees under the private attorney general statute because promoting prosecution of such claims was in the "public interest."

In *Liess*, for example, the plaintiff proved deception in the sale of her home, an archetype one-on-one transaction not actionable under the public benefit restriction. Leiss was awarded $6,787 after trial and sought over $12,000 in attorney's fees but was

---

[2] The *Ly* court further found support in a small minority of other states' courts that have created an analogous doctrine. A full explication of the experience of these other states suggests a different conclusion. *See* Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws,* 33 W. Mitchell L. Rev. 163, 197-200 (2006).

awarded only $2,500 by the trial court on the theory that this amount represented a fair portion of the damage award. The Court of Appeals reversed and increased the attorney's fees award because the private AG statute was designed to "eliminate financial barriers to the vindication of a plaintiff's rights...and the award should provide incentive for counsel to act as private attorney general." *Liess,* 354 N.W.2d at 558.

All of these Court of Appeals decisions mentioned in the *Ly* opinion would be dismissed today under the public benefit restriction.

b. Common Law Limits Do Not Support the Doctrine.

Another ancillary principle underlying the *Ly* decision was that the statutory authority to obtain attorney's fees granted in subdivision 3a was not clear enough to overcome the common law presumption against attorney fee recovery for the prevailing party. Again, it is difficult to conceive of a statement more clear than "any person injured by a violation...may bring a civil action and recover damages...and reasonable attorney's fees." Minn. Stat. § 8.31, subdiv. 3a (2010). Nor is it apparent how this plain statement differs from other permissible statutory or contractual grants of authority to obtain attorney's fees.

What is clear, however, is that Minnesota courts have used the public benefit restriction to overturn common law outcomes. The trial court in this case is a good example. It applied the public benefit restriction to dismiss a certified class because the attorney general had previously settled with the defendant even though application of common law claim preclusion would dictate the opposite result. Thus, the doctrine ostensibly designed to limit the reach of a statute's effect in reversing related common

law outcomes became the vehicle to overturn a different common law doctrine, claim preclusion, which is not remotely implicated by the language or purpose of the statute. The trial court turned a shield created to prevent a statute from too greatly disrupting the common law into a sword to damage the common law.

Failure to ground the public benefit restriction in statutory text or other supportable legal principle makes this court-created doctrine ripe for such misplaced outcomes. NACA urges this Court to overturn the *Ly* decision and return to the plain meaning of the statute.

II. THIS COURT SHOULD NOT ELIMINATE CLASS ACTIONS IN STATUTORY FRAUD CASES BY ADOPTING AN INDIVIDUAL RELIANCE REQUIREMENT.

Philip Morris and allied *amici* argue that this Court should impose an individual reliance requirement for Minnesota statutory fraud laws. For all practical purposes, this result would eliminate class actions in statutory fraud cases. If the Court reaffirms the public benefit restriction and also imposes an individual reliance requirement in place of the current causal nexus test enunciated in *Group Health Plan, Inc., v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001), the private right of action for statutory fraud will also effectively be read out of existence.

A. Imposing an Individual Reliance Requirement Would Eliminate Class Action Cases For Violations of Minnesota Statutory Fraud Law.

Appellant and allied *amici* take slightly different routes to the same position—that this Court should impose an individual reliance requirement as part of the causation element under section 8.31. If *Group Health's* flexible causal nexus standard is replaced

with a required showing of individual reliance, class-wide statutory fraud claims would essentially disappear. Imposing an individual reliance requirement will make class certification next to impossible because individual questions will always predominate over common ones, rendering Rule 23 a nullity. As the United States Court of Appeals bluntly stated in *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir.1996), "a fraud class action cannot be certified when individual reliance will be an issue." *In Re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 371 (Bankr. S.D.N.Y. 1997) (stating that "a class action is generally not appropriate to resolve claims based upon common law fraud because each class member must prove his or her own reliance.").

The three "vanishing premium" cases in Minnesota federal courts, *In re Hartford Sales Practic Litig.*, 192 F.R.D. 592 (D.Minn. 1999), *Parkhill v. Minnesota Mut. Life Insur. Co.*, 188 F.R.D. 332 (D.Minn. 1999), and *In re Lutheran Brotherhood*, 201 F.R.D. 456 (D. Minn. 2001), are examples of the consequence for class certification of imposing an individual reliance requirement. Plaintiffs in these cases argued that the defendant insurance companies had used uniformly deceptive training and sales presentation materials to market certain insurance policies, and "continued to market and sell the vanishing premium insurance policies even after they knew that the policies were underfunded and in danger of lapsing." *In re Lutheran Brotherhood*, 201 F.R.D. at 462. Prior to this Court's ruling in *Group Health*, the courts in *Hartford* and *Parkhill* imposed an individual reliance requirement and refused to certify the class. *In re Hartford Sales Practic Litig.*, 192 F.R.D. at 605; *Parkhill v. Minnesota Mut. Life Insur. Co.*, 188 F.R.D. at 344-345. But, *In re Lutheran Brotherhood* was decided after *Group Health*, and

United States District Court Judge Magnuson determined that the evidence of causation required to meet the causal nexus test could be produced by the plaintiff class and thus certified the class. 201 F.R.D. at 463-464.

Philip Morris and *amicus* Product Liability Advisory Council, Inc. ("PLAC") suggest that an individual reliance requirement for statutory fraud cases is consistent with this Court's rulings in *Group Health* and *Peterson v. B.A.S.F. Corp.*, 675 N.W.2d 57 (Minn. 2004). As to *Group Health*, which was not a class action, Philip Morris and PLAC argue that the *Group Health* plaintiff's position as a "'direct' third-party payer" (PM Br. at 31), also described an "indirectly injured" party (PLAC Br. At 5-8), was critical to the holding in that case, and that the casual nexus test for proving causation does not extend to class actions. If *Group Health* is so limited in its meaning, the practical result will be that business entities will be viable plaintiffs while a class of actual consumers would be foreclosed from using the statutory fraud laws. For example, a fraud on 100,000 consumer purchasers involving a product marketed by Company X could not result in a private action under section 8.31 because of predominance problems with class certification, but a business competitor could bring a statutory fraud claim using circumstantial evidence of indirect injury from the fraud perpetrated by Company X on these same consumers. Combined with the similarly counter-intuitive result from the public benefit restriction described above, reading *Group Health* as proposed by Philip Morris and PLAC will effectively convert private actions under Minnesota statutory fraud laws into a right possessed by businesses but not consumers.

Philip Morris and PLAC also share the view that the result in *Peterson* is consistent with an individual reliance requirement. PLAC describes *Peterson* as a case in which the same product was sold for two different prices and thus the plaintiff class members claims "rested directly and exclusively on the *price* of the product." PLAC Br. at 21 (emphasis in original). Philip Morris suggests that *Peterson* belongs to a "category of cases where the record and common sense demonstrate that no person would engage in the transaction knowing the truth." PM Br. at 37.

The dispute in *Peterson* actually involved a complex interplay between the B.A.S.F. marketing strategy and regulatory decisions of federal and state environmental protection agencies. This Court specifically rejected the notion that *Peterson* was a case about two identical products being sold for the same price. "The farmers' consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF violating the NJCFA [New Jersey Consumer Fraud Act] by making misrepresentations about the products." *Peterson*, 675 N.W.2d at 69. The evidence presented at trial included advertisements and other "repeated, published, and planned misrepresentations" by B.A.S.F. that the cheaper pesticide could only be used on certain crops, which did not include sugar beets. *Id.* at 70-71.

Defendant B.A.S.F., of course, vigorously argued that the plaintiff class could not prove reliance on these representations by all of the individual farmers in the class and thus could not prove injury causation for this and other reasons. "BASF argues that the farmers failed to prove BASF's actions caused an ascertainable loss because they failed to show that either they or other class members were ever aware of BASF's statements." *Id.*

at 72. This Court applied New Jersey law which provided for a "casual relationship" test and not a showing of reliance. *Id.* This Court noted the existence of anecdotal testimony, reasonable jury inference and circumstantial evidence in affirming that the plaintiff class had provided sufficient evidence to support a finding of injury causation. *Id.* at 73. In other words, like almost any statutory fraud case, the *Peterson* class presented proof of causation that would very likely have not survived a legal requirement of individual reliance.

A theoretically perfect case might exist in which a court could impose an individual reliance requirement and certify a class, but it is not *Peterson* or any other real case in which Minnesota courts have applied statutory fraud laws. Overturning *Group Health* to impose an individual reliance requirement in class action cases is the same as reading section 8.31 to prohibit class actions.

B. Minnesota Courts Properly and Cautiously Apply Rule 23 in Statutory Fraud Class Actions.

Appellant Philip Morris and their *amici* U. S. Chamber of Commerce make broad-brush attacks on class actions in statutory fraud cases. Philip Morris charges that the trial court's use of its discretion to certify the *Curtis* class is "out-of-step with modern class action law" because it fails to "protect defendants from 'judicial blackmail' to settle large, but non-meritorious, class actions." PM Br. at 26. According to the Chamber, "class action abuse" is "well-documented," "common," and "widely recognized," with consequences that "cannot be over-stated." Chamber Br. at 13-14.

Both parties warn of dire consequences for Minnesota courts if this Court upholds class certification in this case and simply re-affirms *Group Health.* Philip Morris warns that Minnesota will "become a magnet for misbegotten consumer protection class actions." PM Br. at 26. The Chamber foresees that "[a]ny time any business undertakes a mass marketing plan for its products," plaintiff's counsel will bring cases whether or not the business's conduct "actually deceived or affected any consumers," (Chamber Br. at 13), and that the resulting class action will "bludgeon a defendant into a massive settlement—even in suits that are utterly without merit." *Id.* at 16.

This is overblown nonsense. Minnesota courts are not certifying meritless class cases and are not in crisis over the relatively few certified class actions claiming statutory fraud violations.

1. There is No Evidence of Class Action Abuse in Statutory Fraud Cases in Minnesota Courts.

Despite all the hyperbolic rhetoric, neither Philip Morris nor the Chamber of Commerce cites a single instance of a Minnesota court certifying a frivolous class action under the casual nexus standard. Minnesota courts regularly dismiss cases or refuse to certify putative class actions for failure to establish a causal nexus. Cox, *Consumer Fraud and Deceptive Trade Regulation in Minnesota* § 4.1B2(b)(2) (M.S.B.A. 2009) (listing statutory fraud actions available in electronic search databases dismissed or not certified as class actions for failure to establish causal nexus). Even the damage claim of the *Group Health* plaintiff was dismissed on remand. *Group Health Plan, Inc., v. Philip Morris Inc.*, 344 F.3d 753 (8th Cir. 2003).

In addition to the hurdle of the causal nexus requirement, Rule 23 imposes requirements on which statutory fraud class actions regularly flounder. Rule 23 contains mechanisms to identify and stop abusive or frivolous class action lawsuits. The rules of civil procedure, and Rule 23 in particular, do not permit plaintiffs and their attorneys to breeze into court with a mere suggestion of unlawful conduct and obtain a so-called "blackmail" settlement.

It is particularly odd to argue that consumers in the *Curtis* class were not injured or that this suit is "utterly without merit" and a "non-meritorious" attempt at "judicial blackmail." As to Philip Morris's conduct at issue here, United States District Court Judge Kessler found that, "[b]y engaging in this deception, Defendants dramatically increased their sales of low tar/light cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health dangers of smoking." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 39-41 (D.D.C. 2006), *aff'd. in part, vacated in part and remanded*, 566 F.3d 1095 (D.C. Cir. 2009), *pet. for cert. denied*, 130 S.Ct. 3501and 131 S.Ct. 57 (2010).

2. The Chamber's Sources Citing "Class Action Abuse" Do Not Relate to Minnesota Courts.

Amicus U. S. Chamber of Commerce cites numerous law review and industry trade publications in support of its assertion that abuse is pervasive in statutory fraud class actions. The Chamber does not make any attempt to relate these sources, many of

which focus on now repealed California law, to the experience of parties in Minnesota courts.

Some of the sources cited by the Chamber in support of its assertion reach the entirely opposite conclusion about Minnesota law. The Chamber quotes Professors Stark and Choplin as stating that provisions for attorney fee awards in statutory fraud laws give an incentive for plaintiff's counsel "to bring non-meritorious claims." Chamber Br. at 13-14 (citing Debra Pogrund Stark and Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 Clev. St. L. Rev. 483, 486-487 (2008)). Professors Stark and Choplin explain in the next sentence of their article that their research was aimed at empirically testing this proposition and that their hypothesis on this point was that "most attorneys are not willing to bring a non-meritorious case since there are ethical and civil procedure rules that already prohibit and sanction this." *Id.* at 487-488. They determined that it is not likely that non-meritorious claims will be filed, and they conclude that the Minnesota legislature and 22 other states with similar statutes should clarify that attorney fee awards to plaintiffs are mandatory in statutory fraud cases. *Id.* at 512, 515.

Another law review article cited by the Chamber misconstrues Minnesota law, stating that "Minnesota (statutory fraud) law does not provide for money damages but only for injunctive relief." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 22 (2005) (citing to the Uniform Deceptive Trade Practices Act, Minn.Stat. 325D.45, but failing to recognize Minnesota's other statutory fraud laws and section 8.31). And Professor Scheuerman's

discussion of Minnesota law focuses on her disagreement with this Court's holding in *Group Health.* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. of Legis. 1, 27 (2006).

In short, the Chamber of Commerce's heated rhetoric is not matched by support for its arguments. It presents no evidence that Minnesota courts have certified any class action cases that lack merit using the causal nexus standard. Not a single case.

C. Eliminating Statutory Fraud Class Actions Would Hurt Consumers.

In addition to asserting arguments not applicable to the Minnesota judicial experience and not relevant to the issue at hand, Philip Morris and the Chamber of Commerce present a distorted view of the realities of class action litigation in the statutory fraud context. Class actions are a critical means of ensuring consumer rights. Eliminating them by requiring plaintiffs to prove the elements of common law fraud would be harmful public policy.

1. Class Actions are an Important Device to Vindicate the Rights of Those Who Otherwise Would be Denied Access to the Courts.

Pursuing aggregated claims through class action litigation allows comprehensive resolution of claims of widespread harms. As recently as 2005, Congress made the judgment that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a

defendant that has allegedly caused harm." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1) (2005).

Indeed, in many cases, aggregate litigation affords the only effective means to compensate injured individuals and to sanction businesses engaged in fraud or other misconduct. In the marketplace, consumers often do not know about or understand the ways in which their rights are being violated. They may lack education or face language barriers. Consumers may find themselves unwittingly duped by schemes that cheat them out of small amounts of money that, in the aggregate, generate enormous unlawful sums for businesses. As the New Jersey Supreme Court observed, "without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they have been wronged. *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006).

Moreover, cash-strapped government agencies and public prosecutors, including the attorney general's office, do not have the capacity to take on enforcement actions against all or even most deceptive conduct. As Senator Borden stated in the legislative debate on enactment of subdivision 3a of section 8.31: "It's simply impossible for the Attorney General's Office to investigate and prosecute every act of consumer fraud in this state." *Ly*, 615 N.W.2d at 311.

Finally, class actions allow access to the courts for individuals who would otherwise not be able to prosecute their statutory fraud claims due to lack of resources. Even if individuals are aware that their rights are being violated, they often lack the means to do anything about it. Low-income individuals, in particular, who commonly

face economic demands such as rigid work schedules, burdensome overtime, second jobs, lack of childcare, or debts, are not in a position to navigate the challenging and time-consuming legal system that daunts even the well-educated or well-resourced. Thus, not surprisingly, of the nearly 25 million adults affected by consumer fraud in one year, only 8.4% complain to a federal, state, or local agency or Better Business Bureau, and only 2.4% consulted a lawyer or other professional. *See* FTC, *Consumer Fraud in the United States* ES-6, 80-81 (Aug. 2004), http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf. Many consumers subjected to marketplace deception have been able to vindicate their rights and force businesses to cease unlawful conduct *solely* because they were able to aggregate their claims and pursue them collectively.

2. The Myths About Class Actions Are Without Substantial Merit.

The Chamber of Commerce contends that class actions raise prices and even stifle pro-consumer disclosures by business. Chamber Br. at 13-16. In fact, the opposite is true. Class actions are a proven and effective means to encourage lawful corporate conduct. A more dangerous myth, however, is the contention that class actions help greedy attorneys and plaintiffs assert meritless claims to hold businesses hostage for high payouts.[3] *Id.* at 14-16. In contrast to this myth is the cold reality that class actions settle

[3] About 17 people in Minnesota, including smokers and non-smokers exposed to tobacco smoke, will die from tobacco use on the day this appeal is heard by the Court. Centers for Disease Control and Prevention, "*State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004*," (MMWR) (January 2009). It is disingenuous when Philip Morris and the Chamber of Commerce intimate in their briefs that class plaintiffs and their counsel are somehow greedy against the backdrop of the

no more frequently than individual litigation, and that class settlements are often won only after hard-fought, lengthy and expensive lawyering on *both* sides. *See* Thomas E. Willging *et al.*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 7-10, 32-34, 60-62, 89-90 (Fed. Judicial Ctr. 1996), http://ftp.resource.org/courts.gov/fjc/rule23.pdf; *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 645-50 (2006) .

The Federal Judicial Center ("FJC") noted that defendants typically sought and, in at least a third of the cases obtained, judicial rulings on motions terminating the "litigation without a settlement... ." Willging *et al.*, *Empirical Study* at 34. More than two-thirds of the certified class actions examined had rulings on a motion to dismiss, motion for summary judgment, or both, leading the FJC to conclude that such dispositive motions coupled with active case management "greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency." *Id.* at 61. Likewise, in a later study in 2005, almost a quarter of cases certified for trial did not result in an approved class-wide settlement. 81 Notre Dame L. Rev. at 647. The settlement rate for certified class actions was similar to that of other lawsuits, with approximately 70% of cases filed in federal court ending in pretrial settlement. Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U.L. Rev. 1357, 1401-02 (Oct. 2003).

---

tobacco companies' judicially determined record of having reaped enormous profits at the expense of countless American lives lost because of the knowingly fraudulent marketing of their products.

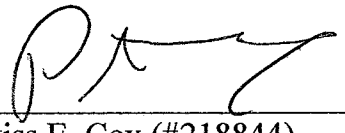
For all of the inflamed rhetoric by Philip Morris and the Chamber of Commerce, they never explain how raising the bar for class certification will prevent the supposed blackmail, other than to force all plaintiffs with class claims not to bring them at all. Eliminating class actions for statutory fraud violations is not a measured or balanced approach in determining which private actions for statutory fraud should be allowed as a matter of law.

CONCLUSION

NACA respectfully requests this Court to restore the right of individual plaintiffs to obtain relief under Minnesota statutory fraud laws by overturning the judicially-created public benefit restriction. NACA also respectfully requests that this Court permit the availability of some class-wide statutory fraud claims by retaining the existing causal nexus test for the determination of causation in private actions under Minnesota statutory fraud laws.

Dated: May 24, 2011

Respectfully submitted:

By: 

Prentiss E. Cox (#218844)
4633 Colfax Avenue South
Minneapolis, Minnesota 55419
(651) 235-1413

CROWDER TESKE, PLLP
William H. Crowder (#20102)
Vildan A. Teske (#241404)
Marisa C. Katz (#389709)
222 South Ninth Street, Suite 3210
Minneapolis, Minnesota 55402
(612) 746-1558

ATTORNEYS FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADOVOCATES