

CASE NO. A10-215

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Gregory Curtis, Joni Kay Hanzal, Josephine Leonard and
Randy Hoskins, individually and on behalf of all others
similarly situated,

Appellants,

vs.

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

Respondents.

**BRIEF AND APPENDIX OF AMICUS CURIAE
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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).

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INTRODUCTION

Minnesota Association for Justice (MAJ) submits this *amicus curiae* brief¹ on one issue: What is the proper legal analysis for determining “public benefit” in order to permit a private litigant to sue for damages under Minn. Stat. § 8.31?

Contrary to the analysis of the trial court, who relied heavily upon federal trial court decisions, this determination is not made by referencing whether only damages, as opposed to injunctive relief, are being sought by a single person. Instead, the focus should be on (1) the conduct of the defendant, that is, does that conduct violate any of the enumerated laws set out in § 8.31, subd. 1? and (2) whether the attorney general, if she had unlimited funding, would have the discretion to punish, stop or recover money for the illegal conduct, given the scope of the audience that the defendant sought to influence by its illegal actions. Anything other than a one-on-one transaction should presumptively be subject to the recovery provisions of § 8.31, subd. 3a.

That the Minnesota legislature intended to permit litigants to recover their own damages and attorney fees for violation of the consumer fraud laws cannot be denied.

The unmistakable intent of the statute is that:

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.

¹ Pursuant to Minn. R. Civ. App. Prac. 129.03, neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case. Neither MAJ nor the writer of this brief have any financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

Minn. Stat. § 8.31, Subd. 3a. The effect of the federal district court decisions, and the adoption of those decisions by the trial court in this case, amounts to judicial repeal of this plainly-worded statute. That must be corrected.

ARGUMENT

1. The Statutes Plainly Allow Private Persons to Sue for Damages.

The starting point for analysis is one of causation: Has the injured party been injured by a violation of any of the laws referred to in Minn. Stat. § 8.31, subd. 1? If so, then the law gives that private person a right to sue for damages in addition to any other remedy. Minn. Stat. § 8.31, subd. 3a. It is hard to conceive alternative wording that would be clearer as to the intent of the legislature. The laws referred to in subdivision 1 include the Consumer Fraud Statute (CFA), Minn. Stat. § 325F.68-70 and the False Advertising Statute, § 325F.67. The CFA prohibits: “The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby.” Minn. Stat. § 325F.69, subd. 1. Minn. Stat. § 325F.67 is equally broad in prohibiting any dissemination of false information in regard to any sale, offer of sale or other disposition of any property to the public.

Minn. Stat. § 325F.70 is the remedy provision of the CFA, and provides that only the attorney general or a county attorney may seek to enjoin consumer fraud. § 325F.67 also mandates that the attorney general and county attorneys investigate and prosecute as

a misdemeanor any suspected violations of the statute and declares such practices a nuisance subject to injunction.

However, the powers of the attorney general in regard to both the CFA and False Advertising statute are expanded in § 8.31. The attorney general is given the authority to seek injunctive relief and to recover a civil penalty for violation of the business fraud laws. Minn. Stat. § 8.31 subd. 3.

In addition, both the attorney general and “any person injured” have a right to pursue damages and equitable relief. *Id.* at subd. 3a. Specifically, the attorney general has a right to pursue “any of the remedies allowable under this subdivision” (§ 8.31, subd. 3a) , which permits persons to sue for their own damages. A plain reading of the statute therefore allows the attorney general to pursue claims for damages on behalf of “any person injured” by a violation of the laws enumerated in § 8.31 subd. 1.

But for the holding of the Supreme Court in Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000) (creating public benefit requirement), these statutes, read together, very plainly allow *any consumer or person* who has been defrauded or otherwise deceived in connection with the sale or offer of sale of any merchandise *and the attorney general on their behalf* to sue for damages and also to collect attorney’s fees and costs.

2. Ly v. Nystrom and Collins, Taken Together, Limit Consumer Fraud and False Advertising Claims for Damages and Attorney's Fees to Cases Involving Advertisements Made to the "Public at Large."

In Ly v. Nystrom, the Court held that the right of a private party to sue for damages is limited by "the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws." 615 N.W.2d at 313.

The roles and duties of the attorney general do not include protecting the rights of a plaintiff involved in "a single one-on-one transaction in which the fraudulent misrepresentation ... was made only to [the injured party]." Id. Instead, the action must be one that has a "public benefit" or a "public interest," phrases left undefined by the Court. Id. at 313-14. It is this limiting factor to which all attention has been focused in the aberrant federal district court decisions.

Beyond the seemingly simple rule laid down in Ly v. Nystrom, the only guidance from the Supreme Court is set out in Collins v. Minnesota School of Business, 655 N.W.2d 320 (Minn. 2003). In Collins, the Court held that an advertisement made to "the public at large" supported the holding that the claim of 18 students for their own damages satisfied the "public benefit" test. Id. at 322, 329-330. The case involved about \$200,000 in damages. Id. at 322. The students who sued represented a small minority of the 1200 total enrollment of the school. Id. Injunctive relief was not requested nor was it part of the settlement of the case, and the Court did not mention an injunction as part of its decision finding that public benefit existed.

Those two cases, Ly v. Nystrom and Collins, represent the total of Minnesota Supreme Court jurisprudence on the topic of “public benefit” or “public interest.” The relatively simple rule that can be discerned from these two cases is that suits for damages under Minn. Stat. § 8.31 by private persons are limited to claims that involve fraud, or deceptive practices that have the potential to affect the “public at large”, that is, something other than one-on-one transactions.

3. The Federal Courts Have Expanded the “Public Benefit” Doctrine Beyond the Intent and Clear Language of the Statute and Supreme Court Precedent, Virtually Eliminating the Right of Consumers to Recover for Violations of the CFA and Other Business Fraud Statutes.

Numerous federal district court cases followed in the wake of Ly v. Nystrom and Collins. The federal courts created new rules, not supported by either Ly v. Nystrom or Collins, that have effectively eviscerated the private attorney general statute. The rules now applied in the federal district court are:

· **No one can sue only for their own damages.** Zutz v. Case Corp., 2003 WL 22848943 (D.Minn. 2003) (plaintiffs sued over the alleged fraudulent sale of farm equipment manufactured by Case. Plaintiffs alleged that they relied upon “promotional materials” for an air drill “warranted that the air drill was appropriate for use on fields treated with pre-emergent herbicides.” Id. at *1. The trial court denied a motion to dismiss the fraud claim, but dismissed the CFA claim because the plaintiff sought only compensatory damages “for the exclusive benefit of the plaintiff.” Id. at *3-4. The court dismissed the case even though the advertisements were “publicly available.” Id. at *4). See also, Behrens v. United Vaccines, Inc., 228 F.Supp.2d 965, 971 (D.Minn. 2002)

(plaintiffs damaged by false advertisements touting the benefits of a canine distemper vaccine that was used on their mink farm; federal district court ruled that a plaintiff who sued *for their own damages* for a violation of the CFA could not maintain that suit because there was no public benefit). The court expressed concern (also articulated by the federal district court in Pecarina v. Tokai Corporation, 2002 WL 1023153 (D.Minn. 2002)), that allowing persons who were defrauded of money as a result of false advertising made to the public to sue for their own damages would violate a fundamental principal of law that “each party bears his own attorney fees in the absence of a statutory or contractual exception,” citing Ly v. Nystrom, 615 N.W.2d at 314.

The court in Behrens explained that a person suing only for their own damages would only offer a “metaphysical potential” of benefit to the public. Behrens, 228 F.Supp. at 971.

· **Unless injunctive relief is sought in the complaint, the suit must be dismissed.** Behrens v. United Vaccine, supra, 228 F.Supp.2d at 972 (unless the complaint also sought relief for a “future injunction” there could be no claim under the CFA). Numerous federal cases have followed the reasoning in Behrens, e.g., PCS Professional Claim Service LLC v. Brambilla’s Inc., 2007 WL 3313661 (D.Minn. 2007) (seller made representations and offered a brochure that extolled virtues of recreational vehicles for use in business of adjusting claims. Held that, because damages were only sought for plaintiff and no injunctive relief sought, CFA claim would be dismissed); Wehner v. Linvatech Corp., 2008 WL 495525 at *3 (D.Minn. 2008) (plaintiff sued for

false representations regarding surgical tacks that failed to dissolve over time; court dismissed case because, although defendant stopped falsely advertising after suit was started, the specific relief sought in the complaint did not include injunction).

· **However, merely seeking injunctive relief is also not enough to survive summary judgment.** Kivel v. Wellspring Mortgage Corp., 398 F.Supp.2d 1049, 1056 (D.Minn. 2005) (citing Behrens, “simply causing defendant to be more forthright in the future as a result of injunctive relief does not satisfy public benefit requirement”).

· **If the defendant has stopped the wrongful conduct, the suit must be dismissed.** Kalmes Farms v. J-Star Industries, Inc., 2004 WL 114976 at *6 (D.Minn. 2004) (even where false advertising was presented to the public at large, the CFA claim must be dismissed because the advertising and the product it sought to promote were no longer in production; the court also found that the plaintiffs’ decision to seek only money damages was “persuasive in determining whether the suit was brought for the benefit of the public”).

· **Even if the fraud or deceptive practice is perpetrated upon many persons, the case must be dismissed unless it is shown to have been made to the “public at large,” meaning every citizen.** Summit Recovery, LLC v. Credit Card Reseller, LLC 2010 WL 1427322 (D.Minn. 2010), (targeted e-mailing to 2000 persons was not an advertisement to the “public at large” and therefore CFA claim dismissed). With due respect to the federal court, targeted e-mailing is just as much an advertisement that the

attorney general could enjoin and sue to recover damages as an ad in the newspaper with wider circulation but less effective market penetration.

The court in Behrens went so far as to rule that the attorney general would not have possessed the power to institute action for any relief for the wrongful conduct alleged in that case (fraudulent advertisement regarding canine distemper vaccine). 228 F.Supp.2d at 972.

The only federal case that the undersigned could find that permitted a CFA case to proceed is Kinetic Co. v. Medtronic Inc., 672 F.Supp.2d 933 (D.Minn. 2009) where the plaintiff alleged a class action seeking damages for false advertisement of 87,000 defibrillators that were implanted. The judge in Kinetic ironically opined that “the ‘public benefit’ requirement is not onerous.” Id. at 946.

The collective effect of these activist federal decisions has been to severely limit, if not entirely eliminate the availability of recovery by any consumer for their damages where there has been consumer fraud. The fear expressed by the Court in Ly v. Nystrom was that “every artful counsel could dress up his dog bite case to come under an attorney's fees statute.” 615 N.W.2d at 312. Today, in the federal district courts, the judicially-created “public benefit” barriers to suit under Minn. Stat. § 8.31 are such that virtually no consumer can make a recovery under CFA or any of the other statutes enumerated in Minn. Stat. § 8.31, subd. 1. What was once proclaimed as a justified nightmare scenario for businesses that committed fraud has now become a nightmare for consumers who thought that this law was passed to protect them.

4. The Federal Court Decisions Do Not Properly Account for the (a) Remedial Purpose of the Consumer Protection Laws, (b) Powers of the Attorney General or (c) Plain Meaning of the Statutes.

a. The Remedial Purpose of the Consumer Protection Laws.

With all due respect to the federal district courts, they are not the authority on the meaning of state statutes and Minnesota common law precedent. Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938) (federal courts have no power to declare common law and must adhere to statutes and law as expressed by highest courts of the several states); Wolner v. Mahaska Industries, Inc. 325 N.W.2d 39, 41 (Minn. 1982) (same). Consumer protection laws and Minn. Stat. § 8.31 are remedial and intended to provide recovery for those who cannot afford attorneys, thus providing incentive for lawyers to take such cases in order to stop the wrongful conduct and permit recovery of all wrongfully gotten gains.

Of prime importance is that adoption of the CFA coupled with § 8.31, subd. 3a was to “address unequal bargaining power often present in consumer transactions.” Ly v. Nystrom, 615 N.W.2d at 308, citing State v. Philip Morris, Inc., 551 N.W.2d 490, 496 (Minn. 1996). In addressing that concern, the Court related that the purpose of the Statute was to “provid [e] incentives to injured parties to enforce the unlawful business practices statutes as a substitute for the attorney general,” as it was “simply impossible for the Attorney General's Office to investigate and prosecute every act of consumer fraud in th[e] state.” Id. at 311, citing Hearing on S.F. 819, S. Comm. Labor and Commerce, 68th Minn. Leg., March 8, 1973, (audiotaped comments of Sen. Borden, Senate sponsor of the Bill). Id. at 311. See, also Ly v. Nystrom, 615 N.W.2d at 311, and

at note 23, citing with approval Leiss v. Lindmeyer, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984) (It is widely recognized that a dual purpose underlies private attorney general statutes: The award should 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).

It is hard to imagine a set of rules better designed to defeat the remedial purposes of the consumer protection laws and Minn. Stat. § 8.31 than those that have been judicially created by the federal district courts. No one is permitted to recover for their own damages. A defendant can prevent suit under the CFA or False Advertising Statute and avoid paying attorney fees by simply stopping the wrongful conduct before anyone sues.

Say a company obtains \$1000 each from 50 retirees through false advertising, but before anyone sues, stops the bad conduct. Those old folks will not be able to sue to obtain a recovery under either the False Advertising Statute (325F.67) or the CFA because they won't be able to afford an attorney. No one will take a \$1000 case on a contingent fee arrangement and the defrauded plaintiff will not want to pay an attorney by the hour to collect only \$1000. The company that defrauded them is rewarded and honest companies are punished in the marketplace.

What is the lesson to the wrongdoer? Defraud as many people as you can as fast as you can, and then stop the fraud before anyone sues. If that company stops the bad conduct in time, it gets to keep the money, unless the plaintiff has the financial ability to

hire an attorney. In many consumer actions that is not financially feasible, as costs of modern litigation are prohibitively high. Even if another legal theory allows some recovery, the high costs of litigation will often mean that the injured party is never fully compensated. That bad company will bank its profits and move on to the next scheme.

This is precisely the wrong lesson for companies that engage in fraudulent or deceptive business practices. Those wrongdoers often count on the inability of poor people to hire lawyers in order to get their money back. When *all* consumers are able to recover both their damages and their attorney's fees, the lesson will be just the opposite. This is not a "metaphysical" proposition that, as the federal courts claim, will have little deterrent effect. Enforcing the consumer fraud laws as written and allowing plaintiffs to recover their damages *plus* attorney fees and expenses in serial litigation will have the intended effect of stopping consumer fraud and deceptive business practices in Minnesota. And it just happens to be exactly what the legislature authorized in Minn. Stat. § 8.31, subd. 3a.

- b. The Enforcement Role of the Attorney General is Very Broad and Includes the Right to Seek Recovery of Damages for Individuals for Any Violation of the Consumer Fraud Laws that Involve Advertisements Made to the Public at Large.

The failure of analysis in the federal cases stems, in large part, from a failure to consider the true scope and power of the enforcement duties and rights of the Minnesota Attorney General. The federal courts assumed, without ever analyzing, that the law limits the scope of the attorney general's power to protect and make recovery for citizens

in this state. This error has led the federal courts to mechanical application of catch-phrase rules that severely limit the ability of individual consumers to recover anything.

The statutory powers of the Attorney General, as expressed in Minn. Stat. § 8.01, are broad and include discretionary authority:

The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; *also in all civil causes of like nature in all other courts of the state whenever, in the attorney general's opinion, the interests of the state require it.* Upon request of the county attorney, the attorney general shall appear in court in such criminal cases as the attorney general deems proper. Upon request of a county attorney, the attorney general may assume the duties of the county attorney in sexual psychopathic personality and sexually dangerous person commitment proceedings under section 253B.185. Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney. (Italics added).

The powers of the Attorney General are not limited to those granted by statute, but instead include extensive common-law powers inherent in the office. Slezak v. Ousdigian, 260 Minn. 303, 308, 110 N.W.2d 1, 5 (1960) (the attorney general “may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights”). The courts will not control the discretionary power of the attorney general in conducting litigation for the state. Id. The attorney general has the authority to institute in district court a civil suit in the name of the state whenever the interests of the state so require. Id., citing Dunn v. Schmid, 239 Minn. 559, 60 N.W.2d 14 (1953); Head v. Special School District No. 1, 288 Minn. 496, 503-04, 182 N.W.2d 887, 892

(1971) (same). The attorney general possesses original discretion which she may exercise in instituting proper proceedings to secure the enforcement of law. Id.

The power of the attorney general is also expanded by the *parens patriae* doctrine. State by Hatch v. Cross Country Bank, Inc. 703 N.W.2d 562 (Minn. Ct. App. 2005) (state may sue under Minn. Stat. §§ 8.31 and 325F.69 for damages in the form of restitution for individual citizens harmed by conduct of defendants). Citing with approval from E.E.O.C. v. Waffle House, 534 U.S. 279, 293-96 (2002), the Court in Cross Country Bank held that the attorney general may, whenever he chose, “bring an enforcement action in a particular case . . . seeking to vindicate a public interest . . . even when it pursues entirely victim specific relief.” Id. at 569. Explaining the role of the attorney general, the court wrote that the attorney general, in seeking relief for particular victims was vindicating a “quasi-sovereign” interest of protecting rights of citizens that “grows out of, but surpasses, the interests of individual citizens.” Id. In those *parens patriae* actions where the state becomes involved, “the state is asserting a state interest that is based upon the facts involving individual cardholders” with claims for restitution. Id. at 570. Going further, the court wrote that, in a *parens patriae* action, “the state becomes, in effect, the embodiment of its citizens. A harm to individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff.” Id.

In State, by Humphrey v. Ri-Mel, Inc., 417 N.W.2d 102 (Minn. Ct. App. 1988) the attorney general brought action against health clubs and their principals for violations of consumer protection statutes (including §325F.69) and for recovery of attorney fees

under Minn. Stat. § 8.31. The court authorized both the right of the attorney general to recover attorney fees and the attorney general's right to institute an action on behalf of citizens for recovery of money for those citizens. State by Humphrey v. Ri-Mel, Inc., 417 N.W.2d at 112, citing with approval State of Minnesota by Humphrey v. Standard Oil Co., 568 F.Supp. 556, 563 (D. Minn. 1983) (approving power of attorney general to recover overcharges for individual citizens as part of *parens patriae* power, noting in particular that the doctrine historically allowed the state to recover for individuals who were legally unable to do so for themselves, but has evolved into a "different but far more broad sovereign power"), citing Alfred L. Snapp & Sons, Inc. v. Puerto Rico, 458 U.S. 592 (1982).

- c. When the Specific Language of Minn. Stat. § 8.31 is Added to the Already Extensive Powers of the Attorney General, it is Clear That Private Citizens Can Maintain Separate Suits for Their Own Damages Where the Defendant Has Made Advertisements to the Public at Large. Even Where There Is No Request for Injunctive Relief or the Bad Behavior Has Already Been Stopped.

The final problem with the federal cases is that they fail to account for the plain wording of the statute. If there is anything that is crystal clear in Minn. Stat. § 8.31, it is that private persons, *in addition to any other remedy they have*, can sue for their own damages. The attorney general possessed, even before the legislature adopted Minn. Stat. § 8.31, extensive powers to recover for and on behalf of consumers for damages under the *parens patriae* doctrine (see, *supra* at 12-13).

Thus, the sentence in § 8.31, subd. 3a that grants individuals the right to sue for their own damages has to mean something new. Giving consumers the right to sue for

their own damages and attorney fees as private attorney generals acting on their own behalf is that new right. Consumers exercising those rights will be an effective weapon against wrongdoers. They will be aiding the attorney general in her fight to uphold the laws of this state and to keep the marketplace competitive for good businesses.

Assuming, *arguendo*, that the attorney general couldn't sue for damages on behalf of individuals under either her pre-existing statutory authority or her common law powers, then § 8.31, subd. 3a grants that power to both individual consumers and to the attorney general. And it is a power that is granted without any expressed limitation. Specifically, there is no requirement that makes the damages recovery contingent upon suing for other injured parties or seeking to stop unlawful practices through injunctive relief.

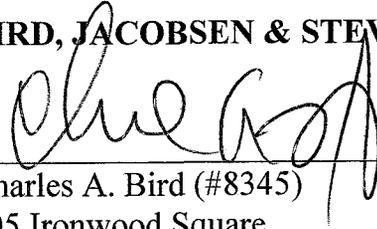
CONCLUSION

For these reasons, the public benefit limitation expressed in Ly v. Nystrom and Collins should be narrowly construed and should give consumers the broadest possible rights to seek recovery for their own damages, including attorney fees in order to effectively deter wrongdoers and to drive them out of business. That rule should first look to determine if the conduct of the wrongdoer is proscribed by one or more of the several laws set out in Minn. Stat. § 8.31, subd. 1. Then, the court should make sure that the transaction was not one-on-one, but instead potentially involved more consumers who the attorney general, in her discretion, could seek to aid if she had sufficient funding from the legislature. If those two criteria are met, then the individual consumer should be permitted to proceed with his own claim for damages and allowed a recovery of attorney

fees and expenses. Any transaction, other than a one-on-one transaction, should presumptively be covered by § 8.31, subd. 3a.

Dated: May 27, 2010

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A handwritten signature in black ink, appearing to read "Charles A. Bird", is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. Civ. P. 132.01, subd. 3(a)(1) in that it is printed in a 13 point, proportionately spaced typeface, and contains 4346 words, excluding the Table of Contents and Table of Authorities. The brief was prepared using Microsoft Word 2007.

Dated: May 27, 2010

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