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Minnesota'S Tobacco Case: Recovering Damages without Individual Proof of Reliance under Minnesota'S Consumer Protection Statutes

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MINNESOTA'S TOBACCO CASE:

RECOVERING DAMAGES WITHOUT INDIVIDUAL PROOF OF RELIANCE UNDER MINNESOTA'S CONSUMER PROTECTION STATUTES

Gary L. Wilson & Jason A. Gillmer†

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I. INTRODUCTION

On May 8, 1998, the State of Minnesota ("the State") and Blue Cross and Blue Shield of Minnesota ("Blue Cross") reached an unprecedented $6.6 billion dollar settlement of their lawsuit against seven tobacco companies and two trade organizations.\(^1\) In addition to monetary compensation, as part of the settlement the tobacco industry is now subject to unprecedented injunctive restrictions, including injunctions against making material misrepresentations and against targeting children in the advertising, promotion, or marketing of cigarettes.\(^2\) The tobacco industry also must remove advertising billboards in Minnesota, fund smoking cessation programs, and dissolve one of its trade groups.\(^3\)

The plaintiffs' underlying claims in the litigation included the allegation that the cigarette industry's decades-long campaign to

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1. The settlement requires the tobacco industry to make payments into perpetuity. The first twenty-five years of payments will result in the plaintiffs receiving $6.6 billion. The defendants were Philip Morris Incorporated ("Philip Morris"), R.J. Reynolds Tobacco Company ("Reynolds"), Brown & Williamson Tobacco Corporation ("Brown & Williamson"), B.A.T. Industries P.L.C. ("B.A.T. Industries"), Lorillard Tobacco Company ("Lorillard"), The American Tobacco Company ("American"), Liggett Group, Inc. ("Liggett"), the Council for Tobacco Research ("CTR"), and the Tobacco Institute ("TI").


maintain and increase the market for cigarettes was deceptive. The plaintiffs alleged that this conduct violated Minnesota’s consumer protection statutes, specifically, the Prevention of Consumer Fraud Act, the Unlawful Trade Practices Act, the False Statement in Advertising statute, and the Uniform Deceptive Trade Practices Act.

4. MINN. STAT. §§ 325F.68-.70 (1998) ("the Consumer Fraud Act"). The plaintiffs alleged that the tobacco industry violated section 325F.69, subd. 1 of the Minnesota Statutes, which provides:

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, is enjoinable as provided herein.

Id. § 325F.69, subd. 1.

5. MINN. STAT. §§ 325D.09-.16 (1998). The plaintiffs alleged violations of Minnesota Statutes section 325D.13, which states “[n]o person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise.” MINN. STAT. § 325D.13.

6. MINN. STAT. § 325F.67 (1998) ("the False Advertising Statute"). The False Advertising Statute provides:

Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public, for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, label, price tag, circular, pamphlet, program, or letter, or over any radio or television station, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, for use, consumption, purchase, or sale, which advertisement contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof, be guilty of a misdemeanor, and any such act is declared to be a public nuisance and may be enjoined as such.

Id.

7. MINN. STAT. §§ 325D.43-.48 (1998) ("the Deceptive Trade Practices Act"). The plaintiffs alleged violations of section 325D.44, subd. 1, which provides in relevant part:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: . . . (5) represents that goods or services have . . . characteristics, ingredients, uses, benefits, ...
A determinative issue in the case was the showing required to establish causation under the statutes. The State and Blue Cross had brought a direct action—not one in subrogation—alleging the violation of duties owed directly to them as public health authorities and large scale purchasers of health care. Nonetheless, the causal chain asserted by the plaintiffs ran through the smoker. The plaintiffs alleged that the actions of the tobacco companies caused persons to begin or continue smoking, which led to increased health care costs for smoking-related disease.

The defendants contended in a motion for summary judgment that to show "causation in fact," the plaintiffs were required to prove that each individual who incurred tobacco related disease had done so only because he or she had relied upon some fraudulent statement made by the defendants. Such individual proof of reliance was, of course, impossible. The death toll caused by smoking meant that many of the smokers were unavailable to testify. Moreover, the plaintiffs' damage calculation model was based on millions of patient records.

The district court rejected the defendants' argument and denied their motion for summary judgment on the issue of causation. Reliance is typically an element of common law fraud. The

that they do not have ... (7) represents that goods or services are of a particular standard, quality, or grade, ... if they are of another; ... (13) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 325D.44, subd. 1.


10. Personal communication with Howard Orenstein, one of the attorneys who worked on plaintiffs' damage model.


12. See Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967). The elements of common law fraud are:
consumer protection statutes, however, are broader than the common law. To recover damages under the statutes, a plaintiff must prove "the proper legal nexus" between the complained of acts and the injury. "Proper legal nexus" cannot, however, be interpreted to mean individual proof of reliance. Such a requirement would emasculate the consumer protection statutes by making them simply a codification of common law fraud—a result clearly not intended by the legislature.

This Article describes the legal causation standard under the consumer protection statutes and details the evidence developed by the State and Blue Cross to prove causation under their consumer protection claims. Part II sets forth a general background on the case. Part III describes the contours of Minnesota's consumer protection statutes. Parts IV and V discuss the causation requirements under the statutes, demonstrating how the consumer protec-

(1) there must be a representation; (2) that representation must be false; (3) it must have to do with a past or present fact; (4) that fact must be material; (5) it must be susceptible of knowledge; (6) the representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false; (7) the representer must intend to have the other person induced to act, or justified in acting upon it; (8) that person must be so induced to act or so justified in acting; (9) that person's action must be in reliance upon the representation; (10) that person must suffer damage; (11) that damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury.

Id.

14. See id.
16. See State ex rel. Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992) ("Consumer protection laws were not intended to codify the common law . . . ."); aff'd, 500 N.W.2d 788, 788 (Minn. 1993); see also Disandro v. Makahuena Corp., 588 F. Supp. 889, 894-95 (D. Haw. 1984) (holding that purchasers of condominiums were not required to prove their reliance on action allegedly taken by sellers in violation of the Hawaii Horizontal Property Act because purchasers would then have proven common law fraud and the statute would be given no independent effect).
17. See infra notes 21-39 and accompanying text.
18. See infra notes 40-125 and accompanying text.
tion statutes justifiably require a relaxed showing of causation.\(^\text{19}\) Finally, Part VI discusses the evidence the State and Blue Cross used to establish causation in successfully defeating the defendants’ motion for summary judgment.\(^\text{20}\)

II. THE DIRECT ACTION NATURE OF THE SUIT

One important aspect of the suit brought by the State and Blue Cross was that the plaintiffs brought it as a direct action, not in subrogation. In a subrogation claim, one party steps into the shoes of another, asserting the rights possessed by, and becoming subject to the defenses available against, that person.\(^\text{21}\) The plaintiffs chose to proceed with a direct action because, from a practical perspective, this was the only viable manner in which the plaintiffs’ rights could have been effectively enforced. In a subrogation action, the cigarette industry would have been able to assert traditional subrogation defenses, including the alleged comparative fault and assumption of risk of individual smokers. To attempt to litigate these claims against the cigarette industry in the shoes of the smokers, one smoker at a time, would obviously have been an impossibility.

Despite the plaintiffs’ prerogative to style their case as they wished,\(^\text{22}\) the cigarette industry defendants repeatedly argued that the State and Blue Cross could only proceed with a subrogation action. In January 1995, the plaintiffs moved for a Rule 12 dismissal of the cigarette industry’s affirmative defenses that rested upon the actions of individual smokers. The plaintiffs argued that:

The State and Blue Cross have not brought this action as subrogated parties to any underlying tort claims that individual smokers may have against the cigarette industry. In a subrogation claim, one party steps into the shoes of another and asserts the rights of the other. By contrast, in the present case, the State and Blue Cross sue in their own right—in a direct action—to recover the enormous sums

\(^{19}\) See infra notes 126-254 and accompanying text.

\(^{20}\) See infra notes 255-330 and accompanying text.


\(^{22}\) See Monroe v. Thulin, 181 Minn. 496, 498, 233 N.W. 241, 242 (1930) (“It is not for the wrongdoer to dictate the remedy to be pursued by his victim in order to seek redress.”).
of money each spends to pay for the health care for smoking-attributable diseases and to obtain equitable relief.  

In May 1995, Ramsey County District Court Judge Kenneth Fitzpatrick denied the plaintiffs' motion as premature, stating:

[S]uch defenses cannot be determined at this time to be irrelevant . . . . If discovery reveals, for example, that Plaintiffs have no direct cause of action, the case could be converted into one involving issues of subrogation. In such a situation, the Defendants' affirmative defenses would not be irrelevant and would, presumably, have to be reinstated . . . .

Judge Fitzpatrick, however, expressly "invite[d] the parties to revisit this issue after discovery."  

Even before the end of discovery, however, the Minnesota Supreme Court put this issue to rest by holding that Blue Cross, and by necessary implication the State, did indeed have a direct cause of action against the cigarette industry. This decision resulted from the cigarette industry's appeal of one portion of Judge Fitzpatrick's Rule 12 order denying the industry's motion to dismiss Blue Cross' direct claims. The Minnesota Supreme Court decisively rejected the cigarette industry's argument that subrogation

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23. Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings at 2, State ex rel. Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Jan. 26, 1995). During this Rule 12 briefing, the cigarette industry expressly recognized that if the State proceeded in a direct action, individual smokers would be free to prosecute their personal injury claims in separate actions. See Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings at 33, State ex rel. Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Feb. 21, 1995) ("Defendants would then face the possibility of a later suit by smokers for additional damages such as pain and suffering.") (emphasis added); id. at 34 ("[I]ndividual smokers . . . could relitigate the identical allegations in their claim for pain and suffering or any other damages other than reimbursed medical costs.") (emphasis added); id. ("[I]ndividual smokers once again could file another suit for their injuries other than medical expenses, such as pain and suffering.") (emphasis added).


25. Id.


27. See id. at 492.
was exclusive.\textsuperscript{28} The supreme court recognized that Blue Cross was asserting a direct action, noting that "Blue Cross seeks relief independent from that available to smokers, such as pain and suffering."\textsuperscript{29} The supreme court held that Blue Cross could "join" the State in pursuing its statutory claims in a direct action: "On [the statutory] claims, we hold that the broad grants of standing within the statutes themselves reach Blue Cross and allow it to join the State of Minnesota in pursuit of relief for these claims."\textsuperscript{30}

Judge Fitzpatrick confirmed in later summary judgment rulings that both the State and Blue Cross were proceeding with direct actions. In a motion for summary judgment seeking dismissal of the State's tort and equitable claims, the cigarette industry again argued that the State's claim was "derivative of injuries to third parties," and that the State was "precluded from maintaining a direct tort or equitable claim to recover medical expenditures."\textsuperscript{31} Judge Fitzpatrick denied the motion, specifically finding that the State was not proceeding in subrogation nor was the State seeking recovery of individual smoker claims:

Nor is subrogation Plaintiffs' sole remedy. The Defendants have unsuccessfuely argued this point previously, both before this Court in its Rule 12 motions and before the Supreme Court of Minnesota. The Supreme Court of Minnesota rejected this argument, finding that the relief sought was independent from that available to individual smokers, "such as pain and suffering," Minnesota, 551 N.W.2d 493; and that the statutes themselves allowed BCBSM to "join the State of Minnesota in pursuit of relief," Id. at 495, under "its statutory and common law antitrust and consumer claims as well as its equitable claims . . . ." Id. at 492. No more need be said on this issue.\textsuperscript{32}

\textsuperscript{28} See id. at 495.
\textsuperscript{29} Id. at 493 (emphasis added).
\textsuperscript{30} Id. at 495. The supreme court found that Blue Cross lacked standing to recover under its claim that the tobacco industry undertook a special tort duty to Blue Cross. See id.
\textsuperscript{32} See Order Denying Defendants' Consolidated Motion For Summary Judgment Against Plaintiffs' Nonstatutory Claims (Counts 1, 8, and 9), State \textit{ex rel.} Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 5-6 (Minn. Dist. Ct.
Judge Fitzpatrick also eventually dismissed all of the cigarette industry's affirmative defenses premised on individual smoker's conduct, such as comparative fault, assumption of risk, or mitigation of damages. Specifically, Judge Fitzpatrick held that:

- "[T]he conduct of individual smokers is irrelevant to the majority, but not all, of the issues in this case."  
- "[T]he Minnesota Supreme Court held in *State of Minnesota v. Philip Morris Inc. et al.*, 551 N.W.2d 490 (Minn. 1996) that Plaintiff Blue Cross and Blue Shield of Minnesota and, by implication, Plaintiff State of Minnesota, have a direct action against defendants for their injuries."  
- "Plaintiffs have a direct claim to which the undisputed rule against imputed defenses applies."  

Judge Fitzpatrick also narrowly defined the role of smokers at trial, finding that the "presence of individual smokers in the casual change [sic] may require the admission of certain other evidence of smoker conduct . . . ."  

At the close of evidence in the cigarette trial, Judge Fitzpatrick instructed the jury that the State had brought a direct action, that smokers were not a party to the case, and that conduct of smokers was not a defense to any violations of the law:

You are instructed that this case is a direct action brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action. The actions of individual smokers do not insulate defendants from liability since the actions of smokers; for example, the fact that they smoke, are both foreseeable by defendants and in accord with defendants' intention for use of their product. Any knowledge by smokers of any health risks of cigarettes or any conduct of the smokers is

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34. *Id.*
35. *Id.* at 3.
36. *Id.*
not a defense as to whether a defendant or defendants have violated the law in this case.\textsuperscript{37}

Thus, the cigarette industry was directly liable to the State and Blue Cross as public health authorities and large scale purchasers of health care.

However, even though the State and Blue Cross did not seek to recover for the breach of duties owed to individual smokers, the individual smokers did occupy a place in the causal chain between the industry’s conduct and the plaintiffs’ ultimate injuries, including tobacco-related health care costs. To prove their case, the plaintiffs were required to show that the acts of the industry had “caused” persons to start or continue to smoke.\textsuperscript{38}

Evidence uncovered by the plaintiffs during the course of the litigation showed that, instead of fulfilling their promises to conduct research, disclose the results and generally act to protect the public health, the defendants restrained research, concealed information on the harmful effects of smoking, manipulated the nicotine in cigarettes, and targeted their product at youth.\textsuperscript{39} This evidence, buttressed by proof from the files of the defendants themselves that their conduct was successful in inducing smokers to begin or continue smoking, was sufficient proof of causation to allow recovery of compensatory damages under the Minnesota consumer protection statutes.

III. MINNESOTA’S CONSUMER PROTECTION STATUTES

Minnesota’s consumer protection statutes were enacted to protect Minnesota consumers from unlawful and fraudulent business practices.\textsuperscript{40} They are remedial statutes and are broadly construed to protect the consuming public.\textsuperscript{41} The evidence detailing the to-


\textsuperscript{38} See \textit{infra} Part VI.

\textsuperscript{39} See \textit{infra} Part VI (giving examples of the evidence put forth by plaintiffs in response to defendants’ motion for summary judgment).

\textsuperscript{40} See Church of the Nativity v. Watpro, Inc., 491 N.W.2d 1, 10 (Minn. 1992) (Simonett, J., concurring in part and dissenting in part) (stating that Consumer Fraud Act is aimed “at deceptive practices to which the consumer public is prey”).

\textsuperscript{41} State \textit{ex rel.} Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 496 (Minn. 1996) (stating that consumer protection statutes “are generally very broadly construed to enhance consumer protection”); State \textit{ex rel.} Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992) (holding “consumer pro-
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bacco industry's deceptive conduct in promoting the sale of cigarettes, as outlined below, is exactly the type of behavior these statutes were designed to prevent.

A. Conduct Prohibited by the Statutes

The consumer protection statutes broadly prohibit deceptive conduct in business and consumer transactions. The Consumer Fraud Act, for example, prohibits false and misleading statements and false promises made in connection with the sale of any merchandise. The Unlawful Trade Practices Act similarly says that "[n]o person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin" of the merchandise. The False Advertising Statute prohibits advertisements containing "untrue, deceptive or misleading" representations "with intent to sell or in anywise dispose of merchandise . . . to increase the consumption thereof, or to induce the public in any manner . . ." The Deceptive Trade Practices Act prohibits a sweeping range of deceptive conduct "in the course of business, vocation, or occupation."

Minnesota courts have consistently interpreted the statutes liberally to further their purpose of protecting the public. "Sale," under the Consumer Fraud Act, is defined to mean "any sale, offer for sale, or attempt to sell any merchandise for any consideration." It means "any sale, offer, or advertisement thereof or contract for the same" under the Unlawful Trade Practices Act. "Sale" has been read broadly enough to include leasing real estate.

42. See Minn. Stat. § 325F.69, subd. 1 (1998).
45. Minn. Stat. § 325D.44, subd. 1 (1998). The Deceptive Trade Practices Act contains a list of twelve types of prohibited conduct, followed by a "catch-all" provision. The plaintiffs alleged violations of the statute that apply to deceptive conduct in the course of a transaction for goods or services. See supra note 7 (quoting parts of the statute alleged in the complaint). Other provisions of the statute apply to such things as "passing off" goods of another and business disparagement claims. See Minn. Stat. § 325D.44, subd. 1(1), (8).
“Merchandise” is defined under the Consumer Fraud Act as “any objects, wares, goods, commodities, intangibles, real estate, loans, or services.” The False Advertising Statute similarly talks about “merchandise, securities, services, or anything offered . . . to the public for sale or distribution.”

Courts applying the Consumer Fraud Act have interpreted the term “merchandise” liberally, and have held that the Act governs the sale of prescription drugs, including the Cu-7 IUD, ice-cream, and a telephone trivia game. It has also been held to apply to the sale of investment contracts and insurance.

“Advertising,” too, is broadly defined to include a host of activity designed to induce a person to use a product. The court in Kociemba v. G.D. Searle & Co. instructed the jury that for purposes of the statutes, advertisements include: “[R]epresentations disseminated in any manner or by any means for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of a product.” Under this definition, a package insert sent to a physician was held to be an advertisement where the insert was intended to induce physicians or patients to purchase the product. The definition includes “advertisement[s] of any sort,” placed in a “newspaper . . . book, notice, handbill, poster, bill, label, price tag,
circular, pamphlet, program, or letter,” or used in “radio or television” or on the Internet. In addition, the False Advertising Statute covers both “direct and indirect’ outreaches to the public.”

Cigarettes certainly meet the definition of “merchandise” under these definitions and decisions, and the tobacco industry’s promotion of these goods qualifies as a “sale.” The industry’s promotional efforts, whether through advertisements or statements regarding the health effects of smoking, were designed to serve one purpose: the continued sale of cigarettes.

Notably, none of the statutes are limited to statements which are literally false. As an example, the Consumer Fraud Act covers any “fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice.” This was important in the Minnesota cigarette litigation because the plaintiffs alleged the industry’s historic strategy was to create misleading impressions about its product—including the impression that it has not been scientifically established that cigarettes cause disease.

The failure to disclose information can also be a misleading practice. The common law imposes a duty to disclose in these instances:

(a) One who speaks must say enough to prevent his words from misleading the other party. (b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to

62. MINN. STAT. § 325F.69, subd. 1 (1998).
63. See infra section VI (citing industry statements denying or minimizing the health consequences of smoking).
64. See Jacobs v. Rosemount Dodge-Winnebago South, 310 N.W.2d 71, 79-80 (Minn. 1981); In re Professional Fin. Management, Ltd., 703 F. Supp. 1388, 1397 (D. Minn. 1989); but see Masepohl v. American Tobacco Co., 974 F. Supp. 1245, 1254 (D. Minn. 1997) (“The false advertising statute and the other consumer fraud statutes . . . do not create a duty to disclose information . . . . Rather, they require companies that present advertising to the public to ensure that such advertising does not contain false, deceptive, or misleading information.”) (citations omitted).
the other party. (c) one who stands in a confidential or fiduciary relation to the party to a transaction must disclose material facts. 65

Cases decided under the consumer protection statutes indicate that there is a duty to disclose in similar circumstances. One case has recognized that there is a duty to disclose where one party has better access to the information. 66 Another has said that a manufacturer's failure to notify purchasers of a product defect, as required by federal law, constituted a violation of the Consumer Fraud Act. 67 In the tobacco litigation, failure to disclose was a key consideration because the plaintiffs alleged that the industry knew about the health hazards of cigarettes but failed to disclose this information.

It is also not necessary under the consumer protection statutes to show that a defendant intends to deceive the public; a negligent misrepresentation is likely enough, although the Minnesota Supreme Court has not definitively decided the issue. 68 In fact, the Deceptive Trade practices Act explicitly states that "intent to deceive is not required." 69 However, the defendant's level of culpability, as explained below, is relevant to the causation question.

B. Actions under the Statutes

All four consumer protection statutes create a cause of action for injunctive relief, 70 but only the Unlawful Trade Practices Act

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65. Boubelik v. Liberty State Bank, 553 N.W.2d 393, 398 (Minn. 1996).
66. See Professional Fin., 703 F. Supp. at 1397.
67. Jacobs, 310 N.W.2d at 79-80.
68. See Church of the Nativity v. Watpro, Inc., 474 N.W.2d 605, 612 (Minn. Ct. App. 1991) (explaining that Minnesota courts have found unintentional and negligent misrepresentations violate the Act); see also Carlock v. Pillsbury Co., 719 F. Supp. 791, 849-50 (D. Minn. 1989) ("A cause of action under section 325F.69 is made out if plaintiff supplies proof of conduct equivalent to negligent misrepresentation.") (citing In re Professional Fin., 703 F. Supp. at 1397). The Minnesota Supreme Court declined to rule on the question of whether liability under the consumer protection statutes is triggered by a negligent misrepresentation the last time it faced the issue. See Watpro, 491 N.W.2d at 8 ("Montedison argues that a negligent misrepresentation does not trigger liability under the Minnesota Consumer Fraud Act. . . . [T]hat argument need not be decided here . . . ."). It has said that the Consumer Fraud Act does not impose strict liability, however. See Jenson v. Touche Ross & Co., 335 N.W.2d 720, 728 n.54 (Minn. 1983) (finding that, absent clear legislative intent, it is inappropriate to impose a standard of strict liability to an action under the Consumer Fraud Act).
69. MINN. STAT. § 325D.45, subd. 1 (1998).
70. See MINN. STAT. § 325F.70, subd. 1 (1998). Subdivision 1 provides:
contains a provision authorizing a private suit for damages.71 However, all of the statutes except the Deceptive Trade Practices Act are specifically mentioned in Minnesota Statutes section 8.31, the statute detailing the responsibilities of the attorney general.72 This statute permits any "person" who has been harmed by a violation of the statutes, including the attorney general himself, to sue for damages and seek equitable relief.73

I. Who May Sue

Section 8.31 of the Minnesota Statutes vests in the attorney general the duty to investigate and enforce violations of Minnesota's consumer protection laws. The statute provides in relevant part that the attorney general:

[S]hall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade, and specifically, but not exclusively, . . . the unlawful trade practices act (sections 325D.09 to 325D.16), . . . section 325F.67 and other laws against false or fraudulent advertising, . . . the prevention of consumer fraud act (sections 325F.68 to 325F.70) . . .

The attorney general or any county attorney may institute a civil action in the name of the state in the district court for an injunction prohibiting any violation of sections 325F.68 to 325F.70. The court, upon proper proof that defendant has engaged in a practice made enjoinable by section 325F.69, may enjoin the future commission of such practice.

Id.; MINN. STAT. § 325F.67 (1998) (stating that conduct in violation of the statute "is declared to be a public nuisance and may be enjoined as such"); MINN. STAT. § 325D.45, subd. 1-5 (limiting relief for a violation of the Deceptive Trade Practices Act to an injunction, costs and attorneys' fees, and any other "remedies otherwise available against the same conduct under the common law or other statutes of this state").

71. See MINN. STAT. § 325D.15 (1998). Section 325D.15 provides:

Any person damaged or who is threatened with loss, damage, or injury by reason of a violation of sections 325D.09 to 325D.16 shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of sections 325D.09 to 325D.16 and for the amount of the actual damages, if any.

Id.

73. See id. subd. 1–3a.
and assist in the enforcement of those laws as in this section provided.\textsuperscript{74}

The attorney general is entitled to seek an injunction and civil penalties for each violation of the laws enumerated in this section.\textsuperscript{75} Section 8.31, subdivision 3a, also creates a private right of action. The statute permits any “person” injured by a violation of the consumer protection statutes to sue for “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.”\textsuperscript{76} The attorney general may also bring an action for damages under this subdivision.\textsuperscript{77}

Case law indicates that “person” is broadly defined, and Minnesota courts have not limited those who may sue to individual consumers.\textsuperscript{78} Rather, the statutes apply to transactions involving diverse types of plaintiffs, including business entities and political bodies. The Minnesota Supreme Court, for example, has held that a church could bring an action for damages under the Consumer Fraud Act for defective roofing materials installed on its school and convent.\textsuperscript{79}

\textsuperscript{74} Id. subd. 1 (emphasis added). In addition, subdivision 2 of this section gives the attorney general the power to investigate and take action against any person “violating any of the statutes specifically mentioned in subdivision 1 or any other laws respecting unfair, discriminatory, or other unlawful practices in business, commerce, or trade.” Id. subd. 2 (emphasis added).

\textsuperscript{75} See id. subd. 3. See also infra notes 111-25 and accompanying text (discussing remedies available under section 8.31).

\textsuperscript{76} MINN. STAT. § 8.31, subd. 3a.

\textsuperscript{77} See id. (stating that court may award any of the remedies, including damages, “[i]n any action brought by the attorney general pursuant to this section”); see also State ex rel. Humphrey v. Ri-Mel Inc., 417 N.W.2d 102, 112 (Minn. Ct. App. 1987) (explaining that subdivision 3a, which expressly provides for damages, “governs the remedies available to the attorney general if he brings an action pursuant to Minn. Stat. § 8.31”).

\textsuperscript{78} See Church of the Nativity v. Watpro, Inc., 491 N.W.2d 1, 8 (Minn. 1992) (rejecting the argument that the Consumer Fraud Act is limited to individual consumers).

\textsuperscript{79} See id. In so holding, the court in \textit{Watpro} cited three past decisions to illustrate how the consumer protection statutes are designed to protect a broad range of plaintiffs. Of the cases relied on was \textit{Eager} v. Siwek Lumber & Millwork, Inc., 392 N.W.2d 691 (Minn. Ct. App. 1986). In \textit{Eager}, a construction contractor brought suit against the seller of a garage kit. See id. at 693. Another decision was Hutchinson Utils. Comm’n v. Curtiss-Wright Corp., 775 F.2d 231 (8th Cir. 1985). There, a municipal power company sued in connection with the purchase of a generating unit. See id. at 233-34. Also, in \textit{Carlock} v. Pillsbury Co., 719 F. Supp. 791 (D. Minn. 1989), the court held that a group of Haagen-Dazs franchisees
Similarly, the federal district court has said that a school district may maintain an action for damages under section 8.31, subdivision 3a, for violations of the Unlawful Trade Practices Act. The defendant in this case argued that the statute only applied to "consumers," not public bodies. The court rejected this argument, turning to the definition of "person" as used in Minnesota Statutes. The court noted that the term "person" is broadly defined to include "bodies politic," and thus the school district fell within the protection of the Unlawful Trade Practices Act.

The Minnesota Court of Appeals also has held that the False Advertising Statute extends its protection to both consumers and non-consumers. This court said that the focus should be "on the defendant's action rather than the complaining party's consumer or non-consumer status," and thus allowed commercial farmers to recover attorney fees under section 8.31.

Blue Cross, a health care organization, was implicitly found to fall under this liberal definition when the Minnesota Supreme Court held that it had standing to sue under all four consumer protection laws.

2. Who May Be Sued

The consumer protection statutes also broadly define the entities that can be subject to liability for statutory violations. In the cigarette litigation, the industry's public relations, lobbying, and research organization, the Tobacco Institute ("TI") and the Council for Tobacco Research ("CTR"), argued that they could not be sued under the consumer protection statutes. Specifically, they argued that the statutes only applied to persons who "sell, offer for sale, or advertise the sale of merchandise," and that they were not "sellers" properly stated a claim for relief under the Consumer Fraud Act in a suit against the franchisor. See id. at 850.

81. See id. (citing MINN. STAT. § 645.44).
82. See id.
83. See Kronebusch v. MVBA Harvestore Sys., 488 N.W.2d 490, 494 (Minn. Ct. App. 1992) (holding that Minnesota Statutes section 325F.67, the False Advertising statute, applies to commercial farmers).
84. Id.
85. See id. at 495.
for purposes of these statutes.\footnote{87}

To support their argument, CTR and TI cited \textit{Banbury v. Omnitrition International, Inc.},\footnote{88} a case holding that "[t]he Consumer Fraud Act does not apply to all allegations of fraud, but only to those where there is a nexus between the alleged fraud and the sale of merchandise."\footnote{89} The plaintiffs in \textit{Banbury} brought their action after the defendant terminated their distributorship for allegedly violating company rules by soliciting others to take part in another network marketing organization.\footnote{90} The court upheld summary judgment on the plaintiffs' consumer fraud claim because the plaintiffs failed to allege that the defendant made any misrepresentation about the sale of merchandise.\footnote{91} Instead, the alleged misrepresentation concerned only the distributorship relationship, which was not covered by the Act.\footnote{92} The \textit{Banbury} decision, in other words, does not hold that only "sellers" are subject to the statutes. Instead, it holds that there must be fraud in the context of a sale, which is precisely what the plaintiffs alleged CTR and TI engaged in.

The trial court properly denied the motions.\footnote{93} While no Minnesota case had—at the time of the defendants' motion—addressed whether a trade organization can be held liable under the consumer protection statutes, it was established that the reach of

88. 533 N.W.2d 876 (Minn. Ct. App. 1995).
89. Id. at 882. See also Cooperman v. R.G. Barry Corp., 775 F. Supp. 1211, 1213-14 (D. Minn. 1991) (holding that a footwear manufacturer's representative could not sue the manufacturer under the Consumer Fraud Act for alleged fraudulent conduct occurring during the course of their relationship because the plaintiff had not encountered any fraud in the context of a sale); Jenson v. Touche Ross & Co., 335 N.W.2d 720, 728 (Minn. 1983) (finding that an accounting firm was not liable under the False Advertising Statute since the firm "was not offering anything, it [could] possibly have the requisite intent to induce others to buy") (emphasis added).
90. See id. at 879.
91. See id.
92. See id. at 882.
the statutes is long. The consumer protection statutes by their terms govern the conduct of “persons,” not just “sellers.” And the term “person,” as used in the statutes, is broadly defined. Advertising agencies, for example, are not per se “sellers,” yet they have frequently been found liable under the Federal Trade Commission Act for committing deceptive acts while advertising another’s products. Minnesota also imposes liability on the advertising me-

94. MINN. STAT. § 8.31, subd. 2 (1998). The statute, for instance, gives the attorney general the power to investigate and take action against “all persons” violating the laws listed in subdivision 1 “or any other laws respecting unfair, discriminatory, or other unlawful practices in business, commerce, or trade.” Id. The Consumer Fraud Act similarly prohibits “any person” from making false and misleading statements in connection with the sale of merchandise. MINN. STAT. § 325F.69, subd. 1 (1998). The Unlawful Trade Practices Act states that “[i]no person . . . in connection with the sale of merchandise, [shall] knowingly misrepresent . . . the true quality, ingredients or origin of such merchandise.” MINN. STAT. § 325D.13 (1998). Likewise, the False Advertising Statute prohibits “[a]ny person, firm, corporation, or association” from using misleading advertising. MINN. STAT. § 325F.67 (1998). Finally, the Deceptive Trade Practices Act applies to any “person” acting “in the course of business, vocation, or occupation.” MINN. STAT. § 325D.44, subd. 1 (1998).

95. The Consumer Fraud Act defines “person” as “any natural person or a legal representative, partnership, corporation (domestic and foreign), company, trust, business entity, or association, and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee, or cestui que trust thereof.” MINN. STAT. § 325F.68, subd. 3 (1998). The Unlawful Trade Practices Act similarly defines “person” to include “any individual, firm, partnership, corporation or other organization, whether organized for profit or not.” MINN. STAT. § 325D.10(a) (1998). The other two statutes do not specifically define “person,” but, like the other statutes, apply to both individuals and business entities. See, e.g., State ex rel. Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 897-98 (Minn. Ct. App. 1992) (holding both a corporation and its president liable under the consumer protection statutes in connection with the sale of air purifier).

96. 15 U.S.C. § 45(a) (1994 & Supp. 1998). The Federal Trade Commission Act (“FTC Act”) makes it unlawful to engage in unfair or deceptive commercial practices. The FTC Act provides, “[U]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” Id. § 45(a)(1). Cases decided under the FTC Act present strong persuasive authority for states interpreting their own consumer protection statutes because “[m]ost state UDAP statutes are modeled after the FTC Act . . . .” JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 3.4.5.1, at 131 (4th ed. 1997); see also infra notes 182-225 and accompanying text (discussing applicability of the FTC Act and the Lanham Act to consumer protection cases in Minnesota).

97. See Carter Prods., Inc. v. FTC, 323 F.2d 523, 534 (5th Cir. 1963) (finding advertising agency was subject to FTC Act where it “actually participated in the deception,” and “was deeply involved”); Colgate-Palmolive Co. v. FTC, 310 F.2d 89, 92 (1st Cir. 1962) (finding that the FTC had jurisdiction over an advertising agency where the agency was “an active, if not the prime, mover” in the deception).
media under the Consumer Fraud Act and the Deceptive Trade Practices Act in limited circumstances.\textsuperscript{98} Actors endorsing a product have been held liable under other states' consumer protection statutes,\textsuperscript{99} as have other third parties furnishing the means for or aiding in the deception.\textsuperscript{100}

The most analogous federal case also supported the court's decision. In \textit{Federal Trade Commission v. National Commission on Egg Nutrition},\textsuperscript{101} the Seventh Circuit addressed the identical issue under the analogous FTC Act and held that a trade organization designed to keep the controversy alive about the health effects of eggs is subject to the FTC Act where it engages in deceptive advertising.\textsuperscript{102} The National Commission on Egg Nutrition ("NCEN") was "a private, not-for-profit corporation composed of representatives of various associations of egg producers throughout the United States."\textsuperscript{103} NCEN published and broadcast a number of advertisements "representing in substance that there is no scientific evi-

\begin{itemize}
  \item \textsuperscript{98} See MINN. STAT. § 325F.69, subd. 3 (1998) (stating that advertising media is liable where it "has either knowledge of the false, misleading or deceptive character of the advertisement or a financial interest in the sale or distribution of the advertised merchandise."); MINN. STAT. § 325D.46, subd. 1a (1998) (stating that publishers, broadcasters or printers are liable "if the persons have either knowledge of the deceptive trade practice or a financial interest in the goods or services being deceptively offered for sale.").
  \item \textsuperscript{99} See Ramson v. Layne, 668 F. Supp. 1162, 1166-67 (N.D. Ill. 1997) (finding actor Lloyd Bridges liable under an Illinois statute of deceptive trade for his involvement in "endorsing" the purchase of questionable mortgage notes).
  \item \textsuperscript{100} See State ex rel. Corbin v. United Energy Corp., 725 P.2d 752, 758 (Ariz. Ct. App. 1986) (holding that individual officers could be assessed civil penalties, along with their corporate employer, for "schem[ing] together in disseminating or causing the dissemination of misrepresentations" in violation of the Arizona Consumer Fraud Act); People v. Bestline Prods., Inc., 132 Cal. Rptr. 767, 770-71, 782, 792 (Cal. Ct. App. 1976) (upholding liability of corporate officers under both conspiracy and aiding-and-abetting theories for, in part, misrepresentations in violation of the California Business and Professions Code); State ex rel. Mays v. Ridenhour, 811 P.2d 1220, 1224, 1228-31 (Kan. 1991) (interpreting Kansas securities law to include liability for conspirators for purposes of imposing permanent injunctive relief and disgorgement of profits); Strahan v. Louisiana Dep't of Agric. & Forestry, 645 So. 2d 1162, 1164-65 (La. Ct. App. 1994) (allowing conspiracy liability, as generally defined in the state civil code, for violations of the Louisiana Unfair Trade Practices and Consumer Protection Law). \textit{But cf.} State v. Stedman, 547 A.2d 1333, 1335-36 (Vt. 1988) (finding that under Vermont's Consumer Fraud Act, liability would not be extended to a defendant who allegedly facilitated the violation because there was no direct participation, direct aid, nor a principal-agent relationship).
  \item \textsuperscript{101} 517 F.2d 485 (7th Cir. 1975).
  \item \textsuperscript{102} See id. at 487.
  \item \textsuperscript{103} Id.
\end{itemize}
idence that eating eggs increases the risk of heart disease . . . . \textsuperscript{104}
The FTC filed a complaint against NCEN, alleging that it made false and misleading statements in violation of the FTC Act. \textsuperscript{105}

In finding that NCEN was subject to the FTC Act, the Seventh Circuit Court of Appeals noted that, according to its articles of incorporation and bylaws, NCEN was “formed to promote the general interests of the egg industry.” \textsuperscript{106} Evidence further demonstrated that although NCEN was a not-for-profit organization, it was “organized for the profit of the egg industry, even though it pursues that profit indirectly.” \textsuperscript{107} The “clear purpose” of the ads at issue, moreover, was “to encourage the consumption of eggs by allaying fears the public may have about their high cholesterol content.” \textsuperscript{108} These advertisements represented the quality of the product and promoted their purchase and use. \textsuperscript{109} NCEN was therefore subject to the FTC Act because, as the concurrence noted, the dissemination of the advertisements was “caused by those whose profit interests are served by the view espoused.” \textsuperscript{110}

This authority established that the cigarette industry trade groups were subject to liability under the statutes. Although they could not be characterized as “sellers” per se, CTR and TI were engaged in the culpable acts of the industry and acted to the commercial benefit of the industry. Thus, like the egg industry trade organization in National Commission on Egg Nutrition, CTR and TI were subject to the statutes.

3. What Remedies Are Available

Minnesota Statute section 8.31, subdivision 3a expressly defines the remedies that are available in a private cause of action for violations of three of the four consumer protection statutes. \textsuperscript{111} Any “person” injured by a violation of these laws 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.” \textsuperscript{112}

\begin{itemize}
\item \textsuperscript{104} Id.
\item \textsuperscript{105} See id.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Id. at 488.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} See id.
\item \textsuperscript{110} Id. at 490 (Fairchild, C.J., concurring).
\item \textsuperscript{111} MINN. STAT. § 8.31, subd. 3a (1998).
\item \textsuperscript{112} Id. (emphasis added). In addition, section 8.31, subd. 3, authorizes the
\end{itemize}
There is a question whether damages are available for violations of the Deceptive Trade Practices Act, as that statute is not specifically mentioned in section 8.31. The court in the Minnesota tobacco litigation found that, since the statute was not listed in section 8.31, no damages were available. An earlier Minnesota Court of Appeals decision, Johnny's, Inc. v. Njaka, also found that damages are not available. That decision, however, limited its inquiry to the language of subdivision 1 of the Deceptive Trade Practices Act, which does not mention damages. The statute provides that a person "likely to be damaged" by a deceptive trade practice can obtain "an injunction against it under the principles of equity . . . ." Subdivision 2 of the statute allows the party to obtain costs and attorneys' fees. Arguably, though not recognized by the court in Johnny's, subdivision 3 of the Deceptive Trade Practices Act authorizes the recovery of damages by stating that "[t]he relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state."

The better argument, however, is that section 8.31 does include the Deceptive Trade Practices Act, making damages available pursuant to subdivision 3a. Minnesota Statutes section 8.31—and its authorization of damages as relief—applies to laws "respecting unfair, discriminatory, and other unlawful practices in business, attorney general to seek civil penalties against violators of the statutes. See id. subd. 3. No showing of causation is required to obtain equitable relief and/or civil penalties. See State ex rel. Humphrey v. Alpine Air Prods., Inc., 500 N.W.2d 788, 790 (Minn. 1995); see also Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortgage Co., 390 So. 2d 601, 611 (Ala. 1980) ("Causation in fact . . . can properly be stated in terms of reliance in the context of misrepresentation."); see infra notes 126-68 and accompanying text (discussing Minnesota's interpretation of causation and reliance requirements).

113. See supra note 74 and accompanying text (authorizing the attorney general to enforce all the consumer protection statutes except the Deceptive Trade Practices Act).


116. See id. at 168.

117. See id.

118. MINN. STAT. § 325D.45, subd. 1 (1998).

119. See id. subd. 2.

120. Id. subd. 3.
While section 8.31 lists certain statutes as examples of the laws to which it applies, the list is not exhaustive. The Deceptive Trade Practices Act is clearly a law respecting unfair, discriminatory and/or unlawful practices in trade. Thus, arguably, the relief enumerated in section 8.31, subdivision 3a—including damages—is incorporated into the Deceptive Trade Practices Act via subdivision 3 of that statute.

In any event, as shown above, conduct that is prescribed by the Deceptive Trade Practices Act is also likely to be actionable under other consumer protection statutes which, under section 8.31, clearly allow a damage remedy. Moreover, the remedy expressed in the Deceptive Trade Practices Act—"injunction . . . under the principles of equity"—is broader than commonly understood. An injunction in equity can include the disgorgement of a wrong-doer’s profits. It can also require the wrong-doer to make restitution of any money wrongly obtained.

IV. MINNESOTA’S CONSUMER PROTECTION STATUTES DO NOT REQUIRE INDIVIDUAL PROOF OF RELIANCE

Dean Prosser maintains that causation depends, in many respects, on questions of public policy, justice and fairness. Prosser writes:

121. MINN. STAT. § 8.31, subd. 1 (1998).
122. See id. (providing that statute applies “specifically, but not exclusively” to enumerated acts).
123. In two decisions, Minnesota courts have strongly suggested that the Deceptive Trade Practices Act falls under the provisions of section 8.31. In In re Rice Lake Auto, Inc., No. CX-88-1965, 1989 WL 12416 (Minn. Ct. App. Feb. 21, 1989), the court assumed that the attorney general could, under the authorization of section 8.31, investigate violations of the Deceptive Trade Practices Act. See id. at *2; see also State ex rel. Humphrey v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 720 (Minn. Ct. App. 1997) (describing state’s allegations that defendant violated three consumer protection statutes including the Deceptive Trade Practices Act, and finding that the attorney general is authorized to seek relief under Minn. Stat. § 8.31 for “the consumer statutes allegedly violated here”), aff’d, 576 N.W.2d 747 (Minn. 1998).
124. See Porter v. Warner Holding Co., 328 U.S. 395, 398-99 (1946) (where statute allows “injunctive relief,” a decree compelling the disgorgement of profits was proper); see also Peterson v. Johnson Nut Co., 209 Minn. 470, 477, 297 N.W. 178, 182 (1941) (having assumed its equitable powers and granted an injunction, court is free to order an accounting of illegal profits).
125. Under Minnesota law, “injunctive relief” includes restitution. See, e.g., State ex rel. Humphrey v. Alpine Air Prods., Inc., 500 N.W.2d 788, 790 (Minn. 1993) (describing how the trial court “ordered injunctive relief, including full restitution to customers”).
Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to greater extent, however, the legal limitation on the scope of liability is associated with policy— with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.  

Concepts of causality have therefore been interpreted flexibly by courts and “used in different guises within different contexts of social and legal policies . . . .” In other words, the practical definition of causation changes as policy considerations change.

The Minnesota consumer protection statutes present one example in which the legislature has made a policy decision to make it easier to sue for a consumer protection violation than it would be under the common law. The legislature did so by relaxing the requirement of causation. Specifically, common law fraud typically requires proof of reliance, but, in enacting the statutes, the legislature eliminated reliance as an element of proof.

The Consumer Fraud Act states that a false statement must be made “with the intent that others rely thereon,” but a violation is established regardless of whether “any person has in fact been misled, deceived, or damaged” as a result. Similarly, the False Advertising Statute states that a defendant is guilty of a misdemeanor;

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128. See id.; see also WEX S. MALONE, Ruminations on Cause in Fact, PERSPECTIVES ON TORT LAW 91, 92 (Robert L. Rabin ed., 1983) (observing that “policy may often be a factor when the issue of cause-in-fact is presented sharply for decision, much as it is when questions of proximate cause are before the court.”).
129. See Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967) (listing elements of common law fraud, including reliance); see also supra note 12 (laying out the elements of common law fraud claim).
131. Id. § 325F.69, subd. 1 (1998).
132. Id. § 325F.67 (1998).
and the act may be enjoined, if the defendant disseminates a misleading advertisement "with the intent to increase the consumption thereof, or to induce the public in any manner...". A complainant under the Deceptive Trade Practices Act "need not prove... actual confusion or misunderstanding" before a violation will be found. And the Unlawful Trade Practices Act contains a legislative finding of reliance, establishing that "[t]he legislature of the state of Minnesota hereby finds: that the trade practices defined and prohibited by sections 325D.09 to 325D.16 are detrimental... [and] that they mislead consumers...."

The Minnesota Supreme Court in the tobacco case held that the language of the statutes reflects a legislative intent to loosen the requirement of causation. In affirming the lower courts' denial of the defendants' Rule 12 motion to dismiss the consumer protection counts asserted by Blue Cross, the court explained that "[t]he legislature may, by statute, expand the necessary connection between conduct and injury necessary to permit suit." Expressly addressing the consumer protection statutes, the court found that the required causal connection had been expanded: "Each of these [consumer protection] statutes contains specific authorizations for suit and each creates a private cause of action for any party injured directly or indirectly by a violation of the statute."

The Minnesota Supreme Court in State ex rel. Humphrey v. Alpine Air Products, Inc. acknowledged that there is no reliance requirement in the consumer protection statutes. The case against Alpine Air was brought by the attorney general on behalf of customers injured by the defendant's deceptive practices in the sale of its air purifiers. The attorney general sought and obtained an injunction, restitutionary relief, and civil penalties for violations of the False Statement in Advertising Statute, the Uniform Deceptive

133. Id.
135. Id. § 325D.44, subd. 2.
136. Id. § 325D.09 (1998).
138. Id. at 495.
139. Id. (emphasis added).
140. 500 N.W.2d 788 (Minn. 1993).
141. See id. at 790.
Trade Practices Act, and the Prevention of Consumer Fraud Act. On its way to holding that the standard of proof under the consumer protection statutes is the preponderance of the evidence standard, the court recognized "the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law." As evidence of the legislative intent, the court noted that the element of reliance has been eliminated.

In its motion for summary judgment on the issue of causation, the tobacco industry tried to distinguish *Alpine Air* on the grounds that it was an action for injunctive relief, restitution, and civil penalties. The industry maintained that while reliance may not be necessary in a suit for equitable relief, a plaintiff suing for damages must still prove reliance—or what it referred to as the "traditional causation requirement"—in an action for damages.

In support of this argument, the industry relied upon the court of appeals decision in *LeSage v. Norwest Bank Calhoun-Isles*. This case does set forth different elements of proof in a consumer fraud case depending on whether the relief sought is an injunction or damages, but the causation requirement in a damage action does not require a showing of reliance. In *LeSage*, the court of appeals held that the "proximate cause" requirement of common law fraud—reliance—is more strict than that required under the consumer protection statutes. The respondents argued that, because the trial court granted summary judgment on the common law fraud claim based on lack of proximate cause, the Consumer Fraud

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143. See id. at 891.
144. *Alpine Air*, 500 N.W.2d at 790.
145. See id. ("The legislature's intent is evidenced by the *elimination* of elements of common law fraud, such as proof of damages or *reliance* on misrepresentations.") (second emphasis added). In another discussion of the issue, at least several members of the supreme court articulated a view that actual reliance leading to consumer deception need not be shown. In *Church of the Nativity v. Watpro, Inc.*, 491 N.W.2d 1 (Minn. 1992), where the plaintiff sought damages under the Consumer Fraud Act, Justice Simonett, described how under the Consumer Fraud Act "a consumer fraud violation does not require a plaintiff to be deceived as does a common law fraud action." *Id.* at 10 (Simonett, J., concurring in part and dissenting in part). In *Watpro*, the plaintiff did show reliance on the defendant's fraudulent statements, and thus the majority did not address the issue. See *id.* at 8 ("Reliance by Nativity on these false promises directly caused damage to Nativity.").
146. SeeDefs.' Mot. for Summ. J. (Causation), *supra* note 8, at 10-11.
147. 409 N.W.2d 536 (Minn. Ct. App. 1987).
148. See id. at 539 (stating that proof of actual damages is not required in a suit for injunctive relief but, in an action for damages, plaintiffs must prove "the proper legal nexus between the complained of acts and their alleged monetary losses.").
Act claim also could not stand. The court disagreed, holding that "[t]he Consumer Fraud Act is broader than common law fraud." The court held that the plaintiffs could satisfy the requirement of proximate cause by showing a "proper legal nexus between the complained of acts and their alleged monetary losses."

The LeSage court later defined the evidence necessary to create an issue of fact and rule out summary judgment with respect to this "legal nexus" under Minnesota Statute section 8.31 and the Consumer Fraud Act:

By their allegations that Hawkland made misrepresentations of fact known to him ... with an intent that the LeSages rely on his statements and invest with Town and Country, appellants have presented genuine issues of material fact under the Consumer Fraud Act, and we remand their claim for trial.

Several Minnesota cases employ the same causation standard—intent to induce reliance—under the consumer protection statutes. In Kronebusch v. MVBA Harvestore System, a case where over three million dollars in damages were awarded, factual findings that "the manufacturers made false representations in their publications (a) of an existing material fact, (b) respecting the design of the Harvestore silo, and (c) with the intent of inducing the farmers to purchase five Harvestore silos" supported the trial court's conclusion that the manufacturers violated the False Advertising Statute. Also, in Wexler v. Brothers Entertainment Group, Inc., the court held that summary judgment was inappropriate on plaintiff's consumer

149. See id.
150. Id. (emphasis added).
151. Id. Some light is shed on the meaning of the term "legal nexus" by the Eighth Circuit's decision in In re Control Data Corp. Sec. Litigation, 933 F.2d 616 (8th Cir. 1991), a case decided under federal securities laws. There, the court reversed a trial court's finding that a securities class had failed to prove causation, finding that "causal nexus" incorporated an expanded rule of causation: "Plaintiffs are not required to meet a strict test of direct causation under [Securities Exchange Commission] Rule 10b-5; they need only show 'some causal nexus' between CDC's improper conduct and plaintiff's losses." Id. at 619; see also Arthur Young & Co. v. Reves, 937 F.2d 1310, 1332 (8th Cir. 1991) (reiterating the "some causal nexus" standard).
152. LeSage, 409 N.W.2d at 541 (emphasis added).
154. Id. at 495 (emphasis added).
fraud and false advertising claims where the trier of fact could find that the owners of a telephone trivia game "never intended to award any prizes and had engaged in false and misleading advertising and fraud for the purpose of inducing persons to play TeleFun Trivia."  

The Minnesota federal district court also rejected an asbestos manufacturer's motion for summary judgment under the Unlawful Trade Practices Act where the plaintiff, a school district, alleged that the defendant knew or should have known asbestos was hazardous but nevertheless represented that it was suitable for use.  

The defendants' representations were enough to state a claim; no mention of reliance was made.  

Some cases go the other way. Two unpublished Minnesota Court of Appeals' decisions have equated "legal nexus" with reliance. In Peterson v. Honeywell, Inc., the court of appeals held that "to establish a claim of damages for misrepresentation under the trade and consumer protection statutes, the plaintiff must establish the elements of common law misrepresentation, including justifiable reliance and proximate cause for pecuniary loss." Likewise, in Garay v. Beers, the court of appeals held that a plaintiff seeking damages for violations of the Consumer Fraud Act "must establish both that they reasonably relied on appellants' alleged misrepresentation and that this reliance proximately caused their damages."  

These unpublished decisions impose upon a plaintiff the same showing required under a common law fraud action in order to prevail. Thus, the decisions, not precedential in any event, are inconsistent with the both the remedial purpose of the statutes and the Minnesota Supreme Court's decisions. In affirming the denial

156. Id. at 222 (emphasis added).
158. See id.
160. Id. at *5.
162. Id. at *3.
163. See id. at *1 (stating that the court will "consider the elements of common law misrepresentation" to determine if a valid claim exists under the Consumer Fraud Act); Peterson, 1994 WL 34200, at *5 ("The statutory scheme before us makes no attempt to alter the plaintiff's common law burden.").
164. See MINN. STAT. § 480A.08, subd. 3(b) (1998) (stating that unpublished opinions lack precedential value).
of the industry’s Rule 12 motions in the cigarette litigation, for example, the Minnesota Supreme Court recognized that “Blue Cross alleges damages resulting from . . . the increased cost of health care services for treatment of smoking related illnesses . . . .”\textsuperscript{165} Nevertheless, the court described that under the statutes, the necessary “connection between conduct and injury” was expanded under the consumer protection statutes.\textsuperscript{166} Moreover, the Minnesota Supreme Court explicitly explained in \textit{Alpine Air} that the showing—especially the showing with regard to the element of reliance—is less than that required in common law fraud.\textsuperscript{167} This is only common sense. Had the legislature intended that damages be available only at common law fraud, and not for violations of the consumer fraud statutes, Minnesota Statute section 8.31 would not expressly allow damages for consumer protection violations.\textsuperscript{168}

V. \textbf{THERE IS AMPLE LEGAL AUTHORITY AND POLICY JUSTIFICATION FOR MINNESOTA’S RULE THAT RELIANCE IS NOT NECESSARY}

The cigarette industry viewed Minnesota’s flexible standard of causation under the consumer protection statutes as a radical departure from settled law. It is not. Other states follow the same approach.\textsuperscript{169} Similar remedial statutes also employ a more liberal causation standard, even in actions for damages.\textsuperscript{170} Indeed, common law causation principles favor the move away from the requirement of proving individual reliance, especially under the unique facts of the Minnesota tobacco litigation.

A. \textit{Other States}

Minnesota’s statutory scheme is not unique. Other states which also recognize that their consumer fraud statutes create a more liberal cause of action than common law fraud hold that actual reliance is not a necessary element in a damage action.

\textsuperscript{165} State \textit{ex rel.} Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 492 (Minn. 1996) (emphasis added).

\textsuperscript{166} \textit{Id.} at 495.


\textsuperscript{168} MINN. STAT. § 8.31, subd. 3a (1998) (“[A]ny person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages . . . .”).

\textsuperscript{169} See infra notes 171-81 and accompanying text.

\textsuperscript{170} See infra notes 182-225 and accompanying text.
Massachusetts law, for example, requires that while a party must establish a “causal connection between the deception and the loss” under its consumer fraud statute, actual reliance need not be shown. 171 New York law also requires the defendant’s unlawful conduct to have caused damages, but it does not require justifiable reliance. 172 Likewise, a claimant under the Illinois Consumer Fraud Act must show that the consumer fraud “proximately caused” the injury, but “[p]laintiff’s reliance is not an element of statutory consumer fraud.” 173

A Texas court has also stated that justifiable reliance is not required to make out a showing of causation under its deceptive trade practices act. 174 In order to recover damages under Texas’ deceptive trade practices act, the consumer must prove that the defendant’s conduct was the “producing cause” of his damages. 175 In one case, a group health insurer, Celtic Life Insurance Company, argued that there could be no “producing cause” without a finding

171. International Fidelity Ins. Co. v. Wilson, 443 N.E.2d 1308, 1314 (Mass. 1983) (“This court has rejected the proposition that a plaintiff must show proof of actual reliance on a misrepresentation under [the Consumer Protection Act].... What the plaintiff must show is a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception.”); see also Glickman v. Brown, 486 N.E.2d 737, 741 (Mass. App. Ct. 1985). The court held:

To succeed on a claim under either § 9 or § 11 [of the Consumer Protection Act] the plaintiffs need not offer evidence of reliance.... All that is required in a case such as the present is proof of a causal relationship between the misrepresentations and the cost of replacing the risers.

Id., abrogated on other grounds by, Cigal v. Leader Dev. Corp., 557 N.E.2d 1119, 1121 n.8 (Mass. 1990); Trifiro v. New York Life Ins. Co., 845 F.2d 30, 33 n.1 (1st Cir. 1988) (observing that there are some “causal chains” under consumer fraud statutes that do not include reliance).

172. See Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995) (holding that while New York State General Business Law section 349, which prohibits deceptive business practices, “does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm”).


175. Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985). A producing cause is “an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages....” Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975).
that the consumer relied on the misrepresentation. The Texas Court of Appeals rejected this argument, noting that "[r]eliance is not an element that consumers are required to prove in order to recover for misrepresentations under the [Deceptive Trade Practices – Consumer Protection Act]." Nor is reliance "implicit" in the definition of producing cause. The court did note that "reliance can be a factor in deciding whether a misrepresentation was a producing cause, and certainly proof of reliance will strengthen a plaintiff's case . . . ." But the court was adamant that requiring a plaintiff to prove that the conduct was a producing cause does not mean that the plaintiff must prove actual reliance. In short, "reliance is not a necessary element of producing cause that a plaintiff must prove in order to recover damages under the DTPA."

B. Similar Standards under Similar Statutes

Cases decided under two federal statutes, the Lanham Act and the Federal Trade Commission Act are instructive authority

176. See Celtic Life, 831 S.W.2d at 596.
177. Id.
178. See id.
179. Id.
180. See id.
181. Id.

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id. § 1125(a)(1).
183. 15 U.S.C. § 45(a) (1994). The FTC Act declares "unlawful" any "[u]nfair methods of competition . . . and unfair or deceptive act or practices in or affecting commerce." Id. § 45(a) (1). The FTC Act does not create a private cause of action; only the Federal Trade Commission is empowered to enforce the Act. See id. § 45(a)(2). The Commission may also seek civil penalties for violations. See id. §
as to the meaning and requirements of the consumer protection statutes. Both of these statutes proscribe deceptive trade practices, especially false advertising. In fact, these federal statutes were the model for many state consumer protection statutes.

1. **Lanham Act Cases**

Under the Lanham Act, there is often no requirement that a plaintiff show direct reliance by consumers upon the misrepresentations made by a defendant. Indeed, under certain circumstances there is a presumption that reliance exists: "[o]nce it is shown that a defendant deliberately engaged in a deceptive commercial practice, we agree that a powerful inference may be drawn that the defendant has succeeded in confusing the public." This presumption of reliance is justified by the difficulty of showing direct reliance and the obvious fact that the acts of the defendant usually prove reliance: "It is not easy to establish actual consumer deception through direct evidence. The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived."

And there is a more powerful rationale in that "[h]e who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded."

This presumption of reliance under the Lanham Act is particularly applicable to Minnesota's statutes protecting consumers from fraud because the structures of the remedial schemes are nearly identical. Under Section 43(a) of the Lanham Act, any person who

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45(m)(1)(A).


189. Id.
uses false descriptions or representations in connection with goods is liable in a civil action by any person who believes that he or she is likely to be damaged by the use of that falsity. \(^{190}\) While the usual format of a Lanham Act case is one competitor suing another alleging that infringement or falsity has confused the buying public to the plaintiff's loss, the statute provides remedies to "any person," not just competitors. \(^{191}\)

Courts in Lanham Act cases impose different evidentiary burdens depending upon the remedy sought by the plaintiff. In order to obtain injunctive relief, plaintiffs have to demonstrate "a likelihood of deception or confusion on part of the buying public," rather than show consumers actually relied upon defendant's statements and were thus deceived or confused. \(^{192}\) Thus, injunctive relief can be granted on the court's own findings without reference to the reaction of the buyer or consumer of the product. \(^{193}\)

However, courts impose a greater burden upon plaintiffs attempting to obtain damages for violation of section 43(a). Plaintiffs may be required to establish "actual consumer confusion or deception resulting from the violation" through direct testimony from members of the buying public, or "through circumstantial evidence, e.g., consumer surveys or consumer reaction tests." \(^{194}\) This is essentially the argument—where damages are sought, reliance must be shown—which the tobacco industry defendants made unsuccessfully in the Minnesota tobacco litigation.

This stricter reliance requirement has, however, been rejected in certain Lanham Act actions for damages. There is "no reason why the same logic [inferring actual consumer confusion without direct testimony from consumers] should not apply in regard to claims for damages [in egregious cases] . . . ." \(^{195}\) One commentator has noted that any distinction between standards for recovery based on relief sought loses its relevance in the context of fraud:


\(^{191}\) Id.; see Smith v. Montoro, 648 F. 2d 602, 607-08 (9th Cir. 1981) (rejecting argument that actor could not sue film distributor under Lanham Act because he was not a competitor).

\(^{192}\) PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F. 2d 266, 271 (2d Cir. 1987) (emphasis added).


\(^{194}\) PPX Enters., 818 F. 2d at 271 (emphasis added).

\(^{195}\) Id. at 272.
Having established falsity, the plaintiff should be entitled to both injunctive and monetary relief, regardless of the extent of impact on consumer purchasing decisions. It is reasoning backwards to permit the kind of relief the plaintiff is seeking to affect the underlying characterization of the defendant's conduct. 196

Thus, where a Lanham Act defendant's actions are egregious, there is "no need to require [a plaintiff] to provide consumer surveys or reaction tests in order to prove entitlement to damages." 197 Such circumstantial, or indeed any direct, evidence of reliance is unnecessary because the only possible conclusion that can be derived from egregious conduct is that consumers actually were deceived by the misrepresentations. 198

Numerous cases have adopted this presumption of reliance. 199 Indeed, the Second Circuit has characterized this presumption of reliance upon the intentional statements or actions of a defendant as "well settled." 200

This presumption of reliance applies wherever there is intentional deception. In Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc., 201 the court stated broadly that "[w]e think that this rationale applies equally to any situation where a plaintiff adequately demonstrates that a defendant has intentionally set out to deceive the public." 202 Thus, in PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc., 203 for example, the seller's purposeful use of Jimi Hendrix's image on its albums wrongly suggested that the al-

197. PPX Enters., 818 F.2d at 272.
198. See id.
199. See WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 45 (1st Cir. 1991) (concluding that it makes sense to presume confusion from an intent to copy); Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 34 (1st Cir. 1989) (stating in case alleging intentional copying of an existing trademark, "we think it fair to presume that purchasers are likely to be confused."); Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1220 (8th Cir. 1976) ("[G]iven the intent of Fruehauf... the inference that a likelihood of confusion would arise is inescapable.").
200. See George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1537 (2d Cir. 1992) (stating a plaintiff must show either actual consumer confusion or that defendant's actions were intentionally deceptive so as to give rise to presumption of confusion).
201. 926 F.2d 134 (2d Cir. 1991).
202. Id. at 140.
203. 818 F.2d 266 (2d Cir. 1987).
bum included substantial performances by Hendrix and gave rise to the presumption. 204 Similarly, in *Bauer Lamp Co. v. Shaffer*, 205 the court found that “[i]ntent to copy in itself creates a rebuttable presumption of likelihood of confusion.” 206

Indeed, the rule that direct evidence of reliance is not required in Lanham Act cases had previously been imposed upon a cigarette industry defendant. In *Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, 207 the U.S. Court of Appeals for the District of Columbia found that, although it may be generally desirable to have empirical evidence of consumer deception, such evidence is not necessary as a matter of law under the FTC Act or the Lanham Act. 208 Indeed, the court, by Judge Bork, found that a court could give weight to expert testimony provided by the parties, and even rely on its own experience and understanding of human nature when drawing inferences about the reactions consumers might have to particular representations. 209 The court found that when an alleged deception rises to “a commonplace,” the court may itself find that the deception is “self-evident.” 210

Even without a showing of intentional conduct, vast promotional expenditures give rise to a presumption that consumers have been deceived. In the *Brown & Williamson* case, Judge Bork found that the large expenditures made by Brown & Williamson in its deceptive “1 mg tar” advertising campaign “strongly supports public reliance because advertising expenditures presumptively have the effect intended.” 211 Thus, several courts have held that the expenditures of “substantial funds in an effort to deceive consumers and influence their purchasing decisions” give rise to the Lanham Act presumption that defendants have successfully deceived the public. 212

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204. See id. at 272-73.  
205. 941 F.2d 1165 (11th Cir. 1991).  
206. Id. at 1172.  
207. 778 F.2d 35 (D.C. Cir. 1985).  
208. See id. at 40. The case was technically decided under the FTC Act. The court found, however, that Lanham Act decisions concerning evidentiary requirements were guidance in FTC cases because the factual predicate underlying action under both the Lanham and FTC Acts was the same: deception of the public. See id. at 40 n.2.  
209. See id. at 41.  
210. Id.  
211. Id. at 42.  
212. U-Haul Int’l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986); see also Merck Consumer Pharm. Co. v. SmithKline Beecham Corp., 960 F.2d. 294
2. **FTC Act Cases**

Cases decided under the FTC Act also show that an individualized showing of reliance is not required. The FTC Act defines as "unfair or deceptive acts or practices," any misrepresentations of material facts made to induce purchases of goods or services.\(^\text{213}\) Once these elements are shown, the FTC can order "the monetary equivalent of rescission."\(^\text{214}\) This measure of damages can include all profits earned because of the misrepresentations, or even all revenues that consumers paid for the misrepresented products.\(^\text{215}\)

There is a long line of cases holding that the FTC does not have to show "subjective reliance" by each harmed individual in order to obtain rescission. Indeed, the United States Supreme Court made it clear in *Federal Trade Commission v. Colgate-Palmolive Co.*,\(^\text{216}\) that the Commission does not have to present evidence of reactions of the viewing public.\(^\text{217}\) Rather, where "the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy."\(^\text{218}\) Thus, a presumption of actual reliance arises once the Commission has proved the defendant made material representations, that they were widely disseminated, and that consumers purchased the defendant's product.\(^\text{219}\)

One overriding rationale for the presumption of reliance under the FTC Act is that it simply is not practical to show individual reliance in actions involving the deception of large groups of consumers. In *Federal Trade Commission v. Figgie International, Inc.*,\(^\text{220}\) for example, the defendant argued that only those consumers who could prove that they purchased the largely worthless Vanguard heat detector in reliance upon the defendant's statements were en-

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\(^{214}\) FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991).

\(^{215}\) See FTC v. Figgie Int'l, Inc., 994 F.2d 595, 606-08 (9th Cir. 1993).

\(^{216}\) 380 U.S. 374 (1965).

\(^{217}\) See id. at 391-92.

\(^{218}\) Id.; see also Security Rare Coin, 931 F.2d at 1316 ("It would be inconsistent with the statutory purpose [in a case brought by the commission] for the court to require proof of subjective reliance by each individual consumer.").


\(^{220}\) 994 F.2d 595 (9th Cir. 1993).
titled to redress. The Ninth Circuit found that this argument was incorrect as a matter of law, as “[i]t is well established” that under the FTC Act, “proof of individual reliance by each purchasing customer is not needed.” The rationale for such a rule is that requiring such proof “would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals” of the Act.

Figgie also shows that common sense underlies the presumption. With regard to damages, the defendant in Figgie argued that the district court had no evidence other than hearsay letters from purchasers who complained to the FTC to support the profits which the Commission claimed had to be rescinded. The court quickly rejected the defendant’s argument that such hearsay evidence was inadmissible and that the complainants had to be subjected to cross examination. The court found that such efforts “would not be reasonable”: “It should not be necessary to scale the highest mountains of Tibet to obtain a deposition for use in a $500 damage claim . . . .”

C. Other Rules of Relaxed Causation

Under facts similar to those shown by the plaintiffs in the Minnesota cigarette litigation, courts routinely dispense with any requirement of individual reliance. Courts dispense with individual proof of causation where, as in this case, a defendant’s deception was aimed at the public at large. Thus, in Amato v. General Motors Corp., an action for damages under the Ohio consumer protection statutes, the court found that proof of extensive advertising was sufficient to make a prima facie case that buyers were exposed to the alleged misrepresentations. The court stated:

In a day of mass media advertising hype intended to saturate markets with inducements to purchase the heralded product, consumer claims would amount to little if accep-

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221. See id. at 605.
222. Id.
223. Id. (quoting Kitco, 612 F. Supp. at 1293).
224. See id. at 608.
225. Id. at 609 (quoting 4 WEINSTEIN & BERGER, EVIDENCE, ¶ 803(24)[01], at 803-438-39 (1984)).
227. See id. at 629.
tance of the representations made for the product could be manifested only by one-on-one proof of individual exposure. The implication of such a requirement is that a multiplicity of individual claims would have to be proven in separate lawsuits, or not at all. 228

Where a defendants' conduct is intentional, causation requirements are lowered. Thus, in City of New York v. Lead Industries Ass'n, Inc., 229 defendants moved for summary judgment after the plaintiff city and housing authority conceded that they never directly relied on any misrepresentations of product safety made by defendants. 230 The court denied this motion, holding that "a showing of direct reliance is not necessary where it is claimed that the defendant marketed a product it actually knew to be unsafe without warning of the dangers it knew to be inherent in the product." 231

Dispensing with individual proof of causation is further justified where the deceptions have a bearing on public health. In McNeilab, Inc. v. American Home Products Corp., 232 for example, the court presumed reliance in a Lanham Act case for injunctive relief where the manufacturer of Anacin, a purveyor of public health, was "[in]sensitive to intimations that its commercials were misleading." 233 Minnesota has long recognized the importance of avoiding consumer confusion where the public health is involved. 234

D. Expert Testimony

In addition, expert testimony of reliance provides adequate proof of the "legal nexus" between the industry's conduct and the plaintiffs' damages. It is beyond dispute that expert testimony may be used to prove causation, 235 even in deceptive practices cases.

228. Id. at 628 (citation omitted).
230. See id. at 423.
231. Id. at 424.
233. Id. at 531.
234. See Mayo Clinic v. Mayo's Drug & Cosmetic, Inc., 262 Minn. 101, 107, 113 N.W.2d 852, 856 (1962) ("It is especially important to avoid confusion on the part of the public when medicines and drugs are involved.").
235. See KEETON ET AL., supra note 126, § 41, at 269 ("Where the conclusion on causation is not one within common knowledge, expert testimony may provide a sufficient basis for it . . . ."); see also Block v. Target Stores, Inc., 458 N.W.2d 705, 710-11 (Minn. Ct. App. 1990) (finding expert testimony on causation admissible and reversing trial court's grant of motion to dismiss); Behlke v. Conwed
One leading treatise writer explains that "those who customarily deal with the purchasers of a particular product are qualified to testify with respect to the buyers' understanding of the words they hear and use."236

In Benton Announcements, Inc. v. Federal Trade Commission,237 the FTC produced an expert witness to testify as to how the ordinary buyer would interpret the words used by the defendants to describe their stationery. That an expert would be used here was undeniably proper: "persons whose business carries them among the buyers of a product are certainly qualified sources of information as to the buyers' understanding of the words they hear and use."238

Also, in Committee on Children's Television, Inc. v. General Foods Corp.,239 the court recognized the necessity of expert testimony to assist the court in how children interpret ads: "it would be difficult for judges unaided by expert testimony to determine how a three-year-old would interpret that advertisement."240

E. Inherent Impracticalities of Proof

The Minnesota tobacco litigation posed an additional thorny causation problem. Because smoking is both addictive and unpopular, it is unreasonable to expect individual smokers to articulate the precise reasons why they smoke. Indeed, the tobacco industry's argument for a requirement of individual proof of reliance perhaps was most belied by the industry's own internal knowledge that such testimony is simply not credible. Evidence showed that the industry was aware that individual smokers cannot describe why they smoke. As one BAT employee noted, it is "always dangerous" to take smokers' verbal statements at face value because a "majority of their verbal communications concerning reasons for smoking is very likely to be justification, rationalisation [sic] or defense, i.e. concealing basic motivations."241 As this document states:

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237. 130 F.2d 254 (2d Cir. 1942).
238. Id. at 255.
239. 673 P.2d 660 (Cal. 1983).
240. Id. at 670.
241. BAT 105657941. All industry documents discovered in the course of State ex rel. Humphrey v. Philip Morris Inc. and cited in this Article will be referenced by Bates number in order to facilitate their location in the Minneapolis document.
For example, if you ask people why they carry out a practice which they are unable to stop (by and large) and which they would basically prefer to stop (if they could) it is reasonable to expect them to take considerable refuge in justifications—i.e. enjoyment, pleasure, taste, satisfaction, tension relief etc. (the whole gamut of verbal rationales uncovered in numerous market research studies).242

Similarly, in 1957, Liggett learned from its promotion experts, Market Planning Corporation, that there are “latent or underlying reasons” for smoking.243 These reasons cannot be discovered through testimony of the smokers because: “[t]hose deeper motivations and personality characteristics relevant to cigarette choice are frequently unexpressed and must be discovered by other than direct means because the respondent may not be directly aware of them himself.”244

A former head of research at Philip Morris more graphically describes the uselessness of a smoker’s direct testimony as to why he smokes:

Although we can ill afford not to collect introspective reports from respondents, there is some justification for the contention that the construction of theory solely upon the self-reports of naive respondents as to why they smoke is an overly optimistic enterprise. Not even a computer can make a silk purse from a sow’s ear.245

This evidence illustrates only what has long been the rule in common law fraud cases in Minnesota and elsewhere: direct individual testimony of reliance is not the best way to prove reliance.246

depository. Many of the documents are also available on the Internet.

242. BAT 105657942.
243. RC 6024048.
244. RC 6024043 (emphasis added).
246. See Watson v. Gardner, 236 N.W. 215, 215 (Minn. 1931) (“While it is necessary that the representations should be relied upon, it does not seem that such reliance must be proved by direct testimony of the party defrauded.... [S]uch facts as intent, belief, and reliance, are perhaps more cogently shown by the facts and circumstances surrounding a transaction and the acts of the parties in relation thereto.”); see also Vasquez v. Superior Court, 94 Cal. Rptr. 796, 804-05 (Cal. 1971)
As the Minnesota Supreme Court has said, "the facts and circumstances surrounding the situation [and not direct testimony] are the best measure of whether there was reliance or not." \(^{247}\) This is particularly true in consumer protection cases, where the consumer is often subject to a barrage of communications from a defendant and thus is not always "fully aware of the effect of these efforts upon him . . . ." \(^{248}\)

The California court in *Committee on Children's Television, Inc. v. General Foods Corp.*, \(^{249}\) mentioned above, recognized this fact in a suit brought against the sugared cereal industry for deceptive advertising. The defendants there objected that the complaint did not "indicate that any particular child relied upon or even saw any particular television advertisement." \(^{250}\) The defendants contended that while the complaint asserted that adult plaintiffs purchased sugared cereal, it did not "state which advertisement they, or their children, saw and relied upon." \(^{251}\) The court rejected these arguments, noting that "[t]he realistic setting of the case . . . may make such specific pleading impossible." \(^{252}\) The court then emphasized the nature of the defendants' ad campaign:

\begin{quote}
A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date. Children in particular are unlikely to recall the specific advertisements which led them to desire a product, but even adults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make that purchase. Plaintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements. \(^{253}\)
\end{quote}

\(^{247}\) Witzig v. Philips, 274 Minn. 406, 412, 144 N.W.2d 266, 270 (1966) (emphasis added).


\(^{249}\) 673 P.2d 660, 673 (Cal. 1983).

\(^{250}\) Id.

\(^{251}\) Id. at 674.

\(^{252}\) Id.

\(^{253}\) Id.
Thus, "broader" evidence than a showing of individual reliance is actually better evidence of causation. 254

VI. EVIDENCE USED TO ESTABLISH CAUSATION IN THE MINNESOTA TOBACCO CASE

To defeat the tobacco industry's motion for summary judgment and establish the required causal nexus, the plaintiffs presented—rather than individual testimony on reliance—the categories of evidence accepted by the authorities described above.

A. Evidence of the Tobacco Industry's Intentional Misconduct

First, there was extensive evidence of intentional conduct by the industry. For example, the tobacco industry has made numerous public statements denying or minimizing the hazards of smoking, while internally recognizing those hazards. Foremost was the "Frank Statement."

In 1954, each of the manufacturing defendants, with the exception of Liggett, published a document under the name Tobacco Industry Research Committee ("TIRC"), now the Council for Tobacco Research - U.S.A., Inc. ("CTR"). This document, entitled "A Frank Statement to Cigarette Smokers," challenged the "theory that cigarette smoking is in some way linked with lung cancer in human beings."255 Further, the defendants affirmatively stated that "[w]e believe the products we make are not injurious to health."256 The Frank Statement was published in 448 newspapers throughout the United States, in virtually every city with a population of 50,000 or greater.257 In the "Frank Statement," the defendants affirmatively undertook numerous obligations to the public concerning smoking and health, and smoking and health research. Specifically, the defendants stated:

We accept an interest in people's health as a basic re-

254. See PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 272 (2d Cir. 1987) (In action seeking damages, court found that the "jury's conclusion that consumers actually were deceived by Audiofidelity's misrepresentations is supported by the false advertising contained on the record albums and the fact that Audiofidelity successfully sold the albums on the market").
255. CTR MN 11309817.
256. Id.
257. JH000896.
sponsibility, paramount to every other consideration in our business.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

... .

We are pledging aid and assistance to the research effort into all phases of tobacco use and health.258

A litany of internal documents, however, demonstrate that top officials from the tobacco industry privately acknowledged that, contrary to the public representations, CTR was meant to serve primarily a public relations function and that CTR’s scientific research was of little value in addressing issues relating to the causal link between smoking and health. In May 1958, scientists (and others from the British tobacco industry) visited representatives of the U.S. industry and found that:

Liggett & Meyers stayed out of T.I.R.C. originally because they doubted the sincerity of T.I.R.C. motives and believed that the organization was too unwieldy to work efficiently. They remain convinced that their misgivings were justified. In their opinion T.I.R.C. has done little if anything constructive, the constantly reiterated “not proven” statements in the face of mounting contrary evidence has thoroughly discredited T.I.R.C., and the S.A.B. of T.I.R.C. is supporting almost without exception projects which are not related directly to smoking and lung cancer.259

The true raison d’etre of the CTR program was, according to a 1970 memorandum from the head of research and development of Philip Morris, truly defensive:

It has been stated that CTR is a program to find out “the truth about smoking and health.” What is truth to one is false to another. CTR and the Industry have publicly and frequently denied what others find as “truth.” Let’s face it. We are interested in evidence which we believe denies

258. CTR MN 11309817
259. BAT 105408495.
the allegations that cigarette [sic] smoking causes disease.\textsuperscript{260}

The program was used as an industry "shield," not to conduct objective research:

Bill Shinn [attorney at Shook, Hardy] described the history, particularly in relation to the CTR. CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry "shield" in 1954 . . . . CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. CTR has provided spokesmen for the industry at Congressional hearings. The monies spent on CTR provides a base for introduction of witnesses.

. . . .

Getting away from the historical story, Bill Shinn mentioned that the "public relations" value of CTR must be considered and continued . . . . A very interesting point, made by Bill Shinn, is the opposition's, "the case is closed with regard to smoking and disease." . . . It is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed . . . . There is a "CTR basket" that must be maintained for "PR" purposes.\textsuperscript{261}

This would be the pattern of future industry-sponsored research. As a research director at Lorillard explained to the company's chief executive officer in a 1974 memorandum:

Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc . . . . In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy.\textsuperscript{262}

\textsuperscript{260} PM 2022200161; see generally CTR MN 2 HK0039151-52; PM 1003119115; LG 0208295-96.


\textsuperscript{262} LOR 01421598.
This ploy worked. Internal documents show that the 1954 Frank Statement—with its strategy of creating a controversy concerning the health effects of smoking—was relied upon by smokers and became a great success for the industry. One year after the Frank Statement was published, the scientific director of the TIRC Scientific Advisory Board reported that “the phase of uncontrolled fear... created by the original premature and overbalanced statement of the American Cancer Society, is rapidly passing.”263 This change in attitude was a reflection of the “general trust which the American people have begun to place in our efforts.”264 This created “trust” changed everything:

There is absolutely no question in my mind that if this committee [TIRC] had not been formed, the cigarette industry by now would have been in a deplorable position . . . . In other words, the TIRC has been a successful defensive operation.265

Following the Frank Statement—year after year, decade after decade—the tobacco industry repeated its mantra that it is not proven that smoking causes any disease. In fact, to this day, the tobacco industry has refused to publicly acknowledge that smoking causes any disease. As mentioned, the industry represented in the Frank Statement, “[w]e believe the products we make are not injurious to health.”266 Forty years later, in testimony before Congress, the industry’s representative testified that causation is not proven.267 And in the intervening years, the statements ranged from “there is no demonstrated causal relationship between smoking and any disease,”268 to “[t]he question about smoking and health is still a question,”269 to “the 1972 report of the Surgeon General . . . ‘insults the scientific community’, and that ‘the number one health problem is

263. JH 000438.
264. Id.
265. MNAT 00724279.
266. CTR MN 11309817.
268. B&W 670307882.
269. TIMN 0081352.
not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public." 270

This campaign to create "doubt" about the health effects of smoking was relied upon by consumers. As Professor Robert Dolan, the plaintiffs' expert in marketing and consumer behavior, testified in his deposition:

Q. And what impact does CTR have?
A. Well, to the extent that CTR influences the information that people have about these products, they would have an impact on stimulating demand for cigarettes.
Q. Can you explain that further; are you able to explain that further?

A. . . . I mean, to the extent that CTR through its activities contributes to the perception in the minds of consumers that there is an open debate about the health effects of cigarettes rather than some hard evidence that it is linked to diseases, to the extent that CTR does contribute to that perception, that influences consumer demand for the products. 271

In their reliance, smokers look for a reason to perpetuate their smoking practice:

Q. Do you believe the American public today still relies on any representations from the tobacco industry about smoking and health?
A. Oh, I believe that there are some people who—the fact that the tobacco industry is still making representations about the value of smoking, they're relying on that information because—and you look at what the tobacco companies have said their role is.

270. TIMN 0120602.
And they look to the tobacco companies for self-justification to perpetuate the habit.272

B. Evidence of the Addiction of the Tobacco Industry’s Customers

The tobacco industry’s documents also provide evidence that the presence of nicotine in cigarettes, and the industry’s manipulation of nicotine, was a proximate cause of continued smoking. It is the existence of an optimal, addictive dose of nicotine within the cigarette that is a substantial factor in why people continue to smoke.

As early as the early 1950s—as the industry prepared to publish the Frank Statement—industry research directors recorded their conclusions that “[i]t’s fortunate for us that cigarettes are a habit they can’t break.”273

Over the years, repeated statements in internal documents demonstrate the tobacco industry’s understanding that smokers are addicted and that it is nicotine which causes continued smoking. A 1961 document by Sir Charles Ellis, a top BAT scientist, stated “smokers are nicotine addicts.”274 BAT scientist S.J. Green referenced “members of the nicotine dependent majority.”275 A 1972 document by Philip Morris’ William Dunn (the “Nicotine Kid”) stated that the majority of conferees at a recent CTR conference “accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking.”276 A 1975 BAT document by A. K. Comer, a company scientist, concluded that:

In summary, it appears that most workers who are not directly concerned with the tobacco industry use the terms ‘addiction’ or ‘dependence’ rather than ‘habitation’, and can be considered quite correct in doing so . . . . If cigarette smoking is as addictive as the evidence suggests, it is not surprising that anti-smoking campaigns are so ineffective . . . .”277

272. Id. at 249.
273. JH 000494.
274. BAT 301083863.
275. BAT 110069977.
276. PM 2024273962.
277. BAT 105392366.
Indeed, internally, the cigarette companies recognized that the addictiveness of nicotine completely undercut the industry’s longstanding defense of smoking and health litigation. As a 1980 Tobacco Institute document stated: “Shook, Hardy reminds us, I’m told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can’t defend continued smoking as ‘free choice’ if the person was ‘addicted.’”

While nicotine is a naturally occurring component of the tobacco plant, the modern cigarette is a highly engineered and sophisticated product in both manufacture and design. The tobacco industry has the technological capability of removing most of the nicotine from cigarettes. However, evidence suggests the tobacco industry maintains nicotine at certain levels because the companies know that nicotine is the addictive substance in cigarettes and that smokers require an optimum dose of nicotine in order for nicotine’s pharmacological and addictive qualities to have their intended effect.

Dr. Richard D. Hurt, director of the Mayo Clinic Nicotine Dependence Center, testified that the tobacco industry’s control of nicotine dosage in cigarettes to maintain an optimal—pharmacologically active and addictive—level of nicotine is a substantial cause of smoking: “If you take the nicotine out of cigarettes, which it’s possible to do, then I don’t think you would—you would get people to continue to smoke because nicotine is the driving force behind the addictive nature of cigarettes.”

Dr. Hurt also testified:

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278. TIMN 0107823.
279. See Defendant Philip Morris Incorporated’s Answers To Plaintiffs’ First Set Of Requests For Admission, State ex rel. Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. July 19, 1995). The tobacco industry admitted in requests for admissions filed in the Minnesota litigation that it has the technological capability of removing most of the nicotine from cigarettes during the manufacturing process. See id. at 4.
280. See BAT 102630336 (Sept. 18, 1963 B&W letter, “[E]ven now . . . we can regulate, fairly precisely, the nicotine and sugar levels to almost any desired level management might require”); RJR 504210018 (May 24, 1971 Reynolds document, referring to the “habituating level of nicotine” and asking “how low can we go?”); BAT 102690342 (an undated BAT document stating, “high on the list of product requirements is an adequate level of nicotine to sustain the smoking habit.”).
Once hooked, once that becomes the central theme of their use, then they are smoking for the nicotine. In fact, they are probably smoking for certain levels of nicotine, we have learned that over the years.\(^\text{282}\)

...\ ...

Well, what it says is that its presence [nicotine] in cigarettes is the cause of continued smoking in all but a small minority of smokers, so the vast majority of smokers continue to smoke because of nicotine, the drug that's being delivered by cigarettes.\(^\text{283}\)

In addition to maintaining a certain quantity of nicotine, documents suggest the industry also manipulated the form of nicotine.\(^\text{284}\) One method to manipulate nicotine is to increase the pH of smoke, which increases the amount of “free” or “freebase” nicotine.\(^\text{285}\) Like “freebase” cocaine, free nicotine is more quickly absorbed by the smoker, and is more physiologically active.\(^\text{286}\) Cigarettes with free nicotine had immediate increases in market share as “free nicotine contributed significantly [upon the market share held by particular brands] to the model over and above the other factors.”\(^\text{287}\) Indeed, shortly after Philip Morris began increasing its free nicotine content through the introduction of added ammonia compounds, Marlboro began its assent to its present status as the leading selling cigarette.\(^\text{288}\) All U.S. manufacturers except Liggett have used ammonia technology.\(^\text{289}\)

\(^\text{282.} \) Id. at 141.
\(^\text{283.} \) Id. at 623.
\(^\text{285.} \) See id. at 1178-79.
\(^\text{286.} \) See id.
\(^\text{287.} \) See RJR 501011401 (providing confirmation of the correlation between free nicotine and sales).
\(^\text{288.} \) See RJR 500540830 (reporting results of studies in the 1970s that gained a better understanding of the physical chemistry of tobacco and tobacco smoke).
C. Evidence of the Tobacco Industry’s Exploitation of Smokers’ Rationalization

The plaintiffs presented evidence that the industry’s public statements denying or minimizing causation enabled smokers to rationalize their continued smoking. The plaintiffs’ experts testified that addicted smokers were vulnerable to such statements. Dr. Hurt opined that:

[M]any smokers seek to justify the fact that they smoke, and will cling to any shred of justification for their behavior. Smokers will also deny to themselves and others, even in the face of serious medical problems caused by smoking, that cigarettes are harmful or addictive . . . . Thus, public statements by tobacco companies denying the health consequences of smoking and “creating doubt” about the causal link between smoking and disease are a substantial contributing factor to continuing smoking behavior.  

Evidence suggests that the tobacco companies intentionally exploited this denial and rationalization. As early as 1964, high level Philip Morris executives described how “we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking.”  

A 1979 study by B.A.T. Industries found that many smokers do not accept that smoking is dangerous and “smokers are more ready to deny the validity of the evidence, or to consciously suppress their awareness of overt propaganda.”

There was ample evidence that smokers—including those in Minnesota—relied upon the industry’s public refutation of causation. One focus group of smokers, conducted in Minnesota on behalf of Reynolds, found that smokers rationalized the risks of smoking and that they “discounted the ‘statistical risk’ of smoking

291. PM 1005038559.
292. BAT 105562125.
... Women smokers relied upon the industry’s public positions and, while they were apprehensive about smoking, they believed “it [was] up to the individual to make a personal decision about smoking.”

D. Evidence of the Tobacco Industry’s “Reassurance” of Smokers in Advertising, Including Promotion of Low Tar Cigarettes

Evidence also indicates that the tobacco industry was aware that smokers relied upon its pledges that it would not knowingly distribute a dangerous product and that it was committed to providing a safe one. For example, documents suggest that Brown & Williamson knew that smokers sought a “new covenant” with the tobacco industry, believing that the manufacturer eventually would provide a product that he or she could enjoy without fear of physical or psychological reprisal. This knowledge led the industry to decades of ubiquitous health claims in cigarette advertising cynically intended to “reassure” smokers that cigarette smoking was safer. Health claims abounded and were relied upon, as proven by the fact that cigarettes deceptively portrayed as “healthier” attracted smokers “in droves.”

The industry conceded that success in the marketplace is evidence of consumer reliance on the industry’s words and actions. According to Mr. Gesell of American Tobacco Company:

Q. You expect people to be able to rely on the advertising that you place on behalf of the American Tobacco Company; correct?

A. Sure.

Q. And you know, in fact, people will rely?

A. Yes.

293. RJR 502458994 (findings of a smoking environment study conducted by The Beaumont Org., Ltd., on behalf of R. J. Reynolds).
294. RJR 502030646-47.
295. See B&W 680082960 (reporting the results of a motivation research study on consumer attitudes toward smoking cigarettes and health).
296. See B&W 680113762 (“[A]dvertising must cope with consumer attitudes about smoking, providing either a rationale or a means of repressing the health concern.”).
297. See B&W 670001753 (1976 memorandum evaluating B&W’s strategy to attract smokers by promising “superior health protection”).
Q. And one of the best measures of reliance would be sales; correct?

A. Correct.298

The industry also created what it cynically called “reassurance products,” including low tar cigarettes. Indeed, the filtered and low tar cigarette was viewed by Philip Morris as “our traditional response to anti-smoking publicity . . . .”299 Evidence from the cigarette industry’s files shows that this strategy was successful. Smokers relied upon the industry’s representations and believed low tar cigarettes were safer. For example, a Lorillard research report shows that “[t]hose who smoke low tar and nicotine cigarettes generally do so because they believe such cigarettes are ‘better for you.’”300 The presence of what was perceived, in reliance on industry action, to be a safer cigarette was a substantial cause of continued smoking. BAT knew, for example, that the ventilated cigarette (low tar) “is emerging as an important health reassurance mechanism for many smokers” and that such a mechanism would prevent smoking rates from declining.301 This marketing tactic was questionable—evidence suggests the industry had ample internal information showing that the “reassurance products” were not safer.302 Moreover, according to documents discovered in the Minnesota case, the industry was well aware that smokers of lower delivery products tended to “compensate” by smoking harder or blocking ventilation holes in order to maintain a “preferred intake level [of nicotine],” thus defeating any reductions in delivery.303 This fact led RJR to report internally that “low tar and ultra-low tar cigarettes are not really what they are claimed to be” and that “the argument can be constructed that ULT advertising is misleading to

299. PM 2028817506.
300. LOR 81568702; see generally id. at 693-728.
301. BAT 109883115.
302. One BAT study of cigarette mutagenicity found that “light cigarettes” had a slightly higher level of mutagenicity. See B&W 620000030; see also BAT 109883191; RJR 509649825; PM 1003121638.
303. PM 1003287884; see also BAT 107469128; B&W 621096300; BAT 401183568.
the smoker."\(^{304}\)

### E. Evidence of the Tobacco Industry's Marketing to Youth

Perhaps the most egregious evidence of the defendants' misconduct was that showing that the industry's massive campaigns to attract youth smokers were successful. The internal documents reveal that the tobacco industry has been well aware that the vast majority of beginning smokers—"starters" in the industry's parlance—are youth.\(^{305}\) These starters are the only source of replacement smokers for those older smokers who die or quit smoking. As Diane Burrows of Reynolds wrote in February of 1984, "Younger adult smokers are the only source of replacement smokers . . . . If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle."\(^{306}\) In a March 31, 1981, report on young smokers, Myron Johnston of Philip Morris wrote: "Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens."\(^{307}\) R.J. Reynolds agreed. In September of 1974, Mr. C. A. Tucker, Reynolds' vice president of marketing, wrote as follows in a presentation to the Board of Directors: "this young adult market, the 14-24 age group, . . . represent[s] tomorrow's cigarette business. As this 14-24 age group matures, they will account for a key share of the total cigarette volume—for at least the next 25 years."\(^{308}\) A document produced by Brown & Williamson, entitled the "The 'New' Smoker" concludes, in a section entitled "Summing Up," that "[t]he younger smoker is of pre- eminent importance."\(^{309}\)

Documents suggest that the industry acted upon its understanding that the young customer was critical. Year after year, as indicated by industry files, the tobacco companies have engaged in a massive campaign to bring youth smokers into the market. Indeed, cigarettes have been one of the most heavily marketed prod-

\(^{304}\) RJR 508978014.

\(^{305}\) See Surgeon General Report, Preventing Tobacco Use Among Young People 5 (1994) ("Nearly all first use of tobacco occurs before high school graduation . . . .").

\(^{306}\) RJR 501928471.

\(^{307}\) PM 1000390808.

\(^{308}\) RJR 501421311 (emphasis added).

\(^{309}\) B&W 779217827.
From 1954 to 1994, the six domestic manufacturers of cigarettes spent $56,471,889,749 in the United States on the advertising and promotion of cigarettes. Despite the prohibition on advertising via electronic media that went into effect in 1971, almost eighty percent of the 1954 to 1994 total—$44,875,790,868—was spent in the years 1983 to 1994 alone. In 1993, the six manufacturers spent more than $6 billion in the United States to advertise and promote cigarettes.

This advertising has the effect of promoting smoking among youth. As the U.S. Centers for Disease Control found in 1994, "[t]he three most commonly purchased brands among adolescent smokers were the three most heavily advertised brands in 1993, suggesting that cigarette advertising influences adolescents' brand preference." These three most heavily advertised brands—smoked by adolescents—were Marlboro, Camel, and Newport.

As early as 1935, Reynolds was "spending 15% of our entire advertising appropriation in Sunday Comics." In 1980, a Reynolds "Report on Teenage Smokers" bemoaned the fact that Marlboro had a much larger share of the fourteen to seventeen year-old smokers, and that Reynolds' share of this group of smokers was in decline, but projected that "[h]opefully, our various planned activities that will be implemented this fall will aid in some way in reducing or correcting these trends." In 1973, Brown & Williamson issued its strategy statement "[t]o improve B&W's position in attracting young male smokers by making as direct an appeal as possible in product, packaging and advertising to young males." The strategy statement identified a "Direct Target Group" of 6.3 million 16-25 year old smokers...

311. See Paul J. Much, Amended Expert Analysis of Advertising, R&D and Youth Prevention Expenses, State ex rel. Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. July, 1997). This figure is based upon reports to the Federal Trade Commission and answers to plaintiffs' interrogatories. See id. Since certain defendants did not provide complete information for all years, this figure is less than the amount actually spent. See id.
312. Id.
314. See id. at 579-80.
315. RJR 501771784-85.
316. RJR 508458894.
318. B&W 670186815.
Frank Colby advocated that to succeed in the "youth market" the company "develop a new RJR youth-appeal brand" that "delivered more 'enjoyment' or 'kicks' (nicotine)."\(^{319}\) Also in 1973, Brown & Williamson attributed Kool growth to sixteen to twenty-five year-olds and noted: "Kool's stake in the 16-25 year old population segment is such that the value of this audience should be accurately weighted and reflected in current media programs. As a result, all magazines will be reviewed to see how efficiently they reach this group.\(^{320}\)

The industry appears to have successfully attracted the young smoker. In 1978, the president of Lorillard, Curtis Judge, was informed that "the base of our business [for Newport brand cigarettes] is the high school student."\(^{321}\) Philip Morris was well aware of its success among children: "It has been well established . . . [by studies] that Marlboro has for many years had its highest market penetration among younger smokers. Most of these studies have been restricted to people age 18 and over, but my own data, which includes younger teenagers, shows even higher Marlboro market penetration among 15-17 year-olds.\(^{322}\) Indeed, Philip Morris marketing documents show that the company knew that "Marlboro dominates in the 17 and younger age category, capturing over 50% of this market."\(^{323}\)

Professor Cheryl Perry, the plaintiffs' expert in youth smoking, testified that cigarette advertising, marketing, and promotion and the images therein make smoking a "functional and rewarding behavior to some adolescents"\(^{324}\) and that the tobacco industry's conduct in targeting youth has been a "substantial contributing factor" in causing young people to begin smoking.\(^{325}\)

\(^{319}\) RJR 501166152.
\(^{320}\) B&W 170052240.
\(^{321}\) LOR 03537131.
\(^{322}\) PM 1003285497.
\(^{323}\) PM 2043828174.
\(^{324}\) Expert Report of Dr. Cheryl L. Perry, Ph.D. at 7, State ex rel. Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. undated). Professor Perry, who is a professor at the University of Minnesota School of Public Health, a behavioral scientist. See id. at 1. She was the senior scientific editor of the 1994 Surgeon General's Report on Preventing Tobacco Use Among Young People. See id. at 2.
\(^{325}\) Id. at 9.
F. Evidence of the Tobacco Industry's Intention that Their Conduct Be Relied Upon

As detailed above, the rule in Minnesota and elsewhere is that a defendant's intent that consumers rely on its conduct is sufficient evidence of causation in a consumer protection case seeking damages. Here, there is evidence that, for decades, the industry acted with the intent to shape the conduct of smokers.

Top industry officials have testified that the industry intended that smokers rely upon industry statements and actions. Joseph Cullman, who was vice-president of Philip Morris in 1954 and ultimately became its president and CEO, admitted that the industry intended that smokers rely upon the Frank Statement, one genesis of the defendants' deception of the public:

Q. ... The cigarette companies intended consumers to read this [F]rank [S]tatement; correct?
A. Yes.

Q. And you hoped people would believe them; right?
A. Yes.

Q. Conduct their affairs with the belief that what is asserted herein is true and accurate.
A. I believe it was true and accurate.
Q. And you wanted the people who read this to believe that it was true and accurate; correct?
A. I would expect that was the reason, yes.
Q. Okay. And you wanted them, in conducting their affairs, to rely on the facts asserted herein as being true and accurate; right?
A. They were true and accurate.
Q. And you wanted people to believe and rely on that; right?

326. See, e.g., LeSage v. Norwest Bank Calhoun-Isles, 409 N.W.2d 536, 539 (Minn. Ct. App. 1987) (stating that a misleading statement or deceptive practice with the intent that others rely thereon in connection with the sale of merchandise is consumer fraud); see also supra notes 131-33, 153-56 and accompanying text (discussing how causation may be proven through the intent of the defendant).
A. I see no reason why they shouldn’t. ... We hoped they would.
Q. ... And that’s what you wanted then; right?
A. Yes. 327

Lorillard’s present CEO Alexander Spears testified that he believes smokers should rely upon statements by the Tobacco Institute that smoking had not been proven to cause cancer:

Q. And to the extent that The Tobacco Institute has made that statement [smoking not proved to cause lung cancer] publicly in the past, do you believe that smokers have the right to rely upon that statement?
A. I believe they should have—they should rely on information that’s provided along with other information that they have. 328

Walker Merryman, long time spokesperson for the Tobacco Institute, explained how the industry intended that smokers rely upon the industry’s public statements that no scientific proof showed cigarette smoking to be hazardous:

Q. ... And it is true, isn’t it, that the Tobacco Institute has consistently in its public statements on smoking and health taken the position that no scientific proof had been found to convince—to convict smoking as a hazard to health?
A. We have said that from time to time.
Q. And in fact you intended people who received this publication and read it to believe what was being said; correct?
A. Correct.


Q. ... And sir, the sentence—the paragraph goes on to say, quote, "The statistical, clinical and experimental findings have not established smoking as a cause of any disease," close quote.

A. That—that is correct.

Q. And in fact The Tobacco Institute intended the people who received this publication and read it to believe what the Tobacco Institute was saying.

A. Yes. 329

The industry believed such reliance by the public was reasonable. Dr. Alan Rodgman, a senior scientist with Reynolds, testified that it would be reasonable for smokers to believe and rely upon the defendants' statements on the health effects of smoking:

Q. And it's reasonable for them [50 million people still smoking] to all conclude and rely on you, the cigarette manufacturers, when you say there's no cause-and-effect relationship proven here; correct?

A. I think if they reason it, they'll come to the same conclusion. 330

329. Transcript of Deposition of Walker P. Merryman at 110-11, State ex rel. Humphrey v. Philip Morris Inc., No. Cl-94-8565 (Minn. Dist. Ct. July 15, 1997). The defendants' allegations that there could be no reliance because the risks of smoking were commonly known is also repudiated by their own testimony. See Transcript of Deposition of R.J. Reynolds Tobacco Company (Designees John H. Robinson and David N. Iaupo) at 302, State ex rel. Humphrey v. Philip Morris Inc., No. Cl-94-8565 (Minn. Dist. Ct. Aug. 22, 1997). When asked if smoking causes cancer Reynolds' Rule 30.02 designee, J. H. Robinson, answered, "I don't know if that's true or not." Id. Robinson also testified that "I think that's a reasonable position" for the "man on the street" to be unsure whether cigarette smoking causes cancer. Id. at 302-03.

VII. CONCLUSION

Minnesota’s historic tobacco litigation reveals how Minnesota’s consumer protection statutes can be a potent tool against “sharp commercial practices.” Minnesota cases establish that the consumer protection statutes were never designed to replicate the common law, but were designed to give the attorney general and other “persons” an effective mechanism for prosecuting violations of the statutes. To that end, the statutes justifiably allow recovery without a showing—on an individual basis—of reliance.

The plaintiffs’ evidence of causation was abundant. First and foremost was evidence of the industry’s intent that consumers rely on the industry’s statements about the health consequences of smoking. Cases in Minnesota and under the related Lanham Act and FTC Act demonstrate that this intent, alone, is sufficient evidence of causation. This evidence was coupled with expert testimony demonstrating the overwhelming success of this campaign, and how consumers relied on the industry’s mantra about the health effects of smoking. Evidence from the industry’s own files also demonstrated that it controlled the levels of nicotine in its products. In addition, fully aware that smokers needed to rationalize their smoking habits in light of the growing evidence implicating smoking with disease, the industry was all too willing to provide “reassurance” products such as “low tar” cigarettes to keep people smoking. Finally, and perhaps most sadly, internal documents suggest that the industry targeted young people to replenish its consumer base. This was competent, indeed damning, evidence of causation.

332. State ex rel. Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992) (stating consumer protection laws were not intended to codify common law but rather to broaden the cause of action to protect consumers).