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Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws

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GOLIATH HAS THE SLINGSHOT: PUBLIC BENEFIT AND PRIVATE ENFORCEMENT OF MINNESOTA CONSUMER PROTECTION LAWS

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I. INTRODUCTION ................................................................. 164

II. PROGRESSIVE PRIVATE ENFORCEMENT OF STATE CONSUMER PROTECTION LAWS ............................................................ 166
   A. The Expansive Universe of State Consumer Protection Law ............................................................ 166
      1. General Statutory Fraud Laws ........................................................................................................ 166
      2. Topical Consumer Protection Laws ................................................................................................. 168
      3. Enforcement of Minnesota Consumer Protection Laws ............................................................... 169
   B. Progressive Enforcement of State Consumer Protection Laws .......................................................... 172

III. JUDICIAL CREATION OF THE PUBLIC BENEFIT LIMIT FOR STATUTORY FRAUD ACTIONS ............................................................. 176
   A. Ly v. Nystrom ................................................................................................................................. 176
   B. Collins v. Minnesota School of Business ......................................................................................... 180

IV. THE NARROW CONSTRAINTS OF “PUBLIC BENEFIT” AS APPLIED IN SUBSEQUENT DECISIONS .............................................................. 181
   A. Results of Applying the Public Benefit Limit ...................................................................................... 181
      1. Decisions Expressly Applying the Public Benefit Limit ................................................................. 181
         a. Suits by Individuals ..................................................................................................................... 182
         b. Class Actions and Joiner Cases .................................................................................................. 186
         c. Business or Organizational Plaintiffs ....................................................................................... 187
         d. Independent Glass Association v. Safelite Group .................................................................... 187
      2. Statutory Fraud Decisions Permitting Plaintiffs’ Claims But Not Addressing the Public Benefit Limit ................................................................. 188
   B. Rationale for Decisions Finding No Public Benefit ........................................................................... 190

V. THE PUBLIC BENEFIT LIMIT OVERTURNED PRIOR CASE

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I. INTRODUCTION

The phrase “consumer protection case” may conjure up a used-car buyer trying to get recompense for a vehicle that turned out to be less than promised, or an elderly homeowner victimized by predatory lending tactics trying to maintain possession of her home. In August 2000, the private right of action to enforce Minnesota consumer protection laws was held to be something
entirely different. After the Minnesota Supreme Court’s decision in *Ly v. Nystrom*, a business complaining about a competitor’s advertising is more likely to have available a private right of action to enforce these laws than either the frustrated car buyer or the predatory lending victim.

I have been asked to evaluate whether private enforcement of consumer protection laws in Minnesota is “progressive.” The answer is that Minnesota courts have essentially shut the courthouse door on individual consumers seeking redress in private actions under statutory fraud laws following the judicial creation in *Ly* of a “public benefit” limitation on bringing such lawsuits, and this outcome is not progressive consumer protection enforcement. Minnesota courts generally permit statutory fraud suits only in class action cases, for large groups of plaintiffs, and even for some business plaintiffs.

Part II of this article identifies the meaning of the terms “consumer protection law” and “progressive,” as used in this article. Part III explains the creation of the “public benefit” limit on suits under Minnesota statutory fraud laws as enunciated in *Ly*. Part IV examines the application of this new limiting principle, concluding that it has all but foreclosed individual consumers from private enforcement of statutory fraud laws. Part V analyzes how the public benefit limit overturned prior case law. Part VI discusses the interpretative gaps in the judicial decision creating the public benefit limit that make it difficult to determine if this sweeping restriction was the intended result, and that may make the doctrine difficult to sustain. Finally, Part VII concludes that this restriction of the individual private right of action has impaired progressive enforcement of consumer protection laws and should be abandoned, or at least substantially narrowed.

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1. 615 N.W.2d 302 (Minn. 2000). The author filed an *amicus curiae* brief in this case on behalf of Attorney General Mike Hatch.
2. See infra Part II.
3. See infra Part III.
4. See infra Part IV.
5. See infra Part V.
6. See infra Part VI.
7. See infra Part VII.
II. PROGRESSIVE PRIVATE ENFORCEMENT OF STATE CONSUMER PROTECTION LAWS

Consumer protection laws are a statutory response to the inadequacy of the common law in protecting buyers from unfair and deceptive acts in the marketplace. These laws attempt to regulate a vast array of marketplace conduct using a variety of legislative strategies. The first subsection below describes the types of consumer protection laws at both the state and federal level, distinguishing general statutory fraud laws from topical consumer protection laws. The following subsection defines “progressive” for purposes of this article.

A. The Expansive Universe of State Consumer Protection Law

State consumer protection law can be placed in two broad categories: (1) general statutory fraud laws; and (2) topical laws that regulate specific types of consumer transactions.

1. General Statutory Fraud Laws

The primary federal statute broadly protecting consumers from fraud in the marketplace is section 5 of the Federal Trade Commission Act (“FTC Act”), which declares unlawful “unfair or deceptive acts or practices in or affecting commerce.” In the 1960s and 1970s, every state in the country adopted a similar general statutory fraud law prohibiting unfair and deceptive marketplace conduct. There are four archetypes of such laws: (1) consumer-fraud acts; (2) the Uniform Deceptive Trade Practices Act (“UDTPA”); (3) “little FTC” acts, which are substantially similar to section 5 of the FTC Act; and (4) the Uniform Consumer Sales Practices Act. These state statutory fraud laws are often called state

“UDAP” laws, after the FTC phrase prohibiting “unfair and deceptive acts and practices.”

The FTC is charged with public enforcement of section 5 of the FTC Act, and state attorneys general are typically the public enforcers of state statutory fraud laws. A critical difference between the FTC Act and state statutory fraud laws is that section 5 of the FTC Act has no private right of action. All states except Iowa have a private right of action for violation of statutory fraud laws. In most states, the private right of action includes the right to recover attorney’s fees for successful plaintiffs, the right to multiplied or enhanced damages, or both.

Minnesota has enacted two of these forms of statutory fraud laws: the Consumer Fraud Act (“CFA”) and the UDTPA. The Minnesota CFA prohibits the “act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice.” The UDTPA lists twelve acts that are prohibited when made by a person “in the course of business, vocation, or occupation,” and generally prohibits conduct that “similarly creates a likelihood of confusion or of misunderstanding.” Minnesota is one of only five states with both a consumer fraud act and an UDTPA version of a statutory fraud law.

In addition, Minnesota has another, older statutory fraud law entitled the False Statement in Advertising Act (“FSAA”). The FSAA prohibits an advertisement “which contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading.” This FSAA is a form of a model law.


10. SHELDON & CARTER, supra note 9, § 1.1.

11. ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION HANDBOOK 77–78 (2004) [hereinafter “ABA”].

12. SHELDON & CARTER, supra note 9, § 8.2.

13. ABA, supra note 11, at 85–86.


16. Delaware and Illinois, like Minnesota, have adopted separate CFA and UDTPA statutes. DEL. CODE ANN. tit. 6, §§ 2513 (CFA), 2532 (UDPTA) (2005); 815 ILL. COMP. STAT. ANN. §§ 505/2 (CFA), 510/2 (UDTPA) (West 2001). Alaska and West Virginia have incorporated the CFA into a UDTPA-type statute. See, e.g., ALASKA STAT. § 45.50.471 (2005); W. VA. CODE ANN. § 46A-6-104 (West 2001).

17. MINN. STAT. § 325F.67 (2004). The FSAA was initially adopted in 1913, MINN. STAT. § 8903 (supp. 1913).

18. Id.
known as a “Printer’s Ink” statute, which was named for an advertising industry trade journal that published the model law and urged its adoption at the turn of the twentieth century.\(^\text{19}\)

2. **Topical Consumer Protection Laws**

Minnesota, like most other states, has a broad array of topical consumer protection laws targeting specific types of transactions.\(^\text{20}\) Automobile buyers, for instance, have protections in Minnesota law related to previously salvaged cars, accuracy of odometer readings, or when they purchase a “lemon,” buy a service contract, obtain repairs, or finance their purchase of a motor vehicle, among other matters.\(^\text{21}\) Vacation travelers who buy timeshares, travel-club memberships or camping memberships all receive state law protections in statutes meant to regulate these particular purchases.\(^\text{22}\) State topical consumer protection laws also govern merchants who use specific types of sales practices. For example, businesses are constrained in their actions when contacting consumers through automatic-dialing machines, unsolicited facsimile transmissions or emails, when sending and billing for unsolicited goods, or during door-to-door sales.\(^\text{23}\)

There are dozens of other topical consumer protection laws in Minnesota meant to provide protections for specific types of marketplace transactions or sales tactics. From 2002 through 2005, Minnesota enacted new topical consumer protections relating to: homeowners in foreclosure, cell phone users entering long-term contracts, the use of private data by internet service providers, the sale of high-cost membership travel clubs, and a state do-not-call list for telemarketers.\(^\text{24}\)

\(^{19}\) 3 George Eric Rosden & Peter Eric Rosden, The Law of Advertising § 40.02 (2004).

\(^{20}\) See generally Sheldon & Carter, supra note 9, § 5 (detailing various types of topical consumer protection laws).


\(^{22}\) Id. §§ 82A.01–26 (Membership Camping Practices), 83.20–45 (Subdivided Lands), 325G.50–505 (Membership Travel Contracts).

\(^{23}\) Id. §§ 325E.26 (Automatic Dialing-Announcing Devices), 325E.395 (Facsimile Transmission of Unsolicited Advertising Materials), 325F.694 (Emails), 325G.01 (Effect of Delivery), 325G.06–11 (Home Solicitation Sales).

\(^{24}\) Id. §§ 325M.01–09 (Internet Privacy), 325N.01–09 (Mortgage Foreclosures), 325E.311–316 (Telephone Solicitation), 325F.695 (Consumer
The extension and collection of credit is an area of particular attention for topical consumer protection laws. The U.S. Congress has enacted statutory schemes regulating credit access and reporting, disclosure of credit terms and use of credit cards, debt collection, real estate and mortgage transactions, leasing, and electronic funds transactions. Unlike section 5 of the FTC Act, the federal statutory fraud law, these consumer credit statutes each contain an express private right of action. Minnesota regulates credit against this background of extensive federal regulation. For example, Minnesota has supplemented federal mortgage regulation with statutes allowing homeowners to cancel private mortgage insurance based on appreciation of home value, requiring written and enforceable interest-rate lock agreements, and limiting fees and excessive prepayment penalties.

3. Enforcement of Minnesota Consumer Protection Laws

The attorney general is responsible for public enforcement of Minnesota’s statutory fraud laws. The attorney general is authorized in Minnesota Statutes section 8.31 to seek injunctive relief and civil penalties of up to $25,000 per violation of these laws. Minnesota courts have held that the attorney general can seek restitution to consumers for a violation of these laws, and section 8.31 has been amended to reflect this power of the attorney general. In addition, the CFA contains its own statutory injunctive protection for Wireless Customers), 325G.505 (Membership Travel Contracts in Excess of $500).


27. MINN. STAT. §§ 47.206–.207, 58.137 (2004).

28. Id. § 8.01, .31–.32.

29. Id. § 8.31, subdiv. 3.

30. State by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888, 896 (Minn. Ct. App. 1992), aff’d, 500 N.W.2d 788 (Minn. 1993); Act of June 2, 1987,
authority for the attorney general, and the FSAA provides that a violation is a misdemeanor that can be prosecuted by county attorneys.\footnote{31}

Section 8.31 also contains Minnesota’s private right of action for its general statutory fraud laws. Subdivision 3a of section 8.31 is known as “the private attorney general statute.” The private attorney general statute provides an express right for “any person injured by a violation [of the laws enumerated in section 8.31 to] bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees.”\footnote{32}

The CFA and FSAA are included in the list of laws “enumerated” in subdivision 1 of section 8.31.\footnote{33} The UDTPA is not expressly included in subdivision 1 of section 8.31, but that subdivision provides a broad grant of authority to the attorney general to enforce laws “respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade, and specifically, but not exclusively”\footnote{34} the laws listed thereafter. Several Minnesota courts, both state and federal, have held that because the UDTPA is not expressly listed, it is not within the purview of the private attorney general statute and there is no private right of action for damages.\footnote{35} The UDTPA contains its own authority for a private right of action, but that authority is limited to injunctive relief.\footnote{36}

\footnote{ch. 366, §§ 2, 4, 1987 Minn. Laws 2538, 2538–39 (codified as amended at MINN. STAT. § 8.31, subdivs. 2c, 3c (2004)).}
\footnote{31. MINN. STAT. §§ 325F.67, 325F.70, subdiv. 1 (2004).}
\footnote{32. Id. § 8.31, subdiv. 3a.}
\footnote{33. Id. § 8.31, subdiv. 1.}
\footnote{34. Id.}
\footnote{35. See, e.g., Tuttle v. Lorillard Tobacco Co., No. Civ. 991550, 2001 WL 821831 (D. Minn. Jul. 5, 2001); Alsädes v. Brown Inst., Ltd., 592 N.W.2d 468, 476 (Minn. Ct. App. 1999) (collecting cases). Although a critique of these cases is beyond the scope of this article, it is noteworthy that none of these cases have analyzed the question in depth. In particular, none of these cases have considered the interpretive relevance of other statutes that have incorporated the UDTPA or “deceptive trade practices” phrase together with the other two general statutory fraud laws, including Minnesota Statutes sections 58.08, 325F.71, 325G.505, 327B.05 (subdivision 1(d)), and 609.2336. Nor have these cases addressed the fact that the UDTPA was passed in the same legislative session as the private attorney general statute, meaning that the UDTPA was not in existence at the time the private attorney general statute was introduced as legislation. See 1973 Minn. Laws 296 (private attorney general statute); 1973 Minn. Laws 420 (UDTPA).}
\footnote{36. MINN. STAT. § 325D.45, subdiv. 1 (2004).}
Topical consumer protection laws have varying private enforcement mechanisms. A few of these statutes contain no private right of action. A substantial number of topical statutes with an express private right of action incorporate, directly or indirectly, the private attorney general statute as the enforcement provision. Some statutes expressly reference section 8.31. Other such statutes state that a violation constitutes a per se violation of the CFA, or otherwise reference the CFA for enforcement, thereby indirectly allowing suit under the private attorney general statute. A few statutes incorporate both section 8.31 and the CFA in some manner. Several statutes have both an independent private right of action and reference the private attorney general statute.

The language incorporating the private attorney general statute in these topical consumer laws varies tremendously. For example:

- A person suffering injury because of a violation of the law regulating prize solicitations has a private right of action in the law, but a violation of that law “also [is] a violation of sections 325F.68 to 325F.71 and is subject to section 8.31.”

- The “immigration services” statute provides consumer protections for immigrants who pay for services related to gaining U.S. citizenship or related matters: “The penalties and remedies of section 8.31 apply to violations of this section, including a private cause of action.”

- A violation of the law regulating industrial hygiene and safety professionals “is an unlawful practice under

37. See, e.g., Id. §§ 325E.31 (automatic dialing/announcing devices), 325F.245, subdiv. 7 (landscape application contracts), 325G.10 (home solicitation sales), 325G.14 (personal solicitation of sales).
38. See, e.g., Id. §§ 148.5198, subdiv. 5 (hearing aid sales contracts), 184.33, subdiv. 2 (employment agent licenses), 327C.07, subdiv. 6 (manufactured home park contracts).
39. See, e.g., Id. §§ 325F.97, subdivs. 1–2 (rental purchase agreements), 332.59 (credit services organizations).
40. See, e.g., Id. §§ 325E.33, subdivs. 3–4 (misconduct of athletic agents), 325F.63, subdiv. 3 (service repairs), 325F.6643 (auto title branding).
41. Id. § 325F.755, subdiv. 7(b).
42. Id. § 325E.031, subdiv. 6.
section 325F.69. A person who violates section 182A.04 is subject to the remedies provided in sections 325F.68 to 325F.70.\textsuperscript{43}

\begin{itemize}
\item A violation of the law regulating agriculture contracts “is a violation subject to section 8.31, subdivision 1, [but] the remedies in section 8.31, subdivisions 3 and 3a, are limited by section 17.9441.”\textsuperscript{44}
\end{itemize}

\section*{B. Progressive Enforcement of State Consumer Protection Laws}

For purposes of this article, “progressive” consumer protection enforcement means lawsuits that have the effect of rectifying an imbalance of power between consumers and the sellers who typically control the terms of marketplace transactions. Minnesota courts have repeatedly stated that an underlying purpose of Minnesota UDAP law is to address the problem of lesser bargaining power by consumers. The Minnesota Supreme Court recently reaffirmed that “one of the central purposes of the Consumer Fraud Act is to address the unequal bargaining power that is often found in consumer transactions.”\textsuperscript{45}

Consumer protection laws are the progeny of “progressive” traditions in American politics. The original consumer protection laws were the result of reform notions rooted in the Progressive movement of the early twentieth century. One fundamental concern reflected in Progressive-era legislation was the use of government power to remedy the unequal bargaining power of the individual. Antitrust law, union protections, food safety, and other such regulations were enacted in part to offset control by increasingly large and powerful corporations of the labor and consumer marketplace.\textsuperscript{46} The first nonprofit consumer advocacy

\begin{footnotes}
\item 43. \textit{Id.} § 182A.05.
\item 44. \textit{Id.} § 17.944, subdivs. 7–8.
\end{footnotes}
organizations, such as the National Consumer’s League, came into existence at this time.\textsuperscript{47}

The progressive era offered inspiration, but the enactment of modern consumer protection laws started with the New Deal and came to fruition in a flurry of activity in the 1960s and 1970s.\textsuperscript{48} The grandfather of statutory fraud laws, the “unfair and deceptive acts and practices” language in section 5 of the FTC Act, was inserted into the FTC Act in 1938.\textsuperscript{49} In the 1960s and 1970s, both federal and state governments enacted a range of consumer protection laws, including the widespread adoption of state statutory fraud laws, consumer credit protections, and topical consumer laws. Like progressive-era reform activities, consumer protection laws were enacted in part to remedy the unequal bargaining power of individual consumers in a marketplace dominated by large corporations.\textsuperscript{50}

For the courts of the first half of the twentieth century, progressive legal thinkers measured success, in part, by overturning the prevailing judicial philosophy of formalistic notions of “freedom of contract” that stood in the way of government regulation to correct market power imbalances. The \textit{Lochner}-era Court found due process constitutional protection for freedom of contract as justification for overturning Progressive legislation.\textsuperscript{51}

\textsc{Economic Change in America, 1900–1933 (1990)}. Keller also describes the rise of consumerism and consumer debt, especially related to automobile purchase, as part of the economic change occurring in the era. \textit{Id.} at 13–14. Many scholars note the enactment of these regulatory schemes but argue that the Progressive era was a conservative movement controlled by the business interests ostensibly being regulated. \textit{See, e.g.}, \textsc{Gabriel Kolko, The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916}, at 2 (1963).

\textsc{47. Patricia M. Kuntze, Communicating With The FDA: The Office Of Consumer Affairs, 48 Food \\& Drug L.J. 15, 16 (1993).}

\textsc{48. Franke \\& Ballam, supra note 9, at 355. See also Kuntze, supra note 47, at 16 (describing the consumer movement to protect from unsafe products as occurring in three phases: “the Progressive Era, when consumers were seen as gullible; the New Deal, when consumers were viewed as targets of the dangers of available foods and drugs; and the 1960s and 1970s, when consumers became tied to larger citizen movements”).}


\textsc{50. Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1283–84 (1986). See also Dee Pridgen, Consumer Protection and the Law § 3.2 (2005) (describing one of the reasons for the enactment of state statutory fraud laws as “a perceived inequality of bargaining power between merchants and consumers”).}

\textsc{51. See Lochner v. New York, 198 U.S. 45 (1905).}
Progressive legal thinkers of the time “came to focus on the unfairness involved in the enforcement of contracts that resulted from greatly unequal bargaining power.”

Legal realism emerged as a response to the *Lochner* Court philosophy and took center stage with the New Deal, continuing a focus on government power as a remedy to unequal marketplace bargaining. William H. Page makes explicit the link between legal realism, Progressive-era theory and imbalance of market power:

At the heart of the [legal realist] challenge was an attack on the dichotomy between freedom of contract and coercive state intervention. Realists argued that the “private” market was simply one form of coercive state ordering. Robert Lee Hale, in particular, attempted to show that the common law market permitted the powerful to coerce the weak: “Each party to a bargain is forced by the bargaining power of the other to surrender certain property... or his freedom to act.... The economically strong retain a considerable residuum of liberty and property; the economically weak, very little.”... [I]t bears emphasizing that these perspectives in New Deal ideology were not new. They were direct descendants of progressive-era reform movements.

From the far right of the political spectrum, a Cato Institute publication has cited the same underlying principles for progressive legal traditions:

As Epstein details, the Progressives, led by Justices Louis Brandeis and Felix Frankfurter, overthrew nearly a century-and-a-half of constitutional learning in the service of a single dubious economic theory: that economic ‘progress’ required the creation of state-run monopolies to remedy the supposedly weak bargaining position of consumers and laborers.

Thus, the ideological underpinnings of modern state consumer protection laws, at least in substantial part, are literally Progressive in origin. They focus on protecting the consumer by

using government regulation to balance what Progressive thinkers have long considered to be the unfair bargaining power possessed by larger, more sophisticated marketplace sellers.

Development of consumer protection law in Minnesota falls squarely within the national pattern for passage of consumer protection legislation. Minnesota enacted a range of Progressive-era legislation, and some prominent United States Supreme Court cases of the first half of the twentieth century concerned Minnesota statutes designed to protect farmers and consumers. \(^{55}\) Minnesota’s first statutory fraud law also came into existence during the Progressive era with the enactment in 1913 of the model Printer’s Ink statute in the form of the FSAA. \(^{56}\)

As with the rest of the nation, Minnesota created the core of its state consumer protection laws during an approximately twenty-year period beginning in the early 1960s. The CFA and the UDTPA were passed in 1963 and 1973, respectively, to make it easier to sue for misleading and deceptive marketplace practices. \(^{57}\) The remedial private attorney general statute provided a private right of action for enforcement of consumer protection laws in 1973. \(^{58}\) This period also included the passage of basic topical consumer laws, many of which provide important and well-known marketplace protections, such as: the right to obtain a replacement vehicle or refund for a defective new car purchase, known as the “lemon law;” the three business day right to cancel door-to-door sales agreements contained in the Home Solicitation Sales Act; and the right to obtain a written repair estimate and limit liability for excess costs under the Truth in Repairs Act. \(^{59}\)

Accepting for purposes of this article that individual consumers face an unequal marketplace position, and that correcting this unfair position through government legislation is a social benefit, brings us to the central question of this article: is Minnesota progressive in terms of private enforcement of consumer protections laws? In other words, can consumers effectively enforce Minnesota consumer protection laws to remedy unequal marketplace bargaining power? The private attorney

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\(^{55}\) See, e.g., Henretta, supra note 53, at 137 (Minnesota rate regulation), 153–54 (Minnesota mortgage moratorium).

\(^{56}\) MINN. STAT. § 8903 (1913 & Supp. 1917).

\(^{57}\) 1963 Minn. Laws 1533; 1973 Minn. Laws 420.

\(^{58}\) 1973 Minn. Laws 296.

general statute, the primary vehicle for private enforcement of consumer protection laws, was radically reinterpreted in 2000, so I focus the analysis on this development.

III. JUDICIAL CREATION OF THE PUBLIC BENEFIT LIMIT FOR STATUTORY FRAUD ACTIONS

The Minnesota Supreme Court charted a new course for use of the private attorney general statute in a 2000 decision, Ly v. Nystrom. This section analyzes the Ly decision and a subsequent Minnesota Supreme Court decision on the subject, Collins v. Minnesota School of Business.

A. Ly v. Nystrom

Hoang Mihn Ly immigrated to the United States from Vietnam in 1981 at the age of 32. He had almost no formal education in Vietnam and neither spoke nor read much English. Mr. Ly worked as a dishwasher and other jobs “neither requiring nor providing any business or management experience.” The defendant in the case, Kim Nystrom, also was from Vietnam but was fluent in English. The parties had become friends when both worked at a local restaurant.

In 1996, Ms. Nystrom offered to sell to Mr. Ly a restaurant named Chin Yung that she owned in Shakopee, Minnesota. At the core of the case was Ms. Nystrom’s oral statement to Mr. Ly that Chin Yung had gross revenues of $25,000 to $30,000 per month and monthly profits of $6,000 to $7,000. In truth, the restaurant’s monthly sales were only $6,000 to $7,000, or roughly the amount the defendant represented as the business’s monthly profit. During the process of selling the restaurant, Ms. Nystrom repeatedly told Mr. Ly that he did not need a lawyer, and that she

60. 615 N.W.2d 302 (Minn. 2000).
61. 655 N.W.2d 320 (Minn. 2003).
62. Ly, 615 N.W.2d at 305.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id. at 306.
2006]

GOLIATH HAS THE SLINGSHOT

would not lie to him because they were friends.\(^{70}\) When Mr. Ly and
his family first assumed control of the restaurant and complained
to Ms. Nystrom about the lack of sales and other problems, she
responded that this may be his fate and that he should see a
fortune teller.\(^{71}\) When Mr. Ly fell behind in his loan payments to
Ms. Nystrom, she threatened that his credit would be ruined and
his home would be seized.\(^{72}\) When Ms. Nystrom, accompanied by
an insurance agent, asked Mr. Ly to execute documents allowing
her to take back control of the restaurant due to Mr. Ly’s failure to
make payments, Mr. Ly indicated that he wanted a lawyer to
evaluate the papers she was asking him to sign.\(^{73}\) Ms. Nystrom
responded that failure to sign the documents by the next day would
lead the police to take control of the restaurant, and that if Mr. Ly
tried to get in, “they will lock you up.”\(^{74}\)

Mr. Ly eventually agreed to return control of the restaurant to
Ms. Nystrom.\(^{75}\) Ms. Nystrom gave Mr. Ly a check for $2,500,
allegedly to help him support his family, but she immediately
stopped payment on the check.\(^{76}\) The same day Ms. Nystrom
assumed control of the restaurant from Mr. Ly, she sold it to
another buyer.\(^{77}\)

Mr. Ly filed suit against Ms. Nystrom alleging violations of
common law fraud and the CFA.\(^{78}\) The trial court found for Mr. Ly
on the common law fraud claim and awarded $25,000 in damages.\(^{79}\)
The trial court, however, found the CFA inapplicable because Ms.
Nystrom’s statements were not made to the public at large and did
not have the potential to deceive or ensnare others.\(^{80}\) The court of
appeals upheld this decision, also finding no violation of the CFA
because Mr. Ly was not a “consumer.”\(^{81}\)

The Minnesota Supreme Court separated the legal issues into
two distinct matters.\(^{82}\) It reversed the lower court rulings as to the

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70. Id. at 305.
71. Id. at 306.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id. at 306–07.
78. Id. at 307.
79. Id.
80. Id.
81. Id. at 307; Ly v. Nystrom, 602 N.W.2d 644, 647 (Minn. Ct. App. 1999).
82. Ly, 615 N.W.2d at 307.
CFA. The court noted that the CFA was part of a wave of state statutory fraud laws enacted to “prohibit deceptive practices and to address the unequal bargaining power often present in consumer transactions.” The court also cited its prior statements that the CFA should be liberally construed in favor of protecting consumers and that the CFA reflected “a clear legislative policy encouraging aggressive prosecution of statutory violations.” Relying on these broad principles and past decisions, including the fact that the Minnesota State Legislature had overturned one of its prior decisions restrictively interpreting the CFA, the court reversed the lower courts and held that deceptive practices in an “isolated one-on-one transaction” in a business context were actionable under the CFA.

Ms. Nystrom, however, prevailed in the case. The Court looked to the private attorney general statute to insert limitations it found missing under the CFA. The court noted that the favorable remedies in the private attorney general statute “raised concern about how broadly the legislature intended the statute to be applied, particularly as it relates to common law fraud actions and recovery of attorney fees.” In particular, the court noted the use by the Minnesota Court of Appeals of Justice Simonett’s dissent in Church of the Nativity of Our Lord v. WatPro, Inc., a previous decision interpreting the private right of action in the context of a CFA claim. In that case, a church was held to have a right to bring a CFA action after being deceived in the purchase of building construction services. Justice Simonett, in his Church of Nativity dissent, proposed a four-part test for limiting the award of attorney fees in CFA cases under the private attorney general statute. One of these four requirements was that the “plaintiff’s lawsuit has been

83. Id. at 310.
84. Id. at 308.
85. Id. (citing State v. Philip Morris, Inc., 551 N.W.2d 490, 495–96 (Minn. 1996)).
86. Id. at 310.
87. MINN. STAT. § 8.31, subdiv. 3a (2004).
88. Ly, 615 N.W.2d at 314.
89. Id. at 311.
90. Id. at 312 (citing Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1 (Minn. 1992)).
91. Id. at 311 n.16.
of benefit to the public."\textsuperscript{93}

Without adopting the Simonett dissent, the court in \textit{Ly} announced a “public benefit” limit on use of the private attorney general statute, restricting it to only “those claimants who demonstrate that their cause of action benefits the public.”\textsuperscript{94} The legal support for this holding was the court’s finding that the private attorney general statute provided individual recourse only if the cause of action would also have been within the attorney general’s authority to bring suit.\textsuperscript{95} The court stated that “the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws must define the limits of the private claimant under the statute” and that “[s]ince the Private AG Statute grants private citizens the right to act as a ‘private’ attorney general, the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws must define the limits of the private claimant under the statute.”\textsuperscript{96} Both statute and case law limit the attorney general’s authority to matters of public interest, the court reasoned, and thus the private right of action under section 8.31 should be so limited.\textsuperscript{97}

Rather than remand Mr. Ly’s case to the trial court for determination as to whether he met this newly imposed requirement, the court held as a matter of law that his case had no public benefit, and thus upheld dismissal of his CFA claim.\textsuperscript{98} The only fact relied on to support this conclusion was that Mr. Ly “was defrauded in a single one-on-one transaction in which the fraudulent misrepresentation, while evincing reprehensible conduct, was made only to appellant.”\textsuperscript{99}

The dissenters, Justices Page and Gilbert, stressed that section 8.31 unambiguously states that “any person injured by a violation of the laws referred to in subdivision 1 may bring a civil action,” with the CFA specifically enumerated under subdivision 1.\textsuperscript{100} The dissent noted that an unambiguous statute should be given its plain meaning, and observed that there is no ambiguity in the language
of the private attorney general statute allowing adoption of a public benefit limitation on suits for CFA violations. Justice Gilbert also argued that any successful prosecution of the CFA “has benefited the public by attempting to prevent the fraudulent business conduct of that particular defendant and alleviating, economically and in terms of time and preparation for investigation and litigation, the burden on the attorney general’s office to enforce the laws.” Thus, to the extent that the court read a “public benefit” requirement into the law, Justice Gilbert argued for finding that a successful prosecution of the CFA met this requirement.

B. Collins v. Minnesota School of Business

In the only post-Ly decision by the Minnesota Supreme Court applying the public benefit limit, Collins v. Minnesota School of Business, the court affirmed the appellate court’s reversal of the trial court determination that the plaintiffs had not met the requirement of showing a public benefit. The plaintiffs in Collins were eighteen former trade school students who alleged that the school had made false and misleading statements in violation of both the FSAA and the CFA, inducing them to enroll in a sports medicine program. The alleged misrepresentations were made in broadcast advertisements, in sales presentations to prospective students, and in brochures. The plaintiffs accepted a Rule 68 offer of settlement that included an award of “any costs and disbursements allowed by the District Court.” The trial court disallowed attorney’s fees under the private attorney general statute, finding that plaintiffs’ suit did not show a public benefit because “only a relatively small group of persons were injured by [the defendant’s] fraudulent activities.”

The Minnesota Supreme Court awarded attorney’s fees on finding that the suit provided a public benefit. The court held

101. Id. (Page, J., dissenting in part).
102. Id. at 316 (Gilbert, J., dissenting).
103. Id.
104. 655 N.W.2d 320 (Minn. 2003).
105. Id. at 322.
106. Id.
107. Id.
108. Id. at 330.
109. Id.
that the trial court erred by focusing on the number of people injured as opposed to the breadth of the sales representations, which were directed “to the public at large.” The court applied the public benefit test to the FSAA claim, as well as the CFA claim.

IV. THE NARROW CONSTRAINTS OF “PUBLIC BENEFIT” AS APPLIED IN SUBSEQUENT DECISIONS

The Minnesota Supreme Court may (or may not) have intended Ly as a scalpel for use in selectively weeding out cases at the margin of public concern, but whatever the court’s initial intent, its decision has been wielded as a scythe by the lower state courts and the federal courts to dismiss statutory fraud claims by individuals.

A. Results of Applying the Public Benefit Limit

This section looks at the outcome of statutory fraud or topical consumer protection law cases that imposed the public benefit limit after Ly. The first section analyzes cases that expressly apply the public benefit limit; the second subsection briefly notes cases decided under statutory fraud laws permitting plaintiff claims but not applying the public benefit limit.

1. Decisions Expressly Applying the Public Benefit Limit

There is almost a perfect correlation between the outcome of cases expressly applying the public benefit limit and whether the plaintiff was an individual (or were family farmers), on the one hand, or a class or group of plaintiffs on the other hand. Suits by the former were almost uniformly dismissed as not in the public interest; suits by the latter generally were found to be in the public benefit.

110. Id.
111. Id.
112. Although Minnesota has three primary statutory fraud laws, the case law applying the public benefit test concerns the CFA and, to a lesser extent, the FSAA. The third statutory fraud law, the UDTPA, has been repeatedly interpreted not to allow for a right of action under the private attorney general statute, and thus “public benefit” is not at issue. See supra note 35.
a. Suits by Individuals

The application of the public benefit limit by courts construing Minnesota law has resulted in the rejection of every consumer protection claim brought solely by an individual natural person or by family members, including family farmers also suing with a related family farm corporation. Courts in twelve cases have expressly considered whether such plaintiffs asserting a claim under the statutory fraud laws met the public benefit limitation enunciated in *Ly*. In every case, the court dismissed the claim. The result has been the same regardless of the court deciding the matter, with one decision of the United States Court of Appeals for the Eighth Circuit, three Minnesota Court of Appeals decisions, and eight decisions of the United States District Court for the District of Minnesota (“federal district court”) dismissing the plaintiffs’ statutory fraud claims. The same fate occurred with suits filed by individual plaintiffs in two cases where the court

113. See note 115 infra.
114. See note 115 infra.
analyzed public benefit in the context of topical consumer protection laws enforced under the private attorney general statute.\(^\text{116}\)

The following three cases, involving plaintiffs who were an individual, a married couple, and family farmers, exemplify the exclusionary reach of the public benefit limit:

- **Dickson v. Lundquist.**\(^\text{117}\) Robert and Phyllis Dickson bought a Stratos boat from Riverview Sports & Marine in 1999.\(^\text{118}\) The Dicksons first encountered Riverview at a boat show where, according to the Dicksons, they were given a brochure listing the boat as a “promotional.”\(^\text{119}\) They later visited the Riverview dealership and were again given the brochure.\(^\text{120}\) The Dicksons allege that they were told the boat had only been used for promotional purposes.\(^\text{121}\) In fact, the boat had been previously sold and registered in North Carolina and returned to the dealer because the prior owner was dissatisfied with it.\(^\text{122}\) Riverview had purchased it from the manufacturer after the return.\(^\text{123}\) A Riverview salesperson informed the Dicksons that one other person was interested in the boat.\(^\text{124}\) The Riverview owner stated that he was unsure how the boat was listed in the brochure, and the brochure was not retained by the Dicksons.\(^\text{125}\) The trial court held that the Dickson’s evidence was “vague” and “questionable,” and found no public benefit allowing for a CFA claim.\(^\text{126}\)

The Court of Appeals upheld the trial court ruling as not clearly erroneous and found that “[t]here is no clear proof of misrepresentation toward the public at large.”\(^\text{127}\)


\(^{118}\) \textit{Id.} at *1.

\(^{119}\) \textit{Id.}

\(^{120}\) \textit{Id.}

\(^{121}\) \textit{Id.}

\(^{122}\) \textit{Id.}

\(^{123}\) \textit{Id.}

\(^{124}\) \textit{Id.}

\(^{125}\) \textit{Id.}

\(^{126}\) \textit{Id.} at *2. The procedural posture in Dickson was similar to Collins. \textit{See supra} Part III.B. The plaintiffs had accepted a Rule 68 settlement offer and were litigating their attorney’s fee claim. \textit{Id.} at *1.

\(^{127}\) \textit{Id.} at *2.
rejected as hypothetical the Dicksons’ argument that this would allow sellers to make false statements in serial fashion and escape CFA liability. The Dicksons also argued that Riverview’s false statements were broadly distributed because they were reiterated to the bank financing the purchase, at least one other possible customer, and the Department of Motor Vehicles. The court acknowledged these facts, but found that it “still cannot find the requisite showing of fraudulent inducement or public benefit under Ly and Collins.”

- **Zutz v. Case Corp.** The Zutz family owned and operated a farm in northwestern Minnesota. In 1998, they obtained an “air drill” manufactured by Case Corporation that mixed soil, seed, fertilizer, and herbicide for crop planting. According to the Zutz family, Case’s promotional material for the product and the dealer both stated that the air drill would work on fields treated with pre-emergent herbicide. Plaintiffs experienced significantly poorer yields using the air drill for three years, 1998 through 2000. During this time, the Zutz family worked with Case and the dealer to solve the problem and received a larger Case air drill for the 2000 planting season. After the 2000 crops again showed poor yields, the Zutz family hired an agronomist, who ran dye tests and determined that the air drill failed to properly mix and distribute the inputs in soil treated with pre-emergent herbicide.

Case moved to dismiss the plaintiffs’ common law fraud and CFA claims. The federal district court held that the Zutz family had properly pleaded common law fraud but dismissed the CFA claim for failure to show public benefit. As to the public distribution of the misleading claims, the court found that the

128. *Id.* at *3.
129. *Id.*
130. *Id.* The Court of Appeals also held, without citation to the law regarding required proof for showing injury under the private attorney general statute, that the Dicksons had to show that the false representation regarding the boat’s prior ownership and use must have “by itself” induced them to purchase the boat. *Id.*
132. *Id.* at *1.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at *2.
139. *Id.* at *6.*
“case falls between the facts of *Ly* and... *Collins,*” and noted the representations were made in promotional materials that were publicly available. The court concluded that “[t]o determine whether a lawsuit is brought for the public benefit the Court must examine not only the form of the... misrepresentation, but also the relief sought by the plaintiff.” The court found no public benefit because the Zutz family sought only damages for their crop loss, and the court held there can be no public benefit when the plaintiff seeks only damages for their losses.

* Scally v. Norwest Mortgage.* Virginia Scally sought a home refinancing loan from Wells Fargo. From May 1998 through November 1999 Ms. Scally engaged in a protracted interaction with Wells Fargo loan officer Donald Myhre. Ms. Scally alleged the following: that Mr. Myhre orally promised her a six-percent loan rate; that he failed to tell her that her loan application was denied due to an insufficient appraisal value; that he told her to stop making payments on her current loan; and that she attended what she thought was a closing with Mr. Myhre on the loan in September 1999, but which Mr. Myhre considered only a “dry closing” at which the client signs documents for use at a later, final closing on the loan. As a result of being told to stop making payments on her current home loan, Ms. Scally’s loan went into foreclosure. Mr. Myhre personally, and ultimately Wells Fargo, made reinstatement payments on the foreclosed loan. Ms. Scally contended that the missed mortgage payments and foreclosure caused substantial harm to her credit and resulted in repeated denials of credit by other lenders. After discovering Myhre’s conduct, Wells Fargo terminated his employment.

The Minnesota Court of Appeals reversed summary judgment for Wells Fargo on numerous claims, but it held that the trial court

140. *Id.* at *4.
141. *Id.*
142. *Id.*
144. *Id.* at *1. Ms. Scally originally sought the loan from Norwest Mortgage, which later became Wells Fargo Mortgage. *Id.* at *1 n.1.
145. *Id.* at *1.
146. *Id.* at *1–2.
147. *Id.* at *2.
148. *Id.*
149. *Id.*
150. *Id.*
properly dismissed the CFA claim for failure to show public benefit. The court determined that these facts fit squarely within the holding of *Ly* because Scally “engaged in a one-on-one transaction with Myhre.” The court rejected the argument that allowing a CFA claim would be of benefit to the public by providing incentives to lenders like Wells Fargo to better supervise its loan officers. The court focused on the particular circumstances of the case and noted that Wells Fargo had fired Myhre so that he was “no longer in any position to harm the public.” Borrowing a phrase from a federal district court case dismissing a CFA claim, the court held that Ms. Scally had not shown more than a “metaphysical potential” of public benefit from her suit.

*b. Class Actions and Joinder Cases*

In the few CFA cases that expressly apply the public benefit limit brought in a class action or by multiple plaintiffs with joined claims, the plaintiffs have prevailed. As noted above, the Minnesota Supreme Court allowed eighteen students to proceed with joined FSAA and CFA claims in *Collins*. In two state district court cases, the court has permitted class action CFA claims and determined that the plaintiffs’ case had a public benefit. The same result has occurred when the public benefit limit has been applied to statutes other than the CFA. In three class action or joinder cases involving the application of Minnesota Statutes chapter 327C, which regulates mobile home parks, the Minnesota Court of Appeals has found a public benefit under *Ly* and allowed the claim to proceed under the private attorney general statute.

151. *Id.* at *7.
152. *Id.*
153. *Id.*
154. *Id.* (citing Behrens v. United Vaccines, Inc., 228 F. Supp. 2d 965, 971 (D. Minn. 2002)).
c. Business or Organizational Plaintiffs

Courts have rejected under the public benefit limit most, but not all, claims where the plaintiff is a business or organization rather than a natural person or family farm. The federal district court refused to dismiss a suit by an auto glass repair company alleging CFA violations by an insurer.\textsuperscript{159} The United States Court of Appeals for the Federal Circuit upheld a federal district court decision that found public benefit in a false advertising claim brought by a business against a competitor, but held that the purpose of the private attorney general statute would not be furthered by awarding attorney’s fees.\textsuperscript{160} The Minnesota Court of Appeals allowed a suit under the private attorney general statute for enforcement of mobile home park regulations.\textsuperscript{161} In the remaining six cases with a business plaintiff, the court found no public benefit and dismissed statutory fraud claims.\textsuperscript{162}

d. Independent Glass Association v. Safelite Group\textsuperscript{163}

The federal district court allowed an FSAA claim by an individual to proceed in a case brought jointly by a trade association for auto glass repair companies, a Minnesota resident who had obtained insurance proceeds for auto glass repairs, a similarly situated Nebraska resident and an anonymous independent insurance adjuster.\textsuperscript{164} The defendant in the case,
Safelite, was a third-party administrator for insurance companies. The trade association and the Minnesota resident alleged that Safelite violated the FSAA and the CFA by providing to insured consumers false and misleading information about independent glass repair businesses who contact Safelite as part of obtaining authorization for glass repairs. The court held that the trade association lacked standing to bring the statutory fraud claims, but refused to grant judgment on a motion to dismiss for lack of public benefit as to the statutory fraud claims by the Minnesota resident. The court determined that this individual plaintiff may be able to show his claim benefited the public by introducing competition into the marketplace and ensuring the provision of more accurate information to insured consumers with auto glass repair claims.

2. Statutory Fraud Decisions Permitting Plaintiffs’ Claims But Not Addressing the Public Benefit Limit

The majority of both federal and state cases deciding statutory fraud claims have done so without reference to the public benefit limit. After the Ly decision, courts in sixteen cases have allowed FSAA or CFA claims to proceed or upheld FSAA or CFA judgments for the plaintiffs. The breakdown of these sixteen cases by type of plaintiff is as follows: eight were class actions, putative class actions or multiple plaintiffs with joined claims; five were business

165. Id. at *1.
166. Id. at *3.
167. Id. at *4–6.
168. Id. at *6. The court allowed the Minnesota resident plaintiff’s FSAA claim to proceed, but dismissed the CFA claim as outside the scope of the CFA. Id. at *6–8. The other two individual plaintiffs did not allege statutory fraud claims. Id. at *6 n.5 and *8 n.7. The court also allowed an UDTPA claim by the Minnesota resident under the private attorney general statute, but did not discuss the contrary case law holding that the private attorney general statute does not extend to UDTPA claims. Id. at *8. See supra note 35 and accompanying text. In a later decision, the court dismissed the statutory fraud claims, finding that the plaintiff could not prove he was injured or likely to be damaged. Indep. Glass Ass’n v. Safelite Group, Inc., No. 05-238, 2005 WL 3079084, at *2 (D. Minn. Nov. 16, 2005).
169. See infra notes 170–172, 304 and accompanying text.
plaintiffs, primarily asserting statutory fraud claims against competitors or other businesses; and only three were individual plaintiffs.

In the sole permitted case brought by an individual consumer, Freeman v. A & J Auto MN, Inc., the Minnesota Court of Appeals reversed the trial court’s dismissal of a CFA claim. The plaintiff in that case alleged that a dealer of used cars told her that the car had a “salvage branded” title because of a prior theft when it was really because the car had been declared a total loss as a result of an accident. Kivel v. ABN AMRO Mortgage Group, Inc., was filed after the statutory fraud claims in a previous suit against the mortgage broker were dismissed for lack of public benefit. The court allowed claims that a mortgage lender had made false statements related to the processing of the plaintiff’s loan application. In Ponzo v. Affordable Homes of Rochester, the Minnesota Court of Appeals upheld the plaintiff’s CFA claim because the defendant did not raise the public benefit issue before the trial court. In dicta, the court noted that a one-on-one transaction such as the conduct at issue in the case is not actionable.
in a private right of action under the CFA.\textsuperscript{178}

Most of the business cases involved suits between competitors, including several federal district court decisions applying the Lanham Act with ancillary Minnesota statutory fraud claims. In \textit{Ott v. Target Corp.}, for example, the court treated an FSAA claim within the context of the Lanham Act and held that a doll manufacturer had raised a sufficient FSAA claim to survive summary judgment against makers and sellers of alleged knock-off products.\textsuperscript{179} In \textit{Thomas & Betts Corp. v. Leger}, the plaintiff was a manufacturer of waste oil furnaces who sued a former distributor for selling modified furnaces as new and for representing himself as a distributor after his termination.\textsuperscript{180} The Minnesota Court of Appeals upheld a trial court judgment for the manufacturer, finding that there was sufficient evidence that the distributor had violated the CFA and allowing a partial award of attorney’s fees.\textsuperscript{181}

\textbf{B. Rationale for Decisions Finding No Public Benefit}

There are two separate rationales underlying the result in the cases dismissed for lack of a public benefit. First, courts have excluded CFA claims arising from the interaction between one buyer and one seller unless the plaintiffs can establish that the specific alleged deceptive representations were disseminated to, or the conduct was perpetrated on, the broader public. This rationale is generally consistent with the language used by the Minnesota Supreme Court in the \textit{Ly} and \textit{Collins} decisions.\textsuperscript{182}

The federal courts have adopted a formulation of the \textit{Ly} public benefit standard which, in effect, almost categorically excludes statutory fraud claims by individuals. In \textit{Davis v. U.S. Bancorp}, the Eighth Circuit considered a CFA claim by an individual, Anitra Davis, who alleged that U.S. Bancorp made misrepresentations in the course of attempting to arrange a home mortgage for her.\textsuperscript{183} Ms. Davis argued that she met the public benefit limitation "because her experience with U.S. Bank reflects its broad treatment

\begin{itemize}
\item \textsuperscript{178} Id.
\item \textsuperscript{179} 153 F. Supp. 2d 1055, 1069 & n.10, 1074 (D. Minn. 2001).
\item \textsuperscript{181} Id. at *15.
\item \textsuperscript{182} \textit{Ly v. Nystrom}, 615 N.W.2d 302, 310 (Minn. 2000); \textit{Collins v. Minn. Sch. of Bus., Inc.}, 655 N.W.2d 320, 329–30 (Minn. 2003).
\item \textsuperscript{183} 383 F.3d 761, 764 (8th Cir. 2004).
\end{itemize}
The court rejected this claim, stating:

That argument, however, is the very foundation for the limitation elaborated in *Ly*, 615 N.W.2d at 314. The class of plaintiffs under the private attorney general statute would be limitless if we assumed that one individual’s negative experience with a company was necessarily duplicated for every other individual and on that basis treated personal claims as benefiting the public. Such an assumption might well render nearly every private suit alleging fraud a public benefit case. Davis had a private transaction with U.S. Bank in which poor communication and confusion on both sides resulted in the cancellation of a purchase agreement. But Davis can complain only about her individual experience with U.S. Bank, and she has not presented evidence that misrepresentations were made to the public at large.

Federal district court cases have summarized the public benefit limit as a near-blanket exclusion of individual claims, with statements such as: “the CFA does not provide a private right of action to individual consumers in ‘one-on-one’ transactions.”

Also, “[g]enerally, the Consumer Fraud Act does not provide a private right of action to individual consumers. In limited circumstances, however, private remedies may be available through the Private Attorney General Act.”

A second rationale for these decisions is not readily apparent from a reading of the *Ly* and *Collins* decisions. This rationale focuses on the relief sought by the plaintiff rather than whether the defendant’s representation or conduct was directed to the general public. In these cases, courts dismissed CFA claims because the plaintiff could not obtain relief to benefit the public by stopping

184. *Id.* at 768.
185. *Id.*
continued deceptive conduct by the defendant, even though there was no dispute in many cases that the alleged deceptive representations or conduct was widely disseminated. In several cases, the court held that there was no public benefit because the defendant withdrew the product and accompanying sales program from the market by the time of the court’s decision. Courts have also found that the plaintiff’s failure to request injunctive relief, seeking instead only damages, is a basis for finding no public benefit.

The federal district court found that no CFA claims are possible in a wrongful death suit in Minnesota, even if based on widely disseminated deceptive sales representations, because no public benefit can be shown when Minnesota law limits wrongful death actions to the recovery of pecuniary loss for surviving family members. Similarly, in a decision following a reversal and remand by the Minnesota Supreme Court, the Minnesota Court of Appeals held that the plaintiff’s suit in *Wiegand v. Walser Automotive Group* provided no public benefit because the Attorney General had already reached a settlement with the defendant that provided for both injunctive relief and arbitration rights for aggrieved consumers.

V. THE PUBLIC BENEFIT LIMIT OVERTURNED PRIOR CASE LAW

The public benefit limit contradicts long-standing notions about, and use of, the private right of action to enforce violations of Minnesota statutory fraud laws. The court in *Ly* did not acknowledge this prior case law. Instead, the *Ly* decision stated

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191. No. A05-1911, 2006 WL 1529511, at *3 (D. Minn. June 6, 2006) (stating that “there is no longer any public benefit to protect because the attorney general’s office has already intervened to correct the complained-of sales activity and provided a remedy for aggrieved consumers”). *See also* *Tuttle*, 2003 WL 1571584, at *6.
that its ruling was consistent with lower court decisions under the private attorney general statute, and decisions from courts in other states. These decisions, however, stand for very different propositions.

A. Prior Case Law Involving Claims In One-On-One Transactions

Prior to Ly, individual plaintiffs routinely used the CFA and FSAA to obtain recoveries in situations of “one-on-one transactions.” Examples of reported decisions by the Minnesota Court of Appeals in cases of this nature include the following: an individual who hired a household goods moving company; a family that made an investment at a bank; a contractor who purchased a “garage kit”; an individual who bought a horse; and a farmer who bought grain silos. The Ly decision made no mention of these or numerous other similar cases whose result it almost surely overturned.

In addition to reaching a different result, prior cases employed legal principles and presumptions for the application of the private attorney general statute that are directly contrary to the public benefit limit doctrine. Earlier cases presumed that the primary reason for passage of the private attorney general statute was to allow, not exclude, suits in individual, one-on-one transactions involving small sums of money. In a 1998 federal district court decision, Kocienba v. G.D. Searle & Co., the plaintiffs were a married couple seeking damages for the wife’s sterility resulting from use of

194. Kronebusch, 488 N.W.2d at 490 (farmer purchasing grain storage silos); Elgharbawi, 483 N.W.2d at 490 (individual hired a household goods moving company); LeSage, 409 N.W.2d at 536 (family making an investment); Eager, 392 N.W.2d at 691 (contractor purchasing a “garage kit”); Yost, 373 N.W.2d at 826 (individual purchasing a horse). The same is true of cases brought by individuals enforcing topical consumer protection laws enforceable through the private attorney general statute. See, e.g., infra notes 268–271 and accompanying text (discussing the Minnesota Supreme Court decision in Jacobs v. Rosemount Dodge-Winnebago South, 310 N.W.2d 71 (Minn. 1981) (mobile home owners have claim for violation of topical consumer protection law enforceable as per se violation of the CFA).
the defendant’s contraceptive device.\textsuperscript{195} The plaintiff asserted CFA and FSAA claims, among other causes of action.\textsuperscript{196} The court rejected an argument by defendant Searle that the private attorney general statute is limited to situations of “direct buyer-to-seller sales in cases which occur too quickly or on too small a scale to bring the attorney general’s enforcement powers to bear.”\textsuperscript{197} The court cited, in part, a Minnesota Court of Appeals decision, \textit{Liess v. Lindemyer}, in agreeing with Searle that “[i]t is without doubt that a primary purpose in adopting the private attorney general provisions of the Consumer Fraud Act was to encourage lawyers to accept cases where damages may be so small as to erect ‘financial barriers to the vindication of a plaintiff’s right.’”\textsuperscript{198} The court held that suits under the private attorney general statute should not be limited only to these small matters that were its “primary purpose.”\textsuperscript{199} Similarly, in a 1992 Minnesota Court of Appeals decision, \textit{Kronebusch v. MVBA Harvestore System}, the court allowed recovery under the private attorney general statute in a FSAA claim by a farmer involving his purchase of grain storage silos, even though the court agreed that “the primary purpose of the statute is to encourage lawyers to accept cases where nominal damages erect financial barriers to litigation.”\textsuperscript{200}

The courts in \textit{Kociemba} and \textit{Kronebusch} were struggling with the legal issue of whether the private attorney general statute extended beyond individual marketplace transactions involving small sums. The public benefit limit turns this earlier framework on its head, finding that the private attorney general statute has the opposite purpose of precluding a private right of action in small, individual transactions.

The public benefit limit also represents a break from long-standing case law holding that establishing liability for common law fraud is sufficient to sustain a CFA claim in a private right of action. In the 1985 case \textit{Yost v. Millhouse},\textsuperscript{201} the Minnesota Court of Appeals found that a seller of a horse misrepresented whether the horse was

\begin{itemize}
\item \textsuperscript{195} 707 F. Supp. 1517 (D. Minn. 1989).
\item \textsuperscript{196} \textit{Id.} at 1523 (the other causes of action included “defective design, defective manufacture, failure to warn, [and] failure to test”).
\item \textsuperscript{198} \textit{Id.} (citing Liess v. Lindemyer, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984)).
\item \textsuperscript{199} \textit{Id.}.
\item \textsuperscript{200} 488 N.W.2d 490, 494–95 (Minn. Ct. App. 1992).
\item \textsuperscript{201} 373 N.W.2d 826 (Minn. Ct. App. 1985).
\end{itemize}
registered and the court awarded $50 in damages under the plaintiff’s common law fraud claim. The court held that as a result of finding for the plaintiff on common law fraud: “[a]s a matter of law, the fraud constitutes a violation of the Consumer Protection Act for which reasonable attorney’s fees are recoverable.” Ly held the opposite—that the plaintiff had no right to bring a private right of action to recover damages for a violation of the CFA even though the defendant had been found liable under common law fraud.

B. Public Benefit Limits Imposed in Other Cases and Jurisdictions

The Court in Ly noted three Minnesota Court of Appeals decisions, as well as cases from other jurisdictions with similar court-imposed requirements. Each of the cited decisions counsels rejection, not adoption, of the public benefit limit.

1. Minnesota Court of Appeals Cases Cited in Ly

The Court in Ly cited three Minnesota Court of Appeals cases that it read as requiring “a showing of public benefit to award attorney fees under the Private AG Statute.” The reasoning and result of these cases is utterly incompatible with the public benefit limit for the same three reasons in each case: (1) the case would have been dismissed under the public benefit limit; (2) the court awarded or increased attorney’s fees under the private attorney general statute because doing so was necessary to promote claims by individuals, including possible plaintiffs with nominal damages; and (3) the court used “public interest” as a factor to determine

202. Id. at 830–31.
203. Id. at 831.
205. Id. at 312. The Court also cited two federal district court cases as support for imposing the public benefit limit. See id. at 312 n.18. In Cooperman v. R.G. Barry Corp., the court was interpreting the reach of the CFA itself, not the private attorney general statute. 775 F. Supp. 1211 (D. Minn. 1991). The court held that an employment dispute did not occur “in connection with the sale of any merchandise,” as required to prove a CFA claim. Id. at 1213 (citing MINN. STAT. § 325F.69 (2004)). Given the Ly court’s sharp distinction between the requirements for liability under the CFA and the scope of the private attorney general statute, Cooperman is irrelevant to the issue before the Court in Ly. The other case cited by the court, Martin v. Hancock, was literally a dog bite case decided under federal civil rights law with no discussion remotely related to excluding all one-on-one transactions from a private right of action. 466 F. Supp. 454 (D. Minn. 1979).
the amount of the fee award, not as a precondition to a private action to enforce statutory fraud laws.

In Liess v. Lindemyer, the plaintiff was an individual who brought a CFA claim relating to the sale of her home, a typical one-on-one transaction not actionable under the public benefit limit. Liess prevailed at trial and was awarded $6,787. Ms. Liess requested over $12,000 in attorney’s fees but was awarded only $2,500 by the trial court on the theory that this amount represented a fair proportion of the damage award. On appeal by Liess, the Minnesota Court of Appeals reversed the attorney’s fee award and stated that hourly attorney’s fee awards were appropriate even if the fees exceeded the amount of the damage award. The court held that the purpose of the private attorney general statute was to “eliminate financial barriers to the vindication of a plaintiff’s rights, and the award should provide incentive for counsel to act as private attorney general.” The court quoted extensively from a case decided under federal consumer credit laws that noted the importance of encouraging lawyers to take cases even if the damage awards are small. The court also mentioned that on remand the trial court should consider the public interest benefit of the suit. This statement was made in the context of a remand to increase the amount of the attorney’s fee for an individual plaintiff, not to preclude suits such as the one brought by Liess.

In Wexler v. Brothers Entertainment Group, Inc., a father brought a CFA claim against the operator of a pay-per-call telephone trivia game used by his son. The trial court granted summary judgment to the defendant and Wexler appealed. The Minnesota Court of Appeals reversed, finding fact issues as to liability for $11.89 in phone charges. The court noted that the attorney general had entered into a settlement with the defendant for comprehensive injunctive relief, but held that the issue of

207. Id.
208. Id.
209. Id. at 558.
210. Id. (citations omitted).
211. Id. (citing Bryant v. TRW, Inc., 689 F.2d 72 (6th Cir. 1982)).
212. Id.
214. Id.
215. Id. at 222.
whether Wexler could obtain further relief should be reserved until after trial. The court noted in dicta that if Wexler prevailed on remand he was entitled to attorney’s fees, and cited Liess for the proposition that the amount of that award should reflect the public purposes of the statute. Nothing in this ruling upholding the right to bring a CFA claim for less than $12 after the attorney general has reached a settlement with the defendants supports the Ly court’s public benefit limit on bringing suit under the private attorney general statute.

Finally, in Untiedt v. Grand Laboratories, Inc., a farmer sued a vaccine manufacturer after use of the vaccine resulted in health problems for the farmer’s cattle and reduced dairy production. These facts are almost identical to the recent federal district court decision in Behrens v. United Vaccines, Inc., in which the court dismissed a CFA claim by a mink farmer as failing to meet the public benefit limit. The jury found for the Untiedts, awarding over $1 million in damages, and the court thereafter awarded attorney’s fees to the Untiedts as the prevailing plaintiff on the CFA claim. In upholding the award of attorney’s fees, the court of appeals cited Liess regarding the need for providing incentives to counsel to take such cases, and that the amount of the award should include consideration of the public interest. The court found that the trial court’s award of fees in this case was proper “because the agricultural community has been particularly susceptible to misrepresentation and the possibility of an award would provide an incentive for experienced litigators to take on similar cases.”

2. Other States With Public Benefit Limits

The court in Ly also stated that “[o]ther state courts have similarly held that a public purpose must be demonstrated.” The two decisions cited from other state courts were Lightfoot v.
MacDonald\(^{224}\) in Washington and Brody v. Finch Univ. of Health Sciences\(^{225}\) in Illinois. The experience of these states, however, provides guidance on the difficulty of applying and sustaining the public benefit limit rather than support for such a judicially imposed rule.

The State of Washington has the most extensive history with a public benefit limit and is the only other state to directly tie the public benefit test for state statutory fraud actions to the authority of the attorney general of the state. In Lightfoot v. MacDonald, the Washington Supreme Court held “that an act or practice of which a private individual may complain must be one which also would be vulnerable to a complaint by the Attorney General” to support a private suit under the Washington Consumer Protection Act.\(^{226}\) In 1980, just four years after Lightfoot was decided, the Washington Supreme Court affirmed the public interest requirement, but abandoned the association between the reach of the private right of action and the authority of that state’s attorney general.\(^{227}\) In Anhold v. Daniels, the court observed that “[t]he ‘Attorney General’ test for sufficiency of public interest appears to have been little utilized or understood and apparently has yielded conflicting results.”\(^{228}\) Since Anhold, the Washington courts have continued to struggle with applying the judicially imposed “public interest” limit. In Hangman Ridge Training Stables v. Safeco Title Insurance Co., decided six years later in 1986, the Washington Supreme Court revisited the issue and substituted a five-element test for the three-factor test articulated in Anhold.\(^{229}\) A series of commentators have repeatedly urged the reformation or abandonment of the Washington public interest test in its various permutations.\(^{230}\) In

\(^{224}\) 544 P.2d 88 (Wash. 1976).


\(^{226}\) 544 P.2d at 90. The Washington Supreme Court relied on specific language in the purpose statement of the Washington Consumer Protection Act and the incorporation of a reference to the Federal Trade Commission Act as a basis for reaching this result, neither of which are present in the relevant Minnesota laws. \textit{Id.}

\(^{227}\) See Anhold v. Daniels, 614 P.2d 184 (Wash. 1980).

\(^{228}\) \textit{Id.} at 187. The \textit{Ly} majority noted Lightfoot as support for its decision, but failed to note that the rationale in that case was overturned. 615 N.W.2d at 312 n.18.


\(^{230}\) See David J. Dove, Comment, \textit{Washington Consumer Protection Act – Public Interest and the Private Litigant}, 60 WASH. L. REV. 201 (1984); Susan Glyatt Lybeck,
Hangman Ridge, the Washington Supreme Court observed that “our public interest requirement has been subject to harsh criticism.”

The Ly court also cited the Illinois Consumer Fraud Act as having been interpreted to support a public interest limit on suits. In fact, the Illinois case cited by the Court in Ly explained that the judicially created “public interest” limit on suits under the Illinois CFA had been overturned by the Illinois Legislature. The case of Brody v. Finch University of Health Sciences discussed a separate “consumer nexus” requirement for finding a violation of the Illinois CFA, which is akin to a limiting principle related to the scope of the CFA that the Ly court rejected in reversing the Minnesota Court of Appeals on the issue of whether a CFA violation had occurred.


231. 719 P.2d at 536.
235. Compare Brody, 698 N.E.2d at 269, with Ly, 615 N.W.2d at 308–10.
VI. INTERPRETATIVE GAPS IN THE PUBLIC BENEFIT LIMIT

The application by Minnesota courts of the public benefit limit in *Ly* raises the question of whether the Minnesota Supreme Court intended the outcome of its decision—the virtual elimination of CFA claims by individuals and family farmers. The *Ly* decision left the following four unresolved analytical problems that make resolution of this question uncertain, or which may make the legal underpinnings of this outcome difficult to sustain: (1) the failure to identify specific standards for applying the public benefit limit; (2) concerns related to tying the legal basis of the public benefit limit to the attorney general’s authority; (3) the need for factual development regarding the existence of a public benefit; and (4) the failure to articulate the reach of the public benefit test for consumer protection laws other than the CFA.

A. The Lack of Standards for Applying the Public Benefit Limit

The *Ly* case put no clear decisional principles in place for how courts were to apply the “public benefit” limit. An early commentator on the case observed: “[T]he lack of precise standards used by the courts in determining whether the requirement in *Ly* is met has not lent much guidance to trial courts, who are left to apply a version of Justice Potter Stewart’s ‘I know it when I see it’ theory to the public benefit rule.”

236. The majority decision in *Ly* cited legislative history in support of its ruling that private actions should be limited to the authority of the attorney general. *Ly*, 615 N.W.2d at 311. However, that legislative history refers specifically to claims by individuals: “On March 8, 1973, Senator Winston Borden, author of the bill, in a hearing before the Labor and Commerce Committee, stated that its goal was to: ‘allow the individual person to bring a civil action for the damages he sustained.’” *Id.* (citation omitted). The cited legislative history further states “if a[n] individual could bring an action, he can do some of the prosecuting, he can do some of the enforcing, he can provide some of the protection for himself and others that the Attorney General’s Office . . . can not do today.” *Id.* In its later decision in *Group Health Plan, Inc. v. Philip Morris Inc.*, the court focused on the language in the private attorney general statute allowing “any person injured” by a violation to bring a claim, and quoted more of Senator Borden’s testimony referring to claims by “an individual.” 621 N.W.2d 2, 10 (Minn. 2001).

finding no public benefit in *Dickson v. Lundquist*, the Minnesota Court of Appeals similarly stated: “The term ‘public benefit’ is subjective... the term can be about what you want it to be.”

Even after *Collins*, the court has not definitively resolved whether there is an exclusion of all “one-on-one” transactions, and if so, what this exclusion means. In neither *Ly* nor *Collins* did the court affirmatively state that a public benefit cannot be found in a suit involving a single buyer and seller. Assuming that individual consumers can ever prove public dissemination sufficient to sustain an individual claim, it is unclear what a plaintiff must show to prove public benefit and survive dismissal by the court. For example, does the public benefit limit exclude sales transactions in which the seller makes deceptive oral representations that may possibly be, would probably be or definitely have been made to other consumers? If such statements should be considered, do they have to be the same or substantially similar to the statements made to other consumers, or is it enough that the seller makes repeatedly false statements of various content to different buyers? Is it enough that similar statements were made to one other consumer, a few other consumers, hundreds of other consumers, or broadcast to many more? Does the severity or intentionality of the alleged deception bear on this determination?

Nor is it clear from *Ly* and *Collins* that the public benefit limit should require the plaintiff to obtain injunctive relief or otherwise demonstrate that his or her particular lawsuit will effectively stop the challenged deceptive practice, as numerous courts applying the doctrine have held. Because the court in *Ly* found that the transaction was a “single one-on-one transaction,” it never had to reach the issue of whether forcing a defendant to pay individual damages for a more widely disseminated practice was sufficient to constitute a public benefit. In *Collins*, the court suggested the opposite—that the focus on the public benefit limit is on breadth of the sales practice, not the number of people seeking relief in the suit or the impact of the relief on the broader public.

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240. 615 N.W.2d at 309.
241. *See Collins*, 655 N.W.2d at 330. In a footnote in *Ly*, however, the court stated that the award of investigative fees to prevailing plaintiffs is implicit support for its decision because investigative costs in a “private dispute... would be of
B. Reference to Attorney General Authority

The one defining principle for the public benefit limit articulated in *Ly*, and the only legal grounding for the decision, is that the reach of the private right of action is the same as the limits on the authority of the attorney general to enforce the CFA. 242 In responding to the dissenters’ argument that the public benefit limit was nowhere to be found in the language of section 8.31, the majority noted that “our analysis is based on the statutory authority of the attorney general.” 243 A closer look at the authority of the attorney general, however, highlights a critical analytical concern with the public benefit limit.

The attorney general’s authority to enforce consumer protection laws is subjective and discretionary. As the *Ly* majority noted, the attorney general may appear “in all civil causes of like nature in all other courts of the state whenever, in the attorney general’s opinion, the interests of the state require it.” 244 The *Ly* majority also cited *Slezak v. Ousdigian* for the proposition that the attorney general “may institute, conduct and maintain all such actions and proceedings as he deems necessary for the... protection of public rights.” 245 The public benefit limit, then, is based on the “opinion” of the current attorney general who takes the actions “he deems necessary” in the public interest. 246

This obviously is a problematic interpretative principle for restricting a private right of action. Presumably, the attorney general could opine as to the public interest of a particular private action before the court, which repeatedly occurred when the state of Washington had a similar, short-lived rule of law imposed by the judiciary. 247 The attorney general could even issue an opinion letter stating that there is a public benefit in the prosecution of any

242. See *Ly*, 615 N.W.2d 302. The court reiterated this point in *Anderson-Johanningmeier v. Mid-Minnesota Women’s Ctr., Inc.*, 637 N.W.2d 270, 276 (Minn. 2002).

243. *Ly*, 615 N.W.2d at 314 n.22.

244. *Id.* at 313 n.20 (citing MINN. STAT. § 8.01 (1998)) (emphasis added). The attorney general also has express authority to “enforce the provisions of law relating to consumer fraud and unlawful practices” in the CFA. MINN. STAT. § 8.32, subdiv. 2(a) (2004).

245. *Ly*, 615 N.W.2d at 313 (citing *Slezak v. Ousligian*, 260 Minn. 303, 308, 110 N.W.2d 1, 5 (Minn. 1961)).

246. See *id.*

“one-on-one” transaction, or certain types of such transactions, that violate the CFA. In part, this was the position of Justice Gilbert’s dissent. Therefore, the meaning of Ly might change with each successive attorney general or each opinion by the attorney general.

The holding in Ly suggests that the attorney general would have had no authority to bring a CFA action against the “reprehensible conduct” of the defendant in that case if the attorney general had decided to do so. In support of this assertion, the Ly Court cited Humphrey v. McLaren for the proposition that “a government litigator must take positions with the common public good in mind, unlike the private practitioner who seeks vindication of a particular result for a particular client.” The fact that public attorneys act with different motives than the private bar is a wholly different issue than whether the attorney general has authority to enforce state law in a given marketplace transaction between a buyer and seller, such as the transaction underlying Ly, if the attorney general exercises his or her discretion to do so. Neither McLaren nor other cases on the powers of the attorney general prohibit the attorney general from bringing suit in a fraudulent transaction between one buyer and one seller. Minnesota courts have consistently held that the attorney general can determine what constitutes the public interest for purposes of filing suit. Over seventy years ago, in State ex rel. Peterson v. City of Fraser, the Minnesota Supreme Court made clear the broad scope of the attorney general’s power:

... [I]nasmuch as the Attorney General in his discretion decided that he should proceed, there is nothing for any court to pass upon as to the necessity for or policy of proceeding. In that field, the discretion of the Attorney General is plenary. He is a constitutional officer (Minn. Const. art. 5, § 1), and, as such, the head of the state’s legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state. That a public attorney must act in the public interest is not a

248. Ly, 615 N.W.2d at 316 (Gilbert, J., dissenting in part).
249. Id. at 313 n.9 (citing Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987)).
250. 191 Minn. 427, 254 N.W. 776 (1934).
251. Id. at 432, 254 N.W. at 778–79.
resolution of the analytical problem of basing a private right of action on the subjective view of the attorney general as to what constitutes the public interest. Nothing in the private attorney general statute suggests that the attorney general’s discretion to determine the public interest should be transferred wholesale to the judiciary so that the court can decide in each case whether it believes the private litigant is acting for the public benefit.

Consider the situation of an ill, elderly woman who owns her home without encumbrance. She is visited by a solicitor who convinces her to transfer to him title to the property in exchange for three years of free rent and a package of in-home services that he falsely claims “are worth $150,000 and will provide all your health care and life activity needs.” In truth, the services are of limited use to the elderly homeowner and she is faced with eviction at the end of the three-year lease. This situation fits squarely into the “single one-on-one transaction” described in Ly and subsequent cases. The rationale underlying this result is that a private right of action is not authorized in this situation because no attorney general, regardless of his or her opinion of the public interest in this matter, could bring a suit to remedy this conduct under the CFA. That result seems unsupportable in Minnesota law, unless Ly is read to impose new restrictions on the powers of the attorney general not suggested in any prior case law and not apparent in the express statutory powers of the office.

The cases decided thus far under the public benefit limit do not fit comfortably within these legal underpinnings of Ly. In Dickson, for example, the consumers were told that they were buying a “promotional” boat used solely by the dealer when, in fact, the boat had been previously sold and registered in North Carolina and returned to the dealer because the prior owner was dissatisfied with the boat.252 The plaintiffs alleged that the representation was made in a brochure that was given to them at a boat show.253 But the court disagreed and found no public benefit present in Dickson.254 The exact same conduct occurred, in part, in an action brought by the attorney general against a Minnesota boat dealer.255

253. Id.
254. Id. at *2.
And there is little doubt that the attorney general would have authority to proceed against a boat seller distributing a misleading brochure in such circumstances.

The case of *Zutz v. Case Corp.*, 256 and similar decisions, raise the problem of how requiring a showing of public benefit in the relief sought by the plaintiffs fits within the rationale that the private right of action is derivative of the attorney general’s authority. While this restriction arguably is consistent with the overall notion of public benefit enunciated in *Ly*, it is even further removed from the language and purpose of the private attorney general statute. Subdivision 3a of section 8.31 provides a right to recover damages for a CFA violation but makes no express mention of an injunction to stop future conduct, instead referring generally at the end of a sentence to “other equitable relief as determined by the court.” 257 This focus on damages contrasts with the attorney general’s authority in subdivision 3 of section 8.31, which is entitled “Injunctive relief” and expressly provides injunctive authority and the right to obtain substantial civil penalties, and the reference to attorney general injunctive authority in the CFA itself. 258 It is not easy to reconcile the legislature’s creation of a private right of action containing more limited statutory remedies with a court-imposed requirement that private litigants seek remedies equivalent to those that would be obtained by the attorney general in prosecuting a CFA claim.

C. Fact Development of Public Benefit Limit

The public benefit limit pushes litigants to fully develop the record on public dissemination of the sales representation at the beginning of the litigation or face dismissal of the claim. This creates incentives for attorneys for plaintiffs to either reject representation or turn cases of individual loss into a class action or

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257. MINN. STAT. § 8.31, subdiv. 3a (2004).
258. Id. § 8.31, subdiv. 3. There also is express statutory injunctive authority for an injunction by the attorney general in the CFA itself. Id. § 325F.70, subdiv. 1. The FSAA also provides that county attorneys can bring criminal actions for a violation. Id. § 325F.67. The private attorney general statute further recognizes the broader scope of attorney general relief in section 8.31 by providing that “[a]ny action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.” Id. § 8.31, subdiv. 3a.
something similar in terms of discovery and proof.

Minnesota courts have a liberal standard for allowing litigants to obtain discovery prior to responding to a dispositive motion.\footnote{See, e.g., Bixler by Bixler v. J.C. Penney Co., 376 N.W.2d 209, 217 (Minn. 1985) (citing MINN. R. CIV. P. 56.06).} Facts relevant to a determination of public benefit as defined in Ly and its progeny could include the sort of sweeping discovery requests characteristic of an attorney general investigation. A plaintiff reasonably could inquire about defendant’s advertising and public statements, lists of all other customers who may have received similar representations or been subject to similar omissions or made complaints to the defendant, training materials for salespeople who may have been told to routinely solicit customers in a similar manner, company operation or sales policies, and a multitude of other information that would bear on the defendant’s repetition of its conduct with other consumers. This sort of discovery increases litigation costs for all parties and often imposes burdens on the court to resolve related discovery disputes.

Conversely, restricting plaintiffs from obtaining this sort of information in opposition to a motion on the merits of the public benefit limit would make it impossible for the vast majority of potential plaintiffs to ever bring an action as an individual under the private attorney general statute. Individual consumers often have no way of knowing the nature or extent of a defendant’s conduct with other consumers. As a practical matter, an individual subject to a deceptive practice often will be unlikely to know others who purchased the same merchandise and experienced the same sales practice.\footnote{An exception is a false advertising case, but most consumer fraud cases are not about broadcast or widely distributed advertising. See, e.g., supra note 171.} Restricting access to such discovery would place individual consumers with CFA claims in the situation of having to allege facts beyond their own experience with the defendant while being denied the right to discover facts in the defendant’s knowledge necessary to sustain the plaintiff’s claim.

The need for discovery by private plaintiffs regarding the defendant’s broader business practices points out a relevant difference between attorney general cases and private CFA actions. The attorney general is given broad pre-complaint investigative authority in the form of a civil investigative demand.\footnote{See, e.g., Kohn v. State by Humphrey,} A private
plaintiff lacks a similar mechanism. This asymmetry in the authority of public and private actors seems to further undercut the rationale in Ly that the legislature tacitly intended to treat the private attorney general statute as co-extensive with the attorney general authority to enforce the CFA. It seems unpersuasive that the legislature would use broad language in describing the private right of action (“any person injured . . . may bring a civil action”), but intend without expressly so stating to limit that right to cases of general public impact, while providing the attorney general—but not private plaintiffs—with authority to uncover patterns of conduct prior to suit.

Justice Gilbert’s dissent in Ly hints at yet another problem with pretrial discovery and the public benefit limit, arguing that the court should have remanded the case to the trial court for a determination of facts relevant to the finding of a public benefit.262 The court’s decision to reverse and enter judgment for Ms. Nystrom presaged the sweeping application of the public benefit limit as a matter of law in later lower court decisions. In Collins, the court held again that the determination of a public benefit should be reviewed de novo.263 Treating the public benefit as a legal question exacerbates these discovery concerns. Allowing lower courts to find no public benefit even when the facts are disputed obviously favors dismissal of such cases because of the asymmetry of information between individual consumers who may only know of their own transaction and defendants who obviously are aware of the company’s pattern of conduct.

D. Uncertain Reach of the Public Benefit Limit Across Consumer Laws

Finally, Ly raises concerns regarding its reach beyond the CFA to an entire range of other consumer protection laws and commercial regulations whose express private enforcement authority is predicated, in whole or in part, on the private attorney

336 N.W.2d 292 (Minn. 1983).


general statute.\textsuperscript{264} The \textit{Ly} court reached its result with no mention of this broader use of the private attorney general statute in Minnesota law.

Minnesota courts applying laws other than the CFA which are also enforced under the private attorney general statute have applied the public benefit limit to determine prerequisite to suit.\textsuperscript{265} Laws other than statutory fraud laws, however, rest uneasily under a public benefit limit. Topical consumer laws, in particular, provide specific rights gauged to protect individuals from specific practices in certain types of marketplace transactions that the legislature has deemed problematic for consumers. Applying the public benefit limit would mean that the legislature meant to exclude violations of such laws in one-on-one transactions while providing specific rights for the individuals engaged in this type of transaction.

For instance, sellers of membership travel clubs that cost $500 or more must provide detailed oral and written disclosures prior to purchase by the consumer, including the length of time the travel club has been operating and the number or percentage of consumers purchasing the service who have complained or cancelled their contracts pursuant to the right to cancel under the

\textsuperscript{264} \textit{Ly}, 615 N.W.2d at 314. This contrasts with other states in which the judiciary has imposed, through case law, limits on the right of private plaintiffs to bring statutory fraud claims. These states have looked only to the state UDAP statute. \textit{See}, e.g., cases cited supra note 171. \textit{See also supra} Part V.B.2.

law.\textsuperscript{266} Under section 325G.51, violations of these requirements are “subject to the penalties and remedies provided in section 8.31.”\textsuperscript{267} The use of the public benefit limit to exclude a lawsuit under the private attorney general statute by an individual consumer who did not receive the proper oral disclosures in a “one-on-one” purchase of a high cost travel club would be hard to reconcile with the granting of such consumer-specific rights under section 325G.505. It is difficult to discern a rationale for holding that the legislature created such transaction-specific rights, but meant to provide no private right of action for an individual subjected to a violation of the law in just such a transaction. Conversely, nothing in the express language of the enforcement provision for this law, section 325G.51, obviously distinguishes the incorporation of the private attorney general statute in this context from its incorporation as the remedial provision for the CFA.

The public benefit limit would also likely have led to a different result in a prior decision of the Minnesota Supreme Court, \textit{Jacobs v. Rosemount Dodge-Winnebago South}.\textsuperscript{268} The plaintiffs in \textit{Jacobs} were a couple who purchased a mobile home in a one-on-one transaction.\textsuperscript{269} They prevailed at trial, including their claim for breach of express warranty.\textsuperscript{270} The court held that because breaches of an express warranty constitute \textit{per se} violations of the consumer protection act, attorney’s fees were recoverable.\textsuperscript{271} However, the holding that the plaintiffs engaged in a one-on-one transaction had a right to recover attorney’s fees under the private attorney general statute would not be sustainable under the public benefit limit.

Requiring the plaintiff to prove “public benefit” in a private right of action under these topical laws would invite a restriction of consumer protection enforcement across a range of statutes—a restriction for which there is no support in the language or purpose of those statutes. In short, \textit{Ly} is an unwarranted invitation for courts to rewrite Minnesota law in favor of specific businesses whose conduct as to individual consumers the legislature sought to

\textsuperscript{266} MINN. STAT. § 325G.505 (2004).
\textsuperscript{267} Id. § 325G.51.
\textsuperscript{268} 310 N.W.2d 71, 79–80 (Minn. 1981).
\textsuperscript{269} Id. at 73.
\textsuperscript{270} Id. at 79.
\textsuperscript{271} Id. After \textit{Jacobs} was decided, the relevant laws were re-codified to state that violation of an express warranty constitutes a CFA violation. See MINN. STAT. § 325G.20 (2004).
restrain in passing topical consumer protection laws.

VII. THE PUBLIC BENEFIT LIMIT UNDERCUTS PROGRESSIVE CONSUMER ENFORCEMENT

The public benefit limit has reduced the progressiveness of Minnesota consumer protection law. The doctrine was created by the judiciary and should be either overturned or substantially narrowed, or it should be eliminated by legislative action, as has occurred in Illinois and Connecticut.

A. The Public Benefit Limit Has Reduced Access to the Courts in Cases of Marketplace Deception and Unequal Bargaining Power

If progressive private enforcement of Minnesota statutory fraud laws means that consumers can use these laws to obtain relief from transactions entered in circumstances of unequal marketplace bargaining power, then the public benefit limit has impaired the progressiveness of Minnesota consumer protection laws. It has done so because it excludes consumer protection claims that involve substantial bargaining power disparities, in many instances greater disparities than are present in claims allowed under the rule. The public benefit limit also reduces progressive enforcement by creating uncertainty and realigning incentives for attorneys considering representing clients with claims of marketplace deception and fraud.

1. The Public Benefit Limit Precludes Suits by Consumers with Unequal Bargaining Power

One need look no further than the outcome of cases under the public benefit limit to determine that it has served to unequally distribute access to the courts so that more powerful parties will sometimes be able to assert consumer protection claims while those at a marketplace disadvantage have no right to bring a claim. Individual consumers faced with significant bargaining power disparities have been denied access to the courts while marketplace competitors have had more success crossing the public benefit threshold. In the example cases noted above, a consumer buying a boat from a dealer, a homeowner seeking a mortgage refinance from a major financial institution and a family farmer deceived
about the qualities of equipment obtained from a large equipment manufacturer were unable to bring CFA claims. Business plaintiffs, on the other hand, have fared somewhat better in asserting statutory fraud claims.

Hoang Minh Ly’s case was a stark example of an individual in an unequal bargaining position. He had little formal education, had little command of the English language, and appeared to have been manipulated by a more sophisticated seller who repeatedly told him to trust her and not to consult a lawyer. The fraud perpetrated against him was found by the court to involve “reprehensible conduct.” Yet, he had no private right to enforce consumer protection laws. Contrast Laysar, Inc. v. State Farm Mutual Automobile Insurance Co., in which an auto glass repair company and allied plaintiffs sought to force an insurer to pay its claims in full and argued that the insurer violated the CFA by selling auto policies that falsely implied full glass coverage while “short paying virtually every glass shop invoice.” While the suit by the individual plaintiff in this case may be of benefit to consumers generally, the case primarily involves a dispute between businesses. There is little doubt that Mr. Ly suffered from a larger bargaining disparity than did Laysar, Inc. Similarly, while the CFA suit by Thomas & Betts Corporation may have been of some benefit to users of waste oil furnaces, allowing it to pursue a claim against a former distributor clearly does less to remedy unequal bargaining power than allowing the Dicksons to recover on a CFA claim for a boat previously sold to a buyer in another state, returned due to poor quality, and resold as a demonstrator to the plaintiffs.

The bias in the public benefit limit in favor of class actions over individual suits also does not necessarily serve the purpose of remedying unequal bargaining power. There is no reason to doubt the allowance of CFA suits by investors in junior mortgage notes or

272. See supra Part IV.A.1.a.
273. See supra notes 159–161, 171, and accompanying text.
275. Id. at 314.
276. Id.
278. Id. at *1.
purchasers of ink cartridges with computer printers. Such class action suits, however, do not necessarily do more to advance the purpose of providing consumers a remedy for unequal bargaining power than the case brought by Virginia Scally, who went to Wells Fargo Mortgage “to refinance her home and consolidate her credit-card debt with an existing home-equity loan.” These results are likely to persist because of the bias in the construction of the “public benefit” limit in favor of certain types of litigants. Individual consumers typically are sold goods through oral communication or a pattern of conduct with salespeople when purchasing a car, boat, appliance, loan, or other merchandise. These transactions have an inherent tendency to be “one-on-one” in nature. Business litigants, however, will often bring suit to change the general practices or public solicitations of their competitors or others. Despite Collins, false advertising suits usually are brought by business competitors, not consumers. But it is false advertising suits, or similar claims, that will have the easiest time meeting the public benefit limit, because these actions involve broad dissemination of the offending representations to the public. This outcome favors suit by competitive equals while reducing access to suit by those on the lesser end of a disparity in bargaining power.

This is not a zero sum situation, in any case. CFA claims by individuals could be allowed to proceed while other types of plaintiffs also have access to the courts. But it is especially regressive to allow larger, better-funded litigants the right to pursue CFA claims while denying that right to individuals with typically smaller claims.

It is difficult to reconcile these outcomes with the court’s repeated statements that statutory fraud laws are meant to “address the unequal bargaining power that is often found in consumer transactions.” The Ly decision and later cases make no mention

283. Id. at *1.
285. See, e.g., cases cited supra note 171.
of how the purpose of remedying unequal bargaining power can be reconciled with holding that individual consumers subject to deception by more sophisticated parties have no right to enforce these laws. The strict dichotomy in *Ly* between an expansively read CFA and a constricted private attorney general statute is also hard to reconcile with the court’s oft-articulated position, reiterated in the *Ly* decision, that statutory fraud laws are meant to encourage aggressive prosecutions. If these laws have nothing to say about who has a remedy for a violation, then they cannot meaningfully encourage aggressive prosecutions. The public benefit limit, in fact, has had the exact opposite effect—to eliminate suits by entire categories of plaintiffs with otherwise valid statutory fraud claims.

2. *The Public Benefit Limit Reduces Progressiveness by Increasing Uncertainty and Changing Incentives for Plaintiff’s Counsel*

The public benefit limit can chill suits for reasons beyond the litany of poor outcomes for plaintiffs. Eliminating statutory fraud claims for individuals does not mean that these plaintiffs necessarily lack a legal basis for relief, even if common law fraud is the only claim. It does mean that these plaintiffs are unlikely to obtain an award of attorney’s fees, which for all practical purposes means

287. Brasel concluded that the majority rejected any consideration of unequal bargaining power in determining what is a public benefit:

Both the *Ly* majority and the Watpro dissent can be read to suggest that an analysis of the sophistication of the parties is not relevant to a public benefit. Nothing about the bargaining power of the parties to a private lawsuit speaks to the issue of whether the consumers of Minnesota are benefited by a particular plaintiff’s action. Thus, an unsophisticated consumer with little bargaining power should not be allowed to make use of the Private AG Statute unless the transaction he or she complains of reaches a wider audience. Brasel, *supra* note 237, at 340.

288. *Ly*, 615 N.W.2d at 308.

289. There are some cases where the plaintiff may not have another claim because statutory fraud laws broaden the cause of action for fraud and deception by eliminating elements of common law fraud. For example, in *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807 (Minn. 2004), the plaintiff alleged an oral misrepresentation contradicted by a later, written representation in the contract. The plaintiff had no common law fraud claim because the contract clause contradicting the oral representation provided a defense as a matter of law on the justifiable reliance element of common law fraud. *Id.* at 810. Under the CFA, common law justifiable reliance is not an element of the claim and thus the lower courts dismissal of the case was reversed. *Id.* at 812–13.
there is no right to relief for many or most of these plaintiffs. Denying the right to recover attorney’s fees actively, perhaps fatally, discourages most private prosecutions of fraud violations. As the court’s majority observed in *Church of Nativity*, failure to grant attorney’s fees in that case would mean that “Nativity will spend virtually all of its damage award paying its attorneys.” 290 The encouragement of suit by private counsel also was the point emphasized in the court of appeals decisions cited in *Ly*. 291

The public benefit limit on suit introduces substantial uncertainty into the calculus for attorneys considering representation of plaintiffs with possible statutory fraud claims. As the court of appeals stated in *Dickson*, the notion of “public benefit” can mean “about what you want it to be.” 292 The uncertainty of the parameters of the doctrine makes it difficult for a potential plaintiff’s counsel to estimate the likelihood of prevailing before the court, which makes it less likely for such counsel to accept representation of consumers with fraud claims. In *Collins*, for instance, the trial court “denied any attorney fees on the ground that [plaintiffs’] claims” lacked public benefit, despite the fact that there were eighteen plaintiffs making similar complaints about representations that were, in part, in broadcast advertising and written materials. 293

The alternate rationale used by courts for the exclusion of statutory fraud claims under the public benefit limit also is troubling from the perspective of certainty of outcomes in private enforcement of these laws. Several courts have dismissed statutory fraud claims because the defendant ceased the conduct or the plaintiff’s requested relief was deemed insufficiently publicly minded to allow a statutory fraud claim to proceed. 294 This means that a potential plaintiff’s attorney faces the additional uncertainty that later actions of the defendant, or of a public agency, can deprive the plaintiff of a possible statutory fraud claim.

Plaintiffs’ attorneys can increase the likelihood of prevailing under the public benefit limit by putting additional resources into

290. *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 8 (Minn. 1992).
293. *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 322 (Minn. 2003).
294. *See supra* notes 188–191 and accompanying text.
pre-complaint investigations or by filing an action and pursuing discovery for the purpose of better establishing that the defendant’s conduct reached other consumers. Plaintiff attorneys thus have an incentive to either refuse to represent individuals with consumer protection problems, or to attempt to turn such cases into a class action or a case with multiple, joined plaintiffs. Pursuing this sort of mass action increases the costs and risks of such litigation. And larger cases do not necessarily mean more remedies for unequal bargaining power in the marketplace, especially if it precludes the willingness of attorneys to help individuals with smaller claims.

Uncertainties and other disincentives for attorneys to take cases for individuals are less of a concern for business plaintiffs pursuing violations of statutory fraud laws. Companies presumably have business motivations for engaging in litigation, and resources for conducting the litigation, that make attorney’s fees under statutory fraud laws a bonus rather than an essential factor in deciding to pursue a case. The businesses pursuing Lanham Act claims against competitor advertising, for example, likely would bring the case in the absence of a valid state statutory fraud claim.

B. The Public Benefit Limit Should Be Abandoned or Narrowly Focused

Even if a more progressive interpretation of the law is not considered a desirable goal consistent with the enunciated purpose of statutory fraud laws, the Minnesota Supreme Court should abandon the public benefit limit on the private attorney general statute. This doctrine ignores the unambiguous language of the statute; it is uneasily and improperly grounded in the attorney general’s discretionary authority; it violates the oft-stated purposes of statutory fraud laws; and it creates uncertainty in enforcing a range of topical consumer protection laws. Perhaps most importantly, the public benefit limit is not a discerning or effective means to address the problem underlying its creation. This last point is the focus of the remainder of this Article.

1. The Poor Fit Between the Court’s Concerns and the Public Benefit Limit

The majority in *Ly* seemed animated by a concern with putting
limits on the broadly worded and construed CFA so that it would not become an additional, routine claim in common disputes between litigants in order to obtain attorney’s fees. The court cited Justice Simonett’s dissent in *Church of Nativity* expressing the fear that “enterprising plaintiffs” might seek attorney’s fees in cases beyond those intended under the private attorney general statute. The court also worried that “artful counsel could dress up his dog bite case” to obtain fees under the statute.

The public benefit limit appears aimed at striking a balance between maintaining a broad reading of statutory fraud laws and this articulated concern with use of these laws to obtain attorney’s fees in routine cases. Although it is sometimes lost in the roll-back of the right to bring a private enforcement action, the court in *Ly* unanimously found that the transaction between a restaurant buyer and seller was within the scope of the CFA. Two subsequent decisions of the Minnesota Supreme Court have emphasized that statutory fraud laws are broader than common law fraud. In *Group Health Plan, Inc. v. Philip Morris Inc.*., the court answered certified questions from the federal district court and held that non-purchasers can bring a CFA claim and that proof of individual common law reliance is not required to bring a CFA claim. In *Wiegand v. Walser Automotive Groups, Inc.*, the court reversed the lower courts, reiterating that the CFA eliminated the common law requirement of reliance and holding that deceptive oral statements contradicted by written statements are actionable under the CFA.

These cases support broadly applying the CFA, and encourage relaxed standards for proof of injury under the private attorney

296. *Ly* v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000). *But see* Sovern, *supra* note 9, at 446–48 (suggesting that merchants should bear the burden of proving a proposed defense and if successful, should bear no liability for attorney’s fees).

297. *Ly*, 615 N.W.2d at 311 (citing *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 10 (Minn. 1992) (Simonett, J., dissenting in part)).

298. *Id.* at 312 (citing *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984)).

299. *Id.* at 310.

300. *See* *Wiegand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004); *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001).

At least one commentator also has suggested that Minnesota has broad, pro-consumer statutory fraud laws. *See* Marshall H. Tanick, *Fool’s Paradise: Expansion of the Minnesota Consumer Fraud Laws*, 58 BENCH & B. MINN. 37 (May/June, 2001) (arguing that the holding in *Group Health Plan, Inc. v. Philip Morris Inc.* in particular made Minnesota consumer protection statutes "more user friendly").

301. 621 N.W.2d at 12.

302. 683 N.W.2d at 812.
general statute, but they leave in place the stringent restriction imposed by the adoption of the public benefit limit in *L*y. On remand in *Wie*gand*, the court of appeals recently affirmed the trial court’s dismissal of the case for failure to meet the public benefit limit.*303 The net result is that Minnesota, at least as articulated by the Minnesota Supreme Court, has broad statutory fraud laws for mass actions (public enforcement, class actions, or joined cases involving multiple plaintiffs), but a strong presumption against individual or smaller claims under those laws.*304


The public benefit limit is both ineffective and unfair as a means of balancing broad application of statutory fraud laws and the perceived potential for misuse of those laws to shift attorney’s fees in routine cases. Eliminating individual claims is not a substitute for finding a balance. Claims arising from individual “one-on-one” transactions are not universally attempts to dress up dog bite cases; and the class action, joinder, and business-plaintiff suits allowed since Lync are not always a close fit with the “intended scope” of the private attorney general statute. The Lync court never explained how restricting suits arising from one-on-one transactions resolved the perceived problem of overuse of statutory fraud laws to shift attorney’s fees in routine cases. The public


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benefit limit works to meet its goal only in the sense that eliminating all individual claims eliminates all perceived problems from a large share of cases raising statutory fraud claims.

For instance, when class plaintiffs in a CFA suit alleged primarily breach of contract, the state district court in Edwards v. Long Beach rejected defendant Washington Mutual’s motion to dismiss. Each member of the class had been charged $60 for a payoff quote and then provided an inaccurate payoff statement. In allowing the suit to proceed, the court noted the number of individuals affected by the practice and “oppressive nature of the practices.” In Ali v. Francois, the state district court allowed seven joined plaintiffs to bring CFA claims. The plaintiffs had entered contracts with the defendant corporation under which the plaintiffs made upfront payments to the defendant in exchange for work as “janitorial subcontractors” on jobs to be arranged by the defendant. The plaintiffs sued for breach of these contracts and violations of the CFA, among other claims. The court found a public benefit to the suit because of the potential for continued misconduct by the defendant, and entered judgment against the defendants.

Both of these cases involve more than one-on-one transactions and are within the type of CFA claim permissible under the public benefit limit. In both of these cases, however, the underlying conduct of the defendant was held to be a breach of contract, and the CFA claim flowed from the implied representations in the contract. This contrasts with the false and deceptive non-contractual oral representations made to Mr. Ly, and with the false and misleading claims of product quality or origin made to the Dicksons or the Zutz family—all of which seem to fall more
easily into the category of deception and fraud that is the focus of the CFA. Yet all these latter cases were dismissed as lacking a public benefit.

2. A Refocused Public Benefit Test

If neither the court nor the legislature decides to eliminate the public benefit limit on private statutory fraud actions, the doctrine should at least be narrowed and refocused on the issue it was meant to resolve. A revised public benefit doctrine could directly address the court's concern with the use of the fee-shifting provision in the private attorney general statute by limiting the amount of attorney's fee awards in cases involving conduct that is not related to the underlying purposes of the consumer protection laws.

Minnesota courts consider several factors, such as time expended and experience of counsel, in determining the proper amount to award in attorney's fees.316 A revised public benefit doctrine could add additional factors to that list in cases of attorney's fee awards under the private attorney general statute. Specifically, such factors might include the following: (1) the centrality of the consumer protection claim to the conduct at issue in the case; (2) whether the attorney's fee award will encourage other counsel to assume representation in similar consumer protection cases; (3) whether the damage award or other relief obtained by the plaintiff(s) remedies the conduct, or provides a disincentive to the defendant or similarly situated entities to engage in such conduct; and (4) whether the plaintiff's suit is otherwise of benefit to the public.

There are at least three important advantages to a narrowed and refocused public benefit test. First, it would be directed at the problem articulated by the court, which is awarding of attorney's fees to litigants whose cases will promote the purposes of Minnesota consumer protection laws. The proposed test for attorney's fees allows courts discretion to limit substantial fee-shifting in cases of peripheral consumer protection concern. Most "dog bite" cases will not survive judgment as a matter of law on the merits of the statutory fraud claim or the need to establish a causal nexus between consumer injury and the alleged fraud. In the cases

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that are held to properly allege a statutory fraud claim, but that appear remote from the purpose of those laws, courts can reduce attorney’s fees accordingly.

Second, limiting the public benefit test to the amount of attorney’s fees awarded provides a more appropriate sliding scale for the courts to apply when compared to forcing dismissal of claims. The current public benefit doctrine is a limit on private suits. It acts like a meat cleaver, either separating the statutory fraud claims or allowing them to proceed. If the plaintiff alleges only a one-on-one transaction, his or her statutory fraud claim likely will be dismissed. A public benefit test tied to the amount of attorney’s fees allows courts flexibility in matching the degree of public benefit to the amount of fee-shifting.

The decision to award attorney’s fees occurs only after judgment on the underlying statutory fraud claim. Accordingly, the court will be aware of all the relevant facts and circumstances at the time it makes a determination of the public benefit in awarding fees. Under the current public benefit limit, the court typically makes this determination on motion at the outset of the litigation, sometimes before any discovery has occurred. Pushing back the time of applying the test also promotes judicial efficiency, as cases will often be settled or dismissed on other grounds before the court is forced to make a ruling on the amount of attorney’s fees.

Third and finally, as a matter of statutory interpretation, the language of the private attorney general statute arguably provides some support for this approach. The majority in Ly made no attempt to identify any ambiguity in the language of the private attorney general statute. As the dissenters noted, there is no ambiguity in the phrase granting a private right of action to “any person injured by a violation” of the statutory fraud laws. Even accepting the court’s logical leap in limiting private suits to the attorney general’s authority, this is an uneasy and ill-fitting legal basis for the doctrine, for the reasons previously noted.

Minnesota Statutes section 8.31 allows for the recovery of “reasonable attorney’s fees.” The term “reasonable” is sufficiently ambiguous to support a construction that allows for consideration of the purpose of the private attorney general statute and the

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318. MINN. STAT. § 8.31, subdiv. 3a (2004).
incorporated statutory fraud laws. It also is consistent with the older Minnesota Court of Appeals decisions that held “public interest” should be a consideration in determining the amount of the attorney’s fee award.

VIII. CONCLUSION

Minnesota courts have actively stretched beyond the express statutory language to create legal barriers effectively shutting the courthouse door to individual consumers with otherwise valid statutory fraud claims alleging marketplace deception. The public benefit limit enunciated in *Ly v. Nystrom* tacitly overturned long-standing case law with a vague and improperly grounded doctrine. It has been used by Minnesota courts to routinely dismiss claims by individuals under Minnesota statutory fraud laws, in effect limiting statutory fraud suits mostly to better-funded and more powerful litigants. As a result, Minnesota cannot be said to have progressive law for private enforcement of consumer protection laws. The court or the legislature should eliminate the public benefit limit, or at least narrow and refocus the doctrine on the perceived policy concern underlying its creation.