

**AD HOC DECEPTIONS IN PRIVATE DISPUTES: WHEN
DOES A PRIVATE PLAINTIFF CONFER A PUBLIC
BENEFIT UNDER MINNESOTA'S PRIVATE ATTORNEY
GENERAL STATUTE?**

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I. INTRODUCTION

A Minnesota plaintiff with a fraud claim has many options to choose from in determining what counts to include in a court complaint. One of the most popular in Minnesota is a claim under Minnesota's Consumer Fraud Statute, in part because the gold at the

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end of that particular rainbow can include attorneys' fees, through a statutory device known as the Private Attorney General ("AG") Statute. Claims under the Private AG Statute are ostensibly brought in the stead of Minnesota's attorney general, on the theory that a private plaintiff should be rewarded for standing in the shoes of other defrauded Minnesota plaintiffs. Ten years ago, the Minnesota Supreme Court appeared to take the view that in order to bring a claim under this statute, it was not necessary for a plaintiff to confer a benefit to the public.¹ The court's decision came despite a call from Justice John Simonett that it was "time to look more closely" at the statute, which in his opinion required a plaintiff to prove a public benefit.²

Two years ago, the Minnesota Supreme Court heeded Justice Simonett's call, reversed itself and held that a private action under the Private AG Statute is only available if it will benefit the public.³ The court did not, however, specify what particular benefits to the public warranted use of the Private AG Statute. Currently, there remains little guidance about what circumstance might constitute a "public benefit" that would turn a private fraud claim into a consumer fraud claim under the Private AG Statute.

II. MINNESOTA LAW: THE PRIVATE ATTORNEY GENERAL STATUTE AND CONSUMER PROTECTION STATUTES

A. *Statutory Scheme*

The Minnesota Consumer Fraud Act is one of several consumer protection statutes enacted in Minnesota to prohibit deceptive practices in the sale of merchandise.⁴ The consumer protection statutes do not by themselves provide for a private cause of action. Instead, it is the Private AG Statute that provides "any person injured by a violation" of these statutes⁵ "may bring a civil action and recover

1. *See infra* Part II.B.

2. *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 9 (Minn. 1992); *see infra* Part II.B.

3. *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000); *see infra* Part II.C.

4. The Consumer Fraud Act is found at MINN. STAT. §§ 325F.68-70 (2000). Two similar statutes are the False Statement in Advertisement Act, MINN. STAT. § 325F.67 (2000), and the Deceptive Trade Practices Act, MINN. STAT. § 325D.44 (2000).

5. The Private AG Statute provides remedies for a greater number of statutes than the three listed above. *See infra* note 7.

damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees."⁶ Section 8.31 of Minnesota Statutes is actually entitled "Additional Duties of the Attorney General," and it provides the attorney general with the authority to investigate and enforce several statutes that regulate "unfair, discriminatory, and other unlawful practices in business, commerce, or trade."⁷

B. *The Consumer Fraud Act is Not Limited to Individual Consumers*

In 1992, in *Church of the Nativity of Our Lord v. Watpro*,⁸ the Minnesota Supreme Court considered whether a building owner could receive attorneys' fees under the Private AG Statute. In *Watpro*, the Church of the Nativity of Our Lord brought an action to recover damages resulting from defective roofing materials installed on the church's school and convent.⁹ At the trial court level, the jury found the manufacturer of the materials liable to the church on a number of claims, including claims under the Minnesota Consumer Fraud Act.¹⁰ The trial court entered a judgment for the church for over \$358,000, including approximately \$121,000—over one third of the church's total recovery—in attorneys' fees and investigation costs.¹¹

On appeal, the manufacturer argued that the Consumer Fraud Act was intended to protect only individual or unsophisticated consumers, and that the attorneys' fees and investigation costs award was therefore unwarranted.¹² The court of appeals rejected this argument, holding that the statute "does not limit recovery to unsophisticated consumers," and that "case law has not limited the

6. MINN. STAT. § 8.31, subd. 3(a) (2000).

7. MINN. STAT. § 8.31, subd. 1 (2000). These statutes include the Nonprofit Corporation Act (sections 317A.001 to 317A.909), the Act Against Unfair Discrimination and Competition (sections 325D.01 to 325D.07), the Unlawful Trade Practices Act (sections 325D.09 to 325D.15), the Antitrust Act (sections 325D.49 to 325D.66), section 325D.67 and other laws against false or fraudulent advertising, the antidiscrimination acts contained in section 325D.67, the act against monopolization of food products (section 325D.68), the act regulating telephone advertising services (section 325D.39), the Prevention of Consumer Fraud Act (325F.68 to 325F.70), and chapter 53A regulating currency exchanges. *Id.*

8. 491 N.W.2d 1 (Minn. 1992).

9. *Id.* at 2.

10. *Id.* at 4.

11. *Id.* at 8 n.14.

12. *Church of the Nativity of Our Lord v. Watpro, Inc.*, 474 N.W.2d 605, 611-12 (Minn. Ct. App. 1991), *aff'd*, 491 N.W.2d 1 (Minn. 1992).

scope of the statute to consumer transactions.”¹³ The supreme court agreed, using both the Consumer Fraud Act and the Private AG Statute in its analysis. The court held that the Consumer Fraud Act “does not expressly limit its application to individual consumers,” and applies “to transactions involving all consumers.”¹⁴

The court did not directly address—and it appears the defendant did not make—any argument that the Private AG Statute did not allow a private cause of action because the statute required a public benefit. The court did address the purpose of the Private AG Statute, however, and held that it applied to these circumstances. “The purpose of the private attorney general statute is to ‘eliminate financial barriers to the vindication of a plaintiff’s rights . . . and to provide incentive for counsel to act as private attorney general.’”¹⁵ These purposes applied to the Church’s circumstances, according to the court, because the Church’s “pursuit of a remedy has involved much time and labor; it has been difficult, lengthy and expensive.”¹⁶ Moreover, given the monetary award to the church, “[i]f there are no attorney fees awarded in this case, Nativity will spend virtually all of its damage award paying its attorneys.”¹⁷ The court noted that the Private AG Statute was thus “intended to cover just this type of case.”¹⁸

Three justices, however, disagreed with the majority on the award of attorneys’ fees, urging that the case required the court to “look more closely at the so-called ‘Private Attorney General Statute,’”¹⁹ and asking, “[D]oes every false promise, every

13. *Id.* at 612.

14. *Watpro*, 491 N.W.2d at 8. The defendant also argued that the plaintiff’s breach of warranty claim should have been rejected because the plaintiff did not satisfy the notice requirements of MINN. STAT. § 336.2-607(3)(a), and that the action was barred by the statute of limitations. The court of appeals rejected both of these arguments, and the Minnesota Supreme Court affirmed. *Id.* at 4-7. The defendant also argued that the church was a “sophisticated merchant,” making the transaction between the parties solely within the scope of the Uniform Commercial Code. *Id.* at 7. The court of appeals also rejected this argument, and the Minnesota Supreme Court affirmed, holding that the transaction was “an ordinary consumer transaction within the scope of state statutes regulating sales to consumers.” *Id.* at 8.

15. *Id.* at 8.

16. *Id.*

17. *Id.*

18. *Id.* The court focused on the attorneys’ fees recovery because in *Watpro*, as in many cases, the Private AG Statute is significant mainly for its inclusion of attorneys’ fees. In *Watpro*, as in other cases, the plaintiff brought claims for common law fraud and misrepresentation as well as under the Consumer Fraud Act. Thus, its recovery of damages was covered by findings under these common law tort claims, making the Private AG statute important because of the large attorneys’ fees award.

19. *Id.* at 9 (Simonett, J., concurring in part and dissenting in part).

misrepresentation, or every misleading statement carry with it an entitlement to attorney fees? I think not.”²⁰

The dissent, authored by Justice John Simonett, advocates that the Private AG Statute and the Consumer Fraud Act must be read together. The Consumer Fraud Act was “meant to protect consumers being hoodwinked by sales promotion scams.”²¹ The Private AG Statute was enacted “[b]ecause the attorney general’s office does not have the resources to pursue all deceptive practices, and because an aggrieved consumer may lack the resources to sue, particularly when the claim is small and suit expense is high.”²² Thus, “the legislature has authorized an award of attorney fees to give the disadvantaged consumer access to the courts and an incentive to assist in the curtailing of consumer fraud practices.”²³

According to the *Watpro* dissent, a consumer’s lack of resources does not automatically render the Private AG Statute applicable. Instead, the Private AG Statute should work to place some limits on the Consumer Fraud Act, because “enterprising plaintiffs, understandably interested in recovering investigation costs and attorney fees, may expand the Consumer Fraud Act beyond its intended scope.”²⁴ This expansion was not envisioned by the legislature. As Justice Simonett pointed out, the Consumer Fraud Act differs from a common law fraud action in that it is not directed at isolated fraud, but rather at a wider body of deceptive practices that may be enjoined before they harm consumers. Moreover, also unlike its common law counterpart, the Consumer Fraud Act does not require a plaintiff *actually* to be deceived. Finally, the Private AG Statute, by including “costs of investigation” in its recovery, indicates that it is not intended to cover every claim of fraud brought by civil litigants.²⁵

20. *Id.* at 10 (Simonett, J., concurring in part and dissenting in part). Justice Coyne joined in the concurrence and dissent of Justice Simonett, and Justice Tomljanovich joined Justice Simonett’s partial dissent. *Id.* at 11.

21. *Id.* One of the main issues in *Watpro* was whether the Act applied to all consumers, even if, like the church, they were not individual consumers. *Id.* at 8. Since the “Act does not expressly limit its application to individual consumers,” the majority held that the Act did not exclude the church, in part because the church was a consumer and not a merchant under the U.C.C. *Id.* Justice Simonett agreed: “Read literally, ‘any person’ means just that.” *Id.* at 9 (Simonett, J., concurring in part and dissenting in part).

22. *Id.* at 10 (Simonett, J., concurring in part and dissenting in part).

23. *Id.*

24. *Id.*

25. *Id.* at 10-11. Moreover, as the *Watpro* dissent points out, an expansion of the

The dissent's idea was not a new one to Minnesota courts. In 1984, the Minnesota Court of Appeals noted that "special factors" applied to recoveries under the Private AG Statute.²⁶ These "special factors" related to the purpose behind awarding attorneys' fees under the statute: the award should "eliminate financial barriers to the vindication of a plaintiff's rights," provide "incentive for counsel to act as private attorney general," and the award "must take into account the degree to which the public interest is advanced by the suit."²⁷ Otherwise, the court of appeals announced, "every artful counsel could dress up his dog bite case to come under an attorney's fees statute."²⁸ The *Watpro* dissent built on the third "public interest" factor. According to the *Watpro* dissent and the cases preceding it, the Private AG Statute should not and does not cover "ad hoc deceptions arising in private disputes."²⁹ Instead, the dissent suggested that a claim or a violation of the Consumer Fraud Act should be allowed under the Private AG Statute only if the following test is met:

- (1) the plaintiff must be a consumer, who is
- (2) injured by an actionable fraud (such as in a common law action for a false pretense, a false promise, or a misrepresentation), and
- (3) the fraud must have the potential to deceive and ensnare members of the consumer public other than just the plaintiff, so that
- (4) plaintiff's lawsuit has been of benefit to the public.³⁰

Private AG Statute could reverse the common law rule in the United States that litigants pay their own attorneys' fees. "[I]f there is to be a wholesale change in awarding attorney fees, it should be done by express legislation." *Watpro*, 491 N.W.2d at 10 (Simonett, J., concurring in part and dissenting in part).

26. *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984). In *Liess*, the plaintiff sued an individual defendant and a real estate company for fraud in connection with the sale of a home. At trial, the jury found fraud by special verdict, and the plaintiff moved for attorneys' fees under the Private AG Statute. *Id.* at 557. The trial court awarded attorneys' fees, considering factors enumerated in *State v. Paulson*, 290 Minn. 371, 188 N.W.2d 424 (Minn. 1971), to determine the size of the award, but it did not take into account the purpose of the Private AG Statute. The court of appeals remanded the case for consideration of both the *Paulson* factors and the policies supporting the Private AG Statute. *Id.* at 558.

27. *Liess*, 354 N.W.2d at 558.

28. *Id.* (quoting *Boland v. City of Rapid City*, 315 N.W.2d 496, 503 (S.D. 1982)); see also *Wexler v. Bros. Entm't Group*, 457 N.W.2d 218, 222-23 (Minn. Ct. App. 1990) ("When awarding attorney fees under the private attorney general statute, the trial court must consider the public interest policies underlying the statute.").

29. *Watpro*, 491 N.W.2d at 10.

30. *Id.* at 11. These requirements, according to the dissent, "would meet the

Put another way, a plaintiff should be a consumer injured by actionable fraud that has the potential to deceive other consumers so that the lawsuit has benefited the public.³¹ Though this test echoes the concern of the court of appeals in cases both before and after *Watpro*,³² it has not been widely used, and until 2000, Minnesota courts did not uniformly require plaintiffs to prove a “public benefit” to bring claims under the Private AG Statute.³³

C. *Ly v. Nystrom: Public Benefit Required*

In 2000, the Minnesota Supreme Court revisited the issue raised by the dissent in *Watpro*, and reversed itself, at least on the issue of attorneys’ fees under the Private AG Statute. In *Ly v. Nystrom*,³⁴ the court held that the Private AG Statute applies only to claimants who demonstrate that their cause of action benefits the public.³⁵ Noting that the *Watpro* court affirmed the award of attorneys’ fees but “did not engage in analysis as to public benefit,” the court stated, “[t]o the extent that [*Watpro*] could be construed to permit recovery under the Private AG Statute without proof of public benefit, it is overruled.”³⁶

worthy purposes of the ‘Private Attorney General Statute’ while at the same time keeping the payment of investigation costs and attorney fees within reasonable bounds.” *Id.*

31. *Control Data Corp. v. Babcock & Wilcox Co.*, Nos. C6-93-472, C2-93-579, 1993 WL 405303, at *6 (Minn. Ct. App. Oct. 12, 1993), *rev. denied* (Dec. 22, 1993) (interpreting the *Watpro* dissent).

32. *See supra* notes 26, 28.

33. After the supreme court’s decision in *Watpro*, some courts did pick up on the dissent’s idea. *See, e.g.*, *Gray v. Conrad*, Nos. C7-97-1784, CO-98-177, 1998 WL 404951, at *6 (Minn. Ct. App. July 21, 1998), *rev. denied* (Oct. 20, 1998) (holding that the district court erred in its award of attorneys’ fees because the case was “fact-specific” and “the protection of public consumers” was not implicated in the case); *Untiedt v. Grand Lab, Inc.*, Nos. C4-94-772, C0-94-851, 1994 WL 714308, at *3 (Minn. Ct. App. Dec. 27, 1994) (holding that because the trial court found that the cause of action would advance the public interest, the trial court considered the appropriate factors); *Control Data Corp.*, 1993 WL 405303, at *6 (upholding denial of an attorneys’ fees award in part because the court “fail[ed] to see how [the plaintiff’s] lawsuit was of benefit to the public”).

34. 615 N.W.2d 302 (Minn. 2000).

35. *Id.* at 314.

36. *Id.* at 314 n.25. Justice Page and Justice Gilbert each dissented from this holding, arguing that the unambiguous language of the Private AG Statute imposes no public benefit requirement. *See id.* at 315 (“Had the legislature intended to limit the scope of [the Private AG Statute] to those causes of action that have a public benefit, it could have easily done so. Whether for good or for ill, by the plain words of the statute, it did not.”) (Page, J., concurring in part); *id.* (agreeing that the majority “artificially engrafts a ‘public benefit’ requirement onto an unambiguous statute”) (Gilbert, J., concurring in part, dissenting in part).

In this landmark case, the plaintiff Ly purchased a restaurant from Nystrom, allegedly based on Nystrom's representations about gross monthly revenues and profits.³⁷ After operating the restaurant at a loss for six months, Ly brought suit against Nystrom for common law fraud and violation of the Consumer Fraud Act. At trial, the district court concluded that Nystrom was liable to Ly for common law fraud, but held that there was no violation of the Consumer Fraud Act (and therefore no attorneys' fees) because the fraudulent representations were made from one individual to another, not to a large number of consumers, and the representations did not have the potential to deceive other consumers.³⁸

The court of appeals upheld the trial court's determination that the Consumer Fraud Act and the Private AG Statute did not apply. The court of appeals reasoned that though consumer fraud statutes were to be construed liberally, the Consumer Fraud Act does not apply to business transactions between individuals:

Even if the Act applies more broadly than common law fraud, it still only applies in consumer fraud situations and the fraud or misrepresentation must be disseminated to others. This was a one-on-one business transaction. If we were to adopt the appellant's interpretation of the statute, virtually every fraudulent transaction would come under the consumer fraud umbrella.³⁹

The supreme court affirmed this holding with an analysis of both the Consumer Fraud Act and the Private AG Statute.⁴⁰ With regard to

37. *Ly v. Nystrom*, 602 N.W.2d 644, 645 (Minn. Ct. App. 1999), *aff'd in part, rev'd in part*, 615 N.W.2d 302 (Minn. 2000).

38. *Id.* at 645-46.

39. *Id.* at 647. The court also determined that Ly did not meet the definition of a consumer under the Consumer Fraud Act, because "he bought the restaurant with the intent to produce, manufacture, and resell food, rather than with the intent of direct ownership of the product." *Id.* at 647. The Consumer Fraud Act itself does not define "consumer." The court relied on the dictionary definition that defines a "consumer" as "one that acquires goods or services for direct use or ownership rather than for resale or use in production or manufacturing." *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY 1238 (3d ed. 1996)).

40. The court reversed the court of appeals' determination that Ly was not a "consumer." *Ly*, 615 N.W.2d at 309-10.

While the CFA does not define 'consumer,' the legislative history clearly indicates that the CFA was intended to protect a broad, though not limitless, range of individuals from fraudulent and deceptive trade practices, and our decisions have also recognized the breadth of its coverage Thus, viewing appellant as a 'consumer' under the CFA does not push application of the statute onto new ground.

the Consumer Fraud Act, the supreme court determined that a plaintiff may have a claim under the act even “in the context of an isolated one-on-one transaction.”⁴¹

Though the Consumer Fraud Act may apply in such a circumstance, the Private AG Statute—which provides the remedy—is another matter. The court correctly noted that the plain language of the Private AG Statute, along with its sweeping remedies, “ha[s] raised concern about how broadly the legislature intended the statute to be applied, particularly as it relates to common law fraud actions and the recovery of attorney fees.”⁴²

Analyzing the legislative history of the Private AG Statute, the court determined that “the legislature could not have intended to sweep every private dispute based on fraud, and falling within the Consumer Fraud Act, into a statute where attorney fees and additional costs and expenses would be awarded”⁴³ Thus, consistent with the history and purpose of the office of the attorney general, the court imposed a public benefit requirement on claimants who wish to bring claims under the statute. Since Ly was defrauded in a “one-on-one transaction” in which the fraudulent misrepresentation was made only to him, the public benefit requirement was not met, and the court of appeals’ holding was affirmed.⁴⁴

D. Post-Ly: Recognizing a Public Benefit When You See One

After the court’s decision in *Ly v. Nystrom*, the public benefit requirement of the Private AG Statute has, perhaps, raised more questions than it has answered. The Minnesota Court of Appeals recently noted that no published Minnesota case sets forth a standard for determining whether a party’s cause of action benefits the public.⁴⁵

Id. at 310.

41. *Id.*

42. *Id.* at 311. The court cited the *Watpro* dissent’s argument “that a consumer can claim attorney fees for ‘almost any commercial transaction that fails.’” *Id.* (quoting *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 10 (Minn. Ct. App. 1992)) (Simonett, J., concurring in part and dissenting in part).

43. *Id.* at 314.

44. *Id.*

45. *Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816 (Minn. Ct. App. 2001), *rev. granted* (Minn. Feb. 28, 2002). *Collins* addressed the Private AG Statute and a false advertising claim. There, the plaintiffs claimed that the school’s claims about their program consisted of false advertising. The court reversed the denial of a request for

In *Ly* itself, the court focused on the individual nature of the transaction at issue, noting that “the fraudulent misrepresentation, while evincing reprehensible conduct, was made only to appellant.”⁴⁶ Under *Ly*, it seems clear that the class of cases involving one-on-one transactions will by definition fail to meet the public benefit requirement.

In a recent federal court case, the court looked not at the nature of the transaction, but at the damages sought by the plaintiff. There, the court dismissed the plaintiff’s claims brought pursuant to the Private AG Statute because “the essence of [the plaintiff’s] lawsuit is personal injury.”⁴⁷ Despite an argument by the plaintiff that the fraudulent misrepresentations were disseminated widely, the court determined that claims for the type of damages sought by the plaintiff—medical expenses, pain and suffering, wage loss, and emotional distress—“are not brought for the benefit of the public,” and therefore the plaintiff’s claims under the Consumer Fraud Act and the False Advertising Act were dismissed.⁴⁸

In false advertising cases, the courts’ treatment of the public benefit rule has also been difficult to predict. *Collins v. Minnesota School of Business*, a 2002 Minnesota Court of Appeals case upon which review has been granted, suggests that the existence of a false advertising claim by itself will meet the public benefit requirement

attorneys’ fees under the Private AG Statute, following federal courts that have “consistently held that the prevention of false or misleading advertising is a public benefit.” *Id.* at 820 (citing cases). Since the school advertised its program to “the public at large,” the court held that the plaintiffs had demonstrated a public benefit. *Id.* at 821.

46. *Ly*, 615 N.W.2d at 314. The *Ly* court also cited analyses by other courts emphasizing that a public benefit is not conferred in a one-on-one transaction. See *Cooperman v. R.G. Barry Corp.*, 775 F. Supp. 1211, 1214 (D. Minn. 1991) (holding that the statute is not to be read so broadly that it is “applicable to any contract remotely related to the ultimate sale of merchandise”) (*quoted in Ly*, 615 N.W.2d at 312 n.18); *Brody v. Finch Univ. of Health Sciences*, 698 N.E.2d 257, 268-69 (Ill Ct. App. 1998) (holding that the Consumer Fraud Act of Illinois did not apply to basic breach of contract cases) (*cited in Ly*, 615 N.W.2d at 312 n.18).

47. *Pecarina v. Tokai Corp.*, No. CUV, 01-1655, 2002 WL 1023153, *5 (D. Minn. May 20, 2002). In *Pecarina*, the plaintiff brought suit against the manufacturer of a non-child-resistant version of the Aim ‘n Flame lighter, after her children started a fire with the device and suffered burns. *Id.* at *1.

48. *Id.* at *5. *Pecarina* demonstrates that while the issue under the Private AG Statute is often framed only in the context of a request for attorneys’ fees, the impact of the rule is much broader. The Private AG Statute is the only vehicle for bringing a private cause of action under the Consumer Fraud Act or the False Advertising Act (as well as the other statutes cited in the Private AG statute). MINN. STAT. § 8.31, subd. 3(a) (2000); see also *supra* note 7. As illustrated by *Pecarina*, these causes of action cannot be maintained without proof of a public benefit.

because “the prevention of false or misleading advertising is a public benefit.”⁴⁹ The federal district court, however, has not followed this rule to the letter, rejecting a claim for attorneys’ fees in a false advertising case in which the claim was brought by a competitor that had used the same tactics in its own advertising.⁵⁰ The court noted that while there is “no doubt” that *some* public interest is furthered by the elimination of false advertising, the award of fees is unwarranted as a matter of equity where the plaintiff has engaged in similar behavior.⁵¹

The results of these cases are not necessarily inconsistent, and by themselves may not be troubling. But the 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.⁵²

E. Clues to a Public Benefit: Purposes of the Private Attorney General Statute

In the search for standards by which to judge a public benefit, it is useful to start where the *Ly* court started before it imposed the requirement—with the purposes behind the Private AG Statute itself.⁵³ Moreover, while the *Ly* court did not adopt specific standards, its reliance on past cases provides hints to its definition of a public benefit.

49. 636 N.W.2d 816, 820-21 (Minn. Ct. App. 2001), *rev. granted* (Minn. Feb. 28, 2002). The *Collins* court, which relied on several federal court holdings for its holding, noted that the defendant “advertised its program to the public at large,” and that “but for [the plaintiff’s] lawsuit, an indefinite class of potential consumers might have been injured in the same manner as were appellants.” *Id.* at 821.

50. *Transclean Corp. v. Bridgewood Serv., Inc.*, 134 F. Supp. 2d 1049, 1054-55 (D. Minn. 2001), *aff’d in relevant part*, 290 F.3d 1364 (Fed. Cir. 2002).

51. *Transclean*, 134 F. Supp. 2d at 1056. The *Transclean* court only applied this ruling to the request for attorneys’ fees, allowing the false advertising claim to stand. The court noted, “Notwithstanding *Transclean*’s entitlement to damages, attorney’s fees under the Private AG Statute are discretionary with the Trial Court.” *Id.* at 1055 (internal citations omitted). Though the defendant did not argue that it was entitled to summary judgment based on the court’s public benefit theory, the court addressed the argument, and noted that “different considerations influence our ascertainment of a reasonable fee award.” *Id.* at 1057 n.5. Thus, the jury’s award on damages “should not be further enhanced by a fee award.” *Id.*

52. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

53. *See Ly v. Nystrom*, 615 N.W.2d 302, 310-14 (Minn. 2000) (discussing the history and purpose of the Private AG Statute).

1. *Standing in the Shoes of the Attorney General: Advancing the "State Interest"*

First, the purpose of the private remedies provided for in the statute lies in its broader context: the Private AG Statute is a part of the statute defining the duties of the Minnesota Attorney General. Thus, a private litigant necessarily acts as "a substitute for the attorney general."⁵⁴ The attorney general, in turn, can only appear in civil lawsuits "whenever, in the attorney general's opinion, the interests of the state require it."⁵⁵ Since the duty of the attorney general's office is "the protection of public rights and the preservation of the interests of the state," a private litigant cannot bring an action in the shoes of the attorney general without serving this purpose as well.⁵⁶ Unfortunately, it is almost as difficult to define the "interests of the state" as it is to define "public benefit." While this statutory purpose does not lend itself to concrete standards, it is crucial to remember that the Private AG Statute begins with the premise that a private litigant stands in the shoes of the attorney general, and therefore can bring a claim only when the attorney general would do so.

2. *Needs Analysis: Elimination of Financial Barriers*

Second, part of the legislative intent behind the Private AG Statute is to "eliminate financial barriers to the vindication of a plaintiff's rights."⁵⁷ Thus, in *Watpro*, the court determined that the purpose of the Private AG Statute had been met in part by comparing

54. *Id.* at 311. State Senator Winston Borden, author of the bill, stated: "It's simply impossible for the Attorney General's Office to investigate and prosecute every act of consumer fraud in this state." Hearing on S.F. 819, S. Comm. Labor and Commerce, 68th Minn. Leg., Mar. 8, 1973 (audio tape) (comments of Sen. Borden), *quoted in Ly*, 615 N.W.2d at 311. Thus, "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.*

55. MINN. STAT. § 8.01, *quoted in Ly*, 615 N.W.2d at 313; *accord Slezak v. Ousdigian*, 260 Minn. 303, 110 N.W.2d 1, 5 (Minn. 1961) (holding that the attorney general "has the authority to institute in a district court a civil suit in the name of the state *whenever the interests of the state so require*") (emphasis added), *quoted in Ly*, 615 N.W.2d at 313.

56. *See Ly*, 615 N.W.2d at 313 (noting that it is "clear that the sweep of the statute can be no broader than the source of its authority—that of the attorney general—whose duties are to protect *public* rights in the interest of the state").

57. *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 8 (Minn. 1992) (quoting *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984), *quoted in Ly*, 615 N.W.2d at 311).

the cost of the suit with the damages recovered. This comparison led the court to conclude that without an award of attorneys' fees, the plaintiff would have spent "virtually all of its damage award paying its attorneys," and the Private AG Statute "was intended to cover just this type of case."⁵⁸

The difficulty with this analysis is that while the elimination of financial barriers may have been a purpose behind the Private AG Statute, consideration of the cost of a suit to an individual plaintiff does not ensure that the public will benefit from the suit. In *Watpro*, the dissent argued that regardless of the individual plaintiff's monetary need for an attorneys' fees award, the public was not benefited merely because of this need.⁵⁹ Indeed, if this were the only requirement, the Private AG Statute could render a major change in the American rule that parties are responsible for their own attorneys' fees.⁶⁰ In *Ly*, the court did not consider any type of needs analysis, perhaps recognizing that a true public benefit requires more than a showing of need on the part of an individual plaintiff, and more than a comparison of the award of damages versus the cost of suit.

3. *A Broader Audience Than One: Preventing Widespread Fraud*

Third, the most significant purpose of the Private AG Statute, identifiable from the legislative history and case law, is to prosecute claims of fraud *on behalf of others*. One legislator noted that the law was intended to stop those who "rip off a large number of citizens."⁶¹ The *Ly* court cited and recognized this purpose as central behind the Private AG Statute.⁶² The court also relied upon a federal district court case noting that the private attorney general concept "is based on the rationale that counsel fees should be awarded by the court when the legal services have provided a benefit to a class of persons, not just the particular litigant."⁶³

Moreover, as the *Watpro* dissent noted, the consumer protection laws are aimed at *practices*—a term that denotes fraud victimizing

58. *Watpro*, 491 N.W.2d at 8.

59. *Id.* at 10 (Simonett, J., concurring in part and dissenting in part).

60. *See id.*

61. Hearing on H.F. 733, H. Comm. Commerce and Econ. Dev., 68th Minn. Leg., Mar. 30, 1973 (audio tape) (comments of Rep. Sieben).

62. *Ly*, 615 N.W.2d at 313 n.21.

63. *Martin v. Hancock*, 466 F. Supp. 454, 456 (D. Minn. 1979) (discussing the private attorney general concept of the Civil Rights Attorney's Fees Awards Act of 1976).

more than one plaintiff.⁶⁴ Thus, to meet this purpose of the statute, a public benefit is not conferred in isolated instances of fraud. The dissent in *Watpro*⁶⁵ and the court in *Ly*⁶⁶ focused centrally on this purpose, requiring the fraud to “have the potential to deceive and ensnare members of the consumer public other than just the plaintiff.”⁶⁷

III. DISSIMILAR TAKES ON SIMILAR STATUTES

While Minnesota is not alone in requiring a private plaintiff to prove a public benefit under consumer protection statutes, it is certainly in the minority.⁶⁸ Indeed, such requirements have been the subject of harsh criticism as judicially created and unnecessarily restrictive to private plaintiffs.⁶⁹ Regardless of the wisdom of the requirement, the search for a standard to measure a public benefit logically leads to other states, some of which have similarly struggled for a means to analyze the public interest/public benefit requirement of their consumer protection statutes. In this regard, the path of the Washington and Colorado courts in interpreting their consumer protection statutes⁷⁰ is particularly instructive to the current state of Minnesota law.

A. *Washington*

In 1976, the Washington Supreme Court first narrowed the scope of a private litigant’s remedy under the Washington Consumer

64. *Watpro*, 491 N.W.2d at 10 (Simonett, J., concurring in part and dissenting in part), *cited in Ly*, 615 N.W.2d at 311 n.16.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See Patterson v. Beall*, 19 P.3d 839, 847 (Okla. 2000) (noting that a minority of states have adopted a public interest element for consumer protection statutes, including Colorado, Nebraska, and Washington, and declining to read such a requirement into the Oklahoma statute); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 536 (Wash. 1986) (noting that Washington “is very clearly in the minority” in requiring a public interest showing of a private plaintiff, and citing six states with the requirement). At least two state legislatures—Connecticut and Illinois—have amended their state consumer protection statute to eliminate a judicially created public interest requirement. *See Collins v. Gulf Oil Corp.*, 605 F. Supp. 1519 (D. Conn. 1985); Joseph G. Feehan, *The Illinois Consumer Fraud Act and the “Public Injury” Debate*, 80 *ILL. B.J.* 136 (1992).

69. *See Hangman Ridge*, 719 P.2d at 536 (“[O]ur public interest requirement has been subject to harsh criticism.”) (citations omitted).

70. WASH. REV. CODE §§ 19.86.010–.920 (2002); COLO. REV. STAT. § 6-1-101-709 (2002).

Protection Act by holding that in order to prevail under the statute, a plaintiff must show that the conduct complained of would be “vulnerable to a complaint by the Attorney General.”⁷¹ In other words, according to the court, the conduct must affect the public interest.⁷² Four years later, in 1980, the Washington Supreme Court noted accurately that “[n]either the legislature nor this court . . . has otherwise formulated criteria for determining when” the public interest requirement is met.⁷³

The court then developed a three-factor test for determining public interest, which it later reconsidered and modified in *Hangman Ridge Training Stables v. Safeco Title Insurance*.⁷⁴ The current test, as set forth in *Hangman Ridge*, requires a court to make a threshold determination of whether the transaction was a “consumer transaction” or a “private dispute.”⁷⁵ While the distinction between these two categories is often less than clear, a consumer transaction is usually between a purchaser of goods and a seller, or between an individual paying for services and the party rendering them.⁷⁶

If the transaction is a consumer transaction, the Washington

71. *Lightfoot v. MacDonald*, 544 P.2d 88, 90 (Wash. 1976). There is a private right of action under the Washington Consumer Protection Act. WASH. REV. CODE § 19.86.090 (2002).

72. *Lightfoot*, 544 P.2d at 90.

73. *Anhold v. Daniels*, 614 P.2d 184, 187 (Wash. 1980); *see also* David J. Dove, *Washington Consumer Protection Act—Public Interest and the Private Litigant*, 60 WASH. L. REV. 201, 202 (1984) (noting that the court in 1976 “did not indicate a criterion that would define the public interest and thereby standardize the determination of when an injury to a private party would constitute a threat to the public interest”); *cf. Hangman Ridge*, 719 P.2d at 535 (“Since the *Lightfoot* decision, the confusion surrounding private rights of action under the CPA has steadily increased.”).

74. *Hangman Ridge*, 719 P.2d at 535-36. Before *Hangman Ridge*, Washington courts required proof that the (1) the defendant by unfair or deceptive acts or practices induced the plaintiff to act or refrain from acting; (2) the plaintiff suffered damage; and (3) the defendant’s deceptive acts or practices have the potential for repetition. *Anhold*, 614 P.2d at 188. The *Hangman Ridge* court changed the test significantly, noting, “[i]t has become clear that this ‘inducement-damage-repetition’ test is not the best vehicle for showing that the public was or will be affected by the act in question.” *Hangman Ridge*, 719 P.2d at 537.

75. *Hangman Ridge*, 719 P.2d at 537-38.

76. *Nordstrom, Inc. v. Tampourlos*, 733 P.2d 208, 211 (Wash. 1987); *see also* *Mason v. Mortgage Am., Inc.*, 792 P.2d 142, 148 (Wash. 1990) (holding that the purchase of a mobile home is a consumer transaction); *Travis v. Wash. Horse Breeders Ass’n*, 759 P.2d 418, 423 (Wash. Ct. App. 1988) (holding that the purchase of a race horse at an auction is a consumer transaction); *Brotten v. May*, 744 P.2d 1085, 1089 (Wash. Ct. App. 1987) (holding that commission dispute between two competing real estate brokers is a private dispute); *Aubrey’s R.V. Center, Inc. v. Tandy Corp.*, 731 P.2d 1124, 1132 (Wash. Ct. App. 1987) (holding that the purchase of a computer system for a business is a consumer transaction).

court then analyzes the following factors to determine whether a public interest is present:

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Are the acts part of a pattern or generalized course of conduct?
- (3) Were repeated acts committed prior to the act involving plaintiff?
- (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?
- (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?⁷⁷

Since the *Hangman Ridge* case, Washington courts have made clear that no single factor is dispositive, nor is it necessary that all be present.⁷⁸

Where the transaction is essentially a private dispute, it is more difficult—but not impossible—to show a public interest under the Washington test. If the transaction is a private dispute, factors indicating a public interest include:

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Did the defendant advertise to the public in general?
- (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
- (4) Did plaintiff and defendant occupy unequal bargaining positions?⁷⁹

Despite these rather specific factors, the court in *Hangman Ridge* noted more fundamentally that “it is the likelihood that additional

77. See *Hangman Ridge*, 719 P.2d at 538.

78. *Mason*, 792 P.2d at 148. “The factors ‘represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.’” *Cotton v. Kronenberg*, 44 P.3d 878, 886 (Wash. Ct. App. 2002) (quoting *Hangman Ridge*, 719 P.2d at 538). While courts often analyze and decide whether a public interest is present as a matter of law, the determination is a question of fact to be made by a trier of fact. See *Cotton*, 44 P.3d at 886 n.41 (reversing a grant of summary judgment because whether a fee agreement impacted the public interest precluded summary judgment on consumer protection claim).

79. *Hangman Ridge*, 719 P.2d at 538. The public interest requirement in Washington can also be established by a “per se” method, which requires a showing that a statute has been violated that contains a specific legislative declaration of a public interest impact. *Id.* For example, Washington statutes covering the distribution and sale of vehicles and the sale of motor vehicle parts both contain specific declarations that these subjects affect the public interest. *Id.* (citing statutes).

plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.”⁸⁰ The Washington Supreme Court developed the *Hangman Ridge* test to bring closure to increasing questions as to the proper application of the public benefit test. However, the two-prong multi-factor test it developed may have engendered more confusion than clarity. The threshold inquiry—whether the transaction is a “consumer” or a “private” transaction—muddies the waters considerably. In Minnesota, courts must determine whether the plaintiff is a “consumer” in order to resolve whether the plaintiff has a claim under the consumer protection statutes. Thus, the initial portion of the Washington test is inapplicable to consideration of Minnesota’s Private AG Statute. The remainder of the Washington test, when reduced to its essence, attempts to uncover the number of consumers who have been or may be affected by the defendant’s practice.

B. Colorado

To prevail on a private cause of action under the Colorado Consumer Protection Act, a plaintiff must demonstrate that the challenged conduct “significantly impacts the public as actual or potential consumers of defendant’s goods, services, or property.”⁸¹ The statute does not address “purely private wrong[s].”⁸²

In companion cases decided in 1998, the Colorado Supreme Court devised a three-factor test to define the element of “public interest” in the Colorado Consumer Protection Act. Under the test, a court must consider:

- (1) the number of consumers directly affected by the challenged practice;
- (2) the relative sophistication and bargaining power of consumers affected by the challenged practice, and
- (3) evidence that the challenged practice previously impacted other consumers or has significant potential to do so.⁸³

The companion cases reached opposite results under this test.

80. *Hangman Ridge*, 719 P.2d at 538.

81. *Martinez v. Lewis*, 969 P.2d 213, 221 (Colo. 1998). Section 6-1-113 of the Colorado Statutes establishes private damages for violations of the Colorado Consumer Protection Act. COLO. REV. STAT. § 6-1-113(1) (2002).

82. *Martinez*, 969 P.2d at 222.

83. *Id.*

In *Hall v. Walter*,⁸⁴ a case against subdivision developers, the court determined that the defendant developers' practices implicated the public as consumers because their misrepresentations—in the form of advertisement—were directed to the market generally.⁸⁵ In *Martinez v. Lewis*,⁸⁶ a plaintiff brought suit against a doctor retained by an insurance company to perform independent medical evaluations, arguing that the doctor committed a deceptive trade practice by falsely representing his qualifications. The deception was committed against the insurance company, in the context of a private agreement with a single consumer in a position of relative bargaining strength.⁸⁷ Thus, the case did not significantly impact the public, and claims under the Consumer Protection Act could not stand.⁸⁸

Under the Colorado approach, the difference between common law fraud and a claim under the Consumer Protection Act lies first in the numbers, and second in the experience of the consumer.⁸⁹ A deception that does not affect or have the potential to affect a significant number of consumers will not meet the public impact requirement of the Consumer Protection Act, and a deception that reaches only sophisticated consumers does not fall within the purposes behind the Colorado Consumer Protection Act. As the court in *Martinez* noted, the Consumer Protection Act was designed to protect the public as consumers “in situations where consumers do not have and cannot reasonably gain access to truthful information relevant to the contemplated transaction unless it comes from the person offering the good, service or property.”⁹⁰

84. 969 P.2d 224 (Colo. 1998). The *Hall* court relied upon the Washington Supreme Court's decision in *Hangman Ridge* for the general test for stating a cause of action under the Colorado Consumer Protection Act. *Id.* at 234. It then clarified the public interest factor: “While the public interest component is longstanding, we now recognize that a more precise reading of the statute's function requires an impact on the public as consumers of the defendant's ‘goods, services, or property.’” *Id.* (quoting COLO. REV. STAT. § 6-1-105(a)). The court noted that it would “look to the Washington test as a model” for the public interest element. *Id.*

85. *Id.* at 235.

86. 969 P.2d 213 (Colo. 1998).

87. *Id.* at 220-22.

88. *Id.* at 222-23.

89. See Catherine A. Talerico, *The Colorado Consumer Protection Act: An Update*, 29 COLO. LAW. 37, 38 (Jan. 2000).

90. *Martinez*, 969 P.2d at 222. This element likely excludes most business-to-business transactions. See *Full Draw Productions v. Easton Sports, Inc.*, 85 F. Supp. 2d 1001, 1007 (D. Colo. 2000).

IV. A SUGGESTED TEST FOR MINNESOTA

A. *Number of Consumers Potentially Affected*

The public interest⁹¹ hurdle to consumer fraud claims in Washington and Colorado has been in place for many years in each state. Courts in each of these states have struggled with defining the parameters of this requirement for as many years as it has been in place. Minnesota courts would do well to learn and borrow from this history, so as to provide the bench and bar with guidance on the requirement announced in *Ly v. Nystrom*.

Of course, the driving force behind any public benefit standard must be the Private AG Statute and its purposes. The court in *Ly*, the dissent in *Watpro*, and the Act's legislative history all suggest that like both Colorado and Washington, the critical distinction between common law fraud and fraud or deceptive practices covered under the consumer protection statutes lies in the numbers.⁹²

The purpose behind the Private AG Statute was not to cover "ad hoc deceptions arising in private disputes."⁹³ Rather, the Private AG Statute applies to plaintiffs who act as a substitute for the attorney general,⁹⁴ which necessarily means that they are representing other consumers who have been or are likely to be injured by the same conduct complained of in the private suit.⁹⁵ Thus, two of the three elements of the Colorado test logically apply in Minnesota, such that

91. The Washington and Colorado courts describe their requirement as a "public interest" requirement; Minnesota's role requires analysis of the potential "public benefit."

92. See Tallerico, *supra* note 89, at 38.

93. *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 10 (Minn. 1992) (Simonett, J., concurring in part and dissenting in part).

94. *Ly v. Nystrom*, 615 N.W.2d at 313. The court stated:

A determination of the scope of the private remedies provision in the Private AG Statute must begin with a recognition that it was adopted by the legislature in 1973 as part of the statutory charter for the duties and responsibilities of the attorney general and provides a reward to private parties for uncovering and bringing to a halt unfair, deceptive and fraudulent business practices, functions that, to that point, had been the responsibility of the attorney general.

Id. "If the attorney general is not authorized to commence a proceeding because it would not result in a public benefit then a claimant under the Private AG Statute is similarly constrained." *Id.* at 314 n.22.

95. See *id.* at 313 n.21 (noting Representative Sieben's comment that the Private AG Statute is intended to stop those who "rip off a large number of citizens").

a Minnesota court should consider (1) the number of consumers directly affected by the challenged practice; and (2) the evidence that the challenged practice previously had impacted other consumers or had significant potential to do so in the future.⁹⁶ This test also encompasses much of the Washington analysis, which at its base attempts to uncover the number of consumers affected by the defendant's actions.⁹⁷

The third Colorado factor, which also appears in the Washington analysis for "private" transactions, instructs the court to consider the relative sophistication and bargaining power of the parties.⁹⁸ The Minnesota Supreme Court acknowledged in both *Ly* and *Watpro* that the Private AG Statute was enacted in part to "eliminate financial barriers to the vindication of a plaintiff's rights."⁹⁹ In *Ly*, the court seemed to add the public interest requirement to the statute *despite* this purpose, rather than because of it, noting the reservations of the *Watpro* dissent and the court of appeals that the Private AG Statute could be expanded beyond its intended scope. 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, as addressed by the

96. *Martinez*, 969 P.2d at 222.

97. *See* *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 538 (Wash. 1986). Many of the factors cited by the Washington Supreme Court in the test applying to a consumer transaction question the number of consumers reached by the conduct, including whether the act was part of a pattern of conduct, whether the acts were repeated, whether there is a potential for repetition, and how many consumers were actually affected. Similarly, the Washington test applicable to a "private" transaction questions the number of consumers affected, by asking whether the defendant advertised to the public and whether the defendant's actions indicate the potential solicitation of others. *Id.*

98. *Martinez*, 969 P.2d at 222; *see also id.* ("The CCPA provides consumers who are in a position of relative bargaining weakness with protection against a range of deceptive trade practices."); *Hangman Ridge*, 719 P.2d at 538 (holding that when the transaction is a private transaction, the court should consider whether the plaintiff and defendant occupied unequal bargaining positions).

99. *Ly*, 615 N.W.2d at 311; *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 8 (Minn. 1992) (Simonett, J., concurring in part and dissenting in part) (both quoting *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984)).

remainder of the Colorado test.¹⁰⁰

B. Attorney General Substitution

Minnesota's Private AG Statute differs from both the Washington and the Colorado consumer protection statutes in that the public benefit/public interest analysis in Washington and Colorado is a part of the consumer protection statutes. In Minnesota, the public benefit test is found in the statute addressing the duties of the attorney general, not in the consumer protection statutes, which by themselves do not include a private cause of action. This distinction is crucial when considering the standards for the public benefit test. "[T]he sweep of the statute can be no broader than the source of its authority"; thus, a Minnesota plaintiff can only bring a claim under the Private AG Statute if the attorney general could also bring a claim.¹⁰¹ The Minnesota test should therefore include an analysis of whether the attorney general would view the lawsuit as suiting a public purpose and the interests of the state.¹⁰²

V. CONCLUSION

To be consistent with the principles announced in *Ly* and the purposes behind the Private AG Statute, Minnesota courts should consider the number of consumers directly affected or likely to be affected by the defendant's actions, and whether the attorney general has the authority to bring the suit the plaintiff proposes. Such a test provides guidance to courts, is faithful to the legislative history of the statute, and assists in winnowing out those enterprising plaintiffs who, through claims under the Private AG Statute, seek to expand the consumer protection laws beyond their intended scope.

100. See, e.g., *Gray v. Conrad*, Nos. C7-97-1784, C0-98-177, 1998 WL 404951, at *6 (Minn. Ct. App. July 21, 1998) (determining that an individual plaintiff could not bring a claim under the Private AG Statute because the case was "totally fact-specific," and the "protection of public consumers at large [was] not implicated").

101. *Ly*, 615 N.W.2d at 313.

102. *Id.* (noting that "[t]he duty of the attorney general's office, and thus the purpose of any statute granting private citizens authority to bring a lawsuit in lieu of the attorney general, is the protection of public rights and the preservation of the interests of the state"). This purpose of the statute reinforces the *exclusion* of consideration of the relative sophistication of the parties, which does not affect "public rights and the preservation of interests of the state." *Id.*