2013 WL 9541123 (Minn.) (Appellate Brief)
Supreme Court of Minnesota.

GRAPHIC COMMUNICATIONS LOCAL 1B HEALTH & WELFARE FUND "A," et al., Plaintiffs-Respondents,
v.
CVS CAREMARK CORPORATION, et al., Coborn's Incorporated, Kmart Holding Corporation, et al., Snyder's Drug Stores (2009), Inc., et al., Target Corporation, Walgreen Co., Wal-Mart Stores, Inc., Defendants-Appellants.

No. A12-1555.
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*1 THE STATE OF MINNESOTA'S INTEREST

The Minnesota Attorney General ("Attorney General" or "Office" or "State") submits this amicus brief on behalf of the State of Minnesota. [1] The Office of the Attorney General, which has enforced the Consumer Fraud Act ("CFA") for 50 years, has a strong public interest in this case. The interests of the citizens of the State of Minnesota are well-served through the proper application of the CFA, which is a vital tool to stop fraudulent conduct, punish wrongdoing, and obtain restitution for victims of unlawful activity.

The Attorney General's enforcement actions for CFA violations protect the public from fraud, scams, and con-artists, hold lawbreakers accountable, and promote an honest marketplace for all Minnesotans. These actions arise in a variety of contexts due to the imagination and creativity of those who perpetrate fraud on our State's citizens. *See, e.g., Force v. ITT Hartford Life & Annuity Ins. Co.,* 4 F. Supp. 2d. 843, 859 (D. Minn. 1998) (referring to "the fertility of human invention in devising new schemes of fraud.") (citations omitted); *Fed. Trade Comm'n v. Sperry & Hutchinson Co.,* 405 U.S. 233, 241 (1972) (referring to "unfair practices" under the Federal Trade Commission Act and stating "[t]here is no limit to human inventiveness in this field.").

For example, under the CFA, the Office prosecuted a chiropractor who charged tens of thousands of dollars on credit cards for which he fraudulently enrolled patients by ***2** falsely listing other unsuspecting patients as co-applicants; [2] obtained an injunction to stop a three-time convicted felon from luring people to give him money in exchange for promissory notes backed up by fake collateral; [3] obtained a judgment for restitution against a "telephone crammer" that billed over 2,500 Minnesotans for long-distance telephone service that they never ordered; [4] obtained an injunction and judgment for restitution against a gold coin dealer who charged senior citizens, some in their 90's, thousands of dollars for coins that were never delivered; [5] and obtained an injunction to stop further sales by a con artist who charged farmers and small business owners tens of thousands of dollars for pole buildings that were never constructed. [6]

Victims of consumer fraud are often **elderly** or vulnerable. "Older adults are particularly vulnerable to financial exploitation..." [7] In an amicus curiae brief filed in support of the Office's CFA prosecution against a "living trust mill" that defrauded over 1,000 senior citizens, AARP recently pointed out: "retirement nest eggs are attractive targets for fraud..." [8] For that reason, the Minnesota Legislature provided for enhanced ***3** civil penalties of up to $10,000 "for each violation" against persons who perpetrate consumer fraud against senior citizens. Minn. Stat. § 325F.71, subd. 2 (2012).

The Attorney General regularly prosecutes CFA claims against those who exploit the **elderly**. For example, the Office prosecuted under the CFA a nursing home that accepted convicted sex offenders - who sexually and physically assaulted **elderly** and fragile patients - without disclosing their presence and that operated with rat and vermin infestation and other deplorable conditions; [9] an insurance agent for selling unlicensed long-term care plans to senior citizens in their 80's and 90's and not providing the promised coverage; [10] telemarketers that scared seniors into believing paramedics would not come to their home if they refused to purchase a medical ID card; [11] and a security alarm company that used strong-arm tactics - including entering a widow's home late at night and not leaving unless a sale was made - to enroll the **elderly** in five-year alarm monitoring contracts. [12]

The public interest is served through the vigorous prosecution of consumer fraud by the Attorney General and the proper application of the CFA. Robust enforcement of the CFA through the combination of the unique authority of the Attorney General and private attorney general actions is essential to protecting the public.

***4 ARGUMENT**

The people of Minnesota have been well-served by the CFA. This Court should, consistent with its past decisions, determine that omissions are actionable and-refrain from writing into the CFA common law fraud elements that the Minnesota Legislature expressly rejected. Based on the plain language of the statute, the Court should also apply the CFA to persons who may be regulated under other provisions of Minnesota law.

I. The CFA Prohibits Material Omissions And Does Not Require A Common Law Duty Of Disclosure.

The CFA prohibits omissions of material fact and does not impose a common law "duty to disclose" in order for the omissions to be actionable. A court ruling that material omissions are not actionable under the CFA, or that they are only actionable if there is an independent "duty to disclose," is inconsistent with the plain language of the CFA and would impede the State's ability to hold wrongdoers accountable for defrauding Minnesota consumers.

A. The CFA Prohibits Material Omissions That Constitute Fraud, Misrepresentations, Misleading Statements Or Deception.

Subdivision 1 of section 325.69 provides:

> The act, use, or employment by any person of any *fraud*, false pretense, false promise, *misrepresentation, misleading statement or deceptive practice*, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

Minn. Stat. § 325.69, subd. 1 (2012) (emphasis added).

***5** Words and phrases in statutes are construed "according to their common and approved usage." Minn. Stat. § 645.08(1) (2012). "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2012). Minnesota courts have repeatedly held that omissions are a form of fraud, misrepresentation, misleading statement or deception. *See Hardin Cnty. Sav. Bank v. Hous. & Redevelopment Auth. of Brainerd,* 821 N.W.2d 184, 194 (Minn. 2012) ("omissions of material fact and representations" that were "false and misleading" sufficiently pled element of negligent misrepresentation claim); *Swedeen v. Swedeen,* 134 N.W.2d 871, 877 (1965) ("'[I]f a party conceals a fact material to the transaction... it is as much a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated."'); *Newell v. Randall,* 19 N.W. 972, 973 (1884) ("To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation.").

The CFA therefore prohibits material omissions as recognized by numerous Minnesota court decisions. *See, e.g., State v. Alpine Air Prods., Inc.,* 490 N.W.2d 888, 897 (Minn. Ct. App. 1992), *aff'd,* 500 N.W.2d 788 (Minn. 1993) (upholding the imposition of civil penalties under the CFA, where, among other things, a company had "sold over 140,000 air purifiers without disclosing the units can emit dangerous levels of ozone."); *Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1018 (D. Minn. 2012) (CFA "'support[s] omissions as violations' when they are material and naturally affect consumers' conduct"); *State v. Fleet Mortg. Corp.*, 158 F. Supp. 2d 962, 966-67 (D. Minn. 2001) (failure of mortgage company to adequately disclose that it was providing ***6** customer financial information to telemarketers sufficiently stated material omission claim under the CFA); *see also State v. Am. Family Prepaid Legal Corp.*, No. A 11-1848, 2012 WL 2505843, at *5 (Minn. Ct. App. July 2, 2012) (upholding judgment for CFA violations that included omissions) SA. 35; *Johnson v. Hewlett-Packard Co.*, No. CX-01-1641, 2002 WL 1050426, at *4 (Minn. Ct. App. May 22, 2002) (unpublished) ("failing to disclose information about how much ink is in the [printer] cartridges renders the statement [at issue] misleading") SA. 4.

This conclusion is also supported by the principle that the CFA is to be "'broadly construed to enhance consumer protection."' *See Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000); *State v. Philip Morris, Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996) (stating CFA "reflect[s] a clear legislative policy encouraging aggressive prosecution of statutory violations"). Ruling that material omissions are actionable under the CFA furthers the purpose of the statute. Indeed, scammers often tell some of the truth, but not the whole truth. *Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950) (stating "[t]o tell less than the whole truth is a well known method of deception"); *Plotkin v IP Axess, Inc.*, 407 F.3d 690, 702 (5th Cir. 2005) (stating "a half-truth is sometimes more misleading than an outright lie").

The State regularly prosecutes CFA claims arising from the omission of material information. For example, as mentioned above, the State prosecuted a nursing home under the CFA for failing to tell medically fragile patients that convicted sex offenders ***7** would be housed with them; [13] a yellow pages "look-alike" company for not adequately disclosing to small businesses and churches that cashing small checks sent as advertisements would result in enrollment in the company's directory services; [14] a subprime mortgage broker for failing to disclose to homeowners that it was placing them into adjustable rate mortgages with exploding interest rates; [15] and an arbitration company for hiding its extensive ties to the debt collection industry. [16]

Material omissions are actionable under the CFA. A contrary result would be a departure from the Court's precedent and unduly restrict the State's ability to protect the public from such wrongdoing.

B. The CFA Does Not Require A Common Law Duty to Disclose.

The Minnesota Legislature clearly intended that common law requirements not be included in the CFA. As this Court stated in *Group Health Plan, Inc. v. Philip Morris Inc.*, "[w]e will not read an element into a statutory claim that the legislature has not articulated and, to the contrary, has indicated should be eliminated." 621 N.W.2d 2, 13 (Minn. 2001). In enacting the CFA, "the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law." *State v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993); *see also* ***8** *Philip Morris*, 551 N.W.2d at 496; Ly, 615 N.W.2d at 308. The CFA "eliminates elements of common law fraud. *Wiegand v. Walser Auto. Groups. Inc.*, 683 N.W.2d 807, 812 (Minn. 2004).

A "duty of disclosure" is a creation of common law. *See, e.g., West v. Carter*, 712 S.W.2d 569, 573 (Tex. App. 1986) (stating that "common law duty to disclose" "cannot be used to defeat" a statutory claim under Texas Deceptive Trade Practices Act). Accordingly, a duty to disclose is not required for an omission to be actionable under the CFA. *See, e.g., Alpine Air Prods.*, 490 N.W.2d at 897 (upholding civil penalties under CFA against air purifier company that failed to disclose ozone dangers without requiring a duty of disclosure); *Fleet Mortgage*, 158 F. Supp. 2d at 967 (concluding that no duty to disclose required for Attorney General to state claim for fraud by omission under CFA).

This conclusion is consistent with rulings elsewhere. For example, earlier this year, a court held that the District of Columbia's consumer protection statute does not impose a duty to disclose requirement to recover for omissions. The court reasoned that consumer protection statutes do "'not prohibit unfair or deceptive trade practices only between fiduciaries."' *Saucier v.*

Countrywide Home Loans, 64 A.3d 428, 443 (D.C. 2013). Many other courts interpreting similar statutes have reached the same result. *See, e.g., V.S.H. Realty v. Texaco, Inc.,* 757 F.2d 411, 416-17 (1st Cir. 1985) (no duty to disclose to recover for omissions under state consumer protection statute); *Green v. H & R Block, Inc.,* 735 A.2d 1039, 1058 (Md. 1999) (CFA claim did not require "fiduciary duty to disclose"); *Connick v. Suzuki Motor Co., Ltd.,* 675 N.E.2d 584, 595 (Ill. 1996) (dismissing common law omission claims for failure to plead a duty to disclose but ***9** upholding the statutory consumer claim because duty to disclose was not an element of statute).

The Court should not write into the CFA a "duty to disclose" when the Legislature chose not to include such a requirement in the statute. *See, e.g., Johnson v. Cook County,* 786 N.W.2d 291, 295 (Minn. 2010) ("We may not add words to a statute that the Legislature has not supplied."); *Reider v. Anoka-Hennepin School Dist. No. 11,* 728 N.W.2d 246, 250 (Minn. 2007) (stating "we cannot add terms that the legislature has omitted") (citation omitted).

II. As The Court Decided In Group Health, the Causal Nexus Required For A Private Party To Recover Damages Under The CFA May Be Proven By Different Types Of Evidence Depending On The Particular Case.

The issue in this case concerning causation relates to what a *private person* seeking *damages* under the CFA must prove to establish a "causal nexus" between the deceptive conduct and the ensuing harm. That issue is separate and distinct from the proof that the *Attorney General* as the State's chief legal officer must introduce to recover restitution (as opposed to damages) for victims of unlawful conduct. In resolving the question before the Court regarding the causal nexus for damages in a private action, the Court should not impose additional requirements beyond its decision in *Group Health.*

A. As A Public Prosecutor, The Attorney General Has Broad Authority To Enforce The CFA And Obtain Restitution For Injured Victims.

The CFA prohibits deceptive practices "with the intent that others rely thereon in connection with the sale of any merchandise, *whether or not any person has in fact been misled, deceived, or damaged thereby..."* Minn. Stat. § 325F.69 (emphasis added). In ***10** other words, the CFA provides for *liability* regardless of whether a person is "misled, deceived or damaged" by the deception. The plain language of this provision is clear and unambiguous and must be given effect. *See, e.g., State v. Heiges,* 806 N.W.2d 1, 15 (Minn. 2011) (citing Minn. Stat. § 645.16 and stating that when a statute is unambiguous, the court gives "effect to its plain meaning").

The Attorney General enforces the CFA through Minn. Stat. section 8.31, which provides for a variety of remedies. This Court recently recognized that "the remedies available to the State AG are broader than those available to a private litigant." *Curtis v. Altria Grp., Inc.,* 813 N.W.2d 891, 899 (Minn. 2012) (stating Attorney General's "duties are to protect public rights in the interest of the state").

Appellants have similarly recognized that the Attorney General has a "lesser burden" in prosecuting CFA claims than a private party. App. Br. at 19. For example, the Attorney General may take action under the CFA *before* harm occurs: the Attorney General under subd. 2 of section 8.31 may obtain pre-litigation discovery when "any person has violated, or is *about to violate"* the law (emphasis added) and under subd. 3 of section 8.31 may obtain an injunction when the law "is being violated, or is *about to be violated."* Minn. Stat. § 8.31 (emphasis added). The last sentence of subdivision 3a provides that in an action by the Attorney General under section 8.31, a court may award "any of the remedies allowable under this subdivision." *Id.* This sentence makes clear that the Attorney General has available to it all remedies listed in Subdivision 3a to enforce its broad authority referenced in other portions of the statute.

***11** In differentiating the responsibilities of the Attorney General in enforcing State law from a private litigant seeking damages under subdivision 3a of section 8.31, this Court noted in the *Curtis* decision:

> Pursuant to section 8.31, we conclude that *the remedies available to the State AG are broader than those available to a private litigant.* Specifically, the State AG may seek not only the remedies available to the private litigant under subdivision 3a, but also the broad remedies solely available to the State, including civil penalties. Additionally, a private litigant does not have the right to obtain expedited discovery without the commencement of a civil action under subdivision 2 or the assurance of discontinuance procedures under subdivision 2b. *Put differently, the right of a private litigant to bring a lawsuit under subdivision 3a is part of the broader authority of the State AG to bring a lawsuit under subdivision 3 to enforce all remedies available to it, including the remedies under subdivision 3a.*

813 N.W.2d at 899 (emphasis added). The Court also observed that "[t]he rights of a private litigant under subdivision 3a are not as broad as those of the State AG," *id.,* and that "the rights of the State AG to bring a specific lawsuit are superior to the right of a private litigant to bring the same lawsuit." *Id.* at 900.

When the Attorney General enforces the CFA, the lawsuit is brought on behalf of the State of Minnesota, not in the name of a private individual. The Attorney General may seek injunctive relief to stop further unlawful conduct, civil penalties to punish the wrongdoer, and restitution for the victims. In pursuing a claim for restitution, the Attorney General does not seek "damages" within the meaning of subdivision 3a. *See Alpine Air Products, Inc.,* 490 N.W.2d at 895 (holding that an Attorney General suit for injunctive relief and restitution was "entirely equitable" and that "[r]estitution is a traditional equitable remedy"); *Philip Morris,* 551 N.W.2d at 492 (restitution is an ***12** "equitable" remedy). A trial on a CFA claim brought by the Attorney General is a bench trial, not a jury trial, because the Attorney General does not seek "damages," just equitable relief. *Alpine Air,* 490 N.W.2d at 895.

When a defendant engages in a pattern and practice of deception, a district court's broad equitable authority permits it to award full restitution to all aggrieved consumers in a case brought by the Attorney General. *See, e.g., Alpine Air,* 490 N.W.2d at 896; Minn. Stat. § 325F.71, subd. 3 (2012) (providing that restitution ordered pursuant to the CFA is given priority over the imposition of enhanced civil penalties for fraud perpetrated against senior citizens); *State v. Am. Family Prepaid Legal Corp.,* No. A11-1848, 2012 WL 2505843, at *4 (Minn. Ct. App. July 2, 2012) (stating "restitution is appropriate in this case" brought by the Attorney General under the CFA) SA. 34.

The U.S. Supreme Court has also distinguished the equitable powers of the court in public lawsuits from private actions: "[When] the public interest is involved in a proceeding... those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake..." *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946) (citations omitted); *see also United States v. Rx Depot, Inc.,* 438 F.3d 1052, 1055 (10th Cir. 2006) ("[B]ecause the suit involved the public interest and not merely a private controversy, courts' 'equitable powers assume an even broader and more flexible character."').

Numerous other courts have in public actions also recognized a court's broad equitable authority to award restitution to all consumers injured by a pattern and practice of deceptive conduct. *See, e.g.,* ***13** *FTC v. Inc21.com Corp.,* 745 F. Supp. 2d 975, 1011 (N.D. Cal. 2010) (the FTC "is not required to prove that every individual consumer was injured to justify" an award of full restitution because this would "thwart effective prosecutions of large consumer redress actions"); *People v. Toomey,* 203 Cal. Rptr. 642, 659 (Cal. Ct. App. 1984) (stating in attorney general action that "the trial court was fully justified in ordering restitution to all purchasers" because the "evidence shows that misrepresentations and nondisclosures were standard practice in [defendant]'s business").

Although a causal nexus question is not before the Court regarding State restitution claims, the Court should be mindful of the distinction and not impede the State's ability to obtain restitution for victims in State enforcement cases.

B. The Court Should Retain The Flexible Group Health Standard For Proving Damages In Private Attorney General Actions.

As noted above, the CFA applies to deceptive conduct "*whether or not any person has in fact been misled, deceived, or damaged thereby*..." Minn. Stat. § 325F.69 (emphasis added). Under the plain language of the statute, no "causal nexus" is required to establish liability. Section 8.31, subd. 3a - the "private attorney general" statute - authorizes private litigants to pursue *damages* for CFA violations. The "causal nexus" issue in this case relates only to the recovery of private damages, and not the imposition of liability under the statute.

In *Group Health,* this Court held that a private party need not "plead individual consumer reliance on the defendant's wrongful conduct to state a claim for damages under subdivision 3a." As noted above, the consumer protection statutes themselves explicitly eliminate reliance as an element. *Group Health,* 621 N.W.2d at 12-13. The ***14** Court should not revisit that ruling on reliance. *Curtis,* 813 N.W.2d at 900 ("The doctrine of stare decisis provides that we adhere to previous decisions to promote stability in the law.")

The Court also ruled in *Group Health* that private litigants must prove "a causal nexus between the allegedly wrongful conduct of the defendants and [the private plaintiffs'] damages." 621 N.W.2d at 13. The Court stated that the proof did not require "direct evidence of reliance of individual consumers," but "may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct." *Id.* at 14.

The Court reasoned that the "*elimination of reliance* as a distinct element of a statutory misrepresentation claim [under the CFA] is consistent with the legislature's intent to broaden the availability of redress." *Id.* at 12 (emphasis added). The Court added that "we are confident that the legislature would not have authorized private damages actions such as this, where the alleged misrepresentations are claimed to have affected a large number of consumers, while retaining a strict burden of proof that depends on evidence of individual consumer reliance." *Id.* at 15.

In *Wiegand,* this Court reaffirmed its holding that reliance is not required by the CFA or section 8.31. 683 N.W.2d at 812 ("one of the central purposes of the Consumer Fraud Act is to address the unequal bargaining power that is often found in consumer transactions."). The Court reiterated that section 8.31 and the CFA do not require "[a]llegations of reliance" and that a plaintiff need only plead "that the defendant ***15** engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." *Id.* at 811. In *Peterson v. BASF Corp.,* 675 N.W.2d 57 (Minn. 2004), the plaintiffs claimed that BASF had "misled and deceived American farmers into believing" that "Poast-Plus" herbicide could not be used on crops such as sugar beets, which caused them to purchase a higher-priced herbicide. *Id.* at 60, 72. The Court held that evidence of a decline in "Poast-Plus" sales after the omissions were disclosed and a decrease in the price of the product after the disclosure was sufficient proof to establish private damages. *Id.* at 73.

Private attorney general actions "advance[] the legislature's intent to prevent fraudulent representations and deceptive practices with regard to consumer products." *Ly v. Nystrom,* 615 N.W.2d 302, 311 (Minn. 2000). "The interest of the legislature in creating a supplemental force of private enforcement to address unlawful trade practices is clear from the testimony at committee hearings." *Id.* at 313.

As this Court determined in *Group Health,* private litigants must show a "causal nexus" between the deceptive conduct and the alleged harm to recover damages. 621 N.W.2d at 14. Consistent with the Court's precedent, including *Group Health,* the Court should retain flexibility as to the types of circumstantial or other evidence needed by private litigants to prove, and therefore plead, a claim for damages in what can be a variety of fact settings.

III. The CFA Applies To Claims Against Regulated Entities.

Appellants ask the Court to ignore the plain language of the CFA and section 8.31 and create a new judicially-crafted rule: that neither the CFA nor the Attorney General's ***16** authority to enforce violations of laws under section 8.31 respecting "unfair, discriminatory, and other unlawful practices in business, commerce, or trade" apply to violations committed by regulated parties. There is no support for such a proposition in the plain language of the statutes or other Minnesota law, and Appellants' section 8.31 argument is not even properly before the Court.

A. The CFA Unambiguously Applies to Claims Against "Any Person."

The CFA provides as follows:

> The act, use, or employment *by any person* of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of *any merchandise,* whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

Minn. Stat. § 325F.69, subd. 1 (emphasis added). "Person" for purposes of the statute is broadly defined. [17] Statutes are to be construed according to their plain language. *City of Brainerd v. Brainerd Invs. P'ship,* 827 N.W.2d 752, 755 (Minn. 2013) ("When legislative intent is clear from the statute's plain and unambiguous language, we interpret the statute according to its plain meaning without resorting to other principles of statutory interpretation.") "It is not for this court to add words of qualification to [a] statute." *In re Application of Minn. Power,* No. A11-0352, ___.W.2d __, 2013 WL 5229779, *5 (Minn. Sept. 18, 2013) (citing *State v. Carufel,* 783 N.W.2d 539, 545 (Minn. 2010) ("[T]he court cannot add words to a statute not supplied by the legislature."); *KSTP-TV v.* ***17** *Ramsey County,* 806 N.W.2d 785, 790 n.6 (Minn. 2011) (stating "we cannot read language into a statute that the legislature has 'purposely omitted or inadvertently overlooked."') (citation omitted). The plain language of the CFA applies to all persons, regardless of whether or not they are regulated by other state regulatory schemes.

The CFA applies to fraud "in connection with the sale of *any merchandise."* Minn. Stat. § 325F.69, subd. 1 (emphasis added). "Merchandise" means "any objects, wares, goods, commodities, intangibles, real estate, loans, or services." Minn. Stat. § 325F.68, subd. 2. Many types of "merchandise" are sold by regulated entities. For example, courts have held that, among other things, securities, [18] insurance, [19] real estate, [20] prescription drugs, [21] and medical services [22] - all of which are sold by entities governed by extensive regulatory schemes - are "merchandise" under the CFA. Further, the CFA is expressly listed in subdivision 1 of section 8.31 as a state law involving "unlawful practices in *business, commerce, or trade"* - further underscoring the Legislature's intent that the law applies to commercial enterprises that may be subject to other state regulations.

The Attorney General often prosecutes CFA violations by persons who are subject to other government regulatory provisions. For example, in the tobacco litigation, the State brought CFA claims for smoking-related injuries to Minnesota consumers against ***18** cigarette manufacturers that were subject to both state and federal regulations. *State v. Philip Morris,* 551 N.W.2d 490, 496 (Minn. 1996); *see also, e.g.,* Compl., *State v. Fleet Mortg. Corp.,* 158 F. Supp. 2d 962, 964-65 (D. Minn. 2001) (Attorney General lawsuit to halt a telemarketing scheme by a licensed mortgage company); *Con. J., State v. Abbott Labs.,* No. 62-CV-12-4065 (2nd Dist. Minn. 2012) (Attorney General settlement of CFA claims with pharmaceutical company regulated by FDA for promoting "off-label" uses of drug to doctors) SA. 11; Compl., *In re Walser Automotive Group, Inc.,* No. 02-000871 (4th Dist. Minn. 2002) (enforcement action by Attorney General against car dealer regulated by Minnesota Department of Public Safety for fraudulent sales of car warranties); Compl., *State v. Allianz Life Ins. Co.,* No. 27-CV-07-581 (4th Dist. Minn. 2007) (Attorney General lawsuit against insurance company regulated by Department of Commerce for selling unsuitable annuities to senior citizens); Compl., *State v. Express Health,* PA, No. 19HA-CV-09-5050 (1st Dist. Minn. 2009) (Attorney General action against health care professional regulated by state licensing board who never told his patients he applied for a credit cards in their names and placed charges on the cards without their consent); Compl., *State v. Grant Holding, LLC*, No. C6-03-12006 (2nd Dist. Minn. 2004) (Attorney General enforcement action against realtor regulated by Minnesota Department of Commerce who fraudulently stripped the equity out of foreclosed homes.)

Nothing in the CFA limits its application to non-regulated parties. "Ordinarily, unless a statute provides that its remedy is exclusive, a party should not be prevented from bringing concurrent claims." ***19** *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 346-47 (Minn. 2002). Further, there is no basis for the Court to defer CFA claims to administrative agencies under the doctrine of "primary jurisdiction." *See, e.g., City of Rochester v. Peoples' Coop. Power Assoc., Inc.*, 483 N.W.2d 477, 480 (Minn. 1992) ("The [primary jurisdiction] doctrine is inapplicable if the issues raised are 'inherently judicial,' unless the legislature has explicitly granted exclusive jurisdiction to the administrative body.") (citation omitted); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976) ("the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts".)

Based upon the plain language of the statute, the CFA clearly applies to a regulated pharmacy if a CFA claim has been properly plead.

B. The Scope of the Attorney General's Powers to Enforce Laws Other Than the CFA Under Section 8.31 Is Not Properly Before the Court, And In Any Event, Appellants Erroneously Interpret The Statute.

Appellants raise for the first time on appeal the issue of whether violation of Minnesota Statute section 151.21, subdivision 4 is an "unfair, discriminatory [or] other unlawful practice in business, commerce, or trade" enforceable by the Attorney General under section 8.31, subd. 1. Respondents have never claimed that section 8.31 allows them to directly enforce section 151.21, and neither Appellants nor the Court of Appeals previously raised or addressed the issue. *See, e.g., Graphic Commc'ns. v. CVS Caremark Corp.*, 833 N.W.2d 403, 414 (Minn. Ct. App. 2013). The Court therefore should not consider the issue. *See, e.g., In re Matter of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990) ("failure to raise and preserve an issue before the court of appeals constitutes a waiver in a subsequent appeal to this court").

***20** In any event, as discussed above, section 8.31 gives the Attorney General broad authority to enforce state laws involving "unlawful practices in business, commerce, or trade." Subdivision 1 of section 8.31provides as follows:

> The attorney general shall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade, and specifically, *but not exclusively*, [certain enumerated laws, including the CFA].

Minn. Stat. § 8.31, subd. 1 (emphasis added). Similarly, subdivision 2 of section 8.31 provides that the Attorney General shall cause the prosecution "of any of the statutes specifically mentioned in subdivision 1 *or any other laws respecting unfair, discriminatory, or other unlawful practices in business, commerce, or trade." Id.* section 8.31, subd. 2 (emphasis added). Subdivision 3 likewise states that the Attorney General may pursue injunctive relief for "violation of the laws referred to in subdivision 1, *specifically and generally." Id.* section 8.31, subd. 3 (emphasis added).

The Attorney General has explicit authority to enforce statutes involving "business, commerce, or trade" that are not expressly mentioned in subdivision 1 of section 8.31. For example, in *Morris v. American Family*, 386 N.W.2d 233, 234 (Minn. 1986), the court held that the Attorney General could enforce the insurance claims practices statutes through section 8.31 - even though a private party could not. The court noted that "[w]hile section 72A.20 is not listed in subdivision 1, that subdivision says its list is not exclusive, and, *it is clear, section 72A.20 does deal with unfair business practices of insurers" Id.* at 235-36 (emphasis added). Until 1983, section 8.31 contained a subdivision 4 that excluded insurance companies from its reach. *Id.* at 236. ***21** The Court concluded from the repeal of the statute that the Attorney General - but not private parties - could bring actions under section 8.31 for violations of the Unfair Claims Practices Act. *Id.* at 238.

In *State v. American Family Mutual Insurance Co.*, the Court of Appeals again held that the Attorney General has the authority to bring enforcement actions against insurers, even though they are also regulated by the Minnesota Department of Commerce. [23] 609 N.W.2d 1, 4 (Minn. Ct. App. 2000). The court relied on the plain language of section 8.31 to conclude that "the attorney general has been authorized by statute to bring suit for all the alleged violations in this action either because the violations are specifically listed by statute or *because the violations involve unfair business practices."* *Id.* at 3-4 ("the existence of a comprehensive regulatory scheme in an area does not necessarily constrain the authority of others"); *see also Am. Family Prepaid Legal Corp.*, 2012 WL 2505843, at *4 (affirming judgment awarding remedies based on "unlawful conduct" including violations of Minn. Stat. § 60K.46 (insurance suitability statute) and Minn. Stat. § 45.026 (financial planner fiduciary duty statute) SA. 34-35.

These decisions correctly apply the plain language of section 8.31 and further the public interest by authorizing the Attorney General to enforce the laws of the laws of the State of Minnesota respecting unfair, discriminatory and other unlawful practices in business, commerce or trade.

*22 CONCLUSION

The State of Minnesota respectfully submits that (1) material omissions are actionable under the CFA without a duty to disclose, (2) the Court should retain flexibility under *Group Health* for how a private litigant proves damages under the "private attorney statute," and (3) the CFA applies to entities that may be otherwise licensed or regulated, based upon the plain language of the applicable statutes.

Appendix not available.

Footnotes

1 Pursuant to Minn. R. Civ. App. P. 129.03, the Office of the Attorney General certifies that no other person or entity authored, prepared, or paid for this brief.

2 Compl., *State v. Okeson,* No. 19HA-cv-09-7091 (1st Dist. Minn. 2009).

3 Mem. Op., *State v. von Behren,* No. 27-cv-04-12164 (4th Dist. Minn. 2008) SA. 173-74.

4 Stip. & Con. J., *State v. Cheap2Dial Telephone, LLC,* No. 27-cv-11-457 (4th Dist. Minn. 2012) SA. 50-51.

5 J., *State v. Reputable Rare Coins, LLC,* No. 27-cv-11-3169 (4th Dist. Minn. 2011) SA. 58-59.

6 Stip. & Con. J., *State v. Burton,* No. 03-cv-09-719 (7th Dist. Minn. 2012) SA. 41-42.

7 U.S. Gen. Accounting Office, *GAO-13-110, **ELDER** JUSTICE: National Strategy Needed to Effectively Combat **Elder** Financial Exploitation* 1 (2012) (stating that **elder** financial exploitation, including by scammers, is "an epidemic with society-wide repercussions").

8 Brief of Amicus Curiae AARP at 2, *State v. Am. Family Prepaid Legal Corp.,* No. A 11-1848, 2012 WL 2505843, at *1 (Minn. Ct. App. July 2, 2012) (upholding judgment for restitution, fines, and injunction in lawsuit by Attorney General) SA. 31.

9 Compl., *State v. Benchmark Healthcare,* No. MC-04-007963 (4th Dist. Minn. 2004).

10 Compl., *State v. Home Health America, LLC,* No. 62-cv-09-10875 (2nd Dist. Minn. 2009).

11 Compl., *State v. EMT Medical, Inc.,*No. 27-cv-10-11694 (4th Dist. Minn. 2010).

12 Compl., *State v. AMP Alarm, LLC.,* No. 27-cv-10-11695 (4th Dist. Minn. 2010).

13 Compl., *Benchmark Healthcare supra* at note 9.

14 Compl., *State v. Yellow Pages, Inc.,* No. C2-04-10585 (2nd Dist. Minn. 2006).

15 Compl., *State v. First Alliance Mortgage Company,* No. C9-98-11416 (2nd Dist. Minn. 1998).

16 *Compl., State v. Nat'l Arbitration Forum, Inc.,* No. 27-cv-09-18550 (4th Dist. Minn. 2009).

17 "Person means any natural person or a legal representative, partnership, corporation (domestic and foreign), company, trust, business entity, or association, and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee, or cestui que trust thereof." Minn. Stat. § 325F.68, subd. 3 (2012).

18 *Workers' Comp. Reinsurance Ass'n v. Wells Fargo Bank,* N.A., Al1-1260, 2012 WL 1253094, at *10 (Minn. Ct. App. Apr. 16, 2012), *rev. denied* (June 27, 2012) SA. 186.

19 *Nagle v. N. Cent. Life Ins. Co.,* No. C4-01-663, 2002 WL 15689, at *2 (Minn. Ct. App. Jan. 8, 2002) SA. 8.

20 *Liess v. Lindemyer,* 354 N.W.2d 556, 557 (Minn. Ct. App. 1984).

21. *Kociemba v. GD Searle & Co.,* 680 F. Supp. 1293, 1304 (D. Minn. 1988).

22 *K.A.C. v. Benson,* 527 N.W.2d 553, 562 (Minn. 1995).

23 The Court of Appeals' decision in *Schermer v. St. Farm Fire & Cas. Co.,* 702 N.W.2d 898, 904 (Minn. Ct. App. 2005) applies the holding in Morris that, unlike the Attorney General, a private party cannot enforce the insurance unfair claims practices laws.

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