No. A12-1555

STATE OF MINNESOTA
IN SUPREME COURT

GRAPHIC COMMUNICATIONS LOCAL 1B HEALTH & WELFARE FUND "A"; and THE TWIN CITIES BAKERY DRIVERS HEALTH AND WELFARE FUND, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

vs.

CVS CAREMARK CORPORATION; CVS PHARMACY, INC.; CAREMARK, LLC; CAREMARK MINNESOTA SPECIALTY PHARMACY, LLC; CAREMARK MINNESOTA SPECIALTY PHARMACY HOLDING, LLC; COBORN'S INCORPORATED; KMART HOLDING CORPORATION; SEARS, ROEBUCK AND CO.; SEARS HOLDINGS CORPORATION; SNYDER'S DRUG STORES (2009), INC.; SNYDER'S HOLDINGS (2009), INC.; SNYDER'S HOLDINGS, INC.; TARGET CORPORATION; WALGREEN CO.; and WAL-MART STORES, INC.,

Defendants-Appellants.

BRIEF AND ADDENDUM OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC.

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INTEREST OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 107 corporate members representing a broad cross-section of American and international product manufacturers. (ADD 1-2.) These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers and retailers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing and retail sectors. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1000 briefs as *amicus curiae* in both state and federal courts, including an *amicus* brief in the Minnesota Supreme Court on September 6, 2011 in the case *Glorvigen v. Cirrus Design Corporation*, presenting the broad perspective of product manufacturers and retailers and seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's interests are both public and private in nature. PLAC seeks to enhance the competitiveness of manufacturing and retailing companies in Minnesota and around the United States by insuring the development of laws and jurisprudence that fairly account for manufacturers' and retailers' legal rights. PLAC members are sincerely

[1] As required by Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, PLAC certifies that no person other than counsel for PLAC authored any part of this brief and that no person or entity other than PLAC made a monetary contribution to the preparation or submission of this brief.

concerned about unwarranted and unnecessary expansion of common law and statutory tort theories. Without reversal, the Court of Appeals' Consumer Fraud Act holdings will ultimately be felt by Minnesota consumers and employers, and by shareholders of Minnesota businesses.

PLAC's members are concerned that an expansion of the Consumer Fraud Act to allow suit based on a violation of a regulatory statute, regulation, or administrative rule that provides no private right of action will expose product manufacturers and sellers to increased liability risks, litigation expense, and other adverse economic effects, both in Minnesota and in other jurisdictions that rely on this Court's interpretation of Minnesota law. For this reason, PLAC's members have a special interest in this Court's review of the Court of Appeals' decision.

SUMMARY OF ARGUMENT

The Court of Appeals' decision to recognize a new cause of action based on the Consumer Fraud Act and Minnesota Statutes §151.21, subd. 4 (hereinafter "§151.21") should be reversed. PLAC's membership, which includes pharmaceutical industry participants, will suffer if the legislature's decision to regulate pharmacies through the Minnesota Board of Pharmacy is thwarted and regulatory authority is handed over to the private bar. This Court should respect the legislative plan and reverse the Court of Appeals' recognition of this new private cause of action.

If affirmed, the Court of Appeals' decision also has the potential to subject PLAC's broader membership of regulated product manufacturers and retailers to increased exposure under the Consumer Fraud Act. The private bar may use the Court of Appeals' decision to bring any number of new private causes of action under state and federal regulatory programs that, to date, have lacked private rights of action. This could create confusion, uncertainty, and inconsistency in a wide variety of regulated industries and make Minnesota a hotbed for these new private attorney general claims.

The Minnesota Supreme Court should also take this opportunity to elucidate pleading standards relating to "causal nexus" that will allow litigants and the courts to screen out tenuous Consumer Fraud Act claims before discovery. Where a plaintiff has been harmed by a defendant's wrongful conduct, that plaintiff should have no trouble pleading a causal nexus. Where a plaintiff cannot plead facts demonstrating the existence of a causal nexus, a defendant should be able to have such claims dismissed before incurring substantial discovery costs.

ARGUMENT

I. PLAINTIFFS MAY NOT USE THE CONSUMER FRAUD ACT TO CIRCUMVENT THE ABSENCE OF A PRIVATE CAUSE OF ACTION UNDER §151.21.

The Court of Appeals' decision to recognize a new cause of action under the Consumer Fraud Act based on a violation of §151.21 is an unprecedented expansion of Minnesota law. In a well-reasoned dissenting opinion, Judge Schellhas provided an extensive analysis on why Minnesota law requires a contrary result. PLAC supports the dissent's analysis.

If the Court of Appeals is affirmed, regulated businesses in Minnesota, including PLAC's manufacturer and retailer members, will have their dealings with regulators complicated, and will face inconsistent, conflicting, and ambiguous regulatory schemes. Based on legislative intent, judicial restraint, and sound public policy, the Minnesota Supreme Court should decline to recognize a new cause of action under the Consumer Fraud Act based on an alleged violation of §151.21.

A. The Minnesota Supreme Court Should Not Thwart Legislative Intent By Recognizing A New Cause Of Action Under A Statute The Legislature Intended To Be Enforced Administratively.

The recognition of a new cause of action under §151.21 and the Consumer Fraud Act is contrary to legislative intent. *See Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990) (before a court recognizes a new tort, "a broader segment of our society should study, debate and consider this action, and if such a tort is to be adopted, decide how broad its scope and how far reaching its award of damages will be."); *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 11 (Minn. 2001) ("We have held that it is not

the role of this court to extend the reach of consumer protection beyond what was intended by the legislature.").

The Minnesota Supreme Court should not circumvent the legislature's intent by allowing a plaintiff to use the Consumer Fraud Act to bring a private right of action under §151.21 through the backdoor. Minnesota courts have repeatedly resisted plaintiffs' attempts to use the common law and the Consumer Fraud Act to bootstrap a cause of action under a statute for which there is not private right of action. *See Palmer v. Illinois Farmers Ins. Co.*, 666 F.3d 1081, 1084-86 (8th Cir. 2012); *Bernstein v. Extendicare Health Servs.*, Inc., 653 F. Supp. 2d 939, 944 (D. Minn. 2009); *Bernstein v. Extendicare Health Servs.*, Inc., 607 F. Supp. 2d 1027, 1032 (D. Minn. 2009); *Elder v. Allstate Ins. Co.*, 341 F. Supp. 2d 1095, 1100-02 (D. Minn. 2004); *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237-38 (Minn. 1986); *Schermer v. State Farm Fire & Cas. Co.*, 702 N.W.2d 898, 905 (Minn. Ct. App. 2005) aff'd, 721 N.W.2d 307 (Minn. 2006); *Olson v. Moorhead Country Club*, 568 N.W.2d 871, 873 (Minn. Ct. App. 1997).

Indeed, courts around the country have refused to thwart legislative intent by allowing a plaintiff to couch a claim under a statute with no private right of action as a consumer fraud act claim. For example, in *Conboy v. AT & T Corp.*, 241 F.3d 242, 257-58 (2d Cir. 2001), the Second Circuit established that a plaintiff cannot circumvent the lack of a private cause of action under a New York statute by claiming that a violation of that statute is actionable under New York's consumer fraud act. The Second Circuit was concerned that allowing a Plaintiff to do so would not only be "contrary to the [legislature's] intent," but also "inconsistent with the statutory scheme." *Id.* at 258.

PLAC's membership includes participants in the pharmaceutical industry whose Minnesota-related activities may be impacted and informed by the legislatively created pharmacy regulation scheme as applied by the Minnesota Board of Pharmacy. The courts should not upset the legislature's pharmacy regulation plan by allowing the private bar to rework the regulatory program by using the Consumer Fraud Act to usurp the authority of the Board.

B. Public Policy Supports The Minnesota Supreme Court's Deference To The Legislature On How §151.21 Should Be Enforced.

Numerous public policies support this Court's deference to the legislature's determination that §151.21 should be enforced exclusively by the Minnesota Board of Pharmacy. First, courts and the private bar lack the institutional competence to regulate this industry in a comprehensive and coordinated fashion. Second, courts and the private bar lack all of the enforcement tools given to the Board by the legislature. Third, the courts and the private bar will not be able to regulate a complex and dynamic industry with the same uniformity and flexibility as the Board. Each of these important public policies will be undermined if the Court of Appeals' decision is affirmed.

Minnesota courts generally defer to appointed regulatory experts to enforce state regulatory schemes. *See Palmer,* 666 F.3d at 1085 ("The decisions by Minnesota courts indicate that they generally defer to the Commissioner of Commerce to enforce the state's comprehensive scheme for insurance regulation."); *Schermer,* 702 N.W.2d at 906-07 ("As compared with the expertise of regulating agencies, courts do not approach the same level of institutional competence to ascertain reasonable rates. . . . Courts are simply

ill-suited to systematically second guess the regulators' decisions and overlay their own resolution."). Indeed, Minnesota courts defer to administrative enforcement when "an issue before the court requires the particular competence and expertise of the agency." *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 48 (Minn. 2009) (discussing the primary jurisdiction doctrine); *see also Taradejna v. General Mills, Inc.*, 909 F. Supp. 2d 1128, 1134 (D. Minn. 2012) ("Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. . . . Agency expertise is the most common reason that courts apply the doctrine of primary jurisdiction.").[2] Where, as here, the legislature has created a professional board composed of experts to regulate a complex and dynamic industry, the courts should defer to board expertise when it comes to enforcement of the regulatory program.

Not only do Minnesota courts defer to administrative enforcement based on expertise, they also defer to administrative enforcement when state regulators possess more tools to regulate. Where the legislature has created a comprehensive regulatory scheme and empowered state-appointed officials to enforce it, courts generally view administrative enforcement as exclusive and disfavor "private rights of action or parallel common law claims." *Palmer*, 666 F.3d at 1085 ("[W]hen a statute creates a right which did not exist at common law and provides administrative remedies, those remedies are exclusive."). Courts question the wisdom of allowing judicial intervention into a

[2] While the primary jurisdiction doctrine does not apply to this case because a claim under §151.21 is not "originally cognizable in the courts," *see Taradejna*, 909 F. Supp. 2d at 1134, the policies underlying the primary jurisdiction doctrine remain relevant to whether the Minnesota Supreme Court should recognize a new cause of action based on §151.21 and the Consumer Fraud Act.

regulatory scheme when such intervention would require the courts to "reconstitute the whole rate structure of an industry." *Schermer*, 702 N.W.2d at 906-07 (discussing the filed rate doctrine). Minnesota courts are also reluctant to interject the judiciary into the day-to-day regulation of an industry. *Bernstein*, 653 F. Supp. 2d at 944 (allowing "allegations regarding the failure to provide legally compliant services . . . to state a claim under Minnesota's consumer protection statutes . . . would allow litigation to supplant the extensive regulatory structure imposed on nursing homes, and it would insert the courts as overseers of the day-to-day operations of nursing homes, requiring that each interaction between nursing home staff and patients be parsed for possible misstatements."). Where the legislature has given state regulators the tools and authority to regulate an entire industry, it is not sound public policy to interject the private bar as a piecemeal and opportunistic regulator.[3]

In order to exercise its delegated authority to regulate, state regulators need to be able to act with uniformity and flexibility; allowing the private bar to usurp control from regulators undermines both of these goals.[4] By layering private enforcement on top of

[3] Where the legislature has denied a private right of action under a regulatory program, it does not make sense to regulate within the framework of the Minnesota Rules of Civil Procedure. While a regulatory enforcement action may be tailored to achieve the desired result by the most efficient means available, a private right of action—including civil discovery under Rule 26 and class action procedures under Rule 23—has a greater potential to devolve into an unrestrained attack on an entire industry.

[4] This is not to say that there is no role for the private bar in overseeing the actions of the regulators. Indeed, if private parties believe that regulators are performing their jobs in an arbitrary manner, there are mechanisms to judicially challenge such arbitrary regulatory actions or inactions. *See, e.g.*, Minn. Stat. §14.63 (Administrative Procedure Act); Minn. Stat. §586.01 (Writ of Mandamus).

administrative regulation, courts risk the creation of discrimination among industry participants.[5] *See Schermer*, 702 N.W.2d at 906-07 (the filed rate doctrine "avoids retroactive relief that would lead to discrimination in rates such that a victorious plaintiff would end up paying less than similarly situated nonsuing customers."). It can also undermine legislative intent that industry participants be subject to uniform regulation. *Id.* at 906-07 (the filed rate doctrine avoids "undermin[ing] the congressional scheme of uniform rate regulation."); *see also Taradejna*, 909 F. Supp. 2d at 1134 ("[C]ourts apply the [primary jurisdiction] doctrine to promote uniformity and consistency within the particular field of regulation."); *Hoffman*, 764 N.W.2d at 48-49 (same). Indeed, enforcement of a regulatory scheme through the courts instead of through state-appointed actors deprives the appointed regulators of the necessary flexibility and authority to create, interpret, and modify regulatory policy. *See Conboy*, 241 F.3d at 253 ("[A] private right of action would place the FCC's 'interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.'"). Where the legislature has delegated the regulation of an industry to appointed officials, the courts should not undermine the regulators' ability to regulate with uniformity and flexibility by

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[5] As one could easily imagine, a business could exploit a dual enforcement regime to interfere with its competitors' attempts at regulatory compliance.

allowing parallel enforcement of the legislative scheme by the private bar through the Consumer Fraud Act.[6]

PLAC's members participate in regulated industries and dedicate substantial resources to working with regulators and maintaining regulatory compliance based on those dealings. PLAC's members are concerned that the Court of Appeals' decision has the potential to complicate and even undermine their work with regulators. Regulated industry needs to know who it is that is articulating the applicable policy and needs to be able to rely on the pronouncements of, and its dealings with, that regulator. Where the legislature has created a plan whereby regulation is achieved by state-appointed officials, and denied a private right of action under the regulatory program, the courts should respect that plan and refuse to allow the private bar to subvert it through the Consumer Fraud Act.

II. ALLOWING PLAINTIFFS TO USE THE CONSUMER FRAUD ACT AS AN END RUN AROUND NO PRIVATE RIGHT OF ACTION COULD GREATLY EXPAND LIABILITY UNDER MINNESOTA LAW.

By affirming the Court of Appeals and recognizing a new cause of action under the Consumer Fraud Act based on an alleged violation of §151.21, the Minnesota Supreme Court will establish a foundation on which the potential liability of Minnesota businesses could be vastly expanded. If the Court allows a private plaintiff to "borrow"

[6] Dual regulation will not only undermine the regulators' authority, it also has the potential to create confusion among the regulated and the regulators. Will regulators now have to determine how 289 district court judges in 10 different judicial districts will interpret the regulatory scheme? Will the regulated businesses now have to conform their behavior to the expectations of the private bar and the 289 judges as well as those of the regulators? How will the judicial process react in real time and keep up with innovation and change in evolving industries?

§151.21 to establish a Consumer Fraud Act claim, such a precedent could be used to bring claims under the Consumer Fraud Act based on any number of other state statutes or administrative rules for which no private right of action exists. And it would not necessarily stop there. Private plaintiffs may use the Court's precedent to bring Consumer Fraud Act claims based on federal statutes and regulations for which there is no private right of action. Indeed, such a precedent may be used by the private bar not only to bring Consumer Fraud Act claims based on statutes, rules, and regulations, but also to repackage common law claims as Consumer Fraud Act claims, upsetting longstanding rules regarding causation, damages, and the recovery of legal fees. The Minnesota Supreme Court should consider the impact that this ruling could have in expanding liability for businesses in considering whether to affirm the Court of Appeals.

A. Plaintiffs May Use The Court Of Appeals' Decision To Hold Businesses Liable Under The Consumer Fraud Act For Violating Any State Law Lacking A Private Right Of Action.

A decision affirming the Court of Appeals could be used by the private bar to bring Consumer Fraud Act claims under any state statute or administrative rule for which there is no freestanding cause of action. Such an application would disrupt the work of myriad state regulators and create confusion among regulated industries in Minnesota. Moreover, it would have the potential to substantially increase Consumer Fraud Act claims against companies doing business in Minnesota.

The Minnesota Statutes and Administrative Rules are replete with provisions regulating businesses in Minnesota, many of which provide no private right of action.

One need only browse the Statutes and Rules to get a sense of the impact that the Court of Appeals' decision could have if affirmed.

For example, the Minnesota Food Code applies to a wide variety of "food establishments" that are licensed and inspected by the Department of Agriculture, Department of Health, or local authorities. *See* Minn. R. 4626.0010; Minn. R. 4626.0017; Minn. R. 4626.0020, subp. 35. Under the Food Code, many food establishments are required to prepare a hazard analysis plan in order to maintain licensure. *See* Minn. R. 4626.0030; Minn. R. 4626.1730. Certain food establishments are required to comply with their hazard analysis plans, Minn. R. 4626.1730, and the regulatory authorities are empowered to inspect food establishments to determine compliance, Minn. R. 4626.1785, and to take actions against food establishments that have not followed the Food Code. *See* Minn. R. 4626.1805. The regulatory authorities are also given considerable flexibility in the enforcement of the Food Code; for example, regulatory authorities are empowered to grant variances where "strict compliance with [a] rule will impose an undue burden on the applicant" and "the variance will have no potential adverse effect on public health." Minn. R. 4626.1695.

Given the breadth of the Food Code, it is possible that food establishments will fall out of strict compliance with the applicable rules. If this Court follows the reasoning of the Court of Appeals, the private bar may use the precedent to bring future cases against food establishments who have fallen out of regulatory compliance with the Food Code and have failed to disclose the regulatory lapse to their customers. If the Consumer Fraud Act could be used by the private bar to sue food establishments for technical

regulatory violations, food sellers could face increased liability even if such lapses did not lead to any sickness or injury. Such enforcement by the private bar could complicate the regulatory authorities' attempts to regulate with uniformity and undermine the authorities' abilities to regulate with flexibility.

The other regulatory programs that could be brought into play are only limited by the creativity of the private bar. For example, the legislature set forth "physical standards" and other rules regarding the construction, maintenance, equipping, and operation of nursing homes. *See* Minn. Stat. §144A.08 (requiring the Commissioner of Health to establish, by rule, "minimum standards for the construction, maintenance, equipping and operation of nursing homes"); *see also* Minn. R. Ch. 4658 (establishing a variety of rules regarding the same). Will nursing homes and nursing home operators be liable to a private plaintiff every time they market a facility in technical violation of the physical standards without disclosing the violation? Will businesses that sell products and services to the nursing home industry be liable for marketing products and services that the private bar argues are somehow deficient under Minnesota's regulatory codification?

Salons and barber shops are subject to a variety of sanitary and other requirements. *See* Minn. Stat. §154.24.24 (allowing the Board of Barber Examiners "to prescribe sanitary requirements for barber shops and barber schools"); Minn. Stat. §155A.26 (same with respect to salons); Minn. R. Ch. 2100 (establishing a variety of rules for the operation of barber shops); Minn. R. Ch. 2105 (same with respect to salons). Will salons

and barber shops be subject to Consumer Fraud Act claims for not disclosing technical violations of sanitary requirements in its advertising and costumer communications?

And the list goes on. While some of these concerns may seem trivial at first blush, the experience of California businesses under California's broad consumer fraud act was not. For example:

- Auto dealers and homebuilders were sued for technical violations such as abbreviating "Annual Percentage Rate" to "APR;"
- Nail salons were sued for technical violations like using the same nail polish bottle for more than one customer;
- Manufacturers were sued for using "Made in the U.S.A." labels when minor parts from other countries were incorporated into final products; and
- Fast food restaurants were sued when restroom components were an inch out of compliance with disability requirements.

See John Wildermuth, *Measure Would Limit Public Interest Suits*, S.F. Chron., May 31, 2004, at B1; Walter Olson, *Stop the Shakedown*, Wall St. J., Oct. 29, 2004, at A14; Amanda Bronson, *Nail Salons Sued Under Unfair Competition Law*, L.A. Bus. J., Dec. 16, 2002, at 12; Robert Rodriquez, *Business Coalition Seeks to Tighten Law, Lawyers Use Loophole to Sue, Group Says*, Fresno Bee, Sept. 24, 2004, at C1.

PLAC's members, whose manufacturing and retailing activities are frequently subject to regulation, are concerned that technical regulatory violations, which may be viewed by regulators as immaterial or properly addressed through cooperative action, could devolve into scorched-earth, class action litigation under the Court of Appeals' interpretation of the Consumer Fraud Act. PLAC's members do not believe that empowering the private bar to second guess regulatory action or inaction through a lay

jury serves the public interest. Instead, PLAC's members submit that the public interest will be better served through administrative enforcement and the accompanying discretion and flexibility that it brings. The Court should not allow the private bar to use the Consumer Fraud Act to subvert the legislature's will.

B. Plaintiffs May Use The Court Of Appeals' Decision To Hold Businesses Liable Under The Consumer Fraud Act For Violating Federal Laws Lacking Private Rights Of Action.

The potential expansion of liability for companies doing business in Minnesota does not stop with state statutes and regulations with no private right of action. If the Court of Appeals is affirmed, the private bar may try to "borrow" a technical violation of any federal statute or regulation for which there is no private right of action as a predicate to a Consumer Fraud Act claim. Indeed, in a state where the consumer fraud act is construed broadly to allow a plaintiff to "borrow" an alleged regulatory violation to establish a consumer fraud act claim, it was recently held that a private plaintiff may base a consumer fraud act suit on an alleged violation of a federal law for which there is no private right of action. *See Rose v. Bank of Am., N.A.*, 304 P.3d 181, 183 (Cal. 2013) (discussing the federal Truth in Savings Act).

A similar extension of the Court of Appeals' holding here could expose companies doing business in Minnesota to liability under the Consumer Fraud Act for any undisclosed violation of any federal statute or regulation—even if Congress never intended a private right of action under such statute or regulation—and create a parallel army of private regulators with which the business community will have to contend.

Such a change in Minnesota law would fundamentally disrupt the status quo and create a sweeping expansion of tort liability.

For example, plaintiffs bringing product liability claims under state law sometimes fail to show, under established state law standards, that the product at issue is unreasonably dangerous, that an unreasonably dangerous condition existed at the time the product left the defendant's possession, or that the condition caused the alleged injury. *See Gibson v. Wal-Mart Stores, Inc.*, 189 F. Supp. 2d 443, 447-448 (W.D. Va. 2002) (granting summary judgment to defendants on plaintiff's claim based on her accidental ingestion of lighter fluid at a retail store). Faced with that failure of proof, creative plaintiffs' lawyers sometimes try to recast such deficient claims as freestanding claims based on federal statutory violations. *See id.* at 448 (alleging violations of the Federal Hazardous Substances Act and the Poison Prevention Packaging Act). Courts are able to dispose of such claims where there is no express or implied private right of action under such statutes. *Id.* at 449. In so doing, courts have been able to keep enforcement of federal statutes in the hands of the appropriate federal regulatory agencies. *Id.* Such decisions do not deny plaintiffs the opportunity for redress, as existing state law provides meaningful relief for meritorious claims. *Id.*; *see also Patterson v. Amos*, No. 1:91-131, 1991 WL 575826, at *2 (W.D. Mich. Aug. 27, 1991) (declining to allow product liability claims to proceed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "since plaintiffs' claims are traditionally governed by state common-law tort principles").

An affirmation of the Court of Appeals' holding, however, could undermine such well-reasoned and just decisions by allowing plaintiffs to plead around the absence of a

federal statutory cause of action by recasting claims as a failure to disclose regulatory violations in violation of the Consumer Fraud Act. Allowing these types of cases to go forward will wrestle regulatory control from expert regulators and allow claims that fail under existing state tort law standards to go forward.

Allowing Consumer Fraud Act claims predicated on federal regulations for which there is no private right of action could also strain the judiciary by creating the need to conduct a tortuous fact-finding inquiry. In *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986), the Eighth Circuit held that Congress did not expressly or impliedly create a private of action based on alleged violations of product hazard reporting rules issued by the Consumer Product Safety Commission and examined "[t]he practical consequences of advancing a private right of action based on the Commission's reporting rules." *Id.* at 610. While a plaintiff injured by a product need show only a defect causing an injury under state product liability law, a private cause of action based on alleged violation of the Commission's reporting rules would require showing both a knowing violation of the reporting rules and that reporting would have prevented the injury. *Id.* This would require a court to speculate on how the Commission would have acted had the defendant reported and to speculate on whether such actions would have prevented the accident. *Id.* The court concluded: "[w]e doubt that Congress intended to set such a tortuous process in motion." *Id.*[7]

[7] In addition to straining the judiciary with tortuous fact-finding inquiries, the Court of Appeals' decision, if affirmed, could turn the Minnesota courts into a dumping ground for more lawsuits from entities outside of Minnesota. As Minnesota courts become magnet for these kinds of expanded claims, judicial resources will be further strained.

PLAC's members are concerned that the same types of problems will be presented if a plaintiff tries to sidestep the absence of a private cause of action by bringing claims under the Consumer Fraud Act. How will a court determine whether the Commission would have held a hearing had the defendant reported a hazard? How will a court determine what remedy the Commission, working cooperatively with the defendant, would have ordered? Does the Court really want to encourage such a "tortuous process" or is it better to resolve such claims through traditional, common law causes of action?

Allowing the private bar to use an alleged violation of a federal statute or regulation for which there is no private right of action as a predicate for a Consumer Fraud Act claim could also expose PLAC's members to conflicting regulation by the relevant federal agencies and the state courts. For example, plaintiffs have sued medical device manufacturers under state consumer fraud acts for not disclosing to patients and doctors that their devices used a component part different from what was approved by FDA. S*ee Littlebear v. Advanced Bionics, LLC*, 896 F. Supp. 2d 1085, 1091-92 (N.D. Okla. 2012). While such cases may be properly disposed of by defenses based on federal preemption, *see id.*, they highlight the tension between a dual enforcement regime involving expert regulators empowered by Congress on the one hand and the private bar on the other. Does the Court want to empower the private bar to attempt to sidestep federal agencies and enforce federal regulatory schemes through the Consumer Fraud Act? Are traditional tort remedies somehow not sufficient?

The Court should decline to expand the Consumer Fraud Act to allow a claim to proceed every time a plaintiff is able to plead that a defendant was in technical violation

of a federal statute or regulation and failed to disclose that violation to consumers. Such an expansion would erode the effectiveness of congressionally created regulatory schemes, expose manufacturers and sellers to inconsistent regulation by federal agencies and the private bar, and force the courts to speculate on how federal agencies would have acted or viewed a defendant's conduct. This is not what the legislature intended by enacting the Consumer Fraud Act.

C. Plaintiffs May Use The Court Of Appeals' Decision To Repackage Common Law Claims As Consumer Fraud Claims.

By affirming the Court of Appeals' decision, the Court not only risks creating a legion of new torts based on state and federal statutes, rules, and regulations that previously could only be enforced by government actors, it also risks disrupting and expanding liability under traditional, recognized common law causes of action.

For example, under California's expansive approach to liability under its consumer fraud act, "borrowing" need not occur from statutes, rules, or regulations; it can also come from the common law. *See Cortez v. Global Ground Support, LLC*, No. 09-4138, 2009 WL 4282076, at *3 (N.D. Cal. Nov. 25, 2009) (describing "the more common practice of allowing plaintiffs to predicate UCL claims upon the commission of common law torts."). Such a practice could have a devastating impact on product manufacturers and sellers because if a plaintiff could recover under the Consumer Fraud Act using a product liability claim, attorney's fees could now become recoverable against product manufacturers and sellers in Minnesota. *See id.* ("[T]he Court sees no basis for holding that claims based on negligent design should be categorically excluded from the remedies

offered by the UCL."); *see also In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 830 (S.D. Ohio 2012) ("[A]llegations suggesting that a defendant knew of and failed to disclose safety risks posed by its defective product are sufficient to establish UCL liability under all three prongs of the statute."). This would not only impact manufacturers and sellers allegedly liable in tort, it could also impact all commercial transactions involving Minnesota businesses. *See Genesco, Inc. v. Visa U.S.A. Inc.*, No. 3:13-202, 2013 WL 3790647, at *20 (M.D. Tenn. July 18, 2013) (noting that a breach of contract may form the predicate for a California consumer fraud act claim).

PLAC's members are concerned that such a result could allow plaintiffs to sidestep established defenses by couching common law claims as consumer fraud claims, as well as ease plaintiffs' burden of proof and undermine the application of the American Rule as the default rule regarding the recovery of attorney's fees in common law actions brought under Minnesota law.

The Court can easily avoid these problems by not allowing plaintiffs to disguise alleged violations of other laws as Consumer Fraud Act claims. Such a decision would find support in the decisions of other Minnesota courts holding that the Consumer Fraud Act is not implicated by every alleged violation of law. *See, e.g., Bernstein*, 607 F. Supp. 2d at 1032 ("It is possible that the Defendants are violating state laws and regulations and are not providing adequate care to residents. . . . A consumer protection action simply is not the path to resolution of those issues . . . ."); *Pecarina v. Tokai Corp.*, No. 01-1655, 2002 WL 1023153, at *5 (D. Minn. May 20, 2002) ("[T]he essence of Plaintiffs' lawsuit is personal injury, involving allegations of negligence and products liability. . . . Plaintiffs

may not craft their products liability suit to bring it within the ambit of the Private AG Act.").

* * *

If this Court adopts the Court of Appeals' reasoning, the Consumer Fraud Act could become a basis for the private bar to interject itself as the enforcer of every state and federal regulation. Such a result should be avoided. The Court should not allow plaintiffs to use a statute or regulation with no private right of action as a predicate for a Consumer Fraud Act claim.

III. THE CAUSAL NEXUS PLEADING REQUIREMENT MUST BE POLICED TO PROTECT BUSINESSES FROM BURDENSOME DISCOVERY IN TENUOUS CASES.

The Court should articulate pleading rules requiring plaintiffs asserting Consumer Fraud Act claims to plead a causal nexus. These pleading rules should contain sufficient teeth to allow defendants and courts to test tenuous Consumer Fraud Act claims at the pleading stage and before defendants are forced to dedicate significant resources towards discovery.

"[T]he [Consumer Fraud Act] requires that there must be some "legal nexus" between the injury and the defendants' wrongful conduct." *Grp. Health Plan, Inc.*, 621 N.W.2d at 14. The Court should take the opportunity to explain what must be established at the pleading stage for a plaintiff to demonstrate a plausible causal nexus sufficient to support a Consumer Fraud Act claim. The Court's explanation should take into account the burden imposed upon manufacturers and retailers when claims against them are allowed to proceed past the pleadings and into discovery.

PLAC is acutely aware of the discovery costs faced by its members in defending product liability cases, particularly since the advent of e-discovery. Even routine product liability cases can cost product manufacturers and sellers millions of dollars in e-discovery costs. A recent study conducted by the RAND Institute for Civil Justice revealed typical e-discovery costs in product liability cases. *See* Nicholas M. Pace et al., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* 17-18 (RAND Corp. 2012), available at http://www.rand.org/pubs/monographs/MG1208.html. That study described seven product liability cases with e-discovery costs ranging from $38,476 to $27,118,520. *Id.* Six of the seven cases described by the study required the defendant to spend more than $2,000,000 on e-discovery. *Id.* The outlook does not improve much for defendants if the case is viewed through the lens of fraud instead of product liability. Defendants involved in the four fraud or false claims cases described by the RAND study spent between $252,473 and $3,208,863 on e-discovery. *Id.* Three of the four cases involved e-discovery expenditures of more than $1,000,000. *Id.*

As this study demonstrates, allowing tenuous claims to proceed past the pleadings and into discovery can impose staggering costs on product manufacturers and sellers. The Court has the opportunity to clarify what must be pleaded to establish the causal nexus element of a Consumer Fraud Act claim. In doing so, the Court should take into account the discovery costs incurred by defendants to respond to claims, and elucidate a standard that will allow defendants and the courts to keep tenuous claims from proceeding beyond the pleadings.

CONCLUSION

For the reasons stated above, PLAC urges the Court to reverse the decision of the Court of Appeals and refuse to allow a plaintiff to bring a Consumer Fraud Act claim based on an alleged violation of a statute with no private right of action.

Dated: September 6, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,684 words. This brief was prepared using Microsoft Word 2010 software.

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