

## I. COMMON LAW CAUSES OF ACTION.

### A. Common Law Fraud.

1. **Overview.** Common law fraud claims are one potential source of consumer protection. Minnesota establishes a high threshold of proof for such claims. Martens v. Minnesota Mining & Manufacturing Co., 616 N.W.2d 732, 740 (Minn. 2000). For example, in contrast to some consumer protection statutes, like the Minnesota Consumer Fraud Act, common law fraud requires a showing of reliance. See Flynn v. Am. Home Prods. Corp., 627 N.W.2d 342, 349 (Minn. Ct. App. 2001).
2. **Elements.** To establish a claim of fraud under Minnesota law a plaintiff must establish that:
  - i. the defendant made a false representation about a past or present fact;
  - ii. the false representation was material and susceptible of knowledge;
  - iii. the defendant knew the representation was false or made the representation without knowing whether it was true or false;
  - iv. the defendant intended that the plaintiff rely on the representation;
  - v. the plaintiff reasonably relied on the representation; and
  - vi. the plaintiff suffered damages due to the representation.

M.H. v. Karitas Family Servs., 488 N.W.2d 282, 289 (Minn. 1992). See also Heidbreder v. Carton, 645 N.W.2d 355, 367 (Minn. 2002) (breaking down fraud claim into 11 separate elements).
3. **Fraudulent Omissions.** In addition to misrepresentations, fraud claims may be based on a failure to disclose material facts.
  - i. Generally, the defendant must have a duty to disclose material facts to the plaintiff in order to be held liable for a fraudulent omission. Heidbreder v. Carton, 645 N.W.2d 355, 368 (Minn. 2002).



## C. Breach of Warranty.

1. **Overview.** Where a transaction involves the sale of goods, Article 2 of the Uniform Commercial Code ("UCC") is implicated. Article 2 provides both express and implied warranties upon the purchase of goods.
2. **Express Warranty.** An express warranty arises from "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." Minn. Stat. § 336.2-313(1)(a). It is not necessary that a seller use formal words such as "warrant" or "guarantee" for an express warranty to exist, but a statement "purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." Minn. Stat. § 336.2-313(2). Generally, disclaimers of express warranties are ineffective.
3. **Implied Warranty of Merchantability.** An implied warranty of merchantability arises automatically when a product sold is a "good" and the seller is in the business of furnishing the product to the consumer. Minn. Stat. § 336.2-314. The implied warranty of merchantability provides that the product is fit for its ordinary purpose. Minn. Stat. § 336.2-314(2)(c). A product is a good if it is "movable at the time of identification to the contract for sale." Id.; see also Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 393 (Minn. Ct. App. 2004); TCF Bank & Sav., F.A. v. Marshall Truss Sys., Inc., 466 N.W.2d 49, 51-52 (Minn. Ct. App. 1991). To exclude or modify an implied warranty of merchantability, the contract language must mention merchantability, and, if there is a writing the exclusion or modification must be conspicuous. Minn. Stat. § 336.2-316(2). A clause is "conspicuous" when "it is so written that a reasonable person against whom it is to operate ought to have noticed it." Minn. Stat. § 336.1-201(10).
4. **Implied Warranty of Fitness.** A warranty of fitness for a particular purpose is implied "unless excluded or modified" when a seller "has reason to know any particular purpose for which the goods are required and that the buyer is relying on [the] seller's skill or judgment to select or furnish suitable goods." Minn. Stat. § 336.2-315. To exclude or modify an implied warranty of fitness, the exclusion must be in writing and conspicuous. Minn. Stat. § 336.2-316(2).

## II. STATUTORY CAUSES OF ACTION.

Responding to widespread perpetration of fraud in consumer transactions, state and federal legislatures have afforded Minnesotans with a broad range of statutory consumer protection. Generally, these statutes are given broad interpretation in order to further consumer protection policy.

### A. Lanham Act – 15 U.S.C. §§ 1051-1127.

1. **Overview.** In the United States trademarks may be protected by both Federal statute under the Lanham Act and states' statutory and/or common laws. The purposes of these trademark laws are: (1) to protect the public from confusion and (2) to protect a trademark owner's investment from misappropriation by "pirates and cheats." Everest Capital Ltd. v. Everest Funds Management, L.L.C., 393 F.3d 755, 762 (8th Cir. 2005).
2. **Federal Protection.** Congress enacted the Lanham Act under its Constitutional grant of authority to regulate interstate and foreign commerce. See U.S. Constitution, Article 1, Section 8, Clause 3. Registered trademarks are protected under § 32 of the Lanham Act. Marks that have not been registered may still be protected against infringement under § 43(a) of the Lanham Act. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 767-68, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992) (trade dress protection). The ultimate inquiry under both sections is always whether, considering all the circumstances, a likelihood exists that consumers will be confused about the source of the allegedly infringing product. Everest Capital Ltd., 393 F.3d at 759.
3. **State Protection.** The Lanham Act does not preempt state trademarks laws; instead, the Act sets only a protective floor. If a trademark is registered in Minnesota, an action for infringement is available under Minn. Stat. § 333.28. If a trademark is not registered in Minnesota, protection may be available under the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43 et seq.
4. **Likelihood of Confusion.** Whether a trademark has been infringed is determined by using the likelihood of confusion test. 15 U.S.C § 1114(1)(a). Factors commonly applied include:
  - i. the similarity or dissimilarity of the marks in their entireties as to the appearance, sound, connotation, and commercial impression;

- ii. the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;
- iii. the fame of the mark;
- iv. the nature and extent of actual confusion; and
- v. the length of time during, and conditions under which, there has been concurrent use without evidence of actual confusion;

In re E.I. duPont de Nemours, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

**B. Minnesota Uniform Deceptive Trade Practices Act – Minn. Stat. §§ 325D.43-48.**

1. **Overview.** Minnesota is one of twelve states which has adopted the Uniform Deceptive Trade Practices Act (“UDTPA”). The UDTPA prohibits a variety of acts, but all involve deception or misrepresentation.
2. **Deceptive Trade Practices.** A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person:
  - i. passes off goods or services as those of another;
  - ii. causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
  - iii. causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
  - iv. uses deceptive representations or designations of geographic origin in connection with goods or services;
  - v. represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have, or that a person has sponsorship, approval, status, affiliation, or connection that the person does not have;

- vi. represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used of secondhand;
- vii. represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- viii. disparages the goods, services, or business of another by false or misleading representation of facts;
- ix. advertises goods or services with intent not to sell them as advertised;
- x. advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- xi. makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- xii. in attempting to collect delinquent accounts, implies or suggests that health care services will be withheld in an emergency situation; or
- xiii. engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

Minn. Stat. § 325D.44, subd. 1.

3. **Relation to Lanham Act.** With respect to false advertising and trademark protection, the Minnesota Deceptive Trade Practices Act enjoins the same false and deceptive practices that are unlawful under the Lanham Act. Goddard, Inc. v. Henry's Foods, Inc., 291 F. Supp. 2d 1021, 1039 (D. Minn. 2003). The analysis for both claims is the same. Group Health Plan, Inc. v. Philip Morris, Inc., 68 F. Supp. 2d 1064, 1069 (D. Minn. 1999). As a result, plaintiffs typically incorporate their claims under both the Federal and State statutes.
4. **Remedies.** Injunctive relief is the sole statutory remedy for deceptive trade practices. Alsides v. Brown Inst. Ltd., 592 N.W.2d 468 (Minn. Ct. App. 1999). A person likely to be damaged by a deceptive trade practice "may be granted an injunction" and "[p]roof of monetary damage, loss of profits, or intent to deceive is not required." Minn. Stat. § 325D.45, subd. 1. A private action for

damages and costs, including attorney's fees, may be available under the private-attorney-general statute, Minn. Stat. § 8.31, subds. 1, 3a. Collins v. Minnesota Sch. of Bus., Inc., 636 N.W.2d 816, 820 (Minn. Ct. App. 2001).

**C. Minnesota Consumer Fraud Act – Minn. Stat. §§ 325F.68-325F.70.**

- 1. Overview.** Minnesota's Consumer Fraud Act ("CFA") was adopted in 1963 to address the unequal bargaining power often present in consumer transactions. Ly v. Nystrom, 615 N.W.2d 302, 308 (Minn. 2000). The Act does not apply to all allegations of fraud, but only to those where there is a nexus between the alleged fraud and the sale of merchandise. Banbury v. Omnitrition Int'l, 533 N.W.2d 876, 882 (Minn. Ct. App. 1995). The CFA 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 enjoined as provided herein." Minn. Stat. § 325F.69, subd. 1.

- 2. Intent.** The CFA does not require an intent to misrepresent. Meyer v. Dygert, 156 F. Supp. 2d 1081, 1086 (D. Minn. 2001). Negligent misrepresentations are sufficient to satisfy the intent requirement. McNamara v. Nomeco Bldg. Specialties, Inc., 26 F. Supp. 2d 1168, 1171 (D. Minn. 1998).
- 3. Consumer.** The CFA does not define consumer. Courts have construed the term very broadly. Generally, one who acquires goods or services for direct use or ownership, rather than for resale or use in manufacturing, is deemed a consumer under the CFA. Hoang Minh Ly v. Nystrom, 602 N.W.2d 644, 647 (Minn. Ct. App. 1999). The Act does not require dissemination to a broad range of consumers; fraudulent representations in the context of a one-on-one transaction may be enough. Ly v. Nystrom, 615 N.W.2d at 310.
- 4. Merchandise.** The CFA does not apply to alleged fraud unrelated to the sale of merchandise. Banbury v. Omnitrition Int'l, Inc., 533 N.W.2d 876, 882 (Minn. Ct. App. 1995) (granting summary judgment where alleged fraud involved distributorship agreement). Merchandise includes "any objects, wares, goods, commodities, intangibles, real estate, loans or services." Minn. Stat. § 325F.68.

5. **Remedies.** The CFA does not specifically provide for money damages. However, Minn. Stat. § 8.31, subd. 3a provides that a private citizen has standing to bring suit under the CFA for damages and costs, including attorney's fees.

**D. Mail & Wire Fraud Statutes.**

1. **Overview.** The current federal wire and mail fraud statutes date back to 1948. See 18 U.S.C. §§ 1341-1350. The legislative history for the statute is sparse, but its purpose is clear. The mail fraud statute is intended “to prevent the post office from being used to carry fraudulent schemes into effect.” U.S. v. Tiller, 302 F.3d 98, 101 (3d Cir. 2002). Similarly, the purpose of the wire fraud statute is “to prevent the use of our telecommunications systems in furtherance of fraudulent enterprises.” U.S. v. Trapilo, 305 F.3d 547, 553 (2d Cir. 1997).
2. **Elements.** To establish a violation of either the mail or wire fraud statute, a prosecutor must prove three elements:
  - i. the existence of a scheme to defraud;
  - ii. the participation by the defendant in the particular scheme;
  - iii. with the specific intent to defraud;
  - iv. the use of the United States mail or of wire communications in furtherance of the fraudulent scheme.

18 U.S.C. §§ 1341, 1343; U.S. v. Syme, 276 F.3d 131, 142 fn.3 (3d Cir. 2002).
3. **Mail.** "Mail," for purposes of the mail fraud statute, is not limited to items sent through United States post offices. In 1994, Congress amended the mail fraud statute to include mail sent by "private or commercial interstate carrier[s]." Examples of private or commercial interstate carriers are Federal Express and United Parcel Service.
4. **“Wire” Communication.** A wire communication, for purposes of the federal wire fraud statute, includes radio and television communications, writings, facsimiles, signs, signals, pictures and sounds. 18 U.S.C. § 1343. The term also includes the use of cellular telephones. See U.S. v. Nunez, 2003 WL 22454495, \*1 (5th Cir. Oct. 29, 2003).

5. **Private Actions.** The mail and wire fraud statutes are criminal statutes and do not support private rights of action. However, fraudulent mailings or wire communications may constitute a "pattern of racketeering activity," 18 U.S.C. § 1961(5), sufficient to support civil RICO liability.

**E. Additional State Consumer Protection Statutes.**

1. **Overview.** There exists in Minnesota a strong public policy in favor of protecting purchasers of consumer goods from overreaching sellers. Holt v. First Nat'l Bank of Minneapolis, 297 Minn. 457, 463, 214 N.W.2d 698, 702 (1973). In keeping with that policy, the state legislature has enacted laws protecting a broad range of consumer interests. See Minn. Stat. §§ 325D.01 to 325G.52.
2. **Examples.** Here are just a few examples of the variety of statutes protecting Minnesota consumers:
  - i. **Manufacture, storage, or sale of matches.** Minn. Stat. § 325F.02.
  - ii. **Flame resistant tents and sleeping bags.** Minn. Stat. § 325F.04.
  - iii. **Unsafe bleachers.** Minn. Stat. § 325F.015.
  - iv. **Manufacture and sale of cotton duck or canvas; stamps, brands, and marks.** Minn. Stat. § 325F.36.
  - v. **Sales of dogs and cats.** Minn. Stat. § 325F.791.
  - vi. **Regulation of automatic garage door opening systems.** Minn. Stat. § 325F.83.

**III. MOTION PRACTICE**

**A. Motions to Dismiss for Failure to State a Claim.**

1. **Overview.** Motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) or Minnesota Rule of Civil Procedure 12.02(e) can be a valuable tool in defending against fraud claims. Courts often use these motions to enforce the special heightened pleading requirements for fraud and mistake prescribed by Federal Rule of Civil Procedure 9(b) and Minnesota Rule of Civil Procedure 9.02.

2. **Rule 9.** Federal Rule of Civil Procedure 9(b) and Minnesota Rule of Civil Procedure 9.02 state, “[i]n all averments of fraud . . . the circumstances constituting fraud or mistake shall be stated with particularity.”
  - i. One of the main purposes of Rule 9 is to facilitate a defendant’s ability to respond and to prepare a defense to charges of fraud. Commercial Prop. Invs, Inc. v. Imcera Group, Inc., 61 F.3d 639, 644 (8<sup>th</sup> Cir. 1995).
  - ii. To satisfy the requirement of Rule 9, allegations of fraud in a complaint must:
    1. specify the statements that the plaintiff contends were fraudulent;
    2. identify the speaker;
    3. state where and when the statements were made; and
    4. explain why the statements were fraudulent.

Commercial Prop. Invs., Inc., 61 F.3d at 644-45.
  - iii. Conclusory allegations that a defendant’s conduct was fraudulent and deceptive are not sufficient to satisfy the heightened pleading standard. Parnes v. Gateway 2000, Inc., 122 F.3d 539, 549-50 (8<sup>th</sup> Cir. 1997).
  - iv. The plaintiff’s complaint must “adduce specific facts which give rise to a strong inference of fraudulent intent.” Lifecore Biomedical, Inc. Sec. Litig., 159 F.R.D. 513, 516 (D. Minn. 1993).
  - v. Where a plaintiff’s fraud claim is grounded on representations of future events, the plaintiff must allege specific facts indicating that the defendant knew, or should have known, that the statements were misleading when made. Weisburgh v. St. Jude Medical, Inc., 158 F.R.D. 638, 643 (D. Minn. 1994).
3. **Res Judicata.** Generally, for purposes of res judicata, a judgment for dismissal for failure to state a claim is a final judgment on the merits. H.J., Inc. v. Northwestern Bell Corp., 420 N.W.2d 673, 677 (Minn. Ct. App. 1988), rev. denied (Minn. May 16, 1988).

4. **Private Securities Litigation Reform Act.** In 1995, Congress, having "concluded that Rule 9(b) had not prevented abuse of the securities laws by private litigants," H.R. Conf. Rep. No. 104-369 (1995), enacted the Private Securities Litigation Reform Act (the "Reform Act"). Under the Reform Act, the circumstances of alleged securities fraud must be stated with particularity, including "such matters as the time, place and contents of false representations, as well as, the identity of the person \* \* \* and what was obtained or given up thereby \* \* \* \* This means the who, what, when, where and how." In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 890 (8th Cir. 2002), quoting Parnes v. Gateway 2000, Inc., 122 F.3d 539, 549-50 (8th Cir. 1997). If a plaintiff does not meet the Reform Act's heightened pleading requirement, the court "shall, on the motion of any defendant, dismiss the complaint." 15 U.S.C. § 78u-4(b)(3).

## **B. Motions for a More Definite Statement.**

1. **Overview.** A motion to dismiss for failure to satisfy the pleading requirements of Rule 9 can be coupled with a motion for a more definite statement under Minnesota Rule of Civil Procedure 12.05 or Federal Rule of Civil Procedure 12(e).
2. **Availability.** Under state and federal procedural rules, the pleadings are intended simply to put the defendant on notice of the basic nature of the plaintiff's case and to give the plaintiff a general idea of what defenses he will face. As such, the availability of a motion for a more definite statement is generally quite restricted. Specific limitations on motions for a more definite statement include:
  - i. motions can only be addressed to a pleading to which a responsive pleading is permitted;
  - ii. motions will be granted only where the challenged pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."

Minn. R. Civ. P. 12.05; Fed. R. Civ. P. 12(e).
3. **Relation to Motions to Dismiss.** Where the plaintiff has failed to allege the "who, what, when, where and how" of the alleged fraud or mistake, but the court cannot say that there are no sets of facts that, if properly pled and proven, would entitle the plaintiff to relief, the court may grant a motion for a more definite statement.

See Indy, L.L.C. v. Talisman Brookdale LLC, 2004 WL 1630976, \*2 (D. Minn. July 20, 2004).

#### IV. DISCOVERY

##### A. Purpose of Discovery.

1. **Overview.** The discovery process provides the means for determining the precise issues and obtaining the information that each party needs to prepare for trial.
2. **Purposes of Modern Discovery Rules.** The liberal discovery rules that exist under current state and federal law serve several distinct purposes, including:
  - i. narrowing the issues before trial;
  - ii. obtaining evidence for use at trial;
  - iii. securing information about the existence and location of potential evidence;
  - iv. eliminating surprise; and
  - v. helping achieve substantial justice.

Marmon v. Hodny, 287 N.W.2d 470, 476 (N.D. 1980), citing Wright & Miller, Federal Practice and Procedure: Civil § 2001; Tenbarge v. Ames Taping Tool Sys., Inc., 190 F.3d 862, 865 (8<sup>th</sup> Cir. 1999). See also Gebhard v. Niedzwiecki, 265 Minn. 471, 476, 122 N.W.2d 110, 114 (1963) (“The purpose of the discovery rules is to enable litigants to prepare for trial free from the element of surprise which, prior to the adoption of the rules, frequently led to a result based more upon legal maneuvering of counsel than upon the merits of the case.”).

##### B. Scope of Discovery.

1. **Overview.** The scope of permissible discovery is broad. Generally, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” Minn. R. Civ. P. 26.02(a); Fed. R. Civ. P. 26(b)(1).

2. **Relevancy.** Rule 26 permits discovery regarding any matter relevant to the pending action. To be relevant, the evidence need not be admissible at trial. Minn. R. Civ. P. 26.02(a); Fed. R. Civ. P. 26(b)(1). Instead, relevant information includes anything which appears reasonably calculated to lead to the discovery of admissible evidence. Id.
3. **No Fishing Expeditions.** "While the standard of relevance in the context of discovery is broader than in the context of admissibility, this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery." Upsher-Smith Labs, Inc. v. Mylan Labs, Inc., 944 F. Supp. 1411 (D. Minn. 1996), quoting Hofer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1992). Instead, "[s]ome threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." Id.
4. **Protective Orders.** State and federal courts are empowered to make a wide variety of orders for the protection of parties and witnesses in the discovery process. See Minn. R. Civ. P. 26.03; Fed. R. Civ. P. 26(c). Protective orders may be obtained by motion or agreement of the parties. Rule 26 lists eight kinds of protective orders that may be made. They are:
  - i. orders that discovery not be had;
  - ii. orders on the terms and conditions of discovery;
  - iii. orders specifying the method of discovery;
  - iv. orders limiting the scope of discovery;
  - v. orders limiting the persons present at discovery;
  - vi. orders that depositions or other discovery remain sealed; and
  - vii. orders protecting confidential information.

Minn. R. Civ. P. 26.03; Fed. R. Civ. P. 26(c).

### C. **Timing of Discovery.**

1. **Overview.** Modern discovery rules allow parties to conduct discovery using the various discovery methods in any sequence

they see fit, and the fact that one party is conducting discovery does not operate to delay any other party's discovery.

2. **Discovery Conferences.** Generally, no formal discovery may be undertaken until the parties have met and discussed a discovery plan. See Minn. R. Civ. P. 26.06; Fed. R. Civ. P. 26(f). The discovery plan often includes provisions regarding scheduling.
3. **Discretion of the Court.** Trial court judges have very broad discretion in controlling the timing of discovery.

## V. REMEDIES

### A. Damages.

1. **Overview.** Generally, damages are recoverable for fraudulent activity. In Minnesota, fraud damages are typically measured using the out-of-pocket rule. Higgins v. Harold-Chevrolet-Geo, Inc., 2004 WL 2660923, \*3 (Minn. Ct. App. Nov. 23, 2004), citing Yost v. Millhouse, 373 N.W.2d 826, 830 (Minn. Ct. App. 1985). The same is true in federal courts. 22 Dunnell Minn. Digest *Fraud* § 3.03 (4th ed. 1994).
2. **Out-of-Pocket Rule.** Under the out-of-pocket rule, the measure of damages is the difference between the amount the defrauded person paid for merchandise and the actual value of the merchandise, plus any other damages proximately caused by the fraud. Yost, 373 N.W.2d at 830-31. The basic premise of this rule is that the plaintiff can recover only what he or she has actually lost, not the benefit of what he or she was promised.
3. **Benefit-of-the-Bargain Rule.** Most state courts measure fraud damages using the benefit-of-the-bargain rule. 22 Dunnell Minn. Digest *Fraud* § 3.03 (4th ed. 1994). This approach allows the plaintiff to recover what he or she would have received had the representations relied upon been true. Yost, 373 N.W.2d at 831. The benefit-of-the-bargain rule, unlike the out-of-pocket rule, also allows recovery of anticipated profits. Id.

### B. Injunctions.

1. **Overview.** Injunctions are the only remedy directly available under the Minnesota Consumer Fraud Act and Deceptive Trade Practices Act. See Minn. Stat. § 325F.69, subd. 1. However, a private citizen may have standing to bring suit under the Consumer

Fraud Act for "damages, together with costs and disbursements, including \* \* \* attorney's fees." Minn. Stat. § 8.31, subd. 3(a).

2. **Standard.** The standard under Minnesota law for injunctive relief is well known. Courts must consider and balance five equitable factors:

- i. the nature of the relationship between the parties before the dispute giving rise to the request for relief;
- ii. the relative hardships between the parties, particularly comparing the harm to be suffered by the moving party if the temporary injunction is denied with that inflicted on the non-moving party if the injunction is granted;
- iii. the public interest in either granting or denying the injunction;
- iv. the likelihood of success on the merits by the plaintiff; and
- v. the administrative burdens involved in enforcing the temporary injunction.

Dahlberg Bros. Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321 (1965).

### C. **Private Attorney General's Statute.**

1. **Overview.** Minnesota's Private Attorney General Statute was adopted in 1973. The statute was intended to help prevent fraudulent representations and deceptive practices in consumer transactions by offering an incentive for defrauded consumers to bring claims in lieu of the state attorney general.
2. **Public Actions.** The state attorney general has broad statutory authority to investigate violations of law regarding unlawful business practices barred by a variety of state and federal statutes, including the Consumer Fraud Act, and to seek injunctive relief and civil penalties on behalf of the state. See Minn. Stat. § 8.31, subs. 1, 3.
3. **Private Actions.** The private attorney general statute allows private persons to investigate and enforce violations of the laws entrusted to the state attorney general. To proceed under the private attorney general statute in a consumer fraud action, the plaintiff is required to demonstrate that the action benefits the

public as a whole, rather than the plaintiff alone. Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 389 fn.3 (Minn. Ct. App. 2004) (citing Ly v. Nystrom, 615 N.W.2d at 312). In making this determination, courts look not only to the number of consumers actually damaged by fraudulent activity, but also to the number of consumers potentially exposed to the fraud. See Collins v. Minnesota Sch. of Bus., Inc., 655 N.W.2d 320, 330 (Minn. 2003).

4. **Costs and Attorney Fees.** In addition to damages, private parties pursuing actions under the private attorney general statute may recover their costs, including attorney fees. Minn. Stat. § 8.31, subs. 1, 3(a).