

# OK Boomer, You Do Have Special Civil Remedies for Consumer Fraud



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- The number of Minnesotans turning 65 during 2010-2019 (about 285,000) will be greater than the past four decades combined.
- Around 2020, Minnesota's 65+ population is expected to eclipse the 5-17 K-12 population, for the first time in history.
- The total number of older adults (65+) is anticipated to double between 2010 and 2030, according to our projections. By then, more than 1 in 5 Minnesotans will be an older adult, including all the Baby Boomers.

While we have known for decades that our population is aging, the facts above may still be surprising and concerning to some. We all have to deal with the implications, especially economic, of an aging population.

There have been well-publicized reports of problems in some nursing homes and assisted living facilities. Those are serious issues and are the subject of important studies, new proposed legislation, and much discussion. Minnesota has enacted a number of criminal statutes to further the legislature's stated public policy of protecting "adults who... are particularly vulnerable to maltreatment. . ."

But, for decades little has been done by the legislature to provide enhanced civil remedies to senior citizens who are victims of financial fraud. Financial fraud on senior citizens should not be neglected. The Minnesota Attorney General's "Seniors Guide to Fighting Fraud" reports on common scams often directed at senior citizens. It reports that telemarketing fraud alone is estimated by the Federal Trade Commission to cost US consumers of all ages more than \$40 billion per year. It also notes that while people in their 20's report being defrauded more than people over 70, seniors tend to lose more money (presumably because they have more money to be pilfered).

In the 1960s and 70s, Minnesota enacted a number of consumer protection laws. Before August, 2000, practitioners generally believed that a private cause of action for a violation of consumer protection statutes was available (regardless of the victim's age) under the private attorney general statute, Minn. Stat. Section 8.31, subd. 3a, and that attorneys' fees and costs were

recoverable. Consumer Fraud Act Claims were commonly asserted in commercial cases.

In August, 2000, however, the Minnesota Supreme Court required that a private claimant under that statute show a public benefit. The *Ly* decision and its progeny significantly limited the usefulness of the consumer protection statutes in private civil litigation.

One seemingly powerful statute enacted in 1989 and designed specifically to provide additional civil remedies specifically for senior citizens is Section 325F.71, which will be referred to as the "Senior Citizens Act." The Senior Citizens Act defines a senior citizen as anyone 62 or older. It incorporates by reference several other consumer protection statutes, including the Consumer Fraud Act. Notably, a private cause of action is expressly provided under subdivision 4 of the Senior Citizens Act and does not rely on the private attorney general statute. The Senior Citizens Act also provides for an award of attorney's fees, and a civil penalty of \$10,000 per violation under certain circumstances.

Interestingly, although in existence for 30 years, only two state published cases even cite the Senior Citizens Act with respect to a private civil action, and none of them have discussed whether a plaintiff must show a public benefit. Moreover, no state unpublished Court of Appeals decisions discuss the issue.

Some advocates have argued that a case brought under the Senior Citizens Act still requires a public benefit. One federal district court, in an unpublished decision, dismissed a claim under the Act for failure to plead a public benefit, describing the statute as merely providing for "an additional civil penalty" for violation of other statutes. But the complaint in that case alleged that the claim was brought pursuant to the private attorney general statute. The Court's decision did not deal with the clear, express language of subdivision 4 of the Senior Citizens Act, which expressly provides the private cause of action. It appears that the parties did not argue the point.

Another federal district court, in another unpublished decision, impliedly found that a public benefit is not required for senior citizens. There, the court wrote: "In part, the [Senior Citizens Act] is a vehicle that the elderly . . . can use to obtain relief from deceptive activities. . ."

So, while the Minnesota State Courts have not clearly decided the issue, it seems likely that aging Baby Boomers do and will have the benefit of a private cause of action under the Senior Citizens Act, and the attorney's fees remedy that comes with it.

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