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III. CONTRACTS AND THE UNIFORM COMMERCIAL CODE

A. Cross-claim for Indemnity and Contribution not Subject to the Uniform Commercial Code Statute of Limitations

In *City of Willmar v. Short-Elliot-Hendrickson, Inc.*,¹ the Minnesota Supreme Court held that a cross-claim for indemnity and contribution is not subject to the four-year statute of limitations established by the Uniform Commercial Code (U.C.C.).² In so doing, Minnesota adopted the majority view and overruled a Minnesota Court of Appeals ruling that barred a third-party action for contribution if the original injured plaintiff would be barred from bringing such a suit.³

The litigation in this case began in 1987 when the City of Willmar sued for damages in connection with the continued malfunctioning of a water treatment plant.⁴ The parties named as defendants included the general contractor, the consulting engineers, and the manufacturer of a major component of the plant.⁵ The consulting engineers, Short-Elliot-Hendrickson, Inc. ("Short-Elliot"), settled with the City of Willmar and obtained a general release.⁶ Short-Elliot then continued the present action against the manufacturer of certain rotating cylinders used in the plant, Clow Corporation (Clow), for contribution and indemnity of a portion of the settlement paid to the City of Willmar.⁷ Clow objected to the indemnity and contribution claims on three grounds.

First, Clow argued that the contribution and indemnity claims were barred by the four year statute of limitations contained in the U.C.C.⁸ They reasoned that the claims for

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1. 512 N.W.2d 872 (Minn. 1994).
2. Id. at 877.
3. Id.
4. Id. at 873.
5. Id.
6. Id.
7. Id.
8. Minnesota Statutes section 336.2-725 provides in part: "1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. 2) A cause of action accrues when the breach occurs, regardless of the
contribution and indemnity were simply extensions of the breach of warranty claims based on the sale of the rotating cylinders, and therefore, the action was governed by the U.C.C. The trial court disagreed with Clow, but the Minnesota Court of Appeals reversed, holding that the four-year statute of limitations contained in the U.C.C. did limit the ability of Short- Elliot to bring the contribution and indemnity claims.

The Minnesota Supreme Court held that the statute of limitations contained in the U.C.C. did not apply in this case. Indemnity and contribution are independent and separate common law claims in Minnesota designed to promote equity.

Indemnity applies in most situations when (1) a party fails to discover or prevent another’s fault; and (2) as a consequence pays damages for which the other is primarily liable. Because these are equitable remedies not founded in either contract or tort exclusively, the nature of the common liability between the actors is of secondary importance. The true determination is whether one actor has paid more than its fair share of a common liability.

Clow argued that it was unfair to hold an actor liable under contribution or indemnity law, when the original plaintiff would have been barred from bringing a claim against the actor.

agrieved party’s lack of knowledge of the breach . . . .” MINN. STAT. § 336.2-725 (1994).

9. Willmar, 512 N.W.2d at 874.


11. Minnesota Statute section 541.051, subdivision 1 recognizes an action for contribution or indemnity by stating that the statute of limitations for these actions do not accrue until the payment of the final judgment, arbitration award, or settlement. See MINN. STAT. § 541.051, subd. 1 (1994).

12. See, e.g., White v. Johnson, 272 Minn. 966, 967-68, 137 N.W.2d 674, 677 (Minn. 1965), overruled on other grounds, Tolbert v. Gerber Indus. 255 N.W.2d 362, 368 (Minn. 1977).

13. Tolbert, 255 N.W.2d at 368.


15. Id.

16. Id. at 875.
This result, they argued, frustrated the purpose of the limitation of actions law.\textsuperscript{17} The court rejected this argument and adopted the position taken by thirteen other states.\textsuperscript{18} The court held that under Minnesota Statutes section 541.051, Short-Elliot was barred from bringing the action more than two years after the settlement agreement, and therefore there was not a frustration of the purpose of the limitation of actions law.\textsuperscript{19}

Second, Clow argued that allowing Short-Elliot to continue its claims for contribution and indemnity would violate the exclusivity of the U.C.C. in governing commercial transactions.\textsuperscript{20} As support, Clow pointed to the long line of Minnesota cases that have attempted to establish when a party may recover for an economic loss in tort for damages to "other property" or "personal injury" arising out of a transaction involving the sale of goods.\textsuperscript{21} The court, however, easily dismissed these arguments by holding that the claims for contribution and indemnity were not based upon a contract for the sale of goods, but were instead based upon the equitable doctrine that a party can recover amounts for which it has paid more than its share of a common liability.\textsuperscript{22} Since these claims were not within the province of the U.C.C., the exclusivity doctrine of the U.C.C. did not apply.\textsuperscript{23}

Finally, Clow argued that the U.C.C. provides the exclusive remedies available to Short-Elliot because under Minnesota's broad definition of privity, Short-Elliot was in privity with the City, and therefore was within the chain of title for the compo-

\textsuperscript{17} Id.
\textsuperscript{18} Id. at 875 n.5. The jurisdictions which have adopted this rule are California, Kansas, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New York, North Carolina, Pennsylvania, Virginia, and West Virginia. Five jurisdictions have adopted Clow's argument: Georgia, Idaho, South Dakota, Utah and Washington.
\textsuperscript{19} Id. at 873. Because of the difference in when the statutes of limitations begin running, the two year statute of limitations under Minnesota Statutes § 541.051 is actually longer than the four-year period allowed under the U.C.C.
\textsuperscript{20} See Hapka v. Paquin Farms, 458 N.W.2d 683, 684 (Minn. 1990) (holding that the U.C.C. was intended to create a complete statutory governance of all commercial transactions).
\textsuperscript{21} See MINN. STAT. § 604.10 (1994); Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11 (Minn. 1992); Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990); Thofson v. Redex Indus., 433 N.W.2d 901 (Minn. Ct. App. 1989).
\textsuperscript{22} Willmar, 512 N.W.2d at 876.
\textsuperscript{23} Id.; see also MINN. STAT. § 336.2-318 (1994) (Minnesota's privity statute under the U.C.C.).
ments sold by Clow.24 The court dismissed the privity argument as irrelevant because contribution and indemnity are common law remedies not precluded by the U.C.C. as evidenced by Minnesota Statutes section 336.1-103 (1992), which states “Unless displaced by the particular provisions of this chapter, the principles of law and equity... shall supplement its provisions.”

In conclusion, the Minnesota Supreme Court established that the claims of contribution and indemnity are not governed by the four year statute of limitations under the U.C.C. even when such claims are the result of an action based upon breaches of warranties established under the U.C.C.

B. Rent-to-Own Transactions are Consumer Credit Sales

In Miller v. Colortyme, Inc.,25 the court found that rent-to-own transactions are to be considered consumer credit sales subject to the Consumer Credit Sales Act (CCSA),26 and that they are also subject to the interest rate limitations established in Minnesota’s general usury statute.27 Delilah Miller was the representative of a class of people who entered into “rent-to-own” agreements.28 Under the standard form used in these agreements, the renters would lease furniture, appliances, televisions, and various other consumer goods on a weekly or monthly basis.29 At the end of each one week or one month term, the renter had the unilateral option to renew the lease by making another payment.30 After a customer had renewed the contract for a predetermined number of terms, she would obtain title and ownership of the goods for no additional consideration.31

The total prices paid under these rent-to-own agreements often exceeded the retail prices of the items. For example, one such contract charged an individual renewing monthly for a total of $1,350.40 for a washer and dryer with a stated cash price of

24. Willmar, 512 N.W.2d at 876.
25. 518 N.W.2d 544 (Minn. 1994).
27. MINN. STAT. § 334.01 (1994).
28. Miller, 518 N.W.2d at 546.
29. Id.
30. Id.
31. Id.
The district court granted summary judgment in favor of the customers, holding that the rent-to-own agreements were clearly consumer credit sales. The Minnesota Court of Appeals reversed.33

The Minnesota Supreme Court first considered whether the rent-to-own agreements were consumer credit sales within the meaning of the CCSA. Under the common law, transactions that were unilaterally terminable by the buyer were considered leases and not sales.34 The Legislature eliminated this common law interpretation of terminable transactions in 1981 when it amended the CCSA.35 Under the amended statute, a terminable lease is considered sale of goods if: 1) the lessee has the option to renew the contract by making payments as specified in the agreement; 2) the contract obligates the lessor to transfer ownership to the consumer if the consumer makes a predetermined number of renewals; and 3) the payments made by the consumer are roughly equivalent or in excess of the value of the product.36

Here, the terminable leases in question clearly satisfied all three statutory requirements classifying them as a sale of goods. Therefore, the court then turned its analysis to whether the sales were actually protected by the CCSA as "consumer credit sales." Minnesota Statutes section 325G.15 states that a "consumer credit sale" is a sale of goods or services where: 1) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind; 2) the buyer is a natural person; and 3) the goods are purchased primarily for a personal, family or household purpose, and not for a commercial or business purpose.37 The rental company argued that the rent-to-own agreements did not constitute consumer "credit sale agreements" under this definition because the seller did not extend credit.38 Instead, they argued, the customers pre pay for the products, and a missed payment results in non renewal with no future

32. Id.
35. MINN. STAT. § 325G.15, subd. 5 (1994).
36. Id.
37. MINN. STAT. § 325G.15, subd. 2 (1994).
The court disagreed. It found that the Legislature, in amending the CCSA to include terminable leases as sales, had specifically intended the CCSA to apply to rent-to-own contracts. If the language of the CCSA was read in accordance with the interpretation forwarded by the rental companies, the 1981 amendment by the Legislature redefining certain terminable leases as sales would be meaningless.

In addition, the court rejected the argument that there was no credit extended because the buyer never actually incurred the debt. A statute is entitled to a liberal construction to promote, not frustrate, its objectives. Here, the court held that although the agreements were terminable at the end of each rental term, they lost their terminable nature in reality because as the amount of the total payments rose, the only feasible or rational choice for the consumer became to complete the rental payments under the contract.

Second, the court ruled that the rent-to-own agreements were governed by the Minnesota general usury statutes. A contract is usurious if the following elements are satisfied: 1) there is a loan of money or a forbearance of a debt; 2) there is an agreement between the parties that the principal shall be payable absolutely; 3) the payment terms include an amount of interest greater than allowed by law; and 4) there is the intention to evade the law at the inception of the agreement.

The rental companies argued that the rent-to-own contracts were not usurious because there is no loan in which the consumer incurs a debt, and there is no forbearance of a debt. The court agreed that technically these contracts do not constitute a loan, or a forbearance of the debt, but that the Legislature’s decision to treat rent-to-own transactions as credit sales signifies the intent of the Legislature to consider them as

39. Id.
40. Id.
41. Id.
42. Id.
44. Miller, 518 N.W.2d at 548 n.2.
47. Miller, 518 N.W.2d at 549.
installment sales contracts under the law. As a result, the Minnesota general usury statutes do govern rent-to-own agreements.

Finally, the rental companies argued that the CCSA should not apply to these transactions because the Rental Purchase Agreement Act (RPAA) repealed the CCSA with respect to rent-to-own agreements. The RPAA, enacted in 1990, regulates the rent-to-own industry by among other things limiting delivery charges, giving statements of rights to customers, imposing restrictions in the case of default, prohibiting abusive debt practices, and limiting security deposit amounts. The statute does not, however, purport to establish an exclusive system regulating rent-to-own contracts. In fact, the language of the statute provides that where the RPAA and the CCSA conflict, the CCSA's provisions should govern.

In conclusion, the court held 1) that rent-to-own agreements were sales of goods governed by the CCSA; 2) that these agreements were also sales within the purview of the Minnesota general usury statutes; and 3) that the CCSA was not repealed by the RPAA.

C. Sale of Machinery Accompanied by a Lease is Subject to the Uniform Commercial Code

In Vesta State Bank v. Independent State Bank of Minnesota the Minnesota Supreme Court found that: 1) a sale of a piece of machinery and an accompanying lease is a sale of goods under the Uniform Commercial Code (U.C.C.); and 2) a settlement for payment on a personal guarantee does not bar a subsequent suit for collection on a claim of fraud relating to that guarantee.

48. Id.
49. MINN. STAT. §§ 325F.84 -.98 (1994).
50. Miller, 518 N.W.2d at 550.
51. MINN. STAT. § 325F.91 (1994).
52. MINN. STAT. § 325F.90 (1994).
53. MINN. STAT. § 325F.89 (1994).
54. MINN. STAT. § 325F.92 (1994).
55. MINN. STAT. § 325F.90 (1994).
56. Miller, 518 N.W.2d at 550.
57. See MINN. STAT. § 325F.97, subd. 2 (1994) (stating that the RPAA's provisions are to be considered cumulative and shall not restrict any other remedy available at law).
58. 518 N.W.2d 850 (Minn. 1994).
Vesta State Bank of Minnesota (Vesta) entered into an agreement for the purchase of an agricultural combine and the accompanying lease.\textsuperscript{59} The combine and lease were purchased from Lease Resources Corporation (Lease Resources) through Independent State Bank of Minnesota (Independent) acting as a broker.\textsuperscript{60} The combine was leased to a small family farmer who also signed a personal guarantee.\textsuperscript{61} The lease contained an option to purchase the combine at the end of the term.\textsuperscript{62} Two years later, the farmer defaulted on his lease.\textsuperscript{63} Vesta settled with the farmer on his guarantee, but they continued an action against Independent for misrepresentation of the terms of the individual guarantee, and of the assets of the lessee.\textsuperscript{64}

The trial court granted summary judgment in favor of Independent, stating that Vesta's claims were barred both by the four-year statute of limitations of the U.C.C. and by the election of remedies doctrine.\textsuperscript{65} The Minnesota Court of Appeals reversed.\textsuperscript{66}

First, the supreme court had to determine whether the transaction in which Vesta acquired the combine and the lease was a sale of goods such that it was governed by the U.C.C.\textsuperscript{67} When a transaction involves the sale of both goods and services, Minnesota uses a "predominant purpose" test to determine whether the U.C.C. applies.\textsuperscript{68} Under this predominant purpose test, a hybrid transaction is classified according to its dominant characteristic.\textsuperscript{69}

Vesta argued that the entire purpose of acquiring the combine and the lease was to obtain investment services and income, and that it had no interest in possessing, using, or

\textsuperscript{59} Id. at 852.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 853.
\textsuperscript{65} Id.
\textsuperscript{67} See MINN. STAT. § 336.2-102 (1994) (stating that the U.C.C. applies to "transactions in goods").
\textsuperscript{68} McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn. 1987).
\textsuperscript{69} Id.
owning the combine at the end of the lease period. Therefore, Vesta was merely purchasing the right to perform a financial service for the farmer. The court disagreed. Vesta became owner of the combine according to the bill of sale exchanged in the transaction. In addition, Vesta obtained tax advantages through its ownership of the combine including the taking of accelerated depreciation. As a result, ownership was the predominate purpose of the transaction regardless of the characterization of the transaction as a stream of income, and the four-year statute of limitations under the U.C.C. applied to this transaction.

Second, because the fraud claims were not governed by the four-year statute of limitations, the court still had to determine whether the fraud claims were barred by the election of remedies doctrine. The election of remedies doctrine requires a party to adopt one of two or more coexisting and inconsistent remedies which arise out of the same set of facts. The purpose of the doctrine is to prevent a double recovery for a single wrong. A party should not, however, be bound by an election unless she has pursued the chosen course of action to a conclusion, or has procured an advantage from the election. If it is doubtful which of alternate theories may bring a remedy, both may be brought until the injury is fully redressed. Independent argued that by accepting a settlement with the family farmer on the guarantee, Vesta acknowledged the guarantee's enforceability and therefore could not choose an alternative remedy against Independent for fraudulently representing the guarantee.

The court disagreed. There was no bar due to the election

70. Vesta, 518 N.W.2d at 854.
71. Id.
72. Id.
73. Id.
74. Id. at 855.
76. Id.
77. First Nat'l Bank of Osakis v. Flynn, 190 Minn. 102, 107, 250 N.W. 806, 808 (1933).
78. Northwestern State Bank, Osseo v. Foss, 293 Minn. 171, 177, 197 N.W.2d 662, 666 (1972).
of remedies doctrine because there was no risk of a double redress for the injury.\textsuperscript{80} The action on the guarantee was entirely separate and independent of the action for fraud.\textsuperscript{81} As separate actions, they arose from separate facts and created separate injuries. As a result, Vesta had the right to be made whole under the law.\textsuperscript{82}

In conclusion, the supreme court reestablished the predominant purpose test by holding that a transfer of a combine and a lease of the combine was a sale of goods under the U.C.C. The court also held that on default of the lease the buyer could maintain actions against both the lessee and the seller of the lease as long as the injuries were separate and independent of one another.

D. Indemnity Agreements Must be Specific

In \textit{National Hydro Systems v. M. A. Mortenson Co.}\textsuperscript{83} the Minnesota Supreme Court found that for an indemnity agreement to allow a party to sign away liability for its own negligence, the agreement must specifically state that such negligence is indemnified.

A general contractor, M.A. Mortenson Company (Mortenson), entered into an agreement with an engineering firm, HDR Engineering (HDR), for the design of a portion of a water treatment plant.\textsuperscript{84} The agreement contained an indemnity agreement in which Mortenson promised to hold HDR harmless from losses or expenses "[W]hether founded in breach of contract, negligence, or pursuant to contract provisions . . . .\textsuperscript{85} Mortenson also contracted with National Hydro Systems ("National") to purchase one of the main components of the treatment plant.\textsuperscript{86}

Due to numerous design problems, the project was delayed, and as a result National was late in providing the components it promised.\textsuperscript{87} Mortenson withheld a part of the payment due to

\textsuperscript{80.} \textit{Id.}
\textsuperscript{81.} \textit{Id.} at 856.
\textsuperscript{82.} \textit{Id.}
\textsuperscript{83.} 529 N.W.2d 690 (Minn. 1995).
\textsuperscript{84.} \textit{Id.} at 692.
\textsuperscript{85.} \textit{Id.}
\textsuperscript{86.} \textit{Id.}
\textsuperscript{87.} \textit{Id.}
the delay, and National sued for the balance due. The parties entered into a *Pierringer* release in which National settled its claim against Mortenson and pursued HDR for negligent design.

The trial court granted summary judgment, holding that the indemnity agreement between Mortenson and HDR coupled with the *Pierringer* release created a "circuity of obligation" thus rendering the claim invalid as a matter of law. The Minnesota Court of Appeals reversed. A circuity of obligation is created when, by virtue of a pre-existing indemnity agreement, the plaintiff in an action is obligated to indemnify the defendant for the the plaintiff's own claim. In other words, circuity arises when a plaintiff literally sues herself by suing someone she has agreed to indemnify. National first argued there was not a circuity of obligation because public policy prohibits engineers from obtaining indemnity agreements protecting the engineers for claims arising out of their own negligence. The court dismissed this argument holding that Minnesota favors risk allocation agreements in the construction setting.

The key question before the court then became whether the indemnity agreement in the original contract was sufficient to indemnify HDR for its negligent design of the water treatment plan. The court adopted the strict construction interpretation of indemnity agreements. Under the strict construction theory, an indemnity agreement only provides indemnity for harms which are specifically enumerated in the indemnification

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88. *Id.*
89. A *Pierringer* release is a settlement document in which in return for an admission of liability, the plaintiff agrees to defend, indemnify and hold harmless the defendant in the claim against the third-party defendant. The plaintiff under such a settlement steps into the shoes of the defendant with respect to his claims against the third-party defendant. *See* Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963).
90. *National Hydro Sys.*, 529 N.W.2d at 692.
93. *Id.*
94. *National Hydro Sys.*, 529 N.W.2d at 693.
95. *Id.*
96. *Id.* at 694.
97. *Id.*

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clause. 98 This means that for a clause to allow indemnity to HDR for its negligence, the clause must specifically enumerate the intent of the parties to enter into such an indemnity agreement in a clear and unequivocal manner. 99

Here, the court found that the clause provided indemnity for HDR from claims arising out of negligence, but the clause did not specifically enumerate indemnification existed for HDR’s own negligence. 100 As a result, there was no circuity of obligation, and National could continue, its action through trial on remand. 101

E. Consequential Damages Under the Uniform Commercial Code

In International Financial Services, Inc. v. Franz, 102 the Minnesota Supreme Court established that limitations on remedies that fail their essential purpose do not necessarily cause limitations on consequential damages to fail with them.

Allen Franz (Franz) entered into negotiations with the Gerber Scientific Instrument Company (Gerber) for the purchase of a photoplotter system. 103 The photoplotter system would be used to produce negatives that were needed to design and build circuit boards. 104 The deal was completed after a long negotiation period, and delivery was arranged as soon as Franz could build a “clean room” necessary to allow the photoplotter to work. 105

The agreement contained fairly standard warranty waiver language and the following clause limiting the remedies available:

GSI’s liability and buyer’s remedy under this warranty will be limited to the repair and/or replacement at GSI’s election of

100. National Hydro Sys., 529 N.W.2d at 694.
101. Justice Coyne wrote a dissenting opinion arguing that the claim should have been dismissed for circuity. Id. at 694-700.
102. 534 N.W.2d 261 (Minn. 1995).
103. Id. at 263.
104. Id.
105. Id.
materials determined by GSI to be defective or non-conform-
ing.

The foregoing warranty is in lieu of all other warranties express or implied, and of all obligations or liabilities on the part of GSI for damages, including but not limited to consequential and/or special damages arising out of or in connection with the use or operation of the equipment sold or leased by this agreement.\footnote{106}

Almost immediately after delivery, there were problems with the photoplotter due to shifting that caused the images to appear blurry.\footnote{107} The trial court found that Gerber had expressly warranted that the photoplotter would be free from material and workmanship defects, and that although the implied warranty of fitness for a particular purpose had effectively been waived, the implied warranty of merchantability had not been waived.\footnote{108} The jury found that the express warranty had not been breached, but that the implied warranty of merchantability had been breached, and that the remedy enumerated had failed its essential purpose.\footnote{109} The Minnesota Court of Appeals affirmed.\footnote{110}

The primary question that came before the supreme court was whether a limitations of damages section that failed its essential purpose also caused a waiver of consequential damages provision in the agreement to fail. Under Minnesota’s version of the U.C.C. an agreement may provide for remedies in addition to or in substitution for those provided in the statute.\footnote{111} Where one of these substituted remedies fails in its essential purpose, the remedy is no longer exclusive or limited by the agreement.\footnote{112} Consequential damages may be limited or excluded unless such an exclusion is unconscionable.\footnote{113}

Jurisdictions have long battled over the interpretation of this statute as a whole. Most early cases held that when a limited

\footnotesize{\begin{itemize}
\item 106. Id.
\item 107. Id.
\item 108. Id. at 265.
\item 109. Id.
\item 111. MINN. STAT. § 336.2-719(1)(a) (1994).
\item 112. MINN. STAT. § 336.2-719(2) (1994).
\item 113. MINN. STAT. § 336.2-719(3) (1994).
\end{itemize}}
remedy failed its essential purpose, the clause excluding consequential damages also became unenforceable.\textsuperscript{114} The rationale behind this theory is that once limitation language has failed, the remedies provided by the statute should take over in full force.\textsuperscript{115} Recently, however, some courts have held that in transactions between parties of equal bargaining power, the clause excluding consequential damages will survive even if the other limitation of remedies clause fails its essential purpose.\textsuperscript{116} The rationale for this theory is that in cases where the consequential damages are limited in a clause independent and distinct from of the other remedy limitation language, the parties should be allowed to form their own bargain.\textsuperscript{117} Where the clauses are independent and distinct, the parties clearly intend the ability of the clauses to survive to be independent.

The Minnesota Supreme Court adopted the latter view. It held that in transactions between merchants, an exclusive remedy section that does not fulfill its essential purpose does not render a clause excluding consequential damages invalid if the clauses are independent and discrete contractual provisions.\textsuperscript{118} Here, Gerber refused to replace the unit that was defective, and the unit originally delivered was irreparable.\textsuperscript{119} As a result, the exclusive remedy provision in the agreement failed its essential purpose.\textsuperscript{120} The exclusion of consequential damages, however, is independent and discreet and therefore will survive.\textsuperscript{121}

The court was careful to limit the impact of this decision because courts throughout the nation are in such disagreement on this issue. The holding was expressly limited to agreements between merchants of relatively equal bargaining power.\textsuperscript{122} In dicta, the court stated that consumer contracts will continue to be governed by the “old” rule in which consequential damage exclusion clauses are deemed invalid if the exclusive remedy

\begin{itemize}
  \item \textsuperscript{114} See Riley v. Ford Motor Co., 442 F.2d 670, 673 (5th Cir. 1971).
  \item \textsuperscript{115} See JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 379-80 (1972).
  \item \textsuperscript{117} Id. at 458.
  \item \textsuperscript{118} International Fin. Servs., Inc. v. Franz, 534 N.W.2d 261, 269 (Minn. 1995).
  \item \textsuperscript{119} Id. at 266.
  \item \textsuperscript{120} Id. at 267.
  \item \textsuperscript{121} Id. at 269
  \item \textsuperscript{122} Id.
\end{itemize}
clause fails its essential purpose.\textsuperscript{123}

\section*{F. Landlord Liability for a Mechanic's Lien}

In \textit{Master Asphalt Co. v. Voss Constr Co.},\textsuperscript{124} the Minnesota Supreme Court held that: 1) a landowner’s actual knowledge of tenant improvements is required to establish his liability for a mechanic’s lien; and 2) that more than a general awareness of the intent of the tenant to make such improvements is required to show that the landowner had actual knowledge of the improvements.

Henry and Marion Reinke (the Reinkes), residents of Illinois, own three parcels of commercial property in downtown Minneapolis.\textsuperscript{125} In 1991 they leased the land to the Farmer’s Market Annex (FMA). The lease stated that the tenant must obtain authorization prior to making improvements on the land.\textsuperscript{126} At the time of the deal, the president of the FMA expressed his desire to make some improvements on the land.\textsuperscript{127} Reinke acknowledged these intentions, but was not told if or when the improvements would actually begin.\textsuperscript{128} The FMA, without contacting the Reinkes, contracted with the Voss Construction Company to construct metal canopy tops for the Reinkes’ property.\textsuperscript{129}

Voss subcontracted the electrical work and asphalt work, which was completed in October 1991.\textsuperscript{130} Voss was paid by the FMA, but subsequently declared bankruptcy and failed to pay the subcontractor.\textsuperscript{131} The Reinkes, still in Illinois, had not inspected the property since the signing of the lease. Two mechanic’s lien actions ensued.\textsuperscript{132}

The Minnesota mechanic’s lien statute provides that when improvements are made by one party on the land of another, the owner of the property may protect her rights by either serving on the parties doing the work or by posting on the sight

\begin{footnotes}
\begin{enumerate}
\item[123.] \textit{Id.}
\item[124.] 535 N.W.2d 349 (Minn. 1995).
\item[125.] \textit{Id.} at 350.
\item[126.] \textit{Id.}
\item[127.] \textit{Id.} at 351.
\item[128.] \textit{Id.}
\item[129.] \textit{Id.}
\item[130.] \textit{Id.}
\item[131.] \textit{Id.}
\item[132.] \textit{Id.}
\end{enumerate}
\end{footnotes}
a written statement that the improvement is not being done at her insistence. This notice to the contractors protects the landowner from having her land subject to a mechanic’s lien action when her tenant defaults on a payment, and puts the contractors on notice that a mechanic’s lien is not available as a means to collect payment.

Minnesota courts have long held that pursuant to the mechanic’s lien statute, the property interests of a landowner who has no knowledge of the improvements to her property cannot be subjected to a lien for those improvements. A landowner who does have notice of the improvements, however, is deemed to have consented to the work and therefore must comply with the notice requirements to protect herself from liability.

Therefore, the first question for the court was whether the Reinkes had authorized the improvements made by the FMA. The Minnesota Court of Appeals found that the Reinkes had authorized the improvements by not expressly objecting when they first learned of the FMA’s desire to make them. The focus at the appellate level was on the conversations between the Reinke’s and the FMA while forming their agreement. The fact that they knew of the desire to make the improvements coupled with a lease that allowed such improvements was deemed by the court of appeals to show the authorization of the improvements.

The supreme court disagreed. It ruled that to authorize something is more than just giving permission. It means an affirmative grant of authority to make such an improvement. Here, the Reinkes could not authorize the improvements unless they had actual knowledge that the repairs were being made.

The contractors argued that the Reinkes had actual

133. MINN. STAT. § 514.06 (1994).
134. Id.
135. See Anderson v. Harrison, 281 Minn. 95, 97-8, 160 N.W.2d 560, 562 (1968).
136. Id.
137. Master Asphalt, 535 N.W.2d at 352.
138. Id.
139. Id.
140. Id.
141. Id. (citing Berglund & Peterson v. Wright, 148 Minn. 412, 417, 192 N.W. 624, 626 (1921)).
142. Master Asphalt, 535 N.W.2d at 353.
knowledge of the improvement because they were made aware that the tenant was contemplating such improvements at the time the lease was signed. The court rejected this argument and held that actual notice required more than just a general awareness of the possibility. To have actual knowledge within the purview of the mechanic's lien statute, the landowner must have actual knowledge that the improvements are underway. Here, the trial court made a finding of fact that the Reinkes did not know the repairs were under way. As a result, the Reinkes were not required to post a statement of their rights at the work scene to avoid the possibility of a mechanic's lien.

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143. Id.
144. Id.
145. See Minn. Stat. § 514.06 (1994); Bruer Lumber Co. v. Kenyon, 166 Minn. 357, 359, 208 N.W. 10, 11 (1926).
146. Master Asphalt, 535 N.W.2d at 354.
147. Id.