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# Civil Procedure: The Civil Right to a Jury Trial and What it Means for Minnesota Creditors in Light of United Prarie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC

Grant M. Borgen

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**CIVIL PROCEDURE: THE CIVIL RIGHT TO A JURY TRIAL AND WHAT IT MEANS FOR MINNESOTA CREDITORS IN LIGHT OF *UNITED PRAIRIE BANK-MOUNTAIN LAKE V. HAUGEN NUTRITION & EQUIPMENT, LLC***

Grant M. Borgen<sup>†</sup>

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## I. INTRODUCTION

Article I, section 4 of the Minnesota Constitution provides litigants the right to unilaterally request a jury trial in civil cases.<sup>1</sup> This right, however, is not absolute.<sup>2</sup> Both the plain language<sup>3</sup> and the Minnesota Supreme Court's interpretation of the constitutional guarantee recognize a difference between legal and equitable causes of action.<sup>4</sup> The former may be submitted to a jury while the latter may not.<sup>5</sup>

Recently, in *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC*, the Minnesota Supreme Court addressed whether a cause of action for the recovery of attorney's fees bargained for in an indemnity contract is legal or equitable.<sup>6</sup> In a matter of first impression,<sup>7</sup> the court concluded that this type of claim is legal in nature.<sup>8</sup> The reasoning advanced is not controversial. However, it places creditors in a difficult position moving forward. Most notably, it means that in actions seeking to enforce loan agreements that include attorney fee provisions, debtors may request a jury determination as to the amount of attorney's fees owed. Whether this is a positive or negative has yet to be determined.<sup>9</sup> It could be beneficial for creditors if juries are sympathetic to their case. However, it is more likely to be viewed negatively. Given that there has not been sufficient time to

1. MINN. CONST. art. I, § 4.

2. Mary F. Torpey, *Right to Civil Jury Trial—"Looking Straight at Things": State Constitution Does Not Guarantee Right to Jury Trial in Promissory Estoppel Case*. Olson v. Synergistic Technologies Business Systems, Inc., 628 N.W.2d 142 (Minn. 2001), 33 RUTGERS L.J. 1231, 1235 (2002).

3. See MINN. CONST. art. I, § 4 (applying only to cases "at law").

4. Torpey, *supra* note 2, at 1235.

5. *Id.*

6. 813 N.W.2d 49 (Minn. 2012). An indemnity contract is "[a] contract whereby one agrees to save another from the legal consequences of the conduct of one of the parties or some other person." BALLENTINE'S LAW DICTIONARY 608 (3d ed. 1969); see also 1 DAN B. DOBBS, THE LAW OF REMEDIES § 3.10(3), at 402 (2d ed. 1993); *infra* note 139. The indemnity contract at issue in *United Prairie Bank* required the debtors, the Haugens and Haugen Nutrition & Equipment, LLC, to reimburse United Prairie Bank if it incurred attorney's fees in any action for the protection or enforcement of its security interests. *United Prairie Bank*, 813 N.W.2d at 52.

7. *United Prairie Bank*, 813 N.W.2d at 64 (Dietzen, J., dissenting).

8. *Id.* at 57 (majority opinion).

9. See Seth Leventhal, *Judge or Jury: Who's Better to Decide the Amount of an Award of Attorneys' Fees?* (Aug. 2, 2012) (on file with the author).

compile data,<sup>10</sup> creditors would be well served to pay close attention to the result reached in *United Prairie Bank*.

This article begins by analyzing the history of the civil right to a jury trial.<sup>11</sup> It then turns to an examination of *United Prairie Bank* in relation to its historical backdrop.<sup>12</sup> It critiques the Minnesota Supreme Court's analysis<sup>13</sup> and concludes with a discussion about the lesson to be learned as a result of *United Prairie Bank*.<sup>14</sup> The lesson is that until there is evidence indicating how juries award fees, Minnesota creditors are advised to include provisions in loan agreements stating that contractual attorney fee disputes shall be decided by the court and not by a jury.

## II. HISTORY OF THE CIVIL RIGHT TO A JURY TRIAL

### A. *From the Magna Carta to the Bill of Rights*

The origins of the civil right to a jury trial can be traced to the Magna Carta, which was signed at Runnymede by King John on June 15, 1215.<sup>15</sup> It guaranteed "no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers or by the 'laws of the land.'"<sup>16</sup> The provision proved popular, and by the early part of the seventeenth century it was a primary tenet of English liberty.<sup>17</sup> The practice also proved well suited for the American colonies, which began to guarantee the right as early as 1606.<sup>18</sup> While the colonies were quick to provide the right,

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10. *Id.*

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.A.

14. *See infra* Part IV.C–D.

15. Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 13 (1993). *Contra* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653 n.44 (1973) (citing commentary for the proposition that the framers of the United States Constitution agreed the civil right to a jury trial was traceable to the Magna Carta but "[h]istorians no longer accept [this] pedigree").

16. Arnold, *supra* note 15, at 13; *see also* Wolfram, *supra* note 15, at 653.

17. Arnold, *supra* note 15, at 13.

18. *Id.* ("The 1606 Charter to the Virginia Company incorporated the right to a jury trial, and by 1624 all trials in Virginia, both civil and criminal, were by jury. In 1628, the Massachusetts Bay Colony introduced jury trials, and the right to a jury trial was codified in the Massachusetts Body of Liberties by 1641. The Colony of West New Jersey implemented trial by jury in 1677, as did New Hampshire in 1680 and Pennsylvania in 1682, under William Penn. Massachusetts (1641), Rhode Island (1647), New Jersey (1683), South Carolina (1712), and Delaware

inclusion in the United States Constitution was more contentious.

As originally drafted, the United States Constitution did not include any provision guaranteeing the civil right to a jury trial.<sup>19</sup> In fact, the issue was only briefly discussed during the Constitutional Convention at Philadelphia in 1787.<sup>20</sup> Each time the right to a jury trial was addressed, it produced “conflicting reactions.”<sup>21</sup> Those in favor of such a provision were concerned about corrupt judges<sup>22</sup> and also safeguarding the right that had been established in the colonies.<sup>23</sup> Those opposed argued that practices among the states varied so greatly that it would be impossible to adopt language satisfactory to every state.<sup>24</sup> The opponents prevailed at the Constitutional Convention, but their success was short-lived.

After the United States Constitution was signed and delivered to the Continental Congress on September 17, 1787, the country became divided over the Drafters’ failure to provide American citizens with a Bill of Rights.<sup>25</sup> At the center of this dispute—possibly even precipitating it<sup>26</sup>—was the failure to guarantee the civil right to a jury trial.<sup>27</sup> Antifederalists, who supported a Bill of Rights, raised several concerns in this regard. They primarily believed that without the right, judgment debtors would be at the mercy of federal judges, who were more likely to be of the same social class as judgment creditors.<sup>28</sup> Antifederalist Judge Samuel Byran stated that judges are likely to have

a bias towards those of their own rank and dignity; for it is not to be expected, that the *few* should be attentive to the rights of the *many*. [The civil right to a jury trial]

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(1727) adopted the Magna Charta’s specific language.”). Commentators have observed that the right was “probably the only one universally secured by the first American constitutions.” Wolfram, *supra* note 15, at 655.

19. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185 (2000).

20. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293–94 (1966) (noting the Framers only debated the issue twice during the entire Constitutional Convention); Wolfram, *supra* note 15, at 657–61.

21. Henderson, *supra* note 20, at 293–94.

22. *Id.* at 293.

23. *Id.*; Moses, *supra* note 19, at 185. The argument was that the failure to guarantee the right essentially meant it had been abolished.

24. Moses, *supra* note 19, at 186.

25. Henderson, *supra* note 20, at 295.

26. *Id.* at 295; Wolfram, *supra* note 15, at 657.

27. Henderson, *supra* note 20, at 295.

28. Moses, *supra* note 19, at 186.

therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens.<sup>29</sup>

Beyond protecting judgment debtors, Antifederalists were also concerned about granting federal judges unregulated power.<sup>30</sup> These arguments had significant appeal and ultimately resulted in the adoption of the Seventh Amendment to the United States Constitution.<sup>31</sup>

The Seventh Amendment guarantees:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>32</sup>

The provision is noticeably vague as to what it actually provides.<sup>33</sup> This appears to be in response to the concerns of Federalists who argued it would be difficult to draft language satisfactory to every state.<sup>34</sup> It has been observed that a more expansive provision would not have survived the political process.<sup>35</sup> The result of the vague language is that courts have delineated the scope of the right.<sup>36</sup>

29. *Id.* (emphasis added) (citing Wolfram, *supra* note 15, at 695–96 (quoting *Letters of Centinel, No. II*, FREEMAN’S J., Oct. 24, 1787, reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 584 (John Bach McMaster & Frederick D. Stone eds., 1888))).

30. *Id.* (“Other arguments advanced by the antifederalists in favor of civil jury trials included the need to guard against unwise legislation, presumably by jury nullification, the need to overturn the practices of courts of vice-admiralty, by which the British had imposed non-jury proceedings on the colonists, the protection of the interests of private citizens against the government, and the protection of individuals against overbearing and oppressive judges.” (internal quotation marks omitted) (citing Wolfram, *supra* note 15, at 670–71)).

31. Moses, *supra* note 19, at 186; see Henderson, *supra* note 20, at 298–99.

32. U.S. CONST. amend. VII.

33. Moses, *supra* note 19, at 186; Wolfram, *supra* note 15, at 639 (noting the “[S]eventh [A]mendment has presented its full share of interpretive and logical difficulties”). See Henderson, *supra* note 20, for a further discussion of the Seventh Amendment’s vague language.

34. Henderson, *supra* note 20, at 294. Federalists were also concerned that it “would be difficult to draft constitutional language that would distinguish intelligently between those cases in which a jury would be appropriate and those in which it would not.” Wolfram, *supra* note 15, at 663.

35. Moses, *supra* note 19, at 186.

36. *Id.* The focus of this article is the Minnesota Supreme Court’s interpretation of article I, section 4. It includes some discussion of federal precedent, but centers on how Minnesota has interpreted its provision. See

B. *A Tale of Two Constitutions? Minnesota's Unique Story*

Minnesota drafted its constitution in 1857<sup>37</sup> and achieved statehood in 1858.<sup>38</sup> It framed a constitution in the shadows of both the United States Constitution and the constitutions of the previously admitted states.<sup>39</sup> Constitutional debates indicate that the framers were keenly aware of this fact and adopted a constitution individually tailored to Minnesota.<sup>40</sup> One of the state's most obvious departures from its federal counterpart is discernible

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Moses, *supra* note 19, at 187–217, for a detailed discussion of federal jurisprudence regarding the Seventh Amendment.

37. MARY JANE MORRISON, *THE MINNESOTA STATE CONSTITUTION 1* (2002). Minnesota's drafting story is interesting in and of itself. Republicans and Democrats vehemently disagreed with one another over the scope and text of Minnesota's constitution and, as a result, only met twice during the entire Constitutional Convention. *Id.* Rather than sorting out their differences, the parties separated and drafted their own documents. *Id.* Although the disagreement was significant, the parties' final products were nearly identical. *Id.* at 1–2. A local newspaper published each party's proceedings and because the drafting process was somewhat public, the parties made concessions to one another throughout. *Id.* at 2. The compromise committee was able to complete its work with relatively minor difficulties. *Id.* Some will say that because the Republicans and Democrats drafted separate documents, Minnesota actually has two constitutions. *Id.* at 6. Others disagree with this assertion claiming the only real difference is punctuation. *Id.*

38. *Id.* at 6 (“Minnesota became the thirty-second state in 1858.”).

39. 7 HENRY W. MCCARR & JACK S. NORDBY, *MINNESOTA PRACTICE: CRIMINAL LAW & PROCEDURE* § 1.4 (4th ed. 2012). The framers of the Minnesota Constitution were also operating in the shadows of the Northwest Ordinance, which was enacted by the First Congress under the United States Constitution. WILLIAM ANDERSON, *A HISTORY OF THE MINNESOTA CONSTITUTION* 9 (1921). The ordinance, which applied to a region that included Minnesota, was simple and provided for a temporary government over the region, even though the territory that was to be Minnesota was uninhabited by people of European ancestry. *Id.* Relevant to this article is the fact that the Northwest Ordinance guaranteed the civil right to a jury trial. *Id.* at 10; MORRISON, *supra* note 37, at 4; Wolfram, *supra* note 15, at 656.

40. MCCARR & NORDBY, *supra* note 39, § 1:4. The 1857 Constitution was not novel by any means, but contrary to some assertions, neither was it the product of cutting and pasting “provisions from the constitutions of other states.” ANDERSON, *supra* note 39, at 4. At least one commentator has stated:

It is more nearly in conformity with the facts to say that from the first day that English-speaking white men set foot in the Northwest territory a course of events was begun which in the fullness of time dictated to the people of Minnesota some of the most important clauses in their constitution. Furthermore, the experiences of the pioneers under the various territorial governments which succeeded each other in the control of the Minnesota country, constituted a very solid education in the fundamentals of administration in a new and undeveloped country.

*Id.*

in its first article, which provides Minnesota's Bill of Rights.<sup>41</sup>

Beyond organization, the language used is also different.<sup>42</sup> This is particularly apparent in examining article I, section 4, which guarantees the civil right to a jury trial.<sup>43</sup> The provision, in pertinent part, provides: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."<sup>44</sup> The most apparent difference between this provision and the Seventh Amendment is that Minnesota does not require a minimum amount in controversy for the right to attach.<sup>45</sup> While the difference in language is noteworthy, the more significant distinction is the way courts interpret the provisions. In *State v. Hamm*, the Minnesota Supreme Court stated:

It is important to remember that we sit today in our role as the highest court of the State of Minnesota interpreting our own constitution, framed and ratified by the people of this state. While a decision of the United States Supreme Court interpreting an identical provision of the federal Constitution may be persuasive, it should not be automatically followed or our separate constitution will be of little value.<sup>46</sup>

These are powerful words that have real importance. Beyond ensuring that the state has a unique identity, the Seventh Amendment has not been incorporated into the Due Process Clause of the Fourteenth Amendment.<sup>47</sup> Therefore, federal

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41. MCCARR & NORDBY, *supra* note 39, § 1:4. This, of course, is different from the United States Constitution, which states the Bill of Rights in its amendments.

42. *Id.*

43. *Id.*

44. MINN. CONST. art. I, § 4.

45. Compare *id.*, with U.S. CONST. amend. VII.

46. 423 N.W.2d 379, 382 (Minn. 1988).

47. Wolfram, *supra* note 15, at 645–46; James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 466 (2004). The doctrine of incorporation refers to the application of the Bill of Rights to state governments. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 416 (8th ed. 2010). As initially interpreted, the Bill of Rights did not apply to the states. See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833). However, through the adoption of the Fourteenth Amendment, namely the Due Process Clause, the United States Supreme Court has applied many of the provisions to the states. NOWAK & ROTUNDA, *supra*. This means that by infringing these provisions, state governments violate the United States Constitution. *Id.* This also means that state governments do not run afoul of the United States Constitution when violating provisions that have not been incorporated. *Id.* As mentioned, the Seventh Amendment right to a jury trial is one of the few

precedent interpreting the Seventh Amendment is merely persuasive authority in Minnesota. As a result, the Minnesota Supreme Court's interpretation of article I, section 4 is critical to understanding the constitutional right in Minnesota state courts.

C. *The Evolution of the Civil Right to a Jury Trial in Minnesota*

The intention of the Drafters in adopting article I, section 4 of the Minnesota Constitution "was clearly not to create a new right."<sup>48</sup> Rather, the intention was "to preserve an old [right] against interference by the legislature."<sup>49</sup> In *Whallon v. Bancroft*, one of the first cases to interpret the constitutional guarantee,<sup>50</sup> the court noted definitively that it has a twofold effect.<sup>51</sup> First, it "recognize[s] the right of trial by jury as it existed in the Territory of Minnesota at the time of the adoption of the State Constitution."<sup>52</sup> Second, it recognizes that this right is "to continue . . . unimpaired and inviolate."<sup>53</sup> In considering the article I, section 4 right to a jury trial, Minnesota courts generally begin their analysis by reciting this language.<sup>54</sup>

The *Whallon* twofold effect recognizes a difference between legal and equitable causes of action.<sup>55</sup> At the time the Minnesota Constitution was adopted, a party was entitled to exercise the right only if the action was legal in nature.<sup>56</sup> This interpretation stems

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provisions that has not been incorporated into the Due Process Clause of the Fourteenth Amendment. *Id.* at 416–17.

48. ANDERSON, *supra* note 39, at 159.

49. *Id.*

50. Torpey, *supra* note 2, at 1234.

51. 4 Minn. 109, 113 (1860).

52. *Id.*

53. *Id.*

54. See, e.g., *Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007); *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002); *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 148 (Minn. 2001); *Smith v. Bailen*, 258 N.W.2d 118, 120 (Minn. 1977); *Breimhorst v. Beckman*, 227 Minn. 409, 433, 35 N.W.2d 719, 734 (1949); *Hawley v. Wallace*, 137 Minn. 183, 187, 163 N.W. 127, 129 (1917); *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 254, 153 N.W. 527, 528 (1915); *In re Peters*, 119 Minn. 96, 101–02, 137 N.W. 390, 392 (1912); *State ex rel. Styve v. Dist. Judge of Tenth Judicial Dist.*, 85 Minn. 215, 217–18, 88 N.W. 742, 743 (1902); *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 209, 68 N.W. 53, 54–55 (1896); *Schmidt v. Schmidt*, 47 Minn. 451, 452–53, 50 N.W. 598, 599 (1891).

55. *Abraham*, 639 N.W.2d at 349; *Olson*, 628 N.W.2d at 154; *Morton*, 130 Minn. at 254, 153 N.W. at 528; *Bond v. Welcome*, 61 Minn. 43, 43–44, 63 N.W. 3, 3–4 (1895); Torpey, *supra* note 2, at 1235.

56. Torpey, *supra* note 2, at 1235.

not only from tradition but also from the plain language of the constitutional guarantee, as it extends only to cases “at law.”<sup>57</sup> Minnesota authority has not elaborated thoroughly on why there is a difference between legal and equitable causes of actions. However, scholars examining the Seventh Amendment note the distinction stems from the common law separation of courts of law and courts of equity.<sup>58</sup> Even though the courts have merged, both federal and state courts continue this historical separation.<sup>59</sup>

The post-merger distinction can be problematic, especially when the cause of action involves both legal and equitable issues.<sup>60</sup> In this situation, the legal issues may be submitted to the jury, while the equitable issues remain within discretion of the trial court.<sup>61</sup> The same is true where a plaintiff brings forth a legal claim and the defendant’s counterclaim seeks equitable relief.<sup>62</sup> However, simply because a cause of action raises a legal issue does not necessarily mean a party is entitled to a jury trial.<sup>63</sup> Where a cause of action is primarily equitable in nature but also includes incidental legal relief, neither party is entitled to a jury trial as a matter of right.<sup>64</sup> For example, in *Koeper* the Minnesota Supreme Court found the plaintiff’s primary goal in bringing the action was to enjoin the defendant from overflowing water onto the plaintiff’s land.<sup>65</sup> The plaintiff’s request for incidental damages was not sufficient to deem the action legal in nature.<sup>66</sup> Similarly, in *Indianhead Trucking* the court found that the plaintiff brought suit for specific performance, and the fact that the action sought incidental damages was not sufficient to warrant a jury trial.<sup>67</sup>

57. See MINN. CONST. art. I, § 4.

58. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 98 (2d ed. 2012).

59. *Id.*

60. MORRISON, *supra* note 37, at 42.

61. Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 254–55, 153 N.W. 527, 528 (1915).

62. See Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 478–79, 101 N.W. 610, 611 (1904).

63. See *Indianhead Trucking Line, Inc. v. Hvidsten Transp., Inc.*, 268 Minn. 176, 192–93, 128 N.W.2d 334, 346 (1964); *Koeper v. Town of Louisville*, 109 Minn. 519, 521–23, 124 N.W. 218, 218–19 (1910); *Lace v. Fixen*, 39 Minn. 46, 48–49, 38 N.W. 762, 763 (1888).

64. See *Indianhead Trucking*, 268 Minn. at 194, 128 N.W.2d at 357; *Koeper*, 109 Minn. at 522, 124 N.W. at 218.

65. 109 Minn. at 522–23, 124 N.W. at 219.

66. *Id.* at 522–23, 124 N.W. at 219.

67. 268 Minn. at 192–94, 128 N.W.2d at 346–47.

Courts initially determined whether a claim was legal or equitable solely by the language in the complaint.<sup>68</sup> Over time, however, courts acknowledged that the complaint alone was too narrow and found that the civil right to a jury trial depended on the “nature and character of the controversy, determined from all the pleadings.”<sup>69</sup> Examining the “nature and character of the controversy” requires courts to ask whether the *type* of action at issue would have been properly submitted to a jury when the Minnesota Constitution was adopted.<sup>70</sup> The practice of reviewing the type of action has proven to be effective in resolving modern disputes because of the inherent difficulties of “analyz[ing] current practice and pleading in the context of 1850’s jurisprudence.”<sup>71</sup> It is also effective as it responds to forms of relief that did not enter Minnesota’s legal arena until the twentieth century.<sup>72</sup>

To make the determination of whether a cause of action is legal or equitable, the Minnesota Supreme Court has articulated a two-pronged test.<sup>73</sup> In *Abraham*, it stated that courts must look at the “nature and character of the controversy”<sup>74</sup> (i.e., the substantive nature of the claim) and also the “theory for relief.”<sup>75</sup> This is the analysis used by the Minnesota Supreme Court in *United Prairie Bank*.<sup>76</sup>

68. See *Williams v. Howes*, 137 Minn. 462, 463, 162 N.W. 1049, 1049 (1917) (“The question of the character of the action is determined solely by the complaint.”); *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 255, 153 N.W. 527, 528 (1915) (examining the complaint to determine whether the action was equitable in nature); *Shiple v. Belduc*, 93 Minn. 414, 416, 101 N.W. 952, 953 (1904) (“The decisive test whether an action is triable to the court or to a jury is to be determined upon an examination of the complaint . . . .”); *Bond v. Welcome*, 61 Minn. 43, 44, 63 N.W. 3, 4 (1895) (“The pleadings in the case at bar, especially the answer, clearly disclose a case which is one of equitable cognizance, to be tried in the methods pertaining to courts of equity. We do not, however, rest our decision in this case upon the proposition that the pleadings show that the action is an equitable one, but upon the ground that the complaint discloses it . . . .”). But see *Fair v. Stickney Farm Co.*, 35 Minn. 380, 381, 29 N.W. 49, 49–50 (1886) (examining the complaint and answer to determine whether the action was equitable in nature).

69. *Landgraf v. Ellsworth*, 267 Minn. 323, 326, 126 N.W.2d 766, 768 (1964).

70. *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 349 (Minn. 2002) (referring directly to cases at law).

71. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 149 (Minn. 2001).

72. *Id.*

73. See *Abraham*, 639 N.W.2d at 350–53.

74. *Id.* at 350.

75. *Id.* at 353.

76. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip.*,

### III. THE *UNITED PRAIRIE BANK* DECISION

#### A. *Factual Background*

In 2002, Defendants Leland Haugen and Ilene Haugen began to experience financial difficulties in connection with their feed mill business.<sup>77</sup> Plaintiff United Prairie Bank agreed to provide relief to the Haugens by refinancing their debt obligations.<sup>78</sup> The parties agreed to a plan that transferred some of the Haugens' assets to a third party and created a new entity, Haugen Nutrition & Equipment, LLC ("HNE"), to purchase those assets.<sup>79</sup> To effectuate the latter transfer, the Haugens borrowed \$323,484.82, which was secured by commercial security agreements, personal guarantees, and a mortgage.<sup>80</sup> Each security entitled United Prairie Bank to attorney's fees if it instituted any collection action against the Haugens and HNE.<sup>81</sup> The personal guarantees also obligated the Haugens and HNE to pay reasonable attorney's fees and legal expenses incurred by United Prairie Bank for the "protection, defense or enforcement" of the personal guarantees in any litigation, bankruptcy, or insolvency proceedings.<sup>82</sup>

In December 2003, an action was brought against the Haugens, HNE, the third party, and United Prairie Bank

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L.L.C., 813 N.W.2d 49, 54–56 (Minn. 2012). In discussing this area of the law, Rule 38.01 of the Minnesota Rules of Civil Procedure is also relevant. The Rule states: "In actions for the recovery of money only, or of specific real or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered." *Id.* The rule appears in cases, but it has been interpreted in a way that it does not have an impact on the right to a jury trial guaranteed by article I, section 4 of the Minnesota Constitution. *See Olson*, 628 N.W.2d at 154. Specifically, the court has determined that Rule 38.01 "does not enlarge or diminish the historical right." *Id.* The sole issue of concern is whether the cause of action is legal or equitable. *Id.*; *see also* 1A DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED § 38.4 (5th ed. 2012).

77. *United Prairie Bank*, 813 N.W.2d at 52.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Specifically, the promissory notes accompanying the loans obligated the Haugens and HNE to pay attorney's fees plus court costs if United Prairie Bank hired an attorney to collect the debt. *Id.* The mortgage required them to pay attorney's fees and legal expenses in connection with any enforcement or protection action with respect to the mortgage. *Id.* Finally, the commercial security agreements obligated the Haugens and HNE to pay "reasonable attorneys' fees and legal expenses" in connection with any action for the repossession of secured property. *Id.*

82. *Id.*

challenging these transactions as fraudulent transfers.<sup>83</sup> United Prairie Bank defended and incurred \$117,110.24 in legal fees.<sup>84</sup> In November 2004, United Prairie Bank notified the Haugens and HNE that they were in default on their loan payments.<sup>85</sup> United Prairie Bank subsequently brought the action at issue to collect amounts due under the agreement.<sup>86</sup> It also brought forth breach of contract claims for breach of the personal guaranties.<sup>87</sup> The prayer for relief sought damages as well as reasonable attorney's fees and costs.<sup>88</sup>

### B. Lower Court Decisions

At trial, the Haugens and HNE moved the court to have a jury determine the amount of attorney's fees owed.<sup>89</sup> The court denied the motion and awarded United Prairie Bank \$403,821.82.<sup>90</sup> The Haugens and HNE appealed, but the Minnesota Court of Appeals affirmed.<sup>91</sup> In reaching its conclusion, the court of appeals noted, similar to prior decisions, that it could not identify authority from 1857 involving a cause of action for contractual attorney's fees.<sup>92</sup> However, it followed the analysis outlined above and addressed "whether 'the nature and character of the controversy, as determined from all the pleadings and by the relief sought[,] indicate[d] that 'the cause of action [was] one at law *today*.'"<sup>93</sup>

The Haugens and HNE argued that United Prairie Bank's claim was for breach of contract,<sup>94</sup> which had already been recognized as legal in nature.<sup>95</sup> United Prairie Bank conceded that

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 53.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The court found United Prairie Bank was entitled \$286,711.58 in attorney's fees in the present action and an additional \$117,110.24 in attorney's fees incurred by United Prairie Bank in defending the earlier lawsuit. *Id.*

91. *Id.*; see also *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 782 N.W.2d 263 (Minn. Ct. App. 2010).

92. See *United Prairie Bank*, 782 N.W.2d at 270 (referring to cases such as *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002) and *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142, 149 (Minn. 2001)).

93. *Id.* at 269 (quoting *Abraham*, 639 N.W.2d at 349).

94. *Id.*

95. See *Landgraf v. Ellsworth*, 267 Minn. 323, 327, 126 N.W.2d 766, 768 (1965); *Raymond Farmers Elevator Co. v. Am. Sur. of N.Y.*, 207 Minn. 117, 119,

a breach of contract claim is legal in nature, but that its claim did not implicate traditional breach of contract considerations.<sup>96</sup> In resolving the dispute, the court of appeals looked to Minnesota precedent, but also relied heavily on federal case law.<sup>97</sup> Specifically, the court applied the test used by the United States Supreme Court in *Ross v. Bernhard*.<sup>98</sup>

In *Ross*, the Court held that “[t]o determine whether a party is entitled to a jury trial, . . . courts look to the ‘nature of the issue to be tried rather than the character of the overall action.’”<sup>99</sup> A conclusion is reached “by considering (1) how the issue was customarily treated prior to the merger of the courts of law and equity (the ‘pre-merger’ custom), (2) the remedy sought, and (3) the abilities and limitations of juries.”<sup>100</sup>

Examining these elements in turn, the court of appeals first cited federal authority to support the conclusion that the pre-merger custom did not view a cause of action for contractual attorney’s fees as legal in nature;<sup>101</sup> rather, it was an issue typically within the province of the trial court.<sup>102</sup> As to the remedy sought, the court viewed United Prairie Bank’s action as one seeking damages in connection with the defendant’s failure to pay amounts due under the loan agreement.<sup>103</sup> The court concluded that the issue of attorney’s fees was “collateral” to the underlying merits of the breach of contract claim.<sup>104</sup> It essentially reasoned that attorney’s fees are not damages as a direct result of the breach.<sup>105</sup>

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290 N.W. 231, 233 (1940).

96. *United Prairie Bank*, 782 N.W.2d at 269.

97. *Id.* at 269–71.

98. *Id.*

99. *Id.* at 269 (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

100. *Id.* (citing *Ross*, 396 U.S. at 538 n.10).

101. *Id.* at 269–70. To support this conclusion, the court of appeals relied on *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1988) and *Resolution Trust Co. v. Marshall*, 939 F.2d 274 (5th Cir. 1991). Specifically, the *Resolution Trust* court held that “[s]ince there is no common law right to recover attorneys fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees.” 939 F.2d at 279. However, as will be discussed in Part IV.A, Minnesota has explicitly disagreed with this contention.

102. *See United Prairie Bank*, 782 N.W.2d at 270.

103. *See id.*

104. *Id.* The court supported its “collateral” position by citing a federal district court decision that held “the issues of liability for attorneys’ fees and the reasonableness of any such award should be addressed separately from liability on the merits.” *Id.* (quoting *Redshaw Credit Corp. v. Diamond*, 686 F. Supp. 674, 676–77 (E.D. Tenn. 1988)).

105. *See id.* at 271.

With respect to the third factor, the abilities and limitations of juries, the court found that requiring the trial court to decide the amount of attorney's fees owed was more practical and more efficient than leaving it to a jury.<sup>106</sup>

Considering these factors as a whole and taking into account Minnesota precedent, the court of appeals drew a distinction between a cause of action seeking attorney's fees as a result of a failure to provide a legal defense and a cause of action seeking attorney's fees in connection with the nonpayment of amounts due under a promissory note.<sup>107</sup> In the latter situation, which the court concluded was the type before it, the issue of attorney's fees was ancillary to the merits of the underlying dispute.<sup>108</sup> The court reasoned that because attorney's fees were ancillary, the trial court was in a better position to determine the amount of attorney's fees owed.<sup>109</sup> The Haugens and HNE appealed, and the Minnesota Supreme Court granted review.

### C. *The Minnesota Supreme Court*

The sole issue before the Minnesota Supreme Court was whether the Minnesota Constitution permitted a jury trial in an action to recover attorney's fees provided by contractual agreement.<sup>110</sup> It reversed the court of appeals and held that the Minnesota Constitution provided such a right because the recovery of damages under a breach of contract claim is legal in nature.<sup>111</sup> The court reached this result using the *Abraham* two-pronged test

106. *Id.* at 270. In reaching this conclusion, the court found *McGuire v. Russell-Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993) particularly persuasive. *United Prairie Bank*, 782 N.W.2d at 271. See Part IV.B for a thorough discussion of the practical abilities and limitations of juries.

107. See *United Prairie Bank*, 782 N.W.2d at 271.

108. See *id.* The juxtaposition of these claims was based on the remedy sought. For the court of appeals, the failure to provide a legal defense was a breach of an obligation to reimburse, which entitled a party to attorney's fees as damages incurred. However, in an action to collect amounts due under a promissory note, the remedy was damages in the amount of the uncollected debt—attorney's fees provided only "collateral" relief. As will be discussed, this reasoning misconstrues basic contract law. See *infra* Part IV.A; Part IV.B (discussing why courts err in drawing this distinction).

109. See *United Prairie Bank*, 782 N.W.2d at 271. For the court of appeals, this also meant that trial courts were required to determine whether a party was entitled to recover attorney's fees in the first place. See *id.*

110. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 51 (Minn. 2012).

111. See *id.* at 52.

discussed above; it addressed the substantive nature of a contractual attorney's fees action as well as the remedy sought.<sup>112</sup>

The Minnesota Supreme Court, like the court of appeals, could not identify authority from 1857 involving a cause of action for contractual attorney's fees.<sup>113</sup> However, the court cited case law involving this type of action as early as 1863.<sup>114</sup> The court connected this early authority with the situation in *United Prairie Bank* because the underlying theme in both was "contractual indemnity."<sup>115</sup> The court considered contractual indemnity an action "at law" because, like a simple breach of contract claim, it was an action for the "recovery of money based upon the promise to pay,"<sup>116</sup> which had already been recognized as legal in nature.<sup>117</sup>

The court then turned to the second prong: the nature of the remedy sought.<sup>118</sup> It determined the claim for attorney's fees was one seeking damages for the breach of the loan agreements.<sup>119</sup> To support this position, the court found *New Amsterdam*, which involved a contractual indemnity action, particularly persuasive, as that court did not differentiate attorney's fees from other issues that were submitted to the jury—each involved "the recovery of money."<sup>120</sup> The court bolstered this analysis by citing decisions that had found the recovery of money under ordinary breach of contract actions legal in nature.<sup>121</sup> The court concluded that

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112. *Id.* at 54–58; see *supra* notes 73–75 and accompanying text. In applying the *Abraham* two-pronged test, the court rejected the *Ross* test adopted by the court of appeals. *United Prairie Bank*, 813 N.W.2d at 60; see also *infra* Part IV.B.

113. *United Prairie Bank*, 813 N.W.2d at 54–55; *supra* note 92 and accompanying text.

114. *United Prairie Bank*, 813 N.W.2d at 54–55 (referring to *Griswold v. Taylor*, 8 Minn. 342 (1863)). See *infra* note 134 for a further discussion of *Griswold*.

115. *United Prairie Bank*, 813 N.W.2d at 55.

116. *Id.* at 55–56.

117. *Id.* at 56; *New Amsterdam Cas. Co. v. Lundquist*, 293 Minn. 274, 287, 198 N.W.2d 543, 551 (1972) ("An action based on an indemnity agreement is for the recovery of money based upon the promise to pay and is therefore triable by a jury."); *Raymond Farmers Elevator Co. v. Am. Sur. Co. of N.Y.*, 207 Minn. 117, 119, 290 N.W. 231, 233 (1940) ("A suit against a surety on the contract is an action for the recovery of money based upon the promise to pay. Therefore it is triable by jury."); *Pierce v. Maetzold*, 126 Minn. 445, 451, 148 N.W. 302, 304 (1914).

118. *United Prairie Bank*, 813 N.W.2d at 56.

119. *Id.*

120. *Id.*

121. *Id.* at 57. The court's use of traditional breach of contract cases includes *Simler v. Conner*, 372 U.S. 221, 223 (1963), which involved an action to determine the amount of fees due under a contingent fee retainer contract; *Landgraf v. Ellsworth*, 267 Minn. 323, 324–26, 126 N.W.2d 766, 767–68 (1964), which involved an action to recover commissions due under a contract; and *Raymond Farmers*

because the claim was seeking money damages, the analysis was complete.<sup>122</sup>

#### IV. ANALYSIS

The Minnesota Supreme Court reached the correct result in *United Prairie Bank*. As stated, the court's analysis is not controversial. However, the opportunity to reach a different result was certainly present. The court seemed cognizant of this fact as it rejected, at length, other theories advanced.<sup>123</sup> The court chose the historical and textual analysis as opposed to the one that might have been more practical.<sup>124</sup> As will be discussed, this was proper in light of precedent and basic logic.<sup>125</sup>

This section begins with a critique of the court's analysis.<sup>126</sup> Particularly, it focuses on how the court addressed the nature and character of the controversy as well as the remedy sought.<sup>127</sup> It then turns to a discussion as to why the court correctly rejected other theories advanced, notably the third *Ross* factor.<sup>128</sup> It concludes with an examination of how Minnesota creditors can protect themselves moving forward.<sup>129</sup>

##### A. *Correctly Concluding that the Nature and Character of the Controversy and the Remedy Sought are Legal in Nature*

Analyzing first the nature and character of the controversy, the court correctly noted that it cannot cite authority from 1857 involving a cause of action for contractual attorney's fees.<sup>130</sup> However, prior decisions have expressly stated "[t]he constitution is not frozen in time in 1857"<sup>131</sup> and precedent permits an examination of whether the *type* of action permitted a jury trial

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*Elevator Co.*, 207 Minn. at 119, 290 N.W. at 233, which involved an action against a surety seeking damages for losses stemming from an employee's fraudulent conduct.

122. *United Prairie Bank*, 813 N.W.2d at 57.

123. *See id.* at 58–63.

124. Leventhal, *supra* note 9.

125. *See infra* Part IV.A–B.

126. *See infra* Part IV.A.

127. *See infra* Part IV.A.

128. *See infra* Part IV.B.

129. *See infra* Part IV.C–D.

130. *See United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 55 (Minn. 2012).

131. *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 349 (Minn. 2002).

when the Minnesota Constitution was adopted.<sup>132</sup>

The type of action at issue in *United Prairie Bank* is one for contractual indemnity.<sup>133</sup> As stated, the court first recognized the validity of this type of provision in 1863 in *Griswold*.<sup>134</sup> In that case, the issue of whether the cause of action was legal or equitable was not before the court.<sup>135</sup> However, later decisions have provided clarity, stating definitively that a contractual indemnity claim is an action at law.<sup>136</sup>

132. *Id.*; *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 148–49 (Minn. 2001).

133. See BALLENTINE'S LAW DICTIONARY 608 (3d. ed. 1969) (stating an indemnity contract is “[a] contract whereby one agrees to save another from the legal consequence of the conduct of one of the parties or of some other person.”); 1 DOBBS, *supra* note 6, § 3.10(3), at 402–03; 10 C.J.S. *Bills and Notes; Letters of Credit* § 98 (2012) (stating the issue of attorney’s fees pursuant to a promissory note obligating a debtor to pay a creditor’s attorney’s fees in the event of the debtor’s default involves many considerations, including “recognition of the fact that an agreement to pay an attorney’s fee is a contract of indemnification.”); 42 C.J.S. *Indemnity* § 1 (2012) (“An agreement to indemnify another is an agreement . . . in which the indemnitor promises to reimburse his or her indemnitee for loss suffered.”). In this case, the Haugens and HNE agreed, *inter alia*, to indemnify United Prairie Bank for any attorney’s fees incurred in the protection or enforcement of their debt obligation. *United Prairie Bank*, 813 N.W.2d at 51.

134. See *Griswold v. Taylor*, 8 Minn. 342, 344–45 (1863). Similar to *United Prairie Bank*, 813 N.W.2d at 51, the contract at issue in *Griswold* provided for attorney’s fees in the event the lender brought a foreclosure action. *Griswold*, 8 Minn. at 342–43. In upholding the contract, the court found the provision was “a stipulation [to] save the mortgagee harmless in the event of a forced collection[.]” *Id.* at 344. While the term was not actually used, it is clear that this is an indemnity contract. See *supra* note 133.

135. See generally *Griswold*, 8 Minn. 342.

136. See *New Amsterdam Cas. Co. v. Lundquist*, 293 Minn. 274, 287, 198 N.W.2d 543, 551 (1972) (“An action based on an indemnity agreement is for the recovery of money based upon the promise to pay and is therefore triable by a jury.”); *Raymond Farmers Elevator Co. v. Am. Sur. Co. of N.Y.*, 207 Minn. 117, 119, 290 N.W. 231, 233 (1940) (“A suit against a surety on the contract is an action for the recovery of money based upon the promise to pay. Therefore it is triable by jury.”); *Pierce v. Maetzold*, 126 Minn. 445, 451, 148 N.W. 302, 304 (1914). While Minnesota has been unwavering in its view that contractual indemnity actions are legal in nature, the Minnesota Supreme Court does not appear to have addressed its substantive origins. See generally *New Amsterdam*, 293 Minn. at 287, 198 N.W.2d at 551; *Raymond*, 207 Minn. at 119, 290 N.W. at 233; *Pierce*, 126 Minn. at 451, 148 N.W. at 304. A review of Minnesota case law suggests that the issue was first addressed in *Pierce*. See 126 Minn. at 451, 148 N.W. at 304. While that court made conclusive statements that the action was legal in nature, it did not cite authority to support its position. See *id.* Later decisions have provided additional support for the proposition but have not expanded on the reasoning. See generally *New Amsterdam*, 293 Minn. at 287, 198 N.W.2d at 551; *Raymond*, 207 Minn. at 119, 290 N.W. at 233. Federal authority has provided some guidance, finding that “it would be difficult to conceive of an action of a more traditionally legal character” than

After considering the nature and character of the controversy, the court turned to the remedy sought.<sup>137</sup> In *United Prairie Bank*, the remedy was attorney's fees,<sup>138</sup> which can, in this case, be properly characterized as money damages pursuant to a contract.<sup>139</sup> In this context, the court correctly concluded that the remedy is legal in nature.

Analysis of the damages at issue in *United Prairie Bank* involves an examination of basic contract law—specifically, expectation damages.<sup>140</sup> “Expectation damages attempt to provide the non-breaching party with the expected benefit of the contract, also known as the benefit of the bargain.”<sup>141</sup> To recover expectation damages, a party is required to show that the damages were foreseeable at the time of contract formation.<sup>142</sup> The issue of foreseeability has its roots in the famous English case *Hadley v. Baxendale*,<sup>143</sup> which Minnesota expressly recognizes.<sup>144</sup> That case provided two basic rules governing expectation damages.<sup>145</sup> The non-breaching party should receive damages that may reasonably be considered as arising naturally from a breach of contract *or* those damages that may reasonably “have been in the

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“an action on a debt allegedly due under a contract.” *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962). The result is that the substantive origins of a contractual indemnity action are somewhat vague. However, precedent clearly states that the nature and character of a contractual indemnity action is legal in nature.

137. *United Prairie Bank*, 813 N.W.2d at 56.

138. *Id.* at 53.

139. DOBBS, *supra* note 6, § 3.10(1), at 389 (recognizing that contractual attorney's fees serve several different purposes, one of which is damages pursuant to a contract—the policy behind the fees as damages rationale is that without the ability to recover the fees, the aggrieved plaintiff is not made whole); 1 ROBERT L. ROSSI, ATTORNEYS' FEES § 8.4 (3d ed. 2011) (“In actions involving indemnity, brought where the duty to indemnify is either implied by law or arises under a contract, reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses, since they are foreseeable consequences of the indemnitor's wrongful conduct.” (footnote omitted)). *Contra id.* (recognizing there is some authority to the contrary).

140. See 20 BRENT A. OLSON, MINNESOTA PRACTICE: BUSINESS LAW DESKBOOK, FORMATION AND OPERATION OF BUSINESSES § 7.41 (2011) (noting that an award of expectation damages is one of the primary remedies for breach of contract).

141. *Id.*

142. *Id.* § 7.42. The converse is also true. Namely, a party not “liable in the event of a breach for the loss that he did not at the time of contracting have reason to foresee as a probable result of such a breach.” *Id.*

143. *Id.*

144. *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 838 (Minn. Ct. App. 1994) (citing *Hadley v. Baxendale*, (1854) 154 Eng. Rep. 145 (Exch.)).

145. 20 OLSON, *supra* note 140, § 7.42.

contemplation of both parties, at the time they made the contract, as the probable result of a breach.”<sup>146</sup> The former are categorized as “general” damages while the latter are referred to as either “special” or “consequential” damages.<sup>147</sup>

The damages sought in *United Prairie Bank* were general damages. “General damages are [those] that are the obvious result of the breach of contract, or those that occur in the ordinary course of events.”<sup>148</sup> The policy rationale behind general damages is that “the plaintiff should be awarded the value of the very thing promised.”<sup>149</sup> In *United Prairie Bank*, the contract made clear that if an action was brought or defended, part of the remedy would be attorney’s fees.<sup>150</sup> This provision was bargained for, and attorney’s fees as damages arose naturally from any breach.<sup>151</sup> Therefore, the remedy is money damages pursuant to a contract. Minnesota has made it clear that this type of remedy is legal in nature.<sup>152</sup>

While the issue is fairly well settled, it must be noted that there is some Minnesota authority suggesting that in an action seeking a default judgment, the award of attorney’s fees is collateral to the underlying merits. Specifically, in *First State Bank of Grand Rapids v. Cohasset Wooden Ware Co.*, the Minnesota Supreme Court found that an attorney’s fees provision in a default action under a promissory note “is not a distinct cause of action.”<sup>153</sup> Similarly, in *Campbell v. Worman*, the court described attorney’s fees as not “part of the original debt.”<sup>154</sup> However, as stated by the Minnesota Supreme Court in *United Prairie Bank*, these propositions “[are] contrary to basic contract law.”<sup>155</sup> The payment of attorney’s fees arises naturally from any breach of the loan documents. The attorney’s fees provisions were presumably bargained for to ensure

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146. *Id.* (citing Hadley, 154 Eng. Rep. 145).

147. *Id.*

148. *Id.*

149. 3 DOBBS, *supra* note 6, § 12.2(3), at 41.

150. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 52 (Minn. 2012).

151. *See id.*

152. *Landgraf v. Ellsworth*, 267 Minn. 323, 327, 126 N.W.2d 766, 768 (1964) (finding a suit for the recovery of money pursuant to a contract dispute was legal in nature); *Raymond Farmers Elevator Co. v. Am. Surety Co. of N.Y.*, 207 Minn. 117, 119, 290 N.W. 231, 233 (1940) (finding that a suit against a surety on a contract seeks money damages and was therefore legal in nature).

153. 136 Minn. 103, 105, 161 N.W. 398, 399 (1917).

154. 58 Minn. 561, 564, 60 N.W. 668, 669 (1894).

155. *United Prairie Bank*, 813 N.W.2d at 59; *see also id.* at 62 n.7 (explicitly criticizing *First State Bank of Grand Rapids* and *Worman*).

compliance with the loan agreement.<sup>156</sup> In the event of a breach, the remedy clearly included collecting attorney's fees incurred.<sup>157</sup> In essence, the provision was bargained for to put United Prairie Bank in the same position it would have been in had no misconduct occurred.<sup>158</sup> *First State Bank of Grand Rapids* and *Worman* are also concerning because they failed to take into account precedent on point. Specifically, in *Jones v. Radatz*, the Minnesota Supreme Court explicitly stated:

The suggestion . . . that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, is not sound. For the payee, if he recover[s] on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency.<sup>159</sup>

Therefore, the court in *United Prairie Bank* properly distinguished cases advancing the "collateral" position and determined that the remedy sought was money damages pursuant to a contract.

#### B. *Rejecting the Third Ross Factor*

In reaching its conclusion, the Minnesota Supreme Court also correctly rejected the third *Ross* factor to determine whether a cause of action is legal or equitable. The factor, used by the court of appeals in *United Prairie Bank*, had its genesis in a footnote in the United States Supreme Court decision *Ross v. Bernhard*.<sup>160</sup> Specifically, the note stated: "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."<sup>161</sup> It should be apparent that the first two factors are nearly

156. DOBBS, *supra* note 6, § 3.10(3), at 401–02 (stating that attorney's fees pursuant to an indemnity agreement serve a dual purpose: they sanction "some particular misbehavior [of the defendant] while at the same time compensating the plaintiff").

157. See 20 OLSON, *supra* note 140, § 7.41.

158. *Id.* ("Expectation damages attempt to provide the non-breaching party with the expected benefit of the contract, also known as the 'benefit of the bargain.'").

159. 27 Minn. 240, 242, 6 N.W. 800, 800 (1880).

160. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

161. *Id.* (emphasis added).

identical to the *Abraham* two-pronged test.<sup>162</sup> However, the third factor prompts an interesting discussion.

The Minnesota Supreme Court has never expressly adopted the third *Ross* factor.<sup>163</sup> The court of appeals made an attempt in *United Prairie Bank*,<sup>164</sup> but the Minnesota Supreme Court quickly rejected its application, finding the United States Supreme Court has limited its use “to a narrow set of circumstances that are inapplicable here.”<sup>165</sup> This assertion is correct. The United States Supreme Court has stated the third *Ross* factor “is relevant only to the determination [of] whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme.”<sup>166</sup> It is quite clear that a cause of action for contractual attorney’s fees does not implicate these considerations.

However, while the Minnesota Supreme Court rejected the third *Ross* factor, it must be clearly stated that the court had the opportunity to consider it for three reasons. First, although the court has never expressly adopted the third *Ross* factor, it has, at least once, considered the practical abilities and limitations of juries in analyzing whether a claim was legal or equitable.<sup>167</sup> Thus, the court had at least some basis for adopting the third *Ross* factor. Second, the Seventh Amendment is not incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution.<sup>168</sup> Therefore, the Minnesota Supreme Court was not bound by the United States Supreme Court’s narrow application. Third, even though the Minnesota Supreme Court was not bound by federal precedent, if the court wanted to adopt the third *Ross*

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162. See *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 349 (Minn. 2002); *supra* Part IV.A.

163. *United Prairie Bank–Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 60 (Minn. 2012).

164. *United Prairie Bank–Mountain Lake v. Haugen Nutrition & Equip., LLC*, 782 N.W.2d 263, 269 (Minn. Ct. App. 2010).

165. *United Prairie Bank*, 813 N.W.2d at 60 (referencing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 n.4 (1990)).

166. *Chauffeurs, Teamsters & Helpers*, 494 U.S. at 565 n.4 (citation omitted).

167. *E.g.*, *Georgopolis v. George*, 237 Minn. 176, 186, 54 N.W.2d 137, 143 (1952) (“[T]he transactions testified to were so detailed and so many documents were introduced in evidence that decisions on the proposed questions would have been very difficult for a jury.”). While this language is used in the decision, the Minnesota Supreme Court makes it clear that the cause of action is equitable in nature. *Id.*

168. See *supra* note 47 and accompanying text.

factor, it could have looked to federal decisions applying it for persuasive support. For example, in *McGuire v. Russell-Miller, Inc.*, which is factually similar to *United Prairie Bank*, the Second Circuit Court of Appeals relied heavily on the practical abilities and limitations of juries in determining whether a cause of action was legal or equitable.<sup>169</sup> The result of these three considerations is that the Minnesota Supreme Court had the opportunity to adopt the third *Ross* factor. As stated, the court rejected the factor on the grounds that the United States Supreme Court has limited its application.<sup>170</sup> However, a detailed analysis of the reasoning advanced in support of the third *Ross* factor, most notably as explained in *McGuire v. Russell-Miller*, shows it is flawed. Minnesota's rejection of the factor was correct, even if the court did so for a different reason.

Similar to *United Prairie Bank*, *McGuire v. Russell-Miller* addressed a contractual indemnity action involving attorney's fees.<sup>171</sup> The relevant contractual provision was breached, and the issue became whether the trial court should have submitted the issue of attorney's fees to the jury.<sup>172</sup> The court acknowledged that the matter was one of first impression for the circuit<sup>173</sup> and ultimately adopted a bifurcated approach: the question of liability for attorney's fees should be submitted to the jury, but the question as to the amount of attorney's fees owed was a matter properly resolved by the trial court.<sup>174</sup>

In reaching its conclusion with respect to the amount of attorney's fees owed, the *McGuire* court made the bald assertion that determining the amount of attorney's fees, in this situation, involved equitable issues of accounting, which is not a legal

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169. 1 F.3d 1306, 1315–16 (2d Cir. 1993). What is interesting about *McGuire* is that it was decided less than five years after the court narrowed the third *Ross* factor's applicability. See *Chauffeurs, Teamsters & Helpers*, 494 U.S. at 565 n.4; *Granfinciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989). Whether this was proper in light of prior precedent is certainly debatable. However, because Minnesota is not bound by the United States Supreme Court's interpretation, it could have used *McGuire* as a basis for adopting the third *Ross* factor.

170. *United Prairie Bank*, 813 N.W.2d at 60.

171. *McGuire*, 1 F.3d at 1309. Specifically, that court addressed a contract that provided attorney's fees to the plaintiff in the event it brought an action against the defendant for breach of any warranty or representation made in connection with the agreement. *Id.*

172. *Id.* at 1310.

173. *Id.* at 1313.

174. *Id.*

remedy.<sup>175</sup> The court also stated that the issue as to the amount of attorney's fees was collateral to the underlying merits.<sup>176</sup> While these contentions are advanced, both the majority and concurring opinions relied heavily on the third *Ross* factor, the practical abilities and limitations of juries, to find the bifurcated approach is the proper way to resolve the case.

The *McGuire* court appeared troubled by the notion of allowing a jury to decide the amount of attorney's fees owed. The majority stated:

To compute a reasonable amount of attorneys' fees in a particular case requires more than simply a report of the number of hours spent and the hourly rate. The calculation depends on an assessment of whether those statistics are reasonable, based on, among other things, the time and labor reasonably required by the case, the skill demanded by the novelty or complexity of the issues, the burdensomeness of the fees, the incentive effects on future cases, and the fairness to the parties.<sup>177</sup>

Judge Jacobs, in his concurrence, was concerned about whether a jury could focus on the underlying merits of the claim when it was also considering the issue of reasonable attorney's fees. Judge Jacobs concluded:

For jurors, the attorney's fee issue will almost always be a different and disconcerting way of looking at the merits. Prevailing counsel should not have to disclose to the jury the need for *in limine* motions, the protective efforts employed in discovery, the pursuit of settlement, or the toil and calculation required to build a case that may have been promoted to the same jury as simple or self-evident.<sup>178</sup>

After finding the practical abilities and limitations of juries were significant enough to remove the issue from their consideration, the court stated that adopting this approach is "efficient."<sup>179</sup> The court concluded that "[j]udges are better equipped than juries to make computations based on details about billing practices,

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175. *See id.* at 1314.

176. *Id.* at 1315.

177. *Id.*

178. *Id.* at 1317 (Jacobs, J., concurring); *see also* Gene F. Zipperle, Jr. & Timothy D. Martin, *Rolling the Dice: Jury Trials—Reasonable Attorney's fees And Expenses*, FOR DEF., Mar. 2008, at 26.

179. *McGuire*, 1 F.3d at 1316 (majority opinion).

including rates and hours charged on a particular case.”<sup>180</sup> For the *McGuire* court, the converse was also true in that requiring juries to make this determination would needlessly increase fees.<sup>181</sup> Finally, the court in *McGuire* reasoned that leaving the amount of attorney’s fees to the jury would require the jurors to keep accurate totals throughout the trial, whereas the judge could make this determination with “perfect hindsight.”<sup>182</sup>

While the *McGuire* reasoning seems persuasive on its face, its logic falls apart when considering a “free-standing” action for contractual attorney’s fees. The Tenth Circuit Court of Appeals recognized this distinction in *J.R. Simplot v. Chevron Pipeline Co.*<sup>183</sup> In *Simplot*, the parties entered into an agreement for Simplot to purchase a pipeline from Chevron.<sup>184</sup> The agreement was complex, but it provided a provision that Chevron would hold Simplot harmless in any pre-closing action against the pipeline.<sup>185</sup> Simplot defended a pre-closing action and notified Chevron of its contractual obligation to reimburse.<sup>186</sup> Chevron refused and Simplot brought the action at issue.<sup>187</sup> At trial, Chevron moved the court to have a jury determine the amount of fees to be awarded.<sup>188</sup> The trial court denied the request and awarded Simplot attorney’s fees.<sup>189</sup> On appeal, the court began its analysis by noting the posture of the case—the action was for the breach of a promise to reimburse, i.e., a straightforward breach of contract claim.<sup>190</sup> The

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180. *Id.*

181. *Id.* (“[I]f the parties submitted evidence of the amount of attorneys’ fees to a jury at trial, the time spent acculturating the jury to the mysteries of attorneys’ hourly rates and incidental charges, and cross-examining about those matters, would likely increase fees and generate inconsistent awards.”).

182. *Id.*

183. 563 F.3d 1102 (10th Cir. 2009).

184. *Id.* at 1106.

185. *Id.*

186. *Id.* at 1107.

187. *Id.*

188. *Id.* at 1108.

189. *Id.*

190. *Id.* at 1116. The court noted that the present dispute was more “like an insurance case where the insurer has breached its duty to defend a lawsuit against the insured by a third party and the insured sues the insurer for payment of the costs of its defense, particularly attorneys’ fees.” *Id.* at 1117. A “free-standing” cause of action for contractual attorney’s fees was also at issue in *United Prairie Bank*; however, the court did not recognize it. This second cause of action arose because the loan documents required the Haugens and HNE to pay all costs and expenses incurred in defending the loan agreements. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 51–52 (Minn.

court then distinguished the situation in *McGuire*, simply stating that it did not involve a “free-standing” attorney’s fees claim.<sup>191</sup>

The court in *Simplot* distinguished *McGuire*, but what it should have done is point out the inconsistency that results in nearly identical situations. That inconsistency is essentially that a jury is *not capable* of awarding attorney’s fees in a case involving a default action under a loan agreement, but *it is capable* when addressing a “free-standing” contractual attorney’s fees claim. The court in *McGuire* correctly noted that “[t]o compute a reasonable amount of attorneys’ fees in a particular case requires more than simply a report of the number of hours spent and the hourly rate.”<sup>192</sup> However, to say that a jury is competent to handle this task in one situation but not the other defies logic. The only difference is the timing of when the jury actually hears the issue. The same goes for the argument that “the attorney’s fee issue will almost always be a different and disconcerting way of looking at the merits.”<sup>193</sup> In fact, there are a number of occurrences during the course of a trial that might result in the jury having a favorable or unfavorable view of the underlying merits, but that has always been a consideration with jury trials.<sup>194</sup> The *McGuire* reasoning simply does not wash when considering the entire spectrum of situations where a jury might need to decide both liability for and the amount of attorney’s fees due. Once past this issue, the court in *McGuire*

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2012). This provision was breached when United Prairie Bank defended the earlier action and was not reimbursed. *Id.* at 52. Thus, United Prairie Bank had a separate, “free-standing,” cause of action for breach of contract. The *Abraham* two-pronged test once again applies, and it is clear that a “free-standing” breach of contract claim is legal in nature. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962) (“As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.”); *J.R. Simplot*, 563 F.3d at 1116. The decision not to address the “free-standing” claim does not change the analysis, but it is worthwhile to point out. In considering this issue, *Simplot* is discussed because that court’s analysis is more robust.

191. *J.R. Simplot*, 563 F.3d at 1116–17 (citing *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993)).

192. *McGuire*, 1 F.3d at 1315.

193. *Id.* at 1317 (Jacobs, J., concurring).

194. See Scott Kitner, Note, *The Need and Means to Restrict Spectators from Wearing Buttons at Criminal Trials*, 27 REV. LITIG. 733, 768 (2008) (arguing that allowing spectators to wear lapel buttons in the courtroom during trials allows the jury to decide guilt on the basis of issues outside the merits of the prosecution’s case); see also Sierra Elizabeth, Note, *The Newest Spectator Sport: Why Extending Victims’ Rights to the Spectators’ Gallery Erodes the Presumption of Innocence*, 58 DUKE L.J. 275, 308–09 (2008).

resorts to an efficiency argument.<sup>195</sup> However, in this country, we have a strong tradition of supporting the constitutional right to a jury trial, even though other procedures might be more efficient.<sup>196</sup>

What the *Simplot* analysis recognized is that a “free-standing” claim for contractual attorney’s fees is one of the most traditional legal claims imaginable. The court in *Simplot* was aware that to take the issue away from the jury would have been to fly in the face of hundreds of years of precedent.<sup>197</sup> Analyzing a “free-standing” contractual attorney’s fees action, such as the one in *Simplot*, sheds light on why the court in *United Prairie Bank* correctly rejected the third *Ross* factor, even if it did so for a different reason.<sup>198</sup> To do so might have been more efficient, but not constitutionally sound.<sup>199</sup>

195. *McGuire*, 1 F.3d at 1316 (majority opinion).

196. *See* *Sioux City & P. R. Co. v. Stout*, 84 U.S. 657, 664 (1873) (“It is assumed that twelve men [and women] know more of the common affairs of life than does one man [or woman], that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”); *Jefferson Nat’l Bank v. Cent. Nat’l Bank*, 700 F.2d 1143, 1150 (7th Cir. 1983) (“In close cases where there is a doubt . . . the court should favor of [sic] the granting of a jury trial to insure [sic] constitutional rights.” (quoting *Dixon v. Nw. Nat’l Bank*, 297 F. Supp. 485, 489 (D. Minn. 1969))); *THE FEDERALIST* No. 83, at 521 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961), available at <http://www.constitution.org/fed/federa83.htm> (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”).

197. The inference that the court is cognizant that a breach of contract claim is a straightforward legal issue comes from the fact that after stating this general proposition, the court supports it with a long string cite of cases recognizing the proposition. *See J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1115 (10th Cir. 2009). It may be a stretch to assume that the court realized that to take this issue away from the jury would not comport with established precedent but, given the context of the case, the inference can be made.

198. As stated above, the reason is that the United States Supreme Court has limited the third *Ross* factor “to a narrow set of circumstances that are inapplicable here.” *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 60 (Minn. 2012). The United States Supreme Court has stated that the third *Ross* factor “is relevant only to the determination whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme.” *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 n.4 (1990) (internal quotations omitted).

199. Beyond what has been already stated, the third *Ross* factor has been criticized on other grounds as well. Notably, Minnesota legal scholar Charles W. Wolfram challenged the United States Supreme Court’s adoption of the third *Ross* factor, stating:

Several difficulties with such a functional approach are apparent. First, no one has successfully isolated those functions which the jury is

Given that the court reached the correct decision in light of its article I, section 4 precedent, the question becomes, what does this mean for Minnesota creditors moving forward?

C. *The Hometown Jury: A Warning to Minnesota Creditors Seeking Contractual Attorney's Fees*

The result reached in *United Prairie Bank* should caution creditors, as it is now clear that a party can unilaterally request a jury trial in any action involving the recovery of contractual attorney's fees.<sup>200</sup> The concern for creditors should be made apparent by the opening two paragraphs of the Haugens' and HNE's brief filed with the Minnesota Supreme Court, which states:

The tragedy which has befallen the Haugens and their family in this case is largely a function of out-of-control attorneys' fees. Because the notes, mortgages and guarantees signed by Leland Haugen, Iene [sic] Haugen, Haugen Nutrition and Equipment, Inc., and other entities belong to or controlled by Leland and Ilene Haugen contained clauses permitting United Prairie Bank to charge costs of collection and reasonable attorneys' fees, *UPB took advantage*. While the Haugens could have paid off their obligations absent the huge amount awarded UPB in attorneys fees, the size of this award has made it impossible for them to do so.

As the District Court's analysis of its attorney fee award indicates, the ultimate amount of that award is subjective. A *rural jury*, while it would certainly have upheld the clear and legitimate costs a bank might have incurred in enforcing a debt on a farm, *is unlikely to have been as generous in an area as subjective and nebulous as a*

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supposed to perform under the [S]eventh [A]mendment, at least not to the satisfaction of any substantial audience. Second, to the extent that such an approach would be used both to expand and to contract the jury trial right, the functional approach might be thought to raise the spectre of federal judges using a disturbingly broad discretion in their determination of whether a jury ought to be interposed in particular cases. Finally, it seems clear that one of the purposes of the right of jury trial in civil cases is to place limitations upon judges. It thus might be thought to be particularly inappropriate in this instance for federal courts to claim a broad and loosely structured power to determine whether this civilian check on their own functioning should be interposed.

Wolfram, *supra* note 15, at 644.

200. See *United Prairie Bank*, 813 N.W.2d at 51.

*determination of attorneys' fees.* Indeed, the failure of the District Court to permit a jury determination of this issue is the single most important factor in the size of the award to UPB.<sup>201</sup>

What should be most concerning to creditors about these statements is that it appears the Haugens' and HNE's goal in this litigation was to get the matter before a "rural jury" who, at least from their perspective, would not award the amount of attorney's fees due because of the hardship that has befallen them. It is alarming because the statement, which is unsupported by any legal authority whatsoever, is essentially advocating for a hometown jury to find in favor of a hometown debtor. The trial strategy would likely play out along the same lines, with the defendants attempting to portray the plaintiff as running up its fees simply because it can.<sup>202</sup> It is debatable whether this strategy would be effective, but it is certainly concerning that the Haugens and HNE would state their presumable goal so boldly. The concern for creditors should be the possibility of being faced with a similar situation.

In light of the result reached in *United Prairie Bank*, how should Minnesota creditors who want to collect attorney's fees for the protection or enforcement of a security interest proceed?

*D. Reasonable Attorney's Fees with a Twist: Agreeing to a Court Trial*

Despite the decision in *United Prairie Bank*, provisions allowing creditors to recover reasonable attorney's fees for the protection of a security interest or enforcement of amounts due under a loan agreement are still desirable; it allows creditors to be reimbursed for costs incurred for "enforcing a legal right against a debtor who, by his [or her] own default, obliges the creditor to act."<sup>203</sup> Moreover, while attorney's fees are limited to what is reasonable,<sup>204</sup>

201. Appellants' Brief & Appendix at 7–8, *United Prairie Bank*, 813 N.W.2d at 49 (No. A09-0607) (emphasis added).

202. *United Prairie Bank's* brief is critical of the contention that it unnecessarily ran up attorney's fees. See Respondent's Brief & Appendix at 39–40, *United Prairie Bank*, 813 N.W.2d at 49 (No. A09-0607). Specifically, it points out that the Haugens and HNE vigorously defended the collection action. *Id.* As a result of this defense, *United Prairie Bank* incurred substantial attorney's fees litigating various matters in order to obtain its lower court victories. *Id.*

203. Comment, *Stipulations for Attorney's Fees*, 37 YALE L.J. 490, 491 (1928).

204. ROSSI, *supra* note 139, § 9:39. The amount of reasonable attorney's fees generally depends on a number of considerations, including "the amount in controversy, the number and seriousness of the questions involved, the difficulties encountered in prosecuting the action, as well as time and labor employed." *Id.*

these provisions allow a party to recover *all* reasonable attorney's fees incurred—the benefit obviously being that predicting which agreements might result in complex litigation, such as that in *United Prairie Bank*, is difficult, to say the least.<sup>205</sup> With that said, creditors in Minnesota would be well served, when including provisions seeking reasonable attorney's fees in connection with the protection of security interests or in actions for the enforcement of obligations to pay amounts due, to also include a provision in the agreement for a court trial in any action contesting the amount of attorney's fees owed.<sup>206</sup> This measure allows creditors not only to obtain all reasonable fees but also protects against the possibility that a jury might improperly award attorney's fees owed pursuant to the contract.<sup>207</sup> To protect clients' interests,

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205. The situation presented in *United Prairie Bank* presents a nice illustration of why liquidated damages can be a problem for creditors seeking to be reimbursed for attorney's fees. Liquidated damages are efficient because the remedy is predictable in the event of a breach. OLSON, *supra* note 140, § 7.45. However, in situations such as *United Prairie Bank*, where the trial court determined that *United Prairie Bank* was entitled to \$403,821.82, it is unlikely that a liquidated damages provision would provide a creditor adequate relief. The converse is obviously also true: in some actions, liquidated damages would result in a windfall to creditors. However, in considering the potential windfall, it must be cautioned that “[i]f the liquidated damages clause provides for an amount of damages that are grossly disproportionate to the damages actually incurred, the clause will be held unenforceable, even if at the time the clause was inserted into the contract it appeared to be a reasonable estimation of damages.” *Id.* Therefore, reasonable attorney fee provisions are the desirable approach.

206. 33 FEDERAL PROCEDURE § 77:128 (Lawyers Ed. 2012) (“There is no abstract public policy against contractual waiver of the right to civil jury trial. Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy. Parties to a contract may *by a prior written agreement*, which is knowingly and voluntarily entered, execute a waiver to the right to jury trial. A contract provision—made independently of litigation—for waiver of a jury trial is enforceable, but it is strictly and narrowly construed.” (emphasis added) (footnotes omitted)). See *generally* *Hoene v. Jamieson*, 289 Minn. 1, 7, 182 N.W.2d 834, 838 (1970) (recognizing that stipulations that only affect legal rights may be effective, but that stipulations regarding matters of law are not binding on the court); 4 RICHARD A. LORD, WILLISTON ON CONTRACTS § 8:50 (4th ed. 2012); 23 RONALD I. MESHBESHER, MINNESOTA PRACTICE: TRIAL HANDBOOK FOR MINNESOTA LAWYERS § 2.27 (2011) (citing *Lane v. Lenfest*, 40 Minn. 375, 376, 42 N.W. 84, 85 (1889) (recognizing the validity of stipulations that certain issues be decided by the court in Minnesota)).

207. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993) (O'Connor, J., dissenting) (“[J]urors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice.”).

specifically the costs incurred by those clients, attorneys drafting attorney's fees provisions in loan documents would be well served to consider this option in light of *United Prairie Bank*.

#### V. CONCLUSION

In *United Prairie Bank*, the Minnesota Supreme Court must be commended for reaching the correct result in light of its article I, section 4 jurisprudence. The court correctly analyzed the nature and character of the controversy as well as the remedy sought to properly determine that a cause of action for contractual attorney's fees pursuant to an indemnity contract is legal in nature. While the court did not totally refute analysis advanced by other jurisdictions, such reasoning was not advanced in Minnesota.

However, creditors should be cautious moving forward. Attorneys drafting loan agreements should consider the events that unfolded in *United Prairie Bank*. Most significantly, it appears that some debtors believe they can have success litigating the amount of attorney's fees in front of a jury. It is unclear whether the strategy will be successful, but it appears to be wise to avoid this possibility. Attorneys drafting loan agreements should pay close attention to the result reached in *United Prairie Bank* and strongly consider including provisions in indemnity agreements stating *the court*, and not a jury, shall resolve attorney fee disputes.