

NO. A07-155

State of Minnesota
In Supreme Court

Lester Building Systems, a division of Butler Manufacturing Company,
and Lester's of Minnesota, Inc.,

Appellants,

v.

Louisiana-Pacific Corporation,

Respondent.

BRIEF OF RESPONDENT
LOUISIANA-PACIFIC CORPORATION

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I. STATEMENT OF LEGAL ISSUES

A. Did the Court of Appeals correctly hold that Lester was not entitled to recover \$11.2 million to repair and replace the siding on buildings covered by a class action settlement between LP and Lester's customers in which the customers released Lester from any and all repair claims?

The Court of Appeals correctly held that a buyer who has resold a defective product is not entitled to recover repair costs unless it can show a potential liability to the ultimate purchaser.

Most Apposite Authority: Louis DeGidio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng'g Co., 225 N.W.2d 217 (Minn. 1974); Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990).

B. As an alternative ground in support of the judgment of the Court of Appeals, and regardless of Minnesota law, did the federal class action settlement preclude Lester from recovering the \$11.2 million awarded for the cost to repair and replace the siding on buildings covered by the settlement?

The trial court permitted the jury to decide what preclusive effect should be accorded to the judgment of the Oregon federal district court, in spite of its duty to determine the question as a matter of law. The trial court failed to apply federal common law and rule that the \$11.2 million awarded as repair cost damages was barred by the class action settlement. The Court of Appeals did not reach this issue.

Most Apposite Authority: Taylor v. Sturgell, 2008 WL 2368748 (U.S. June 12, 2008); Restatement (Second) of Judgments § 56 (1980); Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611 (1926); In re Baldwin-United Corp. Single Premium Deferred Annuities Ins. Litig., 770 F.2d 328 (2d Cir. 1985).

II. INTRODUCTION

Under this Court's decision in Louis DeGidio Oil & Gas Burner Sales & Service, Inc. v. Ace Engineering Co., 225 N.W.2d 217 (Minn. 1974), Minnesota law requires that a reseller show potential liability to customers before it can recover breach-of-warranty or consequential damages for repair or replacement costs. That rule is fair and reflects common sense. The reseller no longer has the goods—its customer has them, and the reseller has the customer's money. If there is no risk that the reseller will ever have to repair or replace the goods or issue a refund, then there is no reason that the reseller should be awarded damages for those purposes.

Lester, however, asks this Court to overturn the rule of DeGidio so that Lester can receive \$11.2 million in consequential damages for repairs that Lester is not—and cannot be—obligated to make: Lester's class-member customers have already taken their share of a \$523 million settlement funded by LP and have released Lester from any repair obligation. Lester argues that, nevertheless, LP should pay again for repairs because problems with Inner-Seal® sullied Lester's reputation and caused it to lose business. Lester's argument, however, ignores the \$10.2 million LP paid it for lost profits and the \$2.8 million LP paid it for the cost to restore its goodwill.

Lester likewise ignores the double recovery it has already collected for direct warranty damages: LP has reimbursed Lester every cent of the \$3.4 million Lester paid to purchase the product; Lester's class-member customers have paid it millions for barns sided with it; and the release of claims that LP obtained for Lester in the class action means that Lester will never have to return any of that money to anyone.

In sum, Lester asks this Court to rule that an adequate remedy for fraud and breach of warranty must, in the end, permit a reseller to acquire a product for free, sell it for pure profit, *and* receive an award for the value of replacements its customers have no legal right to claim on top of their acceptance of a manufacturer's settlement, *in addition to* compensating the reseller for lost sales and lost goodwill. Minnesota law does not and should not permit the windfall recovery Lester here seeks. The decision of the Court of Appeals should be affirmed.

III. STATEMENT OF THE CASE AND THE FACTS

A. GENERAL BACKGROUND.

Louisiana-Pacific Corporation ("LP") is a manufacturer of building materials and wood products for home and commercial builders. App.002.¹ In the 1980s, LP developed a siding product, known as Inner-Seal, made from wafers of wood coated in resin and compressed under heat and pressure into a panel. App.002. After extensive testing, tr.1980-88,² this siding product was sold to builders nationwide and used on thousands of buildings and homes. The siding was considered revolutionary in many respects, tr.875, and over time captured a significant share of the market; LP sold billions of board feet of Inner-Seal.³ Inner-Seal was accompanied by a written 25-year limited

¹ Citations to Lester's Appendix are referred to herein as "App.," whereas citations to LP's separate appendix are referred to as "R.App."

² The transcript pages cited herein are reproduced in LP's separate appendix at R.App.120-222. The page numbers referenced are those found at the top, right-hand corner of each transcript page.

³ From time to time, and particularly in the early years of the product, performance issues arose. Tr.2018-20. LP's claims rate, however, was always small in comparison with the volume of the siding sold. Tr.2022-23.

warranty which passed from LP through the chain of distribution to end customers.

Ex.1009, R.App.009-35.

Among the commercial entities which chose to use Inner-Seal were Lester Building Systems and Lester's of Minnesota, Inc. (collectively "Lester"). App.001-02. Lester is headquartered in Lester Prairie, Minnesota, app.001, but was, for the period it used LP's Inner-Seal siding, a division of Butler Manufacturing, a national manufacturer based in Kansas City, Missouri. Id.

Lester began purchasing Inner-Seal siding from its long-time third-party supplier Canton Lumber in early 1991. App.004. Over the next five years, it purchased approximately \$3.4 million of the siding from Canton. Tr.1557-58; Ex.54a, R.App.061. Lester incorporated Inner-Seal into building kits for hog barns and either sold them to dealers, who in turn sold them to farmers and then built them, or itself acted as the builder, selling direct to farmers. Lester stopped buying Inner-Seal in 1996, app.006, and returned to using plywood instead. By that time, several barn owners had complained of deterioration around the bottom edge of the siding panels. Tr.570. Those barn owners turned to Lester, which had sold the barns with a broad warranty of its own, to remedy the problem. Tr.805, 808.

In the meantime, by 1995 complaints from homeowners and others around the country about the siding's performance had led to the filing of several lawsuits, including a nationwide class action lawsuit in federal court in Portland, Oregon. Following extensive negotiations, LP and the class representatives reached a settlement in late 1995. Ex.1080, App.205-37. The settlement resolved all claims pertaining to buildings built before January 1, 1996, in exchange for LP's establishment of a settlement fund into

which it would make scheduled payments of between \$15 million and \$100 million each year for seven years. App.212-16. The settlement also established an administration system to review and process claims made by class members during that seven-year period. App.216-22.

Federal law subjects class action settlements to rigorous notice and fairness requirements, and this settlement was no exception. Five million dollars were spent to give notice to the class through television, newspapers, trade journals, and 200,000 individual mailings to Inner-Seal purchasers. Tr.2164; App.288. The notice explained the terms of the settlement and informed class members of their right to “opt out” and to pursue their individual claims in a separate action. Tr.2165.

After proper notice had been given, the Oregon federal court conducted a fairness hearing at which class members were afforded the opportunity to object to the terms of the settlement. Tr.2172. The fairness hearing commenced April 15, 1996, and continued into the next day.⁴ R.App.084. During the hearing, the court made clear that it would not approve the settlement in the absence of certain provisions to further protect the interests of class members. Tr.2170. The parties therefore agreed to amend the settlement to address the court’s concerns, and the final details were hammered out at a further hearing on April 22. App.241-85; R.App.084. Among other things, the amended settlement provided for an arbitration provision so that class members who were dissatisfied with

⁴ In its Appendix, Lester presents a two-page excerpt of the fairness hearing transcript. App.238-40. The full transcript of the proceedings on April 15 & 16 consumes nearly 500 pages.

the adjustment of their claims could have an opportunity to be heard. Tr.2173; App.247-50.

On April 26, 1996, the Oregon federal court issued an order approving the settlement as amended, finding it “fair, reasonable, and adequate and in the best interests of the Class.” App.289. The court’s order also provided for an extension of the opt-out period to May 27, 1996. R.App.085. Despite having that additional opportunity, none of Lester’s customers ever opted out of the settlement. Tr.2812.⁵

The settlement fund ultimately disbursed approximately \$523 million⁶ to class members. The settlement thus “resulted in the payment of more dollars to Claimants faster than almost every other product class action settlement, all at no cost or expense to Claimants.” App.308.

In exchange, the owners of covered buildings released claims not only against LP but also against all those in the chain of distribution, including distributors and builders such as Lester. Ex.1080, App.226-27. The settlement agreement included the following provision:

To the extent claims may be asserted against persons or entities in the chain of distribution, installation or finishing of

⁵ As it turns out, only a small portion of Lester’s customers indicated they had any damages by filing a claim seeking a recovery under the settlement. Tr.2812-14.

⁶ At the time of trial in this case, LP had paid \$477 million in satisfaction of \$771 million in claims, but had yet to determine whether to fund all remaining unpaid class-member claims. App.299. LP ultimately elected to fund the settlement fully and paid approximately \$523 million in satisfaction of \$837 million in claims. R.App.089. Although this fact does not appear in the record of this case, it is a matter of record in the United States District Court for the District of Oregon. *Id.* Accordingly, this Court may take judicial notice of it. See *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Smisek v. Comm’r of Public Safety*, 400 N.W.2d 766, 768 (Minn. Ct. App. 1987).

the Exterior Inner-Seal siding, the Releasing Party shall be deemed to and does hereby release and forever discharge those persons or entities from claims based solely on distribution, handling, installation, specification, or use of the Exterior Inner-Seal™ Siding.

Ex.1080, App.227. The amended settlement agreement clarified the release as follows:

[The settlement] is intended to be the sole remedy for any class member who claims injury as a result of damage to L-P Siding, regardless of whether redress for that injury is sought against L-P or anyone else in the ‘chain of distribution.’...If the results were otherwise and a claimant were able to sue parties on the claim related to L-P siding, L-P would not receive the benefit of the settlement since it would be at risk of being sued as a cross defendant in those actions.

Ex.1083, App.282.⁷

Thus, although class members’ rights to pursue claims against LP could be revived in certain circumstances, such as if LP failed to make one of several scheduled funding payments,⁸ their rights to pursue parties in the chain of distribution were completely extinguished. The amendment to the settlement agreement specifically provided that the distribution-chain release “remains in effect as to the builders *whether or not L-P continues to fund the settlement. . . .*” App.283 (emphasis added). The amendment also made provisions for class members who failed to make a claim on the settlement fund prior to January 1, 2003. App.246. Those members could make a claim against LP under its 25-year limited warranty. App.246. They could not, however, pursue anyone else.

⁷ The Notice provided to the Settlement Class also stated as follows: “In exchange for the ability to participate in the Settlement, Class Members agree to release all claims against the Defendants or any third party involved in the building, installing, or distributing the product, relating to any defects or alleged defects in Louisiana-Pacific Inner Seal siding installed prior to January 1, 1996 . . .” Ex.1012, R.App.038.

⁸ As it happened, LP never missed such a payment. See supra n.6.

App.245, 282-84. Accordingly, with regard to entities relevant here, class members were forever barred and permanently enjoined from prosecuting Inner-Seal claims against LP, Canton Lumber, Lester, and Lester's builders.

Despite knowledge that most of its customers were covered by the class settlement, Lester sought to maintain its own repair program for affected hog barns and to have LP fund those costs directly. Although LP initially paid to repair the barns of some of Lester's customers as a gesture of goodwill, tr.151-52, 157, it ultimately insisted that Lester's customers, like other members of the class, submit claims through the class settlement administration. Tr.182-83, 191.

Lester communicated the existence of the federal class action settlement, and the need for all claims to be resolved through it, to its customers. Ex.1020, R.App.044-60. Some chose to make claims through the class action settlement, tr.2812-14; many, however, did not (and have not made claims against anyone). Tr.2866.

B. THE DISPOSITION OF THIS CASE.

In early 2000, Lester brought this action, contending that it had suffered loss of goodwill and profits as a result of LP's manufacture of the siding and its refusal to fund direct repairs of the barns Lester had sold to its customers. App.001-035. Lester's claims included breach of contract, breach of express and implied warranties, fraud, misrepresentation, breach of the implied duty of good faith and fair dealing, promissory estoppel, indemnity, tortious interference with contract, and various statutory claims. App.001-032.⁹ On LP's early motion for partial judgment on the pleadings, the trial

⁹ Lester also asserted numerous claims against Canton Lumber. After Canton Lumber went out of business, however, Lester dismissed the claims against it.

court dismissed various statutory and tort claims and left the warranty and fraud claims for trial.

Before trial, when it became clear that Lester intended to seek not only damages for its own lost profits but also for the cost to repair and replace the siding on all the hog barns it had built, LP brought a motion for partial summary judgment that, as a matter of law, Lester was not entitled to seek such damages because most of the buildings at issue were within the federal class action settlement coverage and any such claims had to be submitted by the building owners through the class action mechanism, not by Lester, which had been released from any liability it might have. R.App.001-02. The trial court denied the motion and ruled that the question of whether such damages were precluded by the terms of the federal class action settlement was a fact question to be tried to a jury. R.App.003-04.

Trial proceeded on Lester's breach of warranty and fraud claims. Lester sought damages not only for the purchase price it paid for the siding, but also for consequential damages, including the cost to repair and replace the siding on each of the nearly 3,000 hog barns it had built using that siding, regardless of the year in which the building had been built. Ex.54a, R.App.062-66. Lester contended that business and moral compulsions required the repairs and that the federal class action settlement did not preclude an award of damages allowing Lester to do them. It offered evidence that removal and replacement of the siding on every barn built from 1991 through 1996 would cost \$13.2 million. Tr.1563. Lester also offered testimony from its President that it intended to use any such damages awarded in fact to perform repairs on all barns:

About the best thing we could expect to come out of this is that we finally get to the farmer what he's entitled to, which is he bought a building and expected to have his siding hold up, and that's what we need to make happen and that's why we're here. We're trying to make that result happen.

Tr.1718. The testimony of Lester's president continued in part:

Q. If Lester's prevails what's it going to do with the money?

A. I want each of you to know that we're going to fix these buildings. That's why we're here. . . ."

Id. This testimony stood in stark contrast to the position Lester had earlier taken with its dealers. In a letter to them, Lester had stated:

The class action ruling covers all end customers, including those owners who purchased Innerseal [sic] through Lester and our dealers, unless they specifically excluded themselves. Regardless of how you or we feel about the terms of the settlement, these owners have, in effect, had their day in court. Such is the nature of class action settlements.

Ex.1020, R.App.044.

At the conclusion of Lester's case, LP made a motion for directed verdict, arguing that any repair and replacement cost claims belonged not to Lester but to the hog barn owners and that most of those claims had already been resolved and released through the federal class action settlement. Tr.1807-08. The court denied the motion. App.067-68.

LP brought a similar motion for directed verdict at the close of the evidence. Tr.2874-930. This time, the trial court ordered a partial directed verdict: repair and replacement costs were recoverable (1) if the barns had been built after January 1, 1996, or (2) if the jury found either that (a) the class settlement fund would be insufficient to pay an owner's claim or (b) the barn would suffer defects after January 1, 2003; otherwise, repair and replacement costs were not recoverable. Tr.2964. It then instructed

the jury accordingly, without any guidance on how to come to a conclusion about the possible insufficiency of the fund or the possible occurrence of further defects. App.093-94. As an attempted prophylactic, however, the court did place a question on the special verdict form asking the jury to specify the damages it was awarding for building repair costs and the amount it would have awarded but for the impact of the class action. App.101.

The jury returned a special verdict in favor of Lester for \$29.6 million. App.99-101. The verdict was composed of four separate awards. App.100; Tr.3090. First, the jury awarded \$3.4 million, which was the entire price Lester paid for all of the Inner-Seal it had purchased. App.100; Tr.1558. Second, the jury awarded the full damages requested for building and repair costs for every building built with Inner-Seal—\$13.2 million. App.100; Tr.1559. The jury made no effort to differentiate the amount it was awarding and the amount barred by the class action and, indeed, answered both damages questions (the actual and the attempted prophylactic) with the same number. App.100-101. Third, the jury awarded \$10.2 million for Lester's profits on lost sales. App.100. Finally, the jury awarded \$2.8 million for Lester to restore its goodwill. App.100. Pursuant to Minn. R. Civ. P. 58.02, the trial court stayed the entry of judgment pending post-trial motions. App.125.

Both parties brought comprehensive post-trial motions. While those motions were pending, LP also sought an injunction from the United States District Court for the District of Oregon to enforce the class action settlement and to enjoin the entry of judgment on that portion of the jury verdict that awarded damages to Lester for the cost to repair and replace the siding on buildings covered by the settlement. R.App.118-19.

On December 13, 2002, the United States District Court partially granted that motion and entered an order enjoining the entry of judgment against LP for \$11.2 million of the jury's verdict. App.330-31. The \$2 million difference between LP's requested injunction and the jury's \$13.2 million award represented the cost to repair buildings constructed after January 1, 1996, which were excluded from the class settlement by definition. Tr.1683. Lester appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit.

The trial court thereafter issued its order on all post-trial motions, generally denying those of both parties and directing the entry of judgment against LP in an amount reduced to reflect the federal court injunction; the judgment entered totaled just over \$20 million. App.102-03, 125-26. The trial court also directed that, in the event the federal court injunction were vacated, judgment should be deemed *nunc pro tunc* to be in the full amount of the jury verdict with pre-verdict interest. App.126. LP and Lester both appealed the judgment raising various issues. The Court of Appeals affirmed the judgment of the district court in all respects. App.155-73. After this Court denied LP's petition for review, LP paid Lester \$21,099,596.25, satisfying the judgment in full. App.174-75.

In its decision, the Court of Appeals expressly did not address whether Lester was entitled to prevail on its claim for the cost to repair and replace siding subject to the class action settlement (the \$11.2 million subject to the federal court injunction). App.169-70. Instead, the court noted that, "[i]f the injunction is reversed, the trial court would amend the current judgment to enter the \$11.2 million portion for repair costs, and LP may appeal from the amended judgment at that point." *Id.*

On October 24, 2005, the United States Court of Appeals for the Ninth Circuit reversed the decision of the Oregon federal court and vacated the injunction. Sandpiper Village Condo. Assoc., Inc. v. Louisiana-Pacific Corp., 428 F.3d 831 (9th Cir. 2005) (App.332-61). The opinions of two members of the three-judge panel were diametrically opposed as to whether or not res judicata barred Lester's claim for repair costs. App.334-50, 352-61. The third judge, Judge Silverman, did not reach the issue at all. App.350-52. Instead, concurring in the judgment, Judge Silverman wrote that "important values of federalism and comity" counseled the federal court not to interfere with the Minnesota case, and that LP should appeal the Minnesota trial court's ruling on res judicata up through the Minnesota appellate courts. Id. On June 26, 2006, the Supreme Court of the United States denied LP's Petition for a Writ of Certiorari. App.362.

On December 27, 2006, the trial court entered an Order for Amended Judgment, holding that Lester is "entitled to satisfaction of the remaining Judgment of \$11,301,438,¹⁰ plus post-Judgment interest computed on the remaining Judgment from October 15, 2002." App.176-77. LP appealed the amended judgment to the Court of Appeals, arguing that both Minnesota law and the federal common law of res judicata barred the \$11.2 million portion of Lester's repair cost award. App.178-79. The Court of Appeals reached only the Minnesota law issue, which it regarded as dispositive. App.186. Writing for a unanimous panel, Judge Willis held that this Court's prior decision in DeGidio, "conditions a manufacturer's liability to a reseller on the reseller's potential liability to end users." App.189. The court observed that barring recovery of

¹⁰ The judgment included \$101,438 in prejudgment interest. App.126.

repair costs by resellers after end users have released their claims prevents windfalls and encourages settlements between manufacturers and consumers. App.190. Lester sought, and this Court granted, further review. App.192-97.

IV. SUMMARY OF ARGUMENT

The Court of Appeals correctly held that, under this Court's prior decision in DeGidio, Lester should not recover the cost to repair buildings that belong to people who settled their claims with LP and agreed to release Lester from liability. Minnesota law recognizes that the purpose of compensating a reseller for breach of warranty is that the reseller's customer, who possesses the goods and suffers directly from their defects, is likely to hold the reseller answerable in damages. When a manufacturer settles with end customers and they agree to release the reseller, however, the reason for an award of such damages to the reseller disappears. Any injury to the reseller's business is separately addressed by the allowance of consequential damages for lost profits and lost goodwill.

In this case, Lester's customers were members of a class that settled with LP and agreed to release all parties between themselves and LP in the Inner-Seal chain of distribution. The only applicable exception to that settlement is for persons who "opted out" of the class. None of Lester's customers did that.

As a result, Lester has already collected more than adequate compensation—approximately \$20 million arising out of the purchase of only \$3.4 million worth of siding. Lester has (1) acquired Inner-Seal for nothing, (2) sold it for a profit, (3) been relieved of any risk that its customers could sue to get their money back or to force repair or replacement, (4) been reimbursed its lost profits, and (5) been reimbursed for the cost

to restore its goodwill. Neither Minnesota law nor the law of other states supports any further award, let alone the \$11.2 million that Lester seeks here.

Moreover, even if Minnesota law supported such an award, it is nonetheless barred in this case under the federal common law of claim preclusion. Res judicata applies to Lester's repair costs claim because that claim was for the same damages which Lester's class-member customers compromised and released in the federal class action, and Lester's relationship to its customers satisfies two exceptions to the federal rule against nonparty preclusion.

Accordingly, the decision of the Court of Appeals should be affirmed.

V. ARGUMENT

A. STANDARD OF REVIEW.

LP agrees with Lester as to the standard of review applicable to the decision of the Court of Appeals. As noted in its response in opposition to Lester's Petition for Review to this Court, app.200 n.3, LP also renews issues raised below that the Court of Appeals found it unnecessary to reach. As to those issues, the trial court's denial of LP's motion for a new trial is reviewed for an abuse of discretion, Law v. Essick Mfg. Co., 396 N.W.2d 883, 888 (Minn. Ct. App. 1986), and the applicability of res judicata is a question of federal common law reviewed *de novo*. Nelson v. Short-Elliot-Hendrickson, Inc., 716 N.W.2d 394, 398 (Minn. Ct. App. 2006).

B. THE COURT OF APPEALS CORRECTLY HELD THAT MINNESOTA LAW DOES NOT PERMIT LESTER TO RECOVER REPAIR COSTS AFTER ITS CLASS-MEMBER CUSTOMERS SETTLED THEIR CLAIMS AND RELEASED LESTER.

No court in the United States has permitted a reseller to recover damages to replace its customers' defective goods after the manufacturer has already settled the

customers' defect claims and obtained a release in favor of the reseller. If such a case existed, Lester surely would have cited it. Unable to locate one, Lester instead relies on generalizations regarding "black letter law" and claims a repair cost award is justified because Inner-Seal defects hurt Lester's business. Lester, however, has already recovered \$13 million in lost profits and goodwill damages to redress its business injury, in addition to having twice recovered its \$3.4 million outlay for Inner-Seal: once from its customers when it originally sold to them (and whom Lester was not obligated to repay once LP settled their claims) and again from LP. The Court of Appeals correctly recognized that any further recovery on top of these sums would give Lester an additional windfall. Its decision should therefore be affirmed.

1. The Court Of Appeals Correctly Applied DeGidio To Bar The Jury's Award Of Repair Cost Damages.

This case can and should be resolved according to the principles underlying this Court's decision in Louis DeGidio Oil & Gas Burner Sales & Service, Inc. v. Ace Engineering Co., 225 N.W.2d 217 (Minn. 1974). DeGidio recognizes that the main reason to compensate a reseller for a manufacturer's breach of warranty is that the reseller's customer is likely to call the reseller to account for any non-conformity of the goods. See 225 N.W.2d at 222 ("clearly DeGidio had a liability to his vendees to make them whole"). The reseller's obligation to its customer is to provide goods that "operate properly for the purposes intended." Id. at 223. A reseller's recovery of warranty damages from a manufacturer permits the reseller to fulfill its obligation to its customer without invading its profit.

DeGidio, a heating contractor, sued Ace, a furnace manufacturer, for breach of warranty arising from defective oil burners that Ace manufactured and DeGidio sold. Id. at 218-19. At the time of trial, all but one of the defective burners were still in the hands of DeGidio's customers. Id. at 224. Nevertheless, Ace argued that DeGidio should not recover warranty damages because DeGidio's customers had fully compensated DeGidio by paying for their furnaces. Id. at 222. Citing section 336.2-714 of the Minnesota Statutes,¹¹ this Court upheld the jury's conclusion that the burners as warranted were worth the price that DeGidio had agreed to pay for them, but that the defective burners that Ace actually delivered were worthless. Id. at 223. Accordingly, the Court upheld the jury's award of the entire price (\$18,200) DeGidio had paid for the burners.

The Court justified the award to DeGidio upon the ground that its customers were yet likely to hold it liable to replace the burners. Id. at 222-23. The Court acknowledged that, having already been paid by its customers, DeGidio might enjoy a windfall if those customers later pursued Ace for breach of warranty, and not DeGidio. Id. at 222. Likewise, DeGidio would enjoy a windfall if its customers never made a warranty claim. Id. at 222. Nevertheless, faced with the choice of permitting DeGidio a possible double

¹¹ Section 336.2-714 provides in relevant part:

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

recovery or of leaving it with no recovery from which to satisfy possible future claims, the Court elected to permit the possibility of double recovery. Id. at 222-23.

With respect to the one burner that DeGidio had already paid to replace, however, the uncertainty of future claims did not exist. See 225 N.W.2d at 224. That particular customer's claim had been extinguished by DeGidio's repair, for which the jury had awarded DeGidio an additional \$2,100 in consequential damages. See id. at 224. As to that burner, this Court recognized that an award of warranty damages would certainly result in double recovery. Id. at 224. If DeGidio were permitted to keep both the price its customer paid and the cost of the original burner paid out in damages by Ace, DeGidio would have acquired a burner for nothing and sold it for pure profit. This Court accordingly ordered a remittitur of \$1,750, representing the original cost of the burner. Id. at 224. DeGidio was reimbursed only what it paid out-of-pocket to replace the defective burner.

In this case, Lester has already secured the kind of double recovery that this Court prevented in DeGidio. With respect to buildings not covered by the class action settlement, Lester has recovered both the original cost of Inner-Seal siding (contained in the jury's \$3.4 million award) and an additional \$2 million for plywood replacement siding.¹² App.168-69. Lester has also secured a double recovery as to buildings covered by the class action settlement. In DeGidio, this Court found itself "vex[ed]" by the

¹² Lester emphasizes that LP did not appeal the \$2 million award for repair costs attributable to buildings not covered by the class action settlement. While that is true, LP did appeal the duplicative purchase-price award. App.168-69. The Court of Appeals affirmed the district court and permitted Lester to recover the original cost of Inner-Seal in addition to the cost of plywood replacement siding. App.168-69.

prospect that DeGidio had already been paid once by its customers and now would be again by Ace, and yet might never be called upon to answer to its customers for the defect in the product it sold. 225 N.W.2d at 222. Here, Lester has been paid once by its customers (for their barns) and again by LP (as part of the jury's \$3.4 million purchase price award). Lester, however, faces none of the risk of future litigation that plagued DeGidio—Lester's customers settled with LP, and they agreed to release Lester from any liability.¹³ Lester will never be called to account by its customers for any defects in Inner-Seal. Instead, it is entitled to keep LP's refund of the costs along with the millions its customers paid. Under DeGidio, that is already an impermissible double recovery.

Now, on top of that double recovery, Lester proposes to pile an additional \$11.2 million, ostensibly to give new siding to people that settled their Inner-Seal defect claims and agreed to release Lester from any repair or replacement obligation. DeGidio, however, does not permit such a recovery. DeGidio will permit a reseller a recovery for repair costs only if it either actually made the repairs (in which case, however, any duplicative purchase-price award must be remitted) or still faces a risk of potential liability to do so in the future. Id. at 222-23. But the award that Lester seeks is neither for repairs that Lester made¹⁴ nor for repairs that it could yet have to do; its customers

¹³ Such a release is entirely appropriate and readily enforceable. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 748 (9th Cir. 2006) ("A class settlement may . . . release factually related claims against parties not named as defendants . . . "); In re Gen. Am. Life Ins. Co. Sales Practices Litig., 357 F.3d 800, 804 (8th Cir. 2004) (class settlement may release claims of class members that exist but are as yet undiscovered). Any suggestion otherwise is sheer speculation that a court would decline to follow the law.

¹⁴ In its Petition for Review, Lester candidly admitted that it is not seeking compensation for out-of-pocket repair expenses: it only contends that "it has been

settled their claims in the class action and released Lester. Under DeGidio, Lester's position that it should be permitted a repair-cost recovery is untenable.

Analysis under Minnesota fraud law yields the same result. Minnesota employs "a yardstick for measuring and confining damages to the actual out-of-pocket losses sustained by the purchaser" in fraud cases. Lowrey v. Dingmann, 86 N.W.2d 499, 502 (Minn. 1957). Those losses include injury to the value of the plaintiff's business. See B.F. Goodrich Co. v. Mesabi Tire Co., 430 N.W.2d 180, 183 (Minn. 1988). The \$11.2 million that Lester seeks is to repair buildings that LP already paid to repair. In exchange, the owners of those buildings agreed to release Lester. Lester will never have any out-of-pocket repair costs as to those buildings. Moreover, as discussed further below, any harm Lester's business may have suffered from misrepresentation is adequately addressed by the jury's awards for lost profits and goodwill damages.

Thus, regardless whether viewed as damages for fraud or for breach of warranty, the Court of Appeals was correct to reverse the jury's award of \$11.2 million in repair costs.

2. As A Matter Of Policy, A Reseller Should Not Be Able To Recover Warranty Damages And Repair Costs When Any Potential Liability To Downstream Buyers Has Been Extinguished By Settlement.

As Lester readily concedes, the remedies afforded under the Uniform Commercial Code are intended to put a plaintiff "in as good a position' as if the other party had performed." Lester Br. at 26 (citing Minn. Stat. § 336.1-305(a)). As Lester's own

unable" to offer to repair end customers' barns without the \$11.2 million repair cost award. App.197. One wonders what Lester has done with the \$21.1 million LP has already paid it in this case, app.174, if offering additional repairs were truly necessary "for Lester to salvage its business." App.197.

authorities make plain, those remedies are not meant to give the plaintiff a better deal. See, e.g., 67A Am. Jur. 2d Sales § 1193 (2008) (“[I]ncidental and consequential damages recoverable by the buyer of defective goods may not go so far as to allow a recovery that puts the buyer in a better position, such as by repairing the goods and acquiring substitute goods, and paying for neither, than it would have been in but for the breach.”), cited in Lester Br. at 23.

DeGidio correctly acknowledges that a reseller receives double compensation when it recovers the cost of goods both from its supplier and from its customer. 225 N.W.2d at 222. When the reseller has potential downstream liability for the manufacturer’s breach of warranty, such that it may be called upon to pass along one of its recoveries, the double recovery is justified so that the reseller’s profit is not invaded.¹⁵ See id. at 222-23. That rule ensures that, regardless of what later transpires, the reseller will be left “in as good a position” as if the manufacturer had fully performed. Minn. Stat. § 336.1-305(a). When a manufacturer’s settlement has discharged the reseller’s duty to answer for the manufacturer’s breach, however, the justification for a double recovery disappears. Such is the circumstance presented here: LP has settled with the ultimate downstream purchasers and obtained a release in favor of every party standing between it and them.

The denial of a double recovery in these circumstances also fully comports with the applicable statutory text. Section 336.2-714 provides in relevant part:

¹⁵ DeGidio thus represents a narrow exception to Minnesota’s long-held policy against double recoveries. See Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 379 (Minn. 1990).

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The value of goods to a reseller inheres in the reseller's ability to sell them for a profit.

When a reseller's profit is protected by a manufacturer's satisfaction of ultimate purchasers' warranty claims, the goods have lost none of their value from the reseller's perspective. Thus, "the value of the goods accepted and the value they would have had if they had been as warranted" are one and the same. Even were that not the case, the "special circumstances" of a manufacturer's settlement with downstream parties fully justify that the reseller be denied any recovery of direct damages for breach of warranty.¹⁶

Any injury to the value of the reseller's business is separately addressed under the statute:

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Minn. Stat. § 336.2-714. Here, Lester attempts to justify the jury's repair cost award as necessary to compensate it for the "los[s] of its customer base as a result of the resale of"

¹⁶ In some circumstances, courts hold that the "difference in value" under U.C.C. section 2-714(2) equals the cost of repairs or replacement necessary to make the goods answer to the warranty. *See, e.g., Manouchehri v. Heim*, 941 P.2d 978, 981 (N.M. Ct. App. 1997); *Miller v. Badgley*, 753 P.2d 530, 536 & n.6 (Wash. Ct. App. 1988); *Vista St. Clair, Inc. v. Landry's Commercial Furnishings, Inc.*, 643 P.2d 1378, 1380 (Or. Ct. App. 1982). This approach holds the virtue of eliminating duplication between direct purchase-price damages and consequential repair damages, as happened in *DeGidio* and in this case. 225 N.W.2d at 224; App.189. Nevertheless, when goods have been resold and the manufacturer has settled repair or replacement claims and obtained a release in favor of the reseller, the reseller's repair costs are properly regarded as nil.

Inner-Seal. Lester Br. at 26. But Lester was permitted to ask the jury for its lost profits due to the problems with Inner-Seal. App.83. The jury awarded \$10.2 million. App.100. Lester was also permitted to ask for a separate award of the cost to restore its goodwill. App.83. The jury valued that cost at \$2.8 million. App.100. Although Lester notes that the jury may not have awarded future lost profits, app.168, the purpose of a goodwill award is to repair the standing of the business with its customers so that no future profits are lost. See Hydraform Prods. Corp. v. Am. Steel & Aluminum Corp., 498 A.2d 339, 346-47 (N.H. 1985). That is, goodwill and future lost profits are equivalent. See id. at 346-47. Thus, any recovery for “repair costs” as a remedy for business injury on top of Lester’s lost profits and goodwill damages would overcompensate Lester.

Moreover, the denial of future repair costs does not conflict with the restitution principles that Lester invokes. DeGidio was specifically awarded restitution (couched in terms of consequential damages) for its out-of-pocket repair costs. 225 N.W.2d at 223-24. Out-of-pocket repair costs were likewise the only kind awarded in Ag-Chem Equipment Co. v. Ceram-Traz Corp., 1996 WL 229263, at *2 (Minn. Ct. App. May 7, 1996). The \$11.2 million award that Lester seeks here, however, is not for restitution of an out-of-pocket expense. LP already paid for class members’ repairs so that Lester would never have to. And, as Lester concedes, app.197, it never has.

“Business compulsion” also fails to justify the recovery that Lester seeks. Lester fails to cite any case in which a reseller was held “compelled” to supplement a manufacturer’s settlement of end-user warranty claims. The comment that Lester selects from the Restatement (First) of Restitution to support its argument is found in the section devoted to indemnity. LP has already effectively indemnified Lester for the repair claims

of its class-member customers. LP paid \$523 million in full and final settlement of those claims and obtained a release for Lester and all other distribution-chain members.

Although Lester would have this Court “eschew conditioning recovery on an artificial requirement of legal liability,” it fails to explain why the law should deem any liability to survive a settlement in which all *legal* claims against the reseller have been extinguished. The Inner-Seal class chose to accept the money that LP offered and to release Lester and all other resellers. The federal court approved that settlement as “fair, reasonable, and adequate and in the best interests of the Class.” App.289. Although Lester’s customers could have opted out of that settlement, they chose not to. Having made that choice, Lester’s customers now have their own moral and business—and legal—duty: they must honor their agreement that Lester owes them nothing. It may well be true that, while still honoring the settlement, some customers could harbor resentment toward Lester and decide to take their future business elsewhere. But that business injury has already been compensated by the allowance of consequential damages for lost profits and lost goodwill.

Moreover, if this Court were to adopt the rule that Lester urges, there is no reason that only Lester would get a windfall award. If Lester can successfully sue LP for damages to repair buildings of end customers whose repair claims have already been settled, certainly Lester’s dealers can do the same. See Minn. Stat. § 336.2-318 (seller’s warranty extends to any person affected by the goods and injured by breach); DeGidio, 225 N.W.2d at 222 (discussing possibility of double liability to downstream parties). Such “repair cost” lawsuits could be repeated not only between LP and Lester’s dealers, but (as Lester correctly observes) also between Lester and Lester’s dealers and

everywhere else within the distribution web: between other distributors and LP, between those distributors and their dealers, and so on. LP could ultimately pay to “replace” the siding on the same barn three or more times. Class-member customers, ironically, would be the only ones not participating in this litigious free-for-all, despite the fact that they will be invoked in all the suits, as they are here, as the ultimate beneficiaries of the plaintiffs’ claims. They will not participate because the class action release bars their claims against any entity in the chain of distribution.

Denying multiple recoveries of “repair costs” in these circumstances also facilitates prompt settlement of consumer claims. As the Court of Appeals correctly observed, this Court has long favored settlements over protracted litigation. See Hentschel v. Smith, 153 N.W.2d 199, 204 (Minn. 1967). A manufacturer is unlikely to pay consumers to repair or replace their goods if it knows that it will have to pay for the same repairs several more times to satisfy distributors, dealers, and retailers. The rule that Lester urges is likely to delay consumers’ compensation and heighten their frustration.

In sum, there is no valid reason why Minnesota law should make a manufacturer pay a middleman to repair goods that the manufacturer has already paid to repair once before. The Court of Appeals’ decision was not only a correct application of DeGidio, but reflected sound policy as well.

3. The Authority Lester Cites From Other States Does Not Offer Any Basis For This Court To Change Minnesota Law.

Besides being unsound as a matter of policy, Lester’s demand for repair costs finds no support in the authorities. Lester fails to cite a single case in which a reseller

sought repair costs after a manufacturer settled end users' claims and obtained a release in favor of the reseller. For example, in Woodbury Chemical Co. v. Holgerson, 439 F.2d 1052, 1055 (10th Cir. 1971), the herbicide manufacturer did not settle with ranchers before the aerial applicator sued it for breach of warranty. The applicator had already resprayed the ranchers' land, and the court compensated it for its out-of-pocket costs just as this Court compensated DeGidio for having replaced one defective burner.¹⁷ Nor was there any manufacturer's settlement in Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643 (3d Cir. 1990). Step-Saver's customers had not settled with Wyse; twelve of them were in the process of suing Step-Saver. Id. at 645. In any event, Step-Saver was an appeal from a judgment on the pleadings upon ripeness grounds. Id. at 645. Its holding is that a reseller need not wait until a customer wins a judgment against it before it can sue the manufacturer for breach of warranty. See id. at 653-54. That point has nothing to do with whether a reseller may recover repair costs after a manufacturer obtains a release of end users' claims against the reseller.

Tremco, Inc. v. Valley Aluminum Products Corp., 831 S.W.2d 156 (Ark. Ct. App. 1992), likewise contains no trace of a settlement between the manufacturer and end customers. The reseller withheld payment from Tremco and demanded repairs. See id. at 160. Tremco did not settle with the reseller's customers; it sued the reseller for the

¹⁷ It appears that the court considered trade usage in construing the contracts between the applicator and the ranchers, with the result that the applicator was contractually, and thus legally, bound to respray. See Woodbury, 439 F.2d at 1055 ("It was not necessary for the trial court to find the obligation to respray in the express terms of the contracts; such obligation was amply proved by all the testimony concerning the accepted practice in this business.")

outstanding purchase price. See id. The reseller counterclaimed and won.¹⁸ See id. Although the court endorsed White and Summers' reading of Woodbury, there is every indication that the reseller was burdened with a significant potential legal liability to end users. See id. at 160.

Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102 (4th Cir. 1980), is even further afield. In that case, the court upheld a repair cost award after specifically noting that “[t]here can be no serious question but that Coastal is liable to the Navy to repair the defective panels.” Id. at 1105.

Finally, Lester makes three mistakes in relying upon Mattingly, Inc. v. Beatrice Foods Co., 835 F.2d 1547 (10th Cir. 1987). First, as with all of Lester's other citations, the case does not feature a manufacturer's settlement. See id. Second, the court later vacated the opinion after the reseller settled with the manufacturer. See Mattingly, Inc. v. Beatrice Foods Co., 852 F.2d 516 (10th Cir. 1988). Third, the reasoning and the result of the vacated opinion supports LP's position, not Lester's. Contrary to Lester's representation, Lester Br. at 30, the repair cost award was vacated, not affirmed. Citing the same section of the Restatement of Restitution upon which Lester grounds its “business compulsion” argument, the court held that the reseller should not have been awarded repair costs if it failed to assert a valid statute of limitations defense in response to its customers' claims. See Mattingly, 835 F.2d at 1563. The court vacated the repair cost award and remanded to the district court for a determination whether the defense had

¹⁸ Although the reseller was awarded both difference-in-value damages and repair costs, the manufacturer apparently did not identify it as a duplication. See id. at 157. Consequently, the court did not discuss it.

been available to the reseller. Id. at 1563. If the reseller in Mattingly was required to enforce a statute of limitations against its customers rather than make repairs at the manufacturer's expense, Lester can hardly assert that it should recover repair costs here. Lester's customers were not denied a recovery; they agreed to take their share of a \$523 million settlement, and they gave Lester a release defense in exchange.

In sum, the authority Lester attempts to marshal in support of its position in this appeal is but non-sequiturs and one case that strongly supports both DeGidio and the decision of the Court of Appeals under review.

4. LP Had No Burden To "Prove" The Effect Of The Class Action Judgment And Release; The Total Protection It Affords Lester Is Self-Evident As A Matter Of Law.

LP had no burden to "prove" the effect of the class action settlement as a factual matter. The United States District Court for the District of Oregon approved the class action settlement as fair, reasonable, and adequate and reduced it to a judgment. App.286. Juries do not sit to determine the effect of judgments; that is a job for judges alone. See United States v. Schimmels (In re Schimmels), 127 F.3d 875, 880 (9th Cir. 1997); Nelson v. Short-Elliot-Hendrickson, Inc., 716 N.W.2d 394, 398 (Minn. Ct. App. 2006). In any event, the effect of an unambiguous release is also a question of law to be determined by the court. See Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979). The district court in this case erred when it made the jury interpret the effect of the class action settlement and its unambiguous release of claims.

But even if the class action issue were somehow properly submitted to the jury, it was Lester's burden to establish its damages stemming from potential liability, not LP's burden to disprove them. A plaintiff must prove its damages with reasonable certainty.

See Jacobs v. Rosemount Dodge-Winnebago S., 310 N.W.2d 71, 78 (Minn. 1981).

Under DeGidio, Lester was required to adduce proof of potential liability to downstream customers before it could recover warranty damages for resold product. See 225 N.W.2d at 222-24. Each person within the class definition was bound to the settlement and could not sue Lester unless he, she, or it “opted out” of the class.¹⁹ See Fed. R. Civ. P.

23(c)(2)(B)(v). Thus, Lester bore the burden to prove who, if anyone, opted out such that Lester would be exposed to potential liability.

Lester failed to offer any proof that any of its customers opted out. The only evidence on the point was offered by LP’s corporate representative, Vance Thomas, who testified that he compared the list of all opt-outs against Lester’s customer list and that none of the names matched. Tr.2810-12. Lester did not object to this testimony, and neither the court nor the jury was free to disregard it.²⁰ See Parrish v. Peoples, 9 N.W.2d 225, 229 (Minn. 1943) (“findings contrary to uncontradicted and not inherently improbable testimony cannot be sustained”) (citing Gustafson v. Northwestern Reed & Fibre Co., 230 N.W. 795 (Minn. 1930)).

¹⁹ The class action settlement included “all Persons who have owned, own, or subsequently acquire Property on which Exterior Inner-Seal™ Siding has been installed prior to January 1, 1996 who are given notice in accordance with the Due Process Clause of the United States Constitution.” App.210. Lester does not dispute that the \$2 million it has already recovered for repair costs covers all Lester buildings built on or after January 1, 1996, and no Due Process argument has been (or could be) asserted.

²⁰ The cases Lester cites hold that a jury is not bound to accept a plaintiff’s testimony, see Stuttgen v. Gipe, 404 N.W.2d 10, 12 (Minn. Ct. App. 1987), or that of the plaintiff’s expert, see Costello v. Johnson, 121 N.W.2d 70, 76 (Minn. 1963), when “there are other facts in evidence which refute or modify the uncontroverted testimony or where the testimony is obviously untrue.” Costello, 121 N.W.2d at 76; see also Stuttgen, 404 N.W.2d at 12 (“jury could have believed that other circumstances discredited the . . . testimony”). Here, LP was not the plaintiff, and Lester points to no evidence that would call into doubt the testimony that none of Lester’s customers opted out.

Moreover, Lester's argument that LP failed to convince the jury that none of Lester's customers opted out wrongly assumes that the jury decided that issue. The truth is that it did not. The trial court instructed the jury that the settlement barred Lester from recovering repair costs for a particular building unless one of three exceptions applied. App.93-94. Claims of opt-outs were not listed as one of those exceptions. App.94. Knowing that none of its customers had opted out, Lester did not object to the trial court's instruction either before, tr.2944-45, or after, tr.2966, 3087, it was given. Lester made only a general argument that none of the repair costs it sought were barred by the settlement and did not even mention opt-outs. Tr.2944-45. Thus, the jury's verdict cannot possibly reflect a conclusion that Lester's customers opted out of the class action settlement.

The various other "exceptions" that Lester purports to find in the settlement's release of distribution-chain entities do not exist. That fact is made plain by the parties' amendment to the settlement agreement, app.241, which Lester simply ignores. Section 5 of the Amendment is entitled "Clarification of Release." App.245. It incorporates an exhibit which confirms that "all builders, installers, finishers, contractors, subcontractors, developers/first time sellers, painters, suppliers and distributors are released from 'claims' relating to siding" and that "'claims', includes, but is not limited to, all 'Settled Claims' as that word is defined in the agreement." App.283.²¹ It observes that "the Settlement Agreement treats the builders more favorably than L-P since the release provided for in the agreement remains in effect as to the builders *whether or not L-P*

²¹ The definition of "Settled Claim" is quoted at p. 34, *infra*.

continues to fund the settlement whereas L-P retains liability if it fails to fund all claims submitted under the Settlement Agreement” App.283-84 (emphasis added). The Amendment also sets forth how claimants who come forward on or after January 1, 2003, are to be treated. App.246. Those claimants can make a claim against LP under its 25-year limited warranty. They cannot, however, pursue claims against Lester or anyone else in the distribution chain. App.246, 282-84. The only exception to the release of distribution-chain parties concerns claims for “bodily injury, wrongful death, or associated emotional distress and mental anguish.” App.283. The repair costs that Lester seeks have nothing to do with that.

Finally, to the extent that Lester complains that its dealers and others further down in the distribution chain could sue Lester for their own customers’ repair costs, Lester can hardly blame LP. That liability could only exist if Lester prevails on the arguments it has itself asserted in this appeal. If this Court affirms the decision of the Court of Appeals, Lester should have no fear of repair cost claims from its dealers. They will be precluded from suing Lester for such damages upon the exact same ground that precludes Lester from suing LP: none of Lester’s dealers can show a potential liability to repair end customers’ barns. Lester’s end customers and the end customers of its dealers are one and the same. None of Lester’s end customers opted out of the settlement, therefore none of its dealers’ end customers opted out. Thus, the class action settlement affords equal protection to Lester and its dealers, both from end customers’ repair cost claims and from repair cost claims asserted by entities further down the distribution chain.

In sum, once Lester failed to show that any of its end customers were among the opt-outs, the district court should have determined as a matter of law that the class action

settlement barred Lester's recovery of the \$11.2 million in repair cost damages for buildings built prior to January 1, 1996. The Court of Appeals was correct to remedy this error, and its decision should therefore be affirmed.

C. **THE FEDERAL LAW OF CLAIM PRECLUSION BARS LESTER'S REPAIR COSTS CLAIM.**

Since it correctly concluded that Minnesota law does not permit Lester to recover damages to repair barns of customers who released Lester from any repair obligation, the Court of Appeals found it unnecessary to reach the issue of res judicata.²² If this Court concludes that Minnesota law otherwise permits Lester to recover such damages, the federal law of claim preclusion nevertheless bars recovery in this case.²³ Under federal common law, claim preclusion applies when three elements are present: there must be (1) an identity of claims and (2) a final judgment on the merits. Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (internal quotations omitted)). In addition, (3) either the previous judgment must have been between the same parties or one of the exceptions

²² LP raised and briefed the res judicata issue in both the trial court, R.App.001-02, 007-08, App.068, and in the Court of Appeals, Br. of Appellant at 20-28, and also noted it as an alternative ground in support of the judgment of the Court of Appeals in its response to Lester's Petition for Review. App.200 n.3.

²³ The Oregon federal court exercised federal-question jurisdiction over the class action because the class alleged claims arising under the federal RICO statute. App.373. The preclusive effect of a federal-court judgment rendered under federal-question jurisdiction is determined by federal common law. Taylor v. Sturgell, 2008 WL 2368748, at *9 (citing Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001)); Marshall v. Inn on Madeline Island, 631 N.W.2d 113, 118 (Minn. Ct. App. 2001). The applicability of claim preclusion, or res judicata, is a question of law to be decided by the trial court and reviewed *de novo* on appeal. Nelson, 716 N.W.2d at 398.

to the rule against nonparty preclusion must apply. Taylor v. Sturgell, 2008 WL 2368748 (U.S. June 12, 2008). Each of the three elements is met in this case.²⁴

1. Lester's Claim For Repair Cost Damages Is The Same Claim That Its Class-Member Customers Released In The Class Action Settlement.

Claim preclusion requires “a substantial identity between the issues in controversy in both suits.” Alaska Sport Fishing Assoc. v. Exxon Corp., 34 F.3d 769, 773-74 (9th Cir. 1994) (citing Satsky v. Paramount Comm'ns, Inc., 7 F.3d 1464, 1467 (10th Cir. 1993)). When the prior judgment was entered on a settlement agreement containing a release of claims, any subsequent claim within the scope of the release contained in the settlement agreement is subject to preclusion. See id. at 774 (citing prior consent decree that released defendant from “any and all civil claims”); see also Gen. Am. Life Ins. Co., 357 F.3d at 803 (preclusive effect of class action settlement “must be determined by inspecting the language of the judgment that concluded the class action, including the settlement agreement that was included in the judgment”). Similarly, if two claims seek the same damages, they are the “same claims” for purposes of claim preclusion. Alaska Sport Fishing, 34 F.3d at 773-74 (barring claims of private plaintiffs where government trustees had “already recovered for the very same damages” on their behalf); see also Clark v. Haas Group, Inc., 953 F.2d 1235, 1238 (10th Cir. 1992) (parties cannot defeat res judicata by alleging new legal theories).

²⁴ This Court can and should resolve this issue now. If it chooses not to, however, it should remand to the Court of Appeals for that court to resolve the issue, since it was fully briefed and argued to that court and only not decided because it was unnecessary for the court to do so given the ruling it made.

Lester's claim to recover the cost to repair buildings owned by its class-member customers is the same claim that those class-member customers compromised and released in the class action settlement. The settlement agreement in the class action defines a "Settled Claim" as:

any claim, liability, right, demand, suit, matter, obligation, damage, loss or cost, action or cause of action, of every kind and description that Releasing Party, (as defined in Section 14 of this Agreement), has or may have, whether known or unknown, asserted or unasserted, latent or patent, that is, has been, could reasonably have been or in the future might reasonably be asserted by the Releasing Party either in the Action or in any other action or proceeding in this Court or any other court or forum, regardless of legal theory, and regardless of the type or amount of relief or damages claimed, against any of the Defendants, arising from or in any way relating to any defects or alleged defects of Exterior Inner-Seal™ Siding, or any part thereof.

Ex.1080, App.209-10. The scope of the release is "broad and comprehensive." App.354 (opinion of Reinhardt, J.). It resolves *any* claim, damage, loss, or cost that *any* class member might assert in *any* forum that in *any* way relates to *any* defect of Inner-Seal Siding. Lester cannot seriously dispute that the claim for money to repair end customers' barns is one that the end customers themselves "asserted . . . in the Action . . . against [LP] . . . arising from . . . defects or alleged defects of Exterior Inner-Seal™ Siding." LP paid out more than \$523 million under the settlement for that express purpose. Lester's claim is thus within the scope of the class action release.²⁵

²⁵ By contrast, Lester's damages for lost profits and lost goodwill are not ones that "[have] been, could reasonably have been or in the future might reasonably be asserted by" class members, app.209, and are therefore not covered by the settlement. Those damages (for which Lester has since been paid by LP) are unique to Lester and its business, whereas the barns that Lester seeks to repair herein are the exact same barns that class members sought to have repaired in the class action.

Moreover, Lester seeks the same damages that its class-member customers already recovered in the settlement. In the words of its own president, John Hill, Lester sought repair cost damages so that it could “finally get to the farmer what he’s entitled to” Tr.1718. That is, Lester intended the repair cost damages to flow through it to its customers to repair the siding on their barns. Id. If John Hill’s testimony did not make this fact plain enough, then the special verdict form surely did. The form asked the jury point blank to determine the “amount of money [that would] fairly and adequately compensate Lester [for the] [c]ost to [r]epair [b]uildings.” App.100. Damages to repair class members’ barns are damages to repair their barns regardless of the legal theory employed to recover them and regardless of whether the check is made out to Lester or directly to the farmers. Accordingly, Lester’s claim for repair cost damages is one of the same claims that was compromised, settled, and released in the federal class action.

2. The Class Action Settlement Constitutes A Final Judgment On The Merits.

There can be no question but that a judgment approving settlement of a class action constitutes a final judgment on the merits for the purposes of claim preclusion. Reyn’s Pasta Bella, 442 F.3d at 746-47 (court approval of class action settlement constitutes final judgment on the merits); see also Dossier v. Miami Valley Broad. Corp., 656 F.2d 1295, 1298-99 (9th Cir. 1981) (class action settlement precludes future claims by class members covered by settlement); Gen. Am. Life Ins. Co., 357 F.3d at 803 (claims within scope of general release contained in class action settlement were barred under res judicata in later action by class member).

3. Lester's Relationship To Its Class-Member Customers Satisfies Two Exceptions To The Federal Rule Against Nonparty Preclusion.

Although Lester was not a party to the class action, the judgment in that case nonetheless operates to bar Lester's repair costs claim. The general federal rule against nonparty preclusion is subject to various exceptions, which the Supreme Court has grouped into six categories. Taylor, 2008 WL 2368748, at *10. Two of those categories are applicable here. First, nonparty preclusion arises from "a variety of pre-existing 'substantive legal relationship[s]' between the person to be bound and a party to the judgment." Id. at *10 (quoting David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 78 (2001) [hereinafter Shapiro]). Second, nonparty preclusion arises "when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. Id. at *10 (citing Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 620, 623 (1926)).

a) Preclusion Is Appropriate Because Lester And Its Class-Member Customer Occupy The Positions Of Promisee And Third-Party Beneficiary.

In Taylor, the Supreme Court offered a non-exhaustive list of substantive legal relationships that will except a case from the general rule against nonparty preclusion. The Court drew the list from Chapter Four, Topic Two of the Restatement (Second) of Judgments (1980). 2008 WL 2368748, at *10. One of the relationships listed in that chapter and topic is that which exists between a promisee and a third-party beneficiary. Restatement § 56; see also Shapiro at 80; Sirinakis v. Colonial Bank, 600 F. Supp. 946, 955-56 (S.D.N.Y. 1984). Minnesota law holds that a downstream purchaser of goods is the third-party beneficiary of any warranties running from the manufacturer to the reseller. See Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 916 (Minn. 1990) (citing

Minn. Stat. § 336.2-318). Applied to this case, that doctrine places LP in the position of promisor, Lester in the position of promisee, and Lester's class-member customers in the position of third-party beneficiaries.

According to the Restatement, “[a] judgment against the third party beneficiary in an action on the obligation to him terminates the promisor’s obligation to the promisee.” Restatement § 56(2). Here, the release of claims in the class action settlement operates akin to a judgment against Lester’s class-member customers. In exchange for the money that LP offered, those customers surrendered all their claims for repair or replacement of the siding on their barns. Under the Restatement, the judgment entered upon the settlement agreement bars Lester (the promisee) from pursuing claims that its customers (the beneficiaries) have already surrendered as to the same obligation (repair or replacement of Inner-Seal).

Even considering the judgment as being in favor of the class, the result would be the same. “The promisor’s satisfaction of a judgment in favor of the beneficiary . . . satisfies the obligation to the [promisee] in accordance with the rules in §§ 305 and 310 of the Restatement, Second, of Contracts.” Restatement § 56(3). LP has fully discharged its repair and replacement obligations to Lester’s class-member customers under the auspices of the class action settlement. R.App.089-90. According to the Restatement, any duty LP (the promisor) owed Lester (the promisee) to repair the same goods was discharged at the same time.

In sum, the substantive legal relationship between Lester and its class-member customer as promisee and third-party beneficiary satisfies the “same party” requirement for claim preclusion under federal common law.²⁶

b) Preclusion Is Appropriate Because Lester Designated Itself The Representative Of Its Class-Member Customers And Seeks Repairs On Their Behalf.

Even if Lester and its class-member customer did not stand in the position of promisee and beneficiary, Lester’s repair costs claim would be barred nonetheless because Lester declared itself the representative of its customers in seeking repairs. Preclusion is appropriate “when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication.” Taylor, 2008 WL 2368748, at *10. The Taylor Court cited two examples of that rule in application: Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 620, 623 (1926) and United States v. Des Moines Valley R.R. Co., 84 F. 40 (8th Cir. 1897). 2008 WL 2368748, at *10, *13.

In Schendel, the personal representative of a decedent’s estate brought an action in a Minnesota state district court under the federal Employers’ Liability Law. 270 U.S. at 614. That action followed an Iowa state-court proceeding in which the decedent’s widow had been awarded compensation under state law. Id. at 614. On appeal in the second action, this Court refused to sustain the railway’s res judicata defense citing, among other things, a lack of identity of parties. Id. at 615. The Supreme Court reversed, holding that

²⁶ This result accords with the res judicata law of many states which holds that parties linked by a distribution chain are in privity for claim preclusion purposes. See West v. Kawasaki Motors Mfg. Corp., 595 So. 2d 92, 96-97 & nn.1 & 2 (Fla. Dist. Ct. App. 1992) (collecting cases).

the question of identity “must be determined as a matter of substance and not of mere form.” Id. at 618. “The essential consideration,” the Court determined, “is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts.” Id. at 618. The decedent’s death “gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law. . . .” Id. at 617.

In Des Moines Valley, the United States brought an action to quiet title to certain land claimed to be the homestead of Fairchild. 84 F. at 42. The Eighth Circuit observed that “the government had no interest in the land to be either conserved or protected” and had “no pecuniary interest in the controversy,” but that “its real purpose [was] to champion the cause of Fairchild, rather than to assert a title of its own.” Id. at 42. Accordingly, the court held the government’s action barred by a previous judgment between Fairchild and the adverse claimant. Id. at 44.

Like the personal representative in Schendel and the United States in Des Moines Valley, Lester pursued repair cost damages in this action not in its own right, but rather as the representative of another: its class-member customer. Lester’s president, John Hill, testified that Lester had sought repair cost damages not to assert some entitlement belonging to it, but rather to “finally get to the farmer what he’s entitled to”

Tr.1718 (emphasis added). Hill’s testimony continued:

Q. If Lester prevails what’s it going to do with the money?

A. I want each of you (the members of the jury) to know that we’re going to fix these buildings. That’s why we’re here

Tr.1718. Thus, Lester's repair cost claim is merely a device to obtain additional compensation for customers who already compromised and settled their repair claims. After all, the siding that Lester sought to repair and replace was not in its warehouse; it was on Lester's customers' barns. Accordingly, the federal common law of claim preclusion looks past the form of Lester's claim to the reality of who will benefit if the claim is sustained: the class members. See Schendel, 270 U.S. at 617.

The Second Circuit's more recent decision in In re Baldwin-United Corp. Single Premium Deferred Annuities Ins. Litig., 770 F.2d 328 (2d Cir. 1985), applies this principle in an analogous context. In Baldwin, thirty-one states stood poised to commence actions to obtain additional money, over and above amounts gained through settlement of consolidated class actions, for distribution to their class-member citizens based upon the conclusion that the settlement amounts "did not adequately compensate plaintiffs for [the] federal and state law claims" which the plaintiffs were releasing as part of the settlement. 770 F.2d at 332 & n.1. The federal court having jurisdiction over the class actions enjoined the states from bringing the actions, recognizing that "as a practical matter no defendant in the consolidated federal [class] actions . . . could reasonably be expected to consummate a settlement of those claims if their claims could be reasserted under state laws, whether by states on behalf of the plaintiffs or by anyone else, seeking recovery of money to be paid to the plaintiffs." Id. at 336-37. "If states or others could derivatively assert the same claims on behalf of the same class or members of it," the court concluded, "there could be no certainty about the finality of any federal settlement." Id. at 337.

Just as in Baldwin, Lester has asserted claims that are derivative of claims which its class-member customers released in the class action. Just as was foretold in Baldwin, Lester's actions threaten to reopen the class settlement to similar claims by any entity in the Inner-Seal chain of distribution who feels that its customers have not gotten "what [they] are entitled to." Tr.1718. Consistent with Baldwin, Schendel, and the federal common law of claim preclusion, Lester's repair costs claim is barred even though Lester was not a party to the class action.

D. ALTERNATIVELY, THIS COURT SHOULD GRANT A NEW TRIAL.

The trial court should never have asked the jury to interpret the legal impact of the federal class action settlement on Lester's claims. The effect of the federal court's judgment, including the construction of the unambiguous release of claims, is a question of law, not fact, and Lester cannot seriously contend otherwise. The district court's error in sending the matter to the jury requires that, at the least, a new trial be ordered. See Kirsebom v. Connelly, 486 N.W.2d 172 (Minn. Ct. App. 1992) (granting new trial because trial court's erroneous submission of issues to jury and errors in jury instructions resulted in substantial prejudice); see also Esbjornsson v. Buffalo Ins. Co., 89 N.W.2d 893, 898 (Minn. 1958) (granting new trial because trial court erroneously submitted a question of law to jury); M.L. v. Magnuson, 531 N.W.2d 849, 856-57 (Minn. Ct. App. 1995) (same); Yule v. Iowa Nat'l Mut. Ins. Co., 390 N.W.2d 391, 393 (Minn. Ct. App. 1986) (new trial required because errors in jury instructions were prejudicial); FM Props. Operating Co. v. City of Austin, 93 F.3d 167, 172 n.6 (5th Cir. 1996) (trial court's posing

question of law to jury was error requiring new trial); Dillard & Sons Constr., Inc. v. Burnup & Sims Comtec, Inc., 51 F.3d 910, 916 (10th Cir. 1995) (same).

Lester's position that LP was responsible for injecting the class action issue into the case is untenable. App.091. The district court forced the class action issue upon the jury by declining to rule as a matter of law before trial. R.App.003-06. Based on those rulings, LP was left with no choice but to confront the issue as best it could while maintaining its objections for appeal and reasserting them in its post-trial motions. R.App.007-08. Furthermore, LP was not the first to interject the class action issue into the trial—the jury first heard about the class action issue during the court's preliminary instructions, tr.29, and the first testimony about the class action issue came from Lester's first witness, Craig Loger. Tr.181.

But even if the district court's decision to send the issue to the jury was somehow correct, its errors in executing that decision entitle LP to a new trial. Two of the exceptions the trial court placed in the class action jury instruction—one for siding failure after January 1, 2003, and one pertaining to LP's decision whether to fund the settlement—were erroneous because they were not exceptions with respect to the class members' release of claims against parties in the chain of distribution, as shown supra.²⁷ Thus the court's instruction necessarily misled the jury as to the legal impact of the class action settlement on Lester's repair costs claim.

Even if the Court concludes that the instruction was correct, the jury quite plainly did not follow it in determining that none of the repair cost damages Lester sought were

²⁷ LP objected to the district court's instruction on the effect of the class action both during the trial, tr.2942-43, and in its motion for JNOV or new trial. R.App.007-08.

precluded. Such was apparently the one point upon which all three judges of the Ninth Circuit panel in Sandpiper Village agreed. As Judge Clifton observed:

[W]hile it may be difficult to reconcile the jury instructions and the verdict that none of the repair costs were barred by the settlement, we are not in a position to second guess the findings of the state court jury Presumably that issue could be taken up with Minnesota's appellate courts.

App.347. Judge Silverman likewise recognized that “[i]t would be tempting to conclude that the jury’s apparent confusion over the district court’s instructions not to award damages for buildings covered by the settlement” justified an affirmance of the federal district court’s injunction. App.351. Judge Reinhardt similarly concluded that the jury’s award of \$11.2 million in extra repair costs was in “disregard of the trial judge’s instruction” App.354. As the Sandpiper Village court unanimously recognized, the trial court’s errors significantly prejudiced LP and justify this Court directing, if not judgment as a matter of law in LP’s favor, at the very least a new trial on the repair costs issue.

VI. CONCLUSION

This Court should affirm the decision of the Court of Appeals. In the alternative, the Court should remand to the district court for a new trial regarding Lester's repair costs.

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