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STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A09-607

District Court File Nos. 17-CV-05-213 & 17-CV-06-247

United Prairie Bank - Mountain Lake,

Respondent,

vs.

Haugen Nutrition & Equipment
LLC., Leland Haugen, Ilene
Haugen et al,

Appellants.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUE INVOLVED

I. DID THE DISTRICT COURT ERR IN DENYING APPELLANTS A JURY TRIAL ON THE ISSUE OF ATTORNEYS' FEES AND RELATED COSTS OF COLLECTION?

The Court of Appeals Held: In the NEGATIVE.

MOST APPOSITE STATUTES:

Minnesota Constitution, Article I § 4

Minn. Stat. § 481.13

Minn. Stat. § 500.24

MOST APPOSITE CASES:

Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002)

Simplot v. Chevron Pipeline, Inc., 563 F.3rd 1102 (10th. Cir. 2009)

Landgraf v. Ellsworth, 126 N.W.2d 766 (Minn. 1964)

Westerlund v. Peterson, 197 N.W. 110 (Minn. 1923)

II. DID THE DISTRICT COURT ERR IN THE AMOUNT OF ATTORNEYS' FEES IT AWARDED?

The Court of Appeals Held: In the NEGATIVE.

MOST APPOSITE STATUTES:

Minn. Stat. § 481.13

Minn. Stat. § 500.24

MOST APPOSITE CASES:

Agri Credit Corporation v. Liedman, 337 N.W.2d 384 (Minn. 1983)

Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981)

Bierlein v. Gagnon, 96 N.W.2d 573 (Minn. 1959)

INTRODUCTION

This case presents two important issues. The first is the right of a party to a contract which includes a "reasonable attorney fees" clause to a jury trial on the issue of the existence and amount of any such fees. The second is the reasonableness of attorneys fees in an amount over \$400,000 as a part of an equitable mortgage/farmer credit litigation. Both issues are important, but the first is perhaps the more interesting: as Judge Dovre-Bjorkman asked at oral argument before the Minnesota Court of Appeals, "Why hasn't this issue come up before?"¹ One can only speculate, but it is probable that most parties facing foreclosure are insolvent anyway, so it does not matter if they owe \$1 or \$1,000,000 in additional obligations. That is not the case here. At least some of the appellants still have significant assets, and the amount of the attorneys' fees awarded prevented appellants from obtaining a loan which would have redeemed their property.

With respect to the first issue - jury trials in reasonable attorney fees cases - appellants' argument is both simple and compelling. If a civil case is of the type that entitled a party to a jury trial at the time of the adoption of the Minnesota Constitution, then a party is entitled to a jury trial in that type of case today, unless the legislature has explicitly

¹I paraphrase from memory, but this is the essence of her question.

determined otherwise. Contract cases entitled the parties to a jury trial in 1858. Mortgages and mortgages notes are a form of contract. Hence, appellants are entitled a jury trial when the right to reasonable attorney fees arises as a result of a mortgage and note.

With respect to the second issue, a reasonable attorney fees clause is an extraordinary remedy, purely a creature of contract, and needs to be narrowly limited, because potentially it severely prejudices the right of a mortgagor to redeem, uses the mortgagors' own right to defend against them, charges the mortgagee the mortgagor's bill for mediating cases, and (if the logic of the present case is upheld) permits the mortgagee to charge fees for cases not part of the mortgage foreclosure action itself. The Court of Appeals' decision, if it stands, opens the door for a mortgagee to effectively prevent redemption by making the payoff so high that it will rarely make sense to exercise that statutory right.

STATEMENT OF THE CASE AND FACTS

Leland and Ilene Haugen owned a farm in Cottonwood County described as follows:

The Southwest Quarter (SW $\frac{1}{4}$), Section 4, Township One Hundred Seven (107), Range Thirty-Five (35) West, Cottonwood County, Minnesota; and

The East Half of the Northeast Quarter (E $\frac{1}{2}$ NE $\frac{1}{4}$) of Section Two (2) in Township One Hundred Seven (107) North, Range Thirty-Five (35) West of the Fifth Principal Meridian in Cottonwood County, Minnesota.

When the events which gave rise to this litigation began, the Haugens had mortgaged their farm to the Bank of Canby ("Canby Bank") and Prudential. The Haugens began to experience financial difficulties, and sought refinancing (A-2)². They sought a possible loan from United Prairie Bank ("UPB"), and conducted most of their discussions with Theodore "Ted" Devine, then a vice president and loan officer of the bank (A-2). Devine indicated that the bank might have difficulty financing the Haugens directly for the full amount they requested, but that it could perhaps finance the transaction if some additional lender were more bankable, such as his friend, Mark Sahli of North Dakota.

On Devine's recommendation, the Haugens formed a corporation, Haugen N & E, and obtained an operating loan in its name from UPB. The Haugens also transferred their farm to Haugen N & E (A-3). Mr. Sahli obtained a loan from the bank, which was used to pay off the existing indebtedness of the Haugens to the Canby Bank, and gave a mortgage to United Prairie in return.³ Haugen N & E sold the farm to Mr. Sahli on contract for deed (A-3). Sahli gave a warranty deed to the farm to the bank (A-3).

²To save time and space, Appellants will usually cite to the District Court's opinion when a "fact" appears not to be in dispute. Actually, very few facts (except ultimate ones) are in dispute between the parties for purposes of this appeal.

³Somewhat oddly, Sahli seems to have given this mortgage before Haugen N & E gave its deed to Sahli.

Appellants did not pay off the contract for deed⁴ in accordance with its terms. Neither the bank nor Mr. Sahli brought an action to cancel the contract for deed⁵, and by the time of trial, UPB had not brought a formal action to foreclose the mortgage on or the equitable mortgage with Appellants.⁶

The bank sued Appellants to collect on its notes and to repossess various personal property upon which it had a security interest (A-4). The suit also requested that the Court determine that the bank owned all right, title and interest in the Haugen farm. The bank claimed absolute ownership of the farm, basing its claim on several legal theories. Its first claim was that because the contract for deed was never recorded, the bank had obtained a deed absolute from Sahli and appellants were mere trespassers. Its alternative position was that even if the bank's acquisition of title from Sahli was subject to the contract for deed, appellants had defaulted on that contract and the bank was entitled to cancel the contract for deed.

⁴Reference to the document as "contract for deed" is made for purpose of identification only. Ultimately, the document was determined by the Court to create an equitable mortgage, a conclusion appellants support and respondent has appealed.

⁵Prior to the Court's determination on the summary judgment motion, of course.

⁶It has since brought an action to foreclose the equitable mortgage, but has not brought an action to foreclose the written mortgage junior to it, the "second mortgage." It also brought no action to redeem the second mortgage at the "redemption auction" of § 580.24.

The appellants answered and counterclaimed, asserting that they owned fee title to the farm subject to an equitable mortgage, or, at the least, owned the vendees' interest in a contract for deed. Appellants claimed that the Sahli transaction was in effect an equitable mortgage, based upon the argument that since the transfer of the property to Sahli was made to secure a debt to Mr. Sahli (in effect, to the bank), the contract for deed was really a mortgage. The Appellant's alternative position was that at the least the Sahli transaction created a contract for deed between Haugen N & E and Sahli, and, upon Sahli's sale of his interest to the bank, between Haugen N & E and the bank. Since the bank had not foreclosed the equitable mortgage or cancelled the contract for deed, the Haugens owned the property subject to some interest in the bank.

Prior to the events which underlie of this appeal, the bank brought a replevin action and obtained crops, machinery, hogs and other property on the farm land. Appellants brought a motion demanding an accounting, and UPB produced a partial accounting, the gist of which is that its expenses and attorneys fees exceeded the value of the property sold at the replevin sale (A-4, 8).

The bank also brought a motion for summary judgment to determine that the Sahli deed to the bank vested absolute ownership in the bank, and that Appellants had no interest in the

farm. The Appellants opposed this motion, based upon the claim that the bank's interest was in effect an equitable mortgage, and that if it was not, it was at least a contract for deed and the bank had not brought a cancellation action. The Court agreed with the Appellants and held (1) there were sufficient facts upon which a trier of fact could determine that the Sahli transaction was a valid contract for deed and (2) there were sufficient facts upon which a trier of facts could determine that an equitable mortgage relationship had been created.

The bank brought a second motion, to determine in the alternative (a) that Haugen N & E had no interest in the property; (b) that if Haugen N & E did have an interest in the property, there was merely a contract for deed between Haugen N & E and the bank; (c) that there was no equitable mortgage between Haugen N & E and the bank; and (d) if there was any sort of security interest in the bank, to set the terms upon which the security interest could be foreclosed. The District Court ruled in favor of UPB, holding that there was not an equitable mortgage. The bank then brought a motion to evict Appellants, which motion was held in the separate file, CV-06-247. The Court ordered that Appellants be evicted, but they could remain on the property provided they posted a bond in the amount of \$75,000. Appellants posted that bond and appealed the eviction order as well. The cases were consolidated for purposes of this appeal.

Appellants prevailed on this first appeal and the Court of Appeals reversed as to all issues, directing the District Court to determine as a matter of fact whether there was an equitable mortgage, whether respondent was entitled to attorneys' fees, and if so, how much. Trial was held on September 10th and 11th, 2008 (A-1). At trial, UPB claimed it had incurred and paid more than \$750,000 in attorneys' fees (T-359). The District Court held that respondent was entitled to attorneys' fees in the amount of \$601,567.65 including costs together with interest, but that the Haugens were entitled to live on the land subject to an equitable mortgage (A-20). After an unsuccessful motion for new trial, the Haugens appealed. The respondents cross-appealed the Court's finding that an equitable mortgage relationship had been created, but dismissed the cross appeal. The Court of Appeals ruled in UPB's favor, and further review was granted.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN DENYING APPELLANTS A JURY TRIAL ON THE ISSUE OF ATTORNEYS' FEES AND RELATED COSTS OF COLLECTION.

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, Ilene 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.⁷

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 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.

Minn. Const. Art. 1 § 4 states, among other things:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

A suit on a contract for the recovery of money is a legal action triable by jury. The Court said, in *Landgraf v.*

Ellsworth, 126 N.W.2d 766 (Minn. 1964):

⁷It should be noted that at the time the equitable mortgage was still considered by the District Court to be a contract for deed, appellants were able to raise approximately \$525,000 to pay that debt off. However, they were unable to pay off the second mortgage because of the size of the attorney fee claim and as a result, the attempted redemption fell through.

1. The right to a jury trial is derived from Minn.Const. art. 1, s 4, which 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, * * *.'

In construing this constitutional provision in *Breimhorst v. Beckman*, 227 Minn. 409, 433, 35 N.W.2d 719, 734, we said:

'* * * The term 'all cases at law' refers to common-law actions as distinguished from causes in equity and certain other proceedings. Art. 1, s 4, preserves unimpaired the right of jury trial as it existed by the laws of the territory at the time our state constitution was adopted, and such right is thereby neither extended nor limited.'[FN1]

FN1. See, also, *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 153 N.W. 527.

2. Where a party has a constitutional right to a jury trial, denial of the right is reversible error.[FN2]

FN2. *Nordeen v. Buck*, 79 Minn. 352, 82 N.W. 644; *St. Paul & S.C.R. Co. v. Gardner*, 19 Minn. 132, Gil. 99; *Williams v. Howes*, 137 Minn. 462, 162 N.W. 1049; *W. T. Rawleigh Co. v. Shogren*, 192 Minn. 483, 257 N.W. 102.

3. Our early cases seem to indicate that the complaint determines the nature of the action[FN3] and consequently the right to a jury trial. But the more recent cases hold and the correct view of the law is that the nature and character of the controversy, determined from all the pleadings, determine the right to a jury trial.[FN4]

FN3. *Shipley v. Bolduc*, 93 Minn. 414, 101 N.W. 952; *Williams v. Howes*, 137 Minn. 462, 162 N.W. 1049.

FN4. *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 153 N.W. 527; *Swanson v. Alworth*, 168 Minn. 84, 209 N.W. 907; *Coughlin v. Farmers & Mechanics Sav. Bank*, 199 Minn.

102, 272 N.W. 166.

In *Gilbertson v. Independent School Dist. No. 1*, 208 Minn. 51, 54, 293 N.W. 129, 130, we said:

'* * * Care should be taken not to permit any mere label, which counsel in their pleadings attempt to put upon a lawsuit, to result in the denial of the constitutional right to jury trial, if the real nature of the action is such as to give a litigant that right.'

4. A suit on a contract for the recovery of money is a legal action triable to a jury, [FN5] and the mere fact that there is an accounting incidental to the main action does not destroy the nature of the action or deprive a party of a jury trial.

(*Id.* at 326, 327)

The state constitution guarantees a jury trial for causes of action recognized as common law actions when the State Constitution was adopted. *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W. 2d 54 (Minn. 1993). A claim for recovery of money is such a common law action. *Olson v. Aretz*, 346 N.W.2d 178 (Minn. 1984).

UPB's complaint and cause of action is based upon several notes to UPB, which notes contain a "reasonable attorneys' fee" clause. Without that clause, plaintiff would not be entitled to attorneys' fees at all. Hence, plaintiff's claim for reasonable attorneys' fees is a contract case. As a contract case, there is nothing special about attorneys' fees. If a case gives a defendant a right to a jury trial in a suit to award fees to a doctor, a grocer, or any other creditor - and it does - then it

permits a defendant to obtain a jury trial in a case involving attorneys as well.

To be sure, there are special statutes permitting an award of attorneys' fees without a jury, such as Minn. Stat. § 481.13ff, sometimes referred to as the "Attorneys' Lien Statute." The attorney's lien statute does not apply directly to this case, because defendants were not the clients of plaintiff's attorneys. But the cases which have interpreted the attorneys' lien statute have had to confront the issue of the right to a jury trial in attorneys' fees cases, and hence have had much to say about the generalized right to a jury trial when an attorney is claiming contract-based attorneys' fees. Frequently, in a case where an attorneys' lien is appropriate, an attorney has an action against a client who fails to pay him in both contract and statute. Where there are claims which involve both issues triable by jury and issues triable by the court alone, the right to jury trial prevails. *Onvoy, Inc. v. Allette, Inc.*, 736 N.W.2d 611 (Minn. 2007). The Court said:

We agree with the weight of authority on this issue and hold that factual findings that are common to both claims at law and claims for equitable relief are binding upon the district court. ... Making a jury's factual findings that are common to claims of law and claims for equitable relief binding on the district court not only helps protect the right to a jury trial by ensuring that proper weight is given to jury findings by the district court, but it also prevents inconsistent decisions between claims at law and claims for equitable relief, thus maintaining the integrity of the judiciary.

(*Id.* at 617)

There is nothing special about an attorney's breach-of-contract claim (as opposed to attorneys' lien claim) with respect to the jury trial right. An attorney provides services, just like any other service provider. If the attorney wants to recover in contract for the agreed amount or value of his services, he has a right to sue, but is subject to the same rules as any other contractor. That includes jury trial. As the Court said in *Westerlund v. Peterson*, 157 Minn. 379:

By extending equitable jurisdiction to new subjects, the Legislature cannot impair the right to trial by jury. It cannot 'confer equity jurisdiction * * * in matters in respect to which such jurisdiction did not exist before the adoption of the Constitution, and draw to it a legal cause of action cognizable exclusively in a law court and triable by jury, and have both tried by the court without a jury.' *Wiggins & Johnson v. Williams*, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754, citing *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358.

(*Id.* at 385)

While there is a special proceeding permitting an attorney to in effect recover for his legal services in a summary action before the bench, this right does not extend to the common law breach-of-contract claim by an attorney. As noted, a fee shifting provision in a note invokes the common law cause of action rather than the attorneys' lien, and as long as the plaintiff is pursuing this theory of recovery, the defendant has a right to a jury trial and the amount owed, which is central to

its cause of action, must be determined by a jury.

Finally, it will often be the case that a cause of action will involve both an equitable component and a legal component. See, e.g., *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002). Where that is the case, a party is entitled to a jury trial on the legal component unless the two components are inseparable. Of course the components are separable in a typical mortgage default case such as this one. The Haugens would be liable on, and were sued on, the note, and a creditor is not obliged to try to foreclose a mortgage in order to collect on the note secured by the mortgage. The action on the note is an ordinary contract debt collection case and thus entitles the debtor to a jury trial. If UPB had attempted to foreclose its mortgages by advertisement, the action would not be subject to a jury trial, but then its attorneys' fees would be strictly limited by statute, too.

The Court of Appeals upheld the District Court's denial of appellants' jury trial request, stating

Applying the analysis of *Olson*, *Abraham*, and *Ross* leads us to conclude that appellants do not have a right to a jury trial on the issue of attorney fees. It is undisputed that claims for recovery of attorney fees under a contract did not exist in the territorial courts of Minnesota, so we look to "the nature and character of the controversy, as determined from the pleadings and by the relief sought." *Abraham*, 639 N.W.2d at 350. The thrust of UPB's complaint is to compel appellants to perform under the various contracts or to obtain damages occasioned by appellants' breach. UPB is entitled to reimbursement of

its attorney fees only if it demonstrates that appellants have defaulted under the terms of the contract. This reimbursement claim is more like a claim for restitution than for compensation. See *A.G. Becker-Kipnis*, 553 F.Supp. at 124. In some respects, UPB's attorney-fees claim is akin to a request for specific performance of a contract, for which a jury trial is not required. See *Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc.*, 268 Minn. 176, 193, 128 N.W.2d 334, 346 (1964) (explaining that a demand for payment of monetary penalties allowed by contract is a request for specific performance, and although specific performance is an equitable remedy, "award of [monetary] damages was within the power of the court of equity").

(*Id.* at 271)

Before analyzing the Court of Appeals' logic in more detail, several comments are in order. First it is not undisputed that claims for recovery under a contract for attorneys' fees did not exist in the territorial courts. The undersigned is unable to find any cases denying (or for that matter, granting) attorneys' fees under a pre-1858 contract. Under ordinary contract principles which applied then as now, there is no reason to believe that a contract for attorneys fees would not have been treated like any other contract in the time period around 1858. Second, note how the Court of Appeals (correctly) characterized UPB's cause of action:

On May 2, 2005, UPB commenced this action seeking recovery of \$347,496.79 due under the contract for deed, with interest accruing at the rate of \$101.84 per diem. UPB also sought to foreclose on the property, requesting a judgment that it is entitled to immediate possession of all collateral covered by the security agreements and that it is the fee owner of the real property under the contract for deed, or, alternately,

cancellation of the contract for deed.

(*Id.* at 267)

An action to recover \$347,496.79 is a legal action to recover money damages. It is based upon a note - i.e., upon a contract. The present appeal and the determination which is being appealed relates largely to the District Court's grant of this prayer for relief. If this had been the only claim in UPB's cause of action, there is no question but that this would have been a jury issue. Adding some other claims, a few of which might be characterized as equitable, does not change this character. The bulk of the equitable issues involved in this case were raised by the appellants, and one does not lose a right to a jury trial as a result of one's counterclaim.

First, if one could frustrate a defendant's right to a jury trial by adding prayers for equitable relief to one's complaint, the jury trial right would be eviscerated. *Landgraf* and *Abraham* make it clear that it is the nature of the action which controls, not the characterization, and the nature of an action to recover \$347,496.79 is an action to recover money. And, as the Court of Appeals' statement of the case implies, the recovery of the money was the first and primary basis for UPB's complaint.

To be sure, the Court of Appeals also characterized the attorneys' fee request as "recovery of attorney fees under a contract in connection with enforcement efforts." But this is

not precisely correct. While UPB's action involved a replevin component and an attempt to recover real estate, neither of these equitable-type actions were important to the judgment appealed from here. Once it was determined that the contract for deed was an equitable mortgage, a separate, later action was brought to foreclose it - so that foreclosure was not in fact part of the judgment under scrutiny. And the replevin had long since been ordered and effectuated, playing at most a secondary role in the judgment appealed from. The award of attorneys fees was not granted "in connection with enforcement efforts": (a) there weren't any left; and (b) the right to attorneys fees and other costs was the primary matter at issue, not the enforcement.

Second, if a cause of action has an equitable and a legal component, courts are able to separate the two, granting a jury trial for the legal portion and a bench trial for the equitable component. See *Westerlund, supra*. It could and should have done so in this case.

Third, UPB either lost on the bulk of the equitable issues it raised, or they were deferred to other actions not part of this appeal. Appellants' prevailed on their claim that one of the contested security interests was an equitable mortgage rather than a contract for deed, and UPB dismissed its appeal of this issue. UPB chose not to foreclose its equitable mortgage as part of the action appealed, and UPB has never foreclosed the second

mortgage, i.e., the mortgage to whose note the attorney fees clause was adjudicated. While there were a few equitable claim portions of UPB's lawsuit determined by the District Court, the moiety, in both number and importance, were legal.

Fourth, many of the claims for attorneys fees made by UPB had nothing to do with the enforcement of its mortgages. More of this later, but for now it is worth noting that efforts to defend the Meadowland lawsuit, to mediate the instant case, to depose the Haugens, etc., had nothing to do with foreclosing the mortgages or enforcing the notes. Rather, they had to do with protecting UPB's collateral. Hence, they were not ancillary to appellants' default. And hence they were not ancillary to UPB's actions to foreclose its mortgages either. They or may not have been permissible charges under the "reasonable attorney fees" clauses (of course, appellants contend they were not) but they certainly were not permissible charges for the foreclosure of the mortgages.

Both the Appellate and the District Courts based their analyses on two grounds. First, they stated that a determination of attorneys' fees is traditionally a matter for the court, citing *Northfield Care Center, Inc. v. Anderson*, 707 N.W.2d 73 (Minn. App. 2006), *Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W. 2d 633 (Minn. 1987), and *Amerman v. Lakeland Development Corporation*, 203 N.W.2d 400 (Minn. 1973). None of these cases is

in point. The party against whom attorneys' fees were to be charged did not demand a jury trial in these cases, so that the issue of the right to a jury trial on the attorneys' fees issue never arose. And in two of the three cases, an attorneys' fees award was either denied outright (*Becker*) or criticized and remanded (*Northfield*). Moreover, only one of these cases was a "reasonable attorneys' fees" clause case, and that case, *Northfield*, was decided on summary judgment so the jury issue never arose.

Northfield was also a case involving the question of whether a son was personally liable for his mother's nursing home debt, including attorneys' fees, and that issue was reversed and remanded. *Becker* was a defamation case, and the District Court denied an award of attorneys' fees. The Supreme Court stated that the District Court should state its reasons for denying attorneys' fees, but did not consider the amount of fees or the right of a party to a jury trial on that issue. And *Amerman* was a case of a client contesting his own attorney's billings. There is also no indication that a jury trial was ever requested.

The second reason for denying appellants' request for a jury trial is based upon several federal cases where it was determined that there was no right to a jury trial on the attorneys' fee issue. The District Court cites *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2nd Cir. 1993) and *Resolution Trust Corporation v.*

Marshall, 939 F.2d 274 (5th Cir. 1991). The Court of Appeals cited primarily *Ross v. Bernhard*, 396 U.S. 531 (1971), analyzing it as follows:

To determine whether a party is entitled to a jury trial under the Seventh Amendment, federal courts look to the "nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970). The nature of the issue is determined 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. *Id.* at 538 n. 10, 90 S.Ct. at 738 n. 10. Using this rubric, federal courts have determined that there is no right to a jury trial to recover attorney fees under the circumstances present in this case.

When considering the first prong of the *Ross* analysis, federal courts have concluded that pre-merger custom did not view attorney fees as an issue to be decided by a jury. In *Kudon v. f.m.e. Corp.*, a lessee of postal meters sued the lessor for tortious interference with contractual relations with the U.S. Postal Service related to lessor's attempt to repossess the meters based on lessee's default. 547 A.2d 976, 978 (D.C.1988). The lessor counterclaimed and sought to recover attorney fees related to its enforcement efforts, as allowed under the lease. *Id.* The *Kudon* court analyzed the historical development of attorney-fees claims, concluding that attorney fees and costs "have traditionally been viewed as a determination to be made by the court rather than by a jury." *Id.* at 979.

Similarly, in *Resolution Trust Co. v. Marshall*, plaintiff sued to collect on a promissory note and to recover attorney fees related to his collection efforts pursuant to a guaranty agreement that accompanied the note. 939 F.2d 274, 275-76 (5th Cir.1991). In affirming the denial of defendant's jury-trial request, the Fifth Circuit 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." *Id.* at 279.

On the second prong of the *Ross* analysis, the *Kudon* court determined that an award of attorney fees authorized by a private contract provision is in the nature of an equitable remedy. 547 A.2d at 979. Citing a number of cases, the court compared claims for attorney fees authorized by contract to other reimbursement claims, that are equitable in nature, because the contract essentially provides for reimbursement of litigation costs. *Id.* (citing *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F.Supp. 118, 123 (N.D.Ill.1982); *Cheek v. McGowan Elec. Supply Co.*, 511 So.2d 977, 979 (Fla.1987)). Other courts have reasoned that attorney fees are equitable because they are more restitutionary than compensatory and are collateral to the contract issue. *A.G. Becker-Kipnis*, 553 F.Supp. at 124; see also *Redshaw Credit Corp. v. Diamond*, 686 F.Supp. 674, 676-77 (E.D.Tenn.1988). In *Redshaw*, the court determined that a claim for attorney fees available to enforce a contract was equitable in nature because it was "collateral" to the issue on the merits of the contract claim. 686 F.Supp. at 676-77. The court held that "the issues of liability for attorneys' fees and the reasonableness of any such award should be addressed separately from liability on the merits." *Id.*

As to the third *Ross* prong, courts agree that "the question of what constitutes a reasonable attorneys' fee, although not entirely incapable of jury resolution, is one better left for the court." *Kudon*, 547 A.2d at 979. Submitting fees to the court at the end of a trial is considered to be a better practice because judges "are better equipped than juries to make computations based on details about billing practices," and because, where only the prevailing party is allowed fees, it is efficient to wait until after the verdict to submit proof of fees. *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1316 (2d Cir.1993).

(*Id.* at 270)

Before analyzing cases to the contrary, it will be helpful to examine the Court of Appeals' analysis of *Ross*. With regard to the first *Ross* test, what appellants have said before is worth repeating: the primary request surviving from UPB's complaint in

this lawsuit was its claim for monetary damages. As adjudicated, this was not a mortgage foreclosure case - no mortgage was foreclosed. So the amount awarded could not have been ancillary to an equitable action. It was the primary action. Actions to recover money, including actions by attorneys to recover money for breach of contract, have always been actions at law.

With respect to the second *Ross* factor, the Court of Appeals cited *Kudon* for the proposition that "reimbursement claims, that are equitable in nature, because the contract essentially provides for reimbursement of litigation costs." The trouble with this logic is that most of UPB's claims for attorneys' fees were not for reimbursement of litigation costs, at least for litigation costs in connection with the foreclosure of its mortgages. They were litigation costs for (a) Meadowland; (b) fighting the appellants' counterclaims; (c) determining the amount of attorneys' fees owed; and (d) mediating the case. Suppose that all UPB had asked the District Court to do was foreclose its security interests and mortgages. Appellants might happily have let them do so and then redeemed for the amounts directly due on the notes and mortgages. It was the request for a money judgment based upon "costs of collection" which was the principle reason for their vigorous defense of the case.⁸

⁸Of course, there was also their vigorous assertion that their ownership of the land was based on an equitable mortgage, but the District Court did not permit attorneys' fees to be

In regard to the third *Ross* factor, that courts are inherently better able than juries to determine the value of attorneys' fees, there is a problematical side to consider. Every judge was a lawyer once. A large award of attorneys' fees by a Court runs the risk of being perceived by the public as judges favoring their former colleagues. Moreover, if a court is the best judge of attorneys' fees, a doctor is the best judge of medical fees, an accountant is the best judge of accounting fees, etc. Yet in all those cases, if a contract calls for determination of such fees, a panel of doctors or a panel of accountants does not make the determination of the value of their services. Indeed, their fees would ordinarily be subject to determination by a jury? What makes the legal profession so special? Furthermore, there appears to be no doubt but that a 1st-person attorney fee contract (such as a retainer agreement between an attorney and a client) is subject to determination by a jury. Yet the same considerations of the value of the attorney's services would go into that jury determination as would go into a Court's determination of attorneys' fees where the Court is called upon to make that finding of fact.

Next, it should be noted that there is a substantial split of authority among the federal circuits on this issue, and the more recent ones, such as *J.R. Simplot v. Chevron Pipeline, Inc.*,

charged in connection with this.

563 F.3rd 1102 (10th. Cir. 2009) hold in favor of a jury trial right:

The right to a jury trial as declared by the Seventh Amendment is preserved inviolate. See Fed.R.Civ.P. 38(a). The Seventh Amendment protects this right “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars.” U.S. Const. amend. XII. The Supreme Court has held that “the phrase ‘Suits at common law’ refers to ‘suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.’” *Teamsters, Local No. 391 v. Terry*, 494 U.S. 558, 564, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (emphasis and alterations in original). The nature of the issues presented and the remedies sought determines whether an action qualifies as “legal.” *Id.* at 565, 110 S.Ct. 1339. The general rule is that monetary relief is legal. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). An ordinary breach of contract claim is no different. See *Terry*, 494 U.S. at 569–70, 110 S.Ct. 1339 (Marshall, J., concurring) (noting that a breach of contract claim is a legal issue); *Ross v. Bernhard*, 396 U.S. 531, 542, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) (concluding stockholders in derivative action were entitled to a jury trial where the complaint included allegations of ordinary breach of contract and gross negligence and sought damages); *Simler*, 372 U.S. at 223, 83 S.Ct. 609 (holding declaratory judgment action by client wherein client challenged the enforceability of a contingent fee retainer agreement “was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally ‘legal’ action”); FN10 *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477, 82 S.Ct. 894, 8 L.Ed.2d 44 (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.”).

FN10. As later intimated by the Court, *Simler* stands for the principle that “[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.” *Ross*, 396

U.S. at 538, 90 S.Ct. 733 (citing *Simler*). The actual language in *Simler* supports this interpretation. *Simler* concluded, "The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved [i.e., contractual enforceability] are traditional common-law issues which can be and should have been submitted to a jury...." 372 U.S. at 223, 83 S.Ct. 609.

The Supreme Court has not specifically addressed a case where previously incurred attorneys' fees are sought as the measure of compensatory damages in a breach of contract suit. Unlike cases in which attorneys' fees are allowable to the prevailing party, here Simplot's attorneys' fees and costs are themselves part of the merits of their contract claim. See *N. Am. Specialty Ins. Co. v. Correctional Med. Servs. Inc.*, 527 F.3d 1033, 1038-39 (10th Cir.2008) (in jurisdictional decision, holding that attorneys' fees and costs awarded as compensatory damages to insured are inseparable from merits of insured's breach of contract claim; distinguishing statutory prevailing party attorneys' fees, which are collateral to the merits). Simplot does not seek the fees "as an element of 'costs' awarded to the prevailing party," *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), which "raises legal issues collateral to and separate from the decision on the merits." *Id.* (quotation marks and citations omitted). Rather, Simplot seeks the fees as the measure of damages resulting from Chevron's breach, "as an element of damages under a contract." 10 J. Moore, *Moore's Federal Practice* § 54.171[1][a] (3d ed.2008) (noting such fees may present "jury triable issues").

Rule 54 of the Federal Rules of Civil Procedure recognizes this distinction. See Fed.R.Civ.P. 54(d)(2)(A) ("A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." (emphasis added)). The advisory committee's note to the 1993 Amendments of Rule 54(d)(2) explains further:

This new paragraph establishes a procedure for

presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.

This action is, at bottom, a legal action for compensatory damages resulting from a breach of contract. That the measure of damages happens to be attorneys' fees does not in and of itself change the nature of Simplot's claim.

(*Id.* at 1115, 1116)

The same principle applies to this case. *Simplot* carefully distinguished cases like *McGuire* and *Marshall*, noting that these cases involved after-the-fact attorney fee awards, not "free standing" attorney fee cases where the right to and amount of attorney fees is part of the contract itself:

While *Simplot* argues to the contrary, other Circuits' decisions addressing contractual attorneys' fees are distinguishable and do not support its contention. In *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1308 (2d Cir.1993), the owner of a merged company sued to rescind the merger. The defendants counterclaimed, alleging, inter alia, that plaintiff had misrepresented the value of its stock and was also liable for breach of contract. *Id.* The jury awarded damages to defendants for fraud and for breach of contract, and determined, in response to a special verdict form, that the plaintiff owed the defendants' attorneys' fees under a contractual provision providing indemnification for "[a]ll costs ... (including costs of defense ... and reasonable attorney's fees) arising out of any claim

... made with respect to" the merger agreement. Id. at 1309. The jury did not compute the amount of fees, however, and the defendants presented no evidence of attorneys' fees at trial. Id. The district court refused to award the fees. Id. The parties appealed, disputing whether the district court or the jury should have decided the amount and reasonableness of any fee award. Id. at 1312.

The Second Circuit concluded that the district court should have ascertained the amount of fees due the prevailing party. Id. at 1316. "[W]hen a contract provides for an award of attorneys' fees, the jury is to decide at trial whether a party may recover such fees." Id. at 1313. Once the jury determines liability, "the judge is to determine a reasonable amount of fees." Id. The court reasoned that a contrary rule would be impractical and inefficient. See id. at 1316. "[T]he jury would have to keep a running total of fees as they accrued through summations and then predict future fees from post-trial proceedings and motions." Id.

The *McGuire* concurrence carefully limited the court's holding by noting the nature of the parties' action. The case did not involve "the availability of a jury trial for fees where ... a claimant seeks contractual indemnification for fees incurred in a separate litigation against a third party."⁹ Id. at 1317 (Jacobs, J., concurring) (emphasis added). In that instance, the concurrence pointed out, Supreme Court precedent might require a jury trial for such a "free-standing" attorneys' fees claim. Id.

The Fifth and Seventh Circuits have agreed that the court-not the jury-should generally determine the amount of attorneys' fees in cases where a contract provides for fees to the prevailing party. The Fifth Circuit held the Seventh Amendment does not guarantee a jury trial to determine the amount of reasonable attorneys' fees, as no common law right exists to recover attorneys' fees awarded pursuant to a contract. *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir.1991). Applying a different rationale, the

⁹Consider, in this regard, UPB's claim for Meadowland reimbursement.

Seventh Circuit concluded "[t]he issue of attorneys' fees (including amount) [i]s [] an issue to be resolved after the trial on the basis of the judgment entered at the trial, just as in cases in which statutory rather than contractual entitlements to attorneys' fees are involved." *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 627 (7th Cir.2000) (citations omitted). Yet each of these cases, like *McGuire*, share one significant distinguishing factor: none involves a "free-standing" breach of contract claim-as here-for attorneys' fees already incurred in a separate, underlying action against a third party.

(*Id.* at 117)

The distinction made in *Simplot* is an important one. Where statutory attorneys' fees are awardable as costs and disbursements for the prevailing party, many courts have held that attorneys' fees are for the Court. Where attorneys' fees arise from a contract granting attorneys' fees, regardless of whether the party prevails or not - as here - the awardability and amount of attorneys' fees is for the jury.¹⁰

The Court of Appeals distinguished *Simplot*, saying:

Appellants urge us to reach a different decision in accordance with *Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102 (10th Cir.2009). *Simplot* involved the sale of a business and an agreement between the parties that the seller would continue to manage ongoing litigation involving the business after the sale. 563 F.3d at 1106. Seller failed to do so. At the close of that litigation, the purchaser sued the seller to recover the attorney fees purchaser incurred in the litigation. *Id.* at 1107. The district court denied seller's request

¹⁰It is an extremely interesting question whether a party may, by contract, indicate that issues such as attorneys' fees are to be determined by the court or jury. See, e.g., *Eriksson v. Boym*, 184 N.W. 961 (Minn. 1921). Fortunately, the notes involved in this case do not involve this touchy issue.

for a jury trial on the attorney-fees claim. *Id.* at 1108. The Tenth Circuit reversed, expressly distinguishing its holding from that of *Resolution Trust* and similar cases: "here *Simplot's* attorneys' fees and costs are themselves part of the merits of their contract claim" and not "collateral to and separate from the decision on the merits." *Id.* at 1115-16.

We consider *Simplot* inapposite based on this significant distinction. Where the contract breach is premised on an obligation to provide a legal defense, attorney fees are the direct consequence of the breach and the measure of damages. Where, as here, the substance of the contract claim is nonpayment of a promissory note, the damages directly caused by nonpayment is the balance due under the note: the issue of fees is collateral.FN4 For the reasons stated above, we hold that appellants were not entitled to a jury trial on their attorney-fees claim.

FN4. Other courts have made similar distinctions. See *Continental Bank, N.A. v. Everett*, 861 F.Supp. 642, 645 (N.D.Ill.1994) ("For Seventh Amendment purposes there is a distinction between attorneys' fees as the measure of damages in an action in contract and attorneys' fees as a post-judgment remedy to be awarded to the prevailing party.").

(*Id.* at 271)

But this is a distinction without a difference. Attorneys fees in a note-and-security interest case are similarly a direct consequence of the breach and important component of the damages sought in the complaint. Furthermore, it is not the case here that "the damages directly caused by nonpayment is the balance due under the note." If this were so, UPB could not claim damages for Meadowland, mediation, efforts to resist appellants' counterclaims, etc. Indeed, the great bulk of UPB's original

\$700,000 request had to do with matters other than foreclosing its mortgages. Indeed, UPB still has not foreclosed a mortgage to which attorneys' fees attach, so all it has is a free-standing judgment for \$403,821.82.

If this were truly an award of attorneys' fees collateral to an action to enforce a debt on collateral, the amount of attorneys' fees would be considerably less. Indeed, one of the distinctions implicit in *Simplot* is precisely what is at stake in this case. Actions to enforce obligations which incidently invoke attorneys fees are ordinarily modest. The reimbursement to attorneys permitted for contract for deed cancellations or foreclosure by advertisement are very modest. Hence, a debtor is ordinarily not greatly prejudiced by their award. By contrast, a judgment in a direct action involving an attorney and a client can be very large indeed, depending as it does on the attorney time involved. In that regard, once an attorney attempts to collect, not simply for the action of foreclosure or replevin, but for the "kitchen sink" involved in the relationship between a debtor and a creditor, the case is much more like an attempt by an attorney to collect on his bill than a reimbursement for fees collateral to another action.

Moreover, while Seventh Amendment litigation is a guide to jury trial issues under the Minnesota Constitution, the jury trial right under the Minnesota Constitution is somewhat broader

than the federal right. The 5th Circuit noted in *Marshall*, there is no right in the United States Constitution to a jury trial in a contract case. Therefore, there is no federal right to a jury trial on a contract case. Now this conclusion is vigorously disputed in *Simplot* and the cases it cites, but at least there is an argument at the federal level over whether there is a jury trial right in contract cases.

Not so in Minnesota. In the seminal case of *Abraham v. County of Hennepin*, *supra*, the court discussed the right of jury trial under the Minnesota Constitution at length and held that there was a right to a jury trial in a whistleblower case. It noted that the key distinction was between an equitable action and an action at law and held that a whistleblower case was an action at law. It discussed the cases, including contract cases, noting that contract and tort cases were actions at law:

A thread runs through our line of decisions following *Bond* and culminating with *Olson* that has consistently acknowledged the distinction between actions at law, for which the constitution guarantees a right to jury trial, and actions in equity, for which there is no constitutional right to jury trial. See *Rognrud v. Zubert*, 282 Minn. 430, 434, 165 N.W.2d 244, 247 (1969) (concluding that causes of action that are legal, as opposed to equitable, are entitled to jury trial); ***Landgraf v. Ellsworth*, 267 Minn. 323, 327, 126 N.W.2d 766, 768 (1964) (concluding that suit on contract to recover money is legal action, and as such, triable to jury)**; *Westerlund v. Peterson*, 157 Minn. 379, 384, 197 N.W. 110, 112 (1923); *Hawley v. Wallace*, 137 Minn. 183, 187, 163 N.W. 127, 129 (1917) ("The term 'cases at law' as used in the Constitution has been construed as referring to ordinary common-law actions as

distinguished from equity or admiralty causes and special proceedings such as quo warranto, mandamus and the like"); *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 254-55, 153 N.W. 527, 528 (1915) (holding that in actions originally actions at law either party may demand jury trial, but in equitable actions there is no right to jury trial); see also *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54, 57 (Minn.1993).

....

This court has not held that only those causes of action that were identified in 1857 as causes of action at law carry today an attendant right to jury trial. Rather, the constitutional right exists for the same type of action for which a jury trial existed when the constitution was adopted, any cause of action at law. See *Olson*, 628 N.W.2d at 149; *Tyroll*, 505 N.W.2d at 57; *Bond*, 61 Minn. at 43-44, 63 N.W. at 3-4. The constitution is not frozen in time in 1857, incapable of application to the law as it evolves. The nature and character of the controversy, as determined from all the pleadings and by the relief sought, determines whether the cause of action is one at law today, and thus carries an attendant constitutional right to jury trial. *Olson*, 628 N.W.2d at 152; *Tyroll*, 505 N.W.2d at 57; *Morton*, 130 Minn. at 255, 153 N.W. at 528; see also *Westerlund*, 157 Minn. at 383, 197 N.W. at 111.

(*Id.* at 349; Italics added)

This is not a close case. The right to recover attorneys' fees was part and parcel of the note (itself a contract), and would not exist without contract. The damages sought were based principally on the work performed by UPB's attorneys in connection with everything they had done in regard to the appellants' defenses and claims, not the execution of its security interests. The right to recover attorneys' fees is therefore a contract action, and all elements of a contract action are triable to a jury.

II.

THE DISTRICT COURT ERRED IN THE AMOUNT OF ATTORNEYS' FEES IT AWARDED.

The District Court awarded \$403,821.82 as attorneys' fees and costs against the Haugens (A-20).¹¹ The total amount due on the Haugens' note with respect to the second mortgage was around \$250,000. The District Court disallowed any attorneys' fees for actions related to appellants' claim of equitable mortgage, noting that appellants had prevailed on this issue and a party cannot charge attorneys' fees to another with respect to litigation upon which the party seeking attorneys' fees had lost (A-20). Adding the attorneys' fees sought by UPB for issues upon which prevailed to attorneys' fees sought for issues upon which it did not prevail, the requested award was in excess of the value of all the property ever mortgaged or secured to UPB. This has to be economic folly.

As some of the cases cited in *Simplot, supra*, cautioned, cases where attorneys fees are to be awarded under contract need to be carefully scrutinized, because attorneys working against an adverse party who is liable for such fees have an incentive to "run up the bill." As the Court said in *Agri Credit Corporation v. Liedman*, 337 N.W.2d 384 (Minn. 1983):

¹¹There was also a judgment against Ilene Haugen in the sum of \$5,008.27 but this amount is so small compared to the judgment against Leland Haugen and Haugen N & E that little will be said about it.

Inasmuch as we have determined that such estimated future attorney fees should not have been considered by the trial court in making its award of attorney fees in the judgment below, we next examine the attorney fees in light of the work done by the respondent's attorneys up to the time of entry of judgment. Applying our estimate of 15 hours of service, such examination shows that the attorney fees awarded amounted to more than \$1,500 an hour for services rendered by respondent's attorneys up to the time of the denial of the new trial motion. It seems clear to us that the trial court's award is patently unreasonable. Accordingly, we reverse and remand to the district court for a determination of reasonable collection costs, including attorney fees, "incurred or paid" by respondent to its attorneys up to the time of the determination on the motion for new trial. In so doing, the court should consider the factors set forth in *Obraske* and should not rely upon the Eighth Judicial District's policy for setting attorney fees.

(*Id.* at 386)

In *Obraske v. Woody*, 199 N.W.2d 429 (Minn. 1972) the Supreme Court set forth the principles guiding attorney fee determinations:

A large fee is not necessarily an unreasonable fee. On the other hand, in cases involving the awarding of reasonable attorneys' fees, we do not deem it to be unduly burdensome on attorneys to require them to present probative evidence to the trial court to assist it in setting the amount of the fees. In that connection it would be helpful to the trial court, and to this court on appeal, to have, if possible, in addition to a recitation of the services performed and to be performed in the future, testimony regarding the time consumed by the attorney in performing his services or such other probative evidence as may assist the trial *110 court in arriving at a fair and reasonable fee. The trial court may also take into consideration such factors as the ability and experience of the attorneys involved, the amount involved, the responsibilities assumed by the attorneys in the case, and the results obtained. *In re Living Trust Created by Atwood*, 227 Minn. 495, 35 N.W.2d 736

(1949); *Hempel v. Hempel*, 225 Minn. 287, 30 N.W.2d 594 (1948).

(*Id.* at 107)

It should be noted that a review of the cases involving attorneys' fee awards make a distinction between attorneys' fees awardable in statutory attorneys' fee cases and contract attorneys' fee cases, although this distinction is not always explicit. In statutory attorneys' fee cases, courts stress that an attorney seeking to uphold the civil rights of a client is performing a public service by vindicating the constitution. See, e.g., *Nadarajah v. Holder*, 569 F.3d 906 (C.A.9 2009). By contrast, attorneys' fees which arise solely by reason of a contract involve matters where, absent contractual provision, attorneys' fees are disallowed as a matter of law. See, e.g., *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46 (Minn. 1983). Far from providing a public service, a large award of attorneys' fees may frustrate important state policies, such as keeping family farmers on their land under Minn. Stat. § 500.24. Thus, it is questionable whether the *Lodestar* or the enhanced attorneys' fees method of determining a right to such fees applies in "reasonable attorneys' fee" contract cases, and in any event, there are important qualifications to that right which do not apply in cases where an award of attorneys' fees is in the public interest.

It is the duty of appellate courts to guard against over-

generosity in the award of attorneys' fees and expenses, even in a statutory attorneys' fee case. The 8th Circuit Court of Appeals, in *Jorstad v. IDS Realty Turst*, 643 F.2d 1305 (8th Cir. 1981), noted:

The standard to be applied by this court in reviewing awards of attorneys' fees is straightforward: we must determine "whether the district court's findings were clearly erroneous as to the factual basis for the award, or whether it committed abuse as to the discretionary margin involved in its allowance." *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir. 1980). Accord, *Omaha Paper Stock Co. v. Harbor Insurance Co.*, 596 F.2d 283, 292 (8th Cir. 1979); *Grunin v. International House of Pancakes*, 513 F.2d 114, 126 (8th Cir.), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). Although these cases did not involve class actions based on alleged securities violations, the rationale for determining the general rule in the appellate review of an award of attorneys' fees is basically the same. Our review of the arguments, the briefs and the record in this appeal has convinced us that Judge Lord's award of fees was excessive and must be reduced. And although we have carefully considered those of the appellants' arguments which are directed towards the district court's factual findings, we must conclude that the error lies in the abuse of the trial court's discretion in awarding "reasonable" attorneys' fees and expenses.

Our task is not simplified by the fact that we sustain most of the district court's findings of fact on appeal. We have examined the record carefully and are basically in accord with Judge Lord's views as to the quality of the work performed by class counsel, the benefits which flowed from their efforts and the risk involved in the undertaking of this litigation. Nevertheless, this court has previously recognized that it is the duty of appellate courts to guard against over-generosity in the award of attorneys' fees and expenses. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, *supra*, 623 F.2d at 1274. See also *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) (Grinnell I). And in this particular

case, several factors have combined to make the district court's award of fees excessive, unacceptable and an abuse of that court's discretionary margin.

(*Id.* at 1312)

With these principles in mind, let us consider the Courts' order of attorneys' fees.

First, the Court awarded \$117,110.24 in attorneys' fees for the defense of another lawsuit, *Meadowland v. Haugen et al.* This lawsuit was commenced in 2003. The District Court held:

52) That UPB incurred \$117,119.24 in legal fees defending against the claims asserted in the Meadowland Lawsuit to preserve and protect its security interests in the hogs, machinery and equipment, and Real Property. These fees were incurred in: (1) reviewing and responding to Meadowland's complaint; (2) discovery, including interrogatories, document production and depositions; (3) summary judgment motion practice; (4) settlement efforts; and (5) reviewing and responding to the Haugens' litigation threat.

53) that all fees incurred by UPB in the Meadowland lawsuit were reasonably and necessarily incurred to preserve and protect UPB's interest in the collateral securing its loans to HNE and the Haugens, including the Real Property.

(A-12)

There are several problems with this analysis. First, the Meadowlands action did not demonstrably arise from the Haugen's **default**. The notes signed by the Haugens states:

I [HNE/Haugens] will pay all costs of collection, replevin, or any other or similar type of cost **if I am in default**.

(A-4; Italics added)

Most of the actions alleged in the meadowlands lawsuit took

place before the relevant notes and mortgages to UPB were signed, and so could hardly have been in default. Furthermore, UPB never claimed that the Haugens were somehow in default of an obligation to UPB at the time the events giving rise to the Meadowlands litigation occurred. UPB never gave notice to the Haugens that it was adding its attorney fees to subsequent notes and mortgages. Also, the Meadowland lawsuit alleged direct misconduct by UPB as well as the Haugens, and a party who is in pari dilecto with another can hardly seek reimbursement for its own misconduct. Furthermore, the Meadowlands lawsuit was settled without any misconduct found on the part of either the Haugens or UPB, so Meadowlands can hardly seek reimbursement for something that was neither a default nor an action giving rise to unnecessary liability on the part of UPB. Indeed, Meadowlands, in its lawsuit, did its best to assert the innocence of the Haugens. While an attorneys' fees clause in a note may justify attorney costs incurred with respect to the note, it may not justify attorney fees with regard to an action unrelated to the note. Indeed, one of the reasons why appellants ought to have been entitled to a jury trial is that attorneys fees were being sought, not simply for defaults with respect to their mortgages and security interests, but with respect to costs run up in an action for which a default was never declared.

Second, the Court erred with respect to attorneys' fees with

respect to the instant lawsuit. The Dist Court said:

63) That Defendants did not raise any issue of fact at trial regarding the seizure or sale of the machinery and equipment and livestock. Nor did Defendants contest at trial any of the expenses included and accounted for by UPB relating to the replevin issues.

(A-14)

In one way, this is misleading, and in another way it is wrong. It is misleading because the Haugens vigorously protested the seizure and the amount of expenses incurred, but their protests at trial were precluded because they lost on these issues upon summary judgment. It is wrong, because the Haugens have always opposed the expenses in the form of attorneys' fees.

73) That Defendants did not dispute any of the non-legal replevin expenses incurred by UPB. Nor did Defendants raise any other fact issue at trial relating to the execution of the June 30, 2005 replevin order or the resulting sale of the machinery and equipment and livestock. Likewise, Defendants did not dispute that the attorneys' fees and expenses were actually incurred and paid by UPB to collect amounts due under the Loan Documents, to protect and preserve the collateral securing Defendants' repayment obligations to UPB and/or to defeat adverse claims made against the Real Property. Finally, Defendants did not challenge UPB's testimony that the instant litigation has been appropriately staffed and that there have been no duplicative charges.

(A-15)

At best, this finding is irrelevant; at worst, it is wrong.

It is irrelevant, because whether UPB paid or incurred the expenses has virtually nothing to do with the real issue here - whether the charges were reasonable. Indeed, it is really odd

that UPB permitted \$800,000 in attorneys' fees to be incurred. This is more than the total amount of the Haugen's debt, and may well turn out to be more than the value of the land, machinery, and livestock put together. At least one test of the reasonableness of attorneys' fees is whether they were wisely incurred. At one point, the Haugens proffered a check for \$525,000 in payment of their obligations to UPB, which UPB refused on the grounds that it still had obligations on other instruments. Since that time, the records of UPB's attorneys indicate that more attorneys' fees have been incurred than the balance due and owing in excess of the Haugen's proffer.

In another way, the Court's claim that "[D]efendants did not dispute that the attorneys' fees and expenses were actually incurred by UPB to collect amounts due under the Loan Documents...." is simply wrong. They vigorously disputed the claim that the fees were incurred to collect amounts due. They stated that the fees were excessive, unnecessary, had nothing to do with collection, and had everything to do with ruining the Haugens and obtaining their property. Consider the issue of excessiveness. UPB took lengthy depositions of Leland Haugen, Darren Haugen, Brian O'Leary, Mark Sahli, Theodore Devine, and others, in each of which depositions approximately 100 exhibits, virtually the same exhibits in each case, were introduced. UPB's attorneys claim approximately 10 hours or more for preparation,

travel, and conduct of most of these depositions. Yet the Sahli deposition and the Devine deposition largely resulted in appellant's victory on the equitable mortgage issue, an issue for which the trial court indicated that UPB could not charge (A-20, no. 6). Important parts of the depositions of Leland and Darren Haugen and Mr. O'Leary were also devoted to the equitable mortgage issue, and the depositions and related documents were never broken down between time spent on a winning issue and time spent on a losing issue.¹²

Indeed, the issue upon which UPB prevailed were fairly simple: Were there notes and mortgages signed by the Haugens? Yes. It takes about 30 minutes to establish this. Did the Haugens pay these notes and mortgages in accordance with their terms? No. It takes about 30 minutes to establish this. Did they make some payments on their notes and mortgages. Yes. It takes about 10 minutes to establish this. How much did the Haugens owe, exclusive of attorneys' fees and costs? With modern computers and records of payment, it should have taken about 5 hours of accountant time to establish this. Motion practice to obtain orders and judgments for replevin and summary judgment on issues not related to costs and attorneys' fees? Perhaps 30 hours. That is about all the non-equitable-mortgage litigation

¹²Note that UPB incurred \$750,000 in attorneys fees and was awarded \$400,000. It is hard to believe 4/5 of respondent's attorney time was not devoted to the equitable mortgage issue.

which was contested.

Contrast this with the equitable mortgage issue. Every deposition taken by UPB was directly related to the equitable mortgage issue, even though many of them were devoted to other issues as well. Nothing in the record reflects an amortization between equitable mortgage and non-equitable mortgage questions, but a review of the file should indicate that well over 50% of the questions related to the equitable mortgage issue. UPB made four motions for summary or partial summary judgment on the equitable mortgage issue, three of them unsuccessful, one of them successful but reversed on appeal.

Moreover, a considerable amount of litigation was indirectly related to the equitable mortgage issue and UPB's attorneys appear to have been awarded fees for them. UPB's attorneys initially denied that the contract for deed which the Court held to be an equitable mortgage even existed, despite strong evidence that it did. UPB fought the District Court's interim finding that the document was (at least) a contract for deed, and UPB's attorneys charged for the time spent on this losing cause.

As even the District Court acknowledged, attorneys' fees incurred in an unsuccessful attempt to assert a position are not incurred in the enforcement of a note. The notes signed by various defendants permit an award of attorneys' fees for reasonable costs of collection. Unsuccessful attempts to claim

that there was no contract for deed, for example, is not a fee incurred in the enforcement of a note. Neither is an unsuccessful attempt to have a document declared not to be an equitable mortgage as a matter of law. Attorneys' fees are not allowable in the absence of statutory or contractual authority. *Bierlein v. Gagnon*, 96 N.W.2d 573 (Minn. 1959). Here, although the notes signed by the defendants permit the collection of attorneys' fees, they only do so with respect to the enforcement of the notes. As *Bierlein* makes clear, attorney's fees may be permitted in the enforcement of a right, but must be based on the reasonable value of the services in the enforcement of the action, not the collateral actions where the plaintiff was charged attorneys' fees. Thus, in *Bierlein*, the plaintiff's attorneys fees were limited to twice the value of the services involved in a mechanic's lien foreclosure action rather than the total services performed by an attorney with respect to the entire action. As the *Bierlein* Court said:

In any event, allowance of an attorneys' fee must rest upon the reasonable value of the services rendered, where the amount is not specified in the statute. There is no evidence to establish reasonable value. Plaintiffs, and apparently the trial court, relied on the minimum fee schedule adopted by the Minnesota State Bar Association in 1952, which provides (Advisory Schedule of Minimum Fees, p. 14) that the minimum fee for foreclosure of an uncontested mechanics lien of the amount involved here shall be \$150 plus 10 percent on the excess of the amount involved over \$1,000. Plaintiffs contend that, in addition to the minimum recommended for foreclosure of an uncontested lien, they are entitled to a per diem fee for 7 days of

trial. The combination of these fees, they argue, is less than the amount which the court allowed.

We do not think that plaintiffs' contentions are tenable. In the first place, the minimum fee schedule is intended to govern minimum charges between attorney and client. No such relationship exists here between defendants and plaintiffs' attorney. While the minimum fee schedule may, in a proper case, serve as a guide in determining what is reasonable, it cannot be used to supersede a statutory provision limiting the amount of such fee, nor can it be used in a case such as this to replace a determination of reasonable value.

(*Id.* at 579)

It also appears that UPB is charging for the work its attorneys performed with respect to mediation. Mediation fees should not be collectable, either directly (i.e. mediator expenses) or indirectly (fees of attorneys at mediation).

Minn.Gen.R.Prac. 114.11(b) states:

The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis. The parties may, however, agree on a different allocation. Where the parties cannot agree, the court retains the authority to determine a final and equitable allocation of the costs of the ADR process.

Note that Rule 114.11(b) refers to the "costs of the ADR process" apart from the payment to the neutral. So the drafters envisioned that all costs relating to the process be shared, not simply the costs of the neutral. Since the Haugen's attorney and UPB's attorney would spend approximately equal amounts of time in the ADR process, neither party should have the ability to bill the other for costs and attorney time associated with the

process. Furthermore, permitting recovery of attorney fees for mediation undermines the procedure. If an attorney knows that his fee will have to be paid by the other party, he may unnecessarily prolong or obstruct the process. The whole idea behind mediation is to lighten the adversarial atmosphere between the parties in the interest of possible agreement. If a party can tax the other for the procedure, this idea is subverted.

The District Court correctly laid out the factors to be considered in determining reasonable attorneys' fees. One would have expected this to have been the beginning of the Court's inquiry, not its end. One of the reasons given in *Marshall, supra*, for making an attorneys' fee question one for the Court is that the complicated accounting sometimes required in an attorneys' fee case requires a professional trier of fact to sort it out. Regardless of the correctness of the *Marshall* decision, it does serve to emphasize one thing - the importance of a judge's attempt to make such an accounting. In particular, the court's findings on the 5 issues noted should be discussed, not summarily expressed. But there are no such findings. To be sure, the number of hours worked on the case by UPB's attorneys is of record, and was not challenged. But the relevance of these hours, and their relation to issues upon which UPB prevailed, was critically challenged, and the Court makes no breakdown permitting counsel or the Court of Appeals to determine what

hours were "counted," and which were not. With respect to issue 2, the nature and difficulty in bringing the instant litigation, in the absence of the contract-for-deed/equitable mortgage issue, this was a fairly standard farm foreclosure - replevin case. With respect to the issue of customary charges, it is the charges in the area for legal services which counts, not the rate the attorneys actually charge. See *Reome v. Gottlieb*, 361 N.W.2d 75 (Minn. App. 1985). No one would claim that UPB was required to pay no more than \$150 per hour. But if it chose to have Twin City lawyers come to Cottonwood County to represent it in matters such as replevin, it should at least be required to approximate rates in the Cottonwood County area. Over \$300 per hour is not such an approximation. And if there were issues which only Twin City law firms could handle successfully that a local attorney or firm could not handle (other than equitable mortgage/contract for deed, which UPB lost), neither the Court nor UPB has explained what such an issue was.

UPB's attorney fees were excessive, and even if appellants are not entitled to a jury trial on the issue, the case should be remanded for a redetermination of them.

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