

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 APPELLANTS  
LESTER BUILDING SYSTEMS  
AND LESTER'S OF MINNESOTA, INC.**

---

FAEGRE & BENSON LLP  
James L. Volling (#113128)  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
(612) 766-7000

DORSEY & WHITNEY LLP  
James K. Langdon II (#171931)  
Suite 1500  
50 South Sixth Street  
Minneapolis, MN 55402-1498  
(612) 340-2600

MORGAN, LEWIS & BOCKIUS LLP  
Kell M. Damsgaard  
Brian W. Shaffer  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5000

Attorneys for Respondent  
Louisiana-Pacific Corporation

Attorneys for Appellants  
Lester Building Systems and  
Lester's of Minnesota, Inc.

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. STATEMENT OF PRIMARY LEGAL ISSUES .....	1
II. STATEMENT OF THE CASE.....	2
III. STATEMENT OF FACTS .....	5
A. The Parties .....	5
B. LP Promoted Inner-Seal To Lester .....	6
C. Inner-Seal Failed On Lester Buildings .....	8
D. LP's Class Action Settlement .....	9
E. The Class Action Did Not Repair Lester's Customers' Barns .....	12
F. Lester's Business Was Ruined.....	13
G. LP Defrauded Lester .....	16
H. LP Failed To Honor Its Warranty Through The Class Action .....	17
IV. SUMMARY OF ARGUMENT .....	20
V. ARGUMENT .....	22
A. Standard Of Review .....	22
B. A Buyer Can Recover The Cost To Repair Defective Products.....	22
C. A Buyer's Right To Recover The Cost To Repair Defective Products Should Not Be Conditioned On Legal Liability To End Customers .....	25
D. LP Did Not Prove The Class Action Settlement Precluded Lester's Legal Liability To Its Customers .....	31
VI. CONCLUSION.....	35

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Coastal Modular Corp. v. Laminators, Inc.</i> , 635 F.2d 1102 (4th Cir. 1980) .....	24, 30-31
<i>Mattingly, Inc. v. Beatrice Foods Co</i> , 835 F.2d 1547 (10th Cir. 1987).....	24, 30
<i>Official Comm. of Unsecured Creditors v. Lafferty &amp; Co.</i> , 267 F.3d 340 (3d Cir. 2001).....	22
<i>Sandpiper Vill. Condo Assoc., Inc. v. Louisiana-Pacific Corp.</i> , 428 F.3d 831 (9th Cir. 2005).....	5
<i>Step-Saver Data Sys. v. Wyse Tech.</i> , 912 F.2d 643 (3d Cir. 1990).....	24, 29
<i>Woodbury Chem Co v Holgerson</i> , 439 F.2d 1052 (10th Cir. 1971).....	1, 24, 27, 28, 30

### MINNESOTA CASES

<i>Ag-Chem Equip Co v Ceram-Traz Corp</i> , No. C9-95-2074, 1996 WL 229263 (Minn. Ct. App. May 7, 1996) .....	24
<i>American Nat'l Gen Ins. Co. v. Solum</i> , 641 N.W.2d 891 (Minn. 2002).....	22
<i>B.F. Goodrich Co. v Mesabi Tire Co.</i> , 430 N.W.2d 180 (Minn. 1988).....	25
<i>Bingham v. Chicago, M. &amp; St. P. Ry. Co.</i> , 181 N.W. 845 (Minn. 1921).....	1, 32
<i>Costello v Johnson</i> , 121 N.W.2d 70 (Minn. 1963) .....	33
<i>DeGidio v. Ace Eng'g Co.</i> , 225 N.W.2d 217 (Minn. 1974).....	1, 20, 21, 23, 24, 25, 31
<i>Edgewater Motels v Gatzke</i> , 277 N.W.2d 11 (Minn. 1979) .....	22
<i>In re Grievance Arbitration</i> , No. CX-9701326, 1998 WL 73140 (Minn. Ct. App. Feb. 24, 1998).....	1, 32
<i>Jacobs v. Rosemount Dodge-Winnebago S</i> , 310 N.W.2d 71 (Minn. 1981) .....	22-23, 26, 27

<i>Lester Build. Sys. v. Louisiana-Pacific Corp.</i> , Civ. A. A03-48, 2004 WL 291998 (Minn. Ct. App. Feb. 17, 2004).....	3, 22
<i>Pietrzak v. Eggen</i> , 295 N.W.2d 504 (Minn. 1980) .....	23
<i>Stuttgen v. Gipe</i> , 404 N.W.2d 10 (Minn. Ct. App. 1987) .....	33

**OTHER STATE CASES**

<i>Tremco, Inc. v Valley Aluminum Prods Corp.</i> , 831 S.W.2d 156, 18 U.C.C. Rep. Serv. 2d 168 (Ark. Ct. App. 1992).....	1, 24, 29, 30
--	---------------

**FEDERAL STATUTES**

18 U.S.C. § 1961, <i>et seq.</i> .....	9
--	---

**MINNESOTA STATUTES**

Minn. Stat. § 336.1-305 (2004).....	23, 26, 27
Minn. Stat. § 336.2-714 (2002).....	22
Minn. Stat. § 336.2-715 (2002).....	23
Minn. Stat. § 336.2-721 (2002).....	22

**OTHER MINNESOTA AUTHORITY**

Minn. R. Civ. P. 8.03 .....	1, 32
4 Minn. Prac. CIVJIG 57.25 .....	25

**TREATISES**

J. David Prince, <i>Defective Products, Fraud and Misrepresentation Claims in Minnesota</i> , 29 Hamline L. Rev. 261 (2006) .....	25
James J. White & Robert S. Summers, 1 <i>Uniform Commercial Code</i> § 10-4 (5th ed. 2006) .....	1, 24, 27, 28
Restatement (First) Restitution § 78 .....	28, 29

67A Am. Jur. 2d Sales § 1193 (2003).....23

## I. STATEMENT OF PRIMARY LEGAL ISSUES

1. *Did the Court of Appeals err in holding as a matter of law that Lester, a defrauded reseller with a demonstrated business injury and its own business need to repair defective products it had sold to its customers, was precluded from recovering costs to repair because it did not have a legal obligation to correct the defects?*

- The Court of Appeals reversed the jury's award and the trial court's amended judgment for Lester of \$11.2 million for costs to repair LP's defective product, on the ground that Lester had no legal obligation to make the repairs.

Most apposite authority:

- *DeGidio v. Ace Eng'g Co.*, 225 N.W.2d 217 (Minn. 1974)
- James J. White & Robert S. Summers, 1 *Uniform Commercial Code* § 10-4 (5th ed. 2006)
- *Tremco, Inc. v. Valley Aluminum Products Corp.*, 831 S.W.2d 156, 18 U.C.C. Rep. Serv. 2d 168 (Ark. Ct. App. 1992)
- *Woodbury Chem. Co. v. Holgerson*, 439 F.2d 1052 (10th Cir. 1971)

2. *Alternatively, did the Court of Appeals err in holding, notwithstanding the jury's verdict, that LP's prior class action settlement released all of Lester's customers' claims and insulated Lester from liability to its customers?*

- The Court of Appeals reversed the jury's award and the trial court's amended judgment for Lester of \$11.2 million for costs to repair LP's defective product, holding that the class action settlement insulated Lester from claims made by Lester's customers.

Most apposite authority:

- Minn. R. Civ. P. 8.03
- *Bingham v. Chicago, M & St. P. Ry. Co.*, 181 N.W. 845 (Minn. 1921)
- *In re Grievance Arbitration*, No. CX-9701326, 1998 WL 73140 (Minn. Ct. App. Feb. 24, 1998)

## II. STATEMENT OF THE CASE

Plaintiffs-Appellants Lester Building Systems and Lester's of Minnesota, Inc. (together "Lester") design and sell hog barns and other livestock containment buildings. Defendant-Respondent Louisiana-Pacific Corporation ("LP") manufactured and sold an exterior siding product, known as Inner-Seal. In the early 1990s, LP convinced Lester to switch from plywood to LP's Inner-Seal siding. Lester sold thousands of hog barns using Inner-Seal. Inner-Seal was a defective product, and LP knew it. Starting in late 1995, the Inner-Seal siding on Lester's barns began to rot. Lester's 50-year reputation as a supplier of quality hog barns was destroyed; its business was pushed to the brink of ruin; and Lester's farmer-customers demanded that Lester repair their buildings. The customers made clear that, unless Lester repaired the buildings, they would never again do business with Lester.

At first, LP worked with Lester to repair the barns. However, LP abruptly stopped all cooperation in 1998. Lester thereafter sued LP in District Court in McLeod County, Minnesota. In October 2002, after a three-week trial before the Honorable L. W. Yost, the jury returned a unanimous verdict in favor of Lester, finding that LP breached its warranties and defrauded Lester. The jury awarded Lester \$29.6 million. The components of the award were \$3.4 million for the cost of the defective Inner-Seal, \$10.2

million in past lost profits,<sup>1</sup> \$2.8 million for the cost to restore goodwill, and \$13.2 million for the costs to repair the deteriorating buildings. App. 100.<sup>2</sup>

LP has twice appealed. All issues regarding liability and damages – *except* for an \$11.2 million portion of the \$13.2 million award reflecting the costs to repair – were presented and considered in the first appeal. The Minnesota Court of Appeals affirmed the judgment of the District Court, except that it did not consider the \$11.2 million for cost to repair. *Lester Build. Sys. v Louisiana-Pacific Corp.*, Civ. A. A03-48, 2004 WL 291998, at \*1, \*8 (Minn. Ct. App. Feb. 17, 2004), App. 549, 555. After this Court declined LP’s Petition for Review, LP satisfied the judgment plus interest (minus \$11.2 million), by paying \$21,099,596.25 to Lester.

The \$11.2 million portion of the cost to repair damages award was not included in the judgment initially entered by the District Court because of LP’s extraordinary efforts to hide behind an earlier settlement in federal court in Oregon in an action brought by a nationwide class of owners of buildings constructed with the defective Inner-Seal. Lester was not a party to that action. Nevertheless, LP claimed that, as a result of that settlement, Lester could not recover part of the damages it suffered as a result of LP’s breach of warranties and fraud. Specifically, LP claimed that Lester’s farmer-customers

---

<sup>1</sup> The \$10.2 million was the precise amount Lester had asked for to compensate it for lost profits up through trial. The jury seemingly did not award future lost profits, which was understandable in light of the \$13.2 million award that would have allowed Lester to repair the defective buildings and avoid additional, future losses.

were members of the class and, by virtue of the settlement, had surrendered their claims for building repairs against LP or against any reseller of Inner-Seal (including Lester). Accordingly, although LP did not challenge the injury to Lester and the business (or moral) obligations facing Lester, it argued that Lester had no legal obligation to repair its customers' barns and therefore could not recover the amount that would be necessary to make repairs.

To press this argument, after the jury verdict, LP went to the federal court in Oregon and sought and obtained an injunction to prevent the McLeod County District Court from entering judgment on the \$11.2 million portion of the cost to repair award. On December 13, 2002, the Oregon federal court enjoined entry of judgment against LP for that \$11.2 million award. App. 310. The remaining \$2 million of the jury's \$13.2 million award for costs to repair represented the cost to repair buildings LP admitted were constructed outside the time covered by the class settlement. LP did not seek to enjoin the entry of judgment on that portion of the cost to repair award. Nor did LP contest in its initial appeal Lester's right to recover that \$2 million for cost to repair. The Minnesota Court of Appeals affirmed the judgment for that amount, and LP ultimately paid it to Lester.

Lester appealed to the United States Court of Appeals for the Ninth Circuit from the federal district court's injunction against entry of judgment on the \$11.2 million

---

<sup>2</sup> Citations to Lester's Appendix are referred to herein as "App." and followed by the page number for the specific reference.

portion of the cost to repair award. The State of Minnesota filed an Amicus Brief supporting Lester's appeal. On October 24, 2005, the Ninth Circuit reversed the decision of the Oregon federal court and vacated the injunction. *Sandpiper Vill. Condo Assoc., Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831 (9<sup>th</sup> Cir. 2005). App. 332. The United States Supreme Court denied LP's request for review. App. 362.

Thereafter, on December 27, 2006, the McLeod County District Court entered an Amended Judgment awarding Lester the remaining \$11.2 million in cost of repair damages found by the jury, plus interest. App. 176. LP appealed that Amended Judgment, and on February 5, 2008, the Minnesota Court of Appeals reversed. The Court of Appeals held that Lester, as a defrauded reseller, though having demonstrated a business injury and need to repair its customers' property, had no right to the cost to repair recovery because it had not proven a legal obligation to its customers to make the repairs. This Court granted Lester's Petition for Review on April 15, 2008.

### **III. STATEMENT OF FACTS**

#### **A. The Parties**

Lester has operated in Lester Prairie, Minnesota, for more than 50 years. It designs and sells pre-engineered wood buildings primarily through a network of independent dealer-builders. Tr. 109-13, App. 365-69.<sup>3</sup> During the 1970s and 1980s,

---

<sup>3</sup> Citations to the trial transcript are referred to herein as "Tr." and followed by the page number of the trial transcript and a parallel citation to the page in Lester's Appendix where the transcript page is reproduced.

Lester earned a well-deserved reputation as a premier supplier of hog barns and other livestock containment buildings. Tr. 223-24, App. 382-83.

LP is a large building products manufacturer headquartered in Portland, Oregon. From the mid-1980s to the mid-1990s, LP manufactured and sold a wood composite exterior siding known as Inner-Seal. Tr. 136, App. 371.

**B. LP Promoted Inner-Seal To Lester.**

For decades prior to 1991, Lester used plywood as the exterior siding on its hog barns, with excellent results and without complaints. Tr. 148, 400-01, App. 374, 390-91. In 1989, however, LP approached Lester and recommended that Lester switch from plywood to Inner-Seal. In initial meetings, LP's salesman, Ken Root, touted Inner-Seal as "totally encapsulated with a resin," having "superior moisture resistance to plywood," and being less expensive than plywood. Tr. 734-35, 740-41, 753, App. 414-15, 416-17, 421. LP assured Lester that Inner-Seal had been fully tested and proven to be superior to plywood. It came with a "25-year warranty." Tr. 552, 735, 768, 775-76, 802, 920, 1175, App. 402, 415, 423, 425-26, 434, 450.

Over the next 18 months, LP made additional visits to Lester to persuade Lester to switch to Inner-Seal. At those presentations, LP provided Lester with written product descriptions that described the Inner-Seal product and set forth the 25-year warranty. Tr. 1486-88, App. 464-66; App. 518-32. Those materials repeated LP's prior promises that Inner-Seal, *inter alia*, is "exceptional in its ability to withstand moisture"; comes with "a 25-year guarantee"; and resists warping, buckling, splintering, splitting, and delamination. Tr. 459, 769, App. 396, 424; App. 521, 524-25, 529, 531.

To ensure that LP understood the use to which Lester would put Inner-Seal, Lester showed LP its plant and the process by which Lester manufactured its exterior wall units. Tr. 750-51, App. 418-19. Lester also took LP to farms to see Lester's buildings in use. Tr. 752, App. 420. Thereafter, LP advised Lester's purchasing manager that "we stand by what we told you before; this is the right product for your application." Tr. 753, App. 421.

By the spring of 1991, Lester was becoming convinced. Before switching from the plywood, however, Lester wanted to present Inner-Seal to its independent dealers. Tr. 1179, App. 451. Lester invited LP to its annual dealers' sales meeting to describe Inner-Seal and its warranties. At the meeting, LP repeated the representations that it had made to Lester concerning Inner-Seal's qualities, testing, and warranties and handed out the Inner-Seal product descriptions. Tr. 461, 1087, 1269, App. 397, 446, 457. When the dealers were skeptical, LP assured them that they had "nothing to lose" in trying Inner-Seal because Inner-Seal came with a 25-year warranty. Tr. 1087-88, 1270-71, App. 446-47, 458-59.

Lester and its dealers relied "very very heavily" on the representations and warranties LP made from 1989 to 1991 in deciding to purchase Inner-Seal. Tr. 740, 769, 776, 1179, App. 416, 424, 426, 451. In particular, during the course of these negotiations, Lester's President (Larry Hayes) and Lester's purchasing manager (Les Forman) explicitly asked LP about LP's experience with Inner-Seal in the field. LP told Lester that LP had experienced "no problems" with Inner-Seal and that the product was performing well in the field. Tr. 462, 754, App. 398, 422.

As a final check, by letter dated February 4, 1991, Lester asked LP to confirm that Inner-Seal was suitable for use in Lester's buildings. App. 533. By letter dated February 13, 1991, LP again warranted that Inner-Seal was fit for Lester's particular purpose, stating that Lester "would have no problems with this wall panel." App. 540.

From 1991 to 1996, Lester purchased millions of dollars of Inner-Seal and used it on approximately 2,600 hog barns and other buildings in Minnesota and elsewhere. Tr. 207, 800, App. 381, 427. Lester provided its own warranty to its customers with these buildings. App. 541-42. After Lester had been buying Inner-Seal for several years, reports appeared in trade publications about lawsuits against LP regarding Inner-Seal. Concerned, Lester's President (Larry Hayes) spoke with LP's CEO (Harry Merlo). Tr. 1186, App. 453. Mr. Merlo assured Mr. Hayes that the reported problems had "nothing to do" with the product Lester was using and Lester had "nothing to worry about." Tr. 1187, App. 454. Lester continued to buy Inner-Seal. Tr. 1187-88, App. 454-55.

**C. Inner-Seal Failed On Lester Buildings.**

In late 1995, Lester began to receive claims that Inner-Seal was failing on Lester's hog barns. Tr. 137, App. 372. Lester immediately notified LP, and the parties conducted joint inspections and agreed upon certain repairs. Tr. 823-24, App. 429-30. By late 1996, the number of claims received by Lester had reached such a critical mass that Lester stopped buying Inner-Seal. Tr. 836, App. 431. Lester switched back to plywood siding, which it again used without problems. Tr. 225, App. 384.

LP initially honored its warranties to Lester. From the time Lester first started receiving claims in late 1995 until September 1998, LP worked with Lester to repair and replace the rotting Inner-Seal on approximately 90 buildings. Tr. 151-52, App. 375-76.

In September 1998, LP abruptly stopped assisting Lester's efforts to replace defective Inner-Seal. Tr. 193, App. 378. LP advised Lester that LP had settled a class action involving Inner-Seal some three years earlier and that Lester should "send" its customers to seek recovery from the class settlement. Tr. 147, App. 373. Lester informed its customers of the existence of the class action settlement. Tr. 191, App. 377. That settlement, however, was not structured so as to solve Lester's problem or to mitigate its losses. In fact, the settlement made Lester's own business problems worse. Tr. 419, App. 394.

**D. LP's Class Action Settlement**

The Inner-Seal class action was filed on June 19, 1995 in Oregon federal court. On September 27, 1995, plaintiffs filed a Second Amended Complaint that invoked federal question jurisdiction, on the ground that LP had violated the federal racketeering statute (RICO), 18 U.S.C. § 1961, *et seq.* App. 240. The class action was quickly settled, and the proposed settlement was filed on October 18, 1995.<sup>4</sup> The settlement was a cozy arrangement between LP and class counsel, under which class counsel received \$26.25 million in fees even though only four months had passed since the initial filing of the

---

<sup>4</sup> This settlement was before any significant number of problems appeared on Lester's buildings.

complaint. App. 290. Further, during the settlement approval hearing, class counsel disclosed in response to questions from the court that the RICO claim (the sole basis for federal jurisdiction) had been “abandoned.” App. 240. Nevertheless, the federal court entered an Order, Final Judgment and Decree on April 26, 1996. App. 241.

The plaintiff class was defined as “[a]ll persons who have owned, own or subsequently acquire Property on which Exterior Inner-Seal Siding has been installed prior to January 1, 1996....” App. 287. Lester was not a party to the class action, (Tr. 2254, 2964, App. 494, 515), and the class action settlement provided no compensation or redress to Lester. App. 286. The class settlement did not bar or release Lester’s claims against LP. Tr. 2964, App. 515.

The settlement agreement stated that class members (owners of buildings with Inner-Seal) who did not file timely notices of exclusion (“opt out”) were to be barred from prosecuting claims for the defective Inner-Seal against, among others, any entities (like Lester) “involved in the distribution, installation, construction and first time sale of structures with Exterior Inner-Seal Siding.” App. 245. The class action settlement did not apply to, bar, or release: (1) claims of class members for defective Inner-Seal that failed after January 1, 2003; (2) claims of class members for Inner-Seal on buildings constructed after January 1, 1996; (3) claims by dealers, builders and erectors (who, like Lester, were not class members) for damages of any kind, including lost profits, money for out-of-pocket repairs, and other costs; (4) claims of class members who opted out of the settlement; (5) claims of class members who proceeded through the class action arbitration mechanism, where LP defended those claims on the basis of improper use or

installation of Inner-Seal by the builder; and (6) claims for personal injuries as a result of Inner-Seal failures. Tr. 2225, 2253-62, 2266-67, 2282, App. 488, 493-502, 503-04, 509; App. 207, 210-11, 215, 242, 247-48, 287.

The settlement agreement called for LP to pay, over 7 years, a minimum of \$275 million to create a settlement fund to pay claims as presented. App. 212. If the claims exceeded the amount funded, the settlement terminated for all other claims, though LP had an option to provide additional funding to pay those claims. App. 214-16.

From the standpoint of LP customers like Lester – who were not represented in the class action – the class action settlement was woefully deficient. Although LP did pay significant sums, those sums came nowhere close to correcting the damage LP caused. The claims for Inner-Seal failures from around the country vastly exceeded the amount of the originally funded settlement. Tr. 2133-35, 2229-30, 2269-72, App. 481-83, 489-90, 505-08. At the time of the Lester trial, thousands of claims for millions of dollars remained unsatisfied, and LP had not decided whether it would provide additional funds to settle more claims. Tr. 2133, 2256, App. 481, 496. Moreover, when class members did receive funds, the checks were but a small percentage of the damage. Tr. 419-20, 691, 1031-32, 1103-04, App. 394-95, 403, 443-44, 448-49. The checks did not even cover the cost of replacement materials (let alone the labor required to make the repairs). Tr. 127, 311-12, App. 370, 385-86. Not surprisingly, the class action was roundly criticized by class members and in the press. Tr. 127, 314, App. 370, 387.

**E. The Class Action Did Not Repair Lester's Customers' Barns.**

Neither the intent nor the effect of the class action settlement was to make Lester or its farmer-customers whole. For those few Lester customers who could and did seek compensation from the class settlement, the remedy fell far short of making them whole. Tr. 419, 691, 1032, 1103-04, App. 394, 403, 444, 448-49. Some received nothing (because LP rejected their claims or had not yet fully funded the settlement); some received amounts well below what they needed to repair their buildings. Tr. 420, 698, 711-12, 1031-32, App. 395, 406, 410-11, 443-44. The few Lester customers who received money from the settlement typically received only about one-third of their out-of-pocket expenses. Tr. 1031-32, App. 443-44. Possible consequential losses aside, Lester's customers were left holding "the bag" for the rest of their out-of-pocket costs of repairing the defective LP Inner-Seal on their Lester buildings.<sup>5</sup> Tr. 692, 711-12, 1031-32, App. 404, 411-12, 443-44.

The class action settlement provided no remedy for Lester's business injury. Lester's dealers and the farmers who had purchased Lester barns, based on Lester's representations and warranties, demanded that Lester repair those buildings. Tr. 147, 411, 692-93, 702-03, 712, 992, 1032, App. 373, 393, 404-05, 408-09, 411, 438, 444. References to a faraway class action were meaningless. The farmers had dealt directly with Lester, had warranties from Lester, and expected Lester to fix their barns.

---

<sup>5</sup> Of the \$11.2 million needed to repair the Inner-Seal on the subject buildings, Lester's customers, according to unsubstantiated testimony presented by LP at trial, received a mere \$640,000. Tr. 2812-14, App. 512-14.

Understandably, Lester's customers were upset when Lester and its dealers stated they did not have the resources to fix all the barns. Tr. 479-81, App. 399-401. Many customers stated emphatically that they would not purchase another Lester building unless and until the rotting Inner-Seal on their existing buildings was fully replaced:

I've had customers tell me what they're going to do if we don't take care of it, they're going to sue us. I've had customers tell me that if we don't take care of it they'll definitely never buy another Lester building from us.

Tr. 147, App. 373; *see further* Tr. 692-93, App. 404-05 ("Q: And how has your experience with Inner-Seal affected your willingness to buy Lester buildings in the future? A: I won't....I got left with the bag...I will not buy a Lester's barn...."); Tr. 712, App. 411 ("...it definitely has left a taste in my mouth that I really did not want to build another Lester building when we could not collect our warranty on the ones that we had today that we're having problems with."); Tr. 992, App. 438 ("Right at this time I wouldn't buy from them [Lester]...I mean it sounds like not too much is going to be done from what we can see at this point."); Tr. 1032, App. 444 ("[W]e've put up three buildings since [the Inner-Seal fiasco] and I haven't contacted a Lester's sales person to even get a price...[b]ecause I'm just very unhappy with the experience with those [Inner-Seal] buildings."). Lester recognized the business imperative in responding to its customers' demands. Tr. 147, 346-47, App. 373, 388-89.

**F. Lester's Business Was Ruined.**

Between 1999 and 2002, Lester's Inner-Seal problem grew ever worse. Inner-Seal failed frequently; Lester's customers were angry; LP refused to help; and the farmers' barns were not being repaired. Tr. 147, 411, 692-93, 712, 992, 1032, App. 373, 393, 404-

05, 411, 438, 444. The hog industry is tightly knit, and it is largely a “repeat customer” business. Farmers buy one building, and if satisfied, return to the same supplier the next time. Tr. 410, App. 392. Because Lester had sold buildings with defective siding, people who had been regular customers of Lester for decades switched to other suppliers. Tr. 195-96, 712-713, 992, 1032, App. 379-80, 411-12, 438, 444. The testimony at trial included accounts of farms with two or three older Lester buildings made with plywood (functioning well), a fourth building with Inner-Seal (rotting), and the fifth and latest building manufactured by a Lester competitor. Tr. 147-48, 480-81, 1032, App. 373-74, 400-01, 444.

As a result of selling thousands of barns with defective Inner-Seal, Lester’s once-fine reputation was sullied and its sales devastated. Tr. 1035, App. 445 (“the [Lester] reputation has been, I suppose in a polite word, substantially tarnished”); Tr. 715, App. 413 (“at one time Lester’s did have the reputation of being the real leader, that Cadillac so to speak, of the confinement building industry...and when that [Inner-Seal] panel failed...I think the industry...took note of that....”); *see also* Tr. 1699-700, App. 473-74 (Lester’s sales drop as a result of Inner-Seal was “devastating”). In the 1980s and early 1990s, Lester had experienced steady revenue growth in its hog business. Tr. 1570, App. 469. Once the Inner-Seal problem arose, however, Lester’s revenue from hog building sales dropped dramatically from \$15 million in 1998 to \$4 million in 1999. Tr. 1574, App. 470. Lester’s sales did not recover from the Inner-Seal debacle, and Lester was on the brink of ruin. Tr. 1734, App. 477. To stop future losses and to regain its business,

Lester had to repair the buildings with Inner-Seal and restore its customers' faith in Lester. Tr. 1685, App. 472.

Lester's president, John Hill, testified: "...I'm looking at this and saying Lester *in order for it to survive* needs to go out and fix these problems." Tr. 1734, App. 477

(emphasis added). He also testified:

A: ...[W]e're here because we want to fix these buildings and that's what we're going to do.

Q: Why?

A: ...[T]here's a business need for us to fix this because it is absolutely killing Lester. Lester will not survive over the long haul if it doesn't take care of this problem.

Tr. 1718-19, App. 475-76. Likewise, Lester's financial business and damages expert, Donald Gorowsky, explaining Lester's claim for the \$13.2 million in repair costs, testified:

Q: ...What's your view about the business need for Lester to do this repair and replacement program?

A: ...[T]he actual sales of Lester in its hog business and the actual profits of Lester...are such that with that level of sales and that level of profitability *they can not continue to sustain and be viable in the hog building industry without taking the actions...to repair the buildings*, to restore the customer's confidence in Lester buildings and in Lester standing behind its product.

Q: So you believe this business needs to do this?

A: There's a significant business need to do it....[M]y view is that it's critical to Lester's business, Lester's hog business, *for them to take these actions or they will no longer be in that business....*

Tr. 1685, App. 472 (emphasis added). The evidence presented at trial demonstrated that Lester suffered a very real injury to its business. The only way to fix or remedy that injury was for Lester to repair its customers' barns. But, Lester itself did not have the resources to make the repairs and, after repairing the first 90 or so barns, LP refused to honor its warranties to Lester and repair the buildings.

**G. LP Defrauded Lester.**

On May 11, 2000, Lester sued LP in McLeod County District Court. Through discovery, Lester learned that LP had not simply sold a defective siding but had intentionally misled Lester. LP's promises regarding testing were not true. Tr. 1759-60, App. 478-79. Further, at the same time LP was assuring Lester that there were "no problems" with Inner-Seal in the field, LP had in fact received thousands of claims of failure across the country, and LP had paid millions of dollars to settle failure claims. App. 534-39. Indeed, at the time, LP was being investigated by the Minnesota Attorney General for fraudulent trade practices because Inner-Seal failed to satisfy the very same product descriptions and warranties that LP was making to Lester. Tr. 983-85, App. 435-37. From 1986 to 1991, LP had received more than 2,500 Inner-Seal claims in Minnesota alone. Tr. 846, App. 432; App. 534. Lester's executives testified that they "absolutely" would not have switched from plywood to Inner-Seal if LP had told them the truth about the claims being received, or the millions LP had expended to settle these claims, or that it was being investigated by the Attorney General regarding Inner-Seal. Tr. 1180, 1217, App. 452, 456. Had LP simply told Lester the truth, Lester would not have needed to seek compensation to save its business.

**H. LP Failed To Honor Its Warranty Through The Class Action.**

At trial, LP made two anomalous arguments. First, LP argued that Lester was not entitled to recover damages to its business, such as lost profits and lost goodwill, because those damages were the result of a failure to mitigate because Lester had not repaired its customers' barns.<sup>6</sup> Tr. 106, App. 364. Throughout the trial, LP's counsel pointedly cross-examined Lester's witnesses to show that Lester should have regained its customers' confidence by repairing the defective Inner-Seal itself. For example, LP's counsel questioned Lester's customer, Wayne Kalenberg, as follows:

Q: (By LP Counsel): ...[I]f Lester had gone and said, you know what, we're going to take care of this, we're going to fix this issue ... would you in fact be more inclined to buy a Lester building in the future?

A: If they said that they were going to correct the problem I don't really care about their relationship with Georgia [Louisiana] Pacific or whoever it is.

\*\*\*\*

Q: And so, therefore, if they had fixed the problem, that would have been enough for you to consider Lester's future buildings, correct?

A: Yes.

Tr. 1003-04, 1013-14, App. 439-40, 441-42.

So, on the one hand, LP argued that Lester had a duty to mitigate its damages by repairing the Inner-Seal siding on its buildings. At the same time, however, LP also argued that Lester had no right to recover cost to repair damages because LP's settlement

---

<sup>6</sup> LP pled as an affirmative defense that Lester failed to mitigate its damages and the District Court charged the jury on mitigation of damages. App. 60.

of the class action in Oregon allegedly had extinguished Lester's customers' claims. App. 60. LP asserted the settlement as a defense to Lester's claims, even though Lester was not a party to the class action and received no money from the settlement, and even though the warranties LP breached were provided to Lester and the fraud was perpetrated upon Lester, not its end customers. Lester's warranty and fraud claims were not settled in the class action.

LP's class action defense, moreover, depended upon proof of certain facts. LP sought and obtained a jury instruction regarding the class action. The District Court properly told the jury that the class settlement did not apply to (a) buildings constructed on or after January 1, 1996, (b) buildings with a siding performance failure after January 1, 2003, and (c) buildings for which claims have not been paid and the class action settlement was not funded in August 2003. Tr. 2964, App. 515. Though vigorously seeking an instruction, LP presented remarkably little evidence at trial to support its alleged class action defense.

First, though LP argued that Lester's customers were within the class definition and had not opted out, LP did not introduce the opt-out list. LP merely presented unsubstantiated hearsay testimony from one of its employees, Vance Thomas, who testified from a summary document (that he did not prepare), regarding whether Lester's customers had opted out of the class action. Tr. 2810-11, App. 510-11. In assessing damages, the jury was not required to accept this testimony from LP's corporate representative.

More importantly, as the District Court instructed, LP's defense depended upon all failures occurring before January 1, 2003, thereby allowing the Lester customers to submit claims by the class action's January 1, 2003 deadline. Lester proved that there were more than 2,600 buildings to be repaired. Lester's expert, Dr. Albert DeBonis, testified that Inner-Seal was so inherently defective that it would eventually fail on each and every one of those Lester buildings. Tr. 1384-86, App. 461-63. In response, LP showed that perhaps as high as 90% of the 2,600 Lester buildings had not failed as of the time of trial in October 2002 (just three months before the January 1, 2003 cut-off). Tr. 701, 2997, App. 407, 516. Hence, by LP's own evidence, the settlement would not cover most of the buildings at issue in this case.

Third, at the time of trial, LP had not fully funded the settlement, which was a condition of a complete release. App. 292. LP's Chairman was asked directly whether LP was going to fund the settlement to address all outstanding claims. He told the jury that he had not made up his mind. Tr. 2134-35, App. 482-83.

Fourth, the class settlement provided no compensation to Lester's dealers, direct customers of Lester. The dealers were, like Lester, not members of the plaintiff class or otherwise parties to the class action. However, their business was just as devastated by the Inner-Seal fiasco as Lester's. For example, Debra Witt, one of Lester's builders, testified:

Q: Has the Inner-Seal problem had an effect on your business?

A: ...I get emotional about this because it does affect our business...and reputation. When we can't go back and offer anything to our clients to help other than to join a class action lawsuit that will only give them a small

piece of the amount of money that it would take to cover the repairs of that, it's embarrassing to us and it hurts. And as far as reputation, we are losing sales over this...we can't financially do the repairs...that we know need to be done.

Tr. 479-81, App. 399-401. The settlement offered Lester no release from such dealers' claims and they were free to sue Lester if it did not repair their mutual customers' buildings. Tr. 2282, App. 509; App. 242.

Finally, the uncontested evidence was that the class settlement did not remedy Lester's injury. The amount necessary to repair the buildings was \$13.2 million (of which \$11.2 million was for buildings at issue in this appeal). App. 100; Tr. 1558-59, App. 467-68. At most, the class settlement had paid Lester customers a mere \$640,000. In fact, LP's Chairman testified repeatedly at trial that he did not know whether *any* of Lester's customers had received *any* money from the class action, and if so, how much. Tr. 2143, 2155, 2157, App. 484, 486, 487. Lester had customers with rotting siding on thousands of Lester barns, demanding that Lester honor its warranties to them by repairing the buildings. If it did not do so, it could suffer complete collapse of its customer base and business. LP's class settlement provided no remedy for Lester's very real injury to its business caused by LP's misconduct directed at Lester. Tr. 1685, 1734, App. 472, 477.

#### IV. SUMMARY OF ARGUMENT

Relying on *DeGidio v. Ace Engineering Co.*, 225 N.W.2d 217 (Minn. 1974), the Court of Appeals vacated the \$11.2 million portion of the cost to repair damages award, holding that Lester could not recover those damages because LP's settlement of the class

action in Oregon precluded Lester from proving that it was legally liable to its customers to make the repairs.

The Court of Appeals erred. It is black letter law that the purchaser of a defective product (be it sold in breach of a warranty or fraudulently) is permitted to recover the cost to repair that product. Indeed, LP did not dispute Lester's right to recover \$2 million of the jury award for the cost to repair the Inner-Seal on Lester's customers' buildings constructed outside the time period covered by the class settlement.

The Court of Appeals' acceptance of LP's argument, that the foregoing general rule of law contains an implicit requirement of proof of legal liability to make the repairs, is not consistent with sound public policy or the case law and should not be the law in Minnesota. This Court in *DeGidio* did not limit recovery to only those resellers who could prove legal liability to their customers. Although *DeGidio* correctly recognizes that the existence of such a legal obligation supports recovery under the U.C.C., it does not establish that a legal obligation is a prerequisite to recovery. Most courts and scholars agree that when a company sells a defective product to its customers, and faces loss of that customer base and destruction of its business, it is entitled to repair the defective product at the manufacturer's expense.

The Court of Appeals' decision is also in error because the jury found, as a matter of fact, that LP failed to prove that the class settlement covered the buildings sold by Lester. The factual predicate for LP's argument and the Court of Appeals' decision is missing. Given LP's failure of proof at trial, it should not be entitled to prevail even if

this Court were to conclude that the existence of legal liability from Lester to its customers is a prerequisite for a cost of repair recovery.

## V. ARGUMENT

### A. Standard Of Review

The issue of law presented in this appeal is subject to *de novo* review. *American Nat'l Gen. Ins. Co. v. Solum*, 641 N.W.2d 891, 895 (Minn. 2002). The Court of Appeals' reversal of the Amended Judgment entered by the District Court is, in effect, a judgment notwithstanding the jury's verdict, which is reviewed *de novo*. *Edgewater Motels v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979).

### B. A Buyer Can Recover The Cost To Repair Defective Products.

The fundamental concepts that govern this appeal are well known. One of the most venerable principles in jurisprudence is that "where there is an injury, the law provides a remedy." See *Official Comm. of Unsecured Creditors v. Lafferty & Co.*, 267 F.3d 340, 351 (3d Cir. 2001). Consistently, under the Uniform Commercial Code ("U.C.C."), a buyer "may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." Minn. Stat. § 336.2-714(1) (2002). The damages include incidental and consequential damages. Minn. Stat. § 336.2-714(3) (2002). Where fraud is involved, the remedies for fraud include, at minimum, all statutory relief available for breach of warranty. Minn. Stat. § 336.2-721 (2002); *Lester Bldg. Sys. v. Louisiana-Pacific Corp.*, A03-48, 2004 WL 291998, at \*5 (Minn. Ct. App. Feb. 17, 2004).

The U.C.C. defines consequential damages broadly. Such damages include, among other things, “any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.” Minn. Stat. § 336.2-715(1) (2002). This breadth achieves the objective of the sound public policy that remedies for breach of warranty and fraudulent sale of defective products should be liberally administered. In *Jacobs v. Rosemount Dodge-Winnebago South*, this Court agreed with other courts and held that “an award based upon a bona fide effort to compensate for the consequences of the defects that established the breach of warranty is a remedy the U.C.C. seeks to provide.” 310 N.W.2d 71, 77-78 (Minn. 1981). The U.C.C. itself states initially that “[the] remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put *in as good a position as if the other party had fully performed....*” Minn. Stat. § 336.1-305(a) (2004) (emphasis added). *See also Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980) (to submit a claim for damages to jury, a plaintiff only needs to present evidence that provides a reasonable basis for their determination).

Consistent with the broad objective of making injured plaintiffs whole, it is black letter law that a buyer is entitled to recover the cost to repair a defective product that it purchased and resold. 67A Am. Jur. 2d Sales § 1193 (2003). Two Minnesota cases are apt. In *DeGidio*, 225 N.W.2d at 218-19, a heating contractor purchased furnaces that it installed in its customers’ buildings. When the furnaces proved defective, the heating contractor sued the manufacturer and recovered the amount it paid for the furnaces, installation costs, and a cost of repair. On appeal, this Court affirmed. In permitting this

recovery, the Court acted in accordance with the sound policy judgment that, even if such an award may expose the manufacturer to potential “double liability,” there is a strong public interest favoring full compensation for costs incurred from the sale of a defective product. *Id.* at 222.

Similarly, in *Ag-Chem Equip. Co. v. Ceram-Traz Corp.*, No. C9-95-2074, 1996 WL 229263 (Minn. Ct. App. May 7, 1996), Ag-Chem, a manufacturer of farm machines, sued a paint company because the paint Ag-Chem had applied to its machines and sold to its customers was defective. As here, Ag-Chem’s customers threatened to cease doing business with Ag-Chem unless it repaired the paint. The Court of Appeals held that plaintiff was entitled to recover the costs to repair the defective paint on its customers’ machines. *Id.* at \*3.

These Minnesota cases parallel those of other jurisdictions permitting a reseller to recover costs to remedy defective products sold to its customers. *See generally Step-Saver Data Sys. v. Wyse Tech.*, 912 F.2d 643 (3d Cir. 1990); *Mattingly, Inc. v. Beatrice Foods Co.*, 835 F.2d 1547 (10th Cir. 1987); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Woodbury Chem. Co. v. Holgerson*, 439 F.2d 1052 (10th Cir. 1971); *Tremco, Inc. v. Valley Aluminum Prods. Corp.*, 831 S.W.2d 156, 18 U.C.C. Rep. Serv. 2d 168 (Ark. Ct. App. 1992). *See also* J. White & R. Summers, 1 *Uniform Commercial Code* § 10-4 (5th ed. 2006) (collecting cases). Hence, the law in Minnesota and elsewhere is quite clear that a buyer (such as Lester) is entitled to recover from a manufacturer (such as LP), as an item of damages, an amount corresponding to the cost to repair defective products sold to third parties.

This basic rule of law has never been in dispute in this case. LP did not even appeal the jury's award of the \$2 million for the costs to repair the Inner-Seal on the hog barns constructed after January 1, 1996 – outside the time frame of the class settlement. LP paid that sum plus interest to Lester on May 7, 2004.<sup>7</sup> App. 174.

C. **A Buyer's Right To Recover The Cost To Repair Defective Products Should Not Be Conditioned On Legal Liability To End Customers.**

In reversing that portion of the jury's award that compensated Lester for the cost to repair hog barns owned by Lester customers allegedly within the plaintiff class, the Court of Appeals interpreted this Court's decision in *DeGidio* as holding that the U.C.C. permits a reseller to recover the cost of repairing a defective product *only* when that reseller establishes legal liability to its end customers. App. 189. This Court announced no such rule of law in *DeGidio*. Although the Court did note that the heating contractor in that case would have been liable to its customers to correct the defects, the Court did not hold that proof of liability to those customers was a prerequisite to the reseller's recovery. The question presented, therefore, is whether a party such as Lester, which has

---

<sup>7</sup> The jury also found that LP defrauded Lester. A defrauded party can, of course, recover damages that are directly caused by relying on the fraud or misrepresentation. 4 Minn. Prac. CIVJIG 57.25; J. David Prince, *Defective Products, Fraud and Misrepresentation Claims in Minnesota*, 29 Hamline L. Rev. 261, 299 (2006) (if a misrepresentation causes consequential economic losses – for example, lost business due to the unsuitability of the defendant's product for use in the plaintiff's production process – Minnesota courts will likely permit the injured plaintiff to be restored to the economic position it held before the misrepresentation); *B.F. Goodrich Co. v Mesabi Tire Co.*, 430 N.W.2d 180, 182-83 (Minn. 1988) (certifying that a defrauded plaintiff can recover the difference between the value of its business before and after it relied on the defendant's misrepresentation).

been fraudulently sold a defective product and faces the prospect of losing its customer base as a result of the resale of that product, has a right in Minnesota to recover the cost to repair that product in an effort to save its business and satisfy its moral obligation to its customers.

Turning first to the language of the U.C.C., as noted above, the remedies in the U.C.C. are intended to be “liberally administered” so that the aggrieved party may be put “in as good a position” as if the other party had performed. Minn. Stat. § 336.1-305(a) (2004). This Court has said that “an award based upon a bona fide effort to compensate for the consequences of the defects...is a remedy the U.C.C. seeks to provide.” *Jacobs*, 310 N.W.2d at 77-78.

In this case, Lester had for decades built its business and reputation as a seller of premium livestock containment buildings. Tr. 223-24, App. 383-84. This started to crumble when LP convinced Lester to switch from plywood siding to Inner-Seal on more than 2,600 hog barns. Through a series of written and oral warranties, LP assured Lester and its dealers that Inner-Seal was a proven, tested product, (Tr. 734-35, 740-41, 753, App. 414-15, 416-17, 421), and that they had “nothing to lose” because Inner-Seal came with a 25-year warranty. Tr. 552, 735, 768, 775-76, 802, 920, 1175, App. 402, 415, 423, 425-26, 428, 434, 450. Well, as recited above, Inner-Seal was not a proven, tested product. It was defective, and LP knew it. And, after purchasing and reselling LP’s Inner-Seal, Lester stood to lose everything. Lester had sold more than 2,600 barns with its own warranties, and the Inner-Seal siding was defective. Its farmer-customers made very clear that they would never buy another Lester building unless and until Lester

repaired the rotting Inner-Seal. Although the class settlement that forms the entire basis for LP's argument might lessen the risk that damages will be awarded against Lester in lawsuits brought by its customers, the class settlement did *nothing* to prevent Lester from suffering the enormous damage of losing as customers the owners of 2,600 defective hog barns, and of having its business deteriorate and collapse. Tr. 147, 346-47, 712, 992, 1035, App. 373, 388-89, 411, 438, 445.

To put Lester "in as good a position" as if LP had fully performed, as stated at Minn. Stat. § 336.1-305(a) (2004), or to "compensate [Lester] for the consequences" of LP's misconduct, as stated by this Court in *Jacobs*, 310 N.W.2d at 77-78, Lester had to be put in a position to be able to repair the defective Inner-Seal siding with a good and quality product. Any other result would leave Lester with grievous damage caused by, but not remedied by, LP. This is contrary to the "liberal administration" of remedies that underlies the U.C.C.

This common-sense construction of the U.C.C. is consistent with the views of the commentators and courts that have considered the issue. They favor full compensation to parties like Lester and eschew conditioning recovery on an artificial requirement of legal liability. Professors James J. White and Robert S. Summers in their leading treatise on the U.C.C. expressly recognize that consequential damages can arise from the resale of a manufacturer's defective product. Such damages can arise in the form of liability to third persons, but can *also* arise and be recoverable even absent legal liability to the end customer. *See* J. White & R. Summers, 1 *Uniform Commercial Code* § 10-4 (5th ed. 2006). To support this latter position, White and Summers cite *Woodbury Chemical Co.*

*v. Holgerson*, 439 F.2d 1052 (10th Cir. 1971). In *Woodbury*, the plaintiff's company engaged in the aerial spraying of herbicides. The plaintiff had purchased a herbicide from a chemical manufacturer, but contrary to the representations of the manufacturer, the herbicide failed to kill the specified types and amounts of weeds. The plaintiff sued the chemical manufacturer for the cost of respraying the ineffectively sprayed areas. The trial court found that the chemical manufacturer breached, *inter alia*, an express warranty regarding the effectiveness of the herbicide and awarded the plaintiff "an amount representing the cost plaintiff would incur in respraying the area." *Id* at 1053. The Tenth Circuit affirmed the damages award, holding:

There was testimony concerning the business of aerial spraying. From that testimony it is clear that respraying is the normal procedure when an applicator fails to get an effective kill. **There is no doubt from the record that the appellee will either respray the areas in question or he will be out of business.** Whether or not appellee is liable to respray is a question which goes to the measure of damages. 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.

*Id* at 1055 (emphasis added). According to White and Summers, this "holding has the virtue of recognizing practical obligations that require business persons to conform to custom and usage in their trade in order to stay in business." White & Summers, § 10-4.

Consistent with White and Summers, the Restatement (First) of Restitution, § 78 states that, as a matter of general common law, a plaintiff is entitled to restitution for a payment made to a third party if the plaintiff became obligated to that third party because of the fault of the defendant and payment was required by "business compulsion." In

comment f, the commentators made clear that the plaintiff is entitled to restitution for such a payment, even though “neither he [plaintiff] nor the primary obligor [the defendant] was under a legal duty to make the payment.” Restatement (First) of Restitution § 78 cmt. f.

Courts around the country likewise have recognized that the law (and particularly the U.C.C.) should not be a prisoner to arcane or abstract restrictions, but should reflect the business practicalities that govern modern commercial transactions. In *Step-Saver Data Systems, Inc v. Wyse Technology*, 912 F.2d 643, 653 (3d Cir. 1990), the Third Circuit held that a party may recover damages if business reasons practically require it to make the expenditures, even though it has no legal responsibility to do so. Speaking for the Court, Judge Becker explained: “Commentators have endorsed this approach because ‘it recognizes practical obligations that require a businessman to conform to custom and usage in his trade in order to stay in business.’” *Id.* (citing White & Summers, 1 *Uniform Commercial Code*, at 520 (3d ed. 1988)).

A similar rule was applied in *Tremco, Inc. v. Valley Aluminum Products Corp.*, 831 S.W.2d 156, 18 U.C.C. Rep. Serv. 2d 168 (Ark. Ct. App. 1992). There, the plaintiff, Tremco, sold gaskets to the defendant, Valley, for use in Valley’s window assemblies. Valley, in turn, sold its window assemblies to a major customer who installed them on two commercial buildings. The gaskets failed, but Tremco nevertheless sued for the unpaid balance of the purchase price. Valley filed counterclaims for breach of warranties. In addition to seeking direct damages, Valley sought lost profits and the costs of replacing the gaskets in its customers’ windows. The jury awarded Valley the

requested damages, including the cost to repair the windows in its customers' buildings. Valley's president, Jerry Brown, had testified at trial that his customer's president told him that Valley "would receive no further business from him as long as the gasket problem existed," and that, in fact, Valley had received no further business from this customer. *Id.* at 159, 18 U.C.C. Serv. 2d at \*6.

At trial and on appeal, Tremco challenged Valley's right to recover the costs to repair on the grounds that the costs were speculative because the repairs had not yet been made and because Valley was under no legal obligation to make the repairs. The Court of Appeals affirmed the damage award. It ruled that making the repairs was necessary to retain the customer and that "taking care of problems was necessary in order to survive in the business." 831 S.W.2d at 160, 18 U.C.C. Rep. Serv. 2d at \*7. In such circumstances, the Court held that the law should recognize the practical obligations that require a businessman to conform to custom and usage in his trade in order to remain in business. The Court's words were:

Professors White and Summers have expressed disapproval of the position taken by appellant that these damages are not recoverable in the absence of a legal obligation. 1 J. White & R. Summers, *Uniform Commercial Code* § 10-4 (3rd ed. 1988). Instead, the authors agree with the decision in *Woodbury Chemical Co. v. Holgerson*, 439 F.2d 1052 (10th Cir. 1971), . . . The authors favor this approach in that it recognizes practical obligations that require a businessman to conform to custom and usage in his trade in order to remain in business. We are also persuaded by this reasoning and find it applicable here.

*Id.*; see also *Mattingly, Inc. v. Beatrice Foods Co.*, 835 F.2d 1547 (10th Cir. 1987)

(affirming cost to repair damages and stating the trial court found a clear moral obligation on the part of the plaintiff to compensate the pool owners for their damages); *Coastal*

*Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1105 (4th Cir. 1980) (awarding reseller consequential damages for the cost to repair even though the end customer had merely threatened to make the repairs and bill the reseller).

In sum, LP's breach of warranty and fraud put Lester at risk of losing thousands of customers and its business if it did not repair the defective LP product. Permitting Lester to recover the costs of such repair would be responsive to business reality in modern commercial transactions and comport with the views of respected U.C.C. scholars and courts in other jurisdictions. It also furthers the sound public interest favoring repair of defective products by the manufacturer that put them in the stream of commerce. As explained above, this Court's ruling in *DeGidio* did not in fact reach the conclusion that the Court of Appeals attributed to it. This Court should not permit the misreading of that case to outweigh all of the legal authority just summarized and to deprive Lester of its right to recover full compensation.

**D. LP Did Not Prove The Class Action Settlement Precluded Lester's Legal Liability To Its Customers.**

Even if this Court were to conclude that Lester has no right to recover absent proof of legal liability (which Lester respectfully submits this Court should not do), the decision below still should be reversed because LP failed to prove that the class action settlement, in fact, protected Lester from liability. In its decision below, the Court of Appeals incorrectly *assumed* that the release in the class settlement "insulated Lester from claims made by Lester's class-member customers." App. 183. The defense of release, however, is an affirmative defense that LP had the burden of proving. App. 80;

*see generally* Minn. R. Civ. P. 8.03; *Bingham v. Chicago, M. & St. P. Ry. Co.*, 181 N.W. 845, 847 (Minn. 1921); *In re Grievance Arbitration*, No. CX-9701326, 1998 WL 73140, at \*3 (Minn. Ct. App. Feb. 24, 1998). LP did not carry that burden at trial, and the jury so found. The jury's finding was proper and supported by the evidence.

First, although the class action settlement documents purport to provide that the class members would release parties in the Inner-Seal distribution chain, that release would occur only under certain circumstances. LP did not prove that those circumstances existed here. The threshold requirement, of course, was that Lester's customers had to be class members. Any customers of Lester who were not class members could not possibly have given any release as part of the class action settlement. At trial, LP made the strategic decision not to present clear proof of which Lester customers were class members, but instead to argue that, by settling the class action, LP had "honored" its warranties to Lester and owed Lester nothing. This "all-or-nothing" strategy left the record bereft of credible evidence regarding which of Lester's customers, if any, were class members. Indeed, only with its final witness, Vance Thomas, did LP present *any* evidence regarding which of Lester's customers did or did not opt out of the class. Mr. Thomas testified as the "corporate representative" of LP, based on a summary document that he did not prepare, regarding whether Lester's end customers had opted out of the class action. Neither he nor LP ever introduced the opt-out list. Tr. 2810-11, App. 510-

11. The jury was free to accept or reject this self-serving conclusory evidence.<sup>8</sup> *Costello v. Johnson*, 121 N.W.2d 70, 76 (Minn. 1963); *Stuttgen v. Gipe*, 404 N.W.2d 10, 12 (Minn. Ct. App. 1987). Equally important, the Court of Appeals' assumption overlooks the critical fact that Lester's direct customers were largely its dealers. Those dealers were not building owners and were therefore not class members. As a result, Lester's liability to the dealers was not released. Those dealers suffered injuries that only could be remedied by repair, and they had the right to sue Lester and indeed threatened to do so. Tr. 195-96, App. 379-80.

Second, the settlement documents on their face do not apply to all building owners or all building claims. In particular, the settlement only applies to claims made prior to January 1, 2003. Hence, the settlement necessarily did not cover Inner-Seal failures that occurred after January 1, 2003. Tr. 2254-55, App. 494-95. At trial, Lester's expert, Dr. Albert DeBonis, testified that Inner-Seal was so inherently defective that it would eventually fail on every Lester building. Tr. 1384-86, App. 461-62. In response (and apparently in an effort to contest the issue of defect), LP presented evidence that as high

---

<sup>8</sup> As noted above, LP's Chairman testified that he did not know whether any of Lester's customers had received any money from the class action. Tr. 2143, 2157, App. 484, 487. Further, the jury heard testimony from Don Gorowsky, Lester's damages expert, a well-qualified accounting and financial expert, that he had not been able to determine which, if any, of Lester's end customers had received money from the class action or how much they had received. Mr. Gorowsky testified that the documents LP had given to Lester (presumably the same materials reviewed by someone on Mr. Thomas' behalf) did not allow him to calculate that figure. Tr. 1632, App. 471. The jury would have been well within its rights to conclude that if Mr. Gorowsky, with his skill and experience, could not do it, neither could LP.

as 90% of the 2,600 Lester buildings had not failed as of the time of trial in October 2002. Tr. 701, 1384-86, 2997, App. 407, 461-63, 516. This was a mere three months before the January 1, 2003 cut-off. The effect of this evidence (mostly presented by LP itself), for purposes of this appeal, was that the vast majority of the buildings at issue would not suffer failures before the January 1, 2003 deadline in the settlement documents and therefore would not be covered by the settlement or the release therein.

Finally, there is the crucial matter of LP fully funding the settlement. During the trial, Lester proved that LP had not provided complete funding for the settlement. Tr. 2133-35, 2269-72, App. 481-83, 505-08. For LP to have a viable release, LP obviously had to prove it would fund the settlement completely. LP did not do so. To the contrary, LP's Chairman on cross-examination admitted that he had not made up his mind whether to continue to fund the settlement. Tr. 2134-35, App. 482-83. Given that Lester proved that LP previously had breached an agreement with Lester to repair certain buildings, and the jury so found (App. 100), the jury also could have fairly concluded that LP ultimately would decide not to fund the rest of the settlement.

In short, totally apart from the legal issue regarding whether Lester's cost to repair recovery depends on the existence of a legal obligation from Lester to its end customers, the jury's verdict following the District Court's instruction concerning the class settlement reveals a fatal factual flaw in LP's position and the decision of the Court of Appeals. LP did not, and could not prove: (1) that all of the owners of the subject building were class members; (2) that the Lester buildings would have Inner-Seal failures within the time limits of the settlement; and (3) that LP would fully fund the settlement.

These were issues of fact that the District Court left to the jury to decide. Tr. 2964, App. 515. The jury rejected LP's defense based on the class settlement and thus found that the deficiencies in LP's proof precluded reliance on any such defense. There is no reason to disturb the jury's factual finding. The jury's award and the subsequent entry of the Amended Judgment should be affirmed.

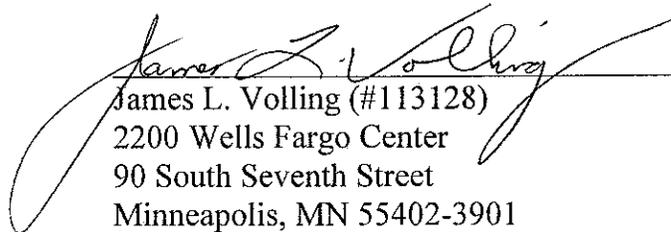
**VI. CONCLUSION**

For the foregoing reasons, Lester respectfully requests that this Court reverse the decision of the Court of Appeals and affirm the Amended Judgment below.

Respectfully submitted,

FAEGRE & BENSON LLP

Dated: May 15, 2008

  
James L. Volling (#113128)  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
Telephone: 612-766-7000  
Facsimile: 612-766-1600

and

Kell M. Damsgaard  
Brian W. Shaffer  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103  
Telephone: 215-963-5000  
Facsimile: 215-963-5001

Attorneys for Appellants Lester Building  
Systems and Lester's of Minnesota, Inc.