

WHILE SOME SERVICE-PLUS LEASE CLAUSES ARE LEGAL AND ENFORCEABLE, THOSE IN STEVEN MELDAHL'S LEASES PROBABLY ARE NOT.

The Covenants of Habitability

If a building is leased for commercial use the lease can require the tenant to do certain repairs or even all the repairs.¹ However, since 1971 if a house or apartment is leased for residential use the landlord has been required to maintain the unit and cannot make the tenant waive those rights. This is so because of a statute known as the Covenants of Habitability, [Minn. Stat. § 504B.161](#), originally enacted in 1971². Its first two subdivisions read as follows:

Subdivision 1. **Requirements.** (a) In every lease or license of residential premises, the landlord or licensor covenants:

(1) that the premises and all common areas are fit for the use intended by the parties;

(2) to keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee;

(3) to make the premises reasonably energy efficient by installing weatherstripping, caulking, storm windows, and storm doors when any such measure will result in energy procurement cost savings, based on current and projected average residential energy costs in Minnesota, that will exceed the cost of implementing that measure, including interest, amortized over the ten-year period following the incurring of the cost; and

(4) to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee.

¹ "At common law, in the absence of any covenant or agreement in the lease to repair, and where there is no fraud, misrepresentation, or concealment by the lessor, there was no implied warranty that the leased premises were fit for the purposes for which they were rented, or covenant to put them in repair or to keep them so." [Meyer v. Parkin, 350 N.W.2d 435,437 \(Minn. App. 1984\)](#) review denied (Minn. Sept. 12, 1984).

² [Minn. Stat. § 504B.161](#) was originally enacted as Minn. Stat. § 504.18 by [1971 Minn. Laws ch. 219](#). Since then it has remained intact except for changes irrelevant to this essay. First, the 1971 law did not include the energy-efficiency requirements, which were added by [1992 Minn. Laws ch. 376 art. 1 s. 3](#) and later amended by [2007 Minn. Laws ch. 136 art. 3 s. 5](#). Second, the 1999 recodification law, [1999 Minn. Laws ch. 199](#), made a few wording changes (e.g. changing "lessor" to "landlord"). However, the 1999 law was explicitly designed only to modernize and streamline language in the landlord-tenant statutes without changing the meaning of any statute. [Occhino v. Grover, 640 N.W.2d 357,362 \(Minn. App. 2002\)](#). The 1999 law also renumbered all the landlord-tenant statutes.

(b) The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section.

Subd. 2. **Tenant maintenance.** The landlord or licensor may agree with the tenant or licensee that the tenant or licensee is to perform specified repairs or maintenance, but only if the agreement is supported by adequate consideration and set forth in a conspicuous writing. No such agreement, however, may waive the provisions of subdivision 1 or relieve the landlord or licensor of the duty to maintain common areas of the premises.

[emphasis added]

Use of a Service-Plus clause to try to get around Minn. Stat. § 504B.161

Some residential landlords, usually those renting single-family houses, have tried to use subdivision 2 to shift repair of appliances and even sewer lines to the tenant. One of the main examples is Steven Meldahl, a major landlord in north Minneapolis. Meldahl is currently the defendant in a lawsuit filed by the Minnesota Attorney General. The lawsuit alleges that a variety of maneuvers by Meldahl are designed to evade his repair duties and other duties, and are violations of the Minnesota's Prevention of Consumer Fraud Act and other laws. The matter went to trial starting May 17, 2021.³

Part of the lawsuit involves this clause, which is in all of Meldahl's leases:

¶26 Tenant must carry the basic plan of Service Plus with CenterPoint Energy or a comparable policy with an appliance service company to cover the main sewer line and all appliances for the full term of the lease and the rental rate has been adjusted to compensate the tenant for this requirement.⁴

One such lease, the Meldahl-Martin lease, is displayed in [Appendix 1](#).⁵ Although it doesn't say so explicitly, ¶26 indicates that the tenant is required not just to buy Service Plus or a similar policy but to use it to fix the appliances and sewer line (hereafter, just "appliances") if they break down.⁶

³ MNCIS indicates the testimony part of the trial is over as of May 27.

⁴ Order on Cross Motions for Summary Judgment, *State by Ellison vs Meldahl*, Henn. Cty. Dist. Ct. File No. 27-CV-19-16424 at 3. All the pleadings in this case are on MCRO, available at <https://www.mncourts.gov/Access-Case-Records/MCRO.aspx>.

⁵ See Exhibit 2, pages 1-4, Affidavit of Nina Grove, dated Nov 4, 2020, *State by Ellison vs Meldahl*, Henn. Cty. Dist. Ct. File No. 27-CV-19-16424.

⁶ ¶26 makes no sense if the tenant is supposed to buy Service Plus but never use it. Some leases make this use explicit. E.g. this clause in another landlord's lease, "Tenant is required to pay for and maintain at all times the CenterPoint Energy Home Service Plus repair plan. Tenant will put repair plan in their name and have the ability/power to call CenterPoint directly should any issue arise with a covered item/appliance. Appliances required to be covered are Fridge, Water Heater,

The trial court entered partial summary judgment that the mere inclusion of this clause in the lease did not violate Minn. Stat. § 504B.161 but left for trial whether the clause is enforceable and whether it thereby represents part of Meldahl’s violation of the Consumer Fraud Act.⁷

Some Service-Plus clauses can be enforceable but not ¶26

The two prongs in Minn. Stat. § 504B.161, subd. 2 and its three technical phrases

Per the sentences in Minn. Stat. § 504B.161 which are underlined above, the residential landlord is ultimately responsible to maintain the appliances even if the tenant under ¶26 also were responsible for their repair. However, does ¶26 successfully require tenant maintenance of the appliances?

Minn. Stat. § 504B.161, subd. 2, has two prongs: [i] The “agreement” in ¶26 must be set forth in a “conspicuous writing”; and [ii] the “agreement” must be supported by “adequate consideration”.

None of these three quoted phrases – “conspicuous writing”, “adequate consideration” and “agreement” -- are defined in either [Minn. Stat. Chap. 504B](#) or [Minn. Stat. Chap. 645](#) (the chapter on construction of Minnesota statutes). The phrases clearly are technical terms and should be construed as such by using case law and legal dictionaries. [State v. Friese, -- N.W.2d – \(Minn. May 5, 2021\), fn. 2.](#)

Is ¶26 a “conspicuous writing”?

Pre-1971 law

As discussed above, the relevant language in Minn. Stat. § 504B.161, subd. 1-2 remains unchanged from the original language in 1971 Minn. Laws ch. 219. Therefore, the first place to turn is pre-1971 case law and pre-1971 law dictionaries.

[Black’s Law Dictionary \(2nd Ed. 1910\)](#) defined “conspicuous” as “Clearly noticeable, obvious.” For some reason, the next couple of editions had no definition of “conspicuous”. Then [Black’s Law Dictionary \(5th Ed. 1983\)](#) and subsequent editions have this definition:

Conspicuous term or clause. A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type

Furnace, Stove, W/D. Maintenance of appliances (excluding catastrophic failure unable to be repaired) is Tenants’ responsibility.”

⁷ Order on Cross Motions for Summary Judgment, *Ellison vs Meldahl*, Henn. Cty. Dist. Ct. File No. 27-CV-19-16424 at 13.

or color. But in a telegram any stated term is "conspicuous." A term or clause is conspicuous when it is written that a reasonable person against whom it is to operate ought to have noticed it. Whether a term or clause is "conspicuous" or not is for decision by the court. Uniform Credit Code, § 1.301(6); U.C.C. § 1-201(10).

[Boeing Airplane Company v. O'Malley, 329 F.2d 585,593 \(8th Cir. 1964\) \(appeal from Minnesota district court\)](#) interpreted a Pennsylvania statute, stating:

the "writing must be conspicuous". Here it is not so. It is merely in the same color and size of other type used for the other provisions and under the statutory definition of "conspicuous" [in the Pennsylvania UCC] fails of its purpose.

I'm unaware of any other pre-1971 Minnesota cases even partly on point.

¶26 is not open and obvious. Thus it is not "conspicuous" under the definition in the 1910 edition of Black's Law Dictionary.

Similarly, under the definitions in the later editions of Black's Law Dictionary and *Boeing Airplane* it is not "conspicuous". ¶26 is just one paragraph among many in the same color and typeface. Even though it is right above the signature block nothing calls it to the reader's attention, especially after she has read through twenty-five other paragraphs.

Post-1971 law

There is one post-1971 case construing "conspicuous" in section 504B.161 (then codified at Minn. Stat. § 504.18), [Wardin v. Maski, No. C4-97-2245, \(Minn. Ct. App. Aug. 18, 1998\) \(nonprecedential\)](#). The *Wardin* court held:

The lease provided that the respondents would maintain mechanical systems, but the district court found that the lease did not contain a "conspicuous indication" * * * to support [Wardin's] contention that [respondents] were obligated to perform specific repairs or maintenance." We agree that the maintenance provision was not specific and was not set forth in a conspicuous writing. The maintenance provision appears on page three of a six-page form lease and is written in the same typeface as the rest of the lease. [emphasis added].

Id., last paragraph of part II. Following *Wardin*, ¶26 is not conspicuous.

There are three Minnesota non-landlord-tenant, post-1971 cases that apply the same logic as *Wardin* in deciding whether language in a contract was conspicuous. [Wong v. Interspace-West, Inc., 701 NW 2d 301,304 \(Minn. Ct. App. 2005\)](#); [Agristor Leasing v. Guggisberg, 617 F. Supp. 902,909 \(D. Minn. 1985\)](#); [American Computer v. Jack Farrell Implement, 763 F.Supp. 1473, 1488 \(D.Minn.1991\)](#).

Thus, ¶26 in the Meldahl-Martin lease is not conspicuous.

Alternative factual situations

Certainly a landlord could include ¶26 in a lease but make it conspicuous by using bold lettering, capitalized lettering, or colored printing. She could have the tenant initial the paragraph as one of only a few initialed paragraphs, making it conspicuous.

In some of his leases, Meldahl himself made ¶26 conspicuous because he handwrote “612-333-6466” or “333-6466” to the left of the paragraph⁸; this is the phone number for the Service-Plus department of CenterPoint Energy. Since few other paragraphs have adjacent handwriting, in these leases the Service-Plus paragraph⁹ probably is “conspicuous”.

Thus some landlords use leases with language like ¶26 but make the language “conspicuous” and even some of Meldahl’s leases make ¶26 “conspicuous”. Whether this means in those cases that the “agreement” is supported by “adequate consideration” or that the “agreement” (as opposed to simply ¶26) is “set forth in a conspicuous writing” is discussed below.

Did Meldahl’s tenant receive adequate consideration in return for the Service-Plus requirement?

[Black’s Law Dictionary \(Rev. 4th ed. 1968\)](#) defined “Adequate Consideration” as “One which is equal, or reasonably proportioned, to the value of that for which it is given.” Subsequent editions also have this definition. There is one pre-1971 Minnesota appellate case applying this principle, [Husbyn v. Lunde, 283 Minn. 74,---, 166 N.W.2d 333,335 \(1969\)](#) (“To warrant specific performance of an oral contract to give real property by will, the contract . . . it must have been made for an adequate consideration and upon terms which are otherwise fair and reasonable;”)

The legislative history of 1971 Minn. Laws ch. 219¹⁰ makes clear that the legislature intended to require more than just some consideration from the landlord. The original bill required only “valid consideration” – something of value but not necessarily of equal value.¹¹ In committee,

⁸ See Exhibit 2, page 8, Affidavit of Nina Grove, dated Nov 4, 2020, *State by Ellison vs Meldahl*, Henn. Cty. Dist. Ct. File No. 27-CV-19-16424.

⁹ In some of the leases, “¶26” is numbered as paragraph 27 but is still the last paragraph.

¹⁰ Compiled at <https://birnberglegalwebsite.files.wordpress.com/2021/06/tm-appendix-4-legislative-history-of-1971-minn-laws-ch-219-504.18-.pdf>, Appendix 4

¹¹ “Valid” meant “Of binding force; legally sufficient or efficacious; authorized by law. Good or sufficient in point of law.” [Black’s Law Dictionary \(Rev. 4th ed. 1968\) \(citations omitted\)](#). So “valid consideration” meant just that the consideration was enough to form a contract, “something which the law regards as of value.” [Estrada v. Hanson, 215 Minn. 353,356, 10 N.W.2d 223, 225 \(1943\)](#).

the bill was amended to substitute “adequate consideration” for “valid consideration”. The amended bill was passed into law.

Has a tenant with the ¶26 lease received adequate consideration for having to purchase the Service Plus contract? The Minnesota Attorney General determined the monthly price for the Service Plus contract to be \$53.90.¹² The tenant also has to be home when CenterPoint’s repairwomen comes, typically meaning a half-day of work lost; if the landlord did the repairs that time would not be lost. There are likely some lost benefits from the [renter’s rebate](#) as well. Altogether, the tenant is likely out \$55-60 per month or \$660-\$720 for a one-year lease.

Conceivably Meldahl paid Martin or other tenants this amount or provided extra amenities worth about \$55 a month or otherwise compensated them similarly. There is nothing in the current record indicating this to be true but it could be true.

What is clear is that the final clause in ¶26, “the rental rate has been adjusted to compensate the tenant for this requirement”, by itself is legally irrelevant. Certainly if Meldahl had met with Martin and told her, “either you can rent this house for \$1160 per month and I’ll deal with appliance repair or you can rent this house for \$1100 per month and ¶26 will be in the lease and you must obey it” and then Martin chose \$1100 with ¶26 in the lease, that would have met the adequate-consideration requirement. However, that hypothetical negotiation seems unlikely.

If Meldahl just unilaterally decided to charge Martin \$1100 per month and include ¶26 in the lease, then there was no adequate consideration because there was no consideration. In a leading case, [Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533,538-39, 104 N.W.2d 661,665 \(1960\)](#), the Minnesota Supreme Court held:

Consideration requires that a contractual promise be the product of a bargain. ... Consideration thus insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation.

[emphasis added]. A couple of years later, the same court expanded on this rule, stating

The consideration for a promise, whether it be some benefit accruing to one party or some detriment suffered by the other * * * or something else * * * must be something which both parties to the contract have adopted and regarded as such.

¹² Complaint in *State by Ellison vs Meldahl*, Henn. Cty. Dist. Ct. File No. 27-CV-19-16424, at 5. The CenterPoint Service Plus website lists the cost of the cost of the Total Repair plan as \$46.95/month and the sewer-line add-on as \$7.95/month for a total of \$54.90/month, See <https://www.centerpointenergy.com/en-us/home-service-plus/plans/total-repair-plan> and <https://www.centerpointenergy.com/en-us/home-service-plus/plans/main-drain-emergency-cleaning-plan>. The AG’s complaint was filed in 2019 so the difference between \$53.90 and \$54.90 probably reflects CenterPoint’s raising its price to account for inflation.

[Cedarstrand v. Lutheran Brotherhood, 263 Minn. 520,535, 117 N.W.2d 213,222-223 \(1962\).](#)

Thus, assuming there was no bargaining over the Service-Plus clause, there was no consideration for it and thus no adequate consideration.

In the context of Minn. Stat. § 504B.161 the rule from *Baehr* is especially pertinent. Meldahl, like other landlords, took all his costs – appliance repair, other repairs, property taxes, mortgage interest, capital expenditure, management salaries, etc – into account when he set the rent. If a landlord can include a tenant-must-repair-his-own-appliances clause in the lease without compensating the tenant, he can include a tenant-must-repair-his-own-roof clause, a tenant-must-repair-his-own-toilet-and-bathtub clause, or a tenant-must-repair-his-own-everything clause in the lease and claim he set the rent accordingly. This would render Minn. Stat. § 504B.161 meaningless. Minn. Stat. § 504B.161 is only meaningful if the tenant is given a chance to bargain over any tenant-must-repair-his-own-thing clause and either accept the clause in return for adequate compensation or reject the clause and (perhaps) pay higher rent.

In summary, it is unlikely that Meldahl provided Martin or any of his other tenants adequate consideration in return for ¶26.

Would a conspicuous ¶26 make “the agreement” be “set forth in a conspicuous writing”?

Suppose ¶26 were made conspicuous with bold typeface and suppose that the tenant in question made an oral deal for adequate compensation. Would that mean that “the agreement is ...set forth in a conspicuous writing” within the meaning of Minn. Stat. § 504B.161, subd. 2? The answer depends on the meaning of “agreement”.

[Black’s Law Dictionary \(Rev. 4th ed. 1968\)](#) defined “Agreement” in part as “a coming together in accord of two minds on a given proposition; in law a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties”. The dictionary went on to state, “Although often used as synonymous with ‘contract,’ it is a wider term than ‘contract’. An agreement might not be a contract, because not fulfilling some requirement. [citations omitted]”¹³

Thus the “agreement” in Minn. Stat. § 504B.161, subd. 2 could be the contract – the landlord’s payment or other promise to the tenant in return for the tenant’s promise to buy Service Plus. Alternatively the “agreement” could be only the tenant’s promise to buy Service Plus. If the latter is the case, then “the agreement is ...set forth in a conspicuous writing” if ¶26 is conspicuous; if the former is the case, then “the agreement is” not “set forth in a conspicuous writing” even if ¶26 is conspicuous.

When I first read Minn. Stat. § 504B.161, subd. 2, my impression was that the “agreement” was only the tenant’s promise and not the entire deal. This came from the fact that the entire statutory phrase is “only if the agreement is supported by adequate consideration and set forth in a conspicuous writing”. If the “adequate consideration” means only the landlord’s consideration

¹³ The full definition is available via the indicated link on page 89.

then the only agreement that needs supporting is the tenant's promise. At the least, this is a reasonable reading of the subdivision.

On the other hand, the beginning of the subdivision reads "The landlord or licensor may agree with the tenant or licensee that the tenant or licensee is to perform specified repairs or maintenance". This phrase indicates that the "agreement" is bilateral. If the "agreement" were only the tenant's promise, then the subdivision would naturally read something like, "The tenant or licensee may agree to perform specified repairs or maintenance". So I think it is reasonable to read the subdivision as using "agreement" to mean the entire deal and not just the tenant's promise.

In other words, the subdivision is ambiguous and other canons of construction are needed to decide which reading is best.

One indication that the "agreement" in Minn. Stat. § 504B.161, subd. 2 means the contract (the entire deal) is that the subdivision is a sort of statute of frauds – a provision requiring a valid contract to not only be actually made but also reduced to writing. As to the actual Statute of Frauds, Minn. Stat. § 513.01, two pre-1971 cases held that the word "agreement" in section 513.01 meant "contract". [Hartung v. Billmeier, 243 Minn. 148, 152, 66 N.W.2d 784, --- \(1954\)](#); [Borchardt v. Kulick, 234 Minn. 308,323-324, 48 N.W.2d 318,-- \(1951\)](#).

Another factor to consider is that Minn. Stat. § 504B.161 is a consumer-protection statute.¹⁴ Consumer protection statutes are to be liberally construed in favor of protecting consumers. [State v. Alpine Air Products., 490 N.W.2d 888, 892 \(Minn. App. 1992\)](#), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

Also, ambiguous remedial statutes should be given a liberal construction. [S.M. Hentges & Sons, Inc. v. Mensing, 777 N.W.2d 228,232 \(Minn. 2010\)](#). One meaning of "remedial statute" is a law that provides a remedy for an existing right.¹⁵ Section 504B.161 does not do that. However, another meaning of "remedial statute" is a law that fixes gaps in the common law, reforms or extends existing rights, or has the purpose of advancing public welfare such as the protection of

¹⁴This seems pretty obvious but I also note the following: A consumer is someone "who buys goods or services for personal, family, or household use, with no intention of resale." [Black's Law Dictionary 395 \(11th Ed. 2019\)](#). The whole point of section 504B.161 is that the tenant is buying repair services; *accord*, [Love v. Amsler, 441 N.W.2d 555 \(Minn.App.1989\)](#) (a residential tenant's lease was a sale of real estate services). Thus the residential tenant is a consumer. A "consumer-protection" statute is a law "designed to protect consumers against faulty and dangerous goods." [Black's Law Dictionary 396 \(11th Ed. 2019\)](#). Since section 504B.161 protects the tenant from faulty goods such as broken appliances it is a consumer-protection statute. *Accord*, [Love v. Amsler, fn. 1](#). (The current version of Black's rather than the 1968 version is used because these are not definitions of words within Minn. Stat. § 504B.161.)

¹⁵[Black's Law Dictionary 1705 \(11th Ed. 2019\)](#); [50 American Jurisprudence, Statutes, Sec. 15](#). A Minnesota example is [Blankholm v. Fearing, 222 Minn. 51, 22 N.W.2d 853 \(1946\) \(statute governing venue of lawsuit\)](#).

the health and safety of society or of the public.¹⁶ Thus, Minn. Stat. § 504B.161 is not only a consumer protection statute but also a remedial statute. Indeed, there are at least three cases from other jurisdictions directly holding that a warranty-of-habitability statute is a remedial statute and thus was construed liberally to protect the tenant.¹⁷

Applying the liberal-construction canon from either *Alpine Air Products* or *Mensing*, if the landlord is allowed to introduce evidence of oral deals or obscure written deals, especially when he does so after the tenant challenges a Service-Plus clause, there is a good chance the landlord will shade the truth or at least leave the court guessing as to what deal was or was not made. The tenant is protected from this sort of problem (i.e. possible “fraud” as in Statute of Frauds) if the landlord is forced from the beginning to reduce the deal to a conspicuous writing, most likely in the lease itself. The landlord could use a lease that begins like this:

Landlord hereby leases to Tenant those said premises known as _____, Minneapolis, MN for a period of _____. Said tenants, in consideration of said lease, hereby covenant as follows:

¶1 {check and initial one of the two boxes}

_____ To pay in advance, without deductions or demand, a monthly rent of \$1,060 on the first day of each and every month. If this box is checked, ¶26 does not apply.

_____ To pay in advance, without deductions or demand, a monthly rent of \$1,000 on the first day of each and every month. If this box is checked, ¶26 applies.

Unfortunately the compiled written legislative history¹⁸ sheds no light on which of the two meanings the legislature meant by “agreement”.¹⁹ Recordings of the committee hearings might

¹⁶[*Black’s Law Dictionary* 1705 \(11th Ed. 2019\); 50 *American Jurisprudence*, Statutes, Sec. 15. Minnesota examples are *Radermacher v. St. Paul City Ry. Co.*, 214 Minn. 427, 8 N.W.2d 466 \(1943\) \(statute extends workers’ compensation coverage\) and *Christensen v. Hennepin Transportation Co. Inc.*, 215 Minn. 394, 10 N.W.2d 406 \(Minn. 1943\)\(statute extends liability to owner for negligence of driver who borrowed car\).](#)

¹⁷ [*Lacks v City of New York*, 156 Misc 2d 749, 751-752 \(N.Y. Cty. Sup. Ct. 1992\); *Leris Realty Corp. v Robbins*, 95 Misc 2d 712,714-715 \(N.Y. Cty Civ. Ct. 1978\); and *Anderson v. Ballard*, 6th Dist. Lucas No. L-10-007, 2010-Ohio-3926, ¶39.](#)

¹⁸ Compiled at <https://birnberglegalwebsite.files.wordpress.com/2021/06/tm-appendix-4-legislative-history-of-1971-minn-laws-ch-219-504.18-.pdf>, Appendix 4

¹⁹ Footnote 13 in the prior version of this essay said that there were still two items I planned to look at once I can get an appointment at the Gale Library of the Minnesota History Museum. I did so on June 4, 2021. Box 151.F.11.7B, the one possible hopeful box of Senator Nick Coleman’s files (from the right years and with a file labeled “Housing”) had nothing re 1971 SF 502. Box 129.C.1.9B did have committee minutes and other committee materials for the Senate Judiciary Committee for the relevant period. However, there was no mention of 1971 SF 502.

well have shed light but those recordings were long ago discarded by the Gale Library. I did ask the chief House author, former State Rep. Thomas Berg what he recalled; unsurprisingly, given that the bill was passed 50 years ago, he said he had no recollection one way or the other.

A “simple” solution is for the legislature to amend Minn. Stat. § 504B.161, subd. 2 to clarify exactly what must in the conspicuous writing. Of course, getting the legislature to enact any law, especially a divided legislature, is never simple. In the meantime, courts will have to decide this issue. As discussed above, I think the better ruling is that “agreement” includes the entire deal, not just the tenant’s promise.

Model Code

Reading the *Model Residential Landlord-Tenant Code* indicates it very likely was a starting point for the drafters of 1971 Minn. Laws ch. 219. Also, as discussed in my prior blog post, the same House author clearly relied on the Code two years later when he sponsored the security-deposit law that is now Minn. Stat. § 504B.178. However, I cannot see anything in the Code that helps resolve the statutory-construction questions discussed above. Perhaps others, more perceptive than me, can. Therefore I provide [copies of the relevant pages from the Code in Appendix 2.](#)

Service-Plus cases in trial courts

As part of their summary-judgment-motion papers, both sides in *State by Ellison v. Meldahl* submitted copies or partial copies of previous trial court decisions dealing in small part with the Service-Plus issue.²⁰ I’ve gathered these in [Appendix 3](#). In all these orders the analysis of the Service-Plus issue was cursory.

The *Bloodsaw* order submitted by Meldahl (Appendix 3a) was actually only two pages of a much longer order. The entire analysis was, “The Lease, by its terms, provides adequate consideration, set forth in a conspicuous writing, for tenant to have the Service Plus agreement.” *Bloodsaw*, paragraph 34. Unless the referee was reading a different lease than the one discussed above or the missing pages have important facts, this is just wrong.

The entire analysis in the *Jones* order issued by Referee Labine and submitted by Meldahl (Appendix 3b) was, “Since the lease requires Tenant to carry a service plus plan with Centerpoint energy to cover appliance repairs, the court will not require Landlord to address any repair issues with the stove at this time.” *Jones/Labine*, paragraph 18. This “analysis” did not even consider the requirements of Minn. Stat. § 504B.161. As indicated in the subsequent order

And, there were indeed no materials from any of the subcommittee meetings. Since Rep. Berg stated in the House Judiciary Committee hearing that his amendment conformed to the amendment made to the companion file in the Senate “subcommittee”, it seem likely that any paper record of that subcommittee’s hearing of 1971 SF 502 are no longer available..

²⁰ Order on Cross Motions for Summary Judgment, *Ellison vs Meldahl*, Henn. Cty. Dist. Ct. File No. 27-CV-19-16424 at 3-4, footnote 4.

on judge review, submitted by the State (Appendix 3c), Referee Labine's order was reversed and remanded and a trial on all the habitability issues ordered. Although the judge's order did not specifically address the Service-Plus clause, that issue was part of the tenant's habitability defense.

The entire analysis in the *Meldahl v. [Redacted]* order issued by Referee Houghtaling and submitted by the State (Appendix 3d) was, "38. Tenant alleged she has been required to pay for Service Plus and has been paying for such a service. Tenant provided no proof of actual payment but all appliances are owned by Landlord and such a requirement is a violation of Minn. Stat. § 504B.161, subd. 1. 39. Tenant shall not be required to maintain Service Plus related to appliances owned by Landlord." *Meldahl v. [Redacted]* at 4.

I've been unable to locate any other trial court orders on the issue, involving either Meldahl or other landlords. Of these four Meldahl orders, the last one, ruling for the tenant, is probably dicta and does not discuss Minn. Stat. § 504B.161, subd. 2, only subdivision 1. The first order, issued by Referee Labine and ruling for Meldahl, is a holding but has little analysis and only part of the order was provided by Meldahl. The second order issued by Referee Labine and ruling for Meldahl has no analysis and was reversed on judge review. Viewed as a whole, these orders prove only that Referee Labine thought ¶26 was okay and Referee Houghtaling did not, while neither provided any meaningful analysis of the application of Minn. Stat. § 504B.161, subd. 2 on ¶26.

Effect of a valid Service-Plus clause

As discussed above, it is possible for a landlord and her tenant to agree to a Service-Plus provision enforceable under subdivision 2 of Minn. Stat. § 504B.161. If so, then how do the non-waiver clauses in section 504B.161 apply?

Those clauses state: "The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section. [subdivision 1(b)]" and "No such agreement, however, may waive the provisions of subdivision 1 or relieve the landlord or licensor of the duty to maintain common areas of the premises. [subdivision 2, second sentence]"

In [*City of Minneapolis v. Ellis*, 441 N.W.2d 134 \(Minn. Ct. App. 1989\)](#), review denied (Minn. July 12, 1989), "the stipulated facts showed that appellant [the landlord, Ellis] and the tenants did agree in writing that the tenants would replace broken glass and torn screens during the term of the lease." *Id.* at 137-138. Nevertheless, the city served Ellis with an order to repair the glass and screens and he was convicted for not doing so. The Court of Appeals affirmed his conviction because "the ultimate responsibility for compliance with subdivision 1 remains with the lessor/licensor". *Id.* at 137-138.

The 1971 legislative history of section 504B.161 supports the ruling in *Ellis*. The original bill did not include the second sentence of Subdivision 2; the amendment, incorporated into the law, did include it. The legislature made sure that subdivision 2 did not provide a loophole around the non-waiver clause in subdivision 1.

So what does an enforceable Service-Plus clause do for the landlord? At a minimum, if he has to repair the appliances, he can sue the tenant for breach of contract for the money and time he spent on repair. He also has a claim against the security deposit since this would be money owed pursuant to the lease. [Minn. Stat. § 504B.178 subd. 3\(b\)\(1\)](#).

Perhaps the landlord can evict the tenant for materially breaching the lease by not purchasing Service Plus. If the eviction case is brought before any appliance repairs are needed, the tenant might have the right to redeem his tenancy by purchasing Service Plus and paying court costs. [American Land Real Estate Investment Corporation v. Pokorny, File No. CO-90-1649 \(Minn. Ct. App. Dec. 18, 1990\) \(nonprecedential\)](#). In *Pokorny* the tenants breached their lease by not paying for renters' insurance as required by the lease. The court affirmed the trial court's order that this was effectively a form of nonpayment of rent and allowed the tenants to retain their tenancy upon redeeming by paying the unpaid insurance premiums plus court costs. If the landlord has had to repair appliances and then sues to evict, perhaps it is too late to cure the breach or perhaps the tenant can redeem by paying for the repair costs + Service Plus + court costs.

As discussed above, Minn. Stat. § 504B.161 was modeled in part on Section 2-203 of the *Model Residential Landlord-Tenant Code*. The comment to that section states, "In neither case can a failure by the tenant [to make repairs he agreed to make] be relied on as grounds for termination of the lease." *Id.* at 47. This provides the tenant with additional ammunition to fight eviction.

Conclusion

The Service-Plus clauses in Meldahl's leases are very likely unenforceable under Minn. Stat. § 504B.161, subd. 2. When courts deal with other leases, they need to carefully determine [i] whether the lease clause is actually conspicuous and not simply readable; [ii] whether the tenant actually had a choice of agreeing to the clause and received something of comparable value (adequate consideration) for agreeing; and [iii] whether the agreement for that adequate consideration needed to be conspicuous and if so was it conspicuous.

The third issue involves an open question – does the bargained-for contract, the tenant's duty to sign up for Service Plus in return for compensation have to be reduced to a conspicuous writing? The legislature could resolve this question by amending the statute.