STATE OF MINNESOTA

IN SUPREME COURT

A17-1608

Court of Appeals | Thissen, J.
Dissenting, Hudson, J., Gildea, C.J.

Jill Hansen et al.,

Appellants,

vs.

Filed: September 25, 2019
Office of Appellate Courts

U. S. Bank National Association, as Special Administrator and Personal Representative of the Estate of Robert J. Hansen,

Respondent.

Richard W. Huffman, James T. Smith, Huffman, Usem, Crawford & Greenberg, P.A., Minneapolis, Minnesota, for appellants.

David F. Herr, Martin S. Fallon, Leora M. Maccabee, Jesse D. Mondry, Maslon LLP, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. An appellate court's review of a decision to grant a motion to dismiss under Minn. R. Civ. P. 12.02(e) on the ground that a claim is barred by a statute of limitation is de novo and limited to the facts set out in the complaint. All facts must be construed in favor of the nonmoving party.

2. Under the "some damage" rule of damage accrual, damage can consist of harm that causes "financial liability" or harm that causes "the loss of a legal right." Financial harm results in some damage when the resulting liability is immediate, concrete,

compensable, noncontingent, and at least partly ascertainable. Harm taking the form of the loss of a legal right results in some damage where the wrongful conduct allowed the claimant's legal rights to be adversely, immediately, and irredeemably changed involuntarily.

3. The allegations of the complaint did not establish that appellants suffered some damage in the form of a loss of a legal right, but did establish that appellants suffered some damage in the form of financial harm in August 2012, when the Estate—and by extension, appellants—stopped receiving payments on its subordinated Note. The district court erred by granting the motion to dismiss because respondent failed at this stage in the proceedings to establish that appellants suffered some damage before August 2012.

Reversed and remanded.

O P I N I O N

THISSEN, Justice.

This case presents a statute of limitations question requiring us to revisit the "some damage" rule of accrual used to evaluate when the statute of limitations begins to run in Minnesota. Appellants Jill Hansen and Leif Layman appeal from an unpublished decision of the court of appeals affirming the district court's dismissal of their complaint against respondent U.S. Bank on statute of limitations grounds. Because U.S. Bank failed to establish based on the pleadings that appellants suffered "some damage" in the form of financial harm before August 2012—less than six years before appellants filed their lawsuit—the district court erred by granting the motion to dismiss. We therefore reverse

the decision of the court of appeals and remand to the district court to reinstate the complaint and for further proceedings.

FACTS

Jill Hansen is the daughter of the late Robert J. Hansen. Leif Layman is the son of Jill Hansen and the grandson of Robert J. Hansen. Both are beneficiaries of Robert J. Hansen's Estate (the Estate). We will refer to Jill Hansen and Leif Layman as the "Beneficiaries."

On or about August 18, 2009, Robert Hansen and his brother, Bryan Hansen, negotiated a purchase agreement to sell certain real property located in Vadnais Heights to Community Facilities Partnership of Vadnais Heights, LLC (CFP) to be used for a community sports complex. In the original purchase agreement, CFP agreed to pay the Hansens $2.5 million in cash at closing and give the Hansens a $2 million tax-exempt subordinate nonrecourse 30-year note (the Note) issued by the City of Vadnais Heights and bearing interest at a rate of eight percent per annum, payable semi-annually. Payments on the Note were to be made by CFP or its designated payer using anticipated revenue from the sports complex.

On November 22, 2009, Robert Hansen died. In the probate action for Robert Hansen's estate, Ramsey County District Court appointed U.S. Bank, along with Barbara Pagel (Robert's widow), as co-Special Administrators of the Estate to supervise and oversee the closing on the sale of the land to CFP. In early April 2010, CFP, Bryan Hansen, and the Estate's Special Administrators amended the purchase agreement. The amendments changed the terms of the Note from "tax-exempt" to "taxable." The

amendments also increased the cash payment due at closing to $2,625,000 to compensate for the change in taxable status. And the interest rate on the Note was increased from 8 percent to 8½ percent.

The April 2010 amendments also altered several provisions in the purchase agreement. Specifically, the amendments changed section 2.D, entitled "Terms of the Note," to require the following:

> Prior to closing, an independent certified public accounting firm or financial professional selected by Seller shall forecast more than enough net operating income is expected to pay the debt service on all improvements and on all Tax-Exempt and Taxable Bonds and Taxable Notes applicable to this Project, its operation, and the property retained by the Buyer herein.

The amendments also modified section 10 of the purchase agreement, entitled "Obligations of Buyer at Closing," to read as follows:

> At Closing, Buyer shall master lease the Project to the City [of Vadnais Heights] for a rent which the City shall pay which shall be sufficient in amount to pay all Project operating expenses and all principal and interest payments under the Series A, B and C Bonds and the Taxable Subordinate Note payable to Seller.

The amendments did not change Section 10(A)(ii) of the purchase agreement, which required CFP to

> provide Seller with . . . (ii) a five-year compiled financial forecast prepared by an independent firm of certified public accountants or other independent financial consultant which shows that projected net operating income of the Project is more than the amount necessary to pay the debt service on the Buyer's financing for such improvements and the debt service on the Bonds and the Note.

These provisions form the core of the statute of limitations dispute now before us. The Beneficiaries allege that U.S. Bank, acting as a co-Special Administrator for the Estate,

never obtained any of the required financial forecasts or revenue assurances and failed to require CFP to master lease the property to the City of Vadnais Heights.

The transaction closed on April 27, 2010, and the Estate received its share of the $2,625,000 initial payment as well as the $2 million Note as consideration for its interest in the land. The Note was a non-recourse revenue note that contained no obligation on the part of the City of Vadnais Heights to pay for the debt out of its general funds. Furthermore, the Note was explicitly subordinated to $24,700,000 in other bond commitments involved in the construction of the sports complex. The first payment on the Note was scheduled to occur in February 2011.

Just three days after closing, on April 30, 2010, U.S. Bank and Pagel were discharged as co-Special Administrators, but contemporaneously appointed as co-Personal Representatives of the Estate. The Beneficiaries allege that, several years after closing, they discovered that two financial reports or forecasts for the project's anticipated revenue had been prepared and provided to CFP and/or the City. Each document purportedly showed that the revenue projections relied upon unsupported revenue commitments and therefore were overstated. Between 2010 and 2012, the sports complex suffered revenue shortfalls. CFP started making payments on the Note in February 2011 as agreed. But in August 2012, the City of Vadnais Heights stopped financial support of the sports complex and the Estate stopped receiving payments on its Note.

On January 24, 2017, the Beneficiaries sued U.S. Bank, alleging breach of fiduciary duty and unjust enrichment.[1] The Beneficiaries allege that U.S. Bank breached its fiduciary duties to them by failing to (1) require CFP to provide financial forecasts; (2) select an independent certified public accounting firm/financial professional to forecast sufficient operating income; (3) require CFP to show a lease with the City of Vadnais Heights sufficient to maintain payments on the Note; and (4) hold itself liable, as a Personal Representative of the Estate, for its three previous failures.

U.S. Bank did not serve an answer. Instead, on April 20, 2017, U.S. Bank moved to dismiss the complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief could be granted. U.S. Bank asserted, among other things, that the Beneficiaries failed to satisfy the applicable six-year statute of limitations. *See, e.g.*, Minn. Stat. § 541.05 (2018). U.S. Bank's argument rested solely on the fact that the alleged breaches of fiduciary duty occurred before the 2010 closing, more than six years before the lawsuit. U.S. Bank did not identify any specific damage that occurred in 2010 connected with those breaches. The Beneficiaries responded that they had suffered damages no earlier than August 2012, the date that the Estate stopped receiving payments on its Note, which was less than six years before the date that they filed suit.

The district court granted U.S. Bank's motion to dismiss on statute of limitations grounds. It held that, under Minnesota's "some damage" accrual rule, the Beneficiaries

[1] The district court dismissed the unjust enrichment claim and the court of appeals affirmed that decision. *Hansen v. U.S. Bank Nat'l Ass'n*, No. A17-1608, 2018 WL 3213105, at *5 (Minn. App. July 2, 2018). The Beneficiaries did not seek review of that decision.

incurred some damage on April 27, 2010, when U.S. Bank closed on the sale of the property without, allegedly, performing its required due diligence. The district court did not identify any damages suffered by the Beneficiaries upon closing. Nevertheless, the district court held that the Beneficiaries could have raised claims against U.S. Bank in April 2010, more than six years before this action was commenced.

The court of appeals affirmed. *Hansen v. U.S. Bank Nat'l Ass'n*, No. A17-1608, 2018 WL 3213105 (Minn. App. July 2, 2018). Regarding the breach of fiduciary duty claim, the court reasoned that "when the sale of the property closed without the required forecast[s,] . . . [the Beneficiaries] reached the 'point of no return' because they lost the opportunity to demand the forecast, to renegotiate the terms of the purchase agreement, or to cancel the purchase agreement." *Id.* at *4 (quoting *Antone v. Mirviss*, 720 N.W.2d 331, 337 (Minn. 2006)). Although the precise amount of damages was not ascertainable, the court noted that "some damage" occurred on April 27, 2010, and therefore the statute of limitations began running on that date. *Id.*

We granted the Beneficiaries' request for review on the question of when the statute of limitations began to run on their breach of fiduciary duty claim.

ANALYSIS

I.

This case comes to us on an appeal from the district court's grant of a motion to dismiss for failure to state a claim for which relief can be granted. Minn. R. Civ. P. 12.02(e). The district court determined that the Beneficiaries' breach of fiduciary duty claim was barred because the complaint was filed on January 24, 2017, more than six years

after the statute of limitations expired.[2] Our review of whether a complaint has stated a claim sufficiently to survive a motion to dismiss is de novo. *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 831 (Minn. 2011) ("The procedural posture of this case—review of the grant of a motion to dismiss—also dictates that we apply a de novo review." (citation omitted)). To determine whether a plaintiff's claim survives a motion to dismiss, we look only to the facts alleged in the complaint, accepting those facts as true. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). We construe all reasonable inferences from the facts in favor of the plaintiff. *Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 429 (Minn. 2014).

When a motion to dismiss is based on the running of a statute of limitations, we have followed this same general rule: look to the facts alleged in the complaint, accept those facts as true, and construe inferences from those facts in favor of the plaintiff. *Park Nicollet Clinic*, 808 N.W.2d at 833–34. Drawing plaintiff-favorable inferences from the allegations in the complaint when a motion to dismiss is based on the statute of limitations, however, is different than drawing inferences in a more typical case when a motion to dismiss is based on the assertion that the complaint substantively fails because the plaintiff did not plead sufficient facts to support a required element of the claim.

In the latter case, construing the allegations in the complaint in favor of the plaintiff means that a motion to dismiss should be denied if the court can infer from the allegations

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[2] We have never explicitly decided the specific statute of limitations period applicable to breach of fiduciary claims. Because the parties do not dispute that a six-year limitation applies, we accept that limitation period without deciding the question.

a factual basis to support each element of the plaintiff's claim. We have said that "a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963) (noting that because the only factual information on a motion to dismiss is that which is disclosed by the pleadings as a whole, the dismissal function is "extremely limited")); *see also Finn v. Alliance Bank*, 860 N.W.2d 638, 653 (Minn. 2015). Stated another way, at the preliminary motion to dismiss stage of litigation, a court should construe the complaint to allow the plaintiff's claim to go forward unless there is no way to construe the alleged facts—and the inferences drawn from those facts—in support of the plaintiff's claim.

An assertion that the statute of limitations bars a cause of action is an affirmative defense and "the party asserting the defense has the burden of establishing each of the elements." *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). In that context, a motion to dismiss should be granted only when it is clear from the stated allegations in the complaint that the statute of limitations has run. We will not make inferential leaps in favor of the defendant to conclude that a lawsuit is time-barred.[3] Federal

[3] Of course, we do not hold that a defendant can never prevail on a motion to dismiss under Rule 12.02(e) based on the running of the statute of limitations. There are cases where the factual allegations asserted on the face of the complaint demonstrate that the complaint was filed too late. For instance, in *Park Nicollet Clinic*, we addressed a motion to dismiss, among others, a claim for breach of an employment contract brought sometime after February 2008. 808 N.W.2d at 832–33. A breach of employment contract claim is subject to a two-year statute of limitations and requires proof of three elements: (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his

courts take a similar approach when addressing a motion to dismiss on statute of limitations grounds under the analogous federal rule, Fed. R. Civ. P. 12(b)(6). *See Joyce v. Armstrong Teasdale, LLP*, 635 F.3d 364, 367 (8th Cir. 2011) ("As a general rule, 'the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense.' " (quoting *Jessie v. Potter*, 516 F.3d 709, 713 n.2 (8th Cir. 2008))).

Accordingly, to prevail at this stage of the proceedings on its motion to dismiss, U.S. Bank must establish—based solely on factual allegations stated in the complaint and

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right to demand performance by the defendant, and (3) breach of the contract by defendant. *Id.* at 833 & n.5 (observing that the plaintiff did not have to allege that the breach caused damages in order to state a claim for breach of employment contract). The employer argued that the claim accrued in 2005 and consequently should be dismissed on statute of limitations grounds. *Id.* at 832–33. To determine whether the district court correctly dismissed the claim, we looked to the allegations clearly stated in the complaint:

> As to the first element, the complaint alleges that a contract was formed in 1995, when Park Nicollet adopted the Policy. The complaint alleges that as of April 2005, Hamann met the criteria set out in the Policy, which satisfies the second element of a breach of contract claim. The complaint also alleges the existence of the third element—the breach—as of April 2005. Hamann asserts that in April 2005, Park Nicollet breached the contract when Hamann "asked Park Nicollet to honor its promises and allow him to be exempt from night call without salary reduction." In response to his request, the complaint alleges that "Park Nicollet refused to honor its agreement, declaring that the Policy no longer existed." The allegation of the April 2005 breach is confirmed elsewhere in the complaint when Hamann alleges that he was told in April 2005 "for the first time that the Policy no longer existed[, that it] would no longer be honored," and "that he had to continue to take OB night call and . . . his salary would be cut if he refused."

Id. at 833 (alteration in original). We concluded that "*[b]ecause the allegations of the complaint establish* that as of April 2005, Hamann's breach of contract claim would have survived a motion to dismiss, the statute of limitations applicable to the claim began to run in April 2005." *Id.* at 833–34 (emphasis added).

inferences from those factual allegations construed in the plaintiff's favor—that the Beneficiaries' breach of fiduciary duty claim accrued before January 24, 2011.[4]

II.

The statute of limitations begins to run when a cause of action accrues. *See Frederick v. Wallerich*, 907 N.W.2d 167, 173 (Minn. 2018). "Accrual" refers to "the point in time when a plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 496 (Minn. 2018) (citation omitted) (internal quotation marks omitted). Consequently, the "[a]ccrual of a cause of action requires the existence of operative facts supporting each element of the claim." *Id.* The question of when a limitations period begins must be analyzed "on the unique record developed in each particular case." *MacRae*, 753 N.W.2d at 720.

A breach of fiduciary duty claim consists of four elements: duty, breach, causation, and damages. *See TCI Bus. Capital, Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 434 (Minn. App. 2017). Here, the parties dispute only the element of damages. Accordingly, the question before us is narrow: looking solely at the Beneficiaries'

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[4] U.S. Bank never filed an answer, instead proceeding directly to its Rule 12.02(e) motion to dismiss. Further, U.S. Bank submitted various transaction documents and court records to support its motion. Those documents are not relevant to the statute of limitations issue that is before us because they pertain to other grounds for dismissal raised by U.S. Bank in the district court. Here, the Beneficiaries sought review exclusively on the question of when the statute of limitations began to run on their breach of fiduciary duty claim. The district court and the court of appeals did not address these alternative grounds for dismissal. Consequently, we do not consider any of U.S. Bank's other possible grounds for dismissal. *See, e.g.*, *Taylor v. LSI Corp. of Am.*, 796 N.W.2d 153, 157 (Minn. 2011) (declining to address an argument that the district court did not consider).

complaint, did U.S. Bank establish that operative facts existed to support the element of damages on the Beneficiaries' breach of fiduciary duty claim against U.S. Bank before January 24, 2011? *See Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968) ("[T]he alleged negligence . . . coupled with the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues.").

We follow the "some damage" rule of accrual. *Sec. Bank & Tr. Co.*, 916 N.W.2d at 498. That rule requires that " 'some damage' has occurred as a result of the alleged . . . negligence, but [does] not requir[e] that a prospective plaintiff be aware of all the operative facts giving rise to a cause of action." *Id.* (citing *Antone v. Mirviss*, 720 N.W.2d 331, 335 (Minn. 2006)). We have generally defined "the occurrence of 'some damage' as 'the occurrence of *any compensable damage*, whether specifically identified in the complaint or not.' " *Id.* at 498–99 (emphasis added) (quoting *Antone*, 720 N.W.2d at 336); *see also MacRae*, 753 N.W.2d at 720 (damage "must be '*compensable* damage,' not just some abstract damage"); *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995) ("[B]reach of a legal duty without compensable damages . . . is not actionable."). We chose the some-damage rule as a middle ground between the "occurrence" and "discovery" rules of accrual.[5] *See Sec. Bank & Tr. Co.*, 916 N.W.2d at 498.

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[5] Under the "occurrence" rule, the limitations period begins to run upon the occurrence of the negligent act, even if there is no actual damage at the time. *Antone*, 720 N.W.2d at 335. We have expressed concern that allowing the limitations period to commence upon the occurrence of a negligent act regardless of whether damages have actually occurred invites speculative litigation when it may be that no harm has accrued or will accrue to either party. We have also rejected a "discovery" rule of accrual under which "the cause of action accrues and the statute of limitations begins to run only when the plaintiff knows or should know of the injury." *Id.* (citations omitted); *see Dalton*, 158

We have recognized that some damage may be "created either by financial liability or the loss of a legal right." *Sec. Bank & Tr. Co.*, 916 N.W.2d at 499. Some damage in the form of financial liability accrues when the resulting liability is immediate, concrete, compensable, noncontingent, and at least partly ascertainable. *See id.* at 498; *see also MacRae*, 753 N.W.2d at 719–20 (noting that damages must have actually occurred, be "compensable," and not "abstract"). Stated another way, some financial damage occurs when the plaintiff first actually loses money or otherwise suffers financial harm. The exact amount of financial loss need not be ascertainable for damage to have accrued. *See Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999).

When some damage exists in the form of "the loss of a legal right," the focus of the inquiry is necessarily different. The category covers a much narrower class of cases where a person's legal right is changed involuntarily.

Antone, which arose from a lawyer's failure to obtain a legally enforceable antenuptial agreement for a client, is a good example of such a case. By operation of Minnesota statute, entry into a marriage has immediate legal consequences, including the right of the new spouse to share in marital assets. *See, e.g.*, Minn. Stat. § 518.58 (2018) (discussing marital property division). To avoid the operation of that default rule, a party to a marriage must take an affirmative step—enter into an antenuptial agreement. In *Antone*, the failure of the lawyer to take that affirmative step, to prevent the loss of a legal

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N.W.2d at 584 ("Under our statutes it has been determined that ignorance of a cause of action . . . does not toll the accrual of a cause of action."). We have noted that "a significant disadvantage of the discovery rule is that it provides open-ended liability." *Antone*, 720 N.W.2d at 335 (citation omitted) (internal quotation marks omitted).

right caused by operation of the default rule, was the relevant harm and caused some damage even if it could not be quantified in money at the moment the lawyer's client married. 720 N.W.2d at 335–36.

For the loss of a legal right to cause some damage to accrue, then, the wrongful conduct must have allowed the claimant's legal rights to be adversely, immediately, and irredeemably changed involuntarily. *See id.* The change to and harm resulting from the change in a legal right must be concrete, locked in, and certain to occur. *See, e.g.*, *Frederick*, 907 N.W.2d at 179 (noting that damages flowed from the "separate negligent act" of incorporating an unenforceable antenuptial agreement into a will such that it irredeemably altered the client's interest in his marital assets for another six years); *Antone*, 720 N.W.2d at 337 (noting that the consequence of getting married was that the client "passed a point of no return").

With these principles in mind and looking solely to the facts in the complaint construed in favor of the Beneficiaries, we turn to the question of when the Beneficiaries first accrued "some damage" for the purpose of the applicable six-year statute of limitations.

III.

A.

First, we conclude that the complaint does not allege facts that establish some damage in the form of a loss of a legal right. The operative legal right in this case was ownership of the property. This is not a case where the Beneficiaries relied on U.S. Bank to protect them from a change in legal rights and U.S. Bank failed to do so. *Cf. Antone*,

720 N.W.2d at 337–38. The whole point of the transaction was precisely to exchange ownership of the property for money. Stated another way, the parties may dispute whether U.S. Bank's alleged breaches caused the Beneficiaries to part with their legal right to ownership of the property for too little money, but that type of economic harm falls in the financial liability category.[6]

B.

We now consider when some damage in the form of financial liability accrued. The Beneficiaries argue that they first suffered some damage in August 2012, which is when the City stopped payments on the Estate's Note. According to the Beneficiaries, the six-year statute of limitations ran in August 2018, well after this litigation was commenced.

If the financial harm is limited to the City's failure to pay on the Note, the Beneficiaries' position makes sense. Before August 2012, when the Estate stopped receiving its payments, any financial harm to the Beneficiaries was abstract because the Estate had received everything it was entitled to receive. *See MacRae*, 753 N.W.2d at 720 (requiring damage to be concrete, not abstract). U.S. Bank's failure to obtain *projections* did not mean that it was inevitable that the City would default on the Note. Projections are just projections; they are not reality. Before August 2012, the loss of payments on the Note

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[6] The possibility that, after U.S. Bank obtained financial projections showing insufficient cash flow, it may have refused to proceed with the transaction does not transform this suit into one for a loss of a legal right. In the "no transaction" scenario, the Beneficiaries could not prove any loss because they have in fact lost nothing—they still have the property, and their circumstances are unchanged. The prevention of the sale as avoiding the loss of a legal right claim is different from a claim that the Estate could have sold the retained property to a different buyer for a higher price. The latter claim is a financial liability case, which we discuss below.

was a contingent financial harm subject to the sports complex's revenues failing to provide adequate income to continue paying on the Note. We have held that contingent financial harm does not constitute damages for the purposes of the statute of limitations because the damages do not accrue unless and until the contingency actually happens. *See Calder v. City of Crystal*, 318 N.W.2d 838, 841 (Minn. 1982) (" 'When a right is dependent on a contingency, the cause of action accrues and the statute begins to run on the date of the happening of the contingency.' " (quoting *Grothe v. Shaffer*, 232 N.W.2d 227, 233 (Minn. 1975))); *Bachertz v. Hayes-Lucas Lumber Co.*, 275 N.W. 694, 697 (Minn. 1937) ("Of course, when a right depends upon some condition or contingency, the cause of action accrues and the statute runs upon the fulfilment of the condition or the happening of the contingency." (citation omitted) (internal quotation marks omitted)).[7]

U.S. Bank, however, argues that the Beneficiaries suffered economic losses before the City defaulted on its payment on the Note. U.S. Bank posits the following claim on behalf of the Beneficiaries: Had U.S. Bank demanded and reviewed the independent financial forecasts projecting revenues for the sports facility as lower than expected, U.S. Bank could have done one of two things. It could have negotiated a better deal for

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[7] While based on the parties' approach to this appeal we limit ourselves to the issue of damages in resolving this case, we observe the artificial nature of such a limitation. When analyzing tort claims, the elements interact extensively (i.e., it is hard to assess damages without understanding the causation theory) and typically should not be treated in isolation. We express no opinion on whether the Beneficiaries can prove causation between U.S. Bank's alleged failure to obtain financial projections and the termination of payments on the Notes.

the Beneficiaries.[8] Alternatively, U.S. Bank could have refused to close on the transaction altogether, leaving the Beneficiaries as owners of the property with the potential to sell the property to another buyer.

The fundamental problem with U.S. Bank's position—at least at this stage in the proceedings—is that nothing in the pleadings shows that U.S. Bank could have negotiated a better deal with CFP. There is also nothing in the pleadings suggesting that another buyer for the property existed who would have paid more than the Beneficiaries were ultimately paid under the deal that did close, or that the Estate would have been better off holding on to the property. Based on the allegations in the complaint, U.S. Bank's statute of limitations argument rests on purely speculative harm. We cannot adopt a rule that would invite the kind of speculation inherent in the rejected occurrence rule of damage accrual. *See Antone*, 720 N.W.2d at 335; *Dalton*, 158 N.W.2d at 585.[9]

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[8] The other effect of the purported failure by U.S. Bank to obtain the required financial projections (which are *predictions* of future revenues, not guarantees) or require a master lease was to render the transaction itself riskier. A contingent risk that a deal may go bad does not constitute "some damage." *See, e.g.*, *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 293 P.3d 645, 649 (Idaho 2013) (applying a some-damage rule and noting in a legal malpractice context that "[c]onduct or action that merely creates the potential for harm, or increases the risk that the client will incur damage, *does not satisfy the 'some damage' requirement*" (emphasis added) (citing *City of McCall v. Buxton*, 201 P.3d 629, 632 (Idaho 2009))).

[9] Neither party makes much of U.S. Bank's failure to insist that CFP enter into a master lease with the City that provided for rental payments sufficient to cover the payments on the Note, and neither the district court nor the court of appeals focused on that issue. We conclude that that allegation does not change our analysis for several reasons. First, the provision is not a preclosing due diligence obligation of U.S. Bank. It was an obligation of CFP at closing. Further, the point of such a master lease was to provide more assurance that what the Estate bargained for—payment under the Note—would be

At this stage in the proceedings, the only nonspeculative harm incurred by the Beneficiaries as a result of U.S. Bank's breach of fiduciary duty came in August 2012 when the Estate stopped receiving payments on its Note. U.S. Bank has not met its burden to show otherwise. The Beneficiaries brought their claims against U.S. Bank in January 2017, within six years of August 2012. Accordingly, the Beneficiaries' breach of fiduciary duty claim is timely.[10]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is reversed and the case is remanded to the district court to reinstate the complaint and for further proceedings.

Reversed and remanded.

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obtained. Until the City stopped paying on the Note, any harm associated with CFP's breach of its duty to master lease the project to the City was contingent and speculative.

[10] The Beneficiaries also assert, for the first time on appeal, that the statute of limitations has not run on their claims because they suffered some damage because U.S. Bank, in its role as co-Personal Representative, either (1) failed to sue itself, which was a second act of negligence with a separate accrual date under *Frederick*; or (2) sat on the sidelines during the six-year statutory period without asserting a claim against itself, and therefore the Beneficiaries' claim accrued at the conclusion of the first six-year statute of limitations for U.S. Bank's breach of fiduciary duty as co-Special Administrator. Because we hold that U.S. Bank has not established that the Beneficiaries' claim is untimely, we need not reach this argument.

D I S S E N T

HUDSON, Justice (dissenting).

On April 27, 2010, Robert Hansen's estate sold the real property where the Vadnais Sports Center is now located. The Beneficiaries claim that, had U.S. Bank obtained forecasts of the center's income, that sale would have been on terms more favorable to the Estate. Because that deal both financially harmed the Beneficiaries and caused them to lose a legal right in 2010, the court errs when it concludes that the Beneficiaries' cause of action did not accrue until 2012. I respectfully dissent.

To determine whether the statute of limitations has expired, we must determine when the Beneficiaries' cause of action accrued. *See Frederick v. Wallerich*, 907 N.W.2d 167, 173 (Minn. 2018). As the court correctly notes, accrual refers to "the point in time when a plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 496 (Minn. 2018) (citation omitted) (internal quotation marks omitted). Thus, this case is really about Minn. R. Civ. P. 12.02(e): would the Beneficiaries have been able to state a claim upon which relief may be granted on April 27, 2010?

In my view, the answer to that question is "yes." "A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). Under the facts of this case, on the day after the closing the Beneficiaries could have pleaded that (1) U.S. Bank owed the

Estate (and by extension, the Beneficiaries) a duty to obtain the financial forecasts; (2) U.S. Bank breached that duty by executing the purchase agreement without obtaining the financial forecasts; (3) because U.S. Bank executed the purchase agreement, the Beneficiaries' benefits were limited to the benefits provided in that agreement; and (4) the benefits received under the purchase agreement were inferior to benefits that could have been received had the forecasts been obtained. These four allegations satisfy the elements of a claim for breach of fiduciary duty, *see Lund ex rel. Revocable Tr. of Kim A. Lund v. Lund*, 924 N.W.2d 274, 284 (Minn. App. 2019), *rev. denied* (Minn. Mar. 27, 2019), and "it is possible on any evidence which might be produced . . . to grant the relief demanded." *Walsh*, 851 N.W.2d at 603.

The court reaches a different conclusion, appearing to contest whether the fourth allegation (that the Beneficiaries could have received superior benefits under a different purchase agreement had the forecasts been obtained) was true at the time the purchase agreement closed. More specifically, the court attempts to negate these damages by arguing that the Beneficiaries suffered neither financial damages nor the loss of a legal right in 2010.

Beginning with financial damages, the court concludes that U.S. Bank's motion to dismiss must be denied because we are limited to looking at the Beneficiaries' pleadings (viewed in the light most favorable to the Beneficiaries), and "nothing in the pleadings shows that U.S. Bank could have negotiated a better deal with the CFP" had "U.S. Bank demanded and reviewed the independent financial forecasts." The court is wrong. Paragraph 23 of the complaint expressly alleges that U.S. Bank breached its duty by failing

to require that CFP provide a forecast, paragraph 24 alleges that U.S. Bank breached its duty by failing to hire a financial professional to provide a forecast, and paragraph 25 alleges that U.S. Bank breached its duty by failing to require that CFP demonstrate the existence of a lease sufficient to pay all project operating expenses and all principal and interest payments due under the various series bonds and amended note. Thus, even accepting that we cannot make *any* inferences adverse to the Beneficiaries from the complaint, the clear crux of the Beneficiaries' claims is precisely that, *because U.S. Bank failed to obtain the forecasts*, U.S. Bank entered into a deal that was worse than the deal that would have been obtained had U.S. Bank obtained the forecasts.

Moreover, if, as the court concludes, nothing in the pleadings shows that U.S. Bank could have negotiated a better deal if it had obtained the forecasts, then the Beneficiaries' claims would fail on the element of causation. If the failure to obtain the forecasts had no impact on the deal that was reached, then U.S. Bank's putative breach of fiduciary duty did not cause the harm the Beneficiaries allegedly suffered.

The court also concludes that this harm is purely speculative. The harm is not speculative, and the court is incorrect in reasoning that because we cannot precisely determine what deal would have been reached had U.S. Bank procured the forecasts in question, the Beneficiaries were precluded from maintaining a cause of action in 2010. In the context of legal malpractice cases, we have held that a client may maintain a malpractice action against an attorney for transactional work if the client can show that "but for [attorney]'s conduct, the [client] would have obtained a more favorable result in the underlying transaction than the result obtained." *Jerry's Enters., Inc. v. Larkin,*

Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 819 (Minn. 2006). Similarly, in this case the Beneficiaries could have stated a claim in 2010 if they could show that but for U.S Bank's conduct, the Estate would have obtained a more favorable result in the underlying purchase agreement. Under our notice pleading standard, it is apparent they could have pleaded facts to that effect.[1]

The lack of exact precision of damages is no impediment to this conclusion. It is true that "damages must . . . be ascertainable with reasonable exactness and may not be the product of benevolent speculation." *Faust v. Parrott*, 270 N.W.2d 117, 120 (Minn. 1978). But:

> [I]t is not fatal to the recovery of substantial damages that he is unable to prove with definiteness the amount of the profits he would have made or the amount of harm that the defendant has caused. It is only essential that he present such evidence as might reasonably be expected to be available under the circumstances.

Restatement (Second) of Torts § 912 cmt. d (Am. Law Inst. 1977); *see also Faust*, 270 N.W.2d at 120 ("[T]he law most certainly does not require that damages be calculable with absolute precision . . . ."). If the Beneficiaries can prove that a purchase agreement would have been reached if the forecasts had been obtained, and that the agreement would have had a profit range between some set of values, fairness dictates that they are entitled,

[1] To be clear, the holding I would reach does not mean that a fiduciary is liable any time the fiduciary fails to obtain the absolute best possible deal. Rather, to establish a claim, a plaintiff must show not only that a better deal was not reached, but that that failure was so great as to breach the fiduciary's duty of care. *Lund*, 924 N.W.2d at 284. The law does not hold fiduciaries to a standard of perfection, rather, they are required only to exercise "reasonable care, skill, and caution." Restatement (Third) of Trusts § 77 (Am. Law Inst. 2007). In this procedural posture, it is uncontested that U.S. Bank breached its duty of care.

at a minimum, to the damages incurred by the failure to obtain at least the bottom of that range.[2] This is particularly true where, as here, it is allegedly U.S. Bank's wrongful conduct that contributed to the difficulty of determining accurate damages. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *Nat'l Merch. Corp. v. Leyden*, 348 N.E.2d 771, 774 (Mass. 1976) ("[W]here . . . the difficulties in determining damages arise in large part from the defendant's conduct, a reasonable approximation will suffice." (citations omitted) (internal quotation marks omitted)); *see also* James M. Fischer, *Understanding Remedies* 56–57 (3d ed. 2014).

The court also decides that the Beneficiaries did not suffer harm until 2012, because before that time "the loss of payments on the Note was a contingent financial harm," and "[w]e have held that contingent financial harm does not constitute damages." That may have been the case before *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006), but it is no longer true in light of that decision.

In *Antone* we held that some damage occurred (due to an improperly executed antenuptial agreement) on the day of the plaintiff's marriage because on that day, his legal

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[2] This is also consistent with the law. If the Beneficiaries show by a preponderance of the evidence that they suffered damages between x and y, they have necessarily shown by a preponderance of the evidence that they suffered damages of at least x. *See Klingelhutz v. Grover*, 236 N.W.2d 610, 612 (Minn. 1975) (affirming damages award that was within range of testimony at trial). I do not mean to suggest that the minimum of the range of damages is the only amount that could be recovered. It is unnecessary for this case to determine where in the range the damages should fall. Instead, my point is that *some damage* was suffered.

rights to his property changed; nothing else needed to happen for the loss of the client's right to be complete. However, just as the Beneficiaries' financial harm in this case was contingent on the failure of the sports center to produce income to repay the Estate, so too the harm to the client in *Antone* was contingent on a divorce occurring. We nevertheless held in *Antone* that, because there was nothing the client could do in that case to affect whether he would incur a loss in the event of divorce, the marriage was a "point of no return" after which the cause of action arose. *Id.* Similarly, in this case, once the purchase agreement was executed, there was nothing the Beneficiaries could do to affect whether they would incur a loss in the event the sports complex failed. Thus, to the extent the court's holding limits damages based on contingent harms, the court is overruling *Antone*.

The court also concludes that the Beneficiaries did not suffer the loss of a legal right. The court is wrong on this issue because it takes an overly narrow view of what constitutes the loss of a legal right for damages in a breach-of-fiduciary-duty case. The court claims that to suffer such a loss, an injured party must have his or her rights "adversely, immediately, and irredeemably changed *involuntarily*." (Emphasis added.) This last condition is overly narrow, and is unsupported by case law. As an example, suppose that a client hired an attorney to draft a deed intended to avoid the rule against perpetuities, but as a result of misdrafting, one of the interests conveyed by the deed is subject to the rule. In such circumstances, the client would have a claim against the attorney, even though the client *did* want his rights to change; he just wanted them to change in a different way than the manner in which they did. This shows that a loss of a legal right can constitute damages, even when the plaintiff wanted his or her rights to change.

Moreover, the court's reliance on *Antone* is misplaced. Although the court claims that case is a "good example" of the claimant's legal rights being changed involuntarily, our discussion of the claimant's desires was a mere afterthought, not a core element that must be met to show the loss of a legal right. *See id.* at 337 ("*While this reality needs no additional amplification*, it is supported by Antone's own testimony that he would not have entered into the marriage if he had known the antenuptial agreement did not adequately protect his property interests." (emphasis added)). And because the other three conditions the court posits (that the change was adverse, immediate, and irredeemable) are present here, the court errs in concluding that the loss of a legal right did not occur.

Because the Estate lost its right to alienate the property on terms other than those contained in the purchase agreement, I conclude that the Beneficiaries suffered the loss of a legal right the day that agreement was executed. Accordingly, their claims accrued on that date, and they had six years in which to bring their claims. They did not do so, and the statute of limitations now bars the claims. Therefore, I would affirm the decision of the court of appeals.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Hudson.