

STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A09-607

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

United Prairie Bank - Mountain Lake,

Respondent,

vs.

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

Appellants.

APPELLANTS' SUPPLEMENTAL BRIEF

MACK & DABY P.A.
John E. Mack
P.O. Box 302
New London MN 56273
(320) 354-2045
ATTORNEYS FOR APPELLANTS

BRIGGS & MORGAN
Jason Aasmus
220 IDS CENTER, 89 S. 8th St.
Minneapolis MN 55402
(612) 977-8446
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Legal Issues v

ARGUMENT:

THE CASES CITED BY THE SUPREME COURT, AND THE CASES
INTERPRETING THEM, INDICATE THAT THERE IS A
CONSTITUTIONAL RIGHT TO A JURY TRIAL IN THAT PORTION OF
A FORECLOSURE BY ACTION WHICH RELATES TO THE AMOUNT OF
REASONABLE ATTORNEYS' FEES TO BE ALLOWED. 1

Conclusion: 16

TABLE OF AUTHORITIES

	PAGE
<u>MINNESOTA STATUTES:</u>	
Minn. Stat. § 181.935(a)	4
Minn. Stat. § 182.669	4
Minn. Stat. § 549.04	9
Minn. Stat. § 580.17	9
Minn. Stat. § 581.01	1
Minn. Stat. § 581.03	1
 MINNESOTA CASES:	
<i>Abraham v. county of Hennepin,</i> 639 N.W.2d 342 (Minn. 2002)	3, 4, 5
<i>Benton v. Bowler,</i> 237 N.W. 424 (Minn. 1931)	9, 10
<i>Breimhorst v. Beckman,</i> 35 N.W.2d 719 (1949)	5, 6
<i>Ewert v. City of Winthrop,</i> 278 N.W.2d 545 (Minn. 1979)	4
<i>Garner v. Reis,</i> 25 Minn. 475	3
<i>Griswold v. Taylor,</i> 8 Minn. 342 (Minn. 1863)	9
<i>Jones v. Radatz,</i> 6 N.W. 800 (Minn. 1880)	10, 11
<i>Jordan v. White,</i> 20 Minn. 91 (Gil. 77)	3
<i>Morton Brick & Tile Co. v. Sodergren,</i> 153 N.W. 527, 528 (1915)	3, 4, 15
<i>New Amsterdam Casualty Company v. Lundquist,</i>	

198 N.W.2d 543 (Minn. 1972)	11, 12
<i>Olson v. Synergistic Technologies Business Systems, Inc.</i> 628 N.W.2d 142 (Minn. 2001)	4
<i>Peters v. City of Duluth</i> , 137 N. W. 390	4
<i>Pierce v. Maetzold</i> , 148 N.W. 302 (Minn. 1931)	7
<i>Raymond Farmers Elevator Co. v. American Surety Co.</i> , 290 N.W. 231 (Minn. 1940)	6, 12, 13
<i>Shipley v. Bolduc</i> , 101 N. W. 952	3, 15
<i>Storms v. Schneider</i> , --- N.W.2d ---- (Minn. App. 2011)	4
<i>Styve v. Kingsley</i> , 88 N. W. 742	4
<i>Whallon v. Bancroft</i> , 4 Minn. 109 (Gil. 70)	4
<u>CASES FROM OTHER JURISDICTIONS:</u>	
<i>Bradberry v. Atlantic Bank of St. Augustine</i> , 336 So.2d 1248 (Fla. 1st DCA 1976)	6
<i>Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry</i> , 494 U.S. 558, 110 S.Ct. 1339 (1990)	7
<i>Cerrito v. Kovitch</i> , 457 So.2d 1021 (Fla.1984)	6
<i>Cheek v. McGowan Electric Supply Co.</i> , 404 So.2d 834 (Fla. 1st DCA 1981)	6
<i>Curtis v. Loether</i> , 415 U.S. 189, 94 S.Ct. 1005 (1974)	7
<i>Duncan v. Jones</i> , 612 P.2d 1239 (Ut. 1980)	14

<i>F.D.I.C. v. Voll,</i> 660 A.2d 358 (Conn. App. 1995)	15
<i>First Union Nat. Bank v. Moore,</i> 27 Conn. L. Rptr. 312 (Conn. App. 2000)	15
<i>Granfinanciera, S.A. v. Nordberg,</i> 492 U.S. 33, 109 S.Ct. 2782, (1989)	7
<i>Great-West Life & Annuity Insurance Co. v. Knudson,</i> 534 U.S. 204, 122 S.Ct. 708 (2002)	7, 8
<i>Hobbes v. First National Bank of Jacksonville,</i> 480 So.2d. 153 (Fla. App. 1985)	5, 6
<i>In re Wells Fargo Bank Minnesota N.A.,</i> 115 S.W.3d 600 (Tex. App. 2003)	16
<i>Kennebeck Federal Savings & Loan Association v. Kueter</i> (695 A.2d 1201)	15
<i>Lucas v. Moore,</i> ___ N.E.2d ___, 2011 WL 4104952 (Ind. 2011)	15
<i>Mertens v. Hewitt Associates,</i> 508 U.S. 248, 113 S.Ct. 2063	8
<i>Padgett v. First Federal Savings & Loan Association,</i> 378 So.2d 58 (Fla. 1st DCA 1979)	6
<i>Palys v. Jewett,</i> 32 N.J. Eq. 302 (N.J. 1880)	14, 15
<i>Seaton v. Scovill,</i> 18 Kan. 433	11
<i>Sperry v. Hoar,</i> 32 Iowa 184	11, 15
<i>Sundale Associates, Ltd. v. Southeast Bank,</i> 471 So.2d 100 (Fla. 3d DCA, 1985)	6
<i>Tull v. United States,</i> 481 U.S. 412, 107 S.Ct. 1831 (1987)	7

STATEMENT OF LEGAL ISSUE

DO THE CASES CITED BY THE SUPREME COURT, AND THE CASES INTERPRETING THEM, INDICATE THAT THERE IS A CONSTITUTIONAL RIGHT TO A JURY TRIAL IN THAT PORTION OF A FORECLOSURE BY ACTION WHICH RELATES TO THE AMOUNT OF REASONABLE ATTORNEYS' FEES TO BE ALLOWED?

MOST SALIENT STATUTES:

Minn. Stat. § 580.17

Minn. Stat. § 581.01

Minn. Stat. § 581.03

MOST SALIENT CASES:

Great-West Life & Annuity Insurance Co. v. Knudson,
534 U.S. 204, 122 S.Ct. 708 (2002)

Hobbes v. First National Bank of Jacksonville,
480 So.2d. 153 (Fla. App. 1985)

New Amsterdam Casualty Company v. Lundquist,
198 N.W.2d 543 (Minn. 1972)

Raymond Farmers Elevator Co. v. American Surety Co.,
290 N.W. 231 (Minn. 1940)

ARGUMENT

THE CASES CITED BY THE SUPREME COURT, AND THE CASES INTERPRETING THEM, INDICATE THAT THERE IS A CONSTITUTIONAL RIGHT TO A JURY TRIAL IN THAT PORTION OF A FORECLOSURE BY ACTION WHICH RELATES TO THE AMOUNT OF REASONABLE ATTORNEYS' FEES TO BE ALLOWED.

This Court has requested that the parties respond to its inquiries regarding the effect of five cases upon the question of the constitutionality of a deficiency judgment determination in the foreclosure by action of a mortgage without benefit of jury trial. Before addressing those cases directly, it will be necessary to provide some background analysis.

Minn. Stat. § 581.01 states:

Actions for the foreclosure of mortgages shall be governed by the same rules and provisions of statute as civil actions, except as in this chapter otherwise provided.

Nothing in § 581.01 specifically refers to the determination by the Court of jury of an attempt to collect attorneys' fees.

The closest the statute comes is Minn. Stat. § 581.03:

Judgment shall be entered, under the direction of the court, adjudging the amount due, with costs and disbursements, and the sale of the mortgages premises, or some part thereof, to satisfy such amount....

Unfortunately, this statute is not as clear as it might be. It does not say, "The Court shall adjudge the amount due, with costs and disbursements." Rather, it indicates that the amount due will be determined "under the direction of the court," which is consistent with a court instructing a jury on the presentation of a special verdict. Moreover, the words "amount due," and

"with costs and disbursements," suggests that these are amounts to be determined separately. And while costs and disbursements are ordinarily determined by the Court without a jury if those costs and disbursements are challenged, the attorneys' fees sought by UPB in this case were neither pled nor tried as a taxation of costs and disbursements. So attorneys' fees are one of the amounts to be determined "under the direction of the Court," not "by the Court." This suggests, rather marginally to be sure, that the legislature intended money issues involved in foreclosures by action, to be determined by a different method and a different body, that costs or the underlying right to that foreclosure. It also suggests, and less marginally, that the legislature intended issues involving moneys owed to be determined by the usual means that the amount of money damages to be determined - here, jury trial.

Suppose that UPB had wished to insure the appellants on their notes and ignore the mortgages. Then there would be little doubt but that the appellants would have been entitled to a jury trial. Somewhat amazingly, there is no Minnesota case directly in point on the right to a trial on a simple note, but everything points to the triability of such an action by jury.

Because there is no right to a reply brief, appellants will anticipate an argument by UPB here, viz, that a mere suit on a note is different from a suit on a mortgage and a note, because

there is no doubt that a suit to foreclose a mortgage contains at least some equitable elements, whereas a suit on a note contains none. But this should not matter. First, the respondent's lawsuit was a suit on the note and the mortgage. Second, and perhaps more importantly, why should the joinder of an equitable claim to a legal one oust the right to a jury trial that a defendant would otherwise have? If a case contains both legal and equitable issues, the case is triable to a jury on the legal issues. See *Abraham, infra*.

Third, while the cases are not completely uniform, to constitute an equitable action depriving the defendant of the right to a jury trial, the action must be equitable "pure and simple." If there are mixed questions of law and equity, the defendant is entitled to a jury trial. As the Court said in *Morton Brick and Tile v. Sondergren*, 153 N.W. 527:

In actions which, according to the former practice, were equitable actions pure and simple neither party can demand a jury trial as of right as to any issue. *Jordan v. White*, 20 Minn. 91 (Gil. 77); *Garner v. Reis*, 25 Minn. 475; *Shipley v. Bolduc*, 93 Minn. 414, 101 N. W. 952. In mixed actions, that is, in actions where legal issues are united with equitable issues, the legal issues are triable by a jury and the equitable issues by the court." (*Id.* at 254).

The sole question on this appeal is whether the plaintiff was entitled to a jury trial. The Constitution provides that 'the right of trial by jury shall remain inviolate, and shall extend to all cases at law.' Article 1, § 4. The statute provides that 'in actions for the recovery of money only, * * * the issues of fact shall be tried by a jury.' G. S. 1913, § 7792. This provision is no broader than the provision

of the Constitution. It has always been held that the effect of this section of the Constitution is to recognize the right of trial by jury as it existed at the time the Constitution was adopted, that is, its purpose was, not to enlarge such right, but to continue it inviolate. *Whallon v. Bancroft*, 4 Minn. 109 (Gil. 70); State ex rel. *Styve v. Kingsley*, 85 Minn. 215, 218, 88 N. W. 742; *Peters v. City of Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

(*Id.* at 147)

See also *Olson v. Synergistic Technologies Business Systems, Inc.* 628 N.W.2d 142 (Minn. 2001); *Storms v. Schneider*, --- N.W.2d ----, 2011 WL 3426034, (Minn. App. 2011) ("If an action includes both legal and equitable issues, "the legal issues are triable by a jury and the equitable issues by the court." *Id.* at 149 (quoting *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 255, 153 N.W. 527, 528 (1915)).

In actions originally actions at law either party may demand a jury trial. The instant case would be an action for recovery of money damages. While not directly in point, *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002) is salient, and does set out the principle that merely because the legislature set forth by statute a remedy that may not have existed at common law does not affect the right to a jury trial on issues triable by jury in 1858:

However, because we look to the nature and character of the controversy as determined from all the pleadings, including the relief sought, the nature of the relief sought is important in determining whether a claim is legal or equitable, and as noted, claims for consequential money damages are typically legal

claims.FN17 We note again that appellants do not seek the equitable relief provided by the Whistleblower Act, Minn.Stat. § 181.935(a), and MOSHA, Minn.Stat. § 182.669, subd. 1, but seek only money damages. Examination of the relief sought further supports the conclusion that a whistleblower claim seeking only money damages is an action at law.

FN17. Much the same as Minnesota's approach of examining the nature and character of the controversy, the U.S. Supreme Court, when determining whether a claim is a legal claim with an attendant right to jury trial under the Seventh Amendment, looks at the nature of the claim and at the nature of the relief sought, and places greater emphasis on the latter. See, e.g., *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989); *Tull v. United States*, 481 U.S. 412, 417, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); *Curtis v. Loether*, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974).

Our analysis is not altered by our decisions in *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719 (1949), or *Ewert v. City of Winthrop*, 278 N.W.2d 545 (Minn. 1979). In *Breimhorst*, we recognized that the legislature abolished a common law cause of action for an employee injured on the job, replacing it with a remedy under the Workers' Compensation Act, a statutory remedy that was new, adequate, and fundamentally different from the common law cause of action. See 227 Minn. at 433-34, 35 N.W.2d at 734. The legislature took the cause of action out of the district court and placed it in a quasi-judicial forum. See *id.* at 432, 35 N.W.2d at 733. We concluded that when the legislature abolished a common law cause of action and substituted a remedy that was new, adequate, and fundamentally different from that which was provided at common law, there was no constitutional right to a jury. *Id.* at 434, 35 N.W.2d at 734. We did not hold in *Breimhorst* that the legislature could deny the constitutional right to jury trial when it codifies, creates, or modifies a cause of action at law.

(*Id.* at 354)

Cases in other jurisdictions which have constitutional provisions similar to those in Minnesota have explicitly held that even though the determination of a mortgage foreclosure may be equitable in nature, the determination of money damages in that action are triable by jury as a matter of constitutional right.¹ As the Florida Court said in *Hobbes v. First National Bank of Jacksonville*, 480 So.2d. 153 (Fla. App. 1985):

Petitioners argue that their liability is predicated on their endorsement of the note, and is not related to the foreclosure of real property in which they had no interest. It follows, they urge, that the action against them is one at law, which entitles them to a jury trial. *Cheek v. McGowan Electric Supply Co.*, 404 So.2d 834 (Fla. 1st DCA 1981). On the other hand, the bank contends the trial court did not depart from the essential requirements of law in denying the demand for jury trial because petitioners' request was untimely; and even if timely, petitioners are not entitled to a jury trial on the determination of the amount of deficiency when tried as a continuation of the foreclosure suit. *Cerrito v. Kovitch*, 457 So.2d 1021 (Fla.1984); and *Bradberry v. Atlantic Bank of St. Augustine*, 336 So.2d 1248 (Fla. 1st DCA 1976).

We find agreement with petitioners. It is clear that an action on a promissory note is an action at law and that a defendant in an action on a promissory note is entitled to a jury trial. *Cheek v. McGowan Electric Supply Co.*, 404 So.2d at 836. We recognize that the action on the promissory note here was brought in a foreclosure proceeding, an equitable proceeding for which trial by jury is not constitutionally guaranteed. Nevertheless, this court has held that the mixture of legal and equitable claims in the same case cannot deprive either of the parties of a right to a jury trial of issues traditionally triable by a jury as a

¹See also pp. 15, 16 below.

matter of right. *Padgett v. First Federal Savings & Loan Association*, 378 So.2d 58 (Fla. 1st DCA 1979). Accordingly, even though some of the issues in the mortgage foreclosure proceeding were equitable, the issues to be tried in the deficiency proceeding against petitioners are legal ones and petitioners are entitled to a jury trial on these. See *Sundale Associates, Ltd. v. Southeast Bank*, 471 So.2d 100 (Fla. 3d DCA, 1985) (failure to disburse funds in accordance with a construction loan is a legal defense).

(*Id.* at 156)

As the Florida Court asked, why should the attachment of the note to a mortgage make any difference?

It is in this context that *Raymond Farmers Elevator Co. v. American Surety Co.*, 290 N.W. 231 (Minn. 1940) becomes salient. In that case, the Supreme court of Minnesota held that an action against a surety company, even though arising from an instrument, some parts of which were triable only at equity, still entitled the defendant to a jury trial on the issues involving monetary damages. The Court said:

While otherwise complete in itself, the contract of suretyship is actually accessory to that between the principal, and, here, the employer. 21 R.C.L. p. 946, § 2. A suit against a surety on the contract is an action for the recovery of money based upon the promise to pay. Therefore it is triable by jury. 2 Mason Minn.St.1927, § 9288; see *Pierce v. Maetzold*, 126 Minn. 445, 148 N.W. 302 (action on an administratrix' bond).

(*Id.* at 119)

While the mortgage in the instant case may be "complete in itself," it is actually accessory to that between the attorneys and the mortgagors. It is an action for the recovery of money

based upon the promise to pay - first the bank, and indirectly the bank's attorneys. Therefore, the action is triable by jury.

Appellants will now turn to the remaining four cases noted in the Supreme Court's Order. Consider first *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708 (2002). In that case, the United States Supreme Court held that because part of the appellee's defense under ERISA was based upon claims triable at law, the lawsuit was not one "for equitable relief" and relief could not lie under ERISA. The Court said:

Because petitioners are seeking legal relief-the imposition of personal liability on respondents for a contractual obligation to pay money- § 502(a)(3) does not authorize this action. Pp. 712-719.

(a) Under § 502(a)(3)-which authorizes a civil action "to enjoin any act or practice which violates ... the terms of the plan, or ... to obtain other appropriate equitable relief"-the term "equitable relief" refers to those categories of relief that were typically available in equity. *Mertens v. Hewitt Associates*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161. Here, petitioners seek, in essence, to impose personal contractual liability on respondents-relief that was not typically available in equity, but is the classic form of legal relief. *Id.*, at 255, 113 S.Ct. 2063. Petitioners' and the Government's efforts to characterize the relief sought as "equitable" are not persuasive. Pp. 712-713.

(*Id.* at 204, 205)

While this is *dicta*, it is important *dicta*. In the instant case, just as in *Great West*, UPB seeks "in essence, to impose personal contractual liability on respondents - relief that was not typically available in equity, but is the classic form of

legal relief," viz., a money judgment. Some equitable relief is available under ERISA, and if that was all the appellees had sought, they would have prevailed. But they sought money damages, and that made the case triable by jury. The lesson for an action for foreclosure by action is clear - if substantial money damages are sought along with the foreclosure itself, the money damages portion of the cause of action is triable by jury. Since the Minnesota Courts tend to follow Seventh Amendment law on right to jury trial in the Federal Courts, and since the United States Supreme Court is the highest federal court, the lesson for this case is palpable - the Appellants are entitled to a jury trial on the money damages portion of UPB's lawsuit.

Next, consider *Griswold v. Taylor*, 8 Minn. 342 (Minn. 1863). In this case, the Court determined that an agreement to pay attorneys' fees in a mortgage is enforceable. To be candid, the undersigned does not really see the importance of *Griswold*. No one is disputing the right to the respondent to reasonable attorneys' fees under the note and mortgage here. The questions are (a) what is reasonable and (b) who is to decide this question? *Griswold* is a "foreclosure by advertisement" case. No trial, either by court or jury was involved and the ruling was essentially equivalent what is now summary judgment. Foreclosure by advertisement under the current statute limits attorneys' fees. See, Minn. Stat. § 580.17, Minn. Stat. § 549.04 and *Benton*

v. Bowler, 237 N.W. 424 (Minn. 1931). Moreover, the amount of attorneys' fees to be awarded was a sum certain as set forth in the contract between plaintiff and defendant, and under modern practice would have been the subject of summary judgment - it would not have required an elaborate finding of fact of the sort that jury trials are expected to make. If there is anything of pertinence in *Griswold*, it is perhaps this:

It can readily be seen how such a course might be pursued as a means of obtaining a greater rate of interest than that allowed by law, or how a sum might be agreed upon between a hard pressed borrower and a rapacious lender, which would be deemed in equity unconscionable, and be relieved against upon a proper showing, but no such features embarrass this case.

(*Id.* at 2)

In the instant case, the actions of the bank and its attorneys were rapacious, but they were rapacious with respect to the money damages to which an ordinary lender would be entitled at law. More than \$400,000 in attorneys' fees were added to the judgment of foreclosure. The fees sought were billed at a far higher rate than was normal in Southwestern Minnesota. In many cases, the fees sought and allowed were for actions by UPB which had little or nothing to do with the default or foreclosure. Rather, they related to actions allegedly to protect the mortgage before any default was made or declared. This is an unusual case only in the farm land prices have gone up considerably and the mortgagee actually stands to make money well beyond the amount

entitled to in its notes through the application of unconscionably high attorneys' fees. To send a message to the farmers and lenders in rural Minnesota that the application of this level of attorneys' fees without even the right to a jury trial is to declare open season on mortgagees everywhere.

Jones v. Radatz, 6 N.W. 800 (Minn. 1880) is another case where the *dicta* may be more important than the holding. The *Jones* Court said:

The instrument before us has this certainty as to the \$135 and the interest. But the whole instrument must be taken together. The promise to pay the \$135 and interest is not the whole of the promise-not the entire obligation created. The entire promise and obligation is to pay absolutely that sum and interest, and in a particular contingency, to-wit, the bringing suit by the payee after default, to pay a further amount not fixed, and not capable of being ascertained from the instrument itself. The suggestion in some of the cases - *Sperry v. Hoar*, 32 Iowa 184; *Seaton v. Scovill*, 18 Kan. 433-that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, is not sound. For the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency.

(*Id.* at 241, 242)

In *Jones*, the question was whether a note with a reasonable attorneys' fee clause in it was enforceable, but that since the amount of attorneys' fees was a question of fact and not a sum certain, the instrument was not negotiable. The Court held that it was, but opined that a note containing a reasonable attorneys' fee clause was not negotiable and the amount thereof would have

to be determined by the trier of fact. Clearly, the Jones court believed that the amount of reasonable attorneys' fees represented an amount of money damages. Because a determination of money damages is a determination to be made by a jury, it follows that a jury would have to determine what sum was owed to the plaintiff as attorneys's fees. Note that *Jones* was tried to a jury, and neither party disputed that a reasonable attorneys' fees case was triable to a jury back in 1880 - only 22 years after the Minnesota Constitution was enacted. While the actions of a court with respect to an issue that neither party brought up is of limited value, *Jones* at least provides some indication of a general acceptance that attorneys' fee cases were triable to a jury about the time the Minnesota Constitution was adopted.

Finally, in *New Amsterdam Casualty Company v. Lundquist*, 198 N.W.2d 543 (Minn. 1972), the Supreme Court decided, in the case of a reasonable attorneys' fees instrument rather similar to a mortgage (an indemnity contract, in the case of *New Amsterdam*), that the issue of attorneys' fees was considered to be for the jury. It said:

An action based on an indemnity agreement is for the recovery of money based upon the promise to pay and is therefore triable by a jury. If fact issues exist with respect to the indemnity agreement, they are for the jury. *Raymond Farmers Elev. Co. v. American Surety Co.*, 207 Minn. 117, 119, 290 N.W. 231, 233 (1940). In the instant case, there remain factual questions for a jury to consider. On the retrial of this case, the jury should consider any reasonable inferences which could be drawn from the meeting of the parties on July 18,

1960, at the Wilken Motel in Fairmont, to support the contention of Barker that New Amsterdam agreed not to proceed against him to obtain indemnity for its losses on the Lundquist projects in consideration of his protecting New Amsterdam from incurring liability on the Fairmont Cast Stone bonds and that there had been a new oral contract to terminate the prior indemnity contracts.

(*Id.* at 287, 288)

To be sure, the *New Amsterdam* case was not specifically a foreclosure case, but the issue of reasonable attorneys' fees was not only submitted to the jury; it constituted a fact issue and therefore subject to the language that "An action based on an indemnity agreement is for the recovery of money based upon the promise to pay and is therefore triable by a jury." Neither appellants nor respondent have ever doubted that the amount of attorneys' fees was a fact question. And again, note that *New Amsterdam*, and the attorneys' fees issue, was tried to a jury.

New Amsterdam is also of importance on another issue before this Court - viz., the amounts subject to a reasonable attorneys' fee clause. The *New Amsterdam* court said:

This rule is extended to surety agreements, and we hold that the indemnitee is required to communicate to the indemnitor all offers of settlement which affect the indemnitor's obligation to the indemnitee. In this case, it is undisputed that New Amsterdam failed to do this. It reserved to itself the prerogative of making a business judgment as to the reasonableness of accepting the offer of settlement. The indemnitee has the right to make such a business judgment but has the further obligation to allow the indemnitor to exercise the same business judgment on his own behalf. An indemnitee who fails to communicate to an indemnitor an offer of settlement is limited thereafter to recovering from the

indemnitor the amount for which the claim could have been settled and, in all situations where attorneys' fees and costs are recoverable, to recover reasonable attorneys' fees and costs incurred only up to the time of the uncommunicated settlement offer.

(*Id.* at 287)

Many of the attorneys' fees sought by UPB are for actions not directly related to the foreclosure, such as the Meadowlands lawsuit. UPB reserved to itself the prerogative of making a judgment of what attorneys' fees to incur and when to settle that lawsuit, and to take other actions for which it is seeking attorneys' fees. The mortgagors have the right to know that the mortgagee is seeking attorneys' fees for its defense of such unrelated actions in order to limit any attorneys' fees it is liable to incur, if the mortgagee can charge such attorneys' fees all. But UPB never declared a default, much less invoked its attorneys' fee clause in Meadowland, or for that matter in the portion of the lawsuit seeking to declare one of its Haugen transactions to be an equitable mortgage. Therefore, as in *New Amsterdam*, it is estopped from claiming attorneys' fees on such transactions.

As noted above, several State Courts have addressed the issue here, and they are about equally divided on the outcome. Some states take a "severable issue" approach and hold that where there are both legal and equitable issues in a mortgage foreclosure proceeding, the proceeding may be bifurcated and the

portion involving money damages may be tried to a jury. See, e.g., *Hobbes, supra*; *Duncan v. Jones*, 612 P.2d 1239 (Ut. 1980; superseded by statute); *Palys v. Jewett*, 32 N.J. Eq. 302 (N.J. 1880); *First Union Nat. Bank v. Moore*, 27 Conn. L. Rptr. 312 (Conn. App. 2000). Some states hold that where the action for foreclosure is statutory, the equitable issues absorb the legal issues and the case is triable only to the court. See, e.g., *Lucas v. Moore*, ___ N.E.2d ___, 2011 WL 4104952 (Ind. 2011 - note, however the strong dissents in favor of jury trial); *Kennebeck Federal Savings & Loan Association v. Kueter* (695 A.2d 1201); *Sperry, Supra* (which Minnesota opined to be unsound); and *F.D.I.C. v. Voll*, 660 A.2d 358 (Conn. App. 1995). All these cases are dependent to some extent upon the states statutory and constitutional provisions. In particular, those states upholding the denial of a jury trial have constitutional provisions weaker than Minnesota's "shall be held inviolate" language, and often have statutes expressly reserving all issues in a foreclosure case to the court.

The states holding that in mixed law/equity cases, a party has a right to a bifurcated trial, with the legal issues to be decided by the jury, has the better of the argument. Minnesota has authorized both bifurcation and jury trial rights when there is a substantial legal question on many occasions. *Morton, supra*. And the language in *Hobbes* to the effect that a plaintiff

should not be able to override what would otherwise be a defendant's jury trial right by style its case in equity - is very logical. Minnesota should follow Florida and the Indiana dissenters.

Finally, a more general word. All the cases which deal with costs and attorneys' fee clauses in mortgage transactions indicate that such clauses are to be shield, not a weapon. They are to reimburse the mortgagee for costs incurred in the mortgage foreclosure, not to pay for everything that the mortgagee ever did with respect to the property or the mortgagors in question. How much less, then, should a reasonable attorneys' fee clause be used to permit a mortgagee and its attorneys to make a profit by acquiring land which has a far higher value than the land which stood collateral for that mortgage ever had before default. One of the purposes of the Minnesota constitutional provision as it has been applied to contracts of any kind is to permit a jury of a defendant's peers to determine what is and what is not reasonable in a community. There is nothing special about the reasonableness or unreasonableness of an attorney fee claim based upon a contract. The District Court's denial of appellants' right to a jury trial violated the Minnesota Constitution.

CONCLUSION

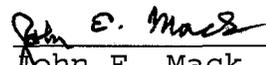
This is an important case involving a constitutional issue, but it is unlikely to have wide application. It will arise only

when there is a large potential equity in the property to be foreclosed and there is a real possibility of a considerable deficiency judgment on the one hand, or a surplusage on the other. While banks may complain that a jury trial limits the protection of their mortgages, it is only in these rare cases that such a worry is realistic. And even in those cases, a mortgagee can protect itself by writing into the mortgage or note an agreement to arbitrate or determine issues of deficiency or surplusage by court alone. See, e.g., *In re Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600 (Tex. App. 2003).

The judgment in favor of the respondent for monetary damages should be reversed and remanded to the District Court to determine the amount of attorneys' fees, and hence the amount of deficiency judgment or surplusage owed to the respective parties.

Dated: October 5th, 2011

MACK & DABY, P.A.



John E. Mack, #65973
P.O. Box 302
New London MN 56273
(320) 354-2045
ATTORNEYS FOR APPELLANTS