

**COURT FILE NOS. A10-1762, A10-2113 & A10-2221**

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***STATE OF MINNESOTA  
IN MINNESOTA SUPREME COURT***

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**Weavewood, Inc., *Respondent***

**vs.**

**S&P Home Improvements, LLC, *Appellant,***

**and**

**M. Jacquelin Stevenson, *Respondent***

**and**

**Palladium Holdings, LLC, et al, *Defendants***

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**RESPONDENT WEAWEWOOD'S BRIEF AND APPENDIX**

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

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## ISSUE

- 1) On December 13, 2011 the Minnesota Supreme Court granted S&P's petition for further review, solely on the following issue:

### **DO STATUTES OF LIMITATIONS APPLY TO ACTIONS FOR DECLARATORY JUDGMENT?<sup>1</sup>**

A) **District Court Holding:** The Honorable Tanya Bransford, citing unpublished federal precedent, held that *Weavewood, Inc.*'s action challenging S&P's attempt to foreclose by advertisement a mortgage against its property to be barred by statutes of limitation that pertained to breach of contract, breach of fiduciary duty, fraud and slander of title.

B) **Court of Appeals Holding:** The Court of Appeals, largely agreeing with the trial court's analysis pertaining to specific causes of actions, held that to the extent that *Weavewood's* action sought monetary damages, its claims were barred by statutes of limitation; however, to the extent that *Weavewood* sought declaratory relief, the Court of Appeals, *citing*, *State v. Joseph*, reversed the trial court and held that 622 N.W.2d 358, 362 (Minn. App. 2001), *rev'd on other grounds*, 636 N.W.2d 322, 326-27 (Minn. 2001). The relevant citation from *State v. Joseph* is,

*"First, there is no statute of limitations for declaratory judgment actions. Second, statutes of limitations apply to claims and not to defenses. A declaratory judgment is an alternative and optional remedy available to parties who want the courts to declare their "rights, status, and other legal relations \* \* \*." Minn.Stat. § 555.01 (1998); Harrington v. Fairchild, 235 Minn. 437, 441, 51 N.W.2d 71, 73 (1952) (declaratory judgment action proper to determine parties' rights under contract even though there had been no default).*

*We have held that, absent a statutory mandate, the commencement of a declaratory judgment action is not subject to any statute of limitations. Fryberger v. Township of Fredenberg, 428 N.W.2d 601, 605 (Minn.App.1988), review denied (Minn. Nov. 16, 1988).*

*Nothing in the Uniform Declaratory Judgments Act or in the caselaw interpreting that*

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<sup>1</sup> *Weavewood* will presume that the Supreme Court sought a determination of the issue under Minnesota law, and not in general.

*act suggests that anyone is ever required to bring a declaratory judgment action. Minn.Stat. § 555.01-555.16 (1998). Furthermore, the court may refuse to render a declaratory judgment if rendering a judgment would not resolve the uncertainty that precipitated the action. Minn.Stat. § 555.06 (1998). The district court here held that Church Mutual not only had to bring the action within six years after the accident but also had to obtain a favorable ruling. Implicit in this holding is the erroneous proposition that Church Mutual would have lost its coverage defense even if it had commenced the action within six years if the court then exercised its discretion not to render judgment.*

2) **Apposite Authority:**

Minn. Stat. §§555.01 - 555.16;  
*State v. Joseph*, 622 N.W.2d 358, 362 (Minn. App. 2001), *rev'd on other grounds*,  
636 N.W.2d 358, 362 (Minn. 2001);  
*Fryberg v. Township of Fredenberg*, 428 N.W.2d 601, 605 (Minn. Ct. App. 1988);  
*Luckenbach Steamship Co. v. United States*, 312 F.2d 545 (2d Cir.1963); and  
*United States v. Western Pac. R. R.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

## **CITATIONS TO RECORD**

“APP” refers to Appellant’s Appendix; “ADD” refers to Appellant’s Addendum;  
“WAP” refers to Weavewood’s Appendix; “WAD” refers to Weavewood’s Addendum

## **STANDARD OF REVIEW**

The construction and applicability of a statute of limitations is a question of law that is to be reviewed *de novo*. *Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating*, 660 N.W.2d 146, 150 (Minn. App. 2003) (*citing*, *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998)). Determinations of law are reviewed *de novo*. *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 615 (Minn. 2007) (citations omitted).

*Weavewood* takes issue with *S&P’s* standard of review, cited at page 12 of its brief, to the extent that it has improperly framed it to suit its own argument. For instance, *S&P*

improperly frames the required standards for analyzing statutes and statutes of limitation as their “*potential effect of affirming the court of appeals on claims that would otherwise be time-barred.*” A standard of review is the measure of deference that a reviewing court gives to a lower court’s decision. *De novo* review simply means that the reviewing court may substitute its own judgment about whether the lower court correctly applied the law.<sup>2</sup> *S&P* has conflated the standards of review with its arguments instead of simply stating them.

## STATEMENT OF THE CASE AND FACTS<sup>3</sup>

*S&P’s Statement of the Case.* *Weavewood* takes issue with many of the allegations made in both *S&P’s Statement of the Case* and its *Statement of Facts*. While *Weavewood* presents its own version below, some of the offending statements in *S&P’s* recitation warrant comment. In ¶1, page 2 of its brief, *S&P* states as fact that *Weavewood* gave James Malcolm Williams (“*Williams*”) a mortgage in 1998. It is not a fact – it has been disputed

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<sup>2</sup> While it is difficult to find an actual definition of standard of review, it is the “*lens through which a tribunal will evaluate the determination of prior authority.*” *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 603 (1993).

<sup>3</sup> Most of the facts stated here are derived from a verified time line that was appended to *Weavewood’s* April 30, 2010 Memorandum of Law. [WAP 191-210] Since this appeal is from summary judgment, there was no testimony and the decisions were based entirely on written submissions. In an effort to be consistent, *Weavewood’s* recitation of the facts and case are substantially those cited in its brief at the Court of Appeals. While in *S&P’s* brief at the Court of Appeals it asserted that the timeline was nothing but attorney hearsay, *S&P* failed to acknowledge that Howard Thompson executed an affidavit in the court file dated July 1, 2010 [WAP 452-454] that affirmed his personal knowledge and involvement with the referenced documents and matters.

vigorously since it was *discovered* after *Williams*' death. *Weavewood* never "granted" it - rather, *Williams*' paramour *Stevenson* made the unauthorized "grant", as is described in detail, *infra*. In ¶2, page 2 of its brief, *S&P* fallaciously diminishes *Weavewood*'s attempt to have the mortgage declared to be void and illegal as "a claim to set aside the mortgage." The issue before this Court is not whether the Court of Appeals improperly characterized *Weavewood*'s defenses to the mortgage as a request for declaratory relief. That *Weavewood* believes is a given in this review. The issue in this review is whether statutes of limitations apply to declaratory relief actions.

***S&P's Statement of the Facts.*** In *S&P's Statement of Fact*, *S&P* immediately violates Rule 128 by arguing the law instead of candidly stating the facts. *I.e.*, in the *first* paragraph *S&P* argues that *Weavewood*'s claims are barred by *the* statute of limitations. As noted, argument (especially conclusory argument) is improper. Secondly, the Court of Appeals determined that *Weavewood*'s defenses (as opposed to claims) formed the basis of its declaratory action.

In ¶2, page 4, *S&P* gives incite into its misguided brief by proclaiming that "*this brief will focus on the mortgage which was eventually foreclosed and Weavewood's prior challenges \* \* \**" Pages 4 - 11 comprise the *Statement of Facts*, which is nothing but *S&P*'s spin on the facts, rather than a candid summary of undisputed facts. What is improper is *S&P*'s repeated reference to "*Weavewood's claims*" that appears throughout pages 4 - 11. *S&P* also makes other false and speculative assertions in pages 4 - 11. For example, At page

6, ¶1, *S&P* mis-characterizes a letter from *Weavewood's* counsel in 2000 as one seeking “satisfaction” of the purported mortgage. The letter is cited at APP 92-93. In fact, the letter demands *removal* of the purported mortgage from the title, not *satisfaction*. At page 6, ¶2 *S&P* refers to a compromise agreement in the *Williams' probate* (involving extensive trust and will files). [APP 54] There is no mention that the purported mortgage had *any* value. In fact, no where in the entire file was anything other than a \$0 value assigned in the court file to the purported mortgage. Furthermore, as required by the title standards, the agreement was never recorded on the Certificate of Title. [APP 26-28] On page 7, ¶1 *S&P* falsely asserts that a document on page 241 of its appendix admits that monies were owing on the mortgage in the probate; however, that page referred to out of context was not involved in the probate file – rather, it was part of the extensive time-lime submitted by *Weavewood* in the trial court in *this* litigation as proof that *nothing* was owed. The \$83,400 purported assignments from the probate file do not appear in the probate file. On the bottom of page 7 of its brief, *S&P* alleges that the mortgage was *struck off and sold*. It is unclear what *S&P* even means here. *S&P* asserts on page 8 of its brief, ¶1 that *Weavewood* had six months to redeem but fails to mention that the trial court never dealt with *Weavewood's* argument that the redemption period should have been 12 months. On page 10 of its brief, *S&P* mis-characterizes the holding of the Court of Appeals in this file.<sup>4</sup> On page 10 of its decision

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<sup>4</sup> *S&P* completely misstates the holding, either because it doesn't understand it, or it has again presented false claims and statements. *S&P's* conclusion at the bottom of page 10 of its brief that the Court of Appeals determined that *Weavewood* only had the

[APP 57], the Court of Appeals cited *Weavewood's* argument that while claims are subject to statutes of limitations, defenses are not. [ADD 57] The Court of Appeals held that there was merit to the argument, with support in case law, citing, *State v. Joseph*. The Court of Appeals stated, "*Weavewood sought monetary damages under several counts. But Weavewood also challenged the validity of the S&P mortgage and foreclosure sale under [three counts] \* \* \**" The Court of Appeals stated that *Weavewood's* complaint included *s request for judgment determining that the mortgage was void and of no force and effect; or in the alternative deem the mortgage satisfied; and find that S&P had no legal right to foreclose, take legal title or obtain a legal interest in the property.*

***Weavewood's Statement of the Case and Facts.*** *Weavewood* is a Minnesota corporation with its offices located in Hennepin County, Minnesota; and, the owner of the subject real property and business. *S&P* is a Minnesota limited liability company that deals in "distressed properties." Respondent M. Jacquelin Stevenson (*Stevenson*) is an individual currently residing in Hennepin County, Minnesota.

*Weavewood* is a family owned business that at times employs more than 20 part-time and full time employees in Golden Valley, Minnesota. The subject property was conservatively appraised in November 2009 for \$1.3 million dollars. Not considering the purported mortgage the property has net value of over one million dollars. *Weavewood*

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ability to challenge the mortgage on grounds of fraud and unjust enrichment is at best bizarre. The simply response is *S&P* is simply wrong – *Weavewood* seeks a declaration of the parties' rights regarding the mortgage, which isn't contingent on a coercive claim for fraud or unjust enrichment.

manufactures woven wood products and has many extremely large presses on the premises that are bolted to and imbedded in cement floors. [WAP 9] On April 1, 1998 *Stevenson* was appointed as the trustee of a trust that owned *Weavewood's* stock. On July 15, 1998, in her capacity as trustee, *Stevenson* retained the services of her paramour, attorney James Malcolm Williams (*Williams*), to act as one of *Weavewood's* attorneys. At the time *Stevenson* also acted in the capacity of *Williams' legal assistant* and was solely responsible for handling all of his billings, including the preparation of monthly statements and the handling of all of his books and records. [WAP 9]

On July 15, 1998, without the knowledge or consent of the Thompson family, *Stevenson* entered into an amended retainer agreement with *Williams*. Included in the terms of the retainer agreement was the following language:

*"The fair and reasonable cost to Weavewood, Inc. to defend against [three] lawsuits will be in excess of One Hundred Thousand Dollars (\$100,000.00). \* \* \* Weavewood, Inc. agrees to grant to said James Malcolm Williams, a First Mortgage in the amount of One Hundred Thousand Dollars (\$100,000.00) on its real estate located in Golden Valley \* \* \* ."*

Prior to July 1998 *Williams* submitted detailed billing statements to *Weavewood* that were paid when received by the company. Consistent with *Williams' prior retainer agreement* the statements were itemized in great detail by date and tasks performed. [WAP 33-34]

*Williams* was diagnosed with a brain illness and while *Weavewood's* counsel he acted erratically and failed to timely submit pleadings and otherwise properly and competently defend actions that were pending against the company. Due to *Williams' lack of diligence* and general incompetence *Weavewood* suffered losses exceeding \$100,000. In late August or early September 1998 *Virgene Thompson (Virgene)*, who had the absolute power of

appointment over *Weavewood's* trustee, directed *Stevenson* to fire *Williams*; however, *Stevenson* refused. On or about September 12, 1998 *Virgene* gave *Stevenson* oral notice that she was being terminated. Immediately thereafter (and unbeknownst to the Thompson family) *Stevenson* signed a note and mortgage in favor of *Williams*, giving *Williams* an interest in *Weavewood's* real estate of up to \$100,000 to cover attorney's fees to be incurred while working on some pending files.<sup>5</sup> *Stevenson* did not disclose the existence of the documents; and, concealed them from members of the Thompson family.<sup>6</sup> The mortgage was not prepared and executed contemporaneously with the retainer agreement. The mortgage was not purportedly created until September 10, 1998. [WAP 194-195]

The mortgage was not a promise to pay \$100,000; rather, it was an agreement to secure up to that amount for attorney's fees that had been incurred between August 1, 1998 and September 10, 1998, and going forward. The mortgage stated that it was due and payable October 1, 2003. [WAP 192 - 199]

*Virgene* gave *Stevenson* oral notice that she was fired the first week in September 1998. She refused. Written notice dated September 15, 1998 was attempted to be served on *Stevenson* and *Williams* on the evening of September 16, 1998. The letter directed:

*"Please immediately do the following: (1) turn over \* \* \* all documents related to the trust or to Weavewood, Inc., (2) cease all use of the Weavewood, Inc. corporate check books, (3) turn over \* \* \* all Weavewood, Inc. Corporate check books; and (4) turn over \* \* \* all keys to Weavewood, Inc."* [WAP 195-96]

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<sup>5</sup> It was *Weavewood's* belief that the mortgage was backdated after *Stevenson* and *Williams* learned of their removals.

<sup>6</sup> *Stevenson* never disclosed the documents. They were discovered on the title by *Weavewood* 18 months later while applying for a loan.

On September 17, 1998 *Virgene* retained legal counsel who sent a facsimile to *Stevenson* and *Williams*. The facsimile verified *Stevenson*'s termination and asked when a representative from his office could pick up all the files and records pertaining to *Stevenson*'s activities as trustee. The fax directed that neither *Stevenson* nor *Williams* were to take any further actions on behalf of *Weavewood*.<sup>7</sup> The fax also requested written verification by the following morning that no further action would be taken. There was no response. [WAP 196]

On September 21, 1998 *Virgene* commenced a probate action in Hennepin County Court File No. C2-98-110 to remove *Stevenson* as trustee. A motion for an *ex parte* emergency order was scheduled to be heard on September 21, 1998; and, a motion for a TRO was scheduled for September 24, 1998. An affidavit was included in the motions that alleged that despite repeated demands *Stevenson* had failed and refused to provide an accounting of her services as trustee. [WAP 196]

On September 21, 1998 Hennepin County Judge Thor Anderson issued an *ex parte* restraining order against *Stevenson* that temporarily restrained her from acting for the corporation. ¶1(e) of the order prohibited *Stevenson* from, "taking any actions whatsoever on behalf of the trust." It also temporarily removed *Stevenson* as trustee, set the matter for further hearing on September 24, 1998, and ordered *Stevenson* to, "provide a full accounting of her trust activities no later than the hearing on [September 24, 1998]." [WAP 196]

The same day that the restraining order was issued, in direct violation of the order,

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<sup>7</sup> Any work done by either *Stevenson* or *Williams* after that date was not authorized by *Weavewood*.

*Stevenson* recorded the purported mortgage with the Hennepin County Registrar's Office, shortly before the office closed. [WAP 196]

On September 24, 1998 Hennepin County Referee Krueger signed the TRO and Judge Patricia Belois signed off on it. At the hearing *Stevenson* failed to produce the accounting that she was ordered to produce in the September 21, 1998 order. The September 24, 1998 order restrained *Stevenson* from taking any actions in her role as trustee until further hearing on October 14, 1998. ¶5 of the order required *Stevenson* to bring with her to court on October 14, 1998,

*“all files, documents, bank account statements, canceled checks, deposit books, correspondences, contracts, agreements, and any and all other documentation pertaining to her activities as trustee and (sic) [her] involvement with Weavewood, Inc.”* (Emp. Added).

*Stevenson* failed to produce an accounting that she was ordered to produce by October 11, 1998. She also failed to produce the documents and records at the hearing on October 14, 1998, which included the then unknown retainer agreement, mortgage and note. [WAP 197]

On October 14, 1998 Judge Belois ordered *Stevenson* to provide complete access to all of the files and records pertaining to *Weavewood*. She was once again ordered to produce the full accounting and records that she had been previously ordered to produce. [WAD 197]

On October 15, 1998 *Stevenson* produced an accounting that *Weavewood* deemed to be woefully incomplete. *Stevenson* did not disclose and/or produce the still unknown retainer, note and mortgage. The accounting *Stevenson* produced showed that as of that date *Williams* was owed less than \$2,000 in attorney's fees. [WAD 198]

On October 30, 1998 *Stevenson* disobeyed Judge Belois' order by refusing to grant

*Virgene's* attorney access to all company books and records. [WAP 199]

On November 3, 1998 *Stevenson* was again ordered by the Court to produce all files and records belonging to *Weavewood*, which again, would have included the then undisclosed retainer agreement, mortgage and note. They were not produced. [WAP 199]

During a trial the first week in December 1998 *Stevenson* testified under oath that as of that date *Williams* was owed approximately \$2,500 in attorney's fees. Shortly thereafter, at the conclusion of 12 days of trial, Judge Belois ruled from the bench that *Virgene's* termination notice was proper and effective September 17, 1998 and that *Stevenson* had been properly removed as *Weavewood's* trustee.<sup>8</sup> *Weavewood's* records demonstrate that *Williams* was paid the \$2,500 by the end of December 1998. [WAP 199-200]

*Williams* died on October 17, 1999. *Stevenson*, along with the daughter of *Williams's* surviving spouse, were appointed co-personal representatives of the *Estate of James Malcolm Williams*, Hennepin County District Court File No. P3-00-103. [WAP 201]

While seeking financing in 2001 *Weavewood* discovered for the first time the existence of the fraudulent mortgage. [WAP 201]

On April 13, 2000 *Weavewood's* new trustee filed a claim against William's estate. The claim was denied.<sup>9</sup> In a discovery response in a lawsuit brought against *Weavewood* in 2001 that involved the title to the subject property, *Stevenson* produced a statement claiming

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<sup>8</sup> The notice also terminated *Williams* from any further representation of *Weavewood* effective that date.

<sup>9</sup> Legally, a claim has to be based on monies actually owed by the decedent to the claimant. The claim was in the nature of a malpractice action over which the probate court did not have jurisdiction.

*Williams* had incurred 139.5 hours of fees that had not been paid as well as other similarly suspect billings. The purported bill had never been submitted to *Weavewood* in the three prior years. Furthermore, it directly contradicted the accountings produced by *Stevenson* and her own sworn testimony at trial. *Stevenson* was unable to produce any work product that supported the claimed 139.5 hour bill and the other statements, even though *Stevenson* conceded that at the time she was in possession of all of *William's* files and records. Nor could she identify the author of the bill. No action was ever taken by *Stevenson* or the estate to collect the purported indebtedness; and, the claimed amounts due were not listed as assets in the probate proceeding. [WAP 201 - 67]

On November 8, 2001 *Weavewood* commenced litigation against *Stevenson* and the estate and sought invalidation of the mortgage as well as damages for fraud. The action was never filed with the Court and despite answers being interposed, neither side pursued the action any further. *Weavewood* was financially strapped at the time and decided to wait out the mortgage and defend against it later if *Stevenson* and/or the estate decided to attempt foreclosure or to sue on the note. *Weavewood* knew that they had six years to sue on the note and 15 years to attempt foreclosure. If they did neither the documents were be of no legal effect. Subsequent lenders reviewed the documentation and history and granted *Weavewood* mortgages despite the *Williams* mortgage being of record as they were satisfied that the purported mortgage was a sham. [WAP 201-202]

On April 16, 2004 *Stevenson* and Meta *Williams (Meta)*, as co-personal representatives of the estate, signed and provided to the probate court an *Inventory in Special Administration*. The document was signed under penalty of perjury. The *Inventory* made no

mention of the mortgage and note. [WAP 205 -210]

On April 22, 2004 an *Assignment of Mortgage* purporting to be in the Williams Estate granted *Stevenson* and *Meta* one-half undivided interests in the subject September 10, 1998 mortgage. The assignment asserted that as of November 1, 1998 the mortgage had a value of \$83,400. The assignment did not appear in the probate court file; however, unbeknownst to *Weavewood* on May 18, 2004 the unfiled assignment was recorded with the Hennepin County Registrar. [WAP 205 - 210]

On May 4, 2004 the *Williams Estate* assigned the mortgage equally to *Stevenson* and *Meta*. In direct contradiction to the unfiled April 22, 2004 assignments, the assignments filed in the probate court listed \$0 value for the note and mortgage. [WAP 205 - 210]

On June 18, 2004 *Stevenson* and *Meta* executed individual *Receipt for Assets by Recipient of Interim Distributions* and filed them in the probate file. At #5 of each document there is listed an,

*“Assignment of ½ interest in \$100,000 Mortgage Note and Mortgage dated 9/10/98 from Weavewood, Inc. **with no present value.**”* [WAP 205 - 210]

Neither *Stevenson* nor *Meta* ever attempted to sue on the note or foreclose the mortgage.

Other fatal defects in the validity of the mortgage have been discerned from the Certificate of Title itself, that render the underlying attempt to foreclose fatally defective.<sup>10</sup>

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<sup>10</sup> This reference and observation does not rely on new evidence. At this time it is presented as background facts garnered from the face of the Certificate of Title which *S&P* relied on in its foreclosure and which appears that pages 26 - 28 of its appendix. The comments merely present additional support for *Weavewood's* contention that the underlying purported mortgage is void.

For instance, when *Stevenson* illegally<sup>11</sup> recorded the purported mortgage, she failed to also record any documentation that demonstrated her authority, i.e., as trustee. When *Stevenson* recorded the purported “*assignments of mortgage*” from the *Williams Estate*, (which are defective on their faces since they don’t even reference the probate case files), she failed to record the death certificate, the last will, the *Williams* trust agreement and the decree of distribution (since it came from a special administration). *See*, document at pages 26 - 28 of *S&P* appendix.

On March 13, 2009 *Stevenson’s* and *Meta’s* interests in the mortgage were assigned to *Palladium Holdings, LLC*. The assignments were recorded on March 26, 2009. The consideration for the assignments is not listed on the document. On March 26, 2009 *Palladium* assigned the mortgage to *S&P*. The assignment was recorded the same day. At no time did any representatives of *S&P* contact *Weavewood* regarding its validity. [WAP 11, WAP 202-210]

Upon learning of the assignments through notice of foreclosure, *Weavewood* provided *S&P* with extensive documentation that conclusively demonstrated and proved that *Stevenson* and *Meta* perpetrated a fraud on *Weavewood* in conjunction with the purported note and mortgage and that no monies were due and owing. Despite such proof, *S&P* commenced a foreclosure by advertisement action on June 10, 2009, setting August 5, 2009 as the

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<sup>11</sup> As noted above, she raced to the Registrar of Titles office in September 2008 after being served with a TRO that prevented her from taking such action, and recorded the purported mortgage.

sheriff's sale date. The notice listed \$154,085.52 being claimed due and owing.

On July 31, 2009 *Weavewood* filed a petition in Hennepin County District Court and sought an order from the Registrar of Titles to declare the mortgage void or satisfied. The action also sought to restrain the sheriff's sale from going through. On August 3, 2009 Hennepin County Judge Marilyn Rosenbaum issued a TRO restraining the foreclosure sale. On August 19, 2009 the TRO was dissolved and the sheriff's sale proceeded on September 1, 2009. Judge Rosenbaum noted in her order that *Weavewood* had other remedies and that the statute of limitations had *likely* run on *Weavewood's* ability to dispute the mortgage. However, those issues were not litigated in that file. [WAP 2 - 36]

On or about February 23, 2010 *Weavewood* commenced an action seeking to restrain the running of the redemption period, seeking declaratory relief that the mortgage was null and void, lacked consideration and/or had been paid; and affirmative relief for fraud and breach of fiduciary duty. [WAP 65, et al]

On February 26, 2010 Judge Tanya Bransford issued an emergency TRO extending the redemption period pending a decision on *Weavewood's* motion for TRO. On March 22, 2010 she issued a TRO, pending further hearing. [WAP 115-116, 133-143]]

The parties appeared in court on May 25, 2010. The Court took under advisement *Weavewood's* request for injunctive relief as well as its motion for default judgment. *Weavewood* served and filed a motion for summary judgment on July 1, 2010. *S&P* filed a memorandum in response to *Weavewood's* motion and filed its own motion for summary judgment. The motions were heard on August 3, 2010.

*S&P* defended on the basis of the statute of limitations, with a minimal attempt to justify the validity of the purported mortgage. None of *Weavewood's* extensive allegations proving the mortgage was a sham were countered or disputed. *S&P* claimed that fraud claims and breach of contract and fiduciary duty claims are barred by 6-year statutes of limitations. On the other hand *Weavewood* asserted the statute of limitations is not applicable to its defenses since a party always has a right to defend against an action and always has a right to seek declaratory relief. *Weavewood* also again asserted that the mortgage was void, it had been paid and/or nothing was owed on it. *S&P* provided no evidence demonstrating that any monies were owing on the mortgage.

On August 24, 2010 Judge Bransford issued an order dissolving the TRO. The order held that the redemption period ran six months from the date of the order. On September 30, 2010 Judge Bransford *sue sponte* amended the August 24, 2010 order to hold that the redemption period ran six months prior to the order. Judge Bransford largely based it on *S&P's* argument that *Weavewood's* "defenses" were barred by statutes of limitation.

The 09/30/10 order arguably gave *S&P* retroactive ownership to the property since no one had redeemed the mortgage due to the TRO and August 24, 2010 order.

On October 8, 2010 *Weavewood* served and filed a motion to stay the trial court's decisions pending appeal or in the alternative reinstating the temporary restraining order pending the outcome of the appeal. The motion was heard as was a motion by *Highland Bank* to intervene. The trial court denied the motion to intervene from the bench. [WAP 504 - 519]

On October 12, 2010 the trial court stayed its decisions pending appeal but declined to reinstate the temporary restraining order. By separate order the trial court granted summary judgment to *S&P* based largely on the same findings and conclusions from the prior two decisions to dissolve the TRO. [WAP 520-521]

*Weavewood* appealed the August 24, 2010 decision and the September 30, 2010 decision in File No. A10-1762. *Weavewood* appealed the October 12, 2010 grant of summary judgment (entered November 12, 2010) in File No. A10-2113. *Highland Bank* appealed the trial court's refusal to allow it to intervene in File No. A10-2221. By order of this Court all three appeals were consolidated.

On September 19, 2011 the Court of Appeals affirmed in part and reversed in part the decision of the trial court. On the basis of applicable statutes of limitation, the Court of appeals affirmed the trial court's grant of summary judgment pertaining to *Weavewood's* claims for monetary damages, i.e., breach of contract, breach of fiduciary duty, slander of title, unjust enrichment, but reversed and remanded its statute of limitations holding pertaining to *Weavewood's* defenses to the foreclosure and mortgage.

### **CHALLENGES TO *S&P'S* APPOSITE CASES**

*S&P* identified the following three cases as being apposite to their argument that statutes of limitation apply to actions for declaratory judgment. *None* of the cases cited remotely support *S&P's* position.

***State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946).**

*S&P* cites the case as "apposite" and argues it at pages 16 and 17 of its brief. *S&P* cites

*Haveland* for a number of propositions, which will each be dealt with here. 1) There needs to be a justiciable controversy, meaning that there needs to be definite and concrete assertions of right, a genuine conflict and not merely a request for an advisory opinion. None of those requirements are lacking here. *S&P* claims that they are the owners of a valid and legitimately recorded interest against the Certificate of Title to the subject property and properly foreclosed by advertisement. *Weavewood* denies that the mortgage is even properly enforceable on the face of the Certificate of Title since the original mortgage lacks required accompanying documents such as those demonstrating *Stevenson*'s authority as trustee; and, the purported assignments are not accompanied by certified copies of the death certificate of Malcolm Williams, his will, his trust agreement nor is there recorded any decree of distribution from the probate files.<sup>12</sup> [APP 26 - 28] *Weavewood* maintains that the purported mortgage is illegal, void, lacks consideration or has been paid in full. It is unclear where the situation fails to rise to the level of a justiciable controversy.

*S&P*'s arguments are couched in terms of substantive law; however, declaratory actions are procedural devices. *S&P* takes the "justiciable controversy" requirement for declaratory actions out of context by citing *Haveland*. The Court of Appeals in *Cincinnati Ins. Co. v. Franck*, cited *Haveland* for the proposition that:

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<sup>12</sup> *Weavewood* concedes that these particular facts were not alleged at the trial court level but they merely supplement the dozens of other inconsistencies and volumes of conclusive evidence that demonstrates *Stevenson* fraudulently and illegally conspired with *Williams* to utilize her confidential position of trustee to attempt to cheat *Weavewood* out of \$100,000.

*“A declaratory action is a justiciable controversy if it (a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.”* (Other citations omitted) 621 N.W.2d 270, 273-74 (Minn. App. 2001).

*Franck* stated,

*“As a procedural device, a declaratory action allows for earlier adjudication of a justiciable controversy, but it does not dispense with the necessary elements of justiciability.”* (Citations omitted). *Id.* at 274.

*S&P*'s argument using *Haveland* is nonsensical. Without drawing any parallels between the facts of this case with those in *Haveland*, or applying the law as stated in *Haveland* to this case, *S&P* makes a number of totally unsupported arguments. First, it argues [at page 16 of its brief, ¶2] that “[d]eclaratory judgment actions by definition always revolve around a body of substantive law not found without the express language of the Act.” *S&P* does not explain the basis for the conclusory statement and there frankly is none. Second, while *S&P* concedes that “a complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for determining declaratory relief,” [at page 16, ¶3 of brief] it proceeds to argue that the relief sought in such an action can be for the dismissal of the complaint due to the running of the statute of limitations. [Citing, *Haveland*, 223 Minn. at 92, 25 N.W.2d at 477.] But in the case of a mortgage foreclosure action, the only relevant statute of limitations pertains to whether or not a mortgagee forecloses within 15 years. To require a mortgagor to contest a foreclosure within six years, before a foreclosure is even commenced, is nonsensical. *S&P* continues to confuse its role in this matter. *It* foreclosed

within 15 years. The statute of limitations is not involved. All *Weavewood* did was timely answer and contest the validity, etc. of the mortgage and foreclosure. There is absolutely no logic to *S&P*'s argument. *See*, Minn. Stat. § 645.17(1) (2010) ("*The legislature does not intend a result that is absurd, impossible of execution, or unreasonable.*")

*State Dept of Public Safety v. \$6,276*, 478 NW 2d 333 (Minn. App. 1991).

*Weavewood* does not dispute the fact that a court may possibly dismiss a declaratory relief action *if* the relief sought is barred by an independent statute of limitations and *if* affirmative relief is sought. In the *\$6,276* case the applicable statute of limitations barred the state from seeking to obtain by forfeiture confiscated property. While *S&P* argues that the same "logic" applies here, it again completely misses the point. Had *S&P* sought to foreclose outside the 15-year statute of limitations, *Weavewood* could seek dismissal. As the court noted in *\$6,276*, "*The defense of the running of a statute of limitations is customarily raised only after the applicable statute is run. Historically, all courts, trial and appellate, have the authority to decide if the statute of limitations, claimed to apply, does apply. If a court cannot decide that issue after the claimed bar has passed, who can?*" *Id.* at 336.

*S&P* continues to fail to differentiate between a "cause of action" and a defense. As held in *State v. Joseph*,

*"[w]e know of no law, and none has been cited to us, that applies a statute of limitations to a defense. A defense is a response to a claim and logically could not be asserted prior to a claim being made. If the defense is affirmative, \* \* \* it must be asserted responsively or it is deemed waived. See Minn.R.Civ.P. 12.02 ("every defense, in law or fact, to a claim for relief \* \* \* shall be asserted in the responsive pleading \* \* \*."); Minn. R.Civ.P. 8.03 (a party must plead affirmatively any defense of avoidance)."*

622 N.W.2d at 363, 363 (Minn. App. 2001).

Here, *Weavewood* has alleged that the subject purported mortgage is void, lacks consideration, has been paid, or was procured by fraud. Instead of even discussing those particular defenses, *S&P* instead centers its argument on the fraud allegation and ignores the fact that fraud can be either offensive or defensive in nature. *Weavewood's* "offensive" fraud actions were dismissed as they related to *damages*. The purely defensive fraud (count) allegations pertain to the illegality of the mortgage and do not seek monetary damages. Of interest is the fact that nowhere in its brief does *S&P* analyze or even mention (other than in passing) the holding cited above from *State v. Joseph*, nor does it identify *one single case* that applies a statute of limitations to a defense.

*Dehoff v. Attorney General*, 564 SW 2d 361 (Tenn 1978) *S&P* dishonestly misapplies and misinterprets this holding (and mis-cites it at page 1 of its brief). In its brief, *S&P* quoted the *Dehoff* case ***but***, apparently intentionally omitted a key internal citation. *S&P's* citation is reproduced below, ***with*** the internal citation (as well as omitted external citations that were not even referenced),

*"Limitations statutes do not apply to declaratory judgments suits, as such, because a declaratory judgment action is a mere procedural device by which various types of substantive claims may be asserted. Luckenbach Steamship Co. v. United States, 312 F.2d 545 (2d Cir.1963). Accordingly, it is necessary to ascertain the nature of the substantive claims sought to be asserted in a declaratory judgment action in order to determine the appropriate statute of limitations. And, if a special statute of limitations applies to a special statutory proceeding, such as an election contest, it will be applied when a declaratory judgment action is employed to achieve the same result as the special proceeding. Finlayson v. West Bloomfield Township, 320 Mich. 350, 31 N.W.2d 80 (1948); Campbell v. Nassau County, 273 App.Div. 785, 75 N.Y.S.2d 482 (1947); 22 Am.Jur.2d Declaratory Judgments*

§ 78 (1965).”

The *Luckenbach* reference is key to the context of the quote itself. The following citation is from the case. While it is lengthy it fairly well resolves the issue in favor of *Weavewood*:

*“Appellant's purpose in bringing this action was to "(a) write off or pay the Government's claim, (b) discharge the surety on its bond insuring payment of additional charter hire, and (c) avoid possible accrual of interest on the Government's claim." (Appellant's brief p. 5.) Appellant would thus appear to be in the very predicament for which the Declaratory Judgments Act was intended to grant relief.*

*The district court, in reaching its conclusion that plaintiff's claim was barred by the statutory limitation provision, relied largely on a remark of this court in the course of its opinion in American-Foreign Steamship Corp. v. United States, 291 F.2d 598 (2d Cir.), cert. denied, 368 U.S. 895, 82 S.Ct. 171, 7 L.Ed.2d 92 (1961). In that case, in which the Luckenbach Steamship Company was also a plaintiff, substantially the same issues were posed as those posed by plaintiff's allegations in the present case. However, the cases are essentially different in character because in the American-Foreign case, the plaintiffs sought affirmative recovery, to wit, the refund of alleged overpayments of charter hire, whereas in the present case, the plaintiff seeks only a declaration of non-liability for additional payments which the defendant claims are due.*

*The language of the American-Foreign opinion to which the district court refers is as follows:*

*‘Charterers could have brought suit in the District Court for a declaratory judgment to determine the legality of the disputed clauses within two years of signing the agreements.’ 291 F.2d at 604.*

*The action in which these words were used was not an action for declaratory relief. The plaintiffs sought not a declaratory but a coercive judgment, a judgment for refund of moneys paid. Whether or not declaratory relief was governed by the two year statute could not have been determinative of the plaintiff's rights, and the weight to be attached to the quoted statement must be considered with that fact in mind. We do not believe that the statement is binding upon us.*

*The limiting statute reads (46 U.S.C. § 745):*

*"Suits as authorized by this chapter may be brought only within two years after the cause*

of action arises \* \* \*."

*Limitations statutes do not apply to declaratory judgments as such. Declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. There are no statutes which provide that declaratory relief will be barred after a certain period of time. Limitations periods are applicable not to the form of relief but to the claim on which the relief is based.[2] In the present case that 549\*549 basic subject matter is a defense, and it is entirely clear, and conceded, that the defense which the plaintiff seeks to assert is not barred by the statute.[3] In other words the government is not contending that the subject matter of plaintiff's claim is barred, but only that declaratory relief based upon that subject matter is barred.[4] The plaintiff's claim can concededly be asserted as a defense but, it is argued, it cannot be asserted as the basis for declaratory relief. This is the equivalent of saying that the claim is not barred but that a declaratory judgment is barred. But, as indicated above, there are no statutes which bar declaratory relief as such, and the interpretation of Section 745 for which the defendant contends is therefore without parallel elsewhere in the law.*

***Non-liability for which plaintiff seeks a declaration is not a "cause of action" within the meaning of the limitations section. Non-liability is the negative of the claim or cause of action with respect to which the declaration is sought. For purposes of the statute of limitations non-liability is inextricably linked with that cause of action. So long as the claim can be made, its negative can be asserted. When the claim itself has been barred, a declaration of non-liability is also barred, except for non-liability which is itself based upon the bar of the limitations period. (In this latter sense a declaration of non-liability 550\*550 will never be barred, since there will always exist the possibility of securing a declaration that the claim is barred by the statute of limitations.)***

*The purpose of statutes of limitations is "to keep stale litigation out of the courts." United States v. Western Pac. R. R., 352 U.S. 59, 72, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956). The declaratory judgment procedure as used in the present case is also designed to permit the termination of a continuing actual controversy when that controversy might otherwise continue indefinitely. See Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 325 (4th Cir., 1937). Both statutes of limitations and declaratory judgment procedures are directed to repose. The position taken by the Government would have us apply one to the other in order to reach the anomalous result of allowing a stale government claim to grow even staler. We do not believe that Congress could have intended such an incongruous result.*

*That congressional policy is designed to permit exactly the kind of determination which the defendant resists in the present case is indicated by 28 U.S.C. § 1494 under which the plaintiff originally brought the present claim. That statute provides:*

*'The Court of Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, \* \* \* where:*

*(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;*

*(2) three years have elapsed from the date of such application without settlement; and*

*(3) no suit upon the same has been brought by the United States.'*

*Such authority as there is on the point at issue supports the view that a declaration of non-liability is not barred by the statute of limitations.*

*In Hill v. Hawes, 79 U.S.App.D.C. 168, 144 F.2d 511 (1944), suit was brought for the cancellation of a note and deed of trust on the ground that if payments of usurious interest were credited to plaintiff, the note was fully paid. In rejecting defendant's contention that the suit was time-barred, the court said:*

*'The statute of limitations does not bar the relief sought in this case. Under the usury statute recovery of usurious payments is limited to one year. Under the general statute of limitations actions not otherwise limited must be brought within three years. However, no statute puts any limitations on the claim of usury used as a defense in a suit based on the usurious obligation. **A usurer cannot by delaying suit on a note acquire the right to collect the usurious payments forfeited by the statute.** In substance, this suit may be regarded as one for a declaratory judgment that the plaintiff's intestate had a complete defense to her obligation on the note. **A declaration that there is a complete defense to the note is not barred by the statute.**' 144 F.2d at 513 (footnotes omitted). (Emphasis supplied.)*

*In Williams v. Neely, 134 F. 1, 69 L.R. A. 232 (8th Cir., 1904), Neely brought an action at law against Williams on a promissory note. By way of recoupment, Williams alleged breach of the vendor's covenant against encumbrances on the land for which the note was given. The trial court held that the facts alleged did not constitute a defense. Thereupon Williams brought an action in equity to enjoin prosecution of Neely's action at law. The Court of Appeals held that the facts as alleged constituted a good defense, and that the statute of limitations had not run against it even though Williams appeared as a party plaintiff in the case before the appellate court. In dealing with the limitations question, the court said:*

*'The next contention is that the defense to the note by way of equitable reduction is unavailable to the 551\*551 complainants because the cause of action upon the covenant*

*against incumbrances is barred by the statute of limitations. Conceding, without deciding, that the bar of the statute had fallen upon the action on this covenant before this suit was instituted, that fact is not fatal to the defense of the complainants, nor to this suit to enforce it. That defense, as we have seen, is not set-off or counterclaim, but an equitable reason why the amount payable by the terms of the note should be reduced. It is reduction. It is that because the consideration of the note failed in part, and because the condition subsequent that the covenant against incumbrances should be kept was not fulfilled, the full amount of the note ought not to be paid. This defense attaches to and inheres in the note itself, and, while the cause of action upon that obligation survives, the defense lives and runs with it. The defense of reduction or recoupment which arises out of the same transaction as the note or claim survives as long as the cause of action upon the note or claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitations.’ 134 F. at 12-13. (Emphasis supplied.)*

*State courts have consistently taken the same position. Thus in Rosborough v. Picton, 12 Tex.Civ.App. 113, 34 S.W. 791, 43 S.W. 1033 (1896), plaintiffs refused to make further payments on their notes given for the purchase of certain lands, claiming that title to a portion thereof had not passed. When the defendants threatened to foreclose the notes, plaintiffs sued to enjoin the foreclosure sale. In rejecting defendants' contention that the action was barred by limitations, the court said:*

*‘The statute of limitation, in our opinion, has no application to the case. It is not a suit to recover anything from the defendants, but is the assertion of a partial defense to the notes which were made the basis of the proceeding to sell under the trust deed, and which defense might become ineffectual if the sale were allowed to proceed. It has been held that a defense of this character can be made to a suit for the purchase money whenever it may be brought, and that the statute of limitations has no application. Moore v. Hazelwood, 67 Tex. 624, 4 S.W. 215, [Franco-Texan] Land Co. v. Simpson, 1 Tex.Civ.App. 600, 20 S.W. 953. If, however, the purchase money has all been paid, and a suit is necessary to recover it, the statute, of course, runs, as it does against any other cause of action. Smith v. Fly, 24 Tex. 345. It necessarily results from these decisions that, so long as the purchase money is unpaid, the defense exists, and the statute does not run; in fact, has no application to it as a defense to the purchase-money notes. \* \* \* [Plaintiff] neither has nor asserts a cause of action to recover money paid, because he has not paid anything in excess of what he owed, and such a cause of action as that only arises when the vendee has paid more than was due for the land which he actually got. So, it is evident that no cause of action is asserted here which the statute has barred. The appellants' right of action consists in the fact that they have a present valid defense to the notes to pay which a sale is about to be made, and that they can only assert it with the aid of a court of equity.’ 34 S.W. at 793.*

See also *Murphy v. Boyt*, 180 S.W.2d 199 (Tex.Civ.App.1944); *Tyrrell Combest Realty Co. v. Ellis*, 127 S.W.2d 598 (Tex.Civ.App.1939). And see *Equitable Life Ins. Co. v. Condon*, 233 Iowa 567, 10 N.W.2d 78 (1943). **These cases were in the nature of suits to quiet title. They gain in persuasiveness when it is remembered that "the action for a so-called negative declaration is simply a broadening of the equitable action for the removal of a cloud from title to cover 552\*552 the removal of clouds from legal relations generally."** *Borchard, Declaratory Judgments* 21 (1941). See also *id.* at 139-143.

In *Nickel v. Looser*, 61 Cal.App.2d 224, 142 P.2d 458 (Dist.Ct.App.1943), plaintiff sued to cancel a promissory note and deed of trust given to the builder of plaintiff's house in 1934. Plaintiff argued that defendant's failure to build the house in a workmanlike manner resulted in a failure of consideration for the note. In affirming judgment for plaintiff, the court held that **"the statute of limitations cannot be invoked by defendants to bar the defense of the invalidity or non-performance of the agreement as alleged and proved by plaintiff."** 142 P.2d at 461.<sup>13</sup> ” (Emp. added)

Footnotes 2 and 3 from the citation are of particular note:

“[2] ***In determining what statute of limitations applies to a claim, it is substance of the right sued on, and not the remedy invoked, that governs. "The right asserted is determinative, not the relief sought."*** *New Amsterdam Cas. Co. v. Waller*, 301 F. 2d 839, 844 (4th Cir. 1962). See *Bechler v. Kaye*, 222 F.2d 216, 220 (10th Cir.), cert. denied, 350 U.S. 837, 76 S.Ct. 75, 100 L.Ed. 747 (1955); *National Discount Corp. v. O'Mell*, 194 F.2d 452 (6th Cir., 1952). ***The same principle is applicable when the question presented is not which statute of limitations applies, but whether a statute is applicable at all.***

[3] **The law is well settled that limitations do not normally run against a defense. The principle has often been expressed in the figure of speech that the statute is available only as a shield, and not as a sword.** *Northern Pac. Ry. v. United States*, 277 F.2d 615, 623-624 (10th Cir. 1960) and cases cited; see 53 C.J.S. *Limitations of Actions* § 104. The rule was explained in *United States v. Western Pac. R. R.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956). In reversing a judgment below that certain defenses of the United States were barred by limitations although the plaintiff's claims were not, the Court said:

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<sup>13</sup> *Weavewood* could, be will not, provide the actual citations from the other omitted citations to *Finlayson v. West Bloomfield Township, Campbell*, and 22 Am.Jur.2d *Declaratory Judgments* § 78 (1965) as it would be overkill. Full copies of the *Luckenbach* and *Dehoff* decisions are appended hereto at [            ]

'the basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.' 352 U.S. at 72, 77 S.Ct. at 169.

See *Burton v. Martin Oil Service, Inc.*, 295 F.2d 679 (7th Cir., 1961); *Hill v. Hawes*, 79 U.S.App.D.C. 168, 144 F.2d 511 (1944).

Thus a defense of recoupment survives as long as the cause of action on the claim exists.

**'Recoupment goes to the foundation of the plaintiff's claim; it is available as a defense, although as an affirmative cause of action it may be barred by limitation. The defense of recoupment, which arises out of the same transaction as plaintiff's claim, survives as long as the cause of action upon the claim exists.'** *Pennsylvania R. R. v. Miller*, 124 F.2d 160, 162, 140 A.L.R. 811 (5th Cir.), (footnotes omitted), cert. denied, 316 U.S. 676, 62 S.Ct. 1047, 86 L.Ed. 1750 (1942).

See *Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935); *City of Grand Rapids v. McCurdy*, 136 F. 2d 615, 619 (6th Cir., 1943); *Ready Mix Concrete Co. v. United States*, 130 F. Supp. 390, 131 Ct.Cl. 204 (1955); *Nautilus Shipping Corp. v. United States*, 158 F.Supp. 353, 141 Ct.Cl. 391 (1958); *Annot.*, 1 A.L.R.2d 630, 666-73 (1948).<sup>7</sup> ” (Emp. added)

In other words, despite S&P's dishonest attempt to alter the law to suit its argument, a purely defensive employment of the statute of limitation is not subject to any underlying substantive statutes of limitation.

## RESPONSE TO REMAINING *S&P* ARGUMENTS

Page 11 of *S&P* brief. *Weavewood* will not respond to *S&P*'s nonsensical insinuation that if the Court of Appeals' decision stands, jurisprudence as we know it will come to an end. On pages 12 and 13 of *S&P*'s brief it bears mention that while *S&P* cites cases for the proposition that a party should not be permitted to stand on a right to the detriment of another - but that is precisely what *S&P* has tried to do here, waiting out what it believe to be the time to object to the mortgage and then foreclosing. The same can be said of the fact that while *S&P* asserts that *Weavewood* could have litigated the issue in 2000 - 2003, *so could have Stevenson and the estate!* On page 13, ¶2, *S&P* speciously suggests, *what is a defense?* *S&P* argues that *State v. Joseph* [at p. 363] "*defined it as a response to a claim and logically [cannot] not be asserted prior to a claim being made.*" (Quotation as stated in brief). *S&P* even takes this out of context. It wasn't a "definition" of the word defense that was made by the court in *State v. Joseph*. It was a contextual argument by the court. Furthermore, *S&P*'s argument that *Weavewood* could have asserted its position sooner takes the argument of out context as well. The point is *Weavewood* was under no legal obligation to bring the action until *S&P* commenced the foreclosure. Until that occurred the mortgage was merely a possibility which would have terminated by law under the 15-year statute of limitations in 2013. *S&P* cites "*Weston v. Jones, 160 Minn. 32, 36, 199 N.W.2d 431 (1924)(citations omitted).*" It is unclear what context this comes from and again, *what* citations were omitted. On page 13, ¶3, *S&P* overrules the Court of Appeals' decision in this case and asserts that

*Weavewood's* requests for declaratory relief are "claims" after-all. But as argued, that is not the issue before this Court. *S&P* fails to recognize that its foreclosure action was a *claim for relief* and *Weavewood* had a right to respond and interpose defenses. The burden is on the foreclosing party to prove that there has been a default in the mortgage and prove up the amount that it due. Minn. Stat. §580.02; *Jackson v. Mortgage Electronic Reg. Sys.*, 770 NW 2d 487, 492 (Minn. 2009).<sup>14</sup>

*S&P* cites *Peterson v. Johnson*, 720 NW 2d 833, 838 (Minn. Ct. App. 2006) and claims that it stands for the proposition that statutes of limitation apply in declaratory judgment actions. Once again, that *is not* what the case says. The case discusses the application of §559.19, not Chapter 555. *S&P* cites, *Vrieze v. New Century Homes, Inc.*, 542 N.W.2d 62 (Minn. App.1996). But the case involves discretionary and governmental immunity and merely stated, "[S]ome recovery theory must underlie a declaratory judgment demand." Furthermore, *S&P's* arguments pertaining to §559.01 are inapposite as the facts of this case don't even fit the rudimentary requirements to bring a case under it.

*S&P* improperly cites other state laws that are "similar." The arguments are meritless as well. However, *Weavewood* extensively de-constructed *S&P's* arguments pertaining to the *Dehoff* case, *supra*. The balance of *S&P's* arguments are all based on the same improper

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<sup>14</sup> On page 14 of its brief *S&P* misstates the law of recoupment, which *Weavewood* argued in its brief at the Court of Appeals as its right to pursue. Furthermore, *S&P* misstates the law and facts pertaining to whether the Court of Appeals was correct in reinstating the redemption period with four days left. This argument is not before this Court and is in any even wrong. [Page 18 of brief in footnote 4]

arguments and baseless applications of law that permeate its entire argument. Further comment will not be made.

## WEAVEWOOD'S ARGUMENT

*Summary Argument.*<sup>15</sup> As argued *supra*, *Weavewood* understands this Court's review to be limited to the express issue of whether statutes of limitation apply to declaratory actions in Minnesota. The answer simply stated is no. However, that does not mean that a court is barred from dismissing a *claim* brought under the Act for reasons such as *res judicata* or even statutes of limitation where the relief sought is affirmative relief for damages and the only legal basis for the claim is barred by an applicable statute of limitations. But in the context of defensive actions to protect and preserve rights, the statute of limitations does not apply.

In, 29 Wm. Mitchell L. Rev. 613 (2002) Civil Procedure—Discouraging Declaratory Actions in Minnesota--the Res Judicata Effect of Declaratory Judgments in Light of *State v. Joseph*, Ryan R. Dreyerd, Dreyerd suggest at page 632,

*"[n]early every state applies statutes of limitation to declaratory actions. However, states have taken one of three approaches to determine which statute of limitation applies. The first applies the limitations period applicable to the underlying claim. The second approach uses a statute of limitation that applies to all causes of action not specifically provided for in other statutes. The third approach adopts a new statute that covers only declaratory actions."*

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<sup>15</sup> *Weavewood* believes that the holding in *Luckenback Steamship Co.* and citation to *United States v. Western Pacific Railroad, supra*, lays out its legal position in this appeal. That argument in response to *S&P's* assertions in its brief is incorporated as *Weavewood's* position.

In Minnesota, the first option seems to be the one employed; however, as argued above, it applies to “claims” not defenses. The Dreyerd article discusses at great length the effect of res judicata or claims preclusion. To the extent that such an argument could have been made against *Weavewood* in this case, they cut both ways. The validity of the mortgage could have been decided by *Stevenson* and the *Williams Estate* ten years ago as well, which would arguably preclude their attempt to foreclose. However, even if *Weavewood’s* defense of the foreclosure was deemed a “claim,” it would not have accrued under any statute of limitation until the foreclosure was commenced. The right here is the right to defend which didn’t accrue until *S&P* foreclosed. *See, i.e., Antone v. Mirviss*, 720 NW 2d 331, 340 (Minn 2006)(discussing when a malpractice claim becomes ripe).

***Statutes of Limitation in Minnesota.*** Minn. Stat. §§541.01 - 541.22 are derived from Chapter 60, 1858 having been around since statehood. Neither the Uniform Declaratory Relief Act or its Federal counterpart [28 U.S.C. §§2201, 2202] address whether a statute of limitations applies to them.

***Minnesota Precedent.*** Minnesota case law has consistently held that statutes of limitation under §§541.01 - 541.22 don’t apply to Chapter 555. *See, Fryberger v. Township of Fredenberg*, 428 N.W.2d 601, 605 (Minn. Ct. App. 1988)(holding declaratory judgments in Minnesota are not subject to statutes of limitation); *State v. Joseph*, 622 N.W.2d 358, 362 (Minn. Ct. App. 2001)(holding absent a statutory mandate, declaratory actions are not barred by statutes of limitations) *rev’d on other grounds* by *State v. Joseph*, 636 N.W.2d 322

(Minn. 2001). However, without a decision from this Court, or a statutory mandate, declaratory actions are not barred by statutes of limitation. *Id.* 622 N.W.2d at 362.

***The Justification for Statutes of Limitation.*** The justification for statutes of limitation lies in necessity and convenience rather than in logic. *Chase Securities Corp. v. Donaldson*, 335 U.S. 304, 314 (1945).<sup>16</sup> They are based on expediency rather than principle – and are intended to be practical and pragmatic barriers to the litigation of stale claims; as well as to spare parties from being forced to defend actions after memories have faded, evidence is lost or witnesses are gone. They are by definition arbitrary and they don't discriminate between just and unjust claims, or voidable and unavoidable delay, *Id.*

***The Purpose of the Declaratory Relief Act.*** The Declaratory Judgments Act is designed to resolve the uncertainty over a party's legal rights pertaining to an actual controversy before those rights have been violated. *Culligan Soft Water Serv. of Inglewood, Inc. v. Culligan Int'l Co.*, 288 N.W.2d 213, 215–16 (Minn. 1979).

***The Existence of Another Adequate Remedy Does Not Preclude Declaratory Relief.*** “The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Minn. R. Civ. P. 57; *Minn. Chippewa Tribe v. Dep't of Labor & Indus.*, 339 N.W.2d 55, 56 (Minn. 1983).

***The Act is Remedial.*** The Declaratory Judgments Act “is remedial, intended to settle and to afford relief from uncertainty with respect to rights, status, and other legal relations.”

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<sup>16</sup> Dealing with Minnesota law pertaining to Blue Sky Statutes and fraud.

*Holiday Acres No. 3 v. Midwest Fed. Savs. & Loan Ass'n of Minneapolis*, 271 N.W.2d 445, 447 n.2 (Minn. 1978).

***The Act is Entitled to Liberal Construction and Administration.*** Since the Act is remedial, it “*is to be liberally construed and administered.*” Minn. Stat. §555.12.

***The Uniform Declaratory Judgment Act.*** Minnesota adopted the Uniform Declaratory Judgments Act in 1933. Uniform Declaratory Judgments Act, ch. 286, 1933 Minn. Laws 372 (codified as amended at Minn. Stat. §§ 555.01-.16 (2011)).

***Judicial Power and Relief Under the Act.*** Under the Declaratory Judgments Act, courts have the power to declare rights, status, and other legal relations. Minn. Stat. §555.01.

***The Marketable Title Act.*** As the Supreme Court stated, “[i]t is plain that the legislature intended to relieve a title from the servitude of provisions contained in ancient records which ~fetter the marketability of real estate.” *Wichelman v. Messner*, 250 Minn. 88, 99, 83 N.W.2d 800, 812, *see, also, Hersh Props., LLC v. McDonald's Corp.*, 588 N.W.2d 728, 734 (Minn. 1999). The MTA accomplishes this goal by deeming sufficiently ancient claims (specifically, those more than 40 years old) conclusively abandoned, so that such ancient claims do not fetter title.

The purpose of the Marketable Title Act is to confirm the continuation of an interest in property as well as eliminating stale claims to an interest in real estate. *Lindberg v. Fasching*, 667 N.W.2d 481, 485 (Minn. Ct. App. 2003). Typically, the MTA applies in actions between persons/entities with an interest in property to determine whether one

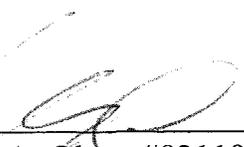
interest has been abandoned within the meaning of the MTA. *See, Id.* (dispute between owners of dominant and servient estates over easement rights); *Henly v. Chisago County*, 370 N.W.2d 920 (Minn. Ct. App. 1985) (dispute between township and landowner asserting title to that road). Here, *Weavewood* clearly has an interest in the property. It was content to wait out the 15-year statute of limitations to foreclosure the subject mortgage. That willingness was justified since there had never been a demand for payment even though according to the note it became ripe in 2003. Furthermore, there was never a demand for payment, even by *S&P*, which simply filed a power of attorney and commenced the foreclosure. *Weavewood* believes that under the act, as a party in fee in possession, it had 40 years to contest the mortgage, which would have become null and void in 2013 under Minn. Stat. §541.03 in any event.

## CONCLUSION

The holding in *State v. Joseph* comports with the law in this state as well recognized legal principles in general that have discussed and ruled on the applicability of statutes of limitation to the declaratory relief actions. The decision of the Court of Appeals should therefore be affirmed.

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