

NO. A11-1081

---

State of Minnesota  
**In Supreme Court**

DORIS RUIZ,

*Plaintiff-Respondent,*

v.

1<sup>st</sup> FIDELITY LOAN SERVICING, LLC,*Defendant-Appellant.*


---

**BRIEF OF AMICUS CURIAE MINNESOTA CREDIT UNION NETWORK**

---

**WILFORD, GESKE & COOK, P.A.**

Eric D. Cook (#218807)  
 David R. Mortensen (#032906X)  
 Christina M. Weber (#034963X)  
 8425 Seasons Parkway, Suite 105  
 Woodbury, MN 55125  
 (651) 209-3300

*Attorneys for Appellant-Defendant***BEISEL & DUNLEVY, P.A.**

Kevin J. Dunlevy (#0162851)  
 Michael E. Kruen (#0311650)  
 282 US Trust Building  
 730 Second Avenue South  
 Minneapolis, MN 55402  
 (612) 436-4343

*Attorneys for Amicus Curiae Minnesota  
 Bankers Association, Minnesota Land Title  
 Assoc., and Minnesota Assoc. of Realtors*

**DREWES LAW, PLLC**

Jonathan L. R. Drewes (#387327)  
 Michael J. Wang (#391420)  
 1516 West Lake Street, Suite 300  
 Minneapolis, MN 55408  
 (612) 285-3051

*Attorneys for Plaintiff-Respondent***MINNESOTA CREDIT UNION  
NETWORK**

John M. Wendland (#0349653)  
 Christopher K. Loftus (#0387618)  
 555 Wabasha Street North, Suite 200  
 St. Paul, MN 55102  
 (651) 288-5170

*Attorneys for Amicus Curiae Minnesota  
 Credit Union Network*

## Table of Contents

Interest of Amicus Curiae Minnesota Credit Union Network. ....	1
Overview .....	1
Argument.....	4
I. Minn. Stat. § 580.032 is Designed Only to Protect Persons Holding a Redeemable Interest in the Property.....	4
A. Minnesota Statute §580.032 was enacted to protect interested parties to the parcel and not the borrower .....	4
B. Minnesota law currently provides the borrower ample notice and protection of the pending foreclosure.....	6
II. The Curative Act demonstrates a substantial compliance standard must be applied to Minn. Stat. § 580.032.....	7
III. The Minnesota Court of Appeals’ Holding Will Create Unnecessary Litigation and Place an Additional Burden on an Already Weakened Housing Market.....	8
Conclusion.....	10
Certification of Brief Length.....	11

## Table of Authorities

### Minnesota Cases

<i>Hudson v. Upper Michigan Land Co.</i> , 206 N.W. 44 (Minn. 1925) .....	7
<i>Ruiz v. 1<sup>st</sup> Fidelity Loan Servicing, LLC</i> , 2012 WL 762313 (Minn. App).....	2

### Statutes

Minn. Stat. § 580.021 (2011) .....	7
Minn. Stat. § 580.03 (2011).....	6, 7
Minn. Stat. § 580.032(1) (2011).....	5
Minn. Stat. § 580.032(3) (2011).....	4
Minn. Stat. § 580.032(4) (2011).....	6, 7
Minn. Stat. § 580.032(5) (2011).....	6
Minn. Stat. § 580.032(6) (2011).....	6, 7
Minn. Stat. § 580.04 (2011) .....	7
Minn. Stat. § 580.06 (2011) .....	7
Minn. Stat. § 580.20 (2011).....	6
Minn. Stat. § 582.25(22) (2011).....	9
Minn. Stat. § 582.27(1)(A) (2011).....	9
1992 Minn. Sess. Law. Serv. Ch. 463 (S.F. 1856).....	5

## **INTEREST OF AMICUS CURIAE MINNESOTA CREDIT UNION NETWORK**

The Minnesota Credit Union Network (“MNCUN”) is a statewide not-for-profit organization that serves and supports the needs and interests of Minnesota’s credit unions, which are not-for-profit cooperative financial institutions owned and controlled by their members and operated for the purpose of providing thrift, providing credit at reasonable rates, and providing other financial services to their members.<sup>1</sup> MNCUN works on behalf of the 139 Minnesota credit unions and their 1.5 million members.

As part of their commitment to the communities they serve, many of MNCUN’s member credit unions offer mortgages to their members, and, from time-to-time, are placed in the unfortunate position of having to foreclose on the mortgages that have gone into default. By acting on behalf of its member credit unions, MNCUN is uniquely situated to offer this Court a broad perspective on the importance of reversing the Minnesota Court of Appeals’ holding of applying a strict compliance standard to the notice of pendency requirement under Minn. Stat. § 580.032, subd. 3 providing a borrower the ability to void the foreclosure sale for any violation thereof and applying a broad brush application of the strict compliance standard.

### **OVERVIEW**

MNCUN relies upon the well-reasoned brief filed by 1<sup>st</sup> Fidelity Loan Servicing, LLC (“1<sup>st</sup> Fidelity”) on June 29, 2012. In furtherance of 1<sup>st</sup> Fidelity’s arguments,

---

<sup>1</sup> No part of this brief was authored by counsel for a party. No person or entity, other than the Minnesota Credit Union Network made any monetary contribution to the preparation or submission of this brief.

MNCUN is submitting this brief to provide the Court with a further understanding of existing mortgage foreclosure law and procedures and to outline the real world consequences of upholding the Minnesota Court of Appeals' holding in regard to the recording of the notice of pendency under Minn. Stat. § 580.032, subd. 3.<sup>2</sup> Specifically, MNCUN disagrees with the strict compliance standard applied by the Minnesota Court of Appeals to the notice of pendency requirement and believes a substantial compliance standard is the appropriate standard to be applied to this section.<sup>3</sup> MNCUN also disagrees with the Minnesota Court of Appeals broad brush application of the strict compliance standard. Additionally, MNCUN disagrees with the Minnesota Court of Appeals in that Minn. Stat. § 580.032 is a basis for a borrower to void a sale following a foreclosure by advertisement.<sup>4</sup> For all other issues before this Court, MNCUN defers to 1<sup>st</sup> Fidelity's arguments set forth in its brief.

For reasons set forth in detail below, failure to record the notice of pendency prior to the first date of publication, under the Minnesota Court of Appeals' broad application of a strict compliance standard, would unnecessarily provide the borrower with an opportunity to void an otherwise valid foreclosure sale. Such an overreaching application of the statute is not only unnecessary and redundant, but contrary to the intent of the Minnesota legislature and creates an undue burden on mortgagees and the Minnesota judicial system.

---

<sup>2</sup> *Ruiz v. 1<sup>st</sup> Fidelity Loan Servicing, LLC*, 2012 WL 762313 (Minn. App), 4-5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

MNCUN submits this amicus brief to raise the concerns of its member credit unions on the holding's future impact on Minnesota credit unions and other mortgage lenders throughout the State of Minnesota, and requests that the Minnesota Supreme Court reverse the Minnesota Court of Appeals' decision regarding the Minn. Stat. § 580.032 violation and the Minnesota Court of Appeals' application of a strict compliance standard to all of Minnesota's foreclosure by advertisement requirements.

### ARGUMENT

#### **I. MINN. STAT. § 580.032 IS DESIGNED TO PROTECT JUNIOR LIENHOLDERS.**

It is clear that when a mortgagee elects to foreclose by advertisement, Minnesota law requires that mortgagee to record a notice of pendency with the county recorder or registrar of titles prior to the first date of publication.<sup>5</sup> This statute is designed to put interested parties on notice of the pending foreclosure. Failure to properly comply with this subsection could *potentially* injure those interested parties seeking to redeem the property. Failure to timely record the notice of pendency, however, would not harm a borrower as they are provided ample notice and protection elsewhere under Minnesota law.

##### **A. Minnesota Statute § 580.032 was enacted to protect interested parties to the parcel and not the borrower.**

Foreclosure by advertisement has long been recognized as a valid method by which a mortgagee may foreclose on a parcel of property in Minnesota. Many of the

---

<sup>5</sup> Minn. Stat. § 580.032, subd. 3 (2011).

requirements set forth in Chapter 580 have remained relatively unchanged since their enactment. The notice of pendency requirement at issue in this appeal, and its counterparts under Minn. Stat. § 580.032, are relatively recent additions to the long-established foreclosure by advertisement process.

Minnesota Statute § 580.032 was signed into law in 1992 and has changed very little since its enactment. The nine subdivisions under Minn. Stat. § 580.032, including the notice of pendency requirement, were enacted collectively.<sup>6</sup> A plain reading of this section in its entirety, along with Minn. Stat. § 580.20, demonstrates the section was enacted to protect persons holding an interest in the foreclosed property; specifically, persons holding a junior lien or other redeemable interest that would not receive notice elsewhere under Chapter 580. The statute, however, was not designed to protect the mortgagor, or provide the mortgagor a basis for rendering a foreclosure sale void.

It is important to point out that Minn. Stat. § 580.032, subd. 1 *does* allow the mortgagor the ability to record a request for notice of a mortgage foreclosure and receive notice under Minn. Stat. § 580.032.<sup>7</sup> However, the Court should not infer that the entire section applies to the mortgagor, nor should the mortgagor be afforded protection under this section.

First, as it happened in this case, it would be highly unlikely and unrealistic for a mortgagor to record a request for notice of a foreclosure pursuant to Minn. Stat. § 580.032, subd. 1. If a mortgagor were to request notice, the requested notice of

---

<sup>6</sup> 1992 Minn. Sess. Law. Serv. Ch. 463 (S.F. 1856).

<sup>7</sup> Minn. Stat. § 580.032(1) (2011).

foreclosure sale would be mailed fourteen days prior to the foreclosure sale.<sup>8</sup> By that point, the mortgagor would be well aware of their default under the mortgage and would have received notice of the pending foreclosure sale weeks earlier pursuant to Minn. Stat. § 580.03.<sup>9</sup> The requested notice delivered to the mortgagor would be ineffectual.

In addition, a plain reading of the section in conjunction with Minnesota's other foreclosure laws suggest the section does not apply to the mortgagor. For example, Minn. Stat. § 580.032, subd. 5 states an interested party's failure to receive a notice of sale does not invalidate the foreclosure sale.<sup>10</sup> On the other hand, Minn. Stat. § 580.20 provides the mortgagor up to five years from the foreclosure sale to bring an action for a *mere defect* in the notice of sale.<sup>11</sup> When applied to the mortgagor, Minn. Stat. § 580.032 is contradictory to the other foreclosure protections afforded the mortgagor under Minnesota law, and therefore, it is reasonable to conclude the section was not designed to protect the mortgagor in the foreclosure by advertisement process.

Additionally, the Minnesota Legislature set forth detailed steps under Minn. Stat. § 580.032 which an interested party must follow in order to participate in the foreclosure process, and detailed steps in which the mortgagee must follow in order to protect interested parties' interests in the property. These steps include: the process by which an interested party can request notice of a potential foreclosure<sup>12</sup>; the process by which the

---

<sup>8</sup> Minn. Stat. § 580.032(4) (2011).

<sup>9</sup> Minn. Stat. § 580.03 (2011).

<sup>10</sup> Minn. Stat. § 580.032(5) (2011).

<sup>11</sup> Minn. Stat. § 580.20 (2011).

<sup>12</sup> Minn. Stat. § 580.032(1) (2011).

foreclosing party must provide notice to the interested party<sup>13</sup>; and the process by which an injured interested party may seek damages.<sup>14</sup> It would be redundant and unnecessary to have the mortgagor follow these steps, or have the mortgagee follow these steps to protect the mortgagor, as the mortgagor is protected elsewhere under Chapter 580.<sup>15</sup>

Altogether, it is clear section 580.032 is designed to carve out a set of protective measures for an interested junior lienholder during the foreclosure by advertisement process. To provide the borrower with additional notices and protections would be superfluous.

**B. Minnesota law currently provides the borrower ample notice and protection of the pending foreclosure.**

Under Minnesota law, the party in possession of the property must be served with notice of the foreclosure sale at least four weeks prior to the date of sale.<sup>16</sup> Furthermore, the foreclosing party is required to provide the borrower with notice of foreclosure prevention counseling.<sup>17</sup> It stands to reason that the subsequent notice of pendency will serve no purpose in providing the borrower with notice of the foreclosure given the previous notices were provided to the borrower. It would be illogical for the borrower to void the foreclosure sale simply because the notice of pendency was recorded on the

---

<sup>13</sup> Minn. Stat. § 580.032(4) (2011).

<sup>14</sup> Minn. Stat. § 580.032(6) (2011).

<sup>15</sup> *See e. g.* Minn. Stat. § 580.03 (2011), Minn. Stat. § 580.04 (2011), Minn. Stat. § 580.06 (2011).

<sup>16</sup> Minn. Stat. § 580.03 (2011).

<sup>17</sup> Minn. Stat. § 580.021 (2011).

same date of publication, particularly given the previous notices served upon the borrower.

**II. THE CURATIVE ACT AND MINNESOTA CASE LAW DEMONSTRATES A SUBSTANTIAL COMPLIANCE STANDARD MUST BE APPLIED TO MINN. STAT. § 580.032.**

As 1<sup>st</sup> Fidelity correctly illustrates in its brief, this Court has required a party attempting to void a foreclosure sale to demonstrate prejudice for technical violations of the foreclosure process.<sup>18</sup> Absent a showing of prejudice by the moving party, mere irregularities with the foreclosure process are insufficient to render the foreclosure sale void.<sup>19</sup> Simply put, a foreclosure sale will be upheld if the mortgagee substantially complied with the foreclosure by advertisement process and no prejudice was experienced by the mortgagor. The Minnesota Court of Appeals in this matter, however, has painted with a broad brush and applied a strict compliance standard to a technical violation under Minn. Stat. § 580.032(3). Such a broad interpretation is in direct contradiction to the prior holding of this Court.

Furthermore, a failure to record the notice of pendency prior to the first date of publication does not automatically void a foreclosure sale under Minnesota law. Minnesota's Curative Act, set forth in Minn. Stat. § 582.25, states a sale following a foreclosure by advertisement is deemed valid and effective against any objection one year after the expiration of the redemption period, provided the notice was recorded prior to

---

<sup>18</sup> *Hudson v. Upper Michigan Land, Co.*, 206 N.W. 44, 46 (Minn. 1925).

<sup>19</sup> *Id.*

the foreclosure sale.<sup>20</sup> It is important to note that any objection based upon the failure to record the notice of pendency must be brought within one year of the expiration of the redemption period.<sup>21</sup> Failure to do so by an interested party waives any potential claim against the property's title thereafter. More importantly, the one-year statute of limitations is substantially less than the five-year statute of limitations applicable to more substantive violations under Minn. Stat. § 580.20.

**III. THE MINNESOTA COURT OF APPEALS' HOLDING WILL CREATE UNNECESSARY LITIGATION AND PLACE AN ADDITIONAL BURDEN ON AN ALREADY WEAKENED HOUSING MARKET.**

MNCUN is concerned the Minnesota Court of Appeals' decision, if upheld, would call into question the validity of thousands of titles belonging to foreclosed Minnesota homes and force credit unions, and other mortgagees, to defend against unnecessary lawsuits from mortgagors seeking to avoid foreclosure sales based upon a mere technical violation. To put it another way, the strict compliance standard applied by the Minnesota Court of Appeals would provide an unprejudiced borrower the ability to void a foreclosure sale based upon mere technical violations of the foreclosure process.

As a result of this expansion of lawsuits challenging the validity of foreclosures by advertisement, mortgagees would be forced to incur legal fees to defend against these claims, and will think twice about utilizing the foreclosure by advertisement process in the future. Mortgagees would have no other choice but to foreclose by judicial action, a

---

<sup>20</sup> Minn. Stat. § 582.25(22) (2011).

<sup>21</sup> Minn. Stat. § 582.27(1)(A) (2011)

result that is both inefficient and burdensome to all of the parties involved. If upheld, the Minnesota Court of Appeals' holding would add unnecessary litigation to an already overburdened legal system and stall Minnesota's recovering housing market.

MNCUN recognizes the need to protect borrowers against unlawful foreclosures; specifically, foreclosures that have in some way violated a mortgagor's rights during the foreclosure process. However, the foreclosure process must also recognize and protect a mortgagee's right to efficiently secure its collateral upon a borrower's default. The currently-recognized process in Minnesota meets both of these demands. It is unnecessary to apply a broad brush application of the strict compliance standard in such a way as to give the mortgagor an avenue to unnecessarily void the foreclosure sale. Such a result will lead to drawn out litigation, past foreclosed homes and homes currently in foreclosure remaining in a state of ownership limbo, and another blow to Minnesota's already weak, but recovering, housing market.

**CONCLUSION**

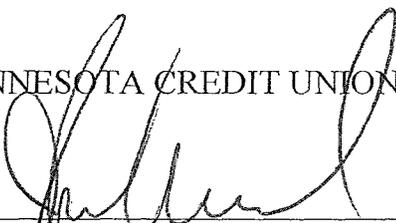
For the reasons set forth in this brief, the Minnesota Court of Appeals incorrectly applied a strict compliance standard to Minn. Stat. § 580.032(3) and interpreted the statute in such a way as to provide the borrower with a basis to void a foreclosure sale and incorrectly applied a broad brush application of the strict compliance standard to the foreclosure process. For the foregoing reasons, MNCUN respectfully requests that this Court reverse the Minnesota Court of Appeals' decision.

Respectfully submitted,

Dated: July 5, 2012

MINNESOTA CREDIT UNION NETWORK

By: \_\_\_\_\_



John M. Wendland (#0349653)  
Christopher K. Loftus (#0387618)  
Minnesota Credit Union Network  
555 Wabasha Street North, Suite 200  
St. Paul, MN 55102  
Telephone: (651) 288-5170  
Facsimile: (651)288-5171

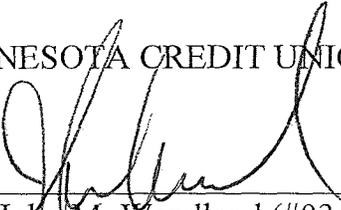
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds 1 and 3, for a brief produced with a proportional font, Times New Roman, at 13 point type. Including footnotes, the length of this brief is 2,772 words. This brief was prepared using Microsoft Office Word 2007.

Dated: July 5, 2012

MINNESOTA CREDIT UNION NETWORK

By: \_\_\_\_\_

  
John M. Wendland (#0349653)  
Christopher K. Loftus (#0387618)  
Minnesota Credit Union Network  
555 Wabasha Street North, Suite 200  
St. Paul, MN 55102  
Telephone: (651) 288-5170  
Facsimile: (651)288-5171