

CASE NO. A05-1979

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**State of Minnesota**  
**In Court of Appeals**

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TCM PROPERTIES, L.L.C.,

*Respondent,*

vs.

LAWRENCE P. GUNDERSON, et al,

*Appellants,*

and

TIMOTHY L. MENNE,

*Appellant,*

vs.

TCM PROPERTIES, L.L.C., et al,

*Respondents.*

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**BRIEF AND APPENDIX OF APPELLANTS MENNE AND GUNDERSON**

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## LEGAL ISSUES

### **I. MAKING MORTGAGES TO EXTEND REDEMPTION FOR THE BENEFIT OF A HOMEOWNER FACING FORECLOSURE IS A LEGITIMATE REDEMPTION TECHNIQUE.**

The district court initially held that the creation of a mortgage shortly before the end of a redemption so that the junior lien holder could redeem the property for the benefit of a homeowner was a legitimate redemption technique. [AA 22]. In its Amended Order, it reversed itself, holding that Minnesota Statutes section 58.13, subd. 1 (13), passed in 1999, effectively prohibits the practice approved in *First National Bank of Glencoe, Minnetonka v. Pletsch*, 543 N.W.2d 706 (Minn.App.1996), by which non-collusive and non-fraudulent junior mortgages are used as a lawful means to satisfy a mortgage demand to secure redemption favorable to the homeowner.

Apposite authority:

*Timeline, LLC v. Williams Holding #3, LLC*, 698 N.W.2d 181 (Minn.App.2005)

*First National Bank of Glencoe, Minnetonka v. Pletsch*, 543 N.W.2d 706 (Minn.App.1996)

### **II. A BENEFACTOR JUNIOR MORTGAGEE NOT INTENDING TO ACQUIRE TITLE THROUGH FORECLOSURE DOES NOT HAVE UNCLEAN HANDS.**

The district court initially held that Minnesota Statutes section 58.13, subd. 1 (13), passed in 1999, did not apply to a benefactor stepping in to assist homeowners preserve their homestead. In its Amended Order, it reversed itself, holding that Minnesota Statutes section 58.13, subd. 1 (13) renders mortgages, approved under *Pletsch*, to be in violation of Minnesota Statutes section 58.13, subd. 1 (13). [AA 55-56] Consequently, the district court held that the legitimate junior mortgagee/benefactor under *Pletsch*, has unclean hands under Minnesota Statutes section 58.13, subd. 1 (13). [AA 56]

Apposite authority:

*Timeline, LLC v. Williams Holding #3, LLC*, 698 N.W.2d 181 (Minn.App.2005)

*First National Bank of Glencoe, Minnetonka v. Pletsch*, 543 N.W.2d 706 (Minn.App.1996)

**III. MINNESOTA STATUTES SECTION 58.13 DOES NOT CREATE A PRIVATE RIGHT OF ACTION AND ANY ACTION MUST BE BROUGHT PURSUANT TO MINNESOTA STATUTES SECTION 8.31.**

The district court initially held that Minnesota Statutes section 58.13, subd. 1 (13) is designed to serve as a standard of conduct for professional mortgage brokers, and does not apply in matters where a benefactor is stepping in to assist homeowners trying to preserve their homestead. In its Amended Order, it reversed itself, applying this section despite no private action being available and no action being brought by the Respondent pursuant to Minnesota Statutes section 8.31.

*Timeline, LLC v. Williams Holding #3, LLC*, 698 N.W.2d 181 (Minn.App.2005)

*Pomrenke v. Commissioner of Commerce*, 2004 WL 376945 (Minn. Ct. App. 2004).

*Davis v. U.S. Bancorp*, 2003 WL 21730102 (D. Minn. 2003)

**IV. STRICT CONTRUCTION DOES NOT PRECLUDE REDEMPTION WHEN FORMAL DEFECTS DO NOT PREJUDICE THE RIGHTS OF JUNIOR CREDITORS.**

The district court initially held that there was no prejudice to the Respondent due to documents necessary to perfect redemption rights not being in the Chisago County Sheriff's foreclosure file because the Respondent had full knowledge of Appellant Menne's intent to redeem. In its Amended Order, it reiterated this holding, affirming its initial finding that a break in the chain of custody occurred, and that substantial compliance without prejudice to a junior creditor was sufficient for redemption.

Apposite authority:

*Timeline, LLC v. Williams Holding #3, LLC*, 698 N.W.2d 181 (Minn.App.2005)

*Sieve v. Rosar*, 613 N.W.2d 789, 792 (Minn. App. 2000)

**STATEMENT OF FACTS**

The Appellants, Lawrence and Kathryn Gunderson and Timothy Menne (hereinafter "Appellants Gunderson and Appellant Menne) contend that the lower court's original May 26, 2005 decision in this matter [AA 20], effectively reversed

sua sponte [AA 49], was correct. While there may have been a legitimate question of law at the time the matter was reheard on June 24, 2005, that question was settled by the Court of Appeals while the district court's decision was pending.

The following is a statement of the underlying facts that gave rise to the dispute. In order for clarity, the facts will be presented in chronological order.

Appellants Gunderson were fee owners of Registered Land described as follows:

Lot 2, Block 1, Kettle River Estates, Chisago County, Minnesota.

The Gundersons had executed a mortgage dated 12-18-00, filed 7-10-01, as Doc. No. 12523, to ABN Amro Mortgage Group, Inc., in the amount of \$128,000.00. Said mortgage was subsequently assigned to Mortgage Electronic Registration System, Inc. and Washington Mutual Bank, FA, by instrument dated 6-20-02, filed 7-1-02, as Doc. No. 13570. [AA 9]. On 10-21-04, a Sheriff's Sale was held pursuant to a default on the mortgage by the Appellants Gunderson. [AA 21]. A Sheriff's Certificate of Sale was filed in favor of Mortgage Electronic Registration System, Inc., as Doc. No. 16884. [AA 21].

At the end of April, 2005, Appellants Gunderson, facing imminent loss of over \$100,000 of equity in their homestead, sought legal counsel. [AA 86]. Mrs. Gunderson's employer, State Farm Insurance, had initially agreed to purchase the property under its relocation program, but was subsequently unable to do so because the relocation department claimed it was unable to obtain multiple appraisals within the time-frame remaining in the redemption period. [AA 48-49]. On the last day of

the redemption period, Timothy J. Menne, Appellants Gundersons' family friend of over 5 years, on the advice of counsel, filed five \$100 mortgages which were memorialized April 21, 2005, as Doc. Nos. T-17441, T-17443, T-17445, T-17447, and T-17449 [AA 3] and 5 Notices of Intent to Redeem which were memorialized April 21, 2005 as Doc. Nos. T-17442, T-17444, T-17446, T-17448, and T-17450. [AA 10]. Appellant Menne testified that he received the mortgages from Appellants Gunderson and filed them to help the Gundersons extend their redemption period in order that they might recoup their equity and to secure repayment of monies he had loaned the Gundersons over the past few years. [AA 133]. Also on April 21, 2005, after the 5 Mortgages and Notices of Intent to Redeem were memorialized on the Torrens Certificate, Appellants contend that the notices of intent to redeem and copies of the mortgages were provided to the Chisago County Sheriff's Department as required by statute and a receipt for \$500 was obtained. [AA 146].

Unbeknownst to Appellants at the time they filed the mortgages for recording, Respondent TCM Properties was seeking to reap a windfall (the Gunderson's equity) should Appellants Gunderson fail to timely redeem. [AA 126]. TCM Properties, LLC is the assignee of an out-of-county judgment creditor's interest in favor of State Farm Casualty Company, against Lawrence P. Gunderson, originally docketed in Hennepin County, on June 23, 2003, Hennepin County Court File No DC-DJ-03-009628. This judgment was subsequently re-docketed by TCM Properties, LLC in Chisago County on April 20, 2005, as Chisago County Court File No. 13-CV-05-315. The foreign county judgment was in the amount of approximately \$2,300.

Respondents waited until the mid-afternoon of April 21, 2005, the last hours of the Gunderson's redemption period, to have the judgment memorialized on the Gundersons' Torrens Certificate. [AA 9]. Respondent's apparent intent was to ensure that the judgment wasn't memorialized until the very last moment so it could steal away with a windfall by redeeming as a junior creditor. [AA 122-23].

Part of this dispute arose as a result of whether Menne's filings complied with statutory requirement in MS§580.24(a)(3), or alternately, the consequences of required documents not being in the Sheriff's file, *at the time when* Respondent TCM Properties, LLC filed its documents with the Sheriff. *See* [AA 22, ¶ 3]. While the necessary filing fees were paid in the amount of five \$100.00 checks to the Sheriff and Menne's Notices of Intent to Redeem were in the Sheriff's file on the property as required, evidence of the mortgages was not in the file. Due to what *appeared* to be a defective filing, respondent TCM Properties, LLC was allowed by the Sheriff's Office to redeem on April 22, 2005. (Evidence was subsequently heard before the court and the factual issue of whether the filing was defective was not determined – the court did, however, determine that the Sheriff's office did not have a receipt log that could conclusively determine what had been filed, and it also found that the Sheriff's Deputy allowed Respondents' agent unsupervised access to the file, thus causing a break in the chain of custody). *See* [AA 23 ¶ 3].

On April 26, 2005, Respondents began an eviction proceeding against Appellants. [AA 1-2]. Said action was filed with the Court on April 27, 2005. Also, on April 26, 2005, Timothy J. Menne began a Declaratory Judgment action as a

Plaintiff to determine his redemption rights because the Chisago County Sheriff's Department had already issued a Certificate of Redemption in favor of Respondents. [AA 3-4]. Said action was filed with the Court on April 28, 2005. Menne also sought emergency relief due to the time-sensitive nature of his claims. [AA 5].

Appellants' counsel, Mr. Beuning, attempted to have the Declaratory Judgment heard at the earliest possible time. The matter was originally assigned to Judge Rancourt, the signing judge at that time. After reviewing the file, Judge Rancourt recused himself due a conflict of interest, having previously represented Menne in private practice. It was subsequently assigned to Judge Swenson, who could not hear the matter because he was on vacation, or otherwise unavailable. In the meantime, the eviction action was scheduled to be heard on May 11, 2005, and the parties did appear before Judge McBride on that day. At that hearing, the parties agreed to that the eviction matter and the Declaratory Judgment be combined for a single hearing. As a result, both matters were continued for hearing on May 16, 2005.

On May 16, 2005, Judge McBride asked both Appellants' and Respondents' counsel to agree to combine the matters for hearing, as the determination of the Declaratory Judgment logically dictated the outcome of the eviction. [AA 22 ¶ 11]. The parties through their counsel agreed. Due to Mr. Beuning being a participant in and witness to events on the last day of redemption, April 21, 2005, John C. Povejsil appeared on behalf of the Respondents and Mr. Menne at the May 16 hearing.

### **May 16, 2005 Hearing**

Both cases were heard on May 16, 2005 in the combined hearing. Menne prevailed on his Declaratory Judgment action. [AA 22-23]. In addition, the Appellants prevailed, at least temporarily insofar as the Respondents' request for eviction was denied until that time when (and if) Menne failed to exercise his redemption rights. The Court's Order, filed May 26, 2005, allowed him to tender payment to Respondents for both the Judgment and the Sheriff's Certificate, and requiring the Respondents to issue a Certificate of Redemption in his favor. [AA 23]. Alternatively, it also ordered the Sheriff's Office to issue a new Certificate of Redemption in favor of Menne upon proper tender. The court gave Menne ten days to perform, or until June 5, 2005. [AA 23].

### **POST-MAY 26, 2005 DECISION EVENTS**

On May 27, 2005, the Appellants tendered payment on the Judgment to Respondents. [AA 29]. The Respondents refused tender. [AA 30-32]. The same day, Appellants' counsel requested a payoff and Certificate of Redemption from Respondents' attorney for redeeming the subject property. [AA 26]. The request was denied by Respondents' counsel. [AA 33]. On or about May 31, 2005, Appellants' counsel also requested preparation of a Sheriff's Certificate and was told by the Sheriff's Department that it would be ready upon receipt of funds. In reliance upon the Sheriff's Department's statement that the Certificate of Redemption would be available, Menne conveyed the property and gave the proceeds to the Appellants, reserving funds for redemption and the Judgment payoff, on June 1, 2005, within the

ten-day window allotted by the court's order. When counsel Craig J. Beuning attempted to present the payoff and obtain the Certificate of Redemption from the Sheriff's Office, he was informed by the Sheriff's Department that the County Attorney's Office had intervened in the matter and had told it not to issue a Certificate of Redemption. Mr. Beuning then called the County Attorney's Office and asked why the Sheriff's Deputy could not issue the Certificate of Redemption. He was told by the Deputy County Attorney that Minn. R. Gen. P. Rule 125 stayed the matter for 30 days (until June 25, 2005), despite the Order giving the Menne only until June 5, 2005 to redeem. After some conversation between Beuning and the Deputy County Attorney, the effect of Rule 125 was unclear given the nature of the Order, and the Deputy County Attorney called the Judge's clerk for clarification. The Judge's clerk then did say that Rule 125 applied. Consequently, Menne effectively could not redeem and the Appellants could not avert eviction, despite the May 26, 2005 order giving them precisely those rights until June 5, 2005. [AA 23].

**June 16, 2005 Hearing and July 8, 2005  
Amended Findings of Fact, Conclusions of Law and Order**

Respondents made a Motion for Amended Findings of Fact, Conclusions of Law and Order which was set for hearing on June 24, 2005. Again, the hearing encompassed both cases. This time, the Respondents prevailed and won a Writ of Restitution against the Appellants and a dismissal of Menne's action. [AA 49-59]. This represented a complete reversal of the initial Order.

### **July 18, 2005 Notice of Appeal**

Because the Amended Order covered an eviction action, it appeared to have been an adverse decision effective on July 8, 2005. [AA 59]. Consequently, it also appeared that MS§504B.371 Subd. 2. required that Appellants perfect their appeal by July 18, 2005, regardless of the 10-day stay. On July 18, 2005, Appellants filed their Notice of Appeal and served it on the Respondents. On July 18, 2005, the Appellants applied for and were granted an Order Setting Supersedeas Bond staying the Writ of Restitution dated July 8, 2005. [AA 63]. Despite the Proposed Order Setting Supersedeas Bond from Appellants' counsel encompassing only the eviction case, the original Order as issued by the court encompassed both cases.

### **Vacation of the July 18, 2005 Order Setting Supersedeas Bond**

On July 20, 2005, the court vacated the Order Setting Supersedeas Bond after a conference call with counsel, stating that the Order had issued with the erroneous caption that included both case file numbers, rather than just 13-CV-05-346, the eviction case. The court subsequently amended that Order limiting it to the proper case (the eviction) and filed it on July 20, 2005. Notice of its filing was dated July 21, 2005. [AA 70].

### **July 20, 2005 Amended Order Vacating Judgment**

On July 20, 2005, the court vacated the Order in Court File No. 13-CV-05-354 of July 8, 2005, again because it now wished to separate the two cases. [AA 66]. While it states that judgment was entered on July 18, 2005, suggesting that that day would be the proper date from which to start the 10-day appeal period, the Appellants

had filed their Notice of Appeal on July 18, 2005, and had applied for and received an Order Setting Supersedeas Bond.

**July 28, 2005 Order from Court of Appeals Requesting Informal Brief**

On July 28, 2005, the Court of Appeals requested informal briefing regarding whether the Gunderson appeal filed July 18, 2005 was timely, insofar as it was unclear whether a judgment had been entered, and thus whether the Court of Appeals had jurisdiction. [AA 82].

**September 12, 2005 Notice of Appeal (Menne A05-1826)**

Appellant Menne filed his appeal on September 12, 2005. The clerk's Notice of Case Filing requested a change correcting the Notice of Appeal, so an "Amended Notice of Appeal" dated September 16, 2005 was submitted. [AA 103].

**September 14, 2005 Order from Court of Appeals**

The Court of Appeals determined that the Gunderson appeal had been timely filed for the sake of preserving the Gundersons' appeal rights, but was untimely because the combined district court cases still had post-trial motion timelines that had not run. At the time the Gunderson Appeal was filed, Appellant Menne had yet to decide whether to pursue post-trial motions. Ultimately he decided that the trial court's findings of fact were correct, but that the questions of law, as noted by the trial court itself, needed higher court clarification. [AA 190-91]. The Court of Appeals held that both the Gunderson and Menne matters were properly combined and should be heard together on appeal for the sake of judicial economy. [AA 101]. Upon receipt of this Court of Appeals' decision, a review of the district court's file indicated

that despite the Gunderson case being an eviction case, judgment may never have been entered.

### **September 26, 2005 Entry of Judgment on Gunderson**

Because Appellants Gunderson were unsure about the entry of judgment, their counsel contacted the Respondent's counsel and the district court. Pursuant to a phone conference between Appellants' counsel, Respondent's counsel and the district court, judgment on CV-05-346 was entered on September 26, 2005.

### **October 3, 2005 Notice of Appeal (Gunderson and Menne A05-1979)**

Given the Court of Appeals Order requesting consolidation, and the new Entry of judgment of Gunderson, a new Notice of Appeal encompassing both cases was filed October 3, 2005 as A05-1979.

### **STANDARD OF REVIEW**

Appellants contend that the instant appeal raises questions of law only. At the heart of this case is a statutory construction of Minnesota Statutes sec. 58.13, subd. 1 (13). This question of law was raised in, argued and briefed before, and ruled on by the trial court. Because the district court had directly commented on the absence of controlling authority regarding the question of law [AA 190-191], Appellant Menne did not move for a new trial. The facts relevant to this question of law are not in dispute. Consequently, the standard of review should be *de novo*. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

## LEGAL ARGUMENT

### I. MAKING MORTGAGES TO EXTEND REDEMPTION FOR THE BENEFIT OF A HOMEOWNER FACING FORECLOSURE IS A LEGITIMATE REDEMPTION TECHNIQUE.

The district court initially held that Minnesota Statutes section 58.13, subd. 1 (13), passed in 1999, did not apply to a benefactor stepping in to assist homeowners preserve the equity in their homestead, and that mortgages made for the purpose of extending redemption were “legitimate redemption technique.” [AA 22]. In its Amended Order, it reversed itself, holding that Minnesota Statutes section 58.13, subd. 1 (13) renders mortgages, approved under *First National Bank of Glencoe, Minnetonka v. Pletsch*, 543 N.W.2d 706 (Minn.App.1996), to be essentially *pe se* statutory violations. [AA 55-56] Consequently, the district court held that Minnesota Statutes section 58.13, subd. 1 (13) essentially overrides the effect of *Pletsch*. [AA 56].

The district court initially and rightly distinguished the motive of a benefactor mortgagee from the improper motives covered by Minnesota Statutes sec. 58.13, subd. 1 (13). [AA 22] Appellant Menne’s motive was not to obtain title to the property *through foreclosure*. As the district court found, Appellant Menne’s motive was to help to the Gundersons “extend their redemption period, thus preserving the Gundersons’ interest in their equity.” [AA 52]

The district court at the second hearing expressed its wish for higher courts to clarify whether *Pletsch* was still good law. [AA 190-191] Two days after the June 24, 2005 hearing, the Court of Appeals addressed this when it issued its decision in

*Timeline, LLC v. Williams Holding #3, LLC*, 698 N.W.2d 181 (Minn.App.2005).

While *Pletsch* was not cited in *Timeline, LLC*, the *Pletsch* analysis of the primary intent of a benefactor mortgagee is wholly consistent with the Court's decision in *Timeline, LLC* and appears to be unaffected by the operation of Minnesota Statutes sec 58.13, subd.1 (13).

In *Timeline, LLC*, "Martin entered into [two mortgages] with Williams Holdings #3 because she was 'without the financial ability to redeem from the [f]oreclosure and [w]as in danger of [losing] the [p]roperty to foreclosure.'" In the present case, Appellants Gunderson and Menne entered into precisely the same kind of transaction for the same reasons. [AA 52].

While *Timeline, LLC* did not cite *Pletsch*, its holding implicitly approves of the "legitimate practice" described there. For these reasons, the district court's decision in the first instance was correct, and its Amended Order holding to the contrary should be reversed.

## **II. A BENEFACITOR JUNIOR MORTGAGEE NOT INTENDING TO ACQUIRE TITLE THROUGH FORECLOSURE DOES NOT HAVE UNCLEAR HANDS.**

The district court initially held that Minnesota Statutes section 58.13, subd. 1 (13), passed in 1999, did not apply to a benefactor stepping in to assist homeowners preserve their homestead by extending their redemption period. [AA 22]

Consequently, it heard Appellant Menne's Declaratory Judgment action and ruled in his favor, granting him the right to tender redemption funds to the Respondent. In its Amended Order, it reversed itself, holding that Minnesota Statutes section 58.13,

subd. 1 (13) renders mortgages, approved under *Pletsch*, to be in essential *per se* violations of Minnesota Statutes section 58.13, subd. 1 (13). [AA 55-56]

Consequently, the district court held that the legitimate benefactor/junior mortgagee under *Pletsch*, has unclean hands under Minnesota Statutes section 58.13, subd. 1 (13), and cannot seek an equitable remedy from the district court. [AA 56] The district court also held that Appellant Menne lacked standing as a result.

In *Timeline, LLC*, the Court of Appeals rejected this analysis and affirmed a district court's holding that a mortgagee who makes mortgages lacking of intent to acquire title to property through foreclosure does not have unclean hands. The Court of Appeals noted that the mortgagee in that case "did not admit such nefarious motives." *Timeline, LLC* at 189-90. In the present case, the district court found that the "primary intent behind [Appellant Menne's] mortgages was not to secure the debt. Rather, the primary intent was for Menne to obtain title through foreclosure *so that he could transfer title back to the Gundersons in[an] effort to preserve their equity.*" (emphasis added). [AA 52] While the district court's finding admittedly has mixed "primary" motives, it is clear that the intent "*to transfer title*" back to the Gundersons "*in[an] effort to preserve their equity*" was the animating intent. Furthermore, Appellant Menne did not intend to foreclose on *his* mortgages to obtain title, but rather to use his mortgages as a means to redeem from the foreclosure of a prior mortgage. *Pletsch* recognizes the distinction between simply acquiring title to property through foreclosure, on the one hand, and a benefactor acquiring title through redemption to preserve homeowners' equity, on the other. *Pletsch* at 720.

While *Pletsch* was not cited in *Timeline, LLC*, the issue clearly was considered. The *Pletsch* analysis of the primary intent of benefactor mortgagee is wholly consistent with the *Timeline, LLC* Court's decision and appears to be unaffected by the operation of Minnesota Statutes sec 58.13, subd. 1 (13).

Finally, Appellant Menne was the Plaintiff in a Declaratory Judgment action seeking the court's construction of his statutory redemption rights, and this was an action at law. [AA 3]. The district court used Minnesota Statutes sec. 58.13 subd. 1 (13) to hold that Appellant Menne had unclean hands. Because Appellant Menne's case sought legal remedies (as well as equitable ones), and because the district court's construction of Minnesota Statutes sec. 58.13 subd. 1 (13) appears to be contrary to *Timeline*, the dismissal of Appellant Menne's claims should be reversed.

For these reasons, the district court's decision in the first instance was correct, and its Amended Order holding to the contrary should be reversed.

**III. MINNESOTA STATUTES SECTION 58.13 DOES NOT CREATE A PRIVATE RIGHT OF ACTION AND ANY ACTION MUST BE BROUGHT PURSUANT TO MINNESOTA STATUTES SECTION 8.31.**

The district court initially held that Minnesota Statutes section 58.13, subd. 1 (13) is designed to serve as a standard of conduct for professional mortgage brokers, and does not apply in matters where a benefactor is stepping in to assist homeowners trying to preserve their homestead. [AA 22] In its Amended Order, it reversed itself, applying this section despite no private action being available and no action being brought by the Respondent pursuant to Minnesota Statutes section 8.31. *See generally* AA 49-59.

Minnesota Statutes chapter 58 is known as the “Minnesota Residential Mortgage Originator and Servicer Licensing Act” (the “Mortgage Licensing Act”). *See* Minn. Stat. Ann. §58.01 (2005). Under the Mortgage Licensing Act, mortgage originators and servicers are required to obtain a license from the Department of Commerce. *See* Minn. Stat. Ann. §58.04 (2005). Certain individuals and entities are exempt from the licensing requirements. *See id.* Exempt individuals and entities are still bound by other provisions of the Mortgage Licensing Act. *See* Minn. Stat. Ann. §58.05 (2005). The plain language of the Mortgage Licensing Act grants the Department of Commerce jurisdiction for enforcement of the act. *See Pomrenke v. Commissioner of Commerce*, 2004 WL 376945 at \*4 (Minn. Ct. App. 2004).

In addition to *Pomrenke*, a United States District Court of Minnesota case has held that Minnesota Statutes section 58.13 does not grant a private right of action; such an action must be brought pursuant to Minnesota Statutes section 8.31. *Davis v. U.S. Bancorp*, 2003 WL 21730102, \*4 (D. Minn. 2003). The Respondent has no standing to challenge the validity of the mortgages under Minnesota Statutes 58.13, because the Department of Commerce has jurisdiction to determine alleged violations of the Mortgage Licensing Act. *Timeline, LLC*, at 189 (Footnote 4).

The Court of Appeals ruled on this in *Timeline, LLC*. There, it held that Minnesota Statutes sec. 58.13 does not create a private right of action. In addition, it held that relief must be sought under Minnesota Statutes sec. 8.31, subd. 3(a), the “private attorney general statute.” Finally, it held that the statute requires “those claimants [to] demonstrate that their cause of action benefits the public,” and that

private transactions like the one in that case and the Gunderson to Menne mortgages, are outside of its scope. *Id.*, at 188.

**IV. STRICT CONTRUCTION DOES NOT PRECLUDE REDEMPTION WHEN FORMAL DEFECTS DO NOT PREJUDICE THE RIGHTS OF JUNIOR CREDITORS.**

The district court initially held that Appellant Menne “at least substantially complied with Minn. Stat. §580.24.... [and the Respondent was] not prejudiced *in any manner* by Mr. Menne’s substantial compliance because [Respondent’s] representative was present and had full knowledge that Mr. Menne recorded his intent to redeem and mortgages with the intent to file copies with the Sheriff’s Department.” [AA 21] In its Amended Order, the district court reiterated its finding verbatim. [AA 53]

It is important to note that the District court *did not* find that there *was not* strict compliance, but rather that it was impossible to determine if there was strict compliance because of a break in the chain of custody of the Sheriff’s foreclosure file. The Sheriff’s Deputy admitted that the Respondent’s agent was left unsupervised with the file. [AA 57]. The district court made its own inquiry into the Sheriff’s Department’s receipt process for foreclosure files, and while the process may have been statutorily compliant, it was found wanting from an evidentiary standpoint because of lax supervision of the files.

On this issue, the district court applied the proper standard and test for determining compliance to exercise redemption rights. *Timeline, LLC v. Williams*

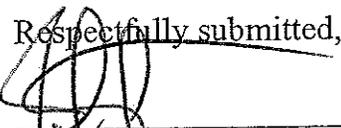
*Holding #3, LLC*, 698 N.W.2d 181 (Minn.App.2005) and *Sieve v. Rosar*, 613 N.W.2d 789, 792 (Minn. App. 2000).

### CONCLUSION

Based on the foregoing facts and law, the district court's initial May 26, 2005 decision was correct, and the Appellants performance under it was timely. The Amended Order reversing that decision was based upon uncertainty as to the effect of Minnesota Statutes sec.58.13, subd. 1 (13) on prior case law. The Court of Appeals dispositively settled that issue while the district court's second decision was pending. For these reasons, Appellants respectfully request that this Court re-instate the May 26, 2005 Order and reverse the July 8, 2005 Order, fixing the amounts necessary for tender to the original tender date.

DATED: November 23, 2005

Respectfully submitted,

  
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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) (with amendments effective July 1, 2007).