Case No. 100188-6

THE SUPREME COURT FOR THE STATE OF WASHINGTON

WEST COAST SERVICING, INC.,

Appellant,

vs.

PRINCE ERIC LUV,

Respondent.

PETITIONER'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR SUPREME COURT REVIEW

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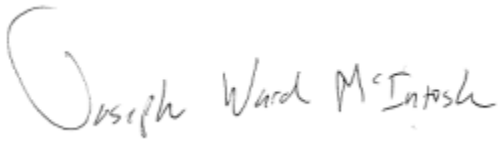
Petitioner, West Coast Servicing, Inc., respectfully submits the attached article, "*Luv V. West Coast Servicing*: A Pyrrhic Victory for Debtors Discharged in Bankruptcy?", published in the state bar's creditor / debtor newsletter, as supplemental authority in support of the pending petition for review.

The article is offered for the proposition that *Luv* is contradictory, triggering review under RAP 13.4(b)(1) and (2). The article is additionally offered for the proposition that *Luv* represents a significant shift in the status quo, and involves a matter of public importance, triggering review under RAP 13.4(b)(4)

DATED November 19, 2021



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LUV V. WEST COAST SERVICING: A Pyrrhic Victory for Debtors Discharged in Bankruptcy?

Michael L. Parrott and Conner W. Morgan, Schweet Linde & Coulson, PLLC

Recently, **the Washington Court of Appeals, Division I,** filed the unpublished opinion of *Luv v. W. Coast Servicing, Inc.*[1] holding that the six-year statute of limitations to enforce a deed of trust commences from the date the last payment on the note was due prior to the discharge of a borrower's personal liability in bankruptcy. Although this holding appears to be a victory for post-discharge debtors, the *Luv* decision leaves secured creditors with no choice but to commence foreclosure proceedings post-discharge to collect on the *in rem* liability of the secured debt. Otherwise, secured creditors risk losing their ability to enforce their deeds of trust due to the expiration of the statute of limitations.

In *Luv*, the defendant opened a home equity line of credit which was secured by a deed of trust on his home. The accompanying promissory note required the defendant to make monthly installment payments over 20 years. On Dec. 8, 2008, the defendant filed a chapter 7 bankruptcy. The chapter 7 trustee found no value in the property above the secured debt and the homestead exemption and did not sell the defendant's property. On March 11, 2009, the defendant received an order discharging all his personal liability on his debts, including that of the home equity line of credit.

Nine years later, *before* the loan matured, the beneficiary of the deed of trust on defendant's home initiated a non-judicial foreclosure against the defendant's home. On April 17, 2019, the defendant filed a quiet title action arguing that the beneficiary of the deed of trust was barred from enforcing the deed of trust because the statute of limitations had expired. On cross motions for summary judgment, the trial court agreed with the defendant and entered an order extinguishing the deed of trust and quieting title to the defendant. The beneficiary to the deed of trust appealed. On appeal, the *Luv* court presented the issue: "[W]hether Luv's bankruptcy discharge commenced the running of the statute of limitations on an action to enforce the deed of trust."

The Luv court ruled that its previous opinion in *Edmundson*[2] was controlling. In *Edmundson*, the debtors obtained a loan to purchase real property documented by a promissory note payable in monthly installments secured by a deed of trust which encumbered the property. The debtors defaulted, filed a chapter 13 bankruptcy proceeding, and received a chapter 13 bankruptcy discharge. Approximately one year post-discharge, the secured creditor attempted to enforce the deed of trust and the *Edmundson* court reversed a trial court's judgment quieting title to the property to the debtors because the right to foreclose the lien of the deed of trust (*i.e.*, the in rem liability) was not affected by the bankruptcy discharge. Additionally, the *Edmundson* court held that a bankruptcy discharge commences the six-year statutory limitation period for enforcing a deed of trust for an obligation payable in installments and reasoned that the statute of limitations does not accrue after discharge because, at that point, no future installment payments are due and owing on the note. In *Luv*, the defendant's last payment due prior to his discharge was on March 1, 2009—ten days prior to the defendant's discharge date. Therefore, the appeals court found that enforcement of the deed of trust against the defendant's home was time barred after March 1, 2015. The appeals court affirmed the trial court's decision.

> …the six-year statute of limitations to enforce a deed of trust commences from the date the last payment on the note was due prior to the discharge of a borrower's personal liability in bankruptcy.

Several points of consideration are relevant from the *Luv* opinion. The court did not rule that a bankruptcy discharge eliminates or accelerates the debt; rather, the court ruled, pursuant to *Edmundson*, that a bankruptcy discharge triggers the statutory limitation period during which a beneficiary may enforce the deed of trust. Although this distinction might appear purely academic on its face, it is important to note that acceleration requires action by the lender—it is not automatically triggered by operation of law once a debtor receives a bankruptcy discharge.

Although the reaffirmation of *Edmundson* may appear as a victory for debtors, the policy fallout could limit the ability of future consumers to obtain non-recourse loans. This outcome is likely because after a debtor receives his or her discharge in bankruptcy, his or her in personam liability on debt is relieved as the bankruptcy discharge operates as an injunction for enforcement of the underlying debt. However, the in rem liability survives. Therefore, the beneficiary of the deed of trust is left with no other recourse but to foreclose on the deed of trust to collect on the in rem liability that survives the bankruptcy discharge.

Further, prior to a foreclosure sale, post-discharge debtors may be left with no recourse to reinstate the underlying indebtedness by making up the missed

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installments because all the installment payments, under *Edmundson*, have now accrued and are subject to a six-year statute of limitations.[3] Presumably, the only cure available to debtors would be to pay the total balance of the underlying indebtedness secured by the deed of trust to resolve the in rem liability of the property. The *Luv* court noted: "Public policy disfavors allowing homeowners to indefinitely face the specter of foreclosure following bankruptcy discharge." Yet, the inverse of this statement is also true because foreclosure appears to be the sole remedy for beneficiaries of a deed of trust and beneficiaries' timeline to enforce the security is finite due to the statute of limitations period. ■

1 No. 81991-7-I, 2021 WL 3288360 (Wash. Ct. App. Aug. 2, 2021).

2 Edmundson v. Bank of America, 194 Wn. App. 920, 378 P.3d 272 (2016).

3 Although a debtor may voluntarily make payment on the underlying debt, the debtor's *in personam* liability cannot be enforced due to the bankruptcy discharge. *See* 11 U.S.C. 524(a) (regarding effect of discharge and injunction); *see also* 11 U.S.C. 524(f) (regarding voluntary payment).

CREDITING A BORROWER'S NOTE FOR PAYMENTS BARRED BY THE STATUTE OF LIMITATIONS: *Howard v. JP Morgan Chase Bank N.A.*

Steve Linkon, Wright, Finlay & Zak, LLP

The recent **unpublished case**, *Howard v. JP Morgan Chase Bank, N.A.*, 2021 Wash. App. LEXIS 1930, *1, 2021 WL 3291737, provides a useful reminder of how to handle note installment payments delinquent by more than six years.

Borrower ("Howard") obtained a $502,000 HELOC. This was an installment note with monthly payments, maturing in 2037. In 2009, Howard defaulted on the loan. In 2013, lender commenced a nonjudicial foreclosure. Howard filed litigation and the lender cancelled the foreclosure. In 2017, lender credited borrower's loan balance $213,378.60 for payments that were over six years past due (six years being the statute of limitations to enforce a written agreement, which includes promissory notes). In June of 2019, lender initiated a second non-judicial foreclosure. Howard filed litigation seeking to restrain the foreclosure sale and for damages, before the foreclosure was completed.

Howard argued that it was fraudulent, and that he was injured, by the lender crediting monies to his account. The court disagreed finding that Howard benefitted from the credit because it reduced the balance owed. The lender could enforce that balance of payments due that were not barred by the statute of limitations.

Howard also argued the note was no longer enforceable because the lender **accelerated** the note in connection with its 2013 nonjudicial foreclosure, so six years later, collection of the entire debt was barred by the statute of limitations.

Acceleration of payments due on an installment note makes all installment payments due immediately; and the statute of limitation to enforce the entire debt commences upon acceleration. But acceleration does not occur automatically simply because a lender commences a nonjudicial foreclosure action, because acceleration is not required to pursue a nonjudicial foreclosure. Rather, an acceleration occurs only if made in a clear, and unequivocal manner which effectively apprises the borrower that the lender has exercised the right to accelerate the payment date. That did not happen in this case.

The statutory limitation period commences separately as to each missed payment up to the loan maturity date. *Merceri v. Bank of New York Mellon*, 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018) (The statute of limitations to enforce a note requiring installment payments runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it).

For the HELOC loan that does not mature until 2037, the borrower could miss the next 10 years of payments and the statutory limitation period will not have run for payments less than 6 years delinquent nor for payments not yet due. ■

MCCARTHY & HOLTHUS, LLP

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