NO. 93426-6

THE SUPREME COURT OF THE STATE OF WASHINGTON

SHASTA APARTMENTS, LLC,
CHARLES R. JOHNSON, II and
ELIZABETH A. JOHNSON,

Petitioners,

v.

UMPQUA BANK,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
PIERCE COUNTY, STATE OF WASHINGTON
Superior Court No. 12-2-07243-0

and

COURT OF APPEALS, DIVISION II
No. 47224-4-II

RESPONDENT UMPQUA BANK'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

This Answer is by Respondent Umpqua Bank ("Umpqua").

II. CITATION TO COURT OF APPEALS DECISION

Petitioners Shasta Apartments, LLC ("Shasta"), Charles R. Johnson, II and Elizabeth A. Johnson and their marital community (collectively, the "Johnsons"), filed a Petition for Review ("Petition") of Division II's decision in *Umpqua Bank v. Shasta Apartments, LLC, et al*, No. 47224-4-II, 194 Wn. App. 685, ___ P.3d ___, decided June 21, 2016.

III. COUNTERSTATEMENT OF ISSUE PRESENTED

The sole issue is whether under RAP 13.4(b)(4)[1] a matter of substantial public interest is presented by Division II's holding that Washington's Receivership Act,[2] judicial foreclosure law,[3] Deed of Trust Act,[4] and the parties' contracts allow the lender a deficiency judgment against a commercial loan's maker and guarantor, when proceeds from a court-appointed Receiver's court-approved sale of that loan's securing commercial realty are insufficient to satisfy the balance due.

Because two months ago this Court held the Receivership Act is not a foreclosing lender's exclusive remedy and that public policy compels that ruling, no issue of substantial public interest is presented by Division

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[1] Petitioners cite only RAP 13.4(b)(4) as grounds to accept review. (Petition, pp. 5, 18.)

[2] RCW 7.60, *et seq.*

[3] RCW 61.12, *et seq.*

[4] RCW 61.24, *et seq.*

II's decision in accord with that holding. *See, Jordan v. Nationstar Mortg., LLC*, 185 Wn.2d 876, 894, 374 P.3d 1195 (2016).

IV. COUNTERSTATEMENT OF THE CASE

A. Shasta Enters Mortgage Waiving Deficiency Defenses, the Johnsons Unconditionally Guarantee Shasta's Performance, Umpqua Acquires Loan, and Shasta and the Johnsons Default.

On June 15, 2007, Shasta made a promissory note to Evergreen Bank for $581,226.45 (the "Note") [CP 271], secured by a Deed of Trust against commercial real estate (collectively with the Note and other securing documents [CP 43-93], the "Loan"). [CP 272-74, 283-99.] The secured property is an apartment building at 1545 South Fawcett Avenue, Tacoma, Washington (the "Property"). [CP 385.]

The Deed of Trust provides, in part:

> *Grantor **waives all rights or defenses*** arising by reason of any 'one action' or 'anti-deficiency' law, or any other law which may prevent Lender from bringing any action against Grantor, *including a **claim for deficiency** ....*

[CP 56 (emphasis supplied).] It also states: "Election by Lender to pursue any remedy *shall **not** exclude pursuit of any other remedy* ...." [CP 60 (emphasis supplied).]

On August 6, 2009, Shasta delivered a new promissory Note to Evergreen Bank, nearly doubling the original principal balance to $1,055,271.51, and replacing the existing Note (the "Replacement Note"). The Replacement Note provides for Shasta's payment of all attorney's fee, costs, and expenses incurred in collecting it. [CP 273, 279-81.]

The Replacement Note was secured by new instruments including the absolute and unconditional Commercial Guaranty of Charles R. Johnson, II (the "Evergreen Guaranty"). [CP 273, 301-04.] It provides:

> Guarantor [Mr. Johnson, his successors and assigns] ***absolutely and unconditionally guarantees full*** and punctual ***payment and satisfaction*** of the Indebtedness of Borrower [Shasta] to Lender [Evergreen Bank, its successors and assigns], and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so ***Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies*** against anyone else obligated to pay the Indebtedness or ***against any collateral securing the Indebtedness,*** this Guaranty or any other guaranty of the Indebtedness. *Guarantor will make any payments to Lender ... without set-off or deduction or counterclaim, ...* Under this Guaranty, ***Guarantor's liability is unlimited*** *and Guarantor's obligations are continuing.*

[CP 301 (emphasis supplied).]

On January 25, 2010, some Evergreen Bank assets were acquired by Umpqua, including the Loan, Note, Replacement Note, Deed of Trust, and Evergreen Guaranty. [CP 273.] One year later, Charles R. Johnson, II provided a second absolute and unconditional Commercial Guaranty to Umpqua Bank (the "Umpqua Guaranty") [CP 274, 313-16], including terms identical to the Evergreen Guaranty quoted above [CP 313]. Shasta subsequently defaulted on the Loan. [CP 274-75.]

B. **Umpqua Sues to Judicially Foreclose Without Waiving the Balance Due, Court Appoints Receiver, Court Orders and Approves Receiver's Property Sale Without Redemption, No One Objects, and Deficiency Judgment is Entered.**

To collect on the Replacement Note and Guarantees, on March 19, 2012, Umpqua filed a "Petition for Appointment of General Receiver for Real Property ... *And* for *Judicial* Foreclosure."[5] [CP 1-12 (emphasis supplied).] Washington's judicial foreclosure law provides:

> [I]n all cases where the mortgagee ... has ***expressly waived any right to a deficiency judgment*** in the [foreclosure] complaint, ..., *there shall be no such judgment for deficiency*, and the remedy of the mortgagee or other owner of the mortgage shall be ***confined*** *to the sale of the property mortgaged.*

RCW 61.12.070 (emphasis supplied). Umpqua's Petition contains no such express deficiency waiver. [CP 1-12.]

In requesting a Receiver's appointment, Umpqua relied on the parties' Deed of Trust:

> ***Lender shall have the right to have a receiver appointed*** to take possession of all or any part of the Property, with the power to protect and preserve the Property, *to operate the Property* preceding or pending foreclosure or sale, and *to collect the Rents from the Property and apply the proceeds*, over and above the cost of the receivership, against the indebtedness. ... *Lender's right to appointment of a receiver shall exist whether or not the apparent value of the property exceeds the indebtedness by a substantial amount.* ....

[CP 2-3 (emphasis supplied); *also see*, CP 60.]

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[5] As recognized by Division II, Umpqua's Petition did not seek a Receiver's appointment to "sell the Property *and/or* judicially foreclose the Property," as Petitioners represent. [Petition, p. 3 (emphasis supplied); 194 Wn. App. at 690, n. 6.]

On Umpqua's motion on April 6, 2012, the trial court appointed a General Receiver of Shasta (the "Receiver") [CP 98-104], ordering:

> The Receiver shall have *authority to **liquidate** [Shasta's] property* and business assets pursuant to RCW 7.60.260. *The Receiver's sale of any collateral property shall be effected **free and clear** of liens and **of all rights of redemption*** whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property.

[CP 101 (emphasis supplied).] The Order also provides:

> *Umpqua Bank's acceptance* and application of said net rents, income and profits, ..., ***shall not constitute a waiver or cure** of the defaults* under the Deed of Trust ***nor a defense to any sale, or*** judicial or nonjudicial ***foreclosure*** of the Deed of Trust encumbering the Property.

[CP 103-04 (emphasis supplied).] Shasta and the Johnsons, who received notice, did not oppose the appointment or the Order's terms. [CP 96-97.]

Over the next 11 months, the Receiver filed 13 pleadings including motions, Notices of Compensation, and reports[6] [CP 117-31, 136-55, 158-61, 166-264, 448-463], none of which were opposed by Shasta or the Johnsons. On July 26, 2013, the Receiver filed its Motion to Sell the Property Free and Clear of Liens, [CP 198-204], supported by the Receiver's Declaration [CP 209-234], detailing Property marketing efforts and the Receiver's opinion and "reasonable business judgment, [that] consummation of the Transaction is in the best interest of the receivership estate, its creditors, and other interested persons" [CP 211].

[6] The motions were to approve the Receiver's bond, approve employment of a real estate broker, approve employment of other professionals, sell the Property, and terminate the Receivership. [CP 117-31, 136-55, 158-61, 166-264, 448-463.]

Again, neither Shasta nor the Johnsons objected to the Receiver's Property sale motion [CP 237], and the Court entered the Receiver's proposed Order,[7] approving sale without redemption rights [*compare*, CP 205-08 to CP 236-39]. The sale closed on January 15, 2014, nearly two years after the Receiver's appointment, and proceeds were paid to Umpqua. [CP 252-53.] Umpqua credited the proceeds to the Loan, but almost $900,000 remained due and owing. [CP 351-52.]

To complete collecting the Replacement Note and enforcing the Guarantees, on November 14, 2014, Umpqua filed its Motion for Summary Judgment Against Shasta Apartments, LLC, and for Entry of Default Judgment Against Other Respondents [CP 337-49], and supporting Declarations [CP 350-67].[8] Umpqua's motion cited the controlling laws of contracts, promissory notes, and commercial guarantees, and argued for a deficiency award of the nearly $900,000 balance due. [CP 345-49, 469-71, 499-507.]

On the same date, Shasta and the Johnsons filed their summary judgment motion [CP 368-75], supported only by evidence Umpqua previously filed and prior pleadings [CP 376-463]. They argued Umpqua elected its remedy by initiating the Receivership which sold the Property without redemption rights, thereby effectively completing a nonjudicial

[7] Contrary to Petitioners' representation [Petition, p. 3], the Order was proposed by the Receiver's counsel, not Umpqua's counsel. [CP 205-08.]

[8] Umpqua had previously obtained an Order of Default against the Johnsons on May 25, 2012. [CP 132-33.]

foreclosure.[9] They urged Umpqua could not obtain a deficiency award because it had extinguished its deficiency rights by extinguishing their redemption rights. [CP 369, 371-75, 477-85.] The parties repeated their positions at oral argument of the cross-motions. [RP 1-13.]

The trial court granted Umpqua summary judgment [CP 508-10], denied Petitioners summary judgment [CP 511-13], awarded Umpqua fees and costs [CP 543-45], and on February 6, 2015, entered Judgment against Shasta and the Johnsons for the $932,997.22 deficiency [CP 546-48].

C. Div. II Affirms, Holding Receivership Act Does Not Preclude a Deficiency Judgment Against Grantors and Guarantors.

Petitioners appealed the summary judgment orders and Judgment. On June 21, 2016, Division II's published opinion issued, holding:

> (1) chapter 7.60 RCW [the Receivership Act] does not preclude a secured creditor from pursuing a deficiency judgment against a grantor and guarantor after a court-ordered and approved receiver's sale of the grantor's property and
> (2) Umpqua was entitled to pursue a deficiency judgment against Shasta and [the] Johnson[s].

Umpqua Bank v. Shasta Apts., LLC, 194 Wn. App. 685, 700, ___ P.3d ___ (2016). Division II affirmed the summary judgment orders, the deficiency judgment, and awarded Umpqua its fees and costs on appeal. *Id.*

[9] This argument ignores the uncontroverted facts that Umpqua sued for *judicial* foreclosure, and no nonjudicial proceeding was ever commenced. [CP 1-12.]

V. ARGUMENT

A. Petitioners Fail to Show Substantial Public Interest Because Div. II Correctly Interpreted the Receivership Act.

Without acknowledging or analyzing any requisite factors, Shasta and the Johnsons argue this Court should grant review under RAP 13.4(b)(4) because Division II's decision: (1) "eviscerates" judicial and nonjudicial foreclosure statutes; (2) violates debtors' "sacred" redemption rights; and (3) "dangerously" expands creditors' deficiency rights against commercial and consumer debtors. (Petition, p. 5.) Each assertion is fallacious.

1. The Receivership Act is Not a Foreclosure Statute.

The premise underpinning Petitioners' arguments is that the Receivership Act, RCW 7.60, *et seq.*, is a "foreclosure process." (Petition, p. 14.] It is not. Instead, as Division II recognized:

> [The Act's] purpose ... is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein.

Substitute S.B. 6189 § 1, 58th Leg., Reg. Sess. (Wash. 2004); *Umpqua, supra,* 194 Wn. App., at 695; *accord, Dep't. of Revenue v. Fed. Deposit Ins. Corp.*, 190 Wn. App. 150, 159, 359 P.3d 913 (2015).

Nowhere does the Receivership Act reference itself as a "foreclosure process" or "foreclosure statute." To the contrary, it describes a Receiver's appointment as a mandatory "remedy" available

"provisionally" after foreclosure is commenced. RCW 7.60.025(1)(b)(ii). The Legislature would not have defined when foreclosure is commenced, if the Act *itself* is a foreclosure statute. *Id.* Similarly, the Act would not reference "the *pendency* of an action to foreclose" as the basis to appoint a Receiver if that appointment request itself constituted initiation of "an action to foreclose." RCW 7.60.015 (emphasis supplied).

Moreover, this Court recently held the Receivership Act provides a "***remedy***" to a foreclosing lender—but reasoned "the plain language of the statute does ***not*** suggest that chapter 7.60 RCW was intended to be an ***exclusive remedy***." *Jordan v. Nationstar Mortg., LLC*, 185 Wn.2d 876, 892, 374 P.3d 1195 (2016) (emphasis supplied). Answering certified questions concerning whether a lender may enter secured property before obtaining title by completing nonjudicial foreclosure, this Court held:

> The text of the receivership statutes, the legislative intent behind them, and public policy considerations compel us to find that chapter 7.60 RCW is ***not the exclusive remedy for lenders*** to gain access to a borrower's property.

Id. (emphasis supplied).

The analysis and holding are equally applicable here. Because the Receivership Act does not provide a lender's exclusive remedy, it neither "eviscerates" nor constitutes a foreclosure statute; rather, it is used in conjunction with foreclosure laws, without it being deemed that the lender has elected an exclusive remedy against its debtors.

2. A Court-Ordered Sale Extinguishing Redemption Rights does Not Extinguish Deficiency Rights.

Shasta and the Johnsons argue that a debtor's extinguished redemption right and a creditor's deficiency right are mutually exclusive—one must necessarily be traded off by the creditor for the other. But the answer to that contention is clear in the Receivership Act:

> The court may order that a general receiver's sale of estate property ... consisting of real property ... be effected ***free and clear*** of liens and ***of all rights of redemption***, *whether or not* the sale will *generate proceeds sufficient* to fully satisfy all claims secured by the property ....

RCW 7.60.260(2)(b) (emphasis supplied).

Petitioners acknowledge the "long-standing balance of rights struck between creditor and debtor *established by the Legislature*" (Petition, pp. 7-8), but fail to accept that the Legislature meant what it wrote in the Receivership Act. As this Court noted regarding the Act:

> [W]hen engaging in statutory interpretation, our "fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."

Jordan, supra, 185 Wn.2d at 891 (quoting *Dep't. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

The redemption extinguishment wording needs no interpretation, and the meaning is clear. As done here, the trial court may order the Receiver's sale of realty "be effected ***free and clear*** of liens and ***of all rights of redemption*** ...." RCW 7.60.260(2)(b) (emphasis supplied).

Petitioners assert Umpqua's limited involvement requesting a Receiver constitutes a "self-help" remedy, barring Umpqua from obtaining deficiency judgment. They confuse the facts here with those considered in *Thompson v. Smith*, 58 Wn. App. 361, 793 P.2d 449 (1990). *Thompson* involved a creditor accepting a deed in lieu of foreclosure, selling the securing property, then suing the debtor for a deficiency. Division I held:

> [The creditor] essentially *carried out a **nonjudicial foreclosure** without having to follow the statutory procedures* of RCW 61.24. Had he foreclosed ***nonjudicially*** pursuant to the statute, *he would have been barred from seeking a deficiency judgment* on the underlying obligation. Given the policies underlying RCW 61.24, we can find no authority for permitting [the creditor] to obtain through self-help that which he could not accomplish pursuant to RCW 61.24. ***Under the specific circumstances of this case,*** [the debtor] is entitled to the protection of RCW 61.24.100.

Id., at 366 (emphasis supplied).

Umpqua's collection efforts did not involve *nonjudicial* foreclosure; instead, Umpqua sued to foreclose *judicially*.[10] Umpqua engaged in no *self-help*—the Receiver, not Umpqua, moved for the sale without redemption rights, and the Court, not Umpqua, ordered it. [CP 98-104.] *Thompson* is distinguishable on—and limited to—its facts, and

[10] Petitioners assertion that Umpqua elected "to have a general receiver appointed and to *not* pursue a judicial foreclosure" (Petition, p. 7 (emphasis supplied)), is unsupported by any citation to the record, and incorrect in view of Umpqua's Complaint seeking *judicial* foreclosure [CP 1-12] and the Court's order that Umpqua's acceptance of proceeds did not constitute a default waiver or cure, nor a foreclosure defense [CP 103-04].

does not hold that redemption extinguishment forces deficiency extinguishment when the lender has sued to foreclose judicially.[11]

Petitioner's specter of "a dangerous precedent permitting broad self-help remedies" (Petition, p. 9) is a gross overstatement where here the trial court: (1) appointed the Receiver; (2) supervised it by requiring regular reports; and (3) based on uncontroverted evidence introduced without objection, ordered the Property's sale without redemption rights. Shasta and the Johnson's bald assertions that debtors' redemption rights are "sacred" and cannot be extinguished (Petition, p. 5) fail under the unequivocal RCW 7.60.260(2)(b) allowing exactly that.[12]

3. The Decision Does Not Apply to Consumer Loans.

Petitioners' argument that Division II's opinion "dangerously" expands creditors' deficiency rights against both commercial *and* consumer debtors (Petition, p. 5) is equally specious. The Deed of Trust Act controls nonjudicial foreclosures. It "generally ***bars*** deficiency judgments, '[e]xcept to the extent permitted ... for deeds of trust securing ***commercial*** loans,....'" *Umpqua*, 194 Wn. App at 697 (quoting RCW 61.24.100(1)) (emphasis supplied); *Harvey, supra*, 182 Wn.2d at 340.

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[11] *Also see, Wash. Fed. v. Harvey*, 182 Wn.2d 335, 341, 340 P.3d 846 (2015) (holding commercial loan guarantors are not protected against deficiency judgments under the Deed of Trust Act; not reaching the question whether the guarantors could waive antideficiency judgment protection).

[12] Notably, *if* Petitioners' redemption rights had not been extinguished, the outcome would be no different. The Receiver did not close sale of the Property until nearly two years after it was appointed [CP 252-53]—a period nearly double that allowed for redemption under RCW 6.23.020(1)(b).

The opinion below involves a *commercial* loan, and is so limited:

> The plain language of the Receivership Statute does not expressly permit or preclude a secured creditor of a *commercial* loan from pursuing a deficiency judgment against the grantor and/or guarantor after a court-approved receiver sale of the grantor's property securing the loan.

Umpqua, 194 Wn. App. at 695 (emphasis supplied).

Nowhere in Division II's decision do the words "consumer," "personal,"[13] "family," or "household" appear. Indeed, homestead property *cannot* be sold by a Receiver *without* the owner's consent.[14]

Shasta and the Johnsons provide no analysis of how Division II's decision has the "potential to radically alter the foreclosure system in Washington ... as to ... *non-commercial* borrowers and guarantors[.]" (Petition, p. 13 (emphasis supplied).) No basis exists for an overbroad application of the decision to consumer loans, and Petitioners cite to none.

B. <u>Div. II did Not Create a Substantive Deficiency Right</u>.

Petitioners contend Division II "created a right to a deficiency under the Receivership Act," which does not provide such a right. (Petition, p. 13.) But *Jordan's* holding that the Act is *not* the lender's exclusive remedy defeats Petitioners' wholly unsupported assertion that there exists *no* "right of a creditor to foreclose on or otherwise compel the

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[13] Except one reference to "personal property," quoting RCW 7.60.025(1)(b). *Id.*

[14] "The court may order that a general receiver's sale ... consisting of real property ... be effected free and clear ... of all rights of redemption, ... *unless ... the property is a homestead ... and the owner of the property has not consented to the sale* following the appointment of the receiver ...." RCW 7.60.260(2)(b)(i) (emphasis supplied).

sale of any property ... pursuant to one statutory act and then pursue deficiency rights under another statutory act." (Petition, p. 15.)

This Court recognized "nothing in ... chapter 7.60 RCW requires the appointment of a receiver[.]" *Jordan, supra,* 185 Wn. 2d at 890. It emphasized the Act "merely set[s] forth requirements *should* a receiver be necessary." *Id.,* at 891. It concluded "the plain language ... does *not* indicate [the Act] was meant to provide an *exclusive* remedy ...." *Id.*

Shasta and the Johnson's protestations that "no [deficiency] exists under the Receivership Act" (Petition, p. 16), are inconsequential because: (1) a deficiency is collectible against a guarantor under RCW 61.24.100(1); (2) a deficiency is collectible against both the guarantor and grantor unless waived, under RCW 61.12.070; (3) the Receivership Act is a remedy, not a foreclosure law; (4) the Act is not an exclusive remedy; and (5) a Receiver may be appointed ancillary to foreclosure, under RCW 7.60.025(1)(b). Because the Receivership Act establishes a "non-exclusive *remedy,*" rather than a "*foreclosure process,*" it need not address deficiency entitlement, as that is established by foreclosure laws.[15]

C. Analysis of Public Interest Factors for Granting Review.

Petitioners cite only RAP 13.4(b)(4) as grounds for review. (Petition, pp. 5, 18.) This Court considers several factors to determine if a decision is of substantial public interest warranting review, *i.e.,* it:

[15] Equally specious is Petitioners' assertion that "Division II completely ignored the competing interests of Shasta and the Johnsons" by not fully quoting the Receivership Act's purpose (Petition, pp. 17-18), when the opinion contains a complete recitation of the Act's purpose immediately above the portion Petitioners cite.

- Has the potential to affect every similar proceeding;
- Invites unnecessary litigation and creates confusion;
- Immediately affects a significant population;
- Presents a public question likely to recur; and
- Renders the future guidance of public officials desirable.

State v. Watson, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005). *Watson* considered a prosecutor's memorandum to all county judges announcing criminal sentencing policies. The Court of Appeals held the memo a public official's *ex parte* communication, such that the decision had broad implications and application, so review was granted. *Id.*, at 577-578.

A more significant factor is the potential to affect similar proceedings. In *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 513, 29 P.3d 1242 (2001), review was granted under a disciplinary rule identical to RAP 13.4(b)(4).[16] The decision concerned whether a prosecutor may induce a defense witness to not testify at a criminal proceeding, which obviously would affect all such proceedings. This Court also accepted review in *In re Marriage of Ortiz*, 108 Wn.2d 643, 646-647, 740 P.2d 843 (1987), because the Court of Appeals' decision concerning property settlement escalation clause retroactivity and income awards would affect marital dissolution decrees.

> The three [RAP 13.4(b)(4)] factors considered essential are: (1) whether the issue is of a public

[16] The former RLD 7.3(a)(4) provided the Supreme Court would accept review when the "petition involves an issue of substantial public interest that should be determined by the Supreme Court." *Bonet, supra*, 144 Wn.2d at 512 (quoting RLD 7.3(a)(4)).

> or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.

Hart v. Dep't. of Soc. & Health Servs., 111 Wn.2d 445, 448, 759 P.2d 1206 (1988) (citing, *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983), and *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

Hart summarized the substantial public interest standard cases reviewed:

> The continuing and substantial public interest exception has been used in cases dealing with *constitutional interpretation*, ...; the *validity and interpretation of statutes* and regulations, ...; and matters deemed sufficiently important ....
>
> Most of the public interest exception cases fall into the first two categories as they tend to present issues which are more public in nature and are more likely to arise again. Further, decisions involving the constitution and statutes generally help to guide public officials. ***The public interest exception has not been used in statutory or regulatory cases that are limited on their facts***, ..., or involve statutes or regulations that have been amended.
>
> The third category includes cases taken by the appellate courts within their discretion because of the importance of the issues involved [such as] ... case involving *definition of death*; ... public *campaign financing and election limit* ordinance ....

Id., at 449-50 (citations omitted) (emphasis supplied).

D. <u>Acceptance of Review Under RAP 13.4(b)(4) is Unsupported</u>.

Shasta and the Johnsons assert—but provide no analysis how—the RAP 13.4(b)(4) factors are present here. Division II's decision does not support those factors because it is governed by the parties' contracts and

foreclosure and receivership statutes that have co-existed and been used without controversy for at least 12 years.[17] The opinion does:

- *Not* potentially affect every similar proceeding or a significant population, because each collection action is private and fact-specific on the parties' contracts, how or whether the creditor elects foreclosing, seeks a deficiency, the loan is guaranteed, it is a commercial loan, a Receiver is appointed, a sale extinguishing redemption ordered, a deficiency exists, the debtor consents to the sale, *etc.*;

- *Not* invite unnecessary litigation, because Petitioners' assertion that the Receivership Act provides a lender's exclusive remedy was rejected by this Court in *Jordon, supra,* 185 Wn.2d at 894;

- *Not* create confusion generally, because the Receivership Act is clearly not a foreclosure statute, such that a deficiency judgment against commercial loan grantors and guarantors is deemed waived by a Court-ordered sale extinguishing their redemption rights; and

- *Not* present a public question likely to recur, because commercial loan terms, conditions, guarantees, and default are all private matters unique to the parties, as are the lender's collection efforts.

The issues Division II addressed are not of the importance or character this Court has reviewed previously. *Hart, supra,* 111 Wn.2d 445 at 449-50. Further militating against review acceptance is the *Jordon*

[17] Judicial foreclosures have been prosecuted for at least a century in Washington State, while the Receivership Act was substantially amended in 2004. SUBSTITUTES.B. 6189, § 1, 58th Leg., Reg. Sess. (Wash. 2004).

decision issued two months ago, analyzing the identical Act at issue here. *Jordon* specifically rejected these Petitioners' public policy arguments:

> [I]t is *worth noting a* ***relevant policy consideration.*** One of the advantages of a deed of trust is that it offers "'efficient and inexpensive'" nonjudicial foreclosure. ... Thus, ***requiring lenders to wade through the judicial receivership process in all cases—regardless of the facts and circumstances—is illogical.*** Overall, both ***policy*** and the plain text of the statute support finding that *it does not provide an* ***exclusive remedy*** *to lenders.*

Jordan, supra, 185 Wn.2d at 893 (emphasis supplied).

Petitioners do not showing any RAP 13.4(b)(4) issue exists.

VI. REQUEST FOR ATTORNEY'S FEES

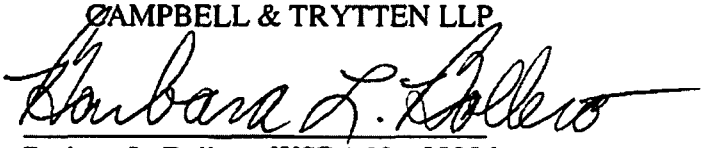
Umpqua Bank requests this Court award its attorney's fees incurred in responding to Petitioners' Petition for Review. Each contract entered by Petitioners includes an attorney's fee clause permitting Umpqua's recovery of enforcement costs and fees, including costs on appeal. [CP 52, 60, 68, 76, 82-83, and 91.] Umpqua appellate fees and costs should be awarded. *See, Marine Enters. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290, *rev. den'd.*, 111 Wn.2d 1013 (1988).

VII. CONCLUSION

For the foregoing reasons, the Court of Appeals Division II decision was correct. Therefore, Respondent Umpqua Bank respectfully requests this Court deny Petitioners' Petition for Review.

Respectfully submitted this 21st day of September, 2016.

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN LLP



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2016, I caused to be delivered the foregoing RESPONDENT UMPQUA BANK'S ANSWER TO PETITION FOR REVIEW to the following parties in the manner indicated below, pursuant to written agreement of counsel:

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Under the penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 21st day of September, 2016, at Seattle, Washington.

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