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Supreme Court No. 93556-4

(Court of Appeals No. 73834-8-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

4518 S. 256th LLC,

Appellant,

v.

KAREN L. GIBBON, P.S., Trustee, RECONTRUST, N.A.,
Trustee; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC. ("MERS") acting as nominee for COUNTRYWIDE HOME
LOANS, INC., a Beneficiary; THE BANK OF NEW YORK MELLON
f/k/a THE BANK OF NEW YORK, as Trustee for the
certificateholders of the CWABS, Inc. Asset-backed Certificates, Series
2006-7,

Respondents.

AMICUS CURIAE MEMORANDUM OF THE NORTHWEST
JUSTICE PROJECT IN SUPPORT OF PETITION TO REVIEW

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 ORIGINAL

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I. INTEREST OF *AMICUS*

The Northwest Justice Project (“NJP”) is a statewide non-profit law firm that provides representation and counseling to low- and moderate-income homeowners in Washington. NJP and its clients have a substantial interest in this Court’s resolution of whether a Notice of Trustee’s Sale under the Deeds of Trust Act (“DTA”) accelerates the entire debt through operation of law.

The heyday of toxic mortgage loans peaked roughly six years ago, and an epidemic of defaults ensued.¹ Loans originated by Countrywide—as was the subject loan—are emblematic of the disastrous subprime loans of that time.² Such loans and their servicing rights have typically been sold and re-sold,³ often without timely foreclosure on long-defaulted debt. Consequently, matters

¹ See John Carney, *Citigroup’s Toxic Mortgage Pipeline Could Mean Mammoth Put-Back Risks*, CNBC, Nov. 2, 2010, <http://www.cnbc.com/id/39916451>; Greg Gordon, *How Goldman Secretly Bet on the U.S. Housing Crash*, MCCLATCHYDC, Nov. 1, 2009, <http://www.mcclatchydc.com/news/politics-government/article24561376.html>.

² See *Bank of America and the Financial Crisis*, THE NEW YORK TIMES, Aug. 21, 2014, http://www.nytimes.com/interactive/2014/06/10/business/dealbook/11bank-timeline.html?_r=0#/#time333_8794.

³ See Kathleen M. Howley & John Gittelsohn, *GSO Drawn to Mortgage Servicing as Banks Retreating*, BLOOMBERG, Sept. 17, 2013, <http://www.bloomberg.com/news/articles/2013-09-17/gso-drawn-to-mortgage-servicing-as-banks-retreating>.

concerning acceleration and statute of limitations analysis arise for NJP's clients with increasing frequency.

In this case, distressed homeowners quitclaimed their home to an LLC on the eve of the trustee's sale, then the LLC sought to quiet title.⁴ Upon motion for summary judgment, the trial court held that acceleration had not occurred, and so the statute of limitations did not bar enforcement of the loan.⁵ The Court of Appeal affirmed the lower court,⁶ and in doing so, disregarded the plain language of the Deeds of Trust Act and applicable case law.

NJP respectfully submits this *Amicus Curiae* Memorandum in Support of Petition for Review pursuant to RAP 13.4(h). The Petition involves an issue of substantial public interest, and Amicus urges the Court to accept review to restore clarity to this area of the law for the benefit of homeowners and creditors alike.

II. ARGUMENT

A. **The Court of Appeal Decision Raises an Issue of Substantial Public Interest.**

The Petition for Review presents these questions: whether acceleration of the entire debt occurs through operation of law in a

⁴ 4518 S. 256th, *LLC v. Karen L. Gibbon, P.S., Trustee, et al.*, No. 73834-8-I, 2016 WL 4273176, at *1-2 (Wash. Ct. App. Aug. 15, 2016).

⁵ *Id.* at 2.

⁶ *Id.*

non-judicial foreclosure under the DTA; and whether the statute of limitations expires when a lender fails to complete a foreclosure sale of the property within a six-year period.⁷ The Court of Appeals decision muddied the waters on these questions when emerging trends demand clarity in this area of the law.

Toxic mortgage loan originations peaked around 2006-2007.⁸ Those loans featured predatory terms that doomed many of them to failure.⁹ Loans of that era that defaulted early and have not been modified or foreclosed upon are reaching the six-year statute of limitations now—and the volumes will increase as other toxic mortgages age into that group.

Not only are many of these loans nonperforming, but they are also typically underwater because of the drop in home values from the overheated levels of 2006.¹⁰ Such loans, as well as their servicing rights, have typically been sold for pennies on the dollar—often multiple times—since their origination.¹¹ Because of these factors, NJP is seeing an uptick in cases where a homeowner

⁷*Petition for Review* at 1.

⁸ See *supra* note 1.

⁹ See Mara Der Hovanesian, *Nightmare Mortgages*, BLOOMBERG, Sept. 10, 2006, <http://www.bloomberg.com/news/articles/2006-09-10/nightmare-mortgages>.

¹⁰ See Diana Olick, *Housing Today: A 'Bubble Larger than 2006'*, CNBC, Oct. 6, 2015, <http://www.cnbc.com/2015/10/06/housing-today-a-bubble-larger-than-2006.html>.

¹¹ See *supra* note 3.

has been in default for six or more years, and one or more Notices of Trustee's Sale have been issued without the sale ever occurring.

Confounding influences often arise to further complicate such cases. For example, what effect does the presence or absence of a recorded Discontinuance of Trustee's Sale have in such a scenario (as occurred in this case)? Without clear case law on point, statute of limitations analysis is difficult—and now, with the Court of Appeals holding in this case that the statutory Notice of Trustee's Sale does not accelerate the debt, the analysis becomes nonsensical.

B. The Court of Appeals Decision Conflicts with Existing Law.

Certain legal principles are well established. For an installment note, the statute of limitations runs against each installment from the time it becomes due.¹² If an installment debt is accelerated, then the loan automatically matures, the entire balance becomes due, and the statute of limitations is triggered for all installments that had not been previously due.¹³ To collect on the

¹² *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945).

¹³ 31 RICHARD A. LORD, WILLISTON ON CONTRACTS § 79:17, at 338; § 79:18, at 347-50.

entire obligation in a standard mortgage loan, it must be accelerated, clearly and unequivocally.¹⁴

However, the Court of Appeals in this case held that a lender need not accelerate the loan to conduct a non-judicial foreclosure under the DTA.¹⁵ It further held that the statutory Notice of Trustee's Sale did not provide sufficiently clear and unequivocal notice of the acceleration.¹⁶ In so holding, the court created blatant conflict with statutory language throughout the DTA, the UCC, a recently published case concerning effective acceleration language, the above-referenced case law, and the plain meaning of "acceleration" itself.

Numerous passages in the DTA address aspects of non-judicial foreclosure and its effects: deprivation of title and the retirement of the *entire* obligation, not just the installments owing.

"A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of *all* their interest in the property..."¹⁷ (emphasis added).

¹⁴ *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909); *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979).

¹⁵ 4518 S. 256th, 2016 WL 4273176, at *10.

¹⁶ *Id.*

¹⁷ RCW 61.24.030(8)(i) (describing language to be included in the Notice of Default warning of the effects of the trustee's sale, should it take place).

“The above-described property will be sold to satisfy the expense of sale **and the obligation secured** by the Deed of Trust...”¹⁸ (emphasis added).

“The sale may be terminated at any time after the...(11 days before the sale date)...by...paying the **entire principal and interest secured by the Deed of Trust**, plus costs, fees, and advances...”¹⁹ (emphasis added).

“The trustee shall apply the proceeds of the sale...to the expense of sale...to **the obligation secured by the deed of trust**, and the surplus, if any...shall be deposited...”²⁰ (emphasis added).

“At any time prior to the eleventh day before the date set...for the sale...shall be entitled to cause a discontinuance...by paying to the trustee: (a) the entire amount then due...**other than such portion of the principal as would not then be due had no default occurred**...”²¹ (emphasis added).

As each of these citations shows, once the trustee’s sale occurs, the *full amount* of the obligation is recoverable by the lender, not merely the arrears, and eleven days before the sale, the sum required to stop the sale becomes the full amount of the obligation. This is the very definition of “acceleration.”²²

¹⁸ RCW 61.24.040(1)(f) (specifying the language to be used in the Notice of Sale that the trustee shall issue).

¹⁹ *Id.*

²⁰ RCW 61.24.080(1-3) (specifying how the trustee is to apply the proceeds in the event there is a surplus).

²¹ RCW 61.24.090(1)(a) (specifying that the trustee’s sale can be discontinued by paying only the arrears, not the full amount of the obligation, up until eleven days before the scheduled sale date).

²² **acceleration** *n.* (18c) 1. ... 2. The advancing of a loan agreement’s maturity date so that payment of the entire debt is due immediately <acceleration of the date>... *Black’s Law Dictionary* (10th ed. 2014).

A recent Court of Appeals Division III case held that a statement that the *entire* amount of principal (plus accrued interest and all other amounts that may be owing) is immediately due and payable suffices for clear and unequivocal notice to the debtor.²³ This language closely parallels the language in the statutory Notice of Trustee's Sale under the DTA, where it specifies that, after the eleventh day before the scheduled sale date, the entire balance of the obligation plus fees must be tendered to discontinue the sale and reinstate the loan "as though no acceleration had taken place."²⁴

The Court of Appeals holding in this case also conflicts with this Court's authority on the applicability of the UCC and the role of acceleration in the enforcement of a defaulted home loan.²⁵

C. The Court of Appeals Decision Leads to Absurd and Unfair Results.

The DTA requires that, after a trustee's sale, the homeowner is divested of *all* title, and the *full* obligation is satisfied from the

²³ "The entire unpaid balance of the Promissory Note... plus all accrued interest and all other amounts that may be owing thereunder are immediately due and payable." See *Washington Fed. v. Azure Chelan, LLC*, No. 33176-8-III (consolidated with 33630-1-III), 2016 WL 5418249, at *8-9 (Wash. Ct. App. July 7, 2016, publication ordered Sept. 6, 2016).

²⁴ RCW 61.24.090(3).

²⁵ See *Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 524-29, 359 P.3d 771 (2015) (discussing the rights of note holders and note owners under the UCC, specifically enforcement under Article 3); see also RCW 62A.3-304 (specifying the effects of acceleration when an instrument is overdue).

sale proceeds. But absent acceleration, only the arrearages would be subject to collection, in direct conflict with numerous provisions of the DTA.

The Court of Appeals decision holds that the Notice of Trustee's Sale does not accelerate the entire debt. The absurdity and unfairness of that holding are well illustrated by its implications in the handling of surplus proceeds. The DTA presumes acceleration of the entire debt, and provides that surplus funds are those remaining after the *entire obligation* and costs of sale are satisfied.²⁶ The former homeowner is entitled to claim that surplus, as it represents the equity held in the property. However, if the decision in this case were allowed to stand, the accelerated amount would be merely the unpaid installment payments of the past six years, not the entire debt—leaving the homeowner liable for the deficiency, in direct conflict with the DTA. That result would be nonsensical as well as unfair, because the balance of the loan would survive the foreclosure, despite the fact that the homeowner lost title to the house and the loan is no longer secured.

²⁶ RCW 61.24.080(1-3) (specifying how the trustee shall apply the proceeds in the event of a surplus).

Clarity and consistency in the law concerning acceleration is vital, because the concept of repose central to the statute of limitations is just as critical to non-judicial foreclosures as it is to judicial actions. The loans most likely to fall into this scenario are those that have been sold and re-sold, with records and other evidence lost in the process. In fact, repose is even more important in non-judicial foreclosure under the DTA because there is no judicial oversight. A stale non-judicial foreclosure could take place based on faulty evidence, or even false information.

The Court of Appeals decision would encourage lenders and their servicers to pursue untimely foreclosures, perhaps after multiple Notices of Trustee's Sale and the accompanying added fees and costs.²⁷ For homeowners trying to keep their homes, this can allow arrears to balloon to the point where modification is no longer an option. For homeowners who move on, incomplete or untimely foreclosures leave property abandoned, to the detriment of neighborhoods and area property values.²⁸ Moreover, the

²⁷ See Diane E. Thompson, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences*, NATIONAL CONSUMER LAW CENTER, Oct. 2009, <https://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf>.

²⁸ See Emily Badger, *How Cities are Starting to Turn Back Decades of Creeping Urban Blight*, THE WASHINGTON POST, May 20, 2015,

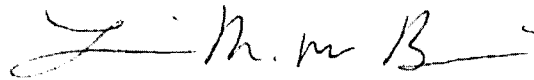
homeowner is forced to remain liable for maintenance and hazards until the property is sold. Either way, there is no closure for the homeowner until title is quieted or foreclosure occurs.

III. CONCLUSION

Amicus curiae Northwest Justice Project respectfully requests that the Court accept review and clarify that a Notice of Sale issued in a non-judicial foreclosure under the DTA accelerates the debt as of the eleventh day before the sale date, the point at which the statute of limitations runs; and that if more than six years pass without enforcement of the security interest under the DTA, a homeowner is entitled to pursue a quiet title action.

DATED this 2nd day of November 2016.

NORTHWEST JUSTICE PROJECT



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Attorney for *Amicus Curiae*
Northwest Justice Project

<https://www.washingtonpost.com/news/wonk/wp/2015/05/20/how-cities-are-starting-to-turn-back-decades-of-creeping-urban-blight/>.

DECLARATION OF SERVICE

I, Melanie Sprague, a legal assistant at Northwest Justice Project, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon the following counsel of record:

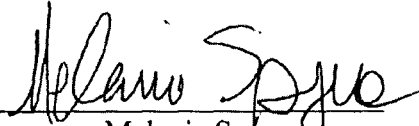
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DATED at Seattle, Washington, this 2nd day of November

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Dear Clerk,

Attached are the following documents for filing with the Court:

- MOTION OF NORTHWEST JUSTICE PROJECT FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION TO REVIEW; and
- AMICUS CURIAE MEMORANDUM OF THE NORTHWEST JUSTICE PROJECT IN SUPPORT OF PETITION TO REVIEW

These have been served today upon all counsel of record by first-class mail, postage prepaid.

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4518 S. 256th LLC, v. KAREN L. GIBBON, P.S., Trustee, *et al.*, Case No. 93556-4, filed by Lisa von Biela, WSBA #42142, (206) 464-1519, lisav@nwjustice.org.

Thank you.

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