No. 96303-7

(Court of Appeals No. 76706-2-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA M. MERCERI, a single woman,

Petitioner,

v.

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OA19, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA19,

Respondent

PETITIONER'S ANSWER TO NORTHWEST JUSTICE PROJECT'S *AMICUS CURIAE* MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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Resolving The Conflict With Supreme Court Precedent Is A Matter Of Substantial Public Interest

This case exemplifies the substantial public interest in foreclosure law of knowing when a holder has accelerated a homeowners' installment note debt. The contractual right to foreclose depends on the holder giving the borrower the contractually required Notice of Intent to Accelerate the loan. [1]

Until this year when the Court of Appeals published its radically divergent opinion in this case, for a lender to establish acceleration, Washington law only required "some affirmative action. . . . some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due." *Weinberg v. Naher,* 51 Wash. 591, 594, P. 736 (1909). The focus for over one hundred years continued to be objective: whether it was 'clearly brought home' to the borrower that the holder intended to accelerate the debt. *See Weinberg at 37-38; Puget Sound Mutual Savings Bank v. Lillions,* 314 P.2d 935, 938, 50 Wn.2d 799 (1957). And even though no formal notice is required by Washington law, *Cook v. Strelau,* 127 Wash. 128, 219 P. 846 (1923) ("He was not obligated to go to the maker and make a formal demand"; notifying maker of

[1] Each institution drafts its own Notice of Intent to Accelerate the loan. Once the Notice is given, and the default is not cured by the borrower within 30 days of receiving the Notice, the loan is fully accelerated, entitling the holder to foreclose.

obligation to make delinquent payments was sufficient), *quoting James v. Brainard-Jackson Co.*, 64 Wash. 6, 80 P. 822 (1905), holders, like the Bank of New York Mellon, gave borrowers, like Sandra Merceri, written notice that the failure to cure the defaults would result in the loan being fully accelerated, entitling the holder to foreclose. At any given time, thousands of homes are subject to foreclosure. The Northwest Justice Project Amicus Curiae Memorandum makes it clear that it is in the public interest that the contractual prerequisites be scrupulously followed, both for the predictability of applying Washington law and for fairness to the homeowners who are facing foreclosure.

Until the Court of Appeals published its opinion in this case, trial courts and trial practitioners understood that the written Notice of Intent to Accelerate drafted by the lender was sufficient to give the borrower proper notice that the loan was fully accelerated when the borrower did not cure its default. The efficacy of the Notice was viewed objectively, i.e. whether the notice was "some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due." *Glassmaker v. Ricard*, 23 Wn.App. 35, 37, 593 P.2d 179 (1979).

And although in this case the lender's Notice was a "clear and unequivocal" expression of the intent to accelerate, the Court of Appeals accepted the bank's expedient, unsupported about-face that its 2010

servicer, Bank of America, did not intend its Notice to actually accelerate the debt. The Court of Appeals abandoned well-established foreclosure law. It adopted subjective intent as the measuring stick. By this radical departure from Supreme Court precedent, the Court of Appeals turned our foreclosure law upside down and opened Pandora's Box, inviting parties to disclaim the legal effect of the Notice by subjective intent. It is no longer an objective test of whether there was a clear and unequivocal expression of the intent to accelerate with the Notice given. It is now whether the bank or its predecessor really intended to accelerate the debt after giving its Notice of Intent to Accelerate.[2] It is now viewed subjectively, more than six years later, after the statute of limitations has run on the bank's right to foreclose. This is an unsettling, radical departure from well-established Washington law.

With the Court of Appeals' disregard of long-standing Supreme Court precedent, knowing whether the debt has been accelerated is no longer predictable.

Abandoning the time-tested objective test for an arbitrary subjective test will likely result in prolonging the foreclosure process.

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[2] The Court of Appeals rejected the objective analysis and adopted subjective intent, even though The Bank of New York Mellon presented no evidence, by declaration or otherwise, as to the Bank's or its predecessor servicer Bank of America's intent to accelerate in 2010.

Extensive discovery into the subjective mind of both the banker and the borrower will become commonplace, when it used to be irrelevant. The Court of Appeal's radical decision is a "watershed departure from prior practice that affects the greater public interest." *In re Personal Restraint of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1092 (2017).

> A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue.

In re Personal Restraint Petition of Flippo, 185 Wn.2d 1032, 380 P.3d 413, 414-15 (2016), *citing State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). With thousands facing foreclosure in the wake of the 2007-2008 mortgage crisis, more foreclosures and statutes of limitations are being litigated. These cases will turn on whether lower courts properly apply Supreme Court precedent or improperly apply the Court of Appeal's new subjective intent test to ascertain whether there was a clear and unequivocal expression of intent to accelerate. Up to this point, federal district court judges in Washington have been following Supreme Court precedent.

Case	Holding
Fujita v. Quality Loan Serv. Corp. of Wash., 2016 U.S. Dist. LEXIS 111756, at *2 (W.D. Wa. Aug. 22, 2016)	"The Notice itself speaks in mandatory terms: 'If the default is not cured on or before July 16, 2009, the mortgage payments will be accelerated…' . . . U.S. Bank advised that acceleration would result from a failure to cure, clearly evidencing that it 'intend[ed] to declare the entire sum due and payable.' Plaintiffs did not cure, and thus the debt accelerated." *Citing Weinberg v. Naher, supra*.
Umouyo v. Bank of America, N.A., 2017 WL 1532664 at *4 (W.D. Wa.. Apr. 28, 2017)	"Here, Defendant accelerated the debt on November 5, 2009. Defendant was not required to send Plaintiff any additional notification in order to trigger the acceleration because the mandatory language in the Notice was clear: if Plaintiff did not cure his debt by November 5, 2009, then 'the mortgage payments will be accelerated.'" *Citing Weinberg v. Naher, supra*.
Hardyal v. U.S. Bank N.A., C17-01416-TSZ (W.D. Wa. July 23, 2018)	"The bank doesn't have to send any other notice. That is an acceleration. I think the *Fujita* case that I decided back in 2016 essentially says the same thing. And I'm satisfied that the notice of default given back in -- the original notice of default [and acceleration] was an acceleration as a matter of law." *Citing Weinberg, Fujita and Umouyo, supra*.

Allowing the Court of Appeals' opinion to stand will likely cause confusion and prolong judicial review. Over a half dozen cases are currently pending where this is a pivotal issue in the foreclosure litigation:

Case Name	**Court**
The Bank of New York Mellon v. Smith et al, 18-cv-764-TSZ, 9th Cir. No. 18-35950	Ninth Circuit (lender appealed 11/6/18)
Meppelink v. Wilmington Savings Fund Society FSB et al, 17-2-00839-9	Kitsap County Superior Court
Odsather v. Fay Servicing et al, 2:18-cv-289-JCC	Western District of Washington
Prather v. Wilmington Savings Fund Society, FSB et al, 18-2-03171-31	Snohomish County Superior Court
Tobin et al v. Bank of America, NA et al, 2:18-cv-1024-TSZ	Western District of Washington
Torres v. SN Servicing Corp., et al, 18-cv-00380 TSZ	Western District of Washington
Wilmington Trust v. Voght, 17-2-27809-2	King County Superior Court

The Northwest Justice Project is correct. This is an issue of utmost importance in the field of foreclosure law. Supreme Court review is warranted and is needed to restore the proper objective analysis on knowing whether the debt has been accelerated. RAP 13.4(b)(1) and RAP 13.4(b)(4).

Respectfully submitted this 20th day of November 2018.

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