SUPREME COURT NO. 101931-9

COURT OF APPEALS NO. 38769-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHELLE E. LOUN,

Petitioner,

v.

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE ON BEHALF OF AND WITH RESPECT TO AJAX MORTGAGE LOAN TRUST 2018-B, MORTGAGE-BACKED NOTES, its successors-in-interest and/or assigns,

Respondent.

PETITION FOR REVIEW

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Table of Contents

Page

Appendices

Page

Table of Authorities

Statutes and Codes

Rules

Other Authorities

I. IDENTITY OF PETITIONER

Petitioner is Michelle Loun (Loun).

II. CITATION TO COURT OF APPEALS' DECISION

The Court of Appeals, Division Three, issued its published opinion on March 28, 2023. The Court of Appeals reversed the trial court's summary judgment order finding that U.S. Bank's judicial foreclosure action on Loun's accelerated promissory note was time-barred. *See* Appendix A (App. Op.). No motion for reconsideration was sought.

III. ISSUES PRESENTED FOR REVIEW

The issue of whether the Court of Appeals erred in reversing the trial court presents three issues of first impression in this state:

No. 1: Where the mortgage contract gives the holder the right to accelerate a promissory note, but not the right to revoke acceleration, can the holder nonetheless revoke acceleration after its foreclosure action is involuntarily dismissed when the homeowner does not tender any payments, or otherwise seek to rein-

state the note before the statute of limitations has run?

No. 2: Should the same requirement for accelerating a promissory note apply to revoking acceleration? In other words, should the revocation be "clearly and unequivocally" communicated to the homeowner, or can revocation occur by implication?

No. 3: Once a note has been accelerated, can sending legally required mortgage information to a homeowner, without more, revoke acceleration and reinstate the note?

These issues are of state-wide significance in residential mortgage foreclosures and directly impact the statute of limitations, including a homeowner's statutory right under RCW 7.28.300 to raise the statute of limitations as a defense to an action to foreclose on a deed of trust; they do not, as the Court of Appeals concluded, simply involve "a private dispute about whether a debt is owed by Ms. Loun to U.S. Bank." App. Op. at 9.

IV. STATEMENT OF THE CASE

A. The Court of Appeals' Decision.

As the Court of Appeals acknowledged: "Washington cas-

es hold that acceleration of an installment note must be made in a *clear and unequivocal* manner that effectively apprises the maker that the holder has exercised his right to accelerate the installment debt." App. Op. at 6-7 (italics added). The court found that U.S. Bank's "predecessor accelerated the loan when it initiated the first judicial foreclosure action in May of 2014." *Id*. at 11.

In deciding whether acceleration was later revoked, the court *sua sponte* looked to the standard of proof that would apply to a claim at trial. App. Op. at 8-9.[1] The court noted that "[t]he evidentiary standard to be applied to a particular claim is `based upon the nature of the interest at stake – the interest which is subject to erroneous deprivation if a mistake is made.'" *Id*. at 8 (cita-

[1] Neither party applied this approach, and Loun is unaware of any case that has done so. Moreover, neither acceleration nor revocation is a legally cognizable claim to which the evidentiary standard of proof should apply. Instead, whether acceleration or revocation has occurred depends upon the manner of notice that a noteholder must give to trigger either event. And both can occur in the absence of a lawsuit.

tion omitted). "Thus, the more important the decision, the higher the standard of proof." *Id.* After characterizing this foreclosure action as "a private dispute," the court concluded that "the preponderance of the evidence standard is appropriate for determining whether the acceleration has been revoked." *Id.* at 9.[2]

Applying this lowest evidentiary standard, the court concluded that reasonable minds could find that U.S. Bank's predecessor revoked acceleration "[s]oon after the first foreclosure action was dismissed in July 2016, when the loan servicer sent seven monthly statements to Ms. Loun", along with a response to Loun's request for information in October of 2016. *Id*. at 11. The court, however, omits mentioning that the statements and letter were required by federal law; that the noteholder at the time subsequently sought to vacate the dismissal of the first foreclosure

[2] Loun submits that, even under the Court's evidentiary standard analysis, the threat of losing one's home through foreclosure on a potentially time-barred debt is of substantial interest to all defaulting homeowners; thus, a higher standard of proof should apply.

action, and to substitute in as plaintiff *on the accelerated note* in that action (CP 798-799, 845-856); and that similar statements were sent to Loun while three foreclosure actions were pending on the accelerated note (CP 802-806).

B. The Countrywide Loan and Loun's Bankruptcy.

This case begins with a 2006 subprime Fannie Mae home loan, in the amount of $399,900, issued by Countrywide Home Loans, Inc. (Countrywide) pursuant to an adjustable-rate promissory note (Note) and Deed of Trust. CP 17-32, 690. Neither the Note nor Deed of Trust allows the holder to unilaterally revoke acceleration after the holder exercises its contractual right to accelerate the debt. CP 17-27, 34-37.

In 2007 Loun was discharged from personal liability under the Note pursuant to a Chapter 7 bankruptcy discharge. CP 6, 100, 123-124. She then made post-discharge payments and ostensibly entered into a second loan modification agreement, with the first payment due January 1, 2012. CP 69, 681-682. (The second modification agreement replaced a prior one. CP 71.)

C. Loun's Default and the Legally Required Monthly Mortgage Statements Sent to Her Thereafter.

Loun has been in default since March 2012. CP 1019. 12 C.F.R. §1026.41 went into effect January 10, 2014. The regulation requires loan servicers to provide periodic mortgage statements to homeowners, setting forth specific information regarding their mortgage loans. *Id.* On October 22, 2013, Countrywide's successor, Bank of America, N.A. (BANA), acknowledged this change in federal law in a written notice to Loun:

> The Consumer Financial Protection Bureau, established by Congress, will soon require mortgage servicers to provide customers with a monthly mortgage statement. To ensure this requirement is met, [BANA] will provide customers with a monthly mortgage statement.

CP 818. U.S. Bank's counsel admitted that the requirements of 12 C.F.R. §1026.41 are mandatory; and where the homeowner is in arrears, the monthly statements must disclose "*the amount you have to pay to reinstate the loan*." VRP 37-38 (italics added).

None of the required statements sent to Loun mention acceleration or indicate that it had been revoked; and most were sent

while the three foreclosure actions on the accelerated note were pending. CP 547-548, 603-651, 661-667.

D. The First Foreclosure Action Was Involuntarily Dismissed.

On May 21, 2014, BANA filed a foreclosure complaint in which it accelerated the Note, based upon the March 2012 default, and sought to recover the entire principal balance owed in the amount of $438,310.72. CP 834.

While BANA's foreclosure action was pending, its loan servicer, Seterus, sent monthly mortgage statements to Loun as required under 12 C.F.R. §1026.41. CP 1277-1286. Not one statement indicated that acceleration had been revoked. *Id.*

On July 25, 2016, BANA's complaint was involuntarily dismissed for want of prosecution. CP 798, 840. *Prior to the dismissal*, on June 29, 2016, the Deed of Trust was assigned to MTGLQ Investors LP (MTGLQ). CP 82-87.

On September 29, 2016, Loun's attorney sent an email to MTGLQ's loan servicer, Shellpoint, asking for information relat-

ing to Loun's mortgage. CP 1081. On October 11, 2016, Shellpoint provided the requested information. CP 1082-1125. Shellpoint's response acknowledged that it was legally required to provide the requested information. CP 1082. (12 U.S.C. §2605(e) imposes a duty on loan servicers to respond to written requests for mortgage information.)

Thereafter, on July 6, 2017, MTGLQ brought a motion to vacate the order dismissing the first foreclosure action *and sought to replace BANA as the plaintiff in that action on the accelerated Note*; the motion was denied on July 17, 2017. CP 9, 782, 842-843, 845-856. In support of its motion, MTGLQ admitted there was no excuse in failing to prosecute the action:

> No action was taken [to prosecute the foreclosure complaint on the accelerated Note] because of an administrative hold by the client from June 2, 2105 [sic] until July 6, 2016. . . . Plaintiff has no excuse for not prosecuting this matter.

CP 782, 846.

E. The Second Foreclosure Action Was Involuntarily Dismissed While Being Prosecuted by U.S. Bank.

Having failed to reinstate and prosecute the first foreclosure action on the accelerated Note, on October 5, 2017, MTGLQ commenced a second foreclosure action on the same default of March 2012, and sought to recover the same accelerated principal balance of $438,310.72. CP 799, 834, 873-874. MTGLQ's complaint did not allege that the 2014 acceleration had ever been revoked. CP 871-877.

On September 6, 2018, MTGLQ assigned the Deed of Trust to U.S. Bank. CP 799, 882-883; VRP 96-97. On October 8, 2018, the Mortgage Law Firm purported to substitute in as the attorney of record for MTGLQ in the second foreclosure action, which it continued to prosecute in the name of MTGLQ. CP 800, 885-886.

However, unbeknownst to Loun and the trial court, the Mortgage Law Firm was in fact representing U.S. Bank, not MTGLQ; and U.S. Bank's counsel admitted he had no authority to

act on behalf of MTGLQ. CP 545-548, 800-801. Accordingly, the trial court granted Loun's motion to strike MTGLQ's pleadings, thus dismissing the second judicial foreclosure action on May 28, 2019. CP at 898-899.

While the second foreclosure action was being prosecuted on the accelerated note, MTGLQ's loan servicer (Shellpoint) and U.S. Bank's loan servicer (Gregory Funding) continued to send Loun the monthly mortgage statements legally required by 12 C.F.R. §1026.41. CP 547-548, 604-677; 1145-1236. Not one statement indicated that acceleration had been revoked. *Id*.

Moreover, on July 23, 2018, while MTGLQ was prosecuting the second foreclosure action, Loun's counsel sent a letter to MTGLQ's counsel, attaching Shellpoint's monthly statement, dated *June 18, 2018*. CP 804. Regarding that statement, Loun's counsel asked: "[w]hat comprises the alleged payment amount of $184,709.70 vis-à-vis the alleged principal balance of $438,310.72[?]" In a footnote at page 2 of his letter, Loun's counsel pointed out that the mortgage statement made clear that

Shellpoint is "sending this statement to [Loun] for information and compliance purposes only." CP 804, 912-914.

MTGLQ's attorney responded:

> (1) The unpaid principal balance of the loan is $438,310.72.
>
> (2) As of 7/1/18, *$184,709.70 was needed to reinstate the loan*, i.e., bring the account current.

CP 804-805, 916 (italics added).

In other words, Shellpoint's statement simply informed Loun of the amount she needed to pay in order to exercise her unilateral right under the Deed of Trust to revoke acceleration and reinstate the Note. *Id*.; CP 25. Loun never sought to exercise this right. CP 796; VRP 18, 143.

F. U.S. Bank's Belated Third Foreclosure Action.

After the second foreclosure action on the accelerated note was involuntarily dismissed on May 28, 2019, U.S. Bank delayed until October 15, 2020, before commencing the third foreclosure action (CP 1), which was *after* Loun had filed her complaint to quiet title on October 12, 2020 (CP 98). U.S. Bank's foreclosure

complaint sought to recover the same accelerated balance ($438,310.72) based upon the same March 2012 default as the prior two foreclosure actions. Compare CP 10 with CP 834 and 873-874. And U.S. Bank's loan servicer, Gregory Funding, continued to send Loun the legally required monthly mortgage statements after U.S. Bank filed its action on the accelerated note. CP 801-802, 805-806, 920, 1419, 1591-1618.

V. ARGUMENT

A. This Petition Involves Unresolved Issues of Substantial Public Interest That Should be Decided by This Court. RAP 13.4(b)(4).

No prior Washington case has decided whether a noteholder can unilaterally revoke acceleration of a promissory note in the absence of a contractual right to do so; nor has the issue of what is required to revoke acceleration been decided in this state; yet these are issues of state-wide significance to any homeowner facing a belated foreclosure action on an accelerated note.

The Court of Appeals' decision grants a noteholder the unconditional right to unilaterally revoke acceleration by mere im-

plication, including by sending the homeowner legally required mortgage information under 12 C.F.R. §1026.41 and 12 U.S.C. §2605(e). The decision thus allows a noteholder to indefinitely toll the six-year statute of limitations, thereby creating a conflict between federal law and the public policy of this state as codified in RCW 4.16.040 and RCW 7.28.300.

"This court has found Washington statutes and case law to be the primary sources of Washington public policy." *Sedlacek v. Hillis*, 145 Wn.2d 379, 388, 36 P.3d 1014 (2001). In enacting RCW 7.28.300, our state legislature declared a clear public policy of protecting homeowners against stale mortgages or deeds of trust that are time-barred, as follows:

> The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

The strong public policy barring stale claims is also reflected in RCW 4.16.040, which contains the six-year statute of limita-

tions applicable here. In *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 330, 815 P.2d 791(1991), this Court explained that "[t]he purpose of the statute of limitations is to compel acts to be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely." It is thus against public policy to allow a deed of trust to be enforced without limits. *Walcker v. Benson & McLaughlin, P.S.*, 79 Wn.App. 739, 745-46, 904 P.2d 1176 (1995). "Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect the defendant against stale claims." *Id*. at 746 (citations omitted).

The Court of Appeals' decision allows compliance with federal law to trump RCW 7.28.300 and RCW 4.16.040. The only facts cited by the court in finding that reasonable minds could conclude that acceleration had been revoked are seven monthly mortgage statements and a 2016 letter sent to Loun after the first judicial foreclosure action was dismissed. But these documents, none of which even mention acceleration or indicate that the Note

was ever reinstated, were legally required. *See* 12 C.F.R. §1026.41; 12 U.S.C. §2605(e).

As a matter of law, this Court should hold that compliance with the mandates of 12 C.F.R. §1026.41 and 12 U.S.C. §2605(e) cannot, without more, constitute evidence of revocation of an accelerated promissory note. To hold otherwise would effectively toll the statute of limitations indefinitely and allow for revocation by implication, which would be unsound public policy that promotes uncertainty and lack of uniformity in residential real estate mortgage foreclosures.

Moreover, there is no dispute over the *content* of the documents relied on by the Court of Appeals in reversing the trial court; instead, it is only their legal effect that is in dispute, which is an issue of law properly decided by the trial court in favor of Loun. "Where the underlying facts are not in dispute, whether a case was filed within the statute of limitations period is a question of law to be determined by a judge." *Kiona Park Estates v. Dehls*, 18 Wn.App.2d 328, 336, 491 P.3d 247 (2021).

B. The Deed of Trust Does Not Give the Holder the Right to Unilaterally Revoke Acceleration.

A promissory note and deed of trust are written contracts; therefore, the general rules of contract interpretation and construction apply. *See, e.g.*, *Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wn.App.2d 708, 718, 446 P.3d 683 (2019), *review denied*, 195 Wn.2d 1004 (2020). Neither the Note (CP 34-37) nor Deed of Trust (CP 17-32) allows U.S. Bank to unilaterally revoke acceleration. Because no Washington case has addressed the issue of whether a noteholder can unilaterally revoke acceleration in the absence of a contractual right to do so, this Court is respectively asked to adopt the sound reasoning of the Oklahoma Court of Civil Appeals in *PNC Bank, N.A. v. Robert C. Keck Revocable Living Trust*, 479 P.2d 238 (Okla. Civ. App. 2020), which closely aligns with Washington law and public policy.

The *PNC Bank* Court held: "Deacceleration, like acceleration, must be authorized by the debt or security instrument." *Id*. at 250. As the rationale for its holding, the court stated: "In all cas-

es involving acceleration, there was existing contractual authority for acceleration. . . . [A]cceleration is a fundamental change in the debtor-creditor contractual relationship, so a contract provision is absolutely required." *Id*. at 246. "Deacceleration is likewise a fundamental change in the debtor-creditor contractual relationship. . . . Therefore, it is mandatory that there must be a deacceleration clause in the instrument evidencing the debt or the instrument evidencing the security for the debt." *Id*. at 247.

The Court of Appeals summarily rejected *PNC Bank's* above holding because it "did not cite any authority for this holding and its holding has not been cited with approval by any other jurisdiction." App. Op. at 10. The *PNC Bank* Court, however, reached its holding after a thorough analysis of the issue; and the case is a recent 2020 decision, which likely explains why it has not been cited by courts in other jurisdictions. Moreover, just because *PNC Bank* has not been cited elsewhere does not mean that it should not be followed.

In rejecting the holding in *PNC Bank*, the Court of Appeals

cited *Freedom Mortgage Corporation v. Engel*, 37 N.Y.3d 1, 28-29, 169 N.E.3d 912, 146 N.Y.S.3d 542 (2021) for the proposition that "[o]ther courts have reached a different conclusion." App. Op. at 10. *Engel*, however, made clear that, "We have not decided whether the notes and mortgages at issue here permit a lender to revoke acceleration." 37 N.Y.3d at 36 (concurring opinion).

Nonetheless, the Court of Appeals proceeded to "adopt the rule in *Engel*", as follows:

> New York's highest court held that absent a specific provision in the contract governing revocation of acceleration, `revocation can be accomplished by an "affirmative act" of the noteholder within six years of the election to accelerate.' Allowing lenders to revoke acceleration – even in the absence of an express provision in the contract – benefits both lenders and borrowers. It benefits lenders by giving them more flexible remedies. It benefits borrowers by allowing them to cure a default without paying the entire balance of the loan. For this reason, we adopt the rule in *Engel*.

App. Op. at 10. As will further be explained below, the Court of Appeals misapprehended "the rule in *Engel*." Unlike the Court of Appeals' decision, *Engel* does not allow for revocation by impli-

cation; instead, the *Engel* Court adopted a "clear rule" that requires "an affirmative act" which communicates to the homeowner that revocation has occurred, thus reinstating the note. *Engel*, 37 N.Y.3d at 19, 28-31.

C. The Same Requirement to Accelerate a Note Should Apply to Revoke Acceleration.

Under Washington law, for a noteholder to effectively exercise its contractual option to accelerate a promissory note, "this option must be exercised by clear and unequivocal notice to the borrowers." *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn.App. 423, 439, 282 P.3d 1 (2016). To promote clarity and uniformity in the law of residential mortgage foreclosures, and to ensure that homeowners are fully apprised of the actual status of their loans, the same standard should logically apply to revoke acceleration. *See, e.g.,* 11 Am. Jur.2d, *Bills and Notes*, §167 (2016) ("Revocation of the debt's acceleration requires an affirmative act by the creditor that communicates to the debtor that the creditor has revoked the debt's acceleration.").

Although no prior Washington case has addressed this issue, cases from other states have. And the cases that apply a similar requirement as those in Washington to accelerate a note have uniformly held that revocation requires an *affirmative act* by which the holder makes known to the homeowner that acceleration has been revoked. *See*, *e.g.*, *PNC Bank*, 479 P.3d at 250 ("Deacceleration requires an affirmative act and notice to the debtor."); *Engel*, 37 N.Y.3d at 28-29 ("effective revocation requires `an affirmative act' of the noteholder within six years of the election to accelerate"); *Igou v. Bank of America, N.A.*, 459 P.3d 776, 780 (Colo. App. 2020) (to abandon acceleration, the noteholder must do so "by a clear affirmative act"); *Kadle Co. II, Inc. v. Fountain*, 281 P.3d 1158 (Nev. 2009) ("a deacceleration, when appropriate, must be clearly communicated by the lender/holder of the note to the obligor").

PNC Bank and *Engel* closely mirror Washington law regarding acceleration and the statute of limitations; they also provide an excellent analysis of the underlying policy for why revok-

ing acceleration should also require a clear affirmative act notifying the homeowner that acceleration has been revoked.

Like the court in *PNC Bank*, the *Engel* Court focused on the significance of the rights and remedies granted under the mortgage contract and noted that both acceleration and revocation of acceleration substantially alter those rights and the parties' relationship. *PNC Bank*, 479 P.3d at 246-247; *Engel*, 37 N.Y.3d at 28-29. The *Engel* Court further stated:

> Practically, the noteholder's act of revocation (also referred to as a de-acceleration) returns the parties to their pre-acceleration rights and obligations – reinstating the borrowers' right to repay any arrears and resume satisfaction of the loan over time via installments, *i.e.*, removing the obligation to immediately repay the total outstanding balance due on the loan, and provides borrowers a renewed opportunity to remain in their homes, despite a prior default. . . . *Determining whether, and when, a noteholder revoked an election to accelerate can be critical to determining whether a foreclosure action commenced more than six years after acceleration is time-barred*.

Id. at 28 (italics added).

Because determining whether, and when, acceleration has

been revoked is of such significance, the *Engel* Court made clear that, where the mortgage contract does not state precisely what a noteholder must do to revoke acceleration, revocation requires "an *affirmative* act of the noteholder within six years of the election to accelerate." *Id.* at 28-29 (italics added). The court held that where acceleration occurred by the filing of a foreclosure complaint, the noteholder's *voluntary* dismissal of the complaint constituted such an affirmative act. *Id*. at 31.

The court also made clear that any lesser requirement (such as revocation by implication) would require courts to scrutinize a noteholder's intent, which the court found to be "both analytically unsound as a matter of contract law, and unworkable from a practical standpoint." *Id*. at 30; *see also id.* at 31-33. The court stated:

> The impetus behind the requirements that an action be unequivocal and overt in order to constitute a valid acceleration and sufficiently affirmative to effectuate a revocation is that these events significantly impact the nature of the parties' respective performance obligations.

Id. at 30-31.

Here, the Court of Appeals' decision does not require "an affirmative act" that clearly apprises the homeowner that revocation has occurred, but instead allows for revocation by implication based upon a "preponderance of the evidence." This Court should reject this result and instead adopt a rule in which the requirements to accelerate a note and revoke acceleration mirror each other, thus providing a clear rule that can be easily followed by the parties and applied by the courts. Doing so will not in any way prejudice or burden a noteholder, who can always revoke acceleration by waiver or abandonment, such as by entering into a loan modification agreement, or by otherwise accepting payments from the borrower. *See, e.g., Equitable Life Leasing Corp. v. Cedarbrook*, 52 Wn.App. 497, 502, 761 P.2d 77 (1988).

D. Providing Legally Required Mortgage Information to a Homeowner Cannot, Without More, Revoke Acceleration and Reinstate the Note.

"Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396

(1997). Thus, *unreasonable* inferences should be disregarded. *Id*. The only facts cited by the Court of Appeals in finding that "reasonable minds" could conclude that acceleration might have been revoked were the seven monthly mortgage statements and the single 2016 letter sent by MTGLQ's loan servicer, Shellpoint, after the first foreclosure action on the accelerated note was dismissed in July 2016. App. Op. at 11.

However, none of these legally required documents even mention acceleration or revocation (CP 1127-1144; 1082-1125); they thus require a finding of revocation by implication. And it is simply unreasonable to conclude that revocation can occur by merely complying with federal law.

Moreover, MTGLQ subsequently filed a motion to vacate the order involuntarily dismissing the first foreclosure action, and to substitute in as plaintiff in that action *on the accelerated note*. If the prior monthly statements and letter had revoked acceleration, then MTGLQ could not prosecute the first foreclosure action *on the accelerated note*. No other reasonable conclusion can

be drawn from these facts.

Driving home this point is the fact that each loan servicer continued to send the required monthly statements to Loun while the noteholder was concurrently pursuing a foreclosure action *on the accelerated note* in the first, second, and third foreclosure actions in this case. CP 547-548, 801-802. If these statements were evidence that acceleration had been revoked, then the foreclosure actions could not be simultaneously maintained on the accelerated note. The two positions are inherently contradictory.

Again, the only reasonable conclusion is that the legally required documents sent to Loun were for informational and compliance purposes, and that the statements themselves, as admitted by U.S. Bank's counsel, simply informed Loun of "the amount [she had] to pay to reinstate the loan." VRP 37-38. In other words, the statements at best invited Loun to cure the default, thus reinstating the Note and revoking acceleration, which she had the contractual right to do under the Deed of Trust, though she never exercised it. CP 25, 796.

E. The Concurring Opinion Would Reverse Established Washington Law.

The concurring opinion argues that "where, as here, the mortgage is a standard form Fannie Mae/Freddie Mac mortgage, there is no longer any borrower-protective need for acceleration *itself* to be clear and unequivocal." *Id*. at 2 (italics original). "Reinstatement rights under modern uniform residential mortgages have eliminated the importance of clear and unequivocal acceleration as a protection for the buyer." *Id*. at 6. "The Uniform Residential Mortgage signed by Ms. Loun affords her the right to bring her loan current to avoid foreclosure up until a final judgment of foreclosure. It is therefore unnecessary that there be a clear and unequivocal act of acceleration to demark the point at which that right is cut off by acceleration." *Id*. at 8. "A special burden of providing such notice should not be imposed on lenders." *Id*. at 9.

The concurring opinion thus advocates rescinding established Washington law requiring a noteholder to give clear and

unequivocal notice to a homeowner in order to accelerate a note, thereby triggering the running of the statute of limitations. *See, e.g.*, *Weinberg v. Nahler*, 51 Wash. 591, 594, 99 P. 736 (1909) ("Some affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due."); *4518 S. 256th, LLC*, 195 Wn.App. at 439 (the option to accelerate a note "must be exercised by clear and unequivocal notice to the borrowers").

Moreover, it is hard to fathom how requiring clear and unequivocal notice of acceleration imposes "a special burden" on lenders, who would still have six years thereafter before their right to foreclose would be time-barred. By contrast, eliminating any notice requirement, as the concurring opinion suggests, would allow noteholders to delay commencing foreclosure actions on accelerated notes indefinitely, in derogation of RCW 4.16.040 and RCW 7.28.300. In short, the concurring opinion unnecessarily favors lenders and noteholders, to the detriment of homeowners.

In doing so, the concurring opinion obfuscates the distinction between a homeowner's contractual right to reinstate an accelerated note and the act of acceleration that triggers the running of the statute of limitations. It also ignores the practical reality that homeowners who are in default often cannot afford to reinstate an accelerated note, and that most homeowners likely have little or no understanding of the relationship between their reinstatement rights and the running of the statute of limitations.

Simply put, the concurring opinion cannot be squared with the public policy codified in RCW 7.28.300; *see also Walcker*, 79 Wn.App. at 745 (rejecting the argument that public policy supports an unlimited right to foreclose deeds of trust).

F. Attorney Fees.

Petitioner seeks her attorney's fees on appeal pursuant to RCW 4.84.330 and the Deed of Trust (CP 26).

VI. CONCLUSION

Limitations periods matter. The Court should grant the petition and provide clear precedent on the above issues, which

should result in reversing the Court of Appeals' decision and affirming the trial court's summary judgment order.

VII. CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), Petitioner hereby certifies that this Petition for Review complies with the formatting requirements of RAP 18.17(a) and is comprised of 4778 words.

DATED this 25th day of April, 2023.

Respectfully submitted,

LATHROP, WINBAUER, HARREL & SLOTHOWER, LLP

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CERTIFICATE OF SERVICE

I certify that on the 25th day of April, 2023, I caused a true and correct copy of this document to be filed and served on the following Attorneys for Respondent and Amicus Curiae and via the Washington State Appellate Court's Secure Portal Electronic Filing System, and via Electronic Mail:

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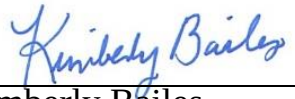

Kimberly Bailes

APPENDIX A

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MARCH 28, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHELLE E. LOUN, Respondent, v. U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE ON BEHALF OF AND WITH RESPECT TO AJAX MORTGAGE LOAN TRUST 2018-B, MORTGAGE-BACKED NOTES, its successors-in-interest and/or assigns, Appellant.	)	No. 38769-1-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — In 2014 and again in 2017, U.S. Bank National Association's (U.S. Bank's) predecessor instituted two deed of trust judicial foreclosure actions against Michelle Loun. Both actions were involuntarily dismissed. After dismissal of the first action and for several months thereafter, Ms. Loun received monthly mortgage statements showing that the current balance did not include the accelerated amount.

In 2020, Ms. Loun filed this quiet title action against U.S. Bank, requesting that the deed of trust be declared void because the six-year statute of limitations had run on

the underlying debt. U.S. Bank brought a separate deed of trust judicial foreclosure action against Ms. Loun. The trial court consolidated both actions and later granted Ms. Loun's summary judgment motion on her quiet title claim.

This appeal requires us to consider if acceleration occurred, what the standard of proof is to reverse an election to accelerate,[1] whether summary judgment was properly granted, and to what extent, if any, the six-year statute of limitations was tolled. We conclude that the prior judicial foreclosure actions accelerated the debt, a preponderance of evidence is required to establish that acceleration was revoked, the evidence presented by U.S. Bank allows reasonable minds to conclude that acceleration was revoked, and the prior judicial foreclosure actions did not toll the statute of limitations. We reverse the trial court's summary judgment order, deny the parties their premature requests for attorney fees and costs on appeal, and remand for further proceedings.

[1] Courts and commentators use different terms to describe the concept of reversing an election to accelerate. New York courts use the term "de-acceleration." *See, e.g.*, *Milone v. U.S. Bank NA*, 164 A.D.3d 145, 83 N.Y.S.3d 524 (2018). Others use the term "deceleration." *See* ANDREW J. BERNHARD, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, 88 FLA. B.J. 30, 31 (2014). Still others use terms like "waiver" and "abandonment." Technically, to "decelerate" means to slow down, as opposed to undoing or revoking the exercise of a right. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 584 (1993). "Waiver" and "abandonment" suggest a choice to not exercise a right. *See Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) (waiver); *In re Est. of Lyman*, 7 Wn. App. 945, 948-49, 503 P.2d 1127 (1972) (abandonment). We believe that "revoking acceleration" most accurately describes the concept.

FACTS

In 2006, Ms. Loun borrowed $399,900 from Bank of America to purchase residential property in Ellensburg. The debt was solemnized by an adjustable rate note that required monthly payments and was secured by a deed of trust against the property. Ms. Loun last paid on the note in February 2012 and has been in default since March 2012.

Paragraph 22 of the deed of trust sets forth the lender's remedies upon the borrower's default. Those remedies include the lender's right to declare the balance accelerated and the borrower's right to reinstate after acceleration.

In May 2014, Bank of America, NA, initiated the first judicial foreclosure action. The complaint, in relevant part, read: "[T]he Borrower's loan is in default. Because of the default, Plaintiff has exercised and hereby exercises the option granted in the Note and Deed of Trust to declare the whole of the balance of both the principal and interest thereon due and payable." Clerk's Papers (CP) at 973. Bank of America assigned the note and deed of trust to the Federal National Mortgage Association, commonly known as Fannie Mae, which then assigned the instruments to MTGLQ Investors, LP. In July 2016, the trial court dismissed the foreclosure action for want of prosecution.

From July 19, 2016 until January 19, 2017, Bank of America's loan servicer sent monthly mortgage statements to Ms. Loun reflecting the balance owing on the loan. The balance consistently reflected the *past* unpaid amount, the *current* monthly payment, and

fees and charges. None of these monthly mortgage statements requested payment of any accelerated amount.

After the September 2016 monthly statement, Ms. Loun's attorney e-mailed the loan servicer, asking for all documents and information about the loan. Consistent with its monthly statements, the loan servicer's response described the loan's maturity date as May 1, 2046, which clearly implied that acceleration had been revoked.[2]

In October 2017, MTGLQ initiated the second judicial foreclosure action. Similar to the earlier complaint, the second complaint notified Ms. Loun of the lender's election to accelerate the loan. While the second action was pending, U.S. Bank acquired the note and deed of trust from MTGLQ. In May 2019, the trial court—for procedural reasons—granted Ms. Loun's motion to strike MTGLQ's complaint. U.S. Bank did not file an amended complaint.

In October 2020, Ms. Loun filed a quiet title action against U.S. Bank, alleging that the six-year statute of limitations had run on any legal right for U.S. Bank to foreclose on the deed of trust. Days later, U.S. Bank filed a third judicial foreclosure action against Ms. Loun. The trial court consolidated both actions.

[2] We question the loan servicer's description of a May 1, 2046 maturity date. The adjustable rate note expressly states that the maturity date is March 1, 2036, even if amounts are still owed.

Ms. Loun moved for summary judgment dismissal of U.S. Bank's foreclosure action on the basis that collection of the debt secured by the deed of trust was time barred. U.S. Bank raised numerous arguments. It argued that the 2014 acceleration of the loan was revoked, waived, or abandoned, that the subsequent judicial foreclosures revoked any and all prior accelerations and started a new limitations period, and that the prior judicial foreclosure actions tolled the statute of limitations. The trial court disagreed with all of U.S. Bank's arguments and granted Ms. Loun's motion.

U.S. Bank timely moved for reconsideration and argued that the prior foreclosure actions never accelerated the debt. The trial court denied U.S. Bank's motion, and the bank timely appealed.

ANALYSIS

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When ruling on a motion for summary judgment, a court views the facts submitted and the reasonable inferences that may be drawn from those facts in the light most favorable to the nonmoving party. *Id.* A court may grant a motion for summary judgment if reasonable minds could reach only one conclusion from the facts submitted. *Id.*

This case presents us with an opportunity to address acceleration of a debt, revocation of acceleration, and under what circumstances collection of the debt is barred by the statute of limitations.

ACCELERATION

An action on a written contract is subject to the six-year statute of limitations. RCW 4.16.040(1). When a contract, such as a promissory note, calls for installment payments, "the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945).

Acceleration of a debt upon the borrower's default is a benefit to the lender that causes the entire balance of the loan to become due and payable. *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, 760-61, 434 P.3d 84 (2018); *accord* Matthew B. Nevola, *Foreclosure Madness: Using Mortgage Deceleration to Evade the Statute of Limitations*, 46 HOFSTRA L. REV. 1453, 1468 (2018). However, when a debt is accelerated, the statute of limitations on the entire balance begins to accrue. *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 434-35, 382 P.3d 1 (2016). If the statute of limitations precludes enforcement of the note and deed of trust, a property owner can file a quiet title action seeking to have the encumbrance removed from the title. *See* RCW 7.28.300.

Washington cases hold that acceleration of an installment note must be made in a clear and unequivocal manner that effectively apprises the maker that the holder has

exercised his right to accelerate the installment debt. *4518 S. 256th*, 195 Wn. App. at 435; *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979).

U.S. Bank contends the loan was never accelerated because Ms. Loun retained the right to reinstate the loan. U.S. Bank cites our recent decision of *U.S. Bank National Association v. Ukpoma*, 8 Wn. App. 2d 254, 438 P.3d 141 (2019). There, the lender gave notice to the borrower of her default and of its election to accelerate, but the lender also stated that the borrower could reinstate the loan by paying the current balance, late charges, costs, and fees. *Id.* at 256-57. We concluded that acceleration did not occur because the notice was ambiguous and inconsistent. *Id.* at 259. Judge Siddoway disagreed with this holding, but concurred on the basis that the statute of limitations had not run on the underlying debt. *Id.* at 261-66 (Siddoway, J., concurring in part and dissenting in part).

We believe that *Ukpoma* wrongly decided the acceleration issue. As noted in *Ukpoma*, the borrower's right to reinstate after acceleration, but prior to a trustee's sale, was protected both by contract and by statute. *Id.* at 257 n.1. To the extent the lender's right to accelerate was qualified by the borrower's right to reinstate, the lender exercised its right as clearly and broadly as it could. We conclude that U.S. Bank's predecessor clearly and unequivocally elected to accelerate the debt, notwithstanding that the deed of trust contained a right for Ms. Loun to reinstate after acceleration.

REVOCATION OF ACCELERATION

Standard of proof

The parties dispute whether U.S. Bank must prove revocation of acceleration by a preponderance of the evidence or by clear and unequivocal evidence. To answer this question, we review why courts apply different standards of proof.

The evidentiary standard to be applied to a particular claim is "based upon the nature of the interest at stake—the interest which is subject to erroneous deprivation if a mistake is made." *Bang D. Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 524, 29 P.3d 689 (2001). The applicable evidentiary standard reflects "'the degree of confidence our society thinks [the fact finder] should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.* (internal quotation marks omitted) (quoting *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). Thus, the more important the decision, the higher the standard of proof. *Id.*

In general, the lowest standard, preponderance of the evidence, applies to civil actions, because society has a minimal interest in the outcome of private disputes. *Id.* The highest standard is beyond a reasonable doubt, in which the accused and society's interests in avoiding wrongful convictions are so great that the standard of proof is designed to exclude as nearly as possible the likelihood of an erroneous judgment. *Id.*

"When the interests at stake in a lawsuit are more significant than a money judgment but less consequential than a deprivation of individual liberty, courts must apply an intermediate evidentiary standard that requires 'clear, cogent, unequivocal, and/or convincing' proof." *In re Custody of C.C.M.*, 149 Wn. App. 184, 203, 202 P.3d 971 (2009) (internal quotation marks omitted) (quoting *Nguyen*, 144 Wn.2d at 524-25). In *C.C.M.*, we held that the clear and convincing evidentiary standard applied to decisions that risked erroneously depriving parents of their constitutionally protected rights to the custody, care, and control of their children. *Id.* at 203-05.

Here, this is a private dispute about whether a debt is owed by Ms. Loun to U.S. Bank. A conclusion that acceleration was revoked preserves the lender's contractual remedy against its borrower, who has breached her promise to repay. Given this, we conclude that the preponderance of the evidence standard is appropriate for determining whether the acceleration has been revoked.

Whether revocation occurred is a question of fact

We next must decide whether reasonable minds can find that acceleration was revoked. As mentioned previously, when reviewing whether summary judgment was properly granted, we construe the evidence and all reasonable inferences in favor of the nonmoving party. *SentinelC3*, 181 Wn.2d at 140. In this instance, the evidence and all reasonable inferences must be construed in favor of U.S. Bank.

Ms. Loun argues that U.S. Bank should not be allowed to revoke acceleration because the deed of trust does not allow for it to do so. Ms. Loun cites *PNC Bank, NA v. Unknown Successor Trustees of the Robert C. Keck Revocable Living Trust*, 2020 OK Civ. App. 60, 479 P.3d 238, as persuasive authority for her position that revocation of acceleration should be allowed only if the parties' contract expressly authorizes it. *PNC Bank* did not cite any authority for this holding and its holding has not been cited with approval by any other jurisdiction.

Other courts have reached a different conclusion. For example, in *Freedom Mortgage Corporation v. Engel*, 37 N.Y.3d 1, 28-29, 169 N.E.3d 912, 146 N.Y.S.3d 542 (2021), New York's highest court held that absent a specific provision in the contract governing revocation of acceleration, "revocation can be accomplished by an 'affirmative act' of the noteholder within six years of the election to accelerate." Allowing lenders to revoke acceleration—even in the absence of an express provision in the contract—benefits both lenders and borrowers. It benefits lenders by giving them more flexible remedies. It benefits borrowers by allowing them to cure a default without paying the entire balance of the loan. For this reason, we adopt the rule in *Engel*.

Therefore, the dispositive question is whether reasonable minds can find that U.S. Bank's predecessor affirmatively revoked acceleration within six years of May

2014, when it first accelerated the loan.[3] As explained below, reasonable minds can so find.

Here, Bank of America accelerated the loan when it initiated the first judicial foreclosure action in May 2014. Soon after that action was dismissed in July 2016, the loan servicer sent seven monthly statements to Ms. Loun notifying her that the balance of her loan did not include any accelerated amounts. In addition, in October 2016, the loan servicer responded to Ms. Loun's request for information by describing the loan as having a maturity date three decades in the future. For these reasons, reasonable minds can find that U.S. Bank's predecessor affirmatively revoked acceleration within six years of 2014 and the six-year statute has not run on the entire obligation. We conclude the trial court erred in granting summary judgment in favor of Ms. Loun.

TOLLING

In the interest of judicial economy, an appellate court may consider an issue that is likely to occur following remand if the parties have briefed and argued the issue in detail. *State ex rel. Haskell v. Spokane County Dist. Ct.*, 198 Wn.2d 1, 16, 491 P.3d 119 (2021). Both below and on appeal, the parties briefed the issue of tolling. Judicial economy favors resolving the issue now rather than in a later appeal.

[3] The second acceleration occurred in October 2017, three years before the parties initiated this current claim and counterclaim. The six-year statute of limitations therefore has not run with respect to the second acceleration.

RCW 4.16.230 provides, "When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

Bankruptcy tolls the statute of limitations

There is some evidence in the record that Ms. Loun may have been in bankruptcy sometime between 2014 and 2020. *See, e.g.*, CP at 1145. 11 U.S.C. § 362(a) automatically stays all proceedings against a debtor. If Ms. Loun was in bankruptcy anytime within six years of when U.S. Bank commenced its action, the statute of limitations would be tolled to that extent.

Judicial foreclosure actions do not toll the statute of limitations

Without citing any direct authority, U.S. Bank contends that the two judicial foreclosure actions tolled the statute of limitations. We disagree.

U.S. Bank fails to provide any evidence that an injunction or statutory prohibition "stayed" its ability to commence an action to recover the unpaid amounts. RCW 4.16.230. Certainly, its predecessor's judicial foreclosure actions did not stay its ability to recover the unpaid debt. A judicial foreclosure action *is* an action to collect an

unpaid debt. We conclude that the judicial foreclosure actions did not toll the statute of limitations.[4]

ATTORNEY FEES AND COSTS

Both parties request an award of reasonable attorney fees and costs on appeal. They cite paragraph 7(E) of the note, and paragraph 26 of the deed of trust. The former authorizes the lender to recover all costs and expenses to recover the accelerated amount, and the latter authorizes the lender to recover its reasonable attorney fees and costs in any action to enforce the security instrument. RCW 4.84.330 modifies unilateral attorney fee provisions in contracts so that only the prevailing party is entitled to recover reasonable attorney fees and costs, whether or not that party is specified in the contract as entitled to fees.[5] *Wash. Fed. v. Gentry*, 179 Wn. App. 470, 496, 319 P.3d 823 (2014).

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[4] In *Bingham v. Lechner*, 111 Wn. App. 118, 131, 45 P.3d 562 (2002), the trial court found, and on appeal the parties agreed, that commencement of a nonjudicial foreclosure tolls the statute of limitations. The appellate court did not analyze this issue. To the extent *Bingham* agreed with the trial court, we disapprove of its conclusion because *Bingham* fails to identify any statute that stays or enjoins the ability of a deed of trust beneficiary from commencing an action to recover the debt.

RCW 61.24.030(4) certainly does not stay or enjoin recovery of the debt. That subsection precludes a trustee's sale if there is a pending action by the deed of trust beneficiary to collect the unpaid debt. This preclusion is not a stay or an injunction from recovering the debt; rather, it is a prohibition against concurrent attempts to collect the same debt.

[5] We suspect that most of the "fees and charges" reflected in the monthly mortgage statements are attorney fees and costs incurred by U.S. Bank's predecessor in the two unsuccessful foreclosures. If so, because the predecessor did not prevail in those actions, we doubt U.S. Bank can recover those amounts.

The above provisions will entitle the prevailing party to reasonable attorney fees and costs, both at trial and on appeal. But neither party has yet prevailed. For this reason, we decline to award either party reasonable attorney fees and costs on appeal.

We authorize the trial court to include in its judgment an award of reasonable attorney fees and costs to the prevailing party for this appeal. But because Ms. Loun did not ultimately prevail on her summary judgment motion, her reasonable attorney fees and costs for litigating these issues should be discounted. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) ("The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.").

Reversed and remanded.

Lawrence-Berry, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

SIDDOWAY, C.J. (concurring) — Michelle Loun's deed of trust states that in the event of her failure to cure a default on or before the date provided in a proper notice, "Lender *at its option*, may require immediate payment in full of all sums secured by this Security Instrument without further demand." Clerk's Papers (CP) at 26 (emphasis added). As explained by the lead opinion, since acceleration is optional with the lender, the lender can revoke it unless the borrower has detrimentally relied.

Ms. Loun argues that Washington requires "clear and unequivocal *evidence*" of acceleration of a promissory note and "[i]t would be inconsistent to apply one standard to trigger acceleration and a different, lower standard to revoke it." Resp't's Br. at 2 (emphasis added). Amicus curiae characterizes Washington cases as holding that acceleration requires "'clear and unequivocal' *notice* to a debtor" and, similar to Ms. Loun, argues that consistency requires that notice of revoking acceleration be clear and unequivocal. Amicus Br. of Nw. Consumer L. Ctr. at 5 (emphasis added). I write separately to address "clear and unequivocal" as a characteristic of the act of acceleration rather than the standard of proof.

Symmetry for symmetry's sake is not a reason for holding that a lender must revoke acceleration by clear and unequivocal notice. We do not lightly impose special burdens on one party to a contract. The question to be examined is whether the reasons Washington courts have required acceleration to be clear and unequivocal supports

requiring that the lender be clear and unequivocal when it revokes acceleration. Not only do the historical reasons *not* support this proposed requirement, but where, as here, the mortgage is a standard form Fannie Mae/Freddie Mac mortgage, there is no longer any borrower-protective need for acceleration *itself* to be clear and unequivocal.

Washington cases have historically offered two reasons for requiring that a lender exercise its right to accelerate affirmatively, or clearly and unequivocally. One protects the lender; the other protects the buyer. The earliest cases address the reason that protects the lender.

I. PROTECTING LENDERS: BORROWERS SHOULD BE PREVENTED FROM ARGUING THAT A LENDER'S RIGHT TO REPAYMENT IS ENTIRELY TIME BARRED BASED ON EQUIVOCAL EVIDENCE OF ACCELERATION

In *First National Bank of Snohomish v. Parker*, 28 Wash. 234, 68 P. 756 (1902), a borrower/mortgagor defended against foreclosure by arguing that a provision in the mortgage provided that upon default of payment of interest when due the right of foreclosure accrued immediately—and since its default had occurred more than six years before commencement of the action, foreclosure was time barred. The court observed that the general rule is that the default "*must be claimed by the mortgagee*, or it is waived. It is for the benefit of the mortgagee, and cannot be taken advantage of by the mortgagor." *Id.* at 237 (emphasis added).

The principle was the basis for rejecting a similar statute of limitations defense in *White v. Krutz*, 37 Wash. 34, 36, 79 P. 495 (1905). In that case, the borrowers had

promised on January 1, 1895, to pay interest semiannually, but never did. The parties' agreement provided that upon a default in payment "the indebtedness . . . should immediately become due and payable, without notice." *Id.* at 35. In an action commenced more than six years after the first default in payment, the court again held that since the provision was for the mortgagee's benefit, it could be waived by him and could not be taken advantage of by the mortgagor. *Id.* at 36.

II. PROTECTING BORROWERS: THE REQUIREMENT OF AN AFFIRMATIVE ACT OF ACCELERATION PROVIDES A BRIGHT LINE FOR THE TIME WITHIN WHICH A BORROWER MAY CURE A DEFAULT

In other early cases, the requirement that the lender take an affirmative act to accelerate was applied to protect the borrower/mortgagor. In *Zeimantz v. Blake*, 39 Wash. 6, 10, 80 P. 822 (1905), it was said that "time was made of the essence of the [parties'] contract, and a forfeiture occurred as of course on default of any payment," yet the court held that to avoid foreclosure, the mortgagor was not required to prove a history of timely payments. It held, "Undoubtedly the party agreeing to make the sale could declare a forfeiture, and cut off the right of the other party to make the payments, *but it required some affirmative action on his part*. If he remained passive until the other party made tender of payment, he was obligated to accept it." *Id.* at 10 (emphasis added).

The same reasoning was applied in *Weinberg v. Naher*, which held that just as a right to accelerate that is not exercised will not start the running of the statute of limitations, it will not "'of itself, forfeit the contract in equity simply because a payment

was not made immediately on its falling due.'" 51 Wash. 591, 596-97, 99 P. 736 (1909) (quoting *Zeimantz*, 39 Wash. at 10). Expanding on *Zeimantz*'s requirement of "some affirmative action," the court explained that for the debt to become due:

> Some affirmative action is required, some action by which the holder of the note makes known to the payors that [he] intends to declare the whole debt due. This exercise of the option may of course take different forms. It may be exercised by giving the payors formal notice to the effect that the whole debt is declared to be due, or by the commencement of an action to recover the debt, *or perhaps by any means by which it is clearly brought home to the payors of the note that the option has been exercised* before the interest is paid or tendered.

Id. at 594 (emphasis added).

In *Coman v. Peters*, 52 Wash. 574, 576, 100 P. 1002 (1909), the borrower's tender of a payment of interest was late, yet "up to the moment the tender was made . . . there had not been any notice, or even intimation . . . to the payors . . . that the interest money would be refused, or that it (payee) elected to declare the whole debt due." The payee's action to foreclose was therefore dismissed by the trial court on the ground that the debt had not matured. The Supreme Court affirmed and observed (having recounted the decisions in *Parker*, *Zeimantz*, and *Weinberg*) that "this court is fully committed to the doctrine . . . that mere default in payment does not mature the whole debt, whether there be words of option in the agreement or not. Such a provision hastening the date of maturity of the whole debt is for the benefit of the payee, and *if he does not manifest any intention to claim it*, before tender is actually made, there is in law no default such as will

cause the maturity of the debt before the regular time provided in the agreement." *Id.* at 578 (emphasis added).

It was not until 1979 that this court, not the Supreme Court, adopted the "clear and unequivocal manner" descriptor. In *Glassmaker v. Ricard*, this court stated that acceleration "must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date." 23 Wn. App. 35, 38, 593 P.2d 179 (1979). *Glassmaker* cites *Weinberg* for the proposition, evidently relying on the Supreme Court's statements in *Weinberg* that "affirmative action" is required "by which the holder of the note makes known to the payors that [he] intends to declare the whole debt due," and by which "it is clearly brought home to the payors of the note that the option has been exercised." *Weinberg*, 51 Wash. at 594.

As with *Parker*, *Zeimantz*, and *Weinberg*, *Glassmaker*'s "clear and unequivocal" standard was relied on to determine whether the lender's exercise of the acceleration right was sufficiently clear to cut off the borrower's ability to cure. *Glassmaker* held that the mere filing of a foreclosure complaint without serving it on the mortgagor was not sufficiently clear notice. 23 Wn. App. at 38.

Notably, decisions following *Glassmaker* that have applied the "clear and unequivocal" standard have *not* done so for the borrower-protective reason—they have consistently done so for the lender-protective reason. This is presumably because under

modern uniform residential mortgages, borrowers no longer need the protection provided by requiring that acceleration be clear and unequivocal.[1]

III. REINSTATEMENT RIGHTS UNDER MODERN UNIFORM RESIDENTIAL MORTGAGES HAVE ELIMINATED THE IMPORTANCE OF CLARITY AS A PROTECTION FOR THE BORROWER

Reinstatement rights under modern uniform residential mortgages have eliminated the importance of clear and unequivocal acceleration as a protection for the buyer. The deed of trust executed by Michelle Loun in 2006 is a uniform mortgage instrument developed by the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac). Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs) created by Congress to provide stability, liquidity, and affordability to the residential mortgage market. *See* 12 U.S.C. § 1716; 12 U.S.C. § 1451.

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[1] The relevant post-1979 decisions cited by Ms. Loun and amicus apply the "clear and unequivocal" standard to protect a lender against a statute of limitations defense. In *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 435-38, 382 P.3d 1 (2016), this court held that notices of default and trustee's sales that demanded payment of arrearages only, without stating that the lender was electing to declare the unpaid balance due, did not meet the "clear and unequivocal" standard for acceleration. In *Merceri v. Bank of New York Mellon*, 4 Wn. App. 2d 755, 761-62, 434 P.3d 84 (2018), this court held that a notice to a borrower that her entire debt "'*will be* accelerated'" if a default is not cured is not an effective clear and unequivocal acceleration. (Emphasis added.) *Accord Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wn. App. 2d 708, 723, 446 P.3d 683 (2019) (a notice of intent to accelerate does not unequivocally alert the borrower that there has been an election to accelerate). As a result, none of the foreclosure actions in these cases was time barred.

Before 1970, little uniformity existed in home mortgage forms. After enactment of the Emergency Home Finance Act (Pub. L. No. 91-351, 84 Stat. 450) in July 1970, however, Fannie Mae created a task force to prepare a draft standard mortgage form. *See* Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077, 1083 (2007). In response to public input, Fannie Mae and Freddie Mac developed forms that were quite consumer friendly. *Id.* at 1084-85.

The right to reinstate provision in Ms. Loun's deed of trust gives her the right, even after acceleration, to stop foreclosure and reinstate the loan by paying the amounts that would have been due absent acceleration plus the lender's expenses. The right exists up to the date of a court order of foreclosure or up to five days prior to a power of sale foreclosure. The provision states:

> **19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably

> require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged.

CP at 25.

Fannie Mae and Freddie Mac require that loans they purchase be documented on their forms, so originators who wish to sell their loans to Fannie Mae or Freddie Mac must use the instruments. Forrester, *supra*, at 1085. Even lenders who do not contemplate selling their loans to the GSEs typically use the forms, which have become the standard for loans sold on the secondary market. *Id.* As of the time of Professor Forrester's law review article, "[b]y some estimates, more than ninety percent of residential mortgage loans are documented on Fannie Mae/Freddie Mac uniform mortgage instruments, although this percentage may have decreased as the size of the subprime mortgage market has increased." *Id.* at 1086-87 (footnote omitted).

The uniform residential mortgage signed by Ms. Loun affords her the right to bring her loan current to avoid foreclosure up until a final judgment of foreclosure. It is therefore unnecessary that there be a clear and unequivocal act of acceleration to demark the point at which that right is cut off by acceleration. Indeed, a Florida appellate court has observed that in the case of a borrower with Ms. Loun's form mortgage, the dismissal of a foreclosure action returns the parties to the status quo existing before acceleration, making it unnecessary for a lender to even take action to revoke acceleration. *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So.3d 938, 947-48 (Fla. Dist. Ct. App. 2016).

Here, of course, there is action; there are several years' worth of mortgage statements and loan descriptions disclosing that Ms. Loun's loan had been returned to the status quo.

Ms. Loun demonstrates no reason we should require clear and unequivocal notice that acceleration has been revoked. A special burden of providing such notice should not be imposed on lenders.

Siddoway, C.J.

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