Supreme Court No. 96303-7

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

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA M. MERCERI,

Appellant,

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.

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

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I. INTEREST OF AMICUS

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 has assisted thousands of Washington homeowners since the recent foreclosure crisis began over eight years ago. In doing so, NJP's attorneys have reviewed thousands of deeds of trust and acceleration demands. NJP and its homeowner clients have a substantial interest in this Court's resolution of whether a bank's Notice of Intent to Accelerate—containing language to the effect that it "will" accelerate the loan if the borrower does not reinstate the arrears in full by a specific date—is sufficient to accelerate the loan and trigger the running of the statute of limitations if the borrower does not cure by the date specified.

In NJP's experience, the subject Notice of Intent to Accelerate is no outlier: its form and language are commonplace, even across different mortgage loan servicers. Specimens of this notice exist from at least the 2009-2010 timeframe. Indeed, Section 22 of the Fannie Mae/Freddie Mac standard deed of trust agreement requires notice prior to acceleration that also informs borrowers of

their right to reinstate. Consequently, many statute-of-limitations cases, such as this one, turn on the legal effect of such notices.

The Court of Appeals decision renders mandatory language ("will accelerate") meaningless and imposes a second step on the servicer to actually accelerate the loan. Unfortunately, this allows servicers to have it both ways: they can use a strongly worded Notice of Acceleration to threaten a borrower, yet after failing to complete the foreclosure within the statute of limitations, they can hide behind favorable Washington law to deny acceleration and foreclose. This Court should provide much-needed clarity on whether borrowers can rely on the subject language to trigger the running of the statute of limitations, or whether borrowers in Washington should instead expect (court-sanctioned) deception in the foreclosure process.

The Court of Appeals decision affects the public interest by creating a fundamentally unfair balance of power between the parties. As NJP's Memorandum describes, the decision creates uncertainty for distressed Washington homeowners and perverse incentives for servicers to ostensibly accelerate mortgage loans, only to deny acceleration to protect themselves from quiet title actions after long-delayed foreclosures. Amicus therefore urges the

Court to accept review under RAP 13.4(b)(4) to ensure the law is fairly applied for the benefit of homeowners and creditors alike, and to ensure that acceleration means acceleration.

II. STATEMENT OF THE CASE

Now a widow, Petitioner Sandra Merceri purchased her home in 1985 with her husband.[1] She refinanced the home in 2006 with an interest-only loan from Countrywide. In early February 2010, she defaulted on her payments. On February 16, 2010, then-servicer Bank of America sent her a Notice of Intent to Accelerate that stated if she did not cure the full arrears by March 18, 2010, the loan "will be accelerated." She did not cure the arrears. A Notice of Trustee's Sale was issued more than 6 years after that March 18 deadline. *See* Appellant's Pet. for Review, pp. 4-7.

Ms. Merceri subsequently filed suit to quiet title. On March 15, 2017, the trial court granted Ms. Merceri's motion for summary judgment, quieting title and reconveying the deed of trust. Division I of the Court of Appeals reversed the trial court in its August 13, 2018, published opinion, holding that the language of the Notice of

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[1] NJP filed an Amicus Memorandum in *Merceri v. Deutsche Bank*, Case No. 95654-5. That case and this one involve a petitioner with the same last name and the same counsel. However, the previous case concerned Michelle Merceri, whereas this case concerns Sandra Merceri.

Intent to Accelerate was *not* sufficient to accelerate the loan without additional notice. Therefore, the court reasoned, the statute of limitations had not run and foreclosure could proceed. *Id.*

III. ARGUMENT

A. In seeking to deny a windfall to one party, the Court of Appeals decision shifts the legal advantage—and the windfall—to the more powerful party.

The law of limitations of actions strikes a balance between two competing policies: elimination of untimely claims, and the resolution of all claims—timely or not—on their merits.[2] "The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution." *Pashley v. Pac. Elec. Co.*, 25 Cal. 2d 226, 228-29, 153 P.2d 325, 326 (1944) (quoting 1 HORACE G. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS 8-9 (4th ed. 1916)). In the world of mortgage servicing and foreclosure, this tension plays out in the choice between granting the debtor a free house or granting the servicer virtually unlimited time to enforce its security interest.

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[2] Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 454-55 (1977).

Another purpose of statutes of limitation is to avoid the erosion of evidence and loss of witnesses. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). In an industry where servicer changes are the norm, foreclosures should not be allowed to languish until records are lost.

1. Courts' bias against "free houses" unfairly favors sleeping creditors.

Courts are reluctant to give away free houses, as this colorful citation amply demonstrates:

> "'No one gets a free house.' This Court and others have uttered that admonition since the early days of the mortgage crisis...with a proper measure of disgust and chagrin, the Court must now retreat from this position...with figurative hand holding the nose, the Court...will grant Debtor's motion for summary judgment."

In re Washington, No. 14-14573-TBA, 2014 WL 5714586, at *1 (Bankr. D. N.J. Nov. 5, 2014) (*rev'd*).

The less sympathetic the debtor, the more difficult it is for a court to find prejudice when a foreclosure has been unduly delayed. New York's Supreme Court, Appellate Division (Second Department) recently found, as the Court of Appeals did here, that "will accelerate" language in a Notice of Intent to Accelerate was insufficient to accelerate the loan. *Milone v. U.S. Bank Nat'l*

Assoc., No. 2016-02068, 2018 WL 3863269, at *3-4 (N.Y. App. Div. Aug. 15, 2018). The debtor in that case took out a $1,235,000 loan, made payments for four years, then resided rent-free in the $1 million home for more than six years. *Id.* at *6. In *In re Washington*, the debtor purchased a 3-family dwelling with a $130,000 deposit and a $520,000 loan. He made only four payments before defaulting. *In re Washington*, 2014 WL 5714586 at *2. The court "held its nose" and reluctantly granted him a free house, only to be reversed on appeal. *Specialized Loan Servicing, LLC v. Gordon Allen Washington*, No. 2:14-cv-8063-SDW, 2015 WL 4757924, at *1-6 (D. N.J. Aug. 12, 2015) (reversing *In re Washington*).

Unfortunately, bad facts make bad law for everyone, not just the sophisticated debtor who takes out a massive loan, or the debtor who makes only a few payments before permanently defaulting.[3] Yet the law should apply equally—and fairly—to all. Within NJP's clientele, debtors in statute-of-limitations cases are frequently elderly, in ill health, of modest means, or any combination thereof.

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[3] *See Haig v. Agee,* 453 U.S. 280, 319 (1981) ("But just as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers.") (commenting on the unfairness of using a passport revocation to silence Philip Agee's damaging statements).

They are confused as to their rights, and bewildered why, after years of silence, the servicer is attempting to foreclose. Yet this bank-friendly interpretation of the law affects debtors like these the same as it does more sophisticated debtors. Courts should not sacrifice established statute-of-limitation law and ignore plain language to transfer a perceived windfall to the more powerful party, the one that slept on its rights.

2. The plain language of the Notice of Intent to Accelerate should be viewed through the eyes of the recipient.

Well-established case law holds that a notice of acceleration requires some "affirmative action" that clearly "brings it home" to the payor that the holder of the note intends to declare the whole debt due. *Cook v. Strelau*, 127 Wash. 128, 135, 219 P. 846 (1923). The subject Notice of Intent to Accelerate states that "the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time," if the default is not cured by the specific date given. Appellant's Pet. for Review, App. 2.

The established test is whether the language "brings it home" *to the debtor* that the debt will be accelerated if the default is not cured by the deadline. Courts should not interpret the language

through the eyes of the self-interested mortgage servicer, allowing it to disclaim its acceleration at will. The Court of Appeals decision renders the word "will" meaningless, in conflict with other notifications sent by the servicer to the debtor in which "will" means "will."

For example, the typical mortgage statement states that, if the payment is not made within the grace period, a late fee *will be* assessed. There is nothing conditional about it. If the payment is made after that date, the contractual late fee is charged, and shows up on the next monthly statement. Why should the debtor think "will" means one thing on one official notice from the servicer, but something completely different on another official notice from the same servicer? It is neither logical nor fair for "will" to mean "will" in one notice to the debtor and "maybe" in another.

3. Is the Notice of Intent to Accelerate a formal notice or is it a new form of consumer harassment?

Most deeds of trust have a provision requiring a notice like the subject Notice of Intent to Accelerate be sent to the debtor before foreclosure proceedings (judicial or non-judicial) can begin. Fannie Mae takes it one step further in its servicing guide: such letter is mandatory, and (unless the borrower is in a workout plan)

the servicer *must* refer the mortgage to foreclosure *upon expiration of the breach or acceleration letter* (emphasis added).[4] In other words, Fannie Mae intends its notice to have teeth: it's not just a warning shot, it's the first step in the march toward foreclosure.

Some foreclosures languish for years. In many cases, intervening servicing transfers—an extremely common event—could explain the delay. And each servicing change presents another opportunity for communications/intentions to get lost, as the loan file is passed along through different computer systems. One of the key purposes of statutes of limitations is to avoid unfair results because of records lost over time—this very scenario.

So when foreclosure doesn't follow reasonably timely after the Notice of Intent to Accelerate, what does the Notice really mean? If the Notice, despite its clear language, did not affect the legal status of the loan, then it would appear to be merely a new form of harassment by the party holding the power against the party with the fewer available resources. The Court of Appeals decision allows servicers to have it both ways. They can issue a Notice of Intent to Accelerate that appears to plainly state they will accelerate

[4] Fannie Mae Servicing Guide, D2-2-06: Sending a Breach or Acceleration Letter (10/14/2015), https://www.fanniemae.com/content/guide/servicing/d2/2/06.html (last visited Oct. 9, 2018).

and move to foreclose if the debtor does not cure by the specified date. But then, years later when the debtor has been lulled into a false sense of security that the debt will not be pursued, the servicer can deny it accelerated and foreclose well after the statute of limitations would have run. It is only fair to require servicers to say what they mean and mean what they say.

IV. CONCLUSION

Amicus curiae Northwest Justice Project respectfully requests that the Court accept review and affirm that clear, mandatory "will" language in a Notice of Intent to Accelerate accelerates the loan unless and until subsequent, equally affirmative confirmation of deceleration, and that such acceleration triggers the statute of limitations period in quiet title cases.

DATED this 2nd day of November 2018.

NORTHWEST JUSTICE PROJECT

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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 electronic mail upon the following counsel of record:

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DATED at Seattle, Washington, this 2nd day of November 2018.

Melanie Sprague

NORTHWEST JUSTICE PROJECT KING COUNTY

November 02, 2018 - 3:15 PM

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