

69904-1

69904-1

No. 69904-1-I

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

BANK OF AMERICA, N.A.,
Appellant,

v.

THE CONDO GROUP LLC,
Respondent.

OPENING BRIEF
of
Appellant
BANK OF AMERICA, N.A.

Appeal from the Superior Court of King County,
the Honorable Laura Inveen, Case No. 12-2-15042-7 SEA

Douglas E. Winter (*PHV*)
BRYAN CAVE LLP
1155 F Street, N.W.
Washington DC 20004
(202) 508-6000 tel
(202) 508-6200 fax

Brian S. Sommer
Steven K. Linkon
RCO LEGAL, P.S.
13555 SE 36th Street Ste. 300
Bellevue WA 98006
(425) 458-2121 tel
(425) 458-2131 fax

Attorneys for *Appellant*
BANK OF AMERICA, N.A.

2013 MAR 24 PM 3:34
STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE

TABLE OF CONTENTS

INTRODUCTION..... 1

MOTION FOR STAY..... 1

ASSIGNMENTS OF ERROR 2

ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE..... 3

ARGUMENT 11

 (I) The Legislature Rejected the *Summerhill* Interpretation
 of the Redemption Act..... 11

 (II) The Plain Language of the Condominium and Race-
 Notice Acts Authorize Redemption..... 17

 (III) SB 5541 Applies Retroactively in This Case 22

CONCLUSION 25

APPENDIX..... A-1

Laws of 2013, ch. 53, § 1 (Senate Bill 5541)..... Ex. A

Final Bill Report for Senate Bill 5541..... Ex. B

BAC Home Loans Servicing, LP v. Fulbright, 2013 WL 1415972,
298 P.3d 779 (Wn. App. 2013), *petition for review filed*,
(May 8, 2013) (No. _____)..... Ex. C

TABLE OF AUTHORITIES

A. Table of Cases

BAC Home Loans Servicing, LP v. Fulbright, No. 67608-3-I, 2013 WL 1415972, 298 P.3d 779 (2013)..... *passim*

Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 167 P.3d 555 (2007)..... 16

Bonded Adj. Co. v. Helgerson, 188 Wash. 176, 178, 61 P.2d 1267 (1936) 24

Burns v. City of Seattle, 161 Wn.2d 129, 164 P.3d 475 (2007) (en banc) 13

De Roberts v. Stiles, 24 Wash. 611, 618, 64 P. 795 (1901) 24

Dumas v. Gagner, 137 Wn.2d 268, 971 P.2d 17 (1999) (en banc)..... 13, 17

Gillis v. King Cy., 42 Wn.2d 373, 255 P.2d 546 (1953) 24

Haddenham v. State, 87 Wn.2d 145, 550 P.2d 9 (1976) (en banc)..... 23

In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992) 22

Johnson v. Cont'l W., Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983) 12, 23

Johnston v. Beneficial Mgmt. Corp. of Am., 85 Wn.2d 637, 538 P.2d 510 (1975) 23

Krutz v. Gardner, 25 Wash. 396, 65 P. 771 (1901) 14

Malm v. Griffith, 109 Wash. 30, 186 P. 647 (1919)..... 20

McGee Guest Home, Inc. v. Dept. of Soc. & Health Servs., 142 Wn.2d 316, 12 P.3d 144 (2000) (en banc) 22, 23

Millay v. Cam, 135 Wn.2d 193, 955 P.2d 791 (1998) *passim*

<i>Mira Owners Ass'n v. Lawrence</i> , No. C10-630RAJ, 2011 WL 677425, (W.D. Wash. Feb. 16, 2011).....	18
<i>Olson Eng'g, Inc. v. KeyBank Nat. Ass'n</i> , 171 Wn. App. 57, 286 P.3d 390 (Oct. 2, 2012).....	15
<i>Rustad Heating & Plumbing Co. v. Waldt</i> , 91 Wn.2d 372, 588 P.2d 1153 (1979)	13, 14
<i>Seattle Mortg. Co. v. Unknown Heirs of Gray</i> , 133 Wn. App. 479, 136 P.3d 776 (2006)	19
<i>Severson v. Penski</i> , 36 Wn. App. 740, 677 P.2d 198 (1984)	24
<i>Singly v. Warren</i> , 18 Wash. 434, 51 P. 1066 (1898).....	24
<i>State v. Day</i> , 96 Wn.2d 646, 638 P.2d 546 (1981) (en banc).....	13
<i>Summerhill Village Homeowners Ass'n v. Roughley</i> , 166 Wn. App. 625, 289 P.3d 649 (2012), <i>amended</i> , 2012 Wn. App. LEXIS 1579 (July 6, 2012).....	passim
<i>Waggoner v. Ace Hardware Corp.</i> , 134 Wn.2d 748, 953 P.2d 88 (1998)	12, 23
<i>Wash. State Farm Bureau Fed. v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007) (en banc).....	22
<i>W.T. Watts, Inc. v. Sherrer</i> , 89 Wn.2d 245, 571 P.2d 203 (1977)	24

B. Statutes

RCW 1.12.010..... 13

RCW 6.23.010..... passim

RCW 6.23.020..... 16

RCW 64.34.364..... passim

RCW 60.04.226..... 18

RCW 65.08.070..... 2, 18, 19

Laws of 2013, ch. 53, § 1 (Senate Bill 5541)..... passim

C. Secondary Authorities

2 Cooley, *Constitutional Limitations* 749 (8th ed. 1927)..... 24

27 Marjorie Dick Rombauer, *Washington Practice, Creditors' Remedies – Debtors' Relief* § 3.19 (2d ed. 2010) 12, 14, 15

18 William B. Stoebuck and John W. Weaver, *Washington Practice, Real Estate: Transactions* § 19.19 (2d ed. 2010) 7, 15

2 Wash. State Bar Ass'n, *Washington Real Property Deskbook* §§ 20.14-15 (4th ed. 2009)..... 20, 25

INTRODUCTION

This case involves the interplay of the Redemption Act, RCW 6.23.010(1)(b), and the Condominium Act, RCW 64.34.364. The issue is whether Bank of America, whose deed of trust in a condominium property was extinguished by a condominium association lien for assessments, is authorized to redeem the property under RCW 6.23.010(1)(b).

This Court considered some, but not all, of the issues presented in *Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 289 P.3d 649 (2012), *amended*, 2012 Wn. App. LEXIS 1579 (July 6, 2012), and *BAC Home Loans Servicing, LP v. Fulbright*, No. 67608-3-I, 2013 WL 1415972, 298 P.3d 779 (2013). Since those decisions, however, the Legislature enacted, and Governor Inslee signed into law, a clarification of RCW 6.23.010(1)(b) that contradicts those decisions and presents a new issue of retroactivity. And those issues are now the subject of a Petition for Review of *Fulbright* in the Washington Supreme Court.

MOTION FOR STAY

Because the Petition for Review of *Fulbright* would, if accepted, resolve the issues presented here, Bank of America moved to stay this appeal for the sake of judicial economy and uniformity. The Commissioner denied the motion on May 3, 2013. Bank of America appealed that denial to this Court because the most efficient and least

burdensome course of litigation is to allow the Supreme Court to have the opportunity to rule first on these important issues – particularly when a stay will cause no prejudice.

ASSIGNMENTS OF ERROR

(1) The Superior Court erred by holding that Bank of America is not a qualified redemptioner under RCW 6.23.010(1)(b).

(2) The Superior Court erred by ignoring the plain language of the Condominium Act, RCW 64.34.364(7), and Washington’s race-notice statute, RCW 65.08.070, because Bank of America recorded its deed of trust in 2005 and the condominium association recorded its declaration and perfected and gave notice of its lien in 2003.

ISSUES PRESENTED FOR REVIEW

If this Court reaches the merits, this Court should hold that:

(1) As the recent enactment of SB 5541 (effective July 28, 2013) confirms, the Legislature intends the Redemption Act, RCW 6.23.010, to grant redemption rights to Bank of America as the holder of a deed of trust subsequent in priority to the foreclosing lien.

(2) The plain language of the Condominium Act, RCW 64.34.364(7), and Washington’s race-notice statute, RCW 65.08.070, provide that Bank of America’s deed of trust, which was recorded subsequent to the condominium declaration, is subsequent in time to the

condominium association's lien and that Bank of America is an authorized redemptioner under RCW 6.23.010.

(3) SB 5541 applies retroactively to authorize Bank of America to redeem the foreclosed property because the sheriff has not issued a sheriff's deed to the Condo Group.

STATEMENT OF THE CASE

On May 20, 2003, the Mill Street Condominium Association recorded its Condominium Association Declaration with the King County Auditor (CP 74). Under the Condominium Act, RCW 64.34.364(7): "Recording of the declaration constitutes record notice and perfection of the lien for assessments..."

On February 15, 2005, Antony Stately purchased Mill Street Condominium Unit 401 for \$320,000 (CP 90-91). Stately borrowed \$256,000 from Countrywide Home Loans, Inc., to finance the purchase (CP 207-10). His promissory note was secured by a deed of trust granted to MERS as nominee for Countrywide, its successors, and assigns (CP 211-29). MERS recorded the deed of trust with the King County Auditor on February 18, 2005 (*Id.*). Bank of America later succeeded to Countrywide's interest through merger (CP 205).

On May 1, 2009, Stately stopped paying on monthly assessments to Mill Street Condominium Association (CP 112).

On November 4, 2010, Mill Street brought suit against Stately – and, as authorized by the Condominium Act, the deed of trust beneficiary, MERS – to collect the unpaid assessments (CP 96-100). (RCW 64.34.364(3) grants condominium associations that record their declarations a limited “super priority” over deeds of trust for six months of unpaid assessments.)

Stately did not defend the lawsuit (CP 102-06). Because of an internal error, MERS did not appear (CP 154). On November 29, 2010, the Superior Court entered a Default Judgment, Order, and Foreclosure Decree against Stately, and a Default Order and Foreclosure Decree (in rem relief only) against MERS (CP 116-20). The Foreclosure Decree against MERS states in relevant part:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of defendant mortgage lenders be adjudged inferior and subordinate to the plaintiff’s lien to the extent of assessments for common expenses based on the periodic budget adopted by the Association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of any sheriff’s sale conducted pursuant to this foreclosure decree...;

... that if the defendant mortgage lenders, and the persons claiming by, through or under them, do not satisfy the Association's lien priority as described in the preceding paragraph prior to any sheriff's sale conducted pursuant to this decree, their rights are forever foreclosed;

[and] ... that the period of redemption shall be one year from the date of the Sheriff's sale after which time the Sheriff shall issue the Sheriff's deed to the purchaser.

(CP 119).

The Sheriff's sale took place on April 29, 2011 (CP 126). Ray Stevenson purchased the condominium for \$33,000, extinguishing Bank of America's deed of trust subject to the statutory right of redemption (*Id.*). He received only a sheriff's certificate, not a deed or title (CP 146-48). Stevenson immediately quitclaimed all rights in the property to The Condo Group LLC (CP 150-51). Condo Group is an investment group formed to acquire condominium units at sheriff's sales when primary lienholders such as Bank of America have been foreclosed, then resell those units for windfall profits.

On March 29, 2012, within the one-year period specified in the Foreclosure Decree, Bank of America sought to redeem the property under RCW 6.23.010 as "a creditor having a lien by judgment, decree, deed of

trust, or mortgage ... subsequent in time to that on which the property was sold.” Bank of America delivered a redemption request letter and supporting documentation to the Sheriff (CP 202-30).

Condo Group refused to cooperate in the redemption process, arguing that Bank of America was not an authorized redemptioner (CP 232-33). On April 23, 2012, Bank of America tendered the estimated redemption sum of \$41,522.81 to the Sheriff pending direction from the court or an agreement between the parties (CP 235-41).

Before the one-year redemption period expired, Bank of America filed this lawsuit on April 25, 2012, seeking a declaratory judgment that it was an authorized redemptioner (CP 1-42). Condo Group opposed, not because of any procedural irregularity, but solely on the theory that Bank of America’s lien was not “subsequent in time” to the condominium lien under RCW 6.23.010 (CP 43-48).

On motion for summary judgment, the Superior Court, relying on this Court’s decision in *Summerhill Village Homeowners Ass’n v. Roughley*, 166 Wn. App. 625, 289 P.3d 649 (2012), *amended*, 2012 Wn. App. LEXIS 1579 (July 6, 2012), ruled that Bank of America was not an authorized redemptioner (CP 372-73).

SUMMERHILL, FULBRIGHT, AND SENATE BILL 5541

Before 2012, Professor Stoeck and Washington practitioners believed that the Redemption Act applied to “a creditor who has a lien ... *subsequent in priority* to that being foreclosed...” 18 William B. Stoeck and John W. Weaver, *Washington Practice, Real Estate: Transactions* § 19.19 (2d ed. 2010) (emphasis added). The Washington Supreme Court used the word “junior,” without reference to “time,” to describe a qualified redemptioner: “*junior lien creditors whose liens have been extinguished by the sale* have the statutory right to redeem the property...” *Millay v. Cam*, 135 Wn.2d 193, 198, 955 P.2d 791 (1998) (emphasis added). Indeed, the record below showed that counsel for Bank of America had facilitated at least eleven redemptions for lienholders foreclosed by condominium association liens in factual circumstances identical to those presented here (CP 243-324).

This Court’s 2012 and 2013 decisions in *Summerhill* and *Fulbright* up-ended conventional and practical wisdom. In direct response to those decisions, the Legislature passed SB 5541 to confirm that redemption rights were authorized for all lienholders “subsequent in priority” to the foreclosing lien.

We review each development in turn.

(A) Summerhill Village Homeowners Assn. v. Roughley (2012)

In *Summerhill Village Homeowners Assn. v. Roughley*, 166 Wn. App. 625, 270 P.3d 639 (2012), *amended by and recon. denied by*, 2012 Wn. App. LEXIS 1579, 289 P.3d 645 (2012), this Court considered the redemption rights of a deed of trust beneficiary, GMAC Mortgage, whose lien was extinguished by a condominium lien foreclosure under facts similar, but not identical, to those presented here.

The property's purchaser argued that, although GMAC's 2006 deed of trust was subsequent in priority to the condominium's "super priority" lien, it was not literally "subsequent in time." GMAC – unlike Bank of America in this case – conceded that its deed of trust was not "subsequent in time," but argued that principles of statutory interpretation, secondary sources, and equity supported interpreting "subsequent in time" to mean "subsequent in priority," vindicating the right of redemption for all lienholders whose liens had been extinguished by foreclosure.

This Court held that the Redemption Act, although widely interpreted to apply to any lienholder whose interests were extinguished by judicial foreclosure, should be read strictly to apply only to extinguished liens that were "subsequent in time" to the foreclosing lien – thus restricting redemption rights based on time rather than priority.

GMAC did not seek review before the Washington Supreme Court.

(B) Bank of America, N.A. v. Fulbright (2013)

In a parallel case, *BAC Home Loans Servicing, LP v. Fulbright*, No. 67608-3-I, 2013 WL 1415972, 298 P.3d 779 (2013), Bank of America sought redemption of a deed of trust securing a \$270,000 loan. Like GMAC in *Summerhill*, Bank of America contended that the Redemption Act authorized redemption by all those whose extinguished liens had been subsequent in priority to the foreclosing lien. But unlike GMAC, Bank of America also argued that its deed of trust was “subsequent in time” to the condominium lien as a matter of fact and law, because RCW 64.34.364(7) provides that recording of the condominium declaration “constitutes record notice and perfection of the lien for assessments,” and Bank of America had recorded its deed of trust in 2005, two years after the condominium association recorded its declaration.

On April 8, 2013, this Court, relying in part on *Summerhill*, ruled against Bank of America and held that Bank of America’s deed of trust, although recorded subsequent in time to the condominium declaration, was not “subsequent in time” to the lien the condominium association created, gave notice of, and perfected by recording that declaration. In so holding, this Court said that Bank of America had “fail[ed] to explain its assertion that the terms ‘record notice and perfection’ in subsection (7)

necessarily signify the time at which a lien comes into being.” 2013 WL 1415972, at *5.

(C) The Legislature Rebukes *Summerhill* and *Fulbright*

In February 2013, Senate Bill 5541 was introduced with bipartisan sponsorship to nullify the *Summerhill* interpretation of RCW 6.23.010(1)(b) (App., Ex. B). This one-word amendment clarified that “subsequent in time” means “subsequent in priority,” exactly as GMAC and Bank of America had argued in *Summerhill* and *Fulbright*. SB 5541 passed with near-unanimity (House: 93-0; Senate: 47-2) (App., Ex. A). On April 23, 2013, two weeks after the decision in *Fulbright*, Governor Inslee signed the bill into law. Like all legislation passed in this year’s regular session, the law will take effect on July 28, 2013.

(D) Bank of America’s Petition for Review in *Fulbright*

On May 8, 2013, Bank of America filed a Petition for Review of *Fulbright* with the Washington Supreme Court (App., Ex. C).

The Petition presents three issues for review:

- (1) Whether the Redemption Act should, consistent with the legislative intent confirmed by SB 5541, apply to lienholders with extinguished liens subsequent in priority to the foreclosing lien, whether or not subsequent in time;

(2) Whether a condominium association creates and perfects its lien for unpaid assessments upon recording of the condominium declaration, thus authorizing Bank of America to redeem because its deed of trust was recorded subsequent to the condominium declaration; and

(3) Whether SB 5541, which is remedial and curative, should be applied retroactively to pending redemptions when the property's purchaser does not hold a sheriff's deed or title.

A Washington Supreme Court ruling in favor of Bank of America on any one of these issues would control and conclude this appeal. There are five other known pending cases calling for interpretation of the Redemption and Condominium Acts in a similar factual context. The issues have a wide-ranging impact on an unknown number of lienholders, homeowners, sheriffs, and sheriff's sale purchasers.

ARGUMENT

I. THE LEGISLATURE REJECTED THE *SUMMERHILL* INTERPRETATION OF THE REDEMPTION ACT

The Legislature, acting in direct response to *Summerhill* – and, by implication, *Fulbright* – has made it clear that the Redemption Act's words “subsequent in time” mean “subsequent in priority” to the lien “on which the property was sold.” See SB 5541 (App., Ex. B, amending RCW

6.23.010 by replacing “subsequent in time” with “subsequent in priority”). This Court should observe the Legislature’s direction in now interpreting the Act.

“If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act.” *Johnson v. Cont’l W., Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983) (citation and quotation omitted). “[W]here a former statute is amended, such amendment is strong evidence of legislative intent of the first statute.” *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755-56, 953 P.2d 88 (1998) (citations omitted).

This “strong evidence” underscores the strong public interest in this Court correcting its interpretation of the Redemption Act.

Summerhill and *Fulbright* adopted an unprecedented reading of the Act that denies redemption to the parties it was intended to protect: “junior lienors whose liens have been extinguished.” 27 Marjorie Dick Rombauer, *Washington Practice, Creditor’s Remedies – Debtors’ Relief* § 3.19 (2d ed. 2010). That reading conflicts with the salient principles of statutory interpretation announced by the Legislature and the Washington Supreme Court.

The Legislature instructs that the Revised Code “shall be liberally construed, and shall not be limited by any rule of strict construction.” RCW 1.12.010. The Washington Supreme Court has warned the judiciary to “avoid a literal reading resulting in unlikely, absurd, or strained consequences.” *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981) (en banc). The “spirit and intent of the statute should prevail over the literal letter of the law and ... there should be made that interpretation which best advances the perceived legislative purpose.” *Dumas v. Gagner*, 137 Wn.2d 268, 286, 971 P.2d 17 (1999) (en banc) (quotation omitted). “The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (en banc).

Applying these principles, the Washington Supreme Court rejected a strict and literal interpretation of the Redemption Act in *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 373, 588 P.2d 1153 (1979) (en banc), in order to affirm a grant of redemption rights. The Court read the Act’s pre-1987 definition of “redemptionner” – which did not include a deed of trust beneficiary – expansively, adopting a common-sense

approach to a new legal development by affirming that the Act's term "mortgage" included a deed of trust. *Id.* at 376. As informed by the Legislature's passage of SB 5541, this Court should undertake a comparable analysis for another relatively recent development: the condominium association lien, which obtains a "super priority" over almost every other lien regardless of whether it was recorded "subsequent in time." *See* RCW 64.34.364(2) and (3).

No decision prior to *Summerhill* and *Fulbright* had interpreted "subsequent in time" so narrowly to deny redemption to a junior lienholder. Instead, lienholders, condominium associations, commentators, and the courts consistently interpreted RCW 6.23.010(1)(b) to apply to any lien subsequent in priority to the foreclosing lien because "the idea is that only one whose title or lien may be extinguished may have 'another bite at the apple.'" 27 Rombauer, § 3.19(a)-(b); (*see* CP 243-324). For example, in *Millay v. Cam*, the Washington Supreme Court used the word "junior" without reference to "time" to describe who qualifies as a statutory redemptioner: "When a mortgage is foreclosed and the property sold under execution, *junior lien creditors whose liens have been extinguished by the sale* have the statutory right to redeem the property from the purchaser." 135 Wn.2d at 198 (emphasis added). And *Krutz v. Gardner*, 25 Wash. 396, 65 P. 771 (1901), held that a mortgage

holder could obtain redemption when a municipal lien, although subsequent in time, had priority: “[S]uch lien is analogous to that of a senior mortgagee, and the right of the appellant as a junior mortgagee to redeem from that lien cannot well be doubted...” *Id.* at 400.

Learned scholars and a 2012 Division III Court of Appeals decision likewise invoke “priority,” not “time,” when analyzing RCW 6.23.010. Professor Stoebuck read RCW 6.23.010(1)(b) to apply to “a creditor who has a lien ... *subsequent in priority* to that being foreclosed...” 18 Washington Practice, *Real Estate: Transactions* § 19.19 (2d ed. 2010) (emphasis added); *see also* 27 Rombauer, § 3.19(a)-(b) (“junior lienors”). In *Olson Eng’g, Inc. v. KeyBank, Nat. Ass’n*, Division III stated that “statutory redemption allows junior lienholders, acting within a year, or in some cases eight months, after the foreclosure sale to buy the foreclosed property by paying the property’s purchaser the amount it paid at the foreclosure sale.” 171 Wn. App. 57, 70 n.15, 286 P.3d 390 (2012) (citations omitted).

Any other interpretation would lead to absurd and inequitable results like the one Condo Group seeks in this case. The Redemption Act ensures that the foreclosing lienholder, the sheriff’s sale purchaser, and the redemptioner – and, more often than not, the borrower – are made whole. The Condo Group’s purchase satisfied the condominium association’s

judgment. Bank of America's redemption will make the Condo Group whole. *See* RCW 6.23.020(2). Bank of America will then mitigate its principal balance loss of \$254,922.44 and extinguish its borrower's debt by selling the condominium.

The Condo Group's theory, on the other hand, creates distorted outcomes, authorizing windfall profits – the Condo Group's representative paid only 10 percent of the condominium's original purchase price of \$320,000 – while leaving Mr. Stately with a debt exceeding \$250,000 and Bank of America with no security to mitigate its loss and extinguish Mr. Stately's debt (CP 345). This unforgiving interpretation of RCW 6.23.010 would lead to deficiency judgments and bankruptcies for homeowners, who remain liable for the unpaid balances of their promissory notes. *See Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 550, 167 P.3d 555 (2007). This is why the Legislature swiftly rebuked *Summerhill* and clarified RCW 6.23.010. Authorizing windfall profits for a third party to the detriment of the foreclosed homeowner and lender negates, rather than furthers, the spirit and intent of the Redemption Act.

SB 5541 was enacted in direct response to *Summerhill*. This Court should follow the Legislature's lead and interpret the Redemption Act consistent with the "spirit and intent of the statute" and make "that interpretation which best advances the perceived legislative purpose,"

which is to preserve, rather than vitiate, the redemption rights of those whose liens have been extinguished by foreclosure. *Dumas*, 137 Wn.2d at 286.

II. **THE PLAIN LANGUAGE OF THE CONDOMINIUM AND RACE-NOTICE ACTS AUTHORIZE REDEMPTION**

The Superior Court's reading of the Condominium Act, which is based on *Fulbright*, conflicts with that Act's plain language, nullifying express legislative intent and vitiating redemption rights for Bank of America in this case, as well as an untold number of Washington lienholders. Even if *Summerhill*'s restrictive reading of the Redemption Act could stand, Bank of America qualifies as a redemptioner.

The Condominium Act specifies the date on which a condominium association creates, gives record notice of, and perfects its lien: "Recording of the [condominium] declaration constitutes record notice and perfection of the lien for assessments... [N]o further recording of any claim or lien for assessment under this section shall be required to perfect the association's lien." RCW 64.34.364(7).

Here, the Mill Street Condominium Association created and perfected its lien in 2003 by recording its declaration in 2003 (CP 74). MERS recorded Bank of America's deed of trust in 2005, "subsequent in time" to the condominium lien (CP 211-29).

Fulbright disregarded Section 7 and Washington’s “race notice” recording jurisprudence, which focuses solely on the comparison of recording dates. *See* RCW 65.08.070. Instead, *Fulbright* held that Bank of America’s deed of trust was not “subsequent in time” because RCW 64.34.364(1) provides: “The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.”

Section 1 merely provides that liens created and perfected under Section 7 “automatically attach at the time the assessment is due.” *Mira Owners Ass’n v. Lawrence*, No. C10-630RAJ, 2011 WL 677425, *3 (W.D. Wash. Feb. 16, 2011). This does not purport to abrogate or alter race notice. To the contrary, RCW 64.34.364(7) invokes race notice by stating, in unequivocal terms, that the association creates record notice of and perfects its lien for assessments when recording its declaration. That occurs, by necessity, *before* “the time the assessment is due.” The statement in *Fulbright* that “*before* ‘the time the assessment is due,’ the association has no lien,” 2013 WL 1415972 at 5 (emphasis original), effectively rewrites RCW 64.34.364(7) and RCW 65.08.070.

RCW 64.34.364(1) and (7) are comparable to RCW 60.04.226, which governs home equity lines of credit (“HELOCs”). Under RCW 60.04.226, the recording date of the HELOC deed of trust establishes

chronological priority “to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed...” Thus, even if the borrower does not immediately draw on the line of credit or draws on the line of credit but later pays it down to zero, the HELOC lien is perfected on the date the deed of trust is recorded, not on the date of a subsequent delinquency or default.

This Court’s decision in *Fulbright* appears to hinge on the perception that Bank of America “fail[ed] to explain its assertion that the terms ‘record notice and perfection’ in subsection (7) necessarily signify the time at which a lien comes into being.” 2013 WL 1415972 at 5. Although Bank of America believes the statute speaks for itself, we proffer further explanation here.

Under the race-notice statute, RCW 65.08.070, lien priority is measured by the date of recording: a recorded security interest in property enjoys priority over encumbrances recorded subsequent in time. *See Seattle Mortg. Co. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 495, 136 P.3d 776 (2006) (“Washington’s recording system was enacted to ensure that a deed recorded first in *time* was superior to any other conveyance...”) (emphasis added).

The Supreme Court, when applying the Redemption Act, has always compared the dates of recording in order to identify the time of

lien creation and authorized redemptioners. *See, e.g., Malm v. Griffith*, 109 Wash. 30, 33, 86 P. 647 (1919). In *Malm*, borrowers granted a mortgage in 1909 that was not recorded. In 1913, the borrowers granted a second mortgage to a different lender that was recorded. Later that year, the borrower and that lender executed and recorded a deed in lieu of foreclosure. The 1909 mortgagee then recorded her mortgage.

The Court held that the 1909 mortgagee was a qualified redemptioner because she “became the holder of a mortgage against the lot, in effect, subsequent in time, because of subsequent recording” to the 1913 mortgage. *Malm*, 109 Wash. at 33; *see also* 2 Wash. State Bar Ass’n, *Washington Real Property Deskbook* § 20.15(3) at 20-46 (4th ed. 2009).

The Condominium Act cannot and should not be read to revise this time-honored paradigm of comparing recording dates for purposes of priority in general and redemption in particular, especially in the absence of any expression of legislative intent. Rather, the proper comparison, and the only one consistent with Washington’s race-notice jurisprudence, is of recording dates: the recording date of the recorded and perfected condominium association declaration (RCW 64.34.364(7)) compared with the recording date of Bank of America’s deed of trust.

A contrary decision will affect an unknown number of lienholders – not merely deed of trust beneficiaries, but holders of judgment liens, mechanic’s liens, and child support liens, among others. A condominium lien has priority over all liens save those recorded prior to the declaration and tax/government liens. RCW 64.34.364(2)(a) and (c). For Bank of America’s deed of trust in this case and other mortgages recorded after a condominium declaration but “before the date on which the assessment sought to be enforced became delinquent,” that priority is limited “to the extent of [six months of] assessments for common expenses...” RCW 64.34.364 (2)(b) and (3). For all other lienholders subject to the condominium lien, however, the condominium lien’s priority is unlimited.

If this Court reaffirms the *Fulbright* interpretation of the Condominium Act and SB 5541 is not held retroactive, then those lienholders who recorded their liens after a condominium declaration but before a delinquency will be rendered subsequent in priority but not subsequent in time to the condominium lien – and lose not only their liens, but also the Redemption Act’s remedy. That interpretation would also create uncertainty about lien hierarchy: On any given date, depending on whether or not any given condominium unit owner is current or in default on paying his or her assessments, the condominium lien may be senior or subordinate to the lender’s deed of trust or any other liens.

III. SB 5541 APPLIES RETROACTIVELY IN THIS CASE

Even if this Court should decide to reaffirm its interpretations of the Redemption Act and Condominium Act, the Court should hold that SB 5541, which takes effect on July 28, 2013, applies retroactively to provide redemption rights to Bank of America in this case.

SB 5541 presents the archetype for retroactive application by clarifying a statutory interpretation that the Washington Supreme Court had not considered after controversy about the interpretation arose. The Legislature acted quickly and decisively to remedy and cure the Court of Appeals' interpretation of the Redemption Act.

Absent instructive language, a new statute or amendment applies retroactively when curative or remedial. *McGee Guest Home, Inc. v. Dept. of Soc. & Health Servs.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000) (en banc). However, retroactive application cannot supplant vested, contractual, or constitutional rights. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 463, 832 P.2d 1303 (1992) (en banc).

SB 5541 satisfies these requirements.

(A) The Amendment Is Curative and Remedial

An amendment that “clarifies or technically corrects an ambiguous statute” is curative. *Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007) (en banc) (quotations omitted).

Amendments adopted soon after controversies arise about statutory interpretation – notably, those “adopted in response to lower court decisions” – are viewed as curative and applied retroactively. *McGee*, 142 Wn.2d at 325.

SB 5541 is remedial because it “better[s] or forward[s] remedies already existing for the enforcement of rights and the redress of injuries,” *i.e.*, redemption. *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (en banc).

The Final Legislative Report states that *Summerhill* was the impetus for SB 5541 (App., Ex. B). The vote was nearly unanimous: Senators voted 47-2 and members of the House of Representatives voted 93-0 in favor of SB 5541 (App., Ex. A).

The swift and resounding legislative response underscores the Legislature’s original intent to remove any ambiguity about who qualifies as a redemptioner. Redemption is intended to protect all junior lien holders subsequent in priority. *See Johnson*, 99 Wn.2d at 559; *Waggoner*, 134 Wn.2d at 755-56.

(B) Retroactivity Will Not Harm Vested Rights

If a statute is remedial, it is *presumed* to operate retroactively, unless it affects a vested right. *Johnston v. Beneficial Mgmt. Corp. of Am.*,

85 Wn.2d 637, 641, 538 P.2d 510 (1975). Here, applying SB 5541 retroactively would affect no vested right.

“[A] right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property...” *Gillis v. King Cy.*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953), *quoting* 2 *Cooley, Constitutional Limitations* 749 (8th ed. 1927).

“[A] certificate of sale executed by a sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into an absolute title.” *Severson v. Penski*, 36 Wn. App. 740, 744, 677 P.2d 198 (1984), *quoting* *Bonded Adj. Co. v. Helgerson*, 188 Wash. 176, 178, 61 P.2d 1267 (1936). “While the purchaser at a judicial sale may be entitled to the immediate possession and the rents and profits of the premises, he cannot be said to hold the title until he receives a deed in pursuance of the sale.” *Singly v. Warren*, 18 Wash. 434, 445, 51 P. 1066 (1898); *see also* *De Roberts v. Stiles*, 24 Wash. 611, 618, 64 P. 795 (1901).

The sheriff has not issued the sheriff’s deed, and will not issue the deed absent a court order (CP 235). Condo Group has only a certificate of sale, which does not pass title or constitute a vested right. *W.T. Watts, Inc.*

v. *Sherrer*, 89 Wn.2d 245, 248, 571 P.2d 203 (1977) (en banc); see 2 Wash. State Bar Ass'n, *Washington Real Property Deskbook* § 20.14(8)(c) at 20-39 (4th ed. 2009). Condo Group purchased the property at the Sheriff's Sale subject to a one-year right of redemption, knowing that the remedy of redemption could occur.

(C) The Time For Redemption Has Not Expired

SB 5541 also applies retroactively because the time to redeem has not run. There is no dispute that Bank of America tendered the funds to redeem the property and filed this declaratory relief action within the one-year redemption period (CP 1-42). Those acts tolled the redemption period. See generally *Millay*, 135 Wn.2d at 198.

CONCLUSION

For these reasons, the Court should reverse the judgment below and hold that:

(1) As the Legislature has confirmed, Bank of America is an authorized redemptioner under RCW 6.23.010 as written before and after SB 5541 because its deed of trust is subsequent in priority to the lien on which the property was sold.

(2) As the Condominium Act's plain language shows, the condominium association created and perfected its lien by recording its condominium declaration in 2003. Because MERS recorded Bank of

America's deed of trust in 2005 – "subsequent in time" to that lien – Bank of America is an authorized redemptioner under RCW 6.23.010 as written before and after SB 5541.

(3) SB 5541, which amends RCW 6.23.010 effective July 28, 2013, has retroactive effect and authorizes redemption of a foreclosed property by a junior lienholder when a sheriff's deed or title has not issued. As a result, Bank of America is an authorized redemptioner.

Dated: May 24, 2013

Respectfully submitted,

Douglas E. Winter (*PHV*)
BRYAN CAVE LLP
1155 F Street, N.W.
Washington DC 20004
(202) 508-6000 tel
(202) 508-6200 fax

By: 
Brian S. Sommer, WSBA No. 37019
Steven K. Linkon, WSBA No. 34896
RCO LEGAL, P.S.
13555 SE 36th Street, Ste. 300
Bellevue, WA 98006
(425) 586-1972 tel
(425) 283-5972 fax

Attorneys for *Appellant*
BANK OF AMERICA, N.A.

APPENDIX

APPENDIX

EXHIBIT

A

CERTIFICATION OF ENROLLMENT

SENATE BILL 5541

Chapter 53, Laws of 2013

63rd Legislature
2013 Regular Session

REAL PROPERTY--REDEMPTION

EFFECTIVE DATE: 07/28/13

Passed by the Senate March 11, 2013
YEAS 47 NAYS 2

BRAD OWEN

President of the Senate

Passed by the House April 9, 2013
YEAS 93 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved April 23, 2013, 4:34 p.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5541** as passed by the Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

April 24, 2013

**Secretary of State
State of Washington**

SENATE BILL 5541

Passed Legislature - 2013 Regular Session

State of Washington 63rd Legislature 2013 Regular Session

By Senators Hobbs, Fain, Hatfield, and Harper

Read first time 02/04/13. Referred to Committee on Financial Institutions, Housing & Insurance.

1 AN ACT Relating to redemption of real property; and amending RCW
2 6.23.010.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 6.23.010 and 1987 c 442 s 701 are each amended to read
5 as follows:

6 (1) Real property sold subject to redemption, as provided in RCW
7 6.21.080, or any part thereof separately sold, may be redeemed by the
8 following persons, or their successors in interest:

9 (a) The judgment debtor, in the whole or any part of the property
10 separately sold.

11 (b) A creditor having a lien by judgment, decree, deed of trust, or
12 mortgage, on any portion of the property, or any portion of any part
13 thereof, separately sold, subsequent in (~~time~~) priority to that on
14 which the property was sold. The persons mentioned in this subsection
15 are termed redemptioners.

16 (2) As used in this chapter, the terms "judgment debtor,"
17 "redemptioner," and "purchaser((7))" refer also to their respective

1 successors in interest.

Passed by the Senate March 11, 2013.

Passed by the House April 9, 2013.

Approved by the Governor April 23, 2013.

Filed in Office of Secretary of State April 24, 2013.

APPENDIX

EXHIBIT

B

FINAL BILL REPORT

SB 5541

C 53 L 13

Synopsis as Enacted

Brief Description: Concerning the redemption of real property.

Sponsors: Senators Hobbs, Fain, Hatfield and Harper.

Senate Committee on Financial Institutions, Housing & Insurance
House Committee on Judiciary

Background: Dating back to the 19th century, a debtor whose real property is sold at a sheriff's foreclosure sale may have the opportunity to purchase back the real property by reimbursing the winning bid amount to the sheriff sale purchaser. This process is known as redemption. Redemption voids the sheriff's sale.

Redemption can occur:

- within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment; or
- within one year after the date of the sale.

Parties entitled to redeem include the judgment debtor and creditors who have a lien on the real property by judgment, decree, deed of trust, or mortgage on any portion of the property, or any portion separately sold subsequent in time to when the property was sold. In other words, the time that a creditor's interest is recorded determines a creditor's priority to redeem a foreclosure sale.

Super Lien Priority. Under RCW 64.34.364 condominium associations have super lien priority. If a unit holder is delinquent in assessments, the association can file a lien against a unit. The association lien is limited to the assessment amount for the six months prior to foreclosure. When an association forecloses upon a lien, and there is a mortgage on the unit recorded before the date on which the assessment became delinquent, the mortgagee must receive notice of the pending foreclosure and has the opportunity to pay off the lien prior to the sheriff's sale to preserve its deed of trust lien. If the mortgage lender does not pay the off the lien in this instance, the mortgage lender's lien is extinguished.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summerhill Village Homeowner's Association v. Roughley. In a recent Court of Appeals Division 1 case, a unit owner was delinquent in paying the condominium association assessments, and the condominium association placed a lien on the unit and moved to foreclose on the lien. The condominium association named and served the mortgage lender in its judicial lien foreclosure action. Because the lender did not respond or pay the six-month priority before the sheriff's sale, the lender's deed of trust was extinguished. The lender's servicer subsequently instituted foreclosure proceedings against the borrower who was in default. According to the case, it was at this time the lender learned of the association's lien and foreclosure sale and tried to redeem. The court held that the lender was not a redemptioner. By not paying off the association's lien, the lender's rights were extinguished and they were not considered a redemptioner.

Summary: A creditor's priority to redeem an interest in foreclosed real property is determined by the creditor's priority, not the time in which the interest was recorded.

In the instance where a condominium association uses its super lien priority to foreclose on a unit owner for unpaid assessments, the lender's priority is not extinguished for failing to pay off the association's lien.

Votes on Final Passage:

Senate	47	2
House	93	0

Effective: July 28, 2013.

APPENDIX

EXHIBIT

C

Court of Appeals Cause No. 67608-3-I

No. _____

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

BANK OF AMERICA, N.A., *Petitioner,*

v.

MICHAEL FULBRIGHT, *Respondent.*

**PETITION FOR REVIEW
of
BANK OF AMERICA, N.A.**

Of A Published Decision Of
The Court of Appeals (Division One), No. 67608-3-I

Douglas E. Winter (*PHV*)
BRYAN CAVE LLP
1155 F Street, N.W.
Washington DC 20004
(202) 508-6000 tel
(202) 508-6200 fax

Brian S. Sommer (No. 37019)
Steven K. Linkon (No. 34896)
RCO LEGAL, P.S.
13555 SE 36th Street, Ste. 300
Bellevue, WA 98006
(425) 586-1972 tel
(425) 283-5972 fax

Attorneys for *Petitioner* BANK OF AMERICA, N.A.

TABLE OF CONTENTS

IDENTITY OF PETITIONER.....1

COURT OF APPEALS DECISION.....1

ISSUES PRESENTED FOR REVIEW1

STATEMENT OF THE CASE.....2

ARGUMENT4

 (I) The Legislature Rejected the Decision's Interpretation of
 the Redemption Act.....5

 (II) The Decision Conflicts with Time-Honored Principles of
 Statutory Interpretation, Including This Court's Decision
 in *Rustad*.....5

 (III) The Decision Below Conflicts with the Plain Language
 of the Condominium Act.....8

 (IV) The Retroactive Impact of SB 5541 Is an Issue of
 Substantial Public Importance.....10

CONCLUSION.....13

APPENDIX..... A-1

TABLE OF AUTHORITIES

A. Table of Cases

Dumas v. Gagner, 137 Wn.2d 268, 971 P.2d 17 (1999) (en banc)..... 6

Gillis v. King Cy., 42 Wn.2d 373, 255 P.2d 546 (1953)..... 12

Haddenham v. State, 87 Wn.2d 145, 550 P.2d 9 (1976) (en banc)..... 12

In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992)..... 11

Krutz v. Gardner, 25 Wash. 396, 65 P. 771 (1901)..... 7

McGee Guest Home, Inc. v. Dept. of Soc. & Health Servs., 142 Wn.2d
316, 12 P.3d 144 (2000) (en banc)..... 11

Millay v. Cam, 135 Wn.2d 193, 955 P.2d 791 (1998)..... passim

Mira Owners Ass'n v. Lawrence, No. C10-630RAJ, 2011 WL 677425, *3
(W.D. Wash. Feb. 16, 2011) 9

Rustad Heating & Plumbing Co. v. Waldt, 91 Wn.2d 372, 588 P.2d 1153
(1979) 4, 6

Summerhill Vill. Homeowners Ass'n v. Roughley, 166 Wn. App. 625, 289
P.3d 649 (2012), amended, 2012 Wn. App. LEXIS 1579 (July 6, 2012)
..... passim

Waggoner v. Ace Hardware Corp., 134 Wn.2d 748, 755-56 (1998)..... 5

Wash. State Farm Bureau Fed. v. Gregoire, 162 Wn.2d 284, 174 P.3d
1142 (2007) (en banc) 11

W.T. Watts, Inc. v. Sherrer, 89 Wn.2d 245, 571 P.2d 203 (1977)..... 12

B. Statutes

RCW 1.12.010 5, 6
RCW 6.23.010 passim
RCW Title 60 11
RCW 6.23.020 7
RCW 64.34.364 passim
Laws of 2013, ch. 53, § 1 (Senate Bill 5541) passim

C. Secondary Authorities

27 Marjorie Dick Rombauer, *Washington Practice, Creditors' Remedies – Debtors' Relief* § 3.19 (2d ed. 2010) 5, 6, 7
18 William B. Stoebuck and John W. Weaver, *Washington Practice, Real Estate: Transactions* § 19.19 (2d ed. 2010) 7
2 Wash. State Bar Ass'n, *Washington Real Property Deskbook* § 20.14(8)(c) (4th ed. 2009) 12

IDENTITY OF PETITIONER

Petitioner Bank of America, N.A., is the successor-in-interest to BAC Home Loans Servicing, LP.

COURT OF APPEALS DECISION

Bank of America seeks review of the published opinion in *BAC Home Loans Servicing, LP v. Fulbright*, Court of Appeals (Division One) No. 67608-3-1, filed on April 8, 2013. The Appendix provides a copy of the decision at pages A-1 through A-7.

ISSUES PRESENTED FOR REVIEW

1. Whether, as confirmed by the recent enactment of SB 5541 (effective July 28, 2013), the Court of Appeals erred in denying Bank of America rights under the Redemption Act, RCW 6.23.010, as a holder of a deed of trust subsequent in priority to the foreclosing lien.

2. Whether the Court of Appeals erred in failing to apply the plain language of the Condominium Act, RCW 64.34.364(7), which states that “[r]ecording of the [condominium] declaration constitutes record notice and perfection of the lien for assessments,” by holding that a deed of trust recorded subsequent to the condominium declaration is not subsequent in time and not subject to redemption under RCW 6.23.010.

3. Whether SB 5541 applies retroactively to authorize redemption of a foreclosed property by a junior lienholder when the sheriff’s deed or title has not issued.

STATEMENT OF THE CASE

On December 20, 2006, the Tanglewood Condominium Association recorded its declaration (CP 40-98), which “constitutes record notice and perfection of [its] lien for assessments.” RCW 64.34.364(7).

On March 6, 2007, Jeanne Lewis purchased a Tanglewood condominium with a \$277,000.00 loan from Bank of America. The Bank recorded its deed of trust on March 9, 2007 (CP 138, 141-58, 380-81).

In May 2008, Lewis defaulted on her monthly condominium assessments (CP 370). In January 2009, Tanglewood initiated a judicial foreclosure proceeding (CP 165-69). Although named as a defendant, Bank of America did not appear due to an internal error (CP 134-36).

On June 24, 2009, the Superior Court entered a default judgment and foreclosure decree against Lewis and Bank of America (CP 170-74).

On May 2010, Michael Fulbright bought Lewis’ condominium at the sheriff’s sale for \$14,481.83, extinguishing Bank of America’s deed of trust subject to the statutory right of redemption (CP 173, 175-76). He received only a sheriff’s certificate, not a deed or title (CP 103, 198-200).

In April 2011, Bank of America sought to redeem the property under RCW 6.23.010 as “a creditor having a lien by judgment, decree, deed of trust, or mortgage ... subsequent in time to that on which the property was sold.” Fulbright objected (CP 33-34). Before the one-year redemption period expired, Bank of America tendered the estimated redemption amount (CP 243) and brought this action, seeking a declaratory judgment that it was an authorized redemptioner (CP 1-8).

On motion for summary judgment, the Superior Court ruled that Bank of America was not an authorized redemptioner (CP 410-13).

The Court of Appeals affirmed, relying on its intervening decision in *Summerhill Vill. Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 289 P.3d 649 (2012), *amended*, 2012 Wn. App. LEXIS 1579 (July 6, 2012), to hold that the Redemption Act, although intended and widely interpreted to apply to any lienholder whose interests were extinguished by judicial foreclosure, should be read strictly and inequitably to apply only to extinguished liens that were “subsequent in time” to the foreclosing lien. The Court of Appeals then ignored the plain text of the Condominium Act, holding that Bank of America’s deed of trust, although recorded subsequent in time to Tanglewood’s condominium declaration, was not “subsequent in time” to the lien that Tanglewood created, gave notice of, and perfected by recording that declaration.

On April 23, 2013, Governor Inslee signed SB 5541 into law. Laws of 2013, ch. 53, § 1 (A-11 to A-15). That legislation, passed in direct response to *Summerhill*, confirmed the Legislature’s intent by clarifying RCW 6.23.010 to state that – as Bank of America had argued below, scholars and practitioners had long reported, and this Court had observed – the right to redemption applies to all lienholders “subsequent in priority” to the foreclosing lien.^{1/}

^{1/} The lienholder in *Summerhill*, GMAC Mortgage, did not timely raise all arguments presented by Bank of America (*see* A-3) and did not seek this Court’s review.

ARGUMENT

This Court should accept review for the following reasons:

1. As SB 5541 confirms, the decision below conflicts with legislative intent and subverts RCW 6.23.010. The Legislature's prompt and near-unanimous action (House 93-0, Senate 47-2) is a unique rebuke of the Court of Appeals' interpretation of the Redemption Act that justifies this Court's intervention to correct the decision below.

2. The decision conflicts with time-honored principles of statutory interpretation, as applied to the Redemption Act in *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 374, 588 P.2d 1153 (1979), which rejected a strict and literal interpretation of the Act.

3. The decision conflicts with the plain language of RCW 64.34.364(7), jeopardizing and vitiating the redemption rights of an unknown number of deed of trust beneficiaries and holders of judgment liens, mechanic's liens, and child support liens, among others.

4. There are six known pending cases requiring interpretation of the Redemption and Condominium Acts. The decision below and SB 5541 have a wide-ranging impact on an unknown number of lienholders, homeowners, sheriffs, and sheriff's sale purchasers. The decision and the retroactive application of SB 5541 present issues of substantial public interest that this Court should resolve now, for reasons of uniformity and judicial economy, and to avoid recurrent and piecemeal litigation.

I. THE LEGISLATURE REJECTED THE DECISION'S INTERPRETATION OF THE REDEMPTION ACT

The Legislature, acting in direct response to *Summerhill* – and, by implication, the decision below – has made it clear that the Redemption Act's words "subsequent in time" mean "subsequent in priority" to the lien "on which the property was sold." See SB 5541 (amending RCW 6.23.010 by replacing "subsequent in time" with "subsequent in priority").

"[W]here a former statute is amended, such amendment is strong evidence of legislative intent of the first statute." *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755-56, 953 P.2d 88 (1998) (citations omitted). This strong evidence underscores the error below and the strong public interest in this Court's intervention to correct that error.

II. THE DECISION CONFLICTS WITH TIME-HONORED PRINCIPLES OF STATUTORY INTERPRETATION, INCLUDING THIS COURT'S DECISION IN RUSTAD

Summerhill and the decision below adopted an unprecedented, hyper-literal reading of the Redemption Act that denies redemption to the parties the Act was intended to protect. See, e.g., 27 Marjorie Dick Rombauer, *Washington Practice, Creditor's Remedies – Debtors' Relief* § 3.19 (2d ed. 2010) (the Act gives "junior lienors, whose liens have been extinguished, a grace period, beyond the sale, to salvage something").

That reading conflicts with the salient principles of statutory interpretation announced by the Legislature and this Court. The Legislature instructs that the Revised Code "shall be liberally construed, and shall not be limited by any rule of strict construction." RCW

1.12.010. The “spirit and intent of the statute should prevail over the literal letter of the law ... [T]here should be made that interpretation which best advances the perceived legislative purpose.” *Dumas v. Gagner*, 137 Wn.2d 268, 286, 971 P.2d 17 (1999) (en banc) (quotation omitted).

Applying these principles, this Court rejected a strict and literal interpretation of the Redemption Act in *Rustad* in order to affirm a grant of redemption rights. The Court read the Act’s pre-1987 definition of redemptioner – which did not include a deed of trust beneficiary – expansively, adopting a common-sense approach to a new legal development by holding that the Act’s term “mortgagee” included a deed of trust beneficiary. 91 Wn.2d at 376.

The Court should undertake a comparable analysis for another relatively recent development: the condominium association lien, which has priority over almost all other liens. See RCW 64.34.364(2) and (3).

No decision prior to *Summerhill* and this case had interpreted “subsequent in time” so narrowly to deny redemption to a junior lienholder. Instead, this Court and commentators consistently read the Act to apply to anyone subsequent in priority to the foreclosing lien because “the idea is that only one whose title or lien may be extinguished may have ‘another bite at the apple.’” 27 Rombauer, § 3.19(a)-(b).

The decision below conflicts with this Court’s observation in *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998), which uses the word “junior,” not “time,” to describe who qualifies as a redemptioner: “When a mortgage is foreclosed and the property sold under execution, *junior lien*

creditors whose liens have been extinguished by the sale have the statutory right to redeem the property from the purchaser.” *Id.* at 198 (emphasis added).

The decision also conflicts with *Krutz v. Gardner*, 25 Wash. 396, 65 P. 771 (1901), which held that a mortgage holder could obtain redemption when a municipal lien, although subsequent in time, had priority: “[S]uch lien is analogous to that of a senior mortgagee, and the right of the appellant as a junior mortgagee to redeem from that lien cannot well be doubted...” *Id.* at 400.

Learned scholars likewise invoke “priority,” not “time.” For example, Professor Stoebuck read the Redemption Act to apply to “a creditor who has a lien ... subsequent in priority to that being foreclosed...” 18 *Washington Practice, Real Estate: Transactions* § 19.19 (2d ed. 2010); *see* 27 Rombauer, § 3.19(a)-(b) (“junior lienors”).

Any other interpretation leads to absurd and inequitable results like the one below. The Redemption Act ensures that the foreclosing lienholder, the sheriff’s sale purchaser, and the redemptioner – and, more often than not, the borrower – are made whole. Fulbright’s purchase satisfied Tanglewood’s judgment. Bank of America’s redemption will make Fulbright whole. *See* RCW 6.23.020(2). Bank of America will then mitigate its loss of \$277,000 in loan proceeds by selling the condominium. That, in turn, will extinguish the borrower’s debt.

The decision below, on the other hand, creates distorted outcomes, authorizing windfall profits – Fulbright paid only five per cent of Lewis’

original purchase price – while leaving the foreclosed borrower with a debt of over \$300,000 and Bank of America with no security to mitigate its loss. If not corrected, it will lead to deficiency judgments and bankruptcies for homeowners, who will remain liable for the unpaid balances of their promissory notes. Authorizing windfall profits for a third party to the detriment of the foreclosed homeowner and lender negates, rather than furthers, the spirit and intent of the Redemption Act.

This Court should follow the Legislature’s lead and act to resolve a matter of manifest public interest, return certainty and uniformity to the law, and vindicate the redemption rights of Bank of America and an unknown number of other lienholders affected by the decision.

III. THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE CONDOMINIUM ACT

The decision also deserves review because its interpretation of the Condominium Act conflicts with the Act’s plain language, nullifying express legislative intent and vitiating redemption rights for an untold number of lienholders. Even if the decision’s errant reading of the Redemption Act could stand, Bank of America qualifies as a redemptioner as a matter of fact.

The Condominium Act specifies the date on which a condominium association creates, gives record notice of, and perfects its lien:

“Recording of the [condominium] declaration constitutes record notice and perfection of the lien for assessments... [N]o further recording of any

claim or lien for assessment under this section shall be required to perfect the association's lien." RCW 64.34.364(7).

Tanglewood thus created and perfected its lien in 2006 by recording its declaration (CP 40-98). Bank of America recorded its deed of trust in 2007, "subsequent in time" to Tanglewood's lien (CP 141-58).

The Court of Appeals disregarded Section 7 and the basic premise of "race notice" jurisprudence – the comparison of recording dates – holding instead that Bank of America's deed of trust was not "subsequent in time" because RCW 64.34.364(1) provides: "The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due" (A-5). But Section 1 merely provides that liens created and perfected under Section 7 "automatically attach at the time the assessment is due." *Mira Owners Ass'n v. Lawrence*, No. C10-630RAJ, 2011 WL 677425, *3 (W.D. Wash. Feb. 16, 2011). And it is self-refuting judicial legislation for the Court of Appeals to hold that "*before* 'the time the assessment is due,' the association has no lien" (A-5; emphasis original). The Condominium Act states, in unequivocal terms, that the association perfects this lien when recording its declaration – which occurs, by necessity, *before* "the time the assessment is due."

If this Court does not intervene, the decision below will affect an unknown number of lienholders – not merely deed of trust beneficiaries, but holders of judgment liens, mechanic's liens, and child support liens, among others. A condominium lien has priority over all liens save those recorded prior to the declaration and tax/government liens. RCW

64.34.364(2)(a) and (c).^{2/} If the Court of Appeals decision stands, then those lienholders who recorded their liens after the condominium declaration but before a delinquency will be rendered subsequent in priority but not subsequent in time to the condominium lien – and lose not only their liens, but also the Redemption Act’s remedy, even though its purpose is to grant them a second chance “to recover their just demands.” *Millay*, 135 Wn.2d at 207.

IV. THE RETROACTIVE IMPACT OF SB 5541 IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE

The Legislature acted quickly to remedy and cure the Court of Appeals’ misinterpretation of the Redemption Act. The State Constitution provides that, unless otherwise qualified, laws passed in any legislative session take effect ninety days after adjournment – for this year’s regular session, on July 28, 2013.

SB 5541 presents the archetype for retroactive application by clarifying a statutory interpretation that this Court had not considered after controversy about the interpretation arose. The issue of its retroactivity deserves this Court’s scrutiny because at least six other pending cases involve interpretation of the Act – and an unknown number of other deeds

^{2/} For Bank of America’s deed of trust in this case and other mortgages recorded after a condominium declaration but “before the date on which the assessment sought to be enforced became delinquent,” that priority is limited “to the extent of [six months of] assessments for common expenses....” RCW 64.34.364 (2)(b) and (3). For all other lienholders subject to the condominium lien, its priority is unlimited.

of trust and judgment, mechanic's, child support, and other liens are affected by the decision below and SB 5541. *See* RCW Title 60. This Court's review will provide certainty, ensure judicial economy, and avert piecemeal and conflicting outcomes.^{3/}

Absent instructive language, a new statute or amendment applies retroactively when curative or remedial. *McGee Guest Home, Inc. v. Dept. of Soc. & Health Servs.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000) (en banc). However, retroactive application cannot supplant vested, contractual, or constitutional rights. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

SB 5541 satisfies these requirements.

(A) The Amendment Is Curative And Remedial

An amendment that “clarifies or technically corrects an ambiguous statute” is curative. *Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007) (en banc) (quotations omitted). Amendments adopted soon after controversies arise about statutory interpretation – notably, those “adopted in response to lower court decisions” – are viewed as curative and applied retroactively. *McGee*, 142 Wn.2d at 325.

^{3/} The six known cases are *Bank of America, N.A. v. Nottingham Properties I, LLC*, 11-2-35753-8 KNT; *Bank of America, N.A. v. Nottingham Properties I, LLC*, 11-40229-1 SEA; *Bank of America, N.A. v. Nottingham Properties I, LLC*, 11-2-26940-0 SEA; *Bank of America, N.A. v. The Condo Group, LLC*, 13-2-02845-0 KNT; *The Bank of New York Mellon v. The Condo Group, LLC*, 12-2-08047-8 (Snohomish County); and *Bank of America, N.A. v. The Condo Group, LLC*, 69904-1-I.

The clarified statute is remedial because it “better[s] or forward[s] remedies already existing for the enforcement of rights and the redress of injuries,” *i.e.*, redemption. *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (en banc).

(B) Retroactivity Will Not Harm Vested Rights

A vested right is “something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property...” *Gillis v. King Cy.*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953) (quotation omitted).

SB 5541 affects no vested right. Fulbright’s purchase of the condominium was subject to a right of redemption; he holds only a sheriff’s certificate of purchase, which does not pass title. *W.T. Watts, Inc. v. Sherrer*, 89 Wn.2d 245, 248, 571 P.2d 203 (1977) (en banc); see 2 Wash. State Bar Ass’n, *Washington Real Property Deskbook* § 20.14(8)(c) at 20-39 (4th ed. 2009).

(C) The Time For Redemption Has Not Expired

SB 5541 also applies retroactively because the time to redeem has not run. There is no dispute that Bank of America tendered the funds to redeem the property and filed this declaratory relief action within the one-year redemption period (CP 109). Those acts tolled the redemption period. *See generally, Millay*, 135 Wn.2d 193.

CONCLUSION

The Court of Appeals erred in interpreting the Redemption Act and the Condominium Act to deny redemption rights to Bank of America. This Court should undo that error by issuing a decision that confirms and vindicates legislative intent, sustains the careful balance of these statutes, restores uniformity, and provides definitive guidance to the lower courts on an issue of public significance. This Court should hold that:

(1) As the Legislature has confirmed, Bank of America is an authorized redemptioner under RCW 6.23.010 as written before and after SB 5541 because its deed of trust is subsequent in priority to the lien on which the property was sold.

(2) As the Condominium Act's plain language shows, Tanglewood created and perfected its condominium lien by recording its condominium declaration in 2006. Bank of America recorded its deed of trust in 2007 – “subsequent in time” to that lien – and it is an authorized redemptioner under RCW 6.23.010 as written before and after SB 5541.

(3) SB 5541, which amends RCW 6.23.010 effective July 28, 2013, has retroactive effect and authorizes redemption of a foreclosed property by a junior lienholder when a sheriff's deed or title has not issued. As a result, Bank of America is an authorized redemptioner.

Dated: May 8, 2013

Douglas E. Winter (*PHV*)
BRYAN CAVE LLP
1155 F Street, N.W.
Washington DC 20004
(202) 508-6000 tel
(202) 508-6200 fax

Respectfully submitted,

By: 
Brian S. Sommer, WSBA No. 37019
Steven K. Linkon, WSBA No. 34896
RCO LEGAL, P.S.
13555 SE 36th Street, Ste. 300
Bellevue, WA 98006
(425) 586-1972 tel
(425) 283-5972 fax

Attorneys for *Petitioner* BANK OF AMERICA, N.A.

2013 APR -8 AM 10: 18

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BAC HOME LOANS SERVICING, LP, a) foreign limited partnership,) Appellant,) v.) MICHAEL FULBRIGHT and JANE DOE) FULBRIGHT, individually and the) marital community composed thereof,) Respondents.)	No. 67608-3-1 DIVISION ONE PUBLISHED OPINION FILED: April 8, 2013
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------

BECKER, J. — This court addressed the priority of a lien for unpaid condominium assessments in Summerhill Vill. Homeowners Ass'n v. Roughley, ___ Wn. App. ___, 289 P.3d 645 (2012). As we held in Summerhill, the association's lien arises under RCW 64.34.364(1) "from the time the assessment is due." The reference to the recording of the condominium declaration in RCW 64.34.364(7) does not determine when the association's lien arises. If the unit on which the association forecloses a superpriority lien is already subject to a deed of trust, the holder of the deed of trust is not a proper redemptioner because its lien is not "subsequent in time" to the lien on which the property was sold. RCW 6.23.010(1)(b). The trial court properly entered summary judgment rejecting the lender's attempt to redeem.

The condominium in this case is Tanglewood at Klahanie in Issaquah. In 2006, the declaration of condominium was recorded. In 2007, Bank of America¹ recorded a deed of trust on a unit in the Tanglewood condominium. The deed of trust secured the bank's loan of \$277,000 to Jeanne Lewis for purchase of the unit.

In May 2008, Lewis became delinquent in paying the monthly condominium assessments due to the Tanglewood homeowners' association.

In 2009, the association began a judicial foreclosure proceeding to collect the delinquent assessments. The lawsuit named Lewis, her marital community, and Bank of America as defendants. The bank was served with the summons and complaint the following week, in early February 2009. The bank did not respond. Lewis also failed to respond. In June 2009, the trial court entered a default judgment, order, and foreclosure decree against all defendants.

In May 2010, the King County Sheriff's Office held a public auction. Michael Fulbright, respondent in this appeal, bought the unit at the auction for a high bid of \$14,481.83—the total of the unpaid assessments, plus \$100.00.

In June 2010, the sale was confirmed by court order.

In April 2011, within the statutory time limit for redemption, Bank of America notified the sheriff's office of its intent to redeem the unit under the Washington redemption law, chapter 6.23 RCW. The bank intended to redeem

¹ Although the caption refers to the appellant in this case as BAC Home Loans Servicing LP, the parties' briefs reflect that this entity has merged into Bank of America and that Bank of America is now the proper appellant.

No. 67608-3-1/3

the unit from Fulbright by paying him the purchase price he paid at the sheriff's sale, plus Fulbright's costs and accrued interest. The sheriff's office forwarded the notice to Fulbright. Fulbright objected that the bank was not a qualified redemptioner. The bank sent the sheriff's office a cashier's check. The sheriff's office refused to issue a certificate of redemption.

In May 2011, the bank sued Fulbright in superior court, seeking a declaratory judgment that it was authorized to redeem the property. Fulbright counterclaimed for an order quieting title in his favor. There were no disputed issues of fact. The trial court denied the bank's motion for summary judgment and quieted title in Fulbright. The bank then brought this appeal.

Bank of America contends the trial court erred in its interpretation of the condominium assessment lien statute, RCW 64.34.364, as it applies to Washington's redemption statute, RCW 6.23.010.

We considered the interaction of these statutes in our recent opinion in Summerhill, a factually similar case. Summerhill, 289 P.3d at 647-49. We adhere to that opinion and rely on it in affirming the trial court's decision in this case. The only difference between this opinion and Summerhill is that here, we have the opportunity to amplify our reasons for holding that a condominium association's superpriority lien for unpaid assessments for common expenses arises after the deed of trust lien on the unit, not before—notwithstanding RCW 64.34.364(7).

In Summerhill, the issue of the effect of RCW 64.34.364(7) was raised

belatedly in a motion for reconsideration by GMAC Mortgage LLC, the entity in the position that Bank of America occupies in the present case. We issued a substitute opinion in which we briefly addressed the new argument in a footnote.

The footnote stated:

RCW 64.34.364(7) provides that recording of a condominium association declaration "constitutes record notice and perfection of the lien for assessments." In a motion for reconsideration, GMAC contends this provision means any mortgage loan made after the filing of the declaration is subsequent in time for purposes of RCW 6.23.010(1)(b). We reject this contention. The association's lien does not arise until the "assessment is due." RCW 64.34.364(1).

Summerhill, 289 P.3d at 648 n.7.

In the present case, Bank of America disputes Summerhill's holding that an association's lien for an assessment does not arise until the assessment is due. The bank makes RCW 64.34.364(7) the centerpiece of its argument that an association's lien arises earlier, when the declaration of condominium is recorded. The bank thus argues that because the Tanglewood declaration of condominium was recorded in 2006 and the bank's deed of trust was not recorded until 2007, the bank's deed of trust was "subsequent in time" to the assessment lien and was therefore subject to redemption under RCW 6.23.010.

The relevant provisions of the condominium assessment lien statute are as follows:

Lien for assessments. (1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.

....
(7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section shall be

required to perfect the association's lien, the association may record a notice of claim of lien for assessments under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section.

RCW 64.34.364(1), (7).

According to the bank, the only function of subsection (1) is to state the time when the right to enforce the already existing lien begins. The bank argues that the lien comes into existence at the time the declaration of condominium is recorded because under subsection (7), the recording of the declaration "constitutes record notice and perfection of the lien for assessments."

The bank fails to explain its assertion that the terms "record notice and perfection" in subsection (7) necessarily signify the time at which a lien comes into being. The bank argues that a lien cannot be "perfected" that does not yet exist, but the bank does not cite authority for this proposition.

Subsection (1) speaks directly to timing. "The association has a lien on a unit for any unpaid assessments levied against a unit *from the time* the assessment is due." RCW 64.34.364(1) (emphasis added). Stated another way, *before* "the time the assessment is due," the association has no lien.

The lien expressly belongs to the association. It is described in subsection (1) as "a lien . . . for any *unpaid* assessments levied" against a unit. RCW 64.34.364(1) (emphasis added). An assessment against a unit cannot be "unpaid" until a unit owner's association has been organized, the association levies assessments against the unit, and the association receives no payment

within the allotted time. At the time the declaration of condominium is recorded, none of these events have occurred. Therefore, a lien for unpaid assessments cannot exist at that time.

The meaning of subsection (7) is that the recording of the condominium declaration "constitutes record notice and perfection of the lien for assessments" that may arise in the future as provided by subsection (1). Recording of the declaration does not accelerate when an actual lien for any given assessment arises or first exists. Recording of the declaration simply gives notice to the world that assessment liens may arise in the future against units in the condominium.

The Tanglewood condominium declaration was recorded in 2006. When Bank of America's deed of trust against the Lewis unit was recorded in 2007, the recording of the declaration gave the bank notice that a future assessment lien might arise if Lewis became delinquent on her assessments. As it turned out, Lewis did become delinquent in May 2008. From May 2008 onward, the Tanglewood association had a lien against the Lewis unit. When the association initiated foreclosure proceedings, the bank was made a defendant and received notice. This was the bank's opportunity to step in and pay off the delinquent assessments in order to avoid having its own lien eliminated. See Summerhill, 289 P.3d at 648 & n.6. The bank missed this opportunity.

The bank's deed of trust was recorded before the lien for assessments came into existence, not afterwards. Because its lien was not "subsequent in

No. 67608-3-1/7

time" to the association's lien as required by RCW 6.23.010(2) for the bank to be an authorized redemptioner, the redemption statute does not afford the bank a second chance to protect its lien.

Affirmed.

Becker, J.

WE CONCUR:

Leach, C. J.

Schubler, J.

RCW 6.23.010
Redemption from sale — Who may redeem — Terms include successors.

***** CHANGE IN 2013 *** (SEE 5541.SL) *****

(1) Real property sold subject to redemption, as provided in RCW 6.21.080, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

(a) The judgment debtor, in the whole or any part of the property separately sold.

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners.

(2) As used in this chapter, the terms "judgment debtor," "redemptioner," and "purchaser," refer also to their respective successors in interest.

[1987 c 442 § 701; 1899 c 53 § 7; RRS § 594. Prior: 1897 c 50 § 15. Formerly RCW 6.24.130.]

RCW 64.34.364
Lien for assessments.

*** CHANGE IN 2013 *** (SEE 5077-S.SL) ***

- (1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.
- (2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. A lien under this section is not subject to the provisions of chapter 6.13 RCW.
- (3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.
- (4) The priority of the association's lien against units encumbered by a mortgage held by an eligible mortgagee or by a mortgagee which has given the association a written request for a notice of delinquent assessments shall be reduced by up to three months if and to the extent that the lien priority under subsection (3) of this section includes delinquencies which relate to a period after such holder becomes an eligible mortgagee or has given such notice and before the association gives the holder a written notice of the delinquency. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.
- (5) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien priority provided for under subsection (3) of this section.
- (6) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.
- (7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien, the association may record a notice of claim of lien for assessments under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section.
- (8) A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within three years after the amount of the assessments sought to be recovered becomes due.
- (9) The lien arising under this section may be enforced judicially by the association or its authorized representative in the manner set forth in chapter 61.12 RCW. The lien arising under this section may be enforced nonjudicially in the manner set forth in chapter 61.24 RCW for nonjudicial foreclosure of deeds of trust if the declaration (a) contains a grant of the condominium in trust to a trustee qualified under RCW 61.24.010 to secure the obligations of the unit owners to the association for the payment of assessments, (b) contains a power of sale, (c) provides in its terms that the units are not used principally for agricultural or farming purposes, and (d) provides that the power of sale is operative in the case of a default in the obligation to pay assessments. The association or its authorized representative shall have the power, unless prohibited by the declaration, to purchase the unit at the foreclosure sale and to acquire, hold, lease, mortgage, or convey the same. Upon an express waiver in the complaint of any right to a deficiency judgment in a judicial foreclosure action, the period of redemption shall be eight months. Nothing in this section shall prohibit an association from taking a deed in lieu of foreclosure.
- (10) From the time of commencement of an action by the association to foreclose a lien for nonpayment of delinquent assessments against a unit that is not occupied by the owner thereof, the association shall be entitled to the appointment of a receiver to collect from the lessee thereof the rent for the unit as and when due. If the rental is not paid, the receiver may obtain possession of the unit, refurbish it for rental up to a reasonable standard for rental units in this type of condominium, rent the unit or permit its rental to others, and apply the rents first to the cost of the receivership and attorneys' fees thereof, then to the cost of refurbishing the unit, then to applicable charges, then to costs, fees, and charges of the foreclosure action, and then to the payment of the delinquent assessments. Only a receiver may take possession and collect rents under this subsection, and a receiver shall not be appointed less than ninety days after the delinquency. The exercise by the association of the foregoing rights shall not affect the priority of preexisting liens on the unit.
- (11) Except as provided in subsection (3) of this section, the holder of a mortgage or other purchaser of a unit who obtains the right of possession of the unit through foreclosure shall not be liable for assessments or installments thereof that became

due prior to such right of possession. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners, including such mortgagee or other purchaser of the unit. Foreclosure of a mortgage does not relieve the prior owner of personal liability for assessments accruing against the unit prior to the date of such sale as provided in this subsection.

(12) In addition to constituting a lien on the unit, each assessment shall be the joint and several obligation of the owner or owners of the unit to which the same are assessed as of the time the assessment is due. In a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. Suit to recover a personal judgment for any delinquent assessment shall be maintainable in any court of competent jurisdiction without foreclosing or waiving the lien securing such sums.

(13) The association may from time to time establish reasonable late charges and a rate of interest to be charged on all subsequent delinquent assessments or installments thereof. In the absence of another established nonusurious rate, delinquent assessments shall bear interest from the date of delinquency at the maximum rate permitted under RCW 19.52.020 on the date on which the assessments became delinquent.

(14) The association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

(15) The association upon written request shall furnish to a unit owner or a mortgagee a statement signed by an officer or authorized agent of the association setting forth the amount of unpaid assessments against that unit. The statement shall be furnished within fifteen days after receipt of the request and is binding on the association, the board of directors, and every unit owner, unless and to the extent known by the recipient to be false.

(16) To the extent not inconsistent with this section, the declaration may provide for such additional remedies for collection of assessments as may be permitted by law.

[1990 c 166 § 6; 1989 c 43 § 3-117.]

Notes:

Effective date -- 1990 c 166: See note following RCW 64.34.020.

CERTIFICATION OF ENROLLMENT

SENATE BILL 5541

Chapter 53, Laws of 2013

63rd Legislature
2013 Regular Session

REAL PROPERTY--REDEMPTION

EFFECTIVE DATE: 07/28/13

Passed by the Senate March 11, 2013
YEAS 47 NAYS 2

BRAD OWEN

President of the Senate

Passed by the House April 9, 2013
YEAS 93 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved April 23, 2013, 4:34 p.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5541** as passed by the Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

April 24, 2013

**Secretary of State
State of Washington**

SENATE BILL 5541

Passed Legislature - 2013 Regular Session

State of Washington

63rd Legislature

2013 Regular Session

By Senators Hobbs, Fain, Hatfield, and Harper

Read first time 02/04/13. Referred to Committee on Financial Institutions, Housing & Insurance.

1 AN ACT Relating to redemption of real property; and amending RCW
2 6.23.010.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 6.23.010 and 1987 c 442 s 701 are each amended to read
5 as follows:

6 (1) Real property sold subject to redemption, as provided in RCW
7 6.21.080, or any part thereof separately sold, may be redeemed by the
8 following persons, or their successors in interest:

9 (a) The judgment debtor, in the whole or any part of the property
10 separately sold.

11 (b) A creditor having a lien by judgment, decree, deed of trust, or
12 mortgage, on any portion of the property, or any portion of any part
13 thereof, separately sold, subsequent in (~~time~~) priority to that on
14 which the property was sold. The persons mentioned in this subsection
15 are termed redemptioners.

16 (2) As used in this chapter, the terms "judgment debtor,"
17 "redemptioner," and "purchaser(~~er~~)" refer also to their respective

1 successors in interest.

Passed by the Senate March 11, 2013.

Passed by the House April 9, 2013.

Approved by the Governor April 23, 2013.

Filed in Office of Secretary of State April 24, 2013.

FINAL BILL REPORT

SB 5541

C 53 L 13
Synopsis as Enacted

Brief Description: Concerning the redemption of real property.

Sponsors: Senators Hobbs, Fain, Hatfield and Harper.

Senate Committee on Financial Institutions, Housing & Insurance
House Committee on Judiciary

Background: Dating back to the 19th century, a debtor whose real property is sold at a sheriff's foreclosure sale may have the opportunity to purchase back the real property by reimbursing the winning bid amount to the sheriff sale purchaser. This process is known as redemption. Redemption voids the sheriff's sale.

Redemption can occur:

- within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment; or
- within one year after the date of the sale.

Parties entitled to redeem include the judgment debtor and creditors who have a lien on the real property by judgment, decree, deed of trust, or mortgage on any portion of the property, or any portion separately sold subsequent in time to when the property was sold. In other words, the time that a creditor's interest is recorded determines a creditor's priority to redeem a foreclosure sale.

Super Lien Priority. Under RCW 64.34.364 condominium associations have super lien priority. If a unit holder is delinquent in assessments, the association can file a lien against a unit. The association lien is limited to the assessment amount for the six months prior to foreclosure. When an association forecloses upon a lien, and there is a mortgage on the unit recorded before the date on which the assessment became delinquent, the mortgagee must receive notice of the pending foreclosure and has the opportunity to pay off the lien prior to the sheriff's sale to preserve its deed of trust lien. If the mortgage lender does not pay the off the lien in this instance, the mortgage lender's lien is extinguished.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summerhill Village Homeowner's Association v. Roughley. In a recent Court of Appeals Division 1 case, a unit owner was delinquent in paying the condominium association assessments, and the condominium association placed a lien on the unit and moved to foreclose on the lien. The condominium association named and served the mortgage lender in its judicial lien foreclosure action. Because the lender did not respond or pay the six-month priority before the sheriff's sale, the lender's deed of trust was extinguished. The lender's servicer subsequently instituted foreclosure proceedings against the borrower who was in default. According to the case, it was at this time the lender learned of the association's lien and foreclosure sale and tried to redeem. The court held that the lender was not a redemptioner. By not paying off the association's lien, the lender's rights were extinguished and they were not considered a redemptioner.

Summary: A creditor's priority to redeem an interest in foreclosed real property is determined by the creditor's priority, not the time in which the interest was recorded.

In the instance where a condominium association uses its super lien priority to foreclose on a unit owner for unpaid assessments, the lender's priority is not extinguished for failing to pay off the association's lien.

Votes on Final Passage:

Senate	47	2
House	93	0

Effective: July 28, 2013.