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COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Receivership of Tragopan Properties  
King County Superior Court Case No. 08-2-34767-2 KNT

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in denying the claim of Smith Development Co., Inc.
2. The trial court erred in entering Finding of Fact No. 20: “Mr. Smith did not sign a reaffirmation during his chapter 13 bankruptcy.” CP 594.
3. The trial court erred in entering Finding of Fact No. 22: “There was no revival of the statute of limitations on the July 1994 Note.” CP 594.
4. The trial court erred in entering Finding of Fact No. 23 “The court finds that Mr. Smith and his successors in interest under the Deed In Lieu of Foreclosure are liable to Smith Development in the amount of zero dollars (\$0.00), and that the deeds securing the obligation to repay that liability secure zero dollars (\$0.00).

### B. Issues Pertaining to Assignments of Error

1. Are the findings above clear error of law?

## II. STANDARD OF APPELLATE REVIEW AND FINALITY OF ORDER

### A. Standard of Review

The appropriate standard of review is *de novo* because the issue on appeal is based on an application of a Washington Statute to undisputed facts. *State v. Nemitz*, 105 Wn.App. 205, 19 P.3d 480 (2001) (holding that the standard of review for fact-based rulings is abuse of discretion and the standard of review for interpretation of the law is *de novo*).

**B. Finality of Order**

A Final Judgment is appealable as a matter of right in a civil case. RAP 2.2. Denying Tom Delanty's under Civ. P. 56 (b) has been held to be an appealable final order. *Seattle First National Bank v. Marshall*, 16 Wn.App. 503, 557 P.2d 352 (1976).

**III. STATEMENT OF THE CASE**

**A. Procedural History**

Trustee for the property at issue, Alison A. Haig, commenced a non-judicial foreclosure on September 11, 2008. CP 226, 337-392. Purported owners of the property at issue, Tragopan Properties, LLC, ("Tragopan"), filed a complaint for the dissolution of the LLC and for the appointment of a receiver on October 7, 2008 under RCW 7.60.025(1)(t) and RCW 25.15.275. CP 1-10. On November 4, 2008, Tom Delanty, dba Smith Development and Investment Company, Inc. ("Smith

Development”), submitted a creditor’s proof of claim in the amount of \$255,000. CP 11-27.

An objection to the claim was filed by Tragopan May 6, 2009. CP 143-210. Following a bench trial on a stipulated record, the Honorable Richard McDermott of the King County Superior Court entered a final judgment denying Smith Development’s claim On May 14, 2010. CP 576. Tom Delanty, dba Smith Development, filed a notice of appeal of the final judgment on August 10, 2010.

**B. Factual History**

On July 28, 1994, Mr. Jackson Smith executed a promissory note and deed of trust to Financial Services Corporation of Washington (“Financial Services”) secured by two contiguous parcels of property located in Seattle Washington in exchange for approximately \$68,000. CP 16. The note matured on August 1, 1996. CP 16. Appellant Tom Delanty was an owner of Financial Services. CP 87, 534.

On September 12, 1996, Financial Services assigned the note and deed of trust to Smith Development (owned by Mr. Tom Delanty, and no relation to Mr. Jackson Smith, the debtor) and Michiko Vincent (each with a 50% interest). CP 21. Later, Michiko Vincent assigned her interest back to Smith Development on August 14, 2008, thus giving Smith Development 100% interest in the subject properties. CP 27.

Appellees agree that the note was extended several times, evidenced by copies of promissory notes and modifications contained in the appellee's January 20, 2009, motion for the "Turnover of Certain Original Documents." CP 28-79.

After the underlying note was overdue and extended several times—including default for overdue property taxes—Mr. Jackson Smith filed a Chapter 13 Bankruptcy in the Western District of the U.S. Bankruptcy Court of the Western District of Washington on January 3, 2003. CP 225, 261-313, 315, *see generally* CP 87-89. In that Bankruptcy proceeding, Mr. Jackson Smith filed with the court a proposed plan to repay the debts owed to "Tom Delanty, Financial Serv. Corp of WA" in the amount of approximately \$95,000 with monthly interest payments in the amount of \$1,089 over 36 months. CP 225, 327, 345-46. The bankruptcy plan was in writing and was signed under penalty of perjury by the petitioner, Mr. Jackson Smith, and with the advice of an attorney. CP 315. On October 6, 2003, Mr. Smith's Chapter 13 Bankruptcy petition was dismissed because Mr. Smith did not make any payments under the plan. CP 357-365.

On August 19, 2006, under dubious circumstances and without notification to, or grant of permission by, Smith Development, Mr. Jackson Smith deeded the property in lieu of foreclosure to Tragopan, a

single purpose LLC owned by Mr. Smith's friend, Efimenko, and his family attorney, Bruce Morgan. CP 90, 370-4. The deed in lieu of foreclosure—which Smith initially denied he signed—reflects that Efimenko and Morgan paid \$25,000 in consideration, and of that amount, \$15,000 represented property taxes that had already been paid by Efemenko and Morgan—in their own self interest, not for Jackson Smith's benefit. CP 374, 531, 537.

The trustee for the property, Haig, commenced a non-judicial foreclosure in favor of Tom Delanty on September 11, 2008. CP 226, 337-392. On October 7, 2008, Tragopan filed a complaint for the dissolution of the LLC and for the appointment of a receiver, creating a stay of the foreclosure. CP 1-10. On November 4, 2008, Tom Delanty submitted a creditor's proof of claim in the amount of \$255,000, which was subsequently rejected by the receiver and later the trial court. CP 11-27.

**C. Timeline of Events**

| <u>DATE</u> | <u>EVENT</u>   |
|-------------|--|
| 07/28/1994  | Promissory Note and Deed of Trust is executed in favor of Financial Services of Washington (Tom Delanty).                            |
| 08/01/1996  | The 7/28/1994 Promissory Note comes due.   |
| 09/12/1996  | Financial Services assigns 50% of the note and deed of trust to Smith Development (owned by Tom Delanty) and 50% to Michiko Vincent. |
| 08/01/2002  | The Statute of Limitations expires under RCW 4.16.040.   |
| 01/03/2003  | Mr. Jackson Smith files for Chapter 13 Bankruptcy, listing   |

the debt owed to Tom Delanty, restarting the statute of limitations.

10/06/2003 The Bankruptcy court dismisses the Chapter 13 for failure to make payments under the plan.

08/19/2006 Mr. Jackson Smith executes a deed in lieu of foreclosure to Tragopan.

08/14/2008 Michiko Vincent assigns her 50% interest to Smith Development (Tom Delanty).

09/11/2008 Trustee commences a non-judicial foreclosure in favor of Tom Delanty.

10/07/2008 Tragopan files a complaint for the dissolution of the LLC and for the appointment of a receiver.

11/04/2008 Smith Development (Tom Delanty) submits a creditor's proof of claim.

05/06/2009 Tragopan files an objection to the claim.

05/14/2010 Honorable Richard McDermott issues a final judgment denying the claim of Smith Development (Tom Delanty).

08/10/2010 Smith Development (Tom Delanty) files a notice of appeal of the final judgment.

#### **IV. ARGUMENT**

##### **A. Summary of Argument**

When Mr. Jackson Smith filed his Chapter 13 Bankruptcy repayment plan on January 3, 2003, listing the debt to Mr. Tom Delanty, he revived the debt, resetting the six year statute of limitations under RCW 4.16.040; the new statute of limitations would therefore run on January 3, 2009. Mr. Delanty was within the statute of limitations when he commenced a foreclosure on September 11, 2008, and later submitted a creditor's proof of claim in the amount of \$255,000 on November 4, 2008.

CP 11-27.

**B. The Trial Court Improperly Held That Listing of a Debt in a Chapter 13 Filing is Not an Acknowledgment of the Debt.**

**1. The Statute of Limitations for a Written Contract is Six Years.**

It is a well established legal principle that if the statute of limitations has run, a party is not necessarily precluded from bringing an action to recover a debt, “[T]he mere fact that an action on the security for a debt is extinguished or barred by the statute of limitations does not bar an action on the principal obligation.” 54 C.J.S. Limitations of Actions § 27. Moreover, “An action may still be maintained to require the performance of the conditions of a mortgage or for interest accruing after an action on the note becomes time-barred.” 54 C.J.S. Limitations of Actions § 26.

Under Washington law, the statute of limitations for written loans is six years from the expiration of the contract. RCW 4.16.040. Here, Tom Delanty’s loan to Mr. Jackson Smith was made July 28, 1994, maturing on August 1, 1996. CP 16. Applying the six year statute of limitations under RCW 4.16.040, the extension of credit on the July 28, 1994 loan would have expired on August 1, 2002.

**2. An “Acknowledgment” of a Debt Takes the Debt out of the Statute of Limitations, Reviving the Six Year Limitation Period.**

An exception to the six year statute of limitations is a signed *acknowledgement* of a debt. RCW 4.16.280, emphasis added. The statute reads:

No acknowledgement or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless it is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

RCW 4.16.280.

Courts have held that a written acknowledgement of a debt by the debtor restarts the statute of limitations on the collection of a debt. *Jewell v. Long*, 74 Wn.App. 854, 876 P.2d 473 (1994).

Moreover, established treatises agree that an acknowledgment of a debt takes the debt out of the statute of limitations, "A debtor's new promise to pay an antecedent debt or the debtor's acknowledgment of its continuing existence serves both to renew the debt and, when made after the applicable statute of limitations has run, to remove that bar to subsequent suit on the debt." 2 Calvin W. Corman, *LIMITATIONS OF ACTIONS* §9.11.1 (1991). The treatise on the statute of limitations goes on to say:

The Restatement (Second) of Contracts adopts the position, as do most recent decisions, that the effective promise or

acknowledgment need not be made within the original limitation period. The new promise to pay a past debt, regardless whether barred at the time the promise is made by the applicable statute of limitations, binds the promisor for a new limitation period.

2 Calvin W. Corman, LIMITATIONS OF ACTIONS § 9.11.1 (1991) (citing to Restatement (Second) of Contracts §82 (1981)).

In Washington, whether the acknowledgment must be made *before* the statute has run or whether the acknowledgment may be made *after* the statute has run, is discussed at length in the case *Lombardo v. Mottola*, 18 Wn.App. 227, 566 P.2d 1273 (1977).

In *Lombardo*, no payments were made under a promissory note executed by debtor Mottola in favor of creditor Lombardo. *Id.* at 227. Seven years after the note was executed, Mottola sent a letter to Lombardo, discussing his inability to pay the overdue note. *Id.* at 227. Although the letter was sent outside of the six year statute of limitations period, the court held that such a letter “significantly acknowledges” the debt, taking the case outside of the statute of limitations. *Id.* at 232. In holding that the debt was revived after the expiration of the statute of limitations, the court stated, “A writing acknowledging a debt which has already been barred ought to be construed much more strictly than a writing acknowledging a debt against which the statute has not run.” *Id.* at 230. In the instant case, under the July 28, 1994 promissory note, the six

year statute of limitations had run by July 28, 2000; however, actions taken by Mr. Jackson Smith should be construed as an acknowledgment of the debt, thus taking the debt outside of the statute of limitations under RCW 4.16.280.

**3. As a Matter of Law, Listing a Debt in a Chapter 13 Bankruptcy Filing is an Acknowledgment of the Debt Under the Jewell Test.**

The primary issue on appeal is whether Mr. Jackson Smith's Chapter 13 Bankruptcy filing on January 3, 2003—listing the loan owed to Tom Delanty—constitutes an acknowledgment of or promise to pay the debt, thus taking the debt out of the statute of limitations and restarting it. CP 327, 345.

It should be noted that Article I, § 8, cl.4, of the United States Constitution provides Congress with the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States”; however, the issue presented in this appeal does not pertain to federal powers, but rather a state law question.

Filing a Chapter 13 bankruptcy represents intent by the debtor to repay all or part of their debts. 11 U.S.C. § 1301, *et. seq.* Under a Chapter 13 plan, debtors propose a repayment plan to make installments to creditors over three to five years. *Id.* A plan may not exceed a period longer than five years. 11 U.S.C. §1322(d). During the bankruptcy period,

Bankruptcy law forbids creditors from starting or continuing collection efforts, also known as the automatic stay. 11 U.S.C. §362.

For an acknowledgment to restart the statute of limitations, the acknowledgement must (1) be in writing, (2) be a recognized existence of the debt, (3) be communicated to the creditor or to another person with intent that it be communicated to the creditor, and (4) not indicate an intent not to pay. *Jewell v. Long*, 74 Wn.App. 854, 876 P.2d 473 (1994) (citing to *Cannavina v. Poston*, 13 Wn.2d 182 (1942); *Griffin v. Lear*, 123 Wn. 191, 212 P. 271 (1923); *Addison v. Stafford*, 183 Wn 313, 316, 48 P.2d 202 (1935); *Rea v. Rea*, 19 Wn.App. 496, 499, 576 P.2d 84, review denied, 90 Wn.2d 1020 (1978)). Exactly that happened when Mr. Smith proposed his plan, signed under penalty of perjury, filed it with the court, and sent it to his creditors.

**a. Listing the Debt owed to Delanty in the Chapter 13 Bankruptcy was in Writing.**

First, to be considered an “acknowledgement” of a debt, it must be written. *Jewell*, 74 Wn.App. at 876. Here, Mr. Jackson Smith filed a Chapter 13 Bankruptcy petition in the Western District of U.S. Bankruptcy Court of the Western District of Washington. CP 225. On that petition, Mr. Smith acknowledged that he owed “Tom Delanty, Financial Serv. Corp of WA” approximately \$95,000 with monthly interest payments in

the amount of \$1,089. CP 225, 346. The listing of the debt on the Chapter 13 Bankruptcy was in writing, and signed by the petitioner. CP 315.

**b. Filing a Chapter 13 Bankruptcy Recognized the Existence of the Debt.**

Whether a debt has been acknowledged, under the second prong of the four factor test, requires that there be a “recognized existence of a debt.” *Jewell*, 74 Wn.App. at 876. Here, appellee Mr. Jackson Smith recognized the existence of the debt when he listed the debt in his Chapter 13 Bankruptcy filing.

In Washington, courts have held that evidence of the existence of a debt may be legally recognized through various written documents including letters and deeds of trust, while other jurisdictions have held that tax returns, corporate financial statements, and bankruptcy filings are appropriate recognitions of an existence of a debt.

In the Washington case, In *Lombardo v. Mottola*, supra, the court held that a letter from the debtor to the creditor restarted the statute of limitations. *Lombardo*, 18 Wn.App. 227. In that case, debtor Mottolla wrote a letter to creditor Lombardo acknowledging his inability to pay the debt, explaining that the debt would be repaid by another party. *Lombardo*, 18 Wn.App. at 228. The debt was never paid, and the creditor

Lombardo sued. *Id.* The court held that the letter written from the debtor to the creditor recognized the existence of the debt. *Id.*

Another Washington case, *Jewell v. Long*, supra, held that a deed of trust restarted the statute of limitations. In the *Jewell* case, creditor Jewell sued debtor Long to collect on a promissory note and foreclose on a deed of trust. *Jewell v. Long*, 74 Wn.App. at 854. Three years after the promissory note was executed, the debtor exchanged the original deed of trust for another deed of trust, desiring to exchange the collateral underlying the promissory note for another piece of real estate. *Id.* The court held that the new deed of trust executed three years after the promissory note was originated restarted the statute of limitations, and that such a deed of trust “recognized the existence of” the debt. *Id.*

Washington case law is silent as to whether a listing of a debt in a Chapter 13 Bankruptcy is considered a “recognized existence of a debt”; however, other jurisdictions have found that listing a debt on the financial statements of a corporation and debts listed on an estate tax return, have been held to be effective acknowledgements. *Federal Deposit Ins. Corp. v. Cardona*, 723 F.2d 132 (1<sup>st</sup> Cir. 1983) (holding estate tax return was valid acknowledgement of the debt); *Tyler Gilman Corp. v. Williams*, 216 Va. 548, 221 S.E.2d 129 (1976) (holding corporate financial statement was valid acknowledgment of the debt).

Perhaps the most persuasive (and perhaps only) case regarding listing a debt in a Bankruptcy repayment plan is an Arkansas case holding that listing a debt in a Chapter 12 bankruptcy would be considered an acknowledgment, reviving a time-barred debt. *Stogsdill v. Stogsdill*, 76 Ark. App. 474, 68 S.W. 3d 324 (Ark. App. 2002). In that case, the debtor borrowed multiple sums of money from his parents, Elizabeth and James Stogsdill, Sr. *Id.* at 477. In exchange, the debtor provided a promissory note secured by a mortgage containing a clause that any future advances to the debtor would be secured by that mortgage. *Id.* It should be noted that a Chapter 12 bankruptcy is functionally identical to a Chapter 13 bankruptcy, except that it is only available to “family farmers” and “family fishermen.” 11 U.S.C. §1201, *et. seq.* Similar to Chapter 13, it requires repayments to creditors over a three to five year time frame. *Id.*

Six years later, the debtor filed a voluntary Chapter 12 Bankruptcy where he included the mortgaged land as a nonexempt asset; he also listed his mother as a secured creditor in his reorganization plan. *Id.* at 478. After the death of both parents, the debtor’s siblings, as executors of the estate, sought payment on the unpaid notes listed in the mother’s will, despite the running of the statute of limitations. *Id.*

The appellate court held that the repayment of the loans was not time barred because the statute of limitations period was revived when the

acknowledgment of the debt was communicated as an intention to repay the debt in his Chapter 12 filing, “Therefore, the appellant’s...acknowledgement of the debt... served to revive any cause of action brought by or on behalf of Mrs. Stogsdill...” *Id.* at 484.

Similar to the *Lombardo* and *Jewell* cases, where a letter written by the debtor and a deed of trust, respectively, was held to be a proper acknowledgment of a debt, in this case, a clear written listing of a debt owed to “Tom Delanty” in a bankruptcy petition and repayment plan of \$1,089 over 36 months should be considered a “recognized existence” of the debt, taking the debt outside of the statute of limitations. CP 225, 346.

Moreover, Washington courts have not specifically rejected the theory that a repayment plan under bankruptcy is not considered a recognized existence of the debt. As represented in the *Stogsdill* case, courts have found that listing a debt in a Chapter 12 bankruptcy—which is functionally identical to a Chapter 13 bankruptcy—to be an appropriate recognition of an outstanding debt, thus taking it outside of the statute of limitations. Moreover, this court is urged to recognize that even though the statute of limitations had run on the original July 28, 1994 note—similar to the *Stogsdill* case, whereby the statute of limitations had run on the debt to the debtor’s parents—by virtue of Mr. Jackson Smith listing of the debt in the Chapter 13 filing and repayment plan, such actions

effectively revived the time-barred debt. All of the bankruptcy cases relied upon by the receiver are Chapter 7 cases where the debtor listed the debt, but where the petition was filed to discharge the debt (or otherwise dispute the debt).

**c. The debt listed on the bankruptcy was communicated to the creditor, Mr. Delanty.**

In order to meet the third prong of the test, the debt must be “communicated to the creditor or to another person with intent that it be communicated to the creditor.” *Jewell*, 74 Wn.App. at 854. Here, the listing of the debt in Mr. Jackson Smith’s Chapter 13 Bankruptcy was communicated to Mr. Delanty by the bankruptcy court, meeting the third prong of the test.

In a Chapter 13 Bankruptcy, the trustee for the bankruptcy proceeding will hold a meeting of creditors 20 to 50 days after the petition is filed with notice to all creditors. 11 U.S.C. § 1301, *et. seq.* During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. *Id.* The debtor must attend the meeting and answer questions regarding his or her financial affairs and the proposed terms of the plan. 11 U.S.C. § 343. After the meeting of creditors, the debtor, the chapter 13 trustee, and those creditors who wish to attend will

come to court for a hearing on the debtor's chapter 13 repayment plan. 11 U.S.C. § 1301, *et. seq.*

In the instant case, the third prong has been met because Mr. Tom Delanty, as the creditor, knew about the listing of the debt in Mr. Jackson Smith's Chapter 13 proceeding and relied upon it, evidenced by the fact that he attended the meeting of creditors. CP 354. The plan was never confirmed, however, because Mr. Jackson Smith failed to make required payments under the plan. CP 357-66.

**d. The Debt Listed in a Chapter 13 Bankruptcy indicates an Intent to Repay the Debt.**

Listing a debt in a Chapter 13 repayment plan indicates an intent by a debtor to repay all or part of their debts, meeting the fourth prong of the test. 11 U.S.C. § 1301, *et. seq.* Unlike a Chapter 7, where the intent is to strip away the debt, leaving the debtor with a fresh start, a Chapter 13 plan is a structured repayment plan set up by the court to make payments more manageable. *Id.* Because Mr. Jackson Smith filed a Chapter 13 bankruptcy—or promising to repay the debt—the fourth prong has been met.

The policy behind the statutes of limitation is readily apparent. An oral contract limitation period is three years compared with the written contract period of six years. RCW 4.16.040, RCW 4.16.080. When a debt

is put forth in writing there is little dispute about the amount of debt and the terms of payment. Conversely, in an oral contract memories fade, proof is lost over time, and there is likely less evidence that support the debt when the terms are based upon an oral contract. Treatises on the subject of the statute of limitations proffer that the main purpose of a limitations period is so that:

A defendant who is afforded repose after the expiration of a specified time is relieved of the obligation to defend against claims for which necessary evidence may no longer be available, memories have faded, or important witnesses may have disappeared.

2 Calvin W. Corman, *LIMITATIONS OF ACTIONS* § 1.1 (1991).

Here, the Chapter 13 bankruptcy filing listing the debt owed to Mr. Delanty was an express promise to repay the debt, regardless of the fact that the bankruptcy plan was ultimately dismissed due to Mr. Smith's inability to complete payments under the reorganization plan. His affirmation of the debt constituted a signed acknowledgement of the debt owed to Mr. Delanty, and restarted the statute of limitations. There can be no doubt that Mr. Smith, with the assistance of his counsel, intended to repay the loan.

The case law regarding the issue of whether listing a debt in a bankruptcy acknowledges the debt, thus restarting the statute of

limitations, is limited. Of the little case law on the subject, cases generally have been decided adversely to the creditor on the premise that the debtor by listing the debt seeks total discharge of the debt. *See generally, Biggs v. Mays*, 125 F.2d 693 (8<sup>th</sup> Cir. 1942), *In re: Plovill*, 105 F.2d 157, 159 (2<sup>nd</sup> Cir., 1939). These cases relied upon by the receiver are distinguished from the present case because Mr. Jackson Smith did not intend to discharge his debt to Mr. Delanty—as would be the result in a Chapter 7 case—but rather Mr. Jackson Smith *intended to pay in full* under a Chapter 13 repayment plan.

In *Biggs v. Mays*, *supra*, the debtor sought total discharge of an unsecured debt in a bankruptcy proceeding. 125 F.2d at 693. He listed a time barred debt in his bankruptcy filing, and the creditor claimed that listing the debt was an acknowledgement, taking it out of the statute of limitations. *Id.* at 697. The Court noted that the listing of the debt “signified an intention [to] not to pay the debt . . . when the *very purpose of listing the debt*, as in a bankruptcy proceeding, *is to secure the discharge of that very debt.*” *Id.* at 697-698, *emphasis added*. The *Biggs* court clearly declined to hold that listing a debt in a bankruptcy proceeding was an acknowledgement of a debt because the purpose of the bankruptcy was to discharge the entire debt, but the implications is there that if the proceeding was a Chapter 13, the rule would be the opposite.

Unlike *Biggs*, where the debtor did not intend to repay the debt, Mr. Jackson Smith did intend to repay the debt, evidenced by the Chapter 13 Bankruptcy filing listing the debt owed to Mr. Delanty, in addition to the specific repayment schedule of \$1,089 over 36 months. CP 327, 345-6.

In another bankruptcy case relied upon by the reciever, *In re: Plovill*, a creditor claimed that listing the debt in the bankruptcy was an “acknowledgement” of debt, taking it out of the statute of limitations. 105 F.2d at 159. The court ultimately held that listing a debt in Bankruptcy is not an acknowledgment because:

[A]n acknowledgement is effective only if it imports an intention to pay....The listing of a claim in a bankrupt’s schedules, without notation that it is disputed or barred, is an acknowledgement of the debt in a literal sense....The listing is not, however, an acknowledgment that implies an intention by the bankrupt to pay the debt. On the contrary, it signifies an intention by the bankrupt not to pay.

*Id.* at 159-60, citations omitted.

The court’s holding was predicated on the premise that listing a debt in bankruptcy showed an intent to *discharge* the debt, unlike the present case, where Mr. Jackson Smith listed the debt in a Chapter 13 plan, indicating an intent to *repay* the debt.

Here, the Chapter 13 Bankruptcy filing, listing the debt owed to Mr. Delanty, coupled with the specific repayment schedule of \$1,089 over

36 months indicates an intent to repay the debt to Mr. Delanty. CP 327, 345-6. Moreover, in his April 23, 2010 deposition, Mr. Jackson Smith specifically listed the Delanty debt and provided for its payment. CP 529-541. Such clear intentions to pay the debt not only meet the fourth prong of the four part test, but also overcome case law to the contrary, stating that listing a debt in a bankruptcy is not an acknowledgement.

**4. As a Matter of Law, the Bankruptcy Statute of Limitations is Inapplicable.**

During the pendency of a bankruptcy proceeding, the statute of limitations is tolled. 11 U.S.C. § 108. The purpose of tolling the limitations period is to protect creditors from the date of the filing the petition in bankruptcy. 2 Calvin W. Corman, LIMITATIONS OF ACTIONS § 8.4.4 (1991). The applicable bankruptcy code regarding the statute of limitations is not disputed by the appellant:

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has *not expired* before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108 (c), emphasis added.

Applying the bankruptcy statute of limitations to the instant case, however, is inapplicable because it applies only to nonbankruptcy proceedings that have “not expired before the date of the filing.” *Id.*

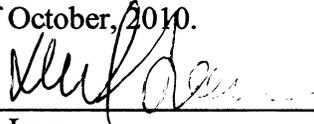
Here, it is clear that the statute of limitations had run on the debt. Tom Delanty’s loan to Mr. Jackson Smith was made July 28, 1994, maturing on August 1, 1996. CP 16. Applying the six year statute of limitations under RCW 4.16.040, the extension of credit on the July 28, 1994 loan would have expired on August 1, 2002.

Because Mr. Jackson Smith filed his bankruptcy on January 3, 2003, listing the debt to Delanty revived the debt, applying the six year statute of limitations under RCW 4.16.040, the new statute of limitations would run on January 3, 2009. Mr. Delanty was within the statute of limitations when he started a foreclosure September 11, 2008, and then submitted a creditor’s proof of claim in the amount of \$255,000 on November 4, 2008. CP 11-27, 226, 337-92.

## V. CONCLUSION

For the reasons set out above, the Appellant respectfully requests that the Court of Appeals find that the trial court erred in denying the claim of Smith Development Corporation and reverse the trial court on this issue.

Respectfully submitted this 29 day of October, 2010.



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