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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.

REPLY 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.

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STATE OF WASHINGTON

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INTRODUCTION

This appeal presents this Court with the unique opportunity to revisit two recent decisions after the Legislature rejected their interpretation of the Redemption Act, RCW 6.23.010. The implications of this rare legislative intervention deserve this Court's careful consideration. As Respondent concedes (Resp. Br. at 12), the result here may control the outcomes of at least 5 known cases. Lenders could be denied their security interests for millions of dollars in loans; borrowers could be left with millions of dollars in loan obligations; and Respondent, who did nothing but exploit condominium foreclosures that the lenders had not pursued, could reap millions of dollars in profits. Alternatively, lenders could redeem their security interests; borrowers could see their debts extinguished; and Respondent could be made whole, with interest at a profitable rate – as the Legislature intended.

Condo Group fails to refute any of the three independent reasons why Washington law authorizes Bank of America to redeem in this case: (1) as the Legislature confirmed by passing SB 5541, the Redemption Act was not drafted – and should not be interpreted – to deny redemption rights to the primary lienholder whose interest was extinguished by judicial foreclosure; (2) the Bank's lien against the condominium was

subsequent in time to the perfected condominium association lien; and (3) SB5541 applies retroactively to authorize redemption on these facts.

Condo Group tries to protect its anticipated windfall by arguing that *Summerhill* and *Fulbright* were correct and can survive the import and impact of SB 5541. That amendment, adopted in direct response to *Summerhill*, confirms that the Legislature intended the Redemption Act to apply to *all* junior lienholders affected by a judicial foreclosure. SB 5541 also fulfills the requirements for retroactive application in this case.^{1/}

ARGUMENT

A. The Redemption Act Was Ambiguous Before and After *Summerhill*.

Bank of America's Opening Brief cited cases and learned authorities that supported interpreting the Redemption Act's "subsequent in time" language as synonymous with "junior lienholder" or "subsequent in priority" (Op. Br. 14-16). Despite more than 100 years of Washington jurisprudence, Condo Group can cite nothing prior to *Summerhill* that supports its restrictive and punitive interpretation of the Act.

^{1/} Bank of America does not contend that SB 5541 applies retroactively to all judicial foreclosures, but solely to those unresolved matters in which an extinguished lienholder sought redemption in a timely manner and the purchaser at the Sheriff's Sale has not acquired title.

Condo Group's reading also negates both the sound public policy objectives of redemption and the rules of statutory construction. The Redemption Act provides affected parties – whether individuals, local lenders, or financial institutions – with a “second chance” to regain an interest vitiated by judicial foreclosure. 27 Marjorie Dick Rombauer, *Washington Practice, Creditors' Remedies – Debtors' Relief* § 3.19 (2d ed. 2010). The foreclosed lender-lienholder can redeem and sell the property – its only security – to minimize its financial loss. This outcome vitiates the borrower's liability on the unpaid note and averts a windfall to a stranger to the transaction. And our Supreme Court has long made it clear that the Redemption Act is to be read with a “liberal rule of construction.” *Scott v. Patterson*, 1 Wash. 487, 489, 20 P. 593 (1889).

Condo Group's argument also exposes the ambiguity of the Redemption Act. *Summerhill* and *Fulbright* cannot be reconciled with the unequivocal *prior* statements of courts and authorities that the Act protected junior lienholders. SB 5541 resolved that ambiguity and should further inform the Court's reading of the Act.

Condo Group effectively admits that, before SB 5541, the Redemption Act was ambiguous. Before *Summerhill* – and even after – courts and commentators understood the Redemption Act to allow any foreclosed creditor to redeem. In *Millay v. Cam*, 135 Wn.2d 193, 955 P.

791 (1998), the Supreme Court stated without qualification: “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” (emphasis added). In *Olson Eng’g, Inc. v. KeyBank Nat. Ass’n*, 171 Wn. App. 57, 71, 286 P.3d 390 (2012), decided after *Summerhill*, the Division II Court of Appeals wrote that “statutory redemption allows *junior lien holders* ... to buy the foreclosed property” (emphasis added). Professor Stoebuck and other secondary authorities are consistent. *See, e.g.*, Stoebuck, 18 Washington Practice, Real Estate Transactions 19.19 (2d ed. 2010) (RCW 6.23.010(1)(b) applies to “a creditor who has a lien . . . *subsequent in priority* to that being foreclosed....”) (emphasis added).

Condo Group ascribes the Supreme Court’s use of the phrase “junior lien creditors” in *Millay* as a “convenient shorthand description” – and says that “phrases like ‘junior lienholder’ and ‘subsequent in time’ [are] used somewhat interchangeably by courts and secondary authorities” (Resp. Br. at 25). If a statute has two or more reasonable meanings – here, “junior lienholder” or “subsequent in priority” versus “subsequent in time” – it is ambiguous. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). The divergence of *Summerhill* from the language of *Millay*, *Olson*, and secondary authorities confirms the ambiguity. To hold

otherwise would be to hold that these respected Washington authorities, including our highest court, have been proffering “unreasonable” interpretations of the Redemption Act for years.

Neither *Summerhill*, *Fulbright*, nor Respondent’s Brief addressed the stark ambiguity in the Redemption Act’s phrase “subsequent in time.” That ambiguity is revealed by the simple question: *What time?* The Act could refer to the time when a lien is created or the time from which a lien’s priority is measured – which, under real property law, are not necessarily the same. *Fulbright* assumes that the reference point is the time when the lien arises. But that contradicts *Malm v. Griffith*, 109 Wash. 30, 33, 186 P. 647 (1919), where the Supreme Court compared recording dates to identify redemption rights, holding that a mortgage created before, but recorded after, another mortgage was “in effect, subsequent in time” and the lienholder qualified for redemption.^{2/}

^{2/} Condo Group stoops to myth-making: that a Bank of America motion in another case admitted that a Sheriff’s Sale precluded redemption (Resp. Br. at 23). There was no Sheriff’s Sale in that case. The Redemption Act was not at issue. Bank of America merely sought leave to pay off a condominium “super priority” lien and vacate a default judgment *before* a Sheriff’s Sale took place, and cited *Summerhill* as its impetus. The motion was not opposed. The court entered a stipulated order vacating the default judgment. See *Crystal Ridge Ass’n v. Eric Pardey, et al.*, King County Sup. Ct. No. 12-2-07907-2KNT, Dckt # 23A). Bank of America admitted nothing.

B. SB 5541 Resolves the Ambiguity and Expresses the Legislative Intent of “Subsequent in Time.”

Summerhill and *Fulbright* not only failed to consider that the phrase “subsequent in time” is ambiguous; those panels also lacked the opportunity to consider that language in light of the Legislature’s enactment of SB 5541.

The Legislature’s one-word amendment to the Redemption Act, confirms that – as the lienholders argued in *Summerhill* and *Fulbright* – “subsequent in time” means “subsequent in priority.” The Senate Report states that SB 5541 was passed in response to *Summerhill*, which *Fulbright* accepted as controlling. *See* 174 Wn. App. at 355.

“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).

Condo Group complains that *Waggoner* does not apply because the Act is “unambiguous” (Resp. Br. at 23). If the Act were “unambiguous,”

then neither the Supreme Court nor Professor Stoebuck would have read its “subsequent in time” language to mean “junior lienholder” and “subsequent in priority.”

As discussed above, *Summerhill* and *Fulbright* confirmed that ambiguity by misreading the Act. In passing SB 5541, the Legislature undid that misreading by stating, in unequivocal terms, that the proper reading of “subsequent in time” was indeed “subsequent in priority.”

C. SB 5541 Applies Retroactively.

The Washington Supreme Court has instructed that, absent legislative direction, statutes should apply 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). Here, the lack of legislative direction is not surprising, given that retroactivity would depend on the unique circumstances of each individual case. Retroactivity is appropriate here because Bank of America tendered the funds to redeem the property and filed its declaratory relief action within the one-year redemption period, which tolled the redemption period – and Condo Group does not hold title.

1. SB 5541 Is Curative.

Condo Group’s repetitive argument –that SB 5541 cannot be construed as curative because the prior statute was not “ambiguous”

(Resp. Br. at 29) –fails again. 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 Guest Home*, 142 Wn.2d at 325. An amendment that “clarifies or technically corrects an ambiguous statute” is also curative. *Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007) (en banc) (quotations omitted).

Statutory interpretation was the central issue in *Summerhill* and *Fulbright*. Those decisions created controversy about the proper interpretation of the Redemption Act. Each disagreed with prior pronouncements of the Supreme Court and leading commentators about the definition of an authorized redemptioner and the meaning of “subsequent in time.” The Legislature acted in response, replacing the outdated “in time” and clarifying that all junior lienholders may redeem. This is a textbook example of a curative amendment that should be applied retroactively.

Condo Group’s reliance on *Marine Power & Equip. Co. v. Washington State Human Rights Comm. Hearing Trib.*, 39 Wn. App. 609, 616, 694 P.2d 697 (1985), is misplaced. In that decision, the new law was not curative because it “materially and affirmatively change[d] that prior statute.” By contrast, SB 5541 merely changed one word, clarifying that

“subsequent in time” meant “subsequent in priority,” reconciling that language with earlier interpretations of the Act as applicable to all junior lienholders whose liens had been extinguished.

2. SB 5541 Is Remedial.

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). “[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).

Condo Group argues that retroactive application of SB 5541 would affect a substantive (rather than a vested) right, but offers no authority or explanation about how that changes the analysis (Resp. Br. at 31). In any event, Condo Group has no title to, and no substantive or vested right in, the property at issue.

Condo Group purchased the property at the Sheriff’s Sale subject to a right of redemption, *i.e.*, with explicit notice that redemption could occur. Its certificate of sale is not final, but contingent, granting title only

if the property is not redeemed. *Severson v. Penski*, 36 Wn. App. 740, 744, 677 P.2d 198 (1984) (citing *Bonded Adj. Co. v. Helgerson*, 188 Wash. 176, 178, 61 P.2d 1267 (1936) (“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”)). That certificate also assures that, if the property is redeemed, Condo Group will receive its purchase price, plus 12% interest. RCW 6.23.020 (2). Condo Group’s apparent belief that the class of authorized redemptioners could not be expanded later (Resp. Br. at 31) is, at best, a “mere expectation ... based upon an anticipated continuance of the present general laws.” *Gillis*, 42 Wn.2d at 377. Condo Group’s supposed “right” was contingent – it is not substantive or vested, but “may or may not ripen into title,” *W.T. Watts, Inc. v. Sherrer*, 89 Wn.2d 245, 248 (1977) – and that should conclude the analysis. And on the undisputed facts, the class of authorized redemptioners could not be expanded “later” (Resp. Br. at 31): Bank of America placed itself within that actual or potential class by tendering the funds to redeem the property and filing its declaratory relief action within the one-year redemption period, which tolled the redemption period. *See generally Millay*, 135 Wn.2d at 198.

D. Bank of America’s Lien Is Subsequent in Time to the Condominium Lien as a Matter of Fact.

This Court also has the opportunity to revisit the *Summerhill* and *Fulbright* interpretation of the Condominium Act. Bank of America's lien on the property arose after the condominium association recorded its condominium declaration (*see* Op. Br. at 9, CP 40-98, 141-158). That declaration established the lien that was the basis of the judicial foreclosure (*see* Op. Br. at 8). Thus, regardless of this Court's interpretation of the Redemption Act, this Court should hold that Bank of America's lien was "subsequent in time" as a matter of undisputed fact.

Condo Group recites *Summerhill* and *Fulbright* to argue that the condominium association's lien arises at the time the unit owner becomes delinquent in paying condominium assessments. Yet Condo Group makes almost no effort to distinguish *Malm* or Bank of America's analogy to home equity lines of credit, where a lender holds a lien from the date of recording, even if no money is owed until the line of credit is used. As it did when reviewing the decisions and authorities that equate "subsequent in time" with "junior lienholder," Condo Group simply suggests that the situations are different because a condominium association is not involved. There is no indication that the Legislature sought to reinvent the purpose and meaning of recording, whether under the Redemption Act or otherwise, when passing the Condominium Act. And Condo Group does not explain how the condominium association could give record notice of

a lien that, to accept its argument, did not exist – or how Bank of America’s recording of a lien subsequent to that record notice could not be “subsequent in time.”

E. Bank of America’s Retroactivity Arguments Are Procedurally Proper.

Bank of America’s retroactivity arguments are ripe for review: SB 5541 was signed into law on April 23, 2013, creating a justiciable controversy about its retroactivity; and it took effect on July 28, 2013, *i.e.*, during the pendency of this appeal.

Condo Group concludes its brief with a plea to ignore Bank of America’s retroactivity arguments (Resp. Br. at 32). Citing RAP 2.5(a), Condo Group says that these arguments are “beyond the scope of review” because they were not raised in the Trial Court.

SB 5541 was not enacted until after summary judgment was entered. Bank of America could not argue the retroactivity of a statute that did not exist.

RAP 2.5(a) is discretionary: the Court “may refuse to review any claim of error.” Given the fact that Bank of America could not present the retroactivity argument – because the law did not exist – and given the important public policy issues and trailing cases at stake, this Court should exercise its discretion to resolve the issue now.

CONCLUSION

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

(1) As the Legislature has confirmed through the enactment of SB 5541, 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 the Bank of America deed of trust was recorded 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: July 24, 2013

Douglas E. Winter (*PHV*)
BRYAN CAVE LLP
1155 F Street, N.W.

Respectfully submitted,

By: 
Brian S. Sommer, WSBA No. 37019
Steven K. Linkon, WSBA No. 34896
RCO LEGAL, P.S.

Washington DC 20004
(202) 508-6000 tel
(202) 508-6200 fax

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.

**COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON**

BANK OF AMERICA, N.A.,)	
successor by merger to BAC HOME)	
LOAN SERVICING, LP, formerly)	No. 69904-1-I
known as COUNTRYWIDE HOME)	
LOANS SERVICING, LP,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
THE CONDO GROUP LLC, a)	
Washington Limited Liability)	
Company,)	
)	
Respondent.)	
)	

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.
2. That on July 24, 2013, I caused a copy of the REPLY BRIEF OF APPELLANT BANK OF AMERICA, N.A. to be served to the following in the manner noted below:

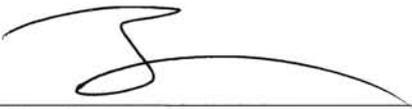
Hecker Wakefield & Feilberg, P.S. Attn: Jordan M. Hecker 321 First Ave. W. Seattle, WA 98119	<input checked="" type="checkbox"/> Courier Service
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Court of Appeals Division 1 Attn: Court Clerk 600 University Street Seattle, WA 98101	<input checked="" type="checkbox"/> Hand Delivery
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3. I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of July, 2013.

RCO LEGAL, P.S.

By: 
Brian Sommer