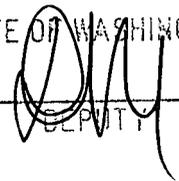


FILED  
COURT OF APPEALS  
DIVISION II

2013 SEP 13 PM 3:52

No. 44839-4

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

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UNION BANK, N.A., successor-in-interest to the FDIC, as Receiver for  
Frontier Bank,

RESPONDENT,

v.

GRANVILLE A. BRINKMAN, an individual; JUDY M. OLSON dba JMO  
ENTERPRISES; and JUDY M. OLSON, an individual,

APPELLANTS.

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APPELLANT BRINKMAN'S REPLY BRIEF

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## INTRODUCTION

Union Bank suggests in its response that Brinkman's interpretation of the plain words of the bank's Deed of Trust and Deed of Trust Act will impose a paralyzing hardship on lenders. Union Bank complains that lenders will be forced "to file lawsuits on guaranties prior to nonjudicial foreclosure or initiate judicial foreclosures in lieu of nonjudicial foreclosures altogether whenever it appears that the value of the foreclosed property will be insufficient to cover the entire debt; otherwise the guaranties bargained for by lender would always be worthless." Union Bank calls this an absurd result and concludes an outcome favorable to Brinkman will "upend the daily business of secured lending in Washington." (Respondent's Brief at p. 14.)

The only reason that Union Bank finds itself unable to obtain a deficiency under the Brinkman Guaranty is because the bank chose to draft its Deed of Trust, without input from the borrower, grantor or guarantors, so that it secures any and all obligations under the Guaranty. Under the Deed of Trust Act, nonjudicial foreclosures, by operation of law, discharge obligations secured by the foreclosed deed of trust. Unsecured commercial guaranty obligations, however, are unaffected by a nonjudicial foreclosure. The outcome here would be different had the bank not secured the Brinkman and Olson

Guaranties. But it did – it chose to draft its Deed of Trust to provide:

**THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. (CP 21)**

\*\*\*

**Indebtedness.** The word “Indebtedness” means **all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents ... (CP26.)**

\* \* \*

**Related Documents.** The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, **guaranties**, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; **provided that the environmental indemnity agreements are not “Related Documents” and are not secured by this Deed of Trust. (CP 27.)**

If Union Bank wishes to preserve deficiency judgments against guarantors post nonjudicial foreclosure, the solution is in its control. The bank may unilaterally eliminate this entire issue through the following simple modification to its form:

**Related Documents.** The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, **guaranties**, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; ***provided that the environmental indemnity agreements and guaranties are not “Related Documents” and are not secured by this Deed of Trust.***

Interpretation of the professionally prepared form deed of trust consistent with the words used in the form will not, as Union Bank infers, leave banks without protection or result in the demise of commercial lending. Regardless of the outcome of this case, Union Bank and all other Washington banks will retain the deficiency judgment as an available recovery tool – they are fully empowered to control the nature and scope of its loan guaranties. The banks need only revise the deed of trust form to no longer secure guaranties.

This case will determine only the legal consequences of prior loan documentation practices and prior elections – practices and elections that were exclusively under bank control. Union Bank’s current protests, which come only after voluntarily procuring the benefits of a swift, inexpensive non-judicial foreclosure (unburdened by a redemption period or an upset price hearing), must be judged in that context. Regardless of the outcome here, the nature and scope of future guaranties will remain in bank control.

#### ARGUMENT

**A. The Deed Of Trust Expressly Secures The Guaranty.**

For this Court to accept Union Bank’s contract interpretation, it must disregard and delete from the Deed of Trust the express statements that the Deed secures the “Indebtedness” and any and all

obligations under the “Related Documents.” It must disregard and delete the explicit provision that states that “guaranties” are included in those secured Related Documents. Union Bank asks the Court to find and apply intent contrary to these unambiguous provisions by focusing on other contract provisions, even though they may be harmonized with the provisions relied upon by Brinkman. Union Bank then protests enforcement of the words used in its own form, claiming it would be “unfair” and “commercially unreasonable.”

Union Bank’s arguments belie the most basic rule of contract construction. Unambiguous contract terms must be given their plain meaning. Courts cannot create an ambiguity where none exists. *Courchaine v. Commonwealth Land Title Ins. Co.* 174 Wn. App. 27, 43, 296 P.3d 913 (2012). Courts likewise cannot modify clear and unambiguous language under the guise of construing it. *Rodenbough v. Grange Ins. Ass’n*, 33 Wn. App. 137, 140, 652 P.2d 22 (1982). It is neither unfair nor commercially unreasonable to require the banks to adhere to the contracts they drafted.

- 1. The Deed of Trust, by its express terms, secures obligations beyond those of the Grantor.**

Union Bank first focuses on the many obligations the Deed of Trust imposes on the Grantor (JMO Development LLC), and argues that they necessarily limit the scope of the security to Grantor obligations.

The plain words of the Deed of Trust defeat the argument. The Deed provides:

THIS DEED OF TRUST ... IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS AND THE DEED OF TRUST. (CP 21, underlining added.)

The obligations imposed by the Deed of Trust and the obligations secured by the Deed are not identical. The obligations secured are much broader. The Deed of Trust affirmatively states it secures obligations outside the Deed itself; it also secures any and all obligations under the Note and under the Related Documents. The Deed of Trust then expressly defines Related Documents to include “guaranties.” (CP 27.) If it was intended to secure only the obligations imposed by the Deed itself, it would not explicitly state that it secures obligations under the Note, the Related Documents and the Deed of Trust. If intended to secure only Grantor obligations under the Related Documents, the Deed would not state it secures “any and all obligations.” Notably, the Deed of Trust Act expressly acknowledges that a deed of trust may secure the obligations “of the grantor or another.” RCW 61.24.020.

The same analysis applies to the payment obligations secured. The Deed of Trust states it secures the Indebtedness – not Grantor’s

Indebtedness, but the Indebtedness. Indebtedness is defined to include “all principal, interest, and other amounts ... payable under the ... Related Documents...” (CP 26), which, again, include guaranties. Regardless of any perceived limitation on obligations imposed by the Deed of Trust, the obligations secured are undeniably broader and include any and all obligations under the Guaranty.

The frequent references to guaranties within the Deed of Trust also belie Union Bank’s argument. Notably, the Deed of Trust defines the terms “Guaranty” and “Guarantor.” (CP 26.) If the Guaranty was wholly separate and unconnected to the Deed of Trust, there would be no reason to define the terms. It is also significant that an event of default under the Deed of Trust includes default under the Guaranty. (CP 24.) If the Deed of Trust secured only the Grantor obligations, there would be no reason to make the default of the Guarantor’s obligations an event of default under the Deed.

Finally, Union Bank argues that the big “G” Guaranty defined in the Deed of Trust is not amongst the small “g” guaranties included in the Related Documents. The argument is nonsensical. The Deed of Trust defines Guaranty to mean “the guaranty from the Guarantor to Lender, including without limitation a guaranty of all or part of the Note.” (CP 26.) Guarantor means “any guarantor ... of any or all of the

Indebtedness.” (*Id.*) Related Documents includes “guaranties ... whether now or hereafter existing, executed in connection with the Indebtedness.” (CP 27.) If the Guaranty was not executed in connection with the subject loans, Union Bank could not claim it applies to secure the loans. Further, Union Bank affirmatively describes the Related Documents list as a “generic” list and likewise refers to “guaranties” as a generic descriptor. By its nature, a “generic” list or descriptor is expansive; it is inclusive of specifically identified guaranties as well as those generally identified. There is no logical support for any argument that the “Guaranty” is excluded from the “guaranties” included in the Related Documents. There certainly is no such express statement within the Deed of Trust.

**2. Contract intent is derived from the plain language actually used in the contract not a desired outcome.**

Union Bank speculates regarding Brinkman’s original understanding or intention as to the enforceability of the Guaranty following a non-judicial foreclosure. Union Bank asserts that, irrespective of the actual words in the Deed of Trust, without evidence that someone expressly bargained for or requested the Deed of Trust to secure the Guaranty; such a result cannot be the intent of the parties.

Of course all the loan documentation was on bank forms professionally drafted without borrower or guarantor input. Apart from loan amounts and similar items, none of the terms and words used in these multi-page fine print documents were not specifically “bargained for” or “negotiated” by the borrowers and guarantors. Will Union Bank now accept arguments from its borrowers and guarantors that they did not intend (and are not bound by) any contract provisions not personally negotiated? Of course not; Union Bank will demand that their borrowers and guarantors be bound by the written words on the form contracts they signed. The same is true for the banks. Even if there were merit to the argument that the banks failed to write their contract forms consistent with their unilateral subjective intent or expectations, the banks must nonetheless abide by the words of their contract. Courts “do not interpret what was intended to be written, but what was written.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (1993).

Moreover, Union Bank’s assertions about the guarantor’s “intent” regarding the bank’s preprinted forms, especially the complex relationship between the guaranty and the Deed of Trust Act, is pure conjecture. This loan transaction was done at a time when deficiency actions were rare. Prior to the 2008 economic crisis, banks frequently

made loans based upon bank appraisals that, while later viewed as inflated, at origination were a critical foundation of the loan underwriting. It was before the collapse of the real estate market and corresponding demise of pending development projects; before the multiple bank failures; before FDIC facilitated bank asset acquisitions; and certainly before deficiency actions became common place by successor banks as they are today.

Banks did not typically extend development loans that were not fully supported by the appraised value of the land being developed. When originated, all the parties to the loan transaction likely intended and expected that the loan was more than sufficiently secured by the land encumbered by the deed of trust. Compelling evidence that lending decisions were founded upon the strength of the bank land valuations is found in the multiple bank failures following the collapse of the real estate market.<sup>1</sup> It is unlikely that guarantors even contemplated, much less consciously intended, that the banks preprinted forms would be used as the basis of post-foreclosure deficiency judgment in excess of a million dollars. Regardless of any speculative “intent” of either party, the actual words employed in the

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<sup>1</sup> Recall that the JMO Development LLC Loan was originated by Frontier Bank. (CP 10-11.) Union Bank acquired the loan from the FDIC Receiver after Frontier Bank failed. (CP 5, 367.)

banks' forms must govern the Court's interpretation.

Finally, Brinkman's interpretation of this unambiguous contract language has been accepted outside this appeal, refuting the argument that the interpretation is strained or unreasonable. While no Washington appellate court has previously construed these deed of trust provisions, the Michigan Court of Appeals has done so in *Greenville Lafayette, LLC v. Elgin State Bank*, 296 Mich. App. 284, 818 N.W.2d 460 (2012). Like Brinkman, the *Greenville* court concluded that the deed of trust secured the guaranties. The decision is instructive.

In *Greenville*, the lender commenced an action against the guarantor and, while the action was still pending, subsequently initiated a non-judicial foreclosure ("foreclosure by advertisement"), which like here is a statutory remedy. 818 N.W.2d at 461-62. Michigan's statute prohibits foreclosure by advertisement if an action was previously instituted to "recover the debt secured." *Id.* at 462, quoting MCL 600.3204(1)(b). Michigan courts consistently hold that, under the statute, a creditor "may generally simultaneously proceed against a guarantor and foreclose on a mortgaged property because the guaranty is an obligation separate from the mortgage note." *Id.* at 463. Application of this general rule was challenged in *Greenville*,

however, because the contractual terms of the deed of trust provided that it also secured the guaranty, rendering the note and guaranty obligations no longer separate. *Id.* at 464.

The language used in the *Greenville* deed of trust was nearly identical to the Brinkman Deed of Trust. *Id.* at 464. The *Greenville* court acknowledged its obligation to “enforce the clear and unambiguous language as written.” *Id.* at 464. Thereafter it held that “the plain language of the mortgage contract specifically includes guaranties in the indebtedness secured by the mortgage. *Id.*

Brinkman’s proffered contract interpretation is based upon the unambiguous words in the form Deed of Trust. Union Bank’s interpretation requires the Court to disregard those unambiguous terms. Like the *Greenville* court, this Court should enforce the contract as written and conclude that the Guaranty was secured by the Deed of Trust.

**B. The Deed Of Trust Act Prohibits Post Non-Judicial Foreclosure Deficiency Actions On Guaranties Secured By The Same Deed Of Trust Foreclosed.**

As with the deed of trust form, if RCW 61.24.100, including subsection 10, is construed consistent with the plain meaning of the words used, one must conclude that it precludes a deficiency action based on a guaranty secured by a foreclosed deed of trust. RCW

61.24.100(1) imposes a general ban on deficiency judgments on obligations secured by a foreclosed deed of trust, “except to the extent permitted” by other sections of RCW 61.24.100. Where such action is allowed, the Legislature repeatedly confirms that the authorization is limited. The authorization in subsection (3)(c) to commence action on guaranties is expressly “subject to” the other sections. Section 10 provides that the limited authorization does not extend to secured guaranties:

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (Emphasis added.)

Union Bank argues that section (10) is permissive; it is merely an acknowledgment that banks may have multiple transactions with a single borrower or guarantor. True, a bank may have extended multiple loans and a trustee’s sale will not preclude enforcement of another unrelated obligation, “if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.” If, however, the bank chooses to secure a guaranty by a deed of trust and thereafter elects to non-judicially foreclose, RCW 61.24.100 does not authorize a deficiency.

The Legislature’s use of the word “if” is significant and rebuts

Union Bank's argument that the section is permissive. *Webster's Ninth New Collegiate Dictionary* defines "if" to mean "on condition that."<sup>2</sup> Applying that definition, the limited statutory authorization to pursue a guarantor following a Trustee's Sale is on the condition that the guarantor's obligation was not secured by the deed of trust foreclosed.

Union Bank argues that Brinkman's interpretation of RCW 61.24.100(10) conflicts with RCW 61.24.100(6). It does not. RCW 61.24.100(6) provides that, as with borrowers (RCW 61.24.100(3)(a)), if the property securing the debt is owned by the commercial guarantor, the guarantor will not generally be subject to any deficiency post foreclosure, unless the guarantor commits waste or withholds property proceeds thereby reducing the value of the property encumbered by the deed of trust.

The only reasonable interpretation that will harmonize and give meaning to both provisions is that RCW 61.24.100(10) establishes a general rule that post foreclosure claims against guarantors are precluded where the guarantors' obligations were secured by a non-judicially foreclosed deed of trust. RCW 61.24.100(6) presents a limited exception to that general rule, allowing claims for waste and

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<sup>2</sup> In determining the plain meaning of words used in a statute, courts will look to the dictionary definition of the words employed. *Homestreet, Inc. v. State Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

wrongful retention of rents committed by the guarantor when the guarantor owns the property encumbered by the deed of trust foreclosed. It gives guarantors the same limited liability as borrowers when there is wrongdoing (waste, wrongful retention of rents). Absent such wrongdoing, however, if the guarantor's obligation was secured, it is discharged by non-judicial foreclosure sale. Union Bank's interpretation, on the other hand, requires the Court to impermissibly delete from subsection (10) and give no meaning to the phrase "if the obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust."

Finally, Union Bank asserts that the House Bill Report summary of revised RCW 61.24.100's requirements for seeking a deficiency judgment against a guarantor supports its interpretation. The summary did not, however, purport to be exhaustive. Instead, it qualified the items listed as conditions with the phrase "if certain conditions are met, including the following:..." (Respondent's Brief at 15.) The restrictions of Section 10 are not the only ones omitted from the brief summary in the Bill Report. See, e.g., RCW 61.24.100(6) and (9). More importantly, the words and phrasing used in the Report were not those selected by the Legislature. The plain meaning of the words used in the Act, construed to harmonize and give meaning to the entire

statute, must prevail in this case. Brinkman's interpretation does that.

The Legislature took care to specifically list the conditions under which it would authorize deficiency actions against guarantors. This implies the Legislature intended to exclude authorization for deficiency judgments for any unspecified circumstances. *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993); *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008). This maxim of statutory construction (along with the cannon that exceptions must be narrowly construed) is particularly relevant when determining a foreclosing lender's powers under the Deed of Trust Act, since Washington's Supreme Court has twice ruled in the last year that the Act should not be construed to provide more expansive rights to lenders than those expressly conferred. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012); *Schroeder v. Excelsior*, 177 Wn.2d 94, 107, 297 P.3d 677 (2013). See also, *Walker v. Quality Loan Services Corp.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.2d \_\_\_ (Div. 1, 65975-8-1, August 5, 2013).

Applying the Act as written will not, as Union Bank protests, result in a "windfall" to guarantors, any more than it is a "windfall" to borrowers when the borrowers' obligations are discharged post foreclosure pursuant to RCW 61.24.100(1). It is the outcome the

Legislature designated. The Deed of Trust Act contemplated a “quid pro quo” between lenders and borrowers. Debtors “relinquished a right to redemption and to a judicially imposed upset price. Creditors, in exchange for inexpensive and efficient non-judicial foreclosure procedures, sacrificed a substantial benefit that remains available in a judicial foreclosure.” *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990). By taking advantage of the procedure, they necessarily gave up their right to seek a deficiency judgment against debtors. *Id.* RCW 61.24.100. Brinkman’s interpretation is consistent with the contemplated trade-offs of the Act. Non-judicial foreclosure of a deed of trust securing a guaranty also has consequences. The lender forfeits its right to a deficiency against the guarantor.

Finally, the issue (and result) presented on this appeal directly result from the bank’s own drafting and remedy elections, not some nefarious act by Brinkman or Olson. As the Supreme Court stated in *Bain* when it rejected similar bank-asserted complaints of “unfairness”: “it is not the plaintiff [borrower] that manipulated the terms of the act; it was whoever drafted the forms used in these cases.” 175 Wn.2d at 108-09. Regardless, as the *Bain* Court noted, “[t]he legislature, not this court, is in the best position to assess policy considerations.” *Id.* at 109.

Ultimately, construction of the Deed of Trust Act must flow from the plain meaning of the words chosen by the Legislature. Relevant to this issue, the Legislature drafted the Act to provide:

(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

\* \* \*

(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

\* \* \*

(c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

\* \* \*

(10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.

The construction advocated by Union Bank would give no meaning to and effectively delete the final, highlighted limiting phrase of subsection (10). Had the Legislature intended, as Union Bank argues, to authorize deficiency judgments against commercial guarantors even when secured by the deed of trust nonjudicially

foreclosed, it would have said so. Subsection (10) would more likely provide:

(10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower ~~or guarantor~~ if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. For deeds of trust securing commercial loans, a deficiency judgment may be obtained against any guarantor after a trustee's sale, regardless of whether the guarantor's obligations were secured by the deed of trust.

The plain words of the Deed of Trust Act, as actually written by the Legislature, lead to a singular conclusion. The Act prohibits deficiency judgments against guarantors whose obligations were secured by the deed of trust nonjudicially foreclosed.

**C. The So-Called "Waivers" Are Not Enforceable Because Protections Of RCW 61.24.100 Cannot Be Waived, The Waivers Are Not Sufficiently Specific And They Contravene Public Policy.**

Union Bank argues that the protections afforded guarantors through the Deed of Trust Act were waived by boilerplate language buried in the fine print on page 2 of the Brinkman Commercial guaranty (CP 30), referencing "anti-deficiency law" but failing to explain or define that term.<sup>3</sup> Union Bank does not even respond to Brinkman's

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<sup>3</sup> Brinkman argued in his opening brief that, independently, the "anti-deficiency law" waiver is unenforceable because it is insufficiently specific and fails to expressly state that the guarantor waives rights it may hold as the guarantor on a secured Guaranty. "A 'waiver' is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish the

argument that the contract provision relied upon is not a “waiver” per se, but an unauthorized attempt to contractually manipulate and expand a legislatively created lender remedy that is an exception to a broader legislative prohibition.

Instead, Union Bank relies on general principals applied in common law where no legislative limits were implicated and application of waivers in wholly different statutory schemes. It then, remarkably, asks this Court to ignore the two recent decisions in which Washington’s Supreme Court refused to enforce waivers of Deed of Trust Act protections, protesting that the cases did not address the identical Act subsection at issue in this case. See, *Schroeder*, 177 Wn.2d at 106-07; *Bain*, 175 Wn.2d at 107-08. In the specific context of the Deed of Trust Act, the Supreme Court has admonished: “We will not allow waiver of statutory protections lightly.” *Schroeder*, 177 Wn.2d at 107, *quoting Bain*, 175 Wn.2d at 108. Union Bank’s waiver arguments fail.

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right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them.” *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). To be enforceable, the waiver must site the specific statute which provides the right being waived and explain the legal significance of the waiver. See *Union Bank v. Gradsky*, 265 Cal. App.2d 40 (1968); *Cathay Bank v. Lee*, 14 Cal. App. 1533 (1993); *Resolution Trust Corporation v. Titan Financial Corporation*, 22 F.3d 923 (9<sup>th</sup> Cir. 1994). The “waivers” in the subject Guaranty make no mention of the Deed of Trust Act and are wholly silent of the right of a secured guarantor. Union Bank offered no response.

The protections of the Deed of Trust Act may not be waived. The opening sentence of RCW 61,24.100 presents mandatory language – except as provided in RCW 61.24.100, a deficiency judgment “shall not be obtained” against a borrower or guarantor. Nothing in the statute even suggests, much less provides, that its protections may be waived. On the contrary, in subsection (9), the Legislature authorizes parties to contractually prohibit a lender from seeking a deficiency. There is no corresponding legislative authorization, however, to contractually expand the circumstances in which a lender may take a deficiency or to contractually waive a borrower or guarantor’s protections in this regard.

Notably, contractual limitation of a discrete Act protection is also expressly and narrowly authorized at subsection (4). There, the Legislature provides that parties may, in certain express and limited circumstances, contract for a deadline to file a deficiency suit later than the Act’s statute of limitations. At subsection (7), the Legislature authorizes parties to contractually preserve a deficiency against the guarantor in instances where a deed in lieu of foreclosure is accepted. Finally, at subsection (11), the Legislature authorizes parties to waive a guarantor’s objection to impairment of collateral by the trustee’s sale. The narrow and limited authorizations in subsections (4), (7), (9) and

(11) are the only circumstances in which the Legislature authorizes contractual limitation of Deed of Trust Act protections.<sup>4</sup> When the Legislature specially authorizes certain specified acts, acts not so specified will be presumed to be deliberately excluded. *National Electric Contractor's Ass'n v. Riverland*, 138 Wn.2d 9, 17-18, 978 P.2d 481 (1999); *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). Put another way, "omissions are deemed exclusions." *Adams v. King County*, *supra*, 164 Wn.2d at 650, quoting, *In re Det. Of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

This is particularly true here in light of the *Bain* and *Schroeder* Courts' specific refusals to allow contractual modification of the Deed of Trust Act. *Schroeder*, 177 Wn.2d at 106-07; *Bain*, 175 Wn.2d at 107-08. Union Bank's glib argument that the Supreme Court cases do not apply here because they do not specifically address Section 100 of the Act is difficult to take seriously since Union Bank relies on case law wholly outside the foreclosure context.<sup>5</sup>

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<sup>4</sup> Notably, even though the Guaranty purports to waive the Guarantor's notice rights (CP 29) and the statute of limitations defense (in a manner different than authorized by RCW 61.24.100(4)) (CP 30), Union Bank seems to recognize that it could not contractually override those statutory prerequisites to a deficiency suit.

<sup>5</sup> Union Bank first cites *Fruenhauf Trailer Co. of Can. Ltd. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966). The court in that case, which addressed a debt guaranty following repossession of personal property, was not required to consider any statutory limitations since none were implicated. Union Bank next cites *Seattle First Nat. Bank v. West Coast Rubber Inc.*, 41 Wn. App. 604, 705 P.2d 800 (1985). There, the defendant attempted to avoid enforcement of a guaranty by asserting that its

Contrary to Union Bank's assertion, nothing in the *Bain* or *Schroeder* decisions suggests that they are limited to pre-foreclosure procedural requirements. The *Bain* Court held that a lender could not contract its way around the Act's substantive requirement that a beneficiary must actually hold the secured note before it may invoke the benefits of nonjudicial foreclosure. 175 Wn.2d at 107-08. The *Schroeder* Court held that the lender could not contract away the Act's prohibition against nonjudicial foreclosure of agricultural land; even though the borrower contracted that he "knowingly waives his right, pursuant to RCW 61.24.030(2) to judicial foreclosure on the subject property on the grounds it is used for agricultural purposes." 177 Wn.2d at 100.

The *Bain and Schroeder* decisions likewise do not suggest that the Supreme Court intended a different policy to apply to the statutory limits upon a lender's legislatively created right to obtain deficiency judgments after the trustee's sale is completed. On the contrary, the

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specific terms were deceptive and, further, that Seattle First acted unfairly and deceptively by adding a term to the guaranty without defendant's consent, all of which defendant claimed violated the Consumer Protection Act. *Id.* at 609. The court held that because the waivers as written in that guaranty were clear and unambiguous, the guarantor did not demonstrate the guaranty was deceptive and, thus, failed to establish the first element of a CPA claim. *Id.* *Seattle First* has no relevance on the issue of whether Union Bank can contractually manipulate and avoid the mandates of the Deed of Trust Act. Neither case addressed the impact of specific statutory mandates on contractual waivers. *Bain and Schroeder*, on the other hand, not only generally addressed waiver of statutory protections, but specifically addressed the issue in the context of the Deed of Trust Act.

language of RCW 61.24.100 is unambiguous and unconditional, beginning with the words “Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained . . .” Allowing waivers of those protections would gut the statute, permitting banks to obtain all of their side of the “quid pro quo” under the statute, while denying it to the parties intended to be protected, i.e. borrowers, grantors and guarantors.

If the anti-deficiency protections set forth in RCW 61.24.100 were waivable, such waivers would be included in every Washington loan document, and lenders would have the best of both worlds: they would receive the speedy non-judicial foreclosure remedy afforded by the Deed of Trust Act, without the burdens of redemption periods, upset price hearings or other aspects of the judicial foreclosure process, while still retaining the right to recover deficiency judgments against the borrowers and guarantors following the trustee’s sale. Such an outcome would be totally at odds with the fundamental “quid pro quo between lenders and borrowers” underlying the Deed of Trust Act. *Thompson v. Smith, supra*, 58 Wn. App. at 365.

The Supreme Court has twice refused in the last 13 months to allow waiver of Deed of Trust Act protections. As the Court said in *Bain*, “We will not allow waiver of statutory protections lightly.” 175

Wn.2d at 108. The mandates of the Deed of Trust Act preclude enforcement of Union Bank's waiver provisions. Enforcement of the waivers would also upset the careful balancing of rights the Legislature achieved through the Deed of Trust Act and contravene public policy.

### III. CONCLUSION

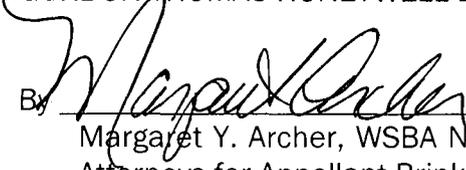
Union Bank is barred from seeking a deficiency judgment because of the bank's unilateral decision to secure each Guaranty by the Deed of Trust, and its subsequent election to foreclose non-judicially pursuant to the Deed of Trust Act. This Court should reverse the superior court and enforce the Deed of Trust form and Deed of Trust Act consistent with their plain meaning.

Dated this 13<sup>th</sup> day of September, 2013.

Respectfully submitted,

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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UNION BANK, N.A., successor-in-interest to the FDIC, as Receiver for  
Frontier Bank,

RESPONDENT,

v.

GRANVILLE A. BRINKMAN, an individual; JUDY M. OLSON dba JMO  
ENTERPRISES; and JUDY M. OLSON, an individual,

APPELLANTS.

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CERTIFICATE OF SERVICE

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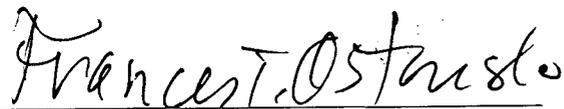
THIS IS TO CERTIFY that on this 13<sup>th</sup> day of September, 2013, I did serve via U.S. Postal Service (or other method indicated below), a true and correct copy of Appellant Brinkman's Reply Brief by addressing and directing for delivery to the following:

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