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STATE OF WASHINGTON  
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Court of Appeals Cause No. 67608-3-I

No. 88853-1

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

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

**v.**

**MICHAEL FULBRIGHT, *Respondent.***

**FILED**  
MAY 24 2013  
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STATE OF WASHINGTON

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

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

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### **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-I, 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.<sup>1/</sup>

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<sup>1/</sup> 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 Stoeckel 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).<sup>2/</sup> 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

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<sup>2/</sup> 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.<sup>3/</sup>

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.

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<sup>3/</sup> 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.

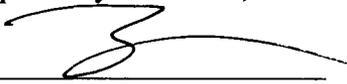
(2) As the Condominium Act's plain language shows, Tanglewood created and perfected its condominium lien by recording its condominium declaration in 2006. Bank of America recorded its deed of trust in 2007 – “subsequent in time” to that lien – and it is an authorized redemptioner under RCW 6.23.010 as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

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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-I DIVISION ONE PUBLISHED OPINION FILED: April 8, 2013
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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 America<sup>1</sup> 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

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<sup>1</sup> 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.

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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

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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**

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**SENATE BILL 5541**

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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(~~τ~~)" 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

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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.

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*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.