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No. 88853-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A.,
Plaintiff-Petitioner,

v.

MICHAEL FULBRIGHT,
Defendant-Respondent.

SUPPLEMENTAL BRIEF
of
PETITIONER BANK OF AMERICA, N.A.

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

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INTRODUCTION

Bank of America, N.A., as successor-in-interest to BAC Home Loans Servicing, LP, seeks reversal of the decision below based on any one of three discrete issues of statutory interpretation.

ASSIGNMENTS OF ERROR / ISSUES PRESENTED

1. As the Legislature confirmed by amending RCW 6.23.010 effective July 28, 2013, the Court of Appeals misinterpreted the Redemption Act to deny Bank of America redemption rights as the holder of a deed of trust subsequent in priority to the foreclosing lien (Pet. 6-8).

If this Court agrees, it need not reach the second and third issues.

2. The Court of Appeals erred in failing to apply the plain language of the Condominium Act, RCW 64.34.364(7), which states: “Recording of the [condominium association] declaration constitutes record notice and perfection of the lien for assessments....” The condominium association recorded its declaration in 2006. Bank of America recorded its deed of trust in 2007. That deed of trust was “subsequent in time” to the foreclosing lien, and RCW 6.23.010 thus authorizes redemption (Pet. 8-10).

If this Court agrees, it need not reach the first and third issues.

If this Court disagrees with both of these assignments of error, it should reach the third issue presented.

3. SB 5541, which amended RCW 6.23.010, applies retroactively to authorize Bank of America to redeem the foreclosed property (Pet. 10-12). Because the Legislature did not pass, and the

Governor did not sign, SB 5541 until after the decisions below, Bank of America could not present this issue in the lower courts.

STATEMENT OF THE CASE

Bank of America's Petition for Review provides a detailed Statement of the Case (Pet. 2-3). No facts are disputed. The following timeline controls the issues presented.

December 20, 2006. Tanglewood Condominium Association records its condominium declaration (CP 40), which "constitutes record notice and perfection of [its] lien for assessments...." RCW 64.34.364(7).

March 6, 2007. Bank of America loans Jeanne Lewis \$277,000 for the purchase of a Tanglewood condominium unit (CP 12, 380).

March 9, 2007. Bank of America records its deed of trust subsequent in time to Tanglewood's recorded declaration (CP 14, 380).

May 2, 2008. Lewis defaults on her condominium fees (CP 372).

January-June 2009. Tanglewood initiates judicial foreclosure (CP 165-69). The Superior Court enters a default judgment and foreclosure decree against Lewis and Bank of America (CP 170-74).

May 7, 2010. Fulbright purchases the unit at a sheriff's sale for \$14,481.83, subject to rights of redemption and without receiving a deed or title (CP 175).

April 29, 2011. Bank of America makes a timely redemption request (CP 9). Fulbright objects, arguing that Bank of America did not record its deed of trust "subsequent in time" to the condominium lien (CP 33-34). Bank of America tenders the estimated redemption amount (CP

243) and brings this declaratory relief action (CP 1-8) within the one-year redemption period.

April 23, 2013. After the Court of Appeals issues its decisions in *Summerhill* and this case, Governor Inslee signs SB 5541 into law, clarifying that RCW 6.23.010 provides redemption rights to lienholders “subsequent in priority” to the foreclosing lien. Laws of 2013, ch. 53, § 1.

July 28, 2013. The effective date of SB 5541.

ARGUMENT

Statutory interpretation is a question of law. *Barton v. Dept. of Transp.*, ___ Wn.2d ___, 308 P.3d 597, 602 (2013). This Court “review[s] pure questions of law de novo and the question of deference to the Court of Appeals does not arise.” *In re Coats*, 173 Wn.2d 123, 133, 267 P.3d 324 (2011) (en banc), citing *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 172, 149 P.3d 616 (2006) (en banc).

In reviewing a statute de novo, “the primary objective of the court is to ascertain and carry out the intent and purpose of the Legislature in creating it.” *F.O.E., Tenino Aerie No. 564 v. Grand Aeri, F.O.E.*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (en banc). “The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quotations omitted) (en banc).

“This court ... will avoid a literal reading of a statute which would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over ... express but inept wording.” *F.O.E.*, 148 Wn.2d at 239 (quotation omitted); see *Dumas v. Gagner*, 137 Wn.2d 268, 286, 971 P.2d 17 (1999) (en banc).

I. THE COURT OF APPEALS MISINTERPRETED THE REDEMPTION ACT

The Court of Appeals’ interpretation of the Redemption Act stems from *Summerhill Vill. Homeowners Ass’n v. Roughley*, 166 Wn. App. 625, 289 P.3d 649 (2012). *Summerhill* held that the Redemption Act’s “subsequent in time” language is “unambiguous.” *Id.* at 632. It is not.

There are five indicators of ambiguity:

- (1) The Redemption Act’s failure to define or specify how to determine whether a lien is “subsequent in time to that on which the property was sold.” RCW 6.23.010.
- (2) The Legislature’s prompt, one-word amendment of the Act in the aftermath of *Summerhill* to read “subsequent in priority” instead of “subsequent in time.”
- (3) The prior statements of this Court, lower courts, and leading commentators that the Act applies to “junior lienholders” and those “subsequent in priority” to the foreclosing lien.
- (4) The need to harmonize the Redemption Act’s language with the Condominium Act, which created an exception to the “race

notice” paradigm that controlled real property issues in this State when the Redemption Act was enacted in 1897; and

(5) The unlikely, absurd, and strained consequences, contrary to the purpose and intent of the Redemption and Condominium Acts, that flow from the Court of Appeals’ “literal” reading of the Redemption Act.

(A) **The Ambiguity of “Subsequent in Time”**

Neither the decision below nor Fulbright’s Answer (“Ans.”) addresses the stark ambiguity in the words “subsequent in time.” The Redemption Act does not answer the simple but essential question: *The time of what?* Read “literally,” as *Summerhill* proposes, the Act could refer to the time when a lien arises, the time when a lien is perfected, the time when a lien attaches, the time when a lien is recorded, or the time when a statute fixes priority. These times are not always the same.

A “literal” reading could control in *Summerhill* because the extinguished lienholder conceded that its lien was *not* “subsequent in time,” 166 Wn. App. at 630; but in this case, Bank of America made no such concession, and pointed to undisputed evidence that its lien was in fact recorded “subsequent in time.” The Court of Appeals, confirming the Redemption Act’s ambiguity, looked elsewhere – to the Condominium Act – and assumed, without precedent, that “subsequent in time” refers to the time when the foreclosing lien “arises” rather than the time when RCW 64.34.364 (2)(a) expressly established that lien’s priority through recording. *BAC Home Loans Servicing, LP v. Fulbright*, 174 Wn. App. 352, 353, 298 P.3d 779 (2013).

The race-notice paradigm in force when the Redemption Act was enacted in 1897 (and now codified as RCW 65.08.070) provides the best guidance to the meaning of “subsequent in time.” Under that law, a recorded security interest in property has priority over encumbrances recorded subsequent in time. *See Seattle Mortg. Co. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 495 (2006) (“Washington’s recording system was enacted to ensure that a deed recorded *first in time* was superior to any other conveyance...”)(emphasis added).

The Redemption Act provides redemption rights to those “whose liens have been extinguished by the [foreclosure] sale.” *Millay v. Cam*, 135 Wn.2d 193, 198, 955 P. 791 (1998). One hundred years ago, a conveyance recorded prior in time to the foreclosing lien was superior and could not be extinguished in foreclosure. The Act thus applied to recorded liens that were “subsequent in priority” to the foreclosing lien because they were recorded “subsequent in time.” *See, e.g., Malm v. Griffith*, 109 Wash. 30, 33, 186 P. 647 (1919) (redemptioners’ mortgage was “in effect, subsequent in time, because of subsequent recording”). By ignoring the Act’s ambiguity when confronted with a recorded lien that was “subsequent in priority” but not, in the eyes of the Court of Appeals, “subsequent in time,” the decision below not only denies the beneficial reach of the Act to an unknown number of lienholders, but also fails to explain why a “literal” reading of the Act compels a court to look at the date the foreclosing lien supposedly “arises” rather than the date on which its priority is established through recording (*see pp. 12-15 below*).

(B) SB 5541

The Legislature, acting in direct response to *Summerhill*, promptly amended RCW 6.23.010 to make it clear that the words “subsequent in time” mean “subsequent in priority” to the lien “on which the property was sold.” *See* SB 5541. “[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). “[I]t 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).

This is not a situation, as Fulbright urges, where different interpretations are merely “conceivable” (Ans. 11, *quoting Densley v. Dept. of Retirement Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007)). If a statute is “susceptible to two or more reasonable interpretations,” it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (en banc). Here, two different interpretations – one judicial, one legislative – are palpable, and each has been published as law. And the Legislature’s swift action in the wake of a contrary judicial interpretation both confirms the Act’s ambiguity and speaks compellingly to its original meaning.

(C) The Weight of Authority

The decision below cannot be reconciled with the prior statements of this Court and other authorities that the Redemption Act protected “junior lienholders” or those “subsequent in priority.” This inconsistency

confirms the ambiguity of the Act's language and the propriety of interpreting that language to mean "subsequent in priority" (*see* Pet. 5-8).

Despite more than 100 years of Washington jurisprudence, Fulbright can cite nothing prior to *Summerhill* that supports the Court of Appeals' restrictive and punitive interpretation of "subsequent in time." Instead, Washington courts and commentators understood the Act to allow foreclosed creditors who are "junior" and "subsequent in priority" to redeem. *See, e.g., Millay*, 135 Wn.2d at 198 ("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"); *Olson Eng'g, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 70 n.15, 286 P.3d 390 (Div. II 2012) ("statutory redemption allows junior lien holders ... to buy the foreclosed property"); 18 Stoebuck, *Washington Practice, Real Estate Transactions* § 19.19 (2d ed. 2010) (the Redemption Act applies to a creditor whose lien is "subsequent in priority to that being foreclosed").^{1/}

Fulbright describes this Court's use of "junior lien creditors" in *Millay* as a "convenient shorthand description" – but concedes that "phrases like 'junior lienholder' and 'subsequent in time' [are] used somewhat interchangeably by courts and secondary authorities" (Ans. 9-10). If a statute has two or more reasonable meanings – particularly ones

^{1/} The Redemption Act itself refers to "the person having the prior lien" and parties with a "lien prior" without tying their rights to "time." *See* RCW 6.23.070, 6.23.080(3).

that are “used somewhat interchangeably by courts and secondary authorities” – it is ambiguous. *See Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001) (en banc). The divergence of *Summerhill* from earlier authorities underscores the ambiguity. If the Act was “unambiguous,” then this Court and commentators would not have used “junior lienholder” and “subsequent in priority” as substitutes for “subsequent in time.” To hold that the Act was “unambiguous” would be to hold that this Court and other authorities have been proffering “unreasonable” descriptions of the Redemption Act for years.

(D) Legislative Harmony, Purpose, and Intent

This appeal turns on the interplay of two statutes adopted nearly ninety years apart. “Statutory provisions ... should be harmonized whenever possible.” *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010) (en banc) (quotation omitted). 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*, 137 Wn.2d at 286 (quotation omitted); *see Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 374-76, 588 P.2d 1153 (1979) (interpreting unambiguous language in RCW 6.23.010 to extend redemption rights to a deed of trust beneficiary).

The Decision Undermines Both Acts. Here, a late Twentieth Century development – the Condominium Act – created a new lien for assessments that could extinguish recorded liens through a “super priority” paradigm that did not exist when the Redemption Act was passed in 1897.

The purpose and intent of the Redemption Act is to provide affected parties – whether individuals, contractors, or financial institutions – with a “second chance” to regain an interest vitiated by judicial foreclosure. 27 Rombauer, *Washington Practice, Creditor’s Remedies – Debtors’ Relief* § 3.19 (2d ed. 2010). As a result, this Court has long read the Redemption Act with a “liberal rule of construction.” *Scott v. Patterson*, 1 Wash. 487, 489, 20 P. 593 (1889). As SB 5541 confirms, that Act should have been read to continue to provide that “second chance” to lienholders affected by the Condominium Act, *i.e.*, those subsequent in priority to the new lien for assessments. As the legislative history states:

The redemption laws were first written in the late 1800s. Some things have changed since that time, including the advent of condominium associations and the lien priority that such associations have by statute.... The use of the word “time” in the statute is archaic, and dates back to 1899. The correct word today is “priority.”

See House Bill Report, SB 5541 (SA-2 - 3).

Under the decision below, only lienholders who recorded their liens after the unit owner’s default on condominium dues could redeem. That interpretation is contrary to the purpose and intent of the Condominium Act to insure the financial well-being of condominium associations without discouraging lenders from making loans to condominium purchasers. 18 Stoebuck, §12.6.

The Decision Creates Unreasonable and Unintended Outcomes. The notion that “lobbying” (Ans. 11-12) could somehow

produce an immediate, bipartisan, and near-unanimous legislative rebuke of the reasoning below – House 93-0, Senate 47-2 – disregards the true reason for the Legislature’s action: the unfair and absurd impact of the interpretation, which saddles borrowers with huge deficiency liabilities or bankruptcies and deprives lenders of their security interests while rewarding third parties with windfall profits. (Fulbright, who paid only five percent of the unit’s original purchase price, has purchased or represents purchasers of at least three other foreclosed units, and stands to reap sizable returns from his theories.)^{2/} As SB 5541 confirms, the purpose and intent of the Redemption Act was to benefit judgment debtors and extinguished lienholders, not strangers to a property.

Fault Is Not An Issue. Fulbright refers repeatedly to Bank of America as a “neglectful lender” who “ignored” this foreclosure (*e.g.*, Ans. to Amicus Mem. 7-9 and Ans. 15). He cites no evidence. None exists. The record shows instead that the complaint was simply forwarded by mistake to a mortgage servicing unit rather than its litigation management unit (*see* CP 134-36).

Similar rhetoric below and in *Summerhill* led the Court of Appeals to justify its punitive outcome by faulting the lienholders for not appearing in the judicial foreclosure. *See BAC Home Loans*, 174 Wn. App. at 357 (“The bank missed [its] opportunity”); *Summerhill*, 166 Wn. App. at 632

^{2/} *See 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.

(“GMAC had both notice and opportunity to protect its interests and failed to do so.... We will not rewrite the redemption statute because [of] a lienholder’s lack of diligence”). But the Redemption Act does not limit the right to redeem based on the reasons for foreclosure, whether fault, negligence, accident, insolvency, or anything else. And its purpose is “benevolent,” not punitive, *Scott*, 1 Wash. at 489: to provide “junior lienors, whose liens have been extinguished, a grace period, beyond the sale, to salvage something ... ‘another bite at the apple.’” 27 Rombauer, *Creditor’s Remedies* § 3.19(a)-(b). The judgment debtor and any extinguished lienholder, whether an individual, a contractor, a small business, or a national bank – and whether or not “neglectful” – have a right of redemption.

II. BANK OF AMERICA’S LIEN IS “SUBSEQUENT IN TIME” TO THE CONDOMINIUM LIEN AS A MATTER OF FACT

Even if its interpretation of the Redemption Act were correct, the decision below fails to recognize that Bank of America’s deed of trust was “subsequent in time” as a matter of fact and law. The decision ignored the plain language of the Condominium Act, earlier decisions of this Court, and the foundation of race- notice jurisprudence: the comparison of recording dates (*see* Pet. 8-10).

(A) The Time of Recording Controls Condominium Act Priority

The Legislature, consistent with the State’s race-notice paradigm, based the Condominium Act’s lien for assessments on recording. RCW 64.34.364(7) states: “Recording of the [condominium association]

declaration constitutes record notice and perfection of the lien for assessments.... [N]o further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien.” Lien perfection, of course, is “[v]alidation of a security interest as against other creditors....” *Black's Law Dictionary* 1157 (7th ed. 1999).

Unless the condominium association records its declaration first in time, its lien has no priority: “A lien under this section shall be prior to all other liens and encumbrances on a unit except ... Liens and encumbrances recorded before the recording of the declaration....” RCW 64.34.364 (2)(a). Only liens recorded “subsequent in time” to the declaration are subject to the condominium lien and to extinguishment in foreclosure, but the decision below denied those liens a right of redemption.

Ignoring the plain language of RCW 64.34.364(7), the decision reads RCW 64.34.364(1) – “The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due” – to establish the time when the lien “arises” and obtains priority, rather than the time when the pre-existing lien becomes enforceable. *BAC Home Loans*, 174 Wn. App. at 353. Based on this interpretation, the Court of Appeals compared the date of the first unpaid assessment (May 2008) to the date on which Bank of America recorded its deed of trust (March 2007) and denied redemption rights. *Id.* at 356.

RCW 64.34.364(1) does not say, as the Court of Appeals held, that the lien “does not arise until the assessment is due.” *BAC Home Loans*, 174 Wn. App. at 353. It never uses the word “arise.” And under RCW

64.34.364(7), the lien for assessments had no priority unless the condominium recorded its declaration and Bank of America recorded its deed of trust subsequent in time to the declaration. The recorded declaration, not the unit owner's default on assessments, created and perfected the lien. RCW 64.34.364(7). The declaration, not the default, gave Bank of America record notice of the lien. *Id.* The recording of the declaration, not the default, is the relevant event under the Redemption Act. Bank of America's deed of trust was subsequent in both time *and* priority to the lien created by that declaration.

Neither Fulbright nor the decision below explains how recording the condominium declaration could be “record notice and perfection,” RCW 64.34.364(7), of a lien that, according to the decision, did not exist when Bank of America recorded its deed of trust – or how that deed of trust, recorded subsequent in time to “record notice and perfection of [the] lien,” could not be “subsequent in time” under the Redemption Act.

The comparison of recording dates is the time-honored benchmark of redemption. In *Malm*, this Court held that a lender whose lien “arose” before, but was recorded after, the foreclosing lien would have been entitled to redeem under the Redemption Act. 109 Wash. at 33. Consistent with race-notice principles, this Court compared recording dates, not the dates on which one or both liens “arose.” The Court of Appeals should have done the same.

In passing the Condominium Act, the Legislature did not purport to affect redemption rights: RCW 64.34.364(9) acknowledges the “period

of redemption” that applies after the condominium association’s judicial foreclosure. The Condominium Act also contains no indication that the Legislature sought to reinvent the significance of recording.^{3/}

(B) The Drafters Rejected the Court of Appeals’ Interpretation

The original drafters of the Condominium Act language at issue have rejected the Court of Appeals’ interpretation that the condominium lien “does not arise until the assessment is due.” *BAC Home Loans*, 174 Wn. App. at 353. As noted above, the word “arise” does not even appear in RCW 64.34.364(1).

The Condominium Act is based on the Uniform Condominium Act of 1980, drafted by the National Conference of Commissioners on Uniform State Laws. *See* 2 Wash. State Bar Ass’n, *Washington Real*

^{3/} RCW 64.34.364 is comparable to RCW 60.04.226, which governs Home Equity Line of Credit (“HELOC”) deeds of trust. HELOC balances can fluctuate from zero to fully drawn and back, depending on the borrower’s repayment habits. Under RCW 60.04.226, the date the HELOC deed of trust is recorded establishes priority for “all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory,” even if the debtor does not immediately draw on the HELOC. A HELOC lien is thus perfected when the deed of trust is recorded, not on the date of default.

Under RCW 64.34.364(7), “[r]ecording of the declaration” – like recording of the HELOC deed of trust – “constitutes record notice and perfection of the lien for assessments.” A subsequent default in paying assessments – like a default on HELOC payments – does not create a lien, but merely triggers the right to enforce the pre-existing lien. The reason is obvious: Like HELOC balances, condominium assessments accrue monthly. If a payment is missed, no new lien is created. The unit owner can make up the payment; otherwise, the condominium can foreclose on the existing lien created by the recorded instrument.

Property Deskbook § 22.2, at 22-3 (3d ed. 1996). RCW 64.34.364(1) is effectively identical to Section 3-116(a) of the 1980 Act, which provides: “The association has a lien on a unit for any assessment ... from the time the assessment or fine becomes due” (SA-5). RCW 64.34.364(7) is identical to Section 3-116(d) of the Uniform Act (SA-6).

In 1994, the National Conference revised Section 3-116(a) of the renamed Uniform Common Interest Ownership Act, deleting the phrase “from the time the assessment or fine becomes due” because it had caused confusion about lien priority. The drafters emphasized that the lien for assessments “arises immediately upon the recording of the declaration”:

The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due.... The deletion of the language as suggested makes clear that the lien arises immediately upon ... the recording of the declaration for new common interest communities.

Official Comments, Unif. Common Interest Ownership Act § 3-116 (amended 1994) (SA-8).

III. SB 5541 APPLIES RETROACTIVELY ON THESE FACTS

Absent legislative direction, statutes should apply retroactively when “curative” or “remedial.” *McGee v. Dept. of Social and Health Servs.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000). The lack of legislative direction in SB 5541 is not surprising, because retroactivity may depend on the circumstances of each case. Retroactivity is appropriate here because (1) Bank of America tendered the funds to redeem the property and brought this action within the one-year

redemption period (CP 109), which tolled the redemption period; and (2) Fulbright does not hold title to the property at issue (*see* Pet. 10-12).

(A) Fulbright's Interest Is Inchoate

Fulbright concedes that his interest is merely inchoate (Ans. 12). *See W.T. Watts, Inc. v. Sherrer*, 89 Wn.2d 245, 248, 571 P.2d 203 (1977). He offers the self-contradictory theory that SB 5541 should not apply retroactively to Bank of America because it did not qualify as a redemptioner before the Legislature passed SB 5541 (Ans. 13). But that is the very reason why Bank of America argues in the alternative for retroactivity: If this Court holds that Bank of America qualified as a redemptioner before SB 5541's enactment, retroactivity is not an issue.

Bank of America is entitled to retroactive application of SB 5541 on the facts presented because the time to redeem has not run. Bank of America tolled the redemption period by tendering the funds to redeem the property and filing this action within the one-year redemption period. *See generally Millay*, 135 Wn.2d at 193; *Metropolitan Fed. S & L Ass'n v. Roberts*, 72 Wn. App. 104, 113-14, 863 P.2d 615 (Div. II 1994).

(B) SB 5541 Is Curative

Fulbright argues that SB 5541 is not curative because the Redemption Act was not "ambiguous" (Ans. 13-14). As shown above, the Act was ambiguous – and SB 5541, which "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).

Even if the Act were not ambiguous, amendments “adopted in response to lower court decisions” on statutory interpretation are curative and applied retroactively. *McGee*, 142 Wn.2d at 325. Here, the Legislature acted in direct response to *Summerhill*. By replacing the archaic “in time” with “in priority,” it clarified that all junior lienholders may redeem. This is a textbook example of a curative amendment that should be applied retroactively.

(C) SB 5541 Is Remedial

A remedial statute is *presumed* to operate retroactively unless it affects a vested right. *Johnston v. Beneficial Mgmt. Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). SB 5541 is remedial because it “better[s] or forward[s] remedies already existing for the enforcement of rights and the redress of injuries,” *i.e.*, redemption. *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (en banc). And the House Bill Report shows that SB 5541 did not make a material change in any substantive rights, but merely changed the word used to describe those rights.

Fulbright conflates *Fidelity Mutual v. Mark*, which held that the right of redemption is “substantive,” 112 Wn.2d 47, 55, 762 P.2d 1382 (1989) (en banc), with the notion that his inchoate interest is somehow a “substantive title right” that precludes retroactive application of SB 5541 (Ans. 14). *Fidelity* says nothing to suggest that the purchaser at a sheriff’s sale who receives only a certificate of sale has some “substantive right.” That decision, which was strongly criticized by then-Chief Justice Callow, merely declined to apply the equitable principle of *GESA Fed. Credit*

Union v. Mutual Life Ins. Co., 105 Wn.2d 248, 713 P.2d 728 (1986), to recognize an unrecorded assignment of redemption rights. *See Syrovoy v. Alpine Resources, Inc.*, 80 Wn. App. 50, 54, 906 P.2d 377 (Div. III 1995) (“*GESA* and *Fidelity* are difficult to reconcile”).

Fulbright offers nothing to explain how his inchoate interest could be considered a substantive or vested right (*see* Pet. 12). His purchase at the sheriff’s sale was subject to redemption rights, *i.e.*, with notice that redemption could occur. The certificate of sale is contingent, granting title only if the property is not redeemed. RCW 6.23.060. That certificate also assures that, if the property is redeemed, Fulbright will receive its purchase price, plus 12% interest. RCW 6.23.020(2).

CONCLUSION

The Court of Appeals misinterpreted the Redemption Act and the Condominium Act to deny redemption rights to Bank of America and an unknown number of other lienholders. This Court should correct that error by adopting one of the following propositions:

- (1) 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) Tanglewood created, gave record notice of, and perfected its lien for assessments by recording its condominium declaration in 2006. Bank of America recorded its deed of trust in 2007 – “subsequent in time” to that lien under the plain language of RCW 64.34.364 – and it is an

authorized redemptioner under RCW 6.23.010 as written before and after SB 5541.

(3) SB 5541 has retroactive effect and authorizes redemption by Bank of America because the redemption period has not expired and a sheriff's deed or title has not issued.

Dated: October 4, 2013

Respectfully submitted,

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HOUSE BILL REPORT

SB 5541

As Passed House:

April 9, 2013

Title: An act relating to redemption of real property.

Brief Description: Concerning the redemption of real property.

Sponsors: Senators Hobbs, Fain, Hatfield and Harper.

Brief History:

Committee Activity:

Judiciary: 3/20/13, 3/27/13 [DP].

Floor Activity:

Passed House: 4/9/13, 93-0.

Brief Summary of Bill

- Provides that whether a lien is subsequent in "priority," rather than subsequent in "time," to the lien on which the property was sold, determines whether a lien holder is a "redemptioneer" for purposes of redeeming following a foreclosure sale.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; O'Ban, Assistant Ranking Minority Member; Goodman, Hope, Jenkins, Kirby, Klippert, Nealey, Orwall, Roberts and Shea.

Staff: Cece Clynych (786-7195).

Background:

Washington's redemption statutes permit "redemptioners" to redeem foreclosed property for the price paid at the foreclosure sale together with interest, any taxes the purchaser has paid, and certain other amounts. The statutory redemption laws, found in chapter 6.23 RCW, govern the redemption process and define who is a "redemptioneer." The debtor, as well as "[a] creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of

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.

the property, ..., *subsequent in time* to that on which the property was sold" qualify as redemptioners.

Under the Washington Condominium Act, a condominium association's lien on a unit for unpaid assessments has "super priority" and is prior to all other liens and encumbrances on a unit except:

- liens and encumbrances recorded before the recording of the condominium declaration;
- a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and
- liens for real property taxes and other governmental assessments or charges.

The Condominium Act further provides that, to the extent that the assessment is for common expenses, an association's lien is also prior to mortgages recorded before the date on which the assessment became delinquent.

In a 2012 case decided by Division One of the Court of Appeals, *Summerhill v. Roughley*, 166 Wn App 625, the issue was whether the lender qualified as a redemptioner. Despite the lender's argument that the Legislature intended to protect all junior lienholders, and that the statutory reference to a "lien subsequent in time" merely meant a "lien subsequent in priority," the court held that because a 2006 deed of trust, although subsequent in priority, was not subsequent in time to a condominium association's 2008 assessment lien, the lender did not qualify as a redemptioner and could not redeem from the purchaser who had purchased the property at the sheriff's sale.

Summary of Bill:

Whether a lien is subsequent in "priority," rather than subsequent in "time," to the lien on which the property was sold, determines whether a lien holder is a "redemptioner" for purposes of redeeming following a foreclosure sale.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The redemption laws were first written in the late 1800s. Some things have changed since that time, including the advent of condominium associations and the lien priority that such associations have by statute. The court case illustrates that it is time to update the redemption laws. Redemption is a grace period in which a redemptioner can find the money, pay the purchaser at the foreclosure sale, and void the sale. The use of the word "time" in the statute is archaic, and dates back to 1899. The correct word today is "priority." Professor Stoebuck's treatise on the subject uses the term "priority" not "time." Statutes can rearrange priorities, an example of which can be seen in the super priority lien that

condominium associations have. The court in the *Summerhill* case just said that "time" means "time" and that if the word should really be "priority" it was up to the Legislature to change the word. This change is agreeable to stakeholders such as the mortgage community, trustees, homeowners, and those providing legal services to low income persons.

(Opposed) None.

Persons Testifying: Senator Hobbs, prime sponsor; and Brian Sommer, RCO Legal.

Persons Signed In To Testify But Not Testifying: None.

UNIFORM CONDOMINIUM ACT

ARTICLE 1

GENERAL PROVISIONS

Section

- 1-101. [Short Title].
- 1-102. [Applicability].
- 1-103. [Definitions].
- 1-104. [Variation by Agreement].
- 1-105. [Separate Titles and Taxation].
- 1-106. [Applicability of Local Ordinances, Regulations, and Building Codes].
- 1-107. [Eminent Domain].
- 1-108. [Supplemental General Principles of Law Applicable].
- 1-109. [Construction Against Implicit Repeal].
- 1-110. [Uniformity of Application and Construction].
- 1-111. [Severability].
- 1-112. [Unconscionable Agreement or Term of Contract].
- 1-113. [Obligation of Good Faith].
- 1-114. [Remedies to be Liberally Administered].

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

- 2-101. [Creation of Condominium].
- 2-102. [Unit Boundaries].
- 2-103. [Construction and Validity of Declaration and Bylaws].
- 2-104. [Description of Units].
- 2-105. [Contents of Declaration].
- 2-106. [Leasehold Condominiums].
- 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities].
- 2-108. [Limited Common Elements].
- 2-109. [Plats and Plans].
- 2-110. [Exercise of Development Rights].
- 2-111. [Alteration of Units].
- 2-112. [Relocation of Boundaries Between Adjoining Units].
- 2-113. [Subdivision of Units].
- 2-114. [Alternative A] [Easement for Encroachments].
[Alternative B] [Monuments as Boundaries].

not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

COMMENT

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision or conversion of units).

§ 3-116. [Lien for Assessments]

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate [or a power of sale under (insert appropriate state statute)] [but the association shall give reasonable notice of its action to all lienholders of the unit whose interest would be affected]. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the

mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. 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. [The lien under this section is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a recordable statement setting forth the amount of unpaid assessments against his unit. The statement must be furnished within (10) business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

COMMENT

1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device. The bracketed language requiring notice of foreclosure should be adopted only in states in which the power of sale statute does not require notice to junior lienholders.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting

**UNIFORM COMMON INTEREST
OWNERSHIP ACT (1994)**

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-THIRD YEAR
IN CHICAGO, ILLINOIS
JULY 29 - AUGUST 5, 1994

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Approved by the American Bar Association
Miami, Florida, February 14, 1995

SA-7

1. Section 3-116(a) was amended in 1994 to delete the language "from the time the assessment or fine becomes due." The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes except with respect to the special priorities identified in subsection (b) of the section. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old common interest communities and upon recording of the declaration for new common interest communities.

As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued. This, however, is no different than in other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the six months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each State should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's

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Dear State of Washington Supreme Court:

Attached for electronic filing are the Supplemental Brief of Petitioner Bank of America, N.A. and a Declaration of Service.

Please consider these two filings as originals for the Court's file. Copies will not be delivered by regular mail or courier.

Very truly yours,

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