

NO. 71227-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A., Respondent,

vs.

THE CONDO GROUP LLC, Appellant,

and

ZION SERVICES LLC, Respondent.

Appeal from King County Superior Court
The Honorable Jean Rietschel, Case No. 13-2-29726-4

**RESPONDENT JPMORGAN CHASE BANK, N.A.'S
RESPONSE BRIEF**

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I. INTRODUCTION

The sole issue in this appeal is whether an amendment to Washington's redemption statute, Laws of 2013, ch. 53, § 1 ("SB 5541"), applies to a redemption request submitted by JPMorgan Chase Bank, N.A. ("Chase"). SB 5541 went into effect on July 28, 2013. Thereafter, Chase submitted a request to redeem a property from the Condo Group LLC ("Condo Group"), which was the successful bidder for the property at a foreclosure sale. Chase delivered the redemption papers to the King County Sheriff on August 9, 2013, and deposited the redemption funds with the court registry on August 16, 2013. None of the parties to this appeal challenge whether Chase's redemption request was timely or procedurally proper. Moreover, none of the parties dispute that Chase would be entitled to redeem if SB 5541 applies prospectively to all redemption requests submitted on or after July 28, 2013 (SB 5541's effective date).

Condo Group objected to Chase's redemption request on the basis that SB 5541 did not apply to redemption periods already underway. Even though Chase submitted its redemption request after SB 5541's effective date, Condo Group asserted that SB 5541 could only apply to Chase's redemption request if the amendment applied retroactively to foreclosure sales that occurred before that date. It then argued that SB 5541 should

not be given *retroactive* effect. The trial court disagreed. The trial court held that SB 5541 should be given *prospective* application from the time of the amendment's effective date and apply to redemption periods already underway. Because Chase submitted its redemption request after July 28, 2013, Chase was authorized to redeem under the redemption statute, as amended by SB 5541.

In this appeal, Condo Group renews its argument that applying SB 5541 to Chase's redemption request involves retroactive application of a statutory amendment. Condo Group, however, misidentifies the "precipitating event" used to determine whether application of a new statute is prospective or retroactive. The precipitating event is Chase's submission of the redemption request. As such, application of SB 5541 involves prospective application, not retroactive application. Moreover, even if this case involved retroactive application, SB 5541 should be applied retroactively because the amendment is curative or remedial. Accordingly, the trial court properly held that Chase is an authorized redemptioner and is entitled to redeem the property from Condo Group.

II. STATEMENT OF ISSUES

1. Did the trial court properly hold that Senate Bill 5541, which amended RCW 6.23.010, has immediate prospective application

from Senate Bill 5541's effective date and applies to redemption periods already underway?

2. Does Senate Bill 5541 apply retroactively to redemption periods that began running before the amendment's effective date because Senate Bill 5541 is curative or remedial?

III. STATEMENT OF THE CASE

A. *Summerhill* Narrowly Interprets The Pre-Amendment Redemption Statute.

The legislature enacted SB 5541 to clarify who could redeem after the Court of Appeals' decision in *Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 289 P.3d 645 (2012). *Summerhill* involved a condominium association that filed an action to judicially foreclose on a statutory lien for unpaid condominium assessments.

Under the Condominium Act, a condominium association's lien for unpaid assessments has a limited priority over mortgages or deeds of trust recorded before the lien arises. *Summerhill*, 166 Wn. App. at 628-29. RCW 64.34.364(3) provides that a lien for common expense assessments "shall . . . be prior to mortgages . . . 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 . . . the association" *Id.* Thus, a lien for unpaid condominium assessments is given "super priority" over

previously recorded mortgages and deeds of trust to the extent of six months' worth of assessments. *Id.* at 629.

The *Summerhill* court noted that the official comments to RCW 64.34.364 set forth the legislature's expectations with the regard to the super priority lien. Those comments stated, "As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien." *Id.* at 629 (citing 2 SENATE JOURNAL, 51st Leg., Reg. Sess., App. A at 2080 (Wash. 1990)).

The condominium association in *Summerhill* filed an action to judicially foreclose on an assessment lien after the owner became delinquent on her condominium association assessments. *Id.* at 627. The loan servicer did not make arrangements to pay the assessments to satisfy the super priority lien. The association obtained default judgments against the owner and loan servicer and proceeded with a foreclosure sale. *Id.* Because the association foreclosed on its super priority lien, the *Summerhill* court found that the foreclosure extinguished the servicer's previously recorded deed of trust. *Id.* at 629.

The *Summerhill* court then addressed whether the loan servicer could redeem from the foreclosure sale purchaser. At the time, Washington’s redemption statute defined a “redemptioneer” as follows:

(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 the successors in interest:

...

(b) *A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold.* The persons mentioned in this subsequent are termed redemptioners.

Id. at 630 (citing RCW 6.23.010 (emphasis in original)).

The *Summerhill* court interpreted the pre-amendment redemption statute narrowly. It reasoned that the servicer’s deed of trust was not “subsequent in time” to the association’s assessment lien because the deed of trust was recorded two years before the assessment lien was created.

Id. at 631. As such, the *Summerhill* court held that the loan servicer was not a proper redemptioner under the pre-amendment redemption statute.

Id.

The *Summerhill* holding created a cottage industry in which foreclosure sale purchasers, like Condo Group, purchased condominiums

at Sheriff's sales for a fraction of their value and free from an extinguished lienholder's right to redeem.¹

B. Legislature Enacts SB 5541 to Clarify RCW 6.23.010 and Supersede *Summerhill*.

Washington's legislature took swift action to alter the *Summerhill* holding. In 2013, the year after the *Summerhill* decision, the legislature enacted SB 5541 with bi-partisan sponsorship and nearly unanimous support (House 93-0, Senate 47-2). (CP 142-43)

In SB 5541, the legislature made a one-word amendment to RCW 6.23.010 by replacing the word "time" with "priority":

(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 the successors in interest:

...

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of any part thereof, separately sold, subsequent in ((~~time~~)) priority to that on which the property was sold. The persons mentioned in this subsequent are termed redemptioners.

¹ *Summerhill* was not appealed. Following *Summerhill*, this Court decided *BAC Home Loan Servicing, LP v. Fulbright*, 174 Wn. App. 352, 298 P.3d 779 (Apr. 8, 2013), *review granted* No. 88853-1, which followed *Summerhill*. The issues before the Supreme Court on the *Fulbright* appeal include the proper interpretation of pre-amendment RCW 6.23.010 and whether SB 5541 applies retroactively. (CP 151-68) Oral argument on the *Fulbright* appeal took place on February 11, 2014.

SB 5541, Sec. 1. The Final Bill Report for SB 5541 specifically cited the *Summerhill* decision and stated that “[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.” (CP 144-45)

SB 5541 had an effective date of July 28, 2013. (CP 141, 145)

C. Poon Obtains Loan from Washington Mutual to Purchase Property.

This case involves the precise type of situation that SB 5541 was intended to address. On August 14, 2006, Hai Poon (“Poon”) signed a promissory note (“Note”) to obtain a loan in the amount of \$162,180 from Washington Mutual Bank, FA (“WaMu”). (CP 69-73) Poon obtained the loan to purchase a unit (“Property”) in the Onyx Condominiums located at 125 East Olive Street, Unit 310, Seattle, Washington. Poon granted WaMu a deed of trust (“Deed of Trust”) against the Property as security for repayment of the Note. (CP 74-96) Chase is the acquirer of the loans and other assets of WaMu from the Federal Deposit Insurance Corporation, acting as receiver for WaMu. (CP 47) At all relevant times,

Chase was the holder of the Poon Note and beneficiary under the Deed of Trust. (CP 67-68)

D. Condo Group Is The Successful Bidder At The Sheriff's Sale.

On March 14, 2012, Onyx Homeowners Association ("Onyx") commenced a judicial foreclosure action against Poon and Chase pursuant to its lien for unpaid assessments. (CP 51-54) A Default Judgment and Order of Foreclosure Decree was entered against Poon and Chase on May 24, 2012 ("Foreclosure Decree"). (CP 56-58) The Foreclosure Decree specifically referred to Chase and Poon's one year right of redemption:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of all defendants, including mortgage lenders, be adjudged inferior and subordinate to the plaintiff's lien and be forever foreclosed except only for the statutory right of redemption allowed by law, if any

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the period of redemption shall be one year from the date of the Sheriff's Sale after which time the Sheriff shall issue the Sheriff's Deed of the purchaser.

(CP 56-58)

On August 17, 2012, the Property was sold at a Sheriff's sale, and the Condo Group placed the highest bid of \$35,000. (CP 60-61) As of July 15, 2013, the unpaid principal balance owed to Chase under the Note was \$162,099.23. (CP 67-68)

E. Chase Timely Submits Its Redemption Request To The Sheriff Within The One-Year Redemption Period.

On August 9, 2013, a date within the one-year redemption period and under the amended RCW 6.23.010, Chase submitted the redemption request papers to the Sheriff in accordance RCW 6.23.080. (CP 63-96)

On August 14, 2013, Condo Group delivered a letter to the Sheriff asserting that Chase was not an authorized redemptioner under RCW 6.23.010. (CP 98-99)

On August 16, 2013, before the redemption period expired, Chase deposited into the Court registry the estimated redemption amount of \$42,110. (CP 101-03)

F. Zion Services LLC Also Tries to Redeem.

Zion Services LLC (“Zion”) is a closely-held limited liability company. (CP 105) In March 2013, Zion obtained an assignment of a judgment against Poon from DCR Services, LLC (“DCR”). (CP 112-117) Both Zion and DCR are owned by the same person who manages condominium and homeowner associations. (CP 105,109) In June 2013, Zion submitted a redemption request to the Sheriff in an attempt to strip Condo Group of the windfall it obtained at Onyx’s foreclosure sale. (CP 112-117) The Sheriff issued a letter in June 2013 advising Zion and

Condo Group that the court must decide whether Zion is a qualified redemptioner. (CP 111)

G. The Trial Court Grants Chase's Motion for Summary Judgment and Denies Condo Group and Zion's Cross-Motions for Summary Judgment.

Chase filed this lawsuit on August 16, 2013, seeking a declaration that it is an authorized redemptioner. (CP 1-6) Chase named Condo Group and Zion as defendants in the action. (CP 200-215) Chase filed a motion for summary judgment on October 18, 2013. Condo Group and Zion filed cross-motions for summary judgment on the same day. (CP 200-233, 417-442)

On November 15, 2013, the trial court granted Chase's motion for summary judgment and held that Chase was an authorized redemptioner. (CP 710-712) The trial court also denied Condo Group's cross-motion for summary judgment, rejecting Condo Group's argument that Chase was not an authorized redemptioner. (CP706-709) Condo Group appealed. (CP 714-715)

IV. ARGUMENT

A. Summary of Argument.

The trial court properly held that SB 5541 should be given immediate, prospective application. As such, the trial court properly concluded that Chase was an authorized redemptioner at the time it

submitted its redemption request to the Sheriff because SB 5541 had already gone into effect. “[A] statute operates prospectively when the precipitating event for the application of the statute occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute.” *In re Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013) (citations and internal quotation marks omitted). Courts “look to the subject matter regulated by the statute and consider its plain language to determine the precipitating or triggering event.” *Id.* (citing *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 809, 272 P.3d 209, 218 (2012)).

Here, SB 5541 amended the redemption statute, so the precipitating event must be Chase’s submission of the redemption request on August 9, 2013. Because this event occurred after SB 5541 became effective on July 28, 2013, applying SB 5541 to Chase’s redemption request involves prospective application.

Alternatively, if the precipitating event occurred before SB 5541’s effective date, Chase would still be an authorized redemptioner. A statutory amendment may be applied retroactively if “(1) the legislature so intended; (2) it is ‘curative’; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition.” *McGee Guest Home, Inc. et al. v. Dep’t of Soc. and Health*

Servs., et al., 142 Wn.2d 316, 324, 12 P.3d 144, 149 (2000) (citation and internal quotation marks omitted). In this case, SB 5541 also applies retroactively to Chase’s redemption request because the amendment is both curative and remedial.

Of course, the Court’s decisions in *Summerhill* and *Fulbright* provide the backdrop for the issues raised in this appeal. If the Supreme Court overturns *Fulbright*, Case No. 88853-1, then Chase will unquestionably have the right to redeem under the pre-amendment redemption statute.

B. Standard of Review.

This Court reviews an order granting summary judgment de novo. *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273, 279 (1998). The Court may affirm the order on any grounds supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696, 700 (2003).

C. Immediate Prospective Application of SB 5541 from the Amendment’s Effective Date Advances the Policies of the Redemption Statute.

The right of redemption provides a “mortgage debtor and certain others . . . a stated time *after the sale* to buy the land from the purchaser by paying, not the mortgage debt, but what the purchaser paid at the sale.” 18

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§ 19.19 (2004) (emphasis in original). The right of redemption serves a number of public policies. “Most obviously, it gives the debtor, whose title has been lost, and junior lienors, whose liens have been extinguished, a grace period, beyond the sale to salvage something.” *Id.* Courts have found “redemption statutes to be remedial in nature, designed ‘to help creditors recover their just demands, nothing more.’” *Gesa Fed. Credit Union v. Mut. Life Ins. Co.*, 105 Wn.2d 248, 255, 713 P.2d 728, 732 (1986) (citations omitted).

Moreover, the “real, driving policy” of the right of redemption is that it “puts pressure on bidders to run the bidding up to a realistic figure” to avoid unreasonably low purchase prices at foreclosures. *STOEBUCK & WEAVER, supra*, § 19.19. The right of redemption prevents real estate investors and others from “snapping” up properties at bargain prices that do not reflect the real market value of the properties. *Id.*

These policies are evident in this case. Condo Group purchased the Property at Onyx’s foreclosure for the amount of the assessment lien—\$35,000. The unpaid principal balance on Poon’s Note to Chase was \$162,099.23. Because *Summerhill* allowed Condo Group to purchase the property free from Chase’s right of redemption, Condo Group had no incentive to increase the amount of its bid. Furthermore, the low purchase price encouraged third-parties, such as Zion, to take an assignment of a

judgment against Poon for the sole purpose of trying to redeem the Property from the successful bidder at the foreclosure sale.

D. SB 5541 Applies Prospectively to Redemption Requests Submitted On or After July 28, 2013.

In this case, the precipitating event is Chase's submission of the redemption request. Because this event occurred after SB 5541's effective date, the amendment involves prospective application.

"A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." *In re Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094, 1097 (1997) (citing *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1438, 128 L. Ed. 2d 229 (1994)). "A statute is 'not retroactive merely because it relates to prior facts or transactions where it does not change their legal effect.'" *Id.* (citing *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992); *Landgraf*, 511 U.S. at 265).

Courts "look to the subject matter regulated by the statute and consider its plain language to determine the precipitating or triggering event." *Haviland*, 177 Wn.2d at 75 (citing *Carrier*, 173 Wn.2d at 809). "The court's fundamental objective is to ascertain and carry out the

Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* at 75-76 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4, 9 (2002)).

The subject matter regulated by SB 5541 is the right of redemption. Using the date of Chase's redemption request as the precipitating event effectuates SB 5541's purpose by limiting the harsh results of *Summerhill*. Although some of the requisites for Chase's redemption are drawn from antecedent events, namely Onyx's foreclosure, SB 5541 is not retroactive merely because it relates to prior facts or transactions.

Not surprisingly, Condo Group asserts that the precipitating event should be the underlying foreclosure sale, which occurred before SB 5541's effective date. Condo Group urges this Court to “hold that the application of the new redemption statute here would be a retroactive, not prospective, application of a new law.” Brief of Appellant at 15-16. Condo Group, however, provides no analysis to support using the foreclosure sale as the precipitating event. Rather, it merely selects the foreclosure sale as the precipitating event because it is most advantageous to Condo Group's legal position. The Supreme Court's reasoning in *In re*

Haviland, however, compels the conclusion that the date of Chase's redemption request is the precipitating event.

1. *Haviland* Set Forth Factors Used to Identify the Precipitating Event.

The Supreme Court provided a detailed precipitating event analysis in *Haviland*. That case involved a probate dispute between a decedent's second wife, Ms. Haviland, and the decedent's adult children from a prior marriage. The decedent, Dr. Haviland, suffered from advanced dementia and was fifty years older than his second wife. *Haviland*, 177 Wn.2d at 71-72. Before his death, Ms. Haviland convinced Dr. Haviland to change his will to transfer substantially all of his estate to her. After his death, Dr. Haviland's children commenced an action challenging the revised will, alleging that Dr. Haviland lacked testamentary capacity and the will was the product of undue influence. *Id.* at 72.

While the probate dispute was pending, "the legislature amended the slayer statutes, extending the statutes' application to prevent financial abusers of vulnerable adults from acquiring property or any benefit from their victims' estates." *Id.* at 73. In light of the amendment to the slayer statute, the administrator of the decedent's estate filed a petition to declare Ms. Haviland an abuser. *Id.* The trial court denied the petition, concluding that the triggering event for application of the abuser statutes

was the financial exploitation of the decedent. *Id.* at 74. The trial court also declined to apply the statutes retroactively. *Id.* The Court of Appeals reversed, concluding that the triggering event was the filing of the petition during probate. *Id.* As such, applying the revised abuser statutes to Dr. Haviland’s probate would not constitute retroactive application. *Id.*

The Supreme Court agreed with the Court of Appeals that the abuser statutes involved prospective application. In reaching its decision, the Supreme Court examined the following factors:

- **Plain Language of Statute:** The Court considered the statutes’ plain language to determine the precipitating event. The Court found that the “language plainly seeks to prevent a financial abuser from receiving any property or other benefit from a decedent’s estate.” *Id.* at 76.

- **Effectuate Purpose of Statute:** The Court reasoned that the abuser statutes “must be applied to prevent distribution of property and other benefits to a financial abuser” for the statutes’ purpose to be effectuated. *Id.* The Court found that “[v]iewing the filing of a petition challenging distribution based on financial abuse as the triggering event best effectuates the statutes’ stated goal of broad application.” *Id.*

- **Absence of an Express Triggering Event:** The Court contrasted the abuser statutes with other provisions in the probate code which *do* state effective dates and application terms. “These provisions demonstrate that the legislature is capable of expressing a triggering event and has done so in the past.” *Id.* at 77. “Its decision not to do so here further supports broad application of the abuser statutes.” *Id.*

- **Activity that the Statute Intends to Regulate:** The Court examined other cases which demonstrated that “the proper triggering event is that which the statute intends to regulate.” *Id.* In *Haviland*, the “abuser statutes intend[ed] to regulate the receipt of benefits, not the financial abuse itself. Thus, despite the fact that abuse occurred prior to the amendments at issue, the triggering event is the attempt by the abuser to receive property or any other benefit from the estate of the abused person.” *Id.* at 78.

- **No Impairment of Vested Rights:** The Court rejected Ms. Haviland’s argument that the abuser statutes applied retroactivity because her vested rights were impaired. “A vested right is more than a mere expectation.” *Id.* at 79. The Court reasoned that Ms. Haviland’s “right to in her deceased husband’s property depends on the outcome of probate proceedings and whether there are

claims of fraud, undue influence, creditor claims, or other challenges.” *Id.* “Thus, prior to probate, Ms. Haviland cannot inherit until probate has been completed.” *Id.* at 80.

- **No New Consequences for Past Actions:** The Court rejected Ms. Haviland’s argument that using the petition as the precipitating event would require her to face new consequences for past actions. The Court reasoned that “[p]rior to Ms. Haviland’s conduct, financial abuse of a vulnerable adult was regulated by the vulnerable adult protection act.” *Id.* at 81. “The vulnerable adult protection act thus provided notice that financial abuse is a wrongful act and that the financial abuser could be liable for the amount they improperly received.” *Id.*

After applying these factors, the Court held that the abuser statutes act prospectively and are triggered by the filing of the petition to declare a beneficiary an abuser. *Id.* at 82.

2. Application of the *Haviland* Factors Demonstrates that Chase’s Submission of the Redemption Request is the Precipitating Event.

Applying the *Haviland* factors to this case overwhelmingly compels the conclusion that the submission of Chase’s redemption request is the precipitating event for the purposes of applying SB 5541.

- **Plain Language of Statute:** The plain language of SB 5541 shows that the amendment’s purpose was to clarify the definition of redemptioners to include mortgage lenders and servicers such as Chase. The redemption statute begins by stating that “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” RCW 6.23.010(1) (emphasis). The redemption statute and SB 5541 presuppose that a sale has already taken place. It is the act of redemption that is the focus of the statute and amendment, not the foreclosure sale.

- **Effectuate Purpose of Statute:** SB 5541 was enacted as a direct response to *Summerhill*. Using the submission of the redemption request as the precipitating event would effectuate the purpose of SB 5541 by permitting Chase to redeem where it previously could not under *Summerhill*.

- **Absence of an Express Triggering Event:** While SB 5541 has an effective date of July 28, 2013, the legislature did not set forth an express triggering event. The absence of an express precipitating event further supports “broad application” of SB 5541. In this case, broad application supports using the date of the

redemption request as the precipitating event, so more creditors can invoke the statute to protect their interests by exercising the right of redemption under SB 5541 and RCW 6.23.010.

- **Activity that the Statute Intends to Regulate:** SB 5541 intends to regulate the right of redemption as provided in RCW 6.23.010. It does not regulate judicial foreclosures or Sheriff's sales, which fall under a completely different chapter of the Revised Code of Washington. *See* Ch. 61.12 RCW. Because SB 5541 does not intend to regulate judicial foreclosures, there is no logical reason to use the foreclosure sale as the precipitating event. The only reasonable precipitating event for this case is the submission of Chase's redemption request.

- **No Impairment of Vested Rights:** Applying SB 5541 to Chase's redemption request does not impair Condo Group's vested rights because it had no such rights in the Property. A foreclosure sale purchaser does not have a vested right during the redemption period. *Severson v. Penski*, 36 Wn. App. 740, 744, 677 P.2d 198, 201 (1984) (“[A] certificate of sale executed by a sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into an absolute title.”); *STOEBUCK & WEAVER*,

supra, § 19.19 (“The purchaser gets only a certificate of sale; he must sweat out the redemption period to get a sheriff’s deed.”).

- **No New Consequences for Past Actions:** Applying SB 5541 to Chase’s redemption request does not impose new consequences on Condo Group for its past actions. A statute’s application may be more appropriately considered retroactive if its “application increases liability for past conduct or imposes new duties or disabilities with respect to *completed* transactions.” *In re Pers. Restraint of Flint*, 174 Wn.2d 539, 547, 277 P.3d 657, 661 (2012) (emphasis added). Here, the transaction was not “complete” because the redemption period had not run before Chase submitted its redemption request. Additionally, the redemption statute is not punitive at all because the redemptioner must pay to the successful bidder the amount of the bid plus interests and other costs. RCW 6.23.020(2). Finally, the right of redemption is a statutory right that can be and has been amended in the past. *Severson*, 36 Wn. App. at 741 (describing amendment that added an “entirely new provision” to the redemption statute); *Geddis v. S.T. Packwood*, 30 Wash. 270, 271-72, 70 P. 481, 481-82 (1902) (describing statutes that extended the right of redemption to judgment creditors). Condo Group was on notice that redemption

statutes could change and additional lienors could be given the right to redeem. It suffered no loss from Chase's exercise of its redemption rights.

There is simply no reasonable basis for using the foreclosure sale as the precipitating event instead of Chase's redemption request. The foreclosure sale could conceivably be the appropriate precipitating event if SB 5541 regulated judicial foreclosures. SB 5541 does not regulate foreclosures, however. Rather, SB 5541 regulates the right of redemption, so the only logical event to use as the precipitating event is the redemption request. *See also Flint*, 174 Wn.2d at 548 (precipitating event for application of statute amending the conditions of confinement for repeat violations of conditions of community custody is the date the offender is found to have committed violations of conditions of community custody at a third violation hearing, not the date the offender was first convicted, sentenced, and imprisoned).

Of course, there can be no right of redemption without a foreclosure sale. However, courts have repeatedly held that a statute is "not retroactive because some of the requisites for its actions are drawn from a time antecedent to its passage or because it fixes the status of a person for the purposes of its operation." *Haviland*, 177 Wn.2d at 75 (citing cases).

E. This Court Has Held That an Amendment to the Redemption Statute Requires Immediate Prospective Application.

In *Severson*, this Court held that an amendment to the redemption statute should be given “immediate prospective application.” *Severson*, 36 Wn. App. at 745. In that case, the redemption statute was amended to require the Sheriff’s sale purchaser to send written notice to the judgment debtor every two months during the redemption period, reminding him of his redemptive rights and the consequences of failing to redeem. *Id.* at 741. The penalty for not sending the notices was extension of the redemption period of two months for every missed notice. *Id.* The amendment to the redemption statute became effective more than seven months after the Sheriff’s sale. *Id.* at 742.

Severson held the amendment had “immediate prospective application” from the date the amendment took effect, thereby applying the amendment to the remainder of the unexpired redemption period. *Id.* at 745. In reaching this decision, the *Severson* court noted that “[i]t is well established that ‘a statute is not retrospective merely because it draws upon antecedent facts for its operation without changing their legal effect.’” *Id.* at 744 (citation omitted). It further explained that the Sheriff’s sale purchaser had no vested right during the redemption period, citing a well-established point of law: “[A] certificate of sale executed by a

sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into an absolute title.” *Id.* (citing *Bonded Adj. Co. v. Helgerson*, 188 Wash. 176, 178, 61 P.2d 1267, 1268 (1936)).

Here, as in *Severson*, SB 5541 should be given immediate prospective application from the amendment’s effective date and applied to the remainder of the redemption period. SB 5541 is not retrospective merely because the right of redemption draws on an antecedent event. Moreover, immediate prospective application of SB 5541 should not be treated as “retroactive” because it does not affect any of Condo Group’s vested rights. As the successful bidder at the Sheriff’s sale, Condo Group had no vested rights to the Property before the redemption period expired. Therefore, application of SB 5541 to Chase’s redemption request involves prospective application, not retroactive application.

F. The Legislature Intended SB 5541 to Immediately Take Effect on July 28, 2013, and Apply to Redemption Periods Underway.

The legislature has previously included reservation clauses in amendments to the redemption statutes expressly limiting the amendment to Sheriff’s sales occurring after the amendment takes effect. SB 5541 has no such reservation. The trial court found that “it is of significance that there is no reservation clause in the statute.” (RP 51)

It is well settled that “where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.” *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791, 795 (1998) (citing *United Parcel Serv., Inc. v. Dep’t of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186, 191 (1984)). “Under the *expressio unius est exclusion alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions.” *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597, 604 (2002) (citation omitted).

For example, *Geddis v. Packwood* involved a mortgage foreclosure sale occurring when the Redemption Act of 1886 was in effect. 30 Wash. 270, 271, 70 P. 481, 481-82 (1902). Under the 1886 Act, only the judgment debtor was entitled to redeem—an extinguished subordinate creditor was not a qualified redemptioner. *Id.* The Redemption Act of 1897 amended the law to extend the right of redemption to an extinguished judgment creditor. *Id.* at 271-72. A judgment creditor had its lien extinguished while the 1886 Act was in effect, but then sought to redeem once the 1897 Act took effect. *Id.* at 271. The Supreme Court held that the extinguished judgment creditor was not a qualified redemptioner because the 1897 Act expressly prohibited redemptions by

extinguished judgment creditors that occurred while the 1886 Act was in effect. *Id.* at 272.

The Court explained that the 1897 Act had a reservation clause stating: “the rights of redemption from sales made upon judgments rendered prior thereto shall remain unaffected.” *Id.* at 272. The Court observed that the Redemption Act of 1899 also included a reservation clause, noting that “in each act there is an express reservation that such rights conferred shall not be applicable to judgments entered before their enactment.” *Id.*

Geddis proves that the legislature knows how to limit the applicability of a redemption law amendment to certain antecedent events (i.e., a Sheriff’s sale or judgment entry date), but chose not to do so in this instance. SB 5541 does not include reservation language seen in *Geddis*. Therefore, it is appropriate to presume that the legislature intended SB 5541 to apply to redemption periods already underway.

G. Aside from Having Immediate Prospective Application, SB 5541 Applies Retroactively.

Alternatively, if this Court finds that SB 5541 requires retroactive application, the amendment should be retroactively applied to Chase’s redemption request.² A statutory amendment may be applied retroactively

² The retroactive application of SB 5541 is another issue before the

if “(1) the legislature so intended; (2) it is ‘curative’; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition.” *McGee*, 142 Wn.2d at 324. SB 5541 satisfies these curative and remedial requirements.

1. SB 5541 is Curative.

SB 5541 is curative because 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, 1152 (2007) (en banc) (quotations omitted). “Ambiguity exists when a law can be reasonably interpreted in more than one way.” *McGee*, 142 Wn.2d at 324–25 (citation and quotations omitted).

Former RCW 6.23.010 was ambiguous. RCW 6.23.010 could reasonably be interpreted in more than one way, as the leading treatise on redemption law in Washington demonstrates. Prior to *Summerhill*, Washington Practice’s volume on the right of redemption interpreted RCW 6.23.010 as defining “redemptioneer” as “a creditor who has a lien . . . subsequent in *priority* to that being foreclosed[.]” *STOEBUCK & WEAVER, supra*, § 19.19 (emphasis added). The statute is capable of more

Supreme Court in the *Fulbright* appeal, Case No. 88853-1. (CP 151-68) As a practical matter, if the Supreme Court holds that SB 5541 applies retroactively, then it will be unnecessary to determine whether the amendment has immediate prospective application to redemption periods already underway.

than one reasonable interpretation because Washington courts and legal scholars interpreted it differently than the *Summerhill* court for years.

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. *Summerhill* was decided in July 2012, and by February 2013 a bi-partisan bill clarifying RCW 6.23.010 was introduced. (CP 142-43) The bill passed nearly unanimously in April 2013—a textbook example of a curative amendment described in *McGee*. (CP 142-44)

2. SB 5541 is Remedial.

Besides being curative, SB 5541 is also remedial. “A remedial change relates to practices, procedures, or remedies without affecting substantive or vested rights.” *Flint*, 174 Wn.2d at 546.

a. SB 5541 Does Not Affect Vested or Substantive Rights.

Retroactive application of SB 5541 to Condo Group does not affect Condo Group’s vested or substantive rights because, as a Sheriff’s sale purchaser, Condo Group only has an inchoate right in the Property. In rendering its decision, the trial court stated, “we start with the very simple principle that a Sheriff’s sale does not vest title. It’s evidence of an inchoate estate that may or may not ripen into absolute title.” (RP 51)

“A vested right, entitled to protection from legislation, must be more than a mere expectation based upon the anticipated continuance of the existing law.” *Haddenham v. State*, 87 Wn.2d 145, 150, 550 P.2d 9, 13 (1976). Condo Group, as the successful bidder at the Sheriff’s sale, merely received a Sheriff’s “certificate of purchase.” (CP 251) A Sheriff’s certificate of purchase does not convey rights to property. Further, it cannot be a vested or substantive property right by definition because it is subject to the statutory right of redemption. This issue is well settled in Washington law. The redemption statute prohibited the Sheriff from issuing a deed conveying title to Condo Group unless no redemption was made during the one-year redemption period. RCW 6.23.060 (“If no redemption is made within the redemption period prescribed by RCW 6.23.020 or within any extension of that period under any other provision of this chapter, the purchaser is entitled to a sheriff’s deed . . .”). Because an authorized redemptioner did redeem within that year, Condo Group has no right to receive a Sheriff’s deed. *Id.*

Washington courts have uniformly held that the Sheriff sale purchaser’s property interest is inchoate: “[A] certificate of sale executed by a sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into absolute title.” *Severson*, 36 Wn. App. at 744 (citing *Helgerson*, 188 Wash. at 178); *Fid. Mut. Sav. Bank v.*

Mark, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989) (same); *W.T. Watts v. Sherrer*, 89 Wn.2d 245, 248 571 P.2d 203, 206 (1977) (same). Any contention that Condo Group had a vested or substantive interest in the Property as a result of its Sheriff's sale purchase, therefore, mischaracterizes the effect of the sale because the redemption statute prohibits transfer of title for one year.

**b. Retroactive Application of SB 5541
Furtheres the Remedial Purpose of the
Redemption Statute.**

Moreover, retroactive application of SB 5541 furthers the remedial purpose of redemption statutes. An exception to the presumption against retroactive application is recognized "if a statute is remedial in nature and retroactive application would further its remedial purpose." *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981); *Haddenham*, 87 Wn.2d at 148 ("Where . . . a statute is remedial and its remedial purpose is furthered by retroactive application, the presumption favoring prospective application is reversed."). "Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham*, 87 Wn.2d at 148 (citations omitted). The Supreme Court has opted to join those courts that have found redemption statutes to be remedial in nature, designed "to help creditors recover their just demands, nothing more." *Gesa*, 105 Wn.2d at

255. 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*, 87 Wn.2d at 148.

The purpose of redemption rights is to provide junior lienors like Chase with a second chance to regain an interest extinguished by judicial foreclosure. *STOEBUCK & WEAVER, supra*, § 19.19. The only way to afford that Chase this second chance is for the court to broadly apply SB 5541 and give the amendment retroactive application. *Gesa*, 105 Wn.2d at 255.

Holding otherwise contradicts the legislature’s intent and saddles Chase with a significant loss while Condo Group nets a huge windfall. Poon defaulted under the Note. If Chase redeems, then Chase or its successors can sell the Property to offset the Note balance, minimizing Poon’s liability on the Note, and Condo Group will recover its \$35,000 bid and other recoverable sums with interest. RCW 6.23.020(2). But, if the Court denies redemption here, then Chase’s only recourse is to sue Poon on the Note, placing him at risk for a personal judgment and possibly forcing him into bankruptcy. *See Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 550, 167 P.3d 555, 560 (2007) (holding that a foreclosure by a senior lien holder does not preclude the extinguished junior lien holder from suing on the note).

H. Prospective and Retroactive Active Application of SB 5541 Does Not Violate the Constitution.

Finally, Condo Group makes a number of cursory arguments that retroactive application of SB 5541 would violate the state and federal constitutions. As a threshold matter, all of these constitutional challenges require this Court to find that SB 5541 requires retroactive application. If the Court finds that SB 5541 applies prospectively from July 28, 2013, then all of Condo Group's constitutional challenges fail.

Moreover, even if SB 5541 requires retroactive application, Condo Group's constitutional challenges would fail for multiple reasons.

1. SB 5541 Does Not Violate Condo Group's Due Process Rights.

Condo Group asserts that retroactive application of SB 5541 violates its due process rights under the 14th Amendment which "prohibits 'changes to the law that retroactively affect rights which vested under the prior law.'" Brief of Appellant at 30 (citing *Carrier*, 173 Wn.2d at 811-13).

Condo Group's due process argument fails because Condo Group does not have a vested interest in the Property. *Severson*, 36 Wn. App. at 744 ("[A] certificate of sale executed by a sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into absolute title."); *Mark*, 112 Wn.2d at 52 (same). Allowing Chase to

redeem the Property would not affect Condo Group's vested rights and therefore would not violate Condo Group's due process.

2. SB 5541 Does Not Impermissibly Impair Contracts.

Condo Group also asserts that retroactive application of SB 5541 would violate the contracts clauses. *See* WASH. CONST. art. 1, § 23 (“No . . . law impairing the obligations of contracts shall ever be passed”); U.S. Const. art. 1, § 10 (“No state shall . . . pass any . . . law impairing the obligation of contracts”); *Caritas Servs. v. Dep’t of Soc. & Health Servs.*, 123 Wn.2d 391, 402, 869 P.2d 28, 34 (1994) (“We give the state and federal contract clauses the same effect.”).

Condo Group's argument is meritless. In *Macumber*, the Supreme Court addressed an analogous issue: “Does the 1977 amendment to the Washington Homestead Statute (RCW 6.12.050), which increased the exemption amount from \$ 10,000 to \$ 20,000, permit a debtor to claim the increased exemption amount as against a creditor who extended unsecured credit prior to the date of the amendment?” *Macumber*, 96 Wn.2d at 569. The Court held that retroactive application of the 1977 amendment did not violate the contracts clauses.

The *Macumber* court started with the proposition that “[t]he prohibition against impairment of contracts ‘is not an absolute one and is

not to be read with literal exactness like a mathematical formula.” *Id.* at 571 (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S. Ct. 231, 78 L. Ed. 413 (1934)). It then found that retroactive application of the 1977 amendment did not impair the creditor’s contract for two reasons.

First, the legislature was merely exercising its sovereign power to increase homestead exemption in response to increases in the cost of living. *Id.* at 572. “It is presumed that parties contract with knowledge that reservation of essential attributes of sovereign power is written into all contracts as a postulate of the legal order.” *Id.* (citing *Crane Towing, Inc. v. Gorton*, 89 Wn.2d 161, 174, 570 P.2d 428, 436 (1977)); *see also Margola Assocs. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23, 39 (1993) (“[A] party who enters into a contract regarding an activity ‘already regulated in the particular to which he now objects’ is deemed to have contracted ‘subject to further legislation upon the same topic.’”).

Second, the increase in the homestead exemption did not impair a contractual obligation. *Id.* It was merely a modification of a remedy. *Id.* Remedies “could be modified as long as it does not totally deny or seriously impair the value of the right.” *Id.* (citing *Blaisdell*, 290 U.S. at 433).

In this case, the legislature exercised its sovereign power to amend the redemption statute. Condo Group purchased the Property at the foreclosure sale knowing that the Property was subject to the right of redemption and that the redemption statute could be amended.

Additionally, SB 5541 simply modifies the redemption statute which courts have held is a remedial statute. SB 5541 does not deny or seriously impair the value of Condo Group's rights as the successful bidder at the Sheriff's sale. Condo Group is still entitled to recover its bid price and other recoverable sums with interest from the redemptioner. These are the same rights Condo Group would be entitled to if any other junior lienor redeemed from Condo Group.

3. SB 5541 Does Not Violate the Separation of Powers.

Condo Group's separation of powers argument likewise fails because SB 5541 does not interfere with any judicial function.

In *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009), the Supreme Court considered whether the legislature's retroactive amendment to Washington's Law Against Discrimination ("WLAD"), which rejected the Court's prior interpretation of the term "disability" in WLAD, violated the separation of powers. The Court held that the retroactive amendment did not violate the separation of powers. It

noted that the legislature was careful not to reverse the Court's prior decision interpreting the term "disability" and it did not attempt to interfere with any judicial function. *Hale*, 165 Wn.2d at 510. Moreover, the Court found that the "legislature has not threatened the independence or integrity or invaded the prerogatives of the judicial branch." *Id.*

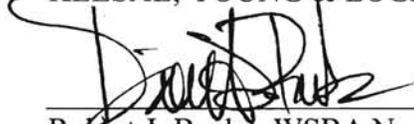
Here, SB 5541 does not purport to reverse *Summerhill* or *Fulbright*. The amendment does not attempt to interfere with the courts' judicial function or threaten their independence or integrity. SB 5541 simply clarifies the redemption statute to make clear that mortgage lenders and servicers are authorized redemptioners. As such, SB 5541 does not violate the separation of powers.

V. CONCLUSION

For all the above reasons, the trial court's decision should be AFFIRMED.

DATED this 18th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing RESPONDENT JPMORGAN CHASE BANK, N.A.'S RESPONSE BRIEF upon the following persons via hand delivery:

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