Case No. 81991-7

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WEST COAST SERVICING, INC.,

Appellant,

vs.

PRINCE ERIC LUV,

Respondent.

APPELLANT'S RESPONSE TO AMICUS

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I. RESPONSE

Appellant submits its response to the Amicus.

A. Pratt is irrelevant.

Amicus relies solely upon a 1922 state case, *Pratt v. Pratt*, 121 Wash. 298, 209 P. 535, as an underlying basis for the *Edmundson v. Bank of Am., NA, 194 Wn. App. 920 (2016)* rule. *Pratt* concerned matured secured debt whose enforcement had expired. That is not the issue, here. The issue in *Edmundson* and this case is the effect of the loss of personal recourse as a remedy on *un-matured* secured debt.

The other cases cited by Amicus are *Edmundson's* progeny, and follow *Edmundson* only because it is a published state court case. None of those cases corroborate the *Edmundson* language as being consistent with state law.

B. Edmundson language comes from Silvers.

The *Edmundson* language did not come from *Pratt*, or any other state case or rule. The language originated from the lender's brief in *Silvers v. U.S. Bank Nat'l Ass'n*, No. 15-5480 RJB, 2015 U.S. Dist. LEXIS 112650 (W.D. Wash. Aug. 25, 2015), which language was set forth without any authority or analysis. Bankruptcy Chief Judge Marc Barreca in *In re Plastino*, No. 17-11760-MLB, 2020 WL 7753628, at *4 (Bankr. W.D. Wash. Dec. 29, 2020) concluded the same from his own research of the language's origins. The *Edmundson* language / rule has *no* ties to state law or legislation.

C. Bankruptcy does not eliminate or alter a secured debt's repayment

schedule.

Amicus provides no support for the proposition that a bankruptcy discharge does anything more than what the Code says it does, i.e. bar *personal* enforcement of the secured debt against the debtor. 11 USC 524(a)(2). The Code does *not* provide that a bankruptcy discharge *eliminates* a secured debt (were the debt eliminated, there would be no lien to survive). Nor does the Code mature or accelerate or otherwise alter the repayment terms and schedule. This Court cannot not read into the Code what is not there. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682 (2003) (courts do not add words to legislation).

D. Possible SOL extensions do not justify adopting a faulty underlying rule.

That the SOL for enforcing a lien can be extended, in certain cases, by a written debt acknowledgment or partial payment does not justify adopting a legally faulty rule in the first place.

Plus, there is no guarantee secured lenders will utilize SOL extensions when available. Following a state mandate that all non-recourse loans are immediately matured, some lenders will undoubtedly benefit from the ability to require immediate payment. Others lenders conceivably will not want to risk loss of the lien relying upon potential SOL extension events (e.g. is this a debt acknowledgment?) when they can just demand full payment.

E. Amicus does not speak for most borrowers.

The Amicus advocates only for the small percentage of borrowers who would obtain free collateral through the adoption of the *Edmundson* rule, due in large part to lender surprise. The vast majority of existing borrowers on non-recourse loans would be prejudiced by a rule immediately maturing the secured debt. Future borrowers would be prejudiced by the chilling effect of requiring personal recourse on all secured loans in the state. In no way does the rule help the majority of borrowers save their houses, or help finance the purchase of houses, as Amicus suggest. Quite the contrary.

If there is a legitimate state concern about certain un-matured, non-recourse "zombie loans" against real property, as set forth in the Amicus, that is an issue for the legislature. This Court cannot impose new requirements on secured lending in the state.

F. Lenders will not always know about the loss of personal recourse.

There are so many potential pitfalls with the *Edmundson* rule that they have been difficult to comprehensively catalog in the briefing. One problem that recently occurred to counsel, that wasn't included in prior briefing, is that lenders do not always know about loss of personal recourse on a loan. For example, a borrower can obtain a bankruptcy discharge of the debt without the lender's knowledge. *See e.g. In re Nielsen*, 383 F.3d 922 (9th Cir. 2004) (dischargeability is unaffected by lack of notice in a Chapter 7 no-assets, no-bar-date case). Another example is – lenders do not automatically know when a borrower dies.

Under the *Edmundson* rule, these loans would mature, and the SOL for security instrument enforcement would commence, without the lenders' knowledge.

G. Notes and deeds of trusts are not susceptible to blanket enforcement rules.

One of the more general issues with *Edmundson* and its progeny (and perhaps some of the earlier mortgage cases in the state's history), that counsel would be remiss not to address, is they seem to treat promissory notes and trust deeds as doing one thing – the note creates the obligation, and the deed of trust merely secures it. It is not always that simple.

Notes and deeds of trust are contracts, and while they might have some common, minimum requirements tied to the UCC and DTA, parties are otherwise free to set forth their own terms. For example, in practice, deeds of trust often include their own, separate repayment obligation against the collateral given by the grantor, i.e. the party with the interest in the collateral[1]. There are certainly

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[1] *See* e.g. CP 100, where Luv, as owner of the real property, covenanted in the deed of trust as follows:

> LOAN: The Deed of Trust will secure your loan in the principal amount of $38,200.00 or so much thereof as may be advanced and readvanced from time to time to Prince Eric Luv the Borrower(s) under the Home Equity Credit Line Agreement and Disclosure Statement (the "Note") dated November 18, 2005, plus interest and costs, late charges and all other charges related to the loan, all of which sums are repayable according to the Note. **This Deed of Trust will also secure the performance of all of the promises and agreements made by us and each Borrower and Co-Signer in the Note, all of our promises and agreements in this Deed of Trust**, any extensions, renewals, amendments, supplements and other modifications of the Note, and any amounts advanced by you under the terms of the section of this Deed of Trust entitled "Our Authority

countless other examples of security instruments that are custom-tailored, and where the security instrument does more than just secure a personal note obligation. *See e.g. Fed. Land Bank v. Miller*, 155 Wash. 479, 482 (1930) (upholding a personal debt repayment obligation contained within a mortgage).

Hypothetically – and while it shouldn't be necessary for reasons already briefed and due to operation of law – parties could *expressly* state in their contract that the secured obligation, and its repayment schedule, remains intact in the absence or loss of personal liability under the note. That would be an enforceable term. Conversely, the parties could expressly say the loss of personal liability is an event of default (although state law would still require an affirmative act by the lender to accelerate, *see e.g. Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, 760 (2018)).

In sum, accrual of rights and enforcement of notes and trust deeds are not susceptible to blanket rules, as *Edmundson* and its progeny suggest – e.g. every time "x" happens, "y" happens under a deed of trust. These instruments are

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> to You." Loans under the Note may be made, repaid and remade from time to time in accordance with the terms of the Note and subject to the Credit Limit set forth in the Note.
>
> …
>
> (a) PAYMENT AND PERFORMANCE. **We will pay to you all amounts secured by this Deed of Trust as they become due**, and shall strictly perform our obligations. (emphasis added)

customizable contracts, and enforcement and the accrual of rights depend on the terms utilized by the parties to the secured transaction.

H. WSBA newsletter article.

The WSBA Creditor-Debtor newsletter article attached to Appellant's prior briefing was provided to counsel by the author. If that was not an accurate copy of the article that eventually printed, counsel was unaware.

Amicus does not and cannot dispute that the bankruptcy judges in this state – unquestionably the foremost experts on the subject matter – have been critical of the *Edmundson* language, so much so that Judge Barreca suggested intervention by the state's Supreme Court to correct the language. *In re Plastino*, No. 17-11760-MLB, 2020 WL 7753628, at *4 (Bankr. W.D. Wash. Dec. 29, 2020).

II. CONCLUSION

The *Edmundson* dicta is not the law of this state, and this Court should reverse, clarifying as much.

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