IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AUTOVEST, L.L.C.,

Plaintiff-Petitioner,

vs. No. S-1-SC-38834

DEBRA M. AGOSTO and
DEBBIE M. AGOSTO,

Defendants-Respondents,

and

AUTOVEST, L.L.C.,

Plaintiff-Petitioner,

vs.

MARIA ESTRADA,

Defendant-Respondent.

On Writ of Certiorari to the Court of Appeals of New Mexico
Ct. App. No. A-1-CA-37483

BRIEF OF NATIONAL CREDITORS BAR ASSOCIATION,
***AMICUS CURIAE*, IN SUPPORT OF PETITIONER**

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Introduction / Interest of the Amicus[1]

New Mexico has adopted by statute the partial-payment revival rule: a cause of action for suit on a contract is revived by partial payment. NMSA 1978, § 37-1-16 (1957). Section 725 of Article 2 of the Uniform Commercial Code, as adopted in New Mexico, expressly preserves the state's existing law on tolling of the statute of limitations for suits on contracts for the sale of goods. Id. § 55-2-725(4) (1961).

Both this Court and the Court of Appeals have characterized Section 37-1-16 as a tolling provision. See Citizens Bank v. Teel, 1987-NMSC-087, ¶ 10, 106 N.M. 290 (applying to Section 37-1-16 the maxim that "a statute which tolls the statute of limitations should be liberally construed to reach the merits if possible"); Joslin v. Gregory, 2003-NMCA-133, ¶ 11, 134 N.M. 527 (describing concept underlying Section 37-1-16 as one that "permits a debtor's actions to toll the statute of limitations"); id. ¶ 16 (noting that payments by third party unauthorized by debtor "cannot toll the statute or lift the limitations bar"); see also Running Bear Rescue, Inc. v. City of Las Vegas, No. A-1-CA-30687, 2012 WL 3193566, at *4 (N.M. Ct. App. July 2, 2012) (non-precedential) (stating that under Section 37-1-16, "mere payment . . . is not enough to toll the statute of limitations and revive a

[1] The present brief was not authored in whole or in part by counsel for any party, nor did a party, party counsel, or any other person other than those referenced in Rule 12-320(C) NMRA make a monetary contribution intended to fund the preparation or submission of the brief.

cause of action"); cf. Lea Cty. State Bank v. Markum Ranch P'ship, 2015-NMCA-026, ¶ 11 n.1, 344 P.3d 1089 (noting mixed use in case law of "revival," "tolling," and "[o]ther similar terms"). Notwithstanding the saving language of Section 55-2-725(4), however, the Court of Appeals held in the present case that the revival rule of Section 37-1-16 does not operate to toll the limitations period for suits to collect payments due under Article 2 contracts.

As Petitioner's merits brief explains, the Court of Appeals decision, which gives to Section 55-2-725(4) precisely the opposite of its intended effect, is both poorly reasoned and erroneous as a matter of statutory construction. In the present brief, the National Creditors Bar Association ("NCBA"), as amicus curiae, offers additional reasons to reverse the Court of Appeals. The partial-payment revival doctrine is an important part of the dynamic between consumers and creditors in Article 2 transactions and should remain so. Failing to apply the revival doctrine to suits on UCC consumer debts actually would be detrimental to consumers and burdensome to the courts.

NCBA is a nationwide, not-for-profit bar association of over 400 law firms and individual members, totaling approximately 2000 attorneys, who are regularly engaged in the practice of creditors rights law. The NCBA's membership standards promote professional, responsible, and ethical practices in the lawful collection of consumer debts and other litigation on behalf of creditors. The

NCBA and its members have an ongoing interest in matters involving the interpretation and application of federal and state laws affecting creditors rights.

As required by Rule 12-320(D)(1) NMRA, all parties received timely notice of the intent of the NCBA to file this brief addressing the applicability of New Mexico's partial-payment revival rule to collections actions brought on Article 2 contracts.

Argument

THE COURT OF APPEALS DECISION HOLDING THE PARTIAL-PAYMENT REVIVAL DOCTRINE INAPPLICABLE TO SUITS TO COLLECT THE COST OF GOODS SOLD UNDER UCC ARTICLE 2 WILL HAVE UNDESIRABLE CONSEQUENCES FOR CONSUMERS AND WILL UNNECESSARILY BURDEN THE COURTS.

By refusing to apply the revival doctrine and holding that Section 55-2-725 bars recovery of deficiency judgments against the defaulting purchasers in this case despite their post-default payments, the Court of Appeals unquestionably reached a result beneficial to those consumer debtors. One might think that the result, which relieves the debtors of any future liability for their default, would establish a precedent of benefit to consumers generally. But that is not the case. If the Court of Appeals decision stands, consumers will be adversely impacted. In addition, the Court of Appeals decision will place new burdens on the judicial system.

A. The Court of Appeals Decision Is Detrimental to Consumers.

If the Court of Appeals decision is upheld, consumers who purchase goods under installment contracts will be subject to more collection actions and will lose opportunities to work in good faith with their creditors, post-default, to pay their delinquent debts and continue to enjoy the benefit of contracts by which they may purchase goods by making a series of partial payments.

Installment contracts, such as those used in the present case, are a common means through which consumers can obtain goods that they want when they want them without having to tender the full purchase price, instead promising to pay for the goods in installments over time. Under Article 2 of the UCC, the creditor's cause of action for the full cost of the goods accrues when the purchaser fails to make any single payment. See NMSA 1978 § 55-2-725(1), (2) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . . A cause of action accrues when the breach occurs."); e.g., Mobile Discount Corp. v. Price, 656 P.2d 851 (Nev. 1983) (holding that, under limitations provision of UCC Article 2, suit for unpaid balance of retail installment contract was untimely when brought more than four years after purchaser stopped making payments, because "the cause of action accrued at that time").

But as this case illustrates, a default by the purchaser on an instalment contract does not lead immediately to a collection suit and is hardly the end of the story. Purchasers in default naturally would wish to avoid a lawsuit and minimize any damage to their credit and would prefer to keep the goods they purchased if repossession has not occurred. They may also desire in good faith to fulfill their lawful obligations. For their part, creditors would prefer to receive payments from the purchasers rather than follow the economically less efficient course of repossessing and selling the goods, filing suit, and pursuing a deficiency judgment that may well be uncollectable. Consequently, creditors are receptive to and consumers can benefit from arrangements whereby the consumer may continue making payments on the debt after an initial default.

The partial-payment revival doctrine facilitates such arrangements. The revival doctrine removes the pressure of an approaching limitations bar by starting the statute of limitations "anew." Lea Cty. State Bank, 2015-NMCA-026, ¶ 11. Under Section 37-1-16, a cause of action founded on contract "shall be deemed to have accrued upon the date of [a] partial or installment payment." NMSA 1978, § 37-1-16. By nullifying any limitations period that may have elapsed prior to the new payment and restarting the limitations time from scratch, Section 37-1-16 tolls the statute of limitations. See State v. Sanchez, 1989-NMSC-068, ¶ 8, 109 N.M. 313 ("'Toll' denotes 'to bar, defeat, or take away,' as in 'to toll the statute of

limitations,' which denotes 'to show facts which remove its bar of the action.'" (citation omitted)).

The revival doctrine as embodied in Section 37-1-16 or under the common law thus provides breathing room for consumers to make and perform under arrangements with their creditors that demonstrate good-faith efforts to cure their delinquency and resume paying their debt, rather than face repossession and suit. Treating the resumption of payments as an acknowledgement of the debt and an implied promise to pay – the rationale underlying the revival doctrine, see Joslin, 2003-NMCA-133, ¶ 14 – is entirely consistent with the purchaser's demonstrated desire to continue to enjoy the benefits of purchasing through an installment contract.

If the revival doctrine is unavailable in suits on installment contracts under UCC Article 2, creditors in those cases will be forced to file collection suits within the limitations period measured from the purchaser's initial default or lose the opportunity to collect any of the remaining debt. See Hamilton v. Pearce, 547 P.2d 866, 869 (Wash. Ct. App. 1976) ("Every late payment, every underpayment and every breach of any kind, whether known to the seller or not, would require the seller to sue or else risk being left without any remedy at all 4 years and a day afterward."). In the absence of a revival rule, even purchasers who manifest a desire to cure their default and continue the installment contract relationship will

nevertheless find themselves sued by creditors who must protect their interest against a potential future default, even though the purchasers have resumed paying. Indeed, the same result would follow for purchasers willing to acknowledge their debt and obligation to repay in writing. See NMSA 1978, § 37-1-16 (giving same effect as partial payment to "an admission that the debt is unpaid" and "a new promise to pay the same," if in writing signed by the debtor).

Of course, some purchasers will be unable to complete their payments despite their best efforts, will default again, and will face suit eventually. But if the revival doctrine applies, a creditor will not be under a limitations deadline to file suit until after the purchaser's subsequent default. The result reached by the Court of Appeals, in contrast, means that every purchaser who has ever defaulted once will be sued within four years of that default, regardless of future events. These suits will discourage, burden, and confuse purchasers even more than they will impose avoidable costs on creditors.

The West Virginia Supreme Court recognized this likely consequence when it held that the partial-payment revival doctrine applies to actions to collect UCC Article 2 debts in that state:

> The practical consequences of the failure to recognize the doctrine of partial payment is to force the creditor to bring suit against his debtor who is making partial payments if the account approaches the statute of limitations bar. We think neither party is served by such a rule.

Greer Limestone Co. v. Nestor, 332 S.E.2d 589, 596 (W. Va. 1985). The doctrine, the West Virginia court noted, "is supported by the overwhelming weight of authority in this country and more accurately reflects commercial realities" than would its rejection. Id.

Thus, while it may not be apparent at the outset, consumers as a whole will benefit from maintaining the partial-payment revival doctrine to toll limitations in suits to collect Article 2 consumer debts. The contrary result reached in the Court of Appeals decision is ill-advised and should not be upheld.

B. The Court of Appeals Decision Will Needlessly Burden the Courts.

This Court favors the development of legal doctrine that "aids in relieving the judiciary's heavily burdened caseload." Rex, Inc. v. Manufactured Housing Comm. of N.M., 1995-NMSC-023, ¶ 12, 119 N.M. 500 (discussing the fashioning of rules regarding scope of review and application of collateral estoppel to increase the efficacy of arbitration awards in removing matters from the courts); see also Quality Automotive Ctr., LLC v. Arrieta, 2013-NMSC-041, ¶ 2, 309 P.3d 80 (taking note, in revising rule regarding judicial excusal, of "the ever increasing and demanding caseloads in our district courts").

In a publication issued in 2020, the National Center for State Courts reported that, on average during Fiscal Years 2015-18, civil contract cases – a category that includes cases on contracts, debt and money due, real estate, and student loans –

made up almost one-quarter (23.1%) of the cases filed in New Mexico district courts. Nat'l Ctr. for State Courts, New Mexico State-Funded Courts Case Processing Staff Workload Assessment Study, 2019, Final Report 4, 28 (2020), https://www.nmcourts.gov/court-administration/reports-and-policies (follow "Reports" hyperlink; then follow hyperlink for this report). That number was exceeded only by cases in the category of domestic relations and protective orders (27.5% of filed cases), and it was more than twice the number of cases (11.7%) categorized as "other civil" matters. Id. at 6.

If the Court of Appeals decision rejecting the partial-payment revival rule in UCC Article 2 collection cases is upheld, many more collection suits, filed solely for protective purposes, will necessarily be added to this already burdensome total. This undesirable result can be avoided by rejecting the erroneous decision reached by the Court of Appeals.

Conclusion

For the practical reasons presented herein, as well as the legal arguments presented by Petitioner, the decision of the Court of Appeals should be reversed. This Court should give to Section 55-2-725 its intended effect: preserving the partial-payment revival doctrine to toll the limitations period in suits to collect the unpaid cost of goods purchased under Article 2 of the UCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that the foregoing brief was filed through the Odyssey File-and-Serve electronic filing system, which caused a copy of the brief to be served automatically on all counsel of record this 20th day of December, 2021.

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