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DEFICIENCY JUDGMENTS IN PENNSYLVANIA:  
THE LENDER'S GAUNTLET REVISITED\*

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## I. INTRODUCTION

TWO recent Pennsylvania appellate court decisions<sup>1</sup> have focused lenders' counsel's attention on Pennsylvania's depression-inspired Deficiency Judgment Act (the Act).<sup>2</sup> The Act is designed to protect a defaulting borrower from a lender who takes over the mortgaged property at foreclosure and thereafter seeks to pursue the borrower personally on the original debt.<sup>3</sup>

Before the Act, at a time when property values were depressed, a lender might foreclose and find, to his dismay, that there were no third-party bidders at the sheriff's sale. The sheriff

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\* Excerpts from Mr. Ominsky's article have been reprinted in the *Pennsylvania Law Journal-Reporter* with the permission of the *Villanova Law Review*.

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1. First Pennsylvania Bank v Lancaster County Tax Claim Bureau, 504 Pa. 179, 470 A.2d 938 (1983); Valley Trust Co. v. Lapitsky, — Pa. Super. —, 488 A.2d 608 (1985). For a discussion of the ways in which these two cases may affect the lender's procedural requirements under the Deficiency Judgment Act, see *infra* notes 37-43 & 58 and accompanying text.

2. 42 PA. CONS. STAT. ANN. § 8103 (Purdon 1982). A copy of Pennsylvania's Deficiency Judgment Act is reprinted in the Appendix to these articles.

3. See Philip Green & Son, Inc. v. Kimwyd, Inc., 410 Pa. 202, 205, 189 A.2d 231, 232 (1963) (Act was passed during Depression to militate against injustice of executing creditor being able to purchase debtor's real estate at nominal cost at execution sale while still being able to hold debtor to full amount of debt). Numerous articles have been written about the struggle of legislatures and courts to protect borrowers from lenders who take over mortgaged property and then seek to pursue borrowers personally for the full amount of the underlying debt. See generally 2 G. LADNER, CONVEYANCING IN PENNSYLVANIA § 12.28 (4th ed. 1979); Nelson, *Deficiency Judgments After Real Estate Foreclosure in Missouri: Some Modest Proposals*, 47 MO. L. REV. 151 (1982); Skilton, *Government and the Mortgage Debtor 1940-46*, 95 U. PA. L. REV. 119 (1946); Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980); Comment, *Economic Aspects of the Deficiency Judgment*, 20 VA. L. REV. 719 (1934); Comment, *Mortgage Deficiency Judgments During an Economic Depression*, 20 VA. L. REV. 771 (1934).



would then deed the property to the lender, in exchange for the sheriff's costs and the expenses of conducting the sale. Since he received no money toward payment of the debt, the lender would take the position that the borrower had not repaid the loan. The lender could conceivably assert this position even if he sold the property after the sheriff's sale for more than the amount of the original debt.<sup>4</sup> The lender would then proceed personally against the borrower and whatever personal property he owned or would own.

While deficiency judgment procedures are applicable to complex commercial mortgage loans as well as residential loans, the main battles are usually fought in the commercial arena. As a practical matter there are few residential mortgages secured by more than one property; and usually it is not fruitful for a lender to pursue a homeowner for a deficiency judgment after that owner has lost his home in foreclosure. Therefore, the primary focus of this article will be on the commercial mortgage loan transaction.

The Act attempts to prevent unjust enrichment by requiring the lender to give the borrower credit for the fair market value of the property deeded to the lender at the sheriff's sale.<sup>5</sup> If the fair market value of the property equals the amount of the loan outstanding, the debt is satisfied.<sup>6</sup> Essentially, the Act is a codification of the old adage that "you can't have your cake and eat it too." However, as this article will discuss, sometimes lenders can have it both ways.

## II. ANALYSIS OF THE ACT

### A. *The Lender's Procedural Gauntlet*

The Act places the procedural burdens of establishing the value of the mortgaged property squarely on the lender. The lender must petition the court to fix a fair market value of the

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4. At first blush, it seems that the borrower should get credit for the purchase price. However, it is not that simple. The sale may not be consummated until after other collateral has been taken over and resold. Should these other transactions then be invalidated? Furthermore, the purchase price may not be an accurate measure of the net benefits to the lender. The lender may have devoted thousands of dollars of time to complete the sale, and may have given substantial concessions to the purchaser. For example, the sale price should be discounted by the value of favorable purchase money financing given to a purchaser. In addition, the purchase money loan may never be collected.

5. See 42 PA. CONS. STAT. ANN. § 8103(c) (Purdon 1982).

6. *Id.*



property deeded to him at the sheriff's sale.<sup>7</sup> If the lender fails to petition the court within six months of the sale, the debt is marked satisfied upon petition of the borrower or his guarantors to the court.<sup>8</sup> Once this occurs, the lender can take no further enforcement action against the borrower, any collateral of the borrower, or the borrower's guarantors.<sup>9</sup>

An onerous side effect of this petition procedure is that until the court fixes a fair value for the property, the lender cannot proceed against other collateral of the borrower. Unless the lender obtains the so-called deficiency judgment, he will not be able to enforce his rights against condemnation proceeds,<sup>10</sup> pledged securities,<sup>11</sup> or even a pledged savings account.<sup>12</sup> Therefore, even where the fair market value of the property is determined to be far smaller than the amount of the debt, the lender will be stymied until the statutory requirements are met. The price for this measure of debtor protection is that the lender's opportunity to sell other collateral at the right price may be lost. During the period of delay, the collateral may depreciate in value or be dissipated. In addition, guarantors of the debt may become insolvent or flee to Venezuela.

Pennsylvania's statutory scheme requires the lender to proceed through a series of time-consuming and expensive steps. First, if the lender has foreclosed by action in mortgage foreclosure (rather than by confession of judgment on the note or by an

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7. *Id.* § 8103(a).

8. *Id.* § 8103(d).

9. *Id.* It should be noted that guarantors of a mortgage debt are not universally entitled to the protection of deficiency judgment acts. *See* Annot., 49 A.L.R. 3d 554 (1973) (discussing the effect of various types of deficiency judgment acts on guarantors and sureties, some of which have been held not to afford protection to guarantors). This presents the anomaly of a defaulting debtor who is insulated from further liability, while his accommodating guarantor is still liable. It also raises questions about what subrogation rights are available to the guarantor, who pays the balance of the debt, when he attempts to proceed against the original debtor.

10. *Federal Nat'l Mortgage Ass'n v. Guy Heavener, Inc.*, 16 Pa. Commw. 386, 328 A.2d 590 (1974) (execution creditor who obtained property at foreclosure sale, but not deficiency judgment, was not entitled to payment of deficiency out of condemnation proceeds).

11. *Auerbach v. Corn Exch. Nat'l Bank & Trust Co.*, 148 F.2d 709 (3d Cir. 1945) (under Pennsylvania law, execution creditor who obtains mortgaged property at foreclosure sale must proceed under Deficiency Judgment Act before he can proceed against pledged securities).

12. *Kokosh v. Progressive Home Fed. Sav. and Loan Ass'n*, 119 Pitt. L.J. 89 (Allegheny Co. 1971) (foreclosing creditor who was not entitled to deficiency judgment because of failure to comply with requirements of Act could not seek payment of deficiency from pledged savings account).



action in assumpsit), the lender must obtain a separate personal judgment against the borrower for the underlying debt.<sup>13</sup> This judicially created requirement is a glaring anomaly for two reasons. The lender may not be interested in, or entitled to, a personal judgment against the borrower, but rather may only want to proceed against other collateral of the borrower. Moreover, defenses raised in the action to obtain personal judgment may render it impossible to meet the six-month deadline for filing a petition under the Deficiency Judgment Act.<sup>14</sup>

13. *McDowell Nat'l Bank v. Stupka*, 310 Pa. Super. 143, 149-50, 456 A.2d 540, 543-44 (1983) (lender who forecloses on real estate but does not obtain personal judgment against borrower may not proceed against additional collateral of borrower); *National Council of Junior Order of United Am. Mechanics v. Zytneck*, 221 Pa. Super. 391, 394, 293 A.2d 112, 114 (1972) (mortgagees who foreclose on mortgaged property can recover a deficiency only if they obtain personal judgment against mortgagor and then proceed under Act). In fashioning the requirement of a personal judgment, Pennsylvania courts sought to ensure that the Deficiency Judgment Act did not extend lenders' rights under *in rem* judgments, such as the judgment in a mortgage foreclosure action. See *Mecco Realty Co. v. Burns*, 414 Pa. 495, 200 A.2d 869 (1964) (Deficiency Judgment Act cannot be used to change nature of judgment in foreclosures from judgment *de terris* to one *in personam*). However, in requiring lenders to obtain personal judgment, the courts have overcompensated for the perceived evil. While it may be reasonable to require a personal judgment if the lender intends to pursue the borrower personally, it does not seem appropriate in the case where the lender wishes only to pursue other items specified by the parties as collateral. Yet courts have required a personal judgment in order to obtain a deficiency judgment and proceed against other collateral even if the collateral is covered by the same mortgage as the collateral foreclosed upon. Other recent decisions have wisely rejected this requirement. See, e.g., *Concord-Liberty Sav. & Loan Ass'n v. Mooney*, 33 Pa. D. & C.3d 107, 109 (1984) ("Furthermore, resort to a deficiency judgment proceeding having as its object the fixing of personal liability upon the foreclosure defendants is useless and void.").

If the requirement of a personal judgment is applied to loans with exculpatory provisions, the results will be bizarre. A blanket mortgage may limit the borrower's liability to the described properties. If a lender, after foreclosure on one parcel, must obtain a personal judgment before proceeding against the others, it will be unexpectedly barred from proceeding against the other properties under the mortgage regardless of the value of the first property.

14. If the borrower raises a defense to an assumpsit action, litigation and appeals could delay final judgment for years. Formerly, quick personal judgments could be obtained by requiring borrowers to agree to confession of judgment clauses in the notes. However, a gradual erosion of Pennsylvania's confession of judgment procedures has rendered confession of judgment a less viable alternative. See 42 PA. CONS. STAT. ANN. § 2951(b) (Purdon Supp. 1984-1985) (requiring person seeking confession of judgment to file complaint in order to obtain confession of judgment if amount due cannot be ascertained from looking only at instrument); *North Penn Consumer Discount Center v. Schultz*, 250 Pa. Super. 530, 378 A.2d 1275 (1977) (in context of confession of judgment on note, due process requires that debtor have opportunity to be heard before execution of judgment against his property). Thus, the requirement of a personal judgment places the lender in a "Catch-22" of sorts: he cannot obtain a deficiency judgment without first obtaining a personal judgment, but he cannot confess judgment or otherwise obtain a personal judgment without filing a com-



A second step in the process of fulfilling the statutory requirements involves the lender's retaining an appraiser.<sup>15</sup> The appraiser must gain access to the building in question and render an appraisal of the property, after the customary research into comparable sales and other factors.<sup>16</sup> This information will be crucial to the lender's success because he bears the burden of establishing the fair market value of the property in a deficiency judgment proceeding.<sup>17</sup>

Third, the lender must prepare and file with the court a petition to fix the fair market value of the property based upon the appraisal.<sup>18</sup> Appropriate service of the petition must be given to all owners of the property as well as to all guarantors or other persons directly or indirectly liable for the debt.<sup>19</sup> Failure to name such parties and serve them properly results in discharge of the parties from any personal liability.<sup>20</sup>

If the borrower files an answer to the petition challenging the lender's evaluation, the court must schedule a hearing and make the determination of value.<sup>21</sup> As some appraisers will admit, an appraisal is only an educated guess of value.<sup>22</sup> It is no guarantee

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plaint and providing opportunity for a hearing. Procedural delays in obtaining the personal judgment could push the lender well past the six months after foreclosure deadline for filing the petition for deficiency judgment.

15. Pennsylvania courts have held that the Act does not require a professional appraisal. *See, e.g.,* National Council of Junior Order of United Am. Mechanics v. Zytneck, 221 Pa. Super. 391, 392-93 n.1, 293 A.2d 112, 114 n.1 (1972). However, most lenders find that professional appraisal is the most practical method of establishing the fair market value of the mortgaged property. For a discussion of the lender's burden in establishing the value of the property, see *infra* notes 18-23 and accompanying text.

16. For a discussion of the factors which go into establishing the fair market value of the property, see *infra* note 22.

17. *See* 42 PA. CONS. STAT. ANN. § 8103(c) (Purdon 1982) (indirectly requiring lender's petition to allege fair market value for the property).

18. *Id.* § 8103(a).

19. *Id.* § 8103(b). Failure to notify all interested persons does not preclude proceeding against any respondent who has been named and properly served. *Id.*

20. *Id.*

21. *Id.* § 8103(c)(4). The Act gives the borrower the opportunity to respond to the lender's petition in a number of ways. In addition to the option of filing an answer and producing testimony to contest the lender's valuation, the borrower may convince the lender to accept the borrower's valuation and stipulate to that effect. *Id.* § 8103(c)(3). The borrower can simply not respond to the petition, or he can contest the petition but provide no testimony supporting a valuation other than the lender's. In either case, the court must fix the value of the property at the value alleged in the lender's petition. *Id.* § 8103(c)(1) & (2).

22. The Act requires a court to fix the "fair market value" of the property. *Id.* § 8103(a). Courts have held that fair market value is "the price which the property would bring at a fair sale between parties dealing on equal terms."



that the property will sell for the appraised value on the market. The borrower gets credit, under the Act, for the amount of the educated guess.<sup>23</sup> However, the lender cannot spend the guess. If the lender is later unable to sell the property at its appraised value, there is no way he can reduce the litigated credit.

Appeals from the ruling on fair market value are, of course, available to any party.<sup>24</sup> However, this right to appeal cuts both ways for the lender. A vindictive, determined borrower could, through the appeal procedure, further delay the lender's collection efforts for many more months.

The foregoing discussion outlines some of the inherent risks and procedural obstacles the lender faces when he takes over mortgaged property at the foreclosure sale and then attempts to proceed against other collateral of the borrower or against guarantors of the debt. Once the lender succeeds in establishing that the fair market value of the mortgaged property is less than the amount of the debt, he may then proceed against the borrower's other collateral for the difference.<sup>25</sup> If the lender subsequently forecloses on another parcel of real estate, he must go through the entire foreclosure proceeding again. And if the second property is deeded to the lender at the foreclosure sale, the lender must again walk the same procedural route he walked after taking over the first property. A Pennsylvania mortgage lender holding a mortgage on several properties at different locations within the state must pass through an unenviable procedural gauntlet before he can take title to all his collateral.<sup>26</sup> And it is important to rec-

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Union Nat'l Bank v. Crump, 349 Pa. 339, 343, 37 A.2d 733, 735 (1944). In determining this price, courts might consider the following factors:

- (1) recent sales of realty of comparable location and descriptions;
- (2) the uses to which the subject property is adapted and might reasonably be adapted;
- (3) the demand for the subject property and the demand for similarly situated realty;
- (4) income produced by the property;
- (5) all other elements that may affect the realty's actual value.

*Id.* (citations omitted).

23. 42 PA. CONS. STAT. ANN. § 8103(c) (Purdon 1982) (discharging debtor to extent of fair market value of realty obtained by lender, as fixed by court).

24. The appellate court may review the trial court's determination of fair market value of mortgaged property in a deficiency judgment proceeding to ascertain whether there was sufficient evidence to sustain the finding and whether the trial court committed a reversible error of law. *Walnut St. Fed. Sav. & Loan Ass'n v. Bernstein*, 394 Pa. 353, 147 A.2d 359 (1959); *Cheltenham Fed. Sav. & Loan Ass'n v. Pocono Sky Enters.*, 305 Pa. Super. 471, 451 A.2d 744 (1982); *Shrawder v. Quiggle*, 256 Pa. Super. 303, 389 A.2d 1135 (1978).

25. 42 PA. CONS. STAT. ANN. § 8103(c) (Purdon 1982).

26. *Id.* § 8103(a) (providing for applicability of Act "[w]henver any real



ognize that taking title is only the first step a lender takes toward realizing cash to discharge the debt.

### B. *Manipulating the Gauntlet*

Rules concerning junior and senior mortgages suggest strategies that could be employed by a sophisticated lender who holds more than one mortgage on a property and who wishes to avoid the procedural delays imposed by the Act. Where a lender holds both a senior and a junior mortgage on a property, the Act applies only to the mortgage which is foreclosed.<sup>27</sup> After a foreclosure on the first mortgage followed by a sheriff's deed to the lender, the lender can still proceed against the borrower for the unaffected debt covered by the second mortgage.<sup>28</sup> The following example illustrates a possible strategy for lenders holding first and second mortgages that are in default.

Suppose that a lender holds a first mortgage of \$100,000 and a second mortgage of \$50,000, for a total of \$150,000 of debt, on a property with a fair market value of \$100,000. Further suppose that the lender would like to take over the property at the sheriff's sale if there are no third-party bidders, and that he would then like to pursue the borrower for the excess of the underlying debt over the fair market value of the property. The question is what steps the lender should take in order to minimize procedural hurdles imposed by the Act.

Under the Act, it makes a difference whether the lender elects to foreclose on the first or the second mortgage. If the lender forecloses on the first mortgage of \$100,000 and a third party purchases the property for \$100,000 at the sheriff's sale, the lender will receive the \$100,000 in satisfaction of the first debt and will be able to proceed against the borrower for the \$50,000 debt without the impairment imposed by the Act.<sup>29</sup> If there is no

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property is sold") (emphasis added). *See also* Union Trust Co. v. Tutino, 353 Pa. 145, 149, 44 A.2d 556, 558 (1945) (if mortgage covers more than one parcel of land and execution is against only one parcel, mortgagee must comply with Deficiency Judgment Act before he can proceed against other property of debtor, including other parcels covered by mortgage).

27. *Peoples-Pittsburgh Trust Co. v. Thorne*, 52 Pa. D. & C. 688, 689 (Allegheny 1943) (Act applies only to debt on which judgment was entered and does not limit proceedings on another debt secured by second mortgage).

28. *Cf. National Bank of Chester Valley v. Thomson*, 51 Lanc. Rev. 169, 170, 4 Chest. 38, 39 (1948) (where holder of first lien purchases property sold at execution sale on second lien that is held by another creditor, debt secured by first lien is not affected by Act).

29. This is true because the Act applies only to proceedings on the debt secured by the mortgage which was foreclosed. *See supra* notes 27-28 and accom-



bidding at the sale, the property will be deeded to the lender and the \$100,000 debt will be deemed satisfied, since the fair market value of the property is \$100,000. As in the first scenario, the lender will be able to pursue the borrower on the \$50,000 debt without going through the Deficiency Judgment Act's procedures.<sup>30</sup>

If, on the other hand, the lender chooses to foreclose on the second mortgage, the property will be transferred at a sheriff's sale subject to the first mortgage of \$100,000.<sup>31</sup> Assuming that there are no bidders who are willing to bid more than the fair market value at the sale, the property will be deeded to the lender. Since the Act only applies to the mortgage which is foreclosed, the lender will be able to proceed against the borrower for the \$100,000 debt without going through a deficiency proceeding. In addition, the lender could proceed under the Act on the \$50,000 debt. He could argue that, since the property with a market value of \$100,000 was transferred subject to a \$100,000 mortgage, the borrower should not get any credit toward the \$50,000 obligation.

In summary, by electing to foreclose on the second mortgage, the lender probably is left with the property and a total of \$150,000 in claims against the borrower. If, on the other hand, the lender chooses to foreclose on the first mortgage, he will be left with the property and only a \$50,000 claim.<sup>32</sup> A puzzle aficio-

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panying text. In order to simplify the mathematics in these examples, the author is ignoring interest on the debt to which the lender might be entitled, and he is assuming that there are no offsets against the price received or the fair market value of the property, such as costs, taxes, or municipal claims.

30. This is true, again, because the Act applies only to proceedings on the debt secured by the mortgage which was foreclosed. *See supra* notes 28-29 and accompanying text.

31. *See* 42 PA. CONS. STAT. ANN. § 8152 (Purdon 1982) (a prior mortgage is not divested by a foreclosure sale to satisfy a junior mortgage).

32. There are alternative results to the one presented in the text. A somewhat sophisticated analysis demonstrates one of these alternatives. Consider the case where the lender purchases the property at the sheriff's sale for a nominal sum, subject to the first mortgage of \$100,000. After the lender collects on the \$100,000 debt from other assets of the borrower, the borrower could try to require the lender to assign the \$100,000 mortgage to him. In effect, the borrower would be subrogated to the lender's rights in the mortgage against property owned by the lender upon payment of the underlying debt. *See* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 7.15 (1979). A factor militating against the borrower's subrogation is the distinction made by courts between paying off a mortgage and purchasing it. Courts have curbed the right of a party to require an assignment of a mortgage which that party has paid. *See* *Burgoon v. Lavezzo*, 92 F.2d 726 (D.C. Cir. 1937) and cases cited therein.

The borrower might also argue that the first mortgage is extinguished



nado or computer mathematician could substitute different hypothetical factual situations and come up with infinite variations on this theme. It is sufficient to say that because of the peculiarities of the Act the lender should carefully work out his strategies before he commences foreclosure proceedings in order to maximize his return and minimize procedural obstacles.

### C. *Recent Battles Over the Gauntlet*

As indicated by the case citations to the Introduction, the applicability of the Act to foreclosures of mortgages secured by several properties, sometimes called "blanket mortgages," has been hotly contested recently. If the properties are located in one county and sold at one sale, the Act should present no particular problem for the lender, even if the properties are separately auctioned.<sup>33</sup> However, if the properties are in different counties<sup>34</sup> or are sold at different times,<sup>35</sup> Pennsylvania courts have held that the Act applies. Consequently, a lender who takes over a prop-

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under the doctrine of merger. See *id.* §§ 6.13-14. See also *McDonald v. Magirl*, 97 Iowa 677, 679-80, 66 N.W. 904, 905 (1896) (where holder of both first and second mortgage forecloses on second mortgage and purchases property at foreclosure sale, senior mortgage is merged into fee interest and debt secured by senior mortgage is extinguished). However, this latter argument is likely to fail because the lender did not intend to merge the mortgage interest with his fee interest in the property. See *Continental Title & Trust Co. v. Devlin*, 209 Pa. 380, 384-85, 58 A. 843, 844 (1904) (intent of parties controls whether encumbrance will merge in estate of purchaser at foreclosure sale of subsequent lien).

33. See *Farmer Trust Co. v. Murray*, 2 Pa. D. & C.3d 41, 44 (Snyder, Union 1975) (Act not applicable where creditor levied on several properties located in same county at same execution sale). Accord *Hoffman Lumber Co. v. Mitchell*, 170 Pa. Super. 326, 85 A.2d 664 (1952) (creditor violated Act when, after levy and sale on three tracts of land, he attempted to recover against other assets of debtor without first fixing value of property sold).

34. Properties located in different counties necessarily are sold at different sheriff's sales because the sheriff in a given county can only execute against properties in his county. See *First Pennsylvania Bank v. Lancaster County Tax Claim Bureau*, 504 Pa. 179, 189-90 n.7, 470 A.2d 938, 944 n.7 (1983). For a discussion of the effect of property being sold at different times, see *infra* note 35. For a discussion of the *First Pennsylvania Bank* court's analysis of this result, see *infra* notes 38-44 and accompanying text.

35. *Valley Trust Co. v. Lapitsky*, 339 Pa. Super. 177, 182, 488 A.2d 608, 612 (1985) (where mortgage covered more than one parcel in the same county, but execution was issued against only one tract, lender was required to proceed under Act before executing against other mortgaged properties); *Union Trust Co. v. Tutino*, 353 Pa. 145, 149, 44 A.2d 556, 558 (1946)(same); *Western Flour Co. v. Alosi*, 216 Pa. Super. 341, 345, 264 A.2d 413, 415 (1970) (same); *First Nat'l Consumer Discount Co. v. Fetherman*, 41 Bucks Co. Rep. 138, 141 (1983) (same). But see *Kitzmiller v. Cumberland Valley Sav. & Loan Ass'n*, 10 Pa. D. & C.3d 462, 471 (Cumberland 1979) (Act was not applicable in case where creditor sought to sell several parcels out of twenty-nine parcels covered by blanket mortgage).



erty at a foreclosure sale would find himself barred from other properties under the mortgage unless he obtained a deficiency judgment.

Where the lender structures a loan by taking separate mortgages and notes for each parcel, he fares better under the Act. In such a situation, the lender would be permitted to take over each property upon foreclosure without obtaining a deficiency judgment.<sup>36</sup> Hence, it is advantageous to the lender to avoid blanket mortgages on properties located in different counties or properties which are likely to be sold at different times.

Two recent appellate court decisions in Pennsylvania advocate completely divergent approaches to the application of the Act to blanket mortgages. The supreme court case of *First Pennsylvania Bank v. Lancaster County Tax Claim Bureau*<sup>37</sup> appears to change the above results in cases of blanket mortgages. This case is known primarily for its holding that the notice provisions of the Pennsylvania Real Estate Tax Sale statute are inadequate under the principles of due process.<sup>38</sup> However, in a decision not supported by the majority of the court, the Pennsylvania Supreme

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36. See 42 PA. CONS. STAT. ANN. § 8103(c) (Purdon 1982) (providing that only debt secured by the property made subject to foreclosure can be discharged under the Act). Foreclosure of one mortgage results only in discharge of the debt underlying that mortgage. Other debts, even if they are secured by the same property, would not be discharged under the Act simply because the lender foreclosed on a mortgage securing one of the debts. *Peoples-Pittsburgh Trust Co. v. Thorne*, 52 Pa. D. & C. 688, 689 (Allegheny 1943). Thus, if a lender had separate debts and mortgages for each property, he could foreclose on one mortgage, obtain a sheriff's deed and proceed under the Act to obtain a deficiency judgment for the underlying debt (or entirely ignore the Act) without affecting the borrower's obligations on any other debts.

An advantage of a blanket mortgage over separate mortgages is that with the blanket mortgage the lender has the additional security of a property's appreciation in value beyond the amount of the separate mortgage which could have been allocated to that property. For example, assume that \$150,000 is owed and that three properties are to be covered by a blanket mortgage. If the lender makes three separate mortgages of \$50,000 each, it has impaired its security. If on sale one property brings \$50,000, the second \$25,000 and the third \$100,000, the lender will recover the full \$150,000 with a blanket mortgage. However, it will recover only \$125,000 of the \$150,000 debt with separate mortgages. This is because the lender will only recover the \$50,000 mortgage amount on the \$100,000 sale. This result can be overcome by placing three \$50,000 mortgages on each of the three properties and inserting default provisions in each of them.

37. 504 Pa. 179, 470 A.2d 938 (1983).

38. *Id.* at 181, 470 A.2d at 939. The *First Pennsylvania Bank* court held that Pennsylvania's notice provisions for tax sales were unconstitutional in that they did not require either personal service or notice by mail to be given to a record mortgagee in the event of a tax sale. *Id.* For a thorough discussion of this aspect of *First Pennsylvania Bank*, see Comment, *The Constitutional Validity of Pennsylvania Procedure Governing Notice of Judicial Sales of Real Property after Mennonite Board*,



Court made sweeping pronouncements as to the applicability of the Deficiency Judgment Act to mortgages on properties located in different counties.<sup>39</sup>

In *First Pennsylvania Bank*, the lender had extended a loan and had taken back separate mortgages on properties located in several counties. Although the mortgages were security for a single loan, the court indicated that the lender could take over the separate properties at different sheriffs' sales without application of the Act. The court observed that a lender who had to obtain a deficiency judgment in connection with foreclosures of each parcel would perceive that the value of the collateral was significantly reduced. The court then stated that it believed that "a creditor who has bargained for a specific lien on several parcels should, instead, be able to issue successive executions against those specific parcels until he collects his debt."<sup>40</sup>

*First Pennsylvania Bank* dealt with separate mortgages securing a single loan, so it is not clear whether the decision would have been different if there had been a blanket mortgage. However, the court's reasoning seems equally applicable to blanket mort-

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First Pennsylvania Bank, and In Re Upset Sale, Tax Claim Bureau of Berks County, 30 VILL. L. REV. 1191(1985).

39. 504 Pa. at 186-89, 470 A.2d at 942-44. In *First Pennsylvania Bank*, a junior mortgagee challenged the adequacy of the notice it received of an impending tax sale which extinguished its junior lien. *Id.* at 181, 470 A.2d at 939. In addition to arguing that the sale was valid, the opposing party in the case claimed that the mortgagee was prohibited under the Act from proceeding against the property which had been the subject of the tax sale. *Id.* at 186-87, 470 A.2d at 942. The mortgagee's opponent argued that the Act applied to any proceeding against that property because the mortgagee had previously foreclosed on properties in other counties securing the same debt. *Id.* at 187, 470 A.2d at 942.

The *First Pennsylvania Bank* court stated that its determination of the Deficiency Judgment Act issue was necessary to the final resolution of the case because the mortgagee sought to set aside the tax sale, reinstate its mortgage interest, and then foreclose on the property in question. *Id.* at 181-82 n.1, 470 A.2d at 939 n.1. If the court had found that the Act had been triggered by the mortgagee's prior foreclosure actions, the mortgagee would have been required to proceed under the Act in order to reach the tax sale property. *Id.* at 188-90, 470 A.2d at 943. In this case, the mortgagee would have been unable to proceed under the Act because more than six months had passed since the original foreclosure proceedings. *Id.* at 181-82 n.1, 470 A.2d at 939 n.1. Thus, two justices reasoned that a determination as to applicability of the Act was necessary to the final resolution of the case.

In a concurring opinion, Justice Zappala, joined by three other justices, stated that he agreed with the majority's holding as to the constitutionality of Pennsylvania's tax sale notice provisions. *Id.* at 191, 470 A.2d at 944 (Zappala, J., concurring). However, Justice Zappala believed that the constitutional issue disposed of the case, and that the holding as to the Deficiency Judgment Act was unnecessary to the case and better regarded as dictum. *Id.*

40. *Id.* at 190, 470 A.2d at 944.



gages. The effect of requiring a deficiency judgment before a lender can proceed on parcels under a blanket mortgage in a different county is to diminish the value of the collateral in the eyes of the lender. If subsequent decisions adopt the rationale set forth in *First Pennsylvania Bank*, it will no longer be necessary for lenders to avoid blanket mortgages in order to avoid applicability of the Act.

However, the likelihood of courts following the *First Pennsylvania Bank* decision concerning the Deficiency Judgment Act has recently been called into question. In *Valley Trust Company v. Lapitsky*, the Pennsylvania Superior Court held that the Act was applicable to foreclosure proceedings on various properties secured by a single mortgage.<sup>41</sup> The lender in *Valley Trust Company* held a blanket mortgage covering three properties in three different counties. The lender foreclosed on one of the properties, obtained it at a foreclosure sale, and did not file a petition for fair value within the required six months. When the lender attempted to foreclose on a second property covered by the mortgage, the court refused to permit the foreclosure sale, holding that the lender's failure to proceed under the Act after the first foreclosure created "an irrebuttable presumption that the creditor was paid in full in kind" at the first sale.<sup>42</sup> The *Valley Trust Company* court justified its departure from *First Pennsylvania Bank* on the ground that a majority of the court did not join in the Deficiency Judgment Act holding in that case, and in fact only one justice joined in the lead opinion.<sup>43</sup> Until these conflicting decisions are

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41. 339 Pa. Super. 177, 182, 488 A.2d 608, 611-12 (1985).

42. *Id.* at 182-83, 488 A.2d at 611.

43. Justice Samuel J. Roberts has commented upon decisions in which there is no majority opinion:

Vote-counting is important not only when the Court divides evenly as to the appropriate judgment, but also when a majority agrees on the judgment but disagrees as to the reasons for that result. Whenever members of the Court either concur in the result or file a concurring opinion, the reader is alerted to count the justices who join in each opinion. If a justice concurs only in the result, he joins only in the Court's judgment. If a justice writes a concurring opinion, that opinion must be read to see whether the writer joins only in the judgment of the Court (for the reasons he expresses) or whether the writer also joins another opinion written in the case.

Occasionally, more members of the Court will join in a concurring opinion than in the lead opinion. An illustration is presented by the 1971 decision in *Commonwealth v. English*, where the concurring opinion in fact expressed the view of four justices, thereby constituting a majority opinion of precedential weight. Ironically, just last term in *Commonwealth v. Sleighter*, the lead opinion advocated the overruling of *English*, but a majority of the Court (four members) joined in a concurring opin-



resolved by a Supreme Court ruling in which a majority of the court agrees, lenders must assume that the Act does apply to blanket mortgages.

#### D. *Avoiding the Gauntlet: Foreclosing on a Business*

The Act can also cause unexpected problems if a loan is secured by both a mortgage on real estate and a security agreement on personal property. This is the traditional method of securing a loan made to a going business. A typical loan to a restaurant, for example, is secured by a mortgage covering the borrower's real estate, fixtures, equipment and personal property. The mortgage is backed by security interests in personal property, as provided in article nine of the Uniform Commercial Code.<sup>44</sup> Upon default, the lender wants to take possession of the entire business and resell it as quickly as possible. The Act may not always permit this result.

##### 1. *The Industrial Plant Doctrine*

There is a way in which personal property not specifically covered by the mortgage can be considered part of the real estate and therefore be transferred at the foreclosure sale. In Pennsylvania, under the "industrial plant doctrine," fixtures and equipment necessary to the operation of a business may be considered part of the mortgaged property and will be transferred at the foreclosure sale as if they were real estate.<sup>45</sup> This is sometimes true even if the property traditionally would be considered

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ion which found reexamination of the holding in *English* unnecessary to the decision of the case, thus leaving it undisturbed. Although cases where a single concurring opinion expresses a majority view are rare, cases where no opinion commands a majority are common and should never be mistaken as precedential.

Roberts, *The Supreme Court of Pennsylvania: Constitutional Government in Action*, 54 TEMP. L.Q. 403, 408-409 (1981) (footnotes omitted).

44. U.C.C. § 9-102 (1972) (codified in Pennsylvania at 13 PA. CONS. STAT. ANN. § 9102 (Purdon 1984)) (providing that article nine applies to all transactions intended to create security interest in personal property or fixtures). In order to be perfected, a security interest generally must be evidenced by filing of financing statements with the secretary of state of the commonwealth in which the collateral is located. U.C.C. §§ 9-302, 9-401 (1972) (codified in Pennsylvania at 13 PA. CONS. STAT. ANN. §§ 9302, 9401 (Purdon 1984)). Perfected security interests enjoy priority over unperfected interests and certain other lien creditors' interests. U.C.C. § 9-301 (1972) (codified in Pennsylvania at 13 PA. CONS. STAT. ANN. § 9301 (Purdon 1984)).

45. *Singer v. Redevelopment Auth.*, 437 Pa. 55, 59-60, 261 A.2d 594, 596-97 (1970) (if machinery is vital to operation of plant and is permanent part of plant, it is considered part of real estate); *Commonwealth Trust Co. v. Harkins*, 312 Pa. 402, 406-07, 167 A. 278, 280 (1933) (chattel necessary to operation of



personal property and even if it is not specifically described in the mortgage or in the article nine financing statements.<sup>46</sup> In order to come within the industrial plant doctrine, the property in question must be an integral part of the business carried on at the mortgaged premises and it must be placed on the premises for permanent use.<sup>47</sup> A classic Pennsylvania case involved pitcars designed to fit the tracks of a coal mine. The pitcars were held to be part of the mortgaged real estate under the industrial plant doctrine.<sup>48</sup> Despite its name, the industrial plant doctrine is not limited to manufacturing concerns, and has been extended even to apartment buildings.<sup>49</sup>

In a case involving fixtures, which are traditionally covered by real estate mortgages, or property considered to be part of the real estate under the industrial plant doctrine, the lender can foreclose on the land and building and receive this additional property without the Act coming into play. Inevitably, though, there will be uncertainties about whether certain items are to be considered real estate under the industrial plant doctrine. The doctrine clearly has not been extended to all personal property used in connection with a functioning business.<sup>50</sup> If the mortgage does not specifically cover particular items and if they are not deemed to be part of the real estate, either as fixtures or under the industrial plant doctrine, the foreclosure sale will not include

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business and placed in the establishment for permanent use is considered part of real estate even if it is not attached thereon).

46. *Kaczmarek v. Mesta Mach. Co.*, 324 F. Supp. 298 (W.D. Pa. 1971) (doctrine applied to property not specifically mentioned in mortgage); *Commonwealth Trust Co. v. Harkins*, 312 Pa. 402, 407, 167 A. 278, 280 (1933) (doctrine applied to chattel not attached to real estate); *Fidelity Deposit & Discount Bank v. Barrett Publishing Co.*, 74 Lack. Jur. 127 (1973) (doctrine applied to property not specifically mentioned in mortgage).

47. *Commonwealth Trust Co. v. Harkins*, 312 Pa. 402, 407, 167 A. 278, 280 (1933) (application of industrial plant doctrine depends, in great part, on whether property in question was placed on mortgaged property permanently or for temporary purpose); *First Nat'l Bank v. Reichneder*, 371 Pa. 463, 470-71, 91 A.2d 277, 280 (1952) (trucks, safes, desks, chairs, typewriters and other office furniture were not essential to operation of plant and therefore were not covered by industrial plant doctrine).

48. *See Titus v. Poland Coal Co.*, 275 Pa. 431, 119 A. 540 (1923).

49. *See, e.g., Land Title Bank & Trust Co. v. Stout*, 339 Pa. 302, 308, 14 A.2d 282, 284-85 (1940) (elevators in apartment building considered to be part of realty under industrial plant doctrine).

50. *See Rotell v. Pennsylvania Dep't of Transp.*, 53 Pa. D. & C.2d 46 (Mercer 1971) (equipment in tavern, except for bar, backbar, cooler, walls, and carbonation system, could be removed without destroying "economic unit" of tavern and therefore did not constitute part of realty under industrial plant doctrine).



such property. Therefore, the lender may have to obtain a deficiency judgment against the debtor and take other legal action to obtain the property not covered by the mortgage in order to be able to sell the business as a whole.

## 2. *Intent of the Parties*

Although there is no Pennsylvania case on point, a New York case illustrates the difficulties a lender may face in attempting to sell both the real estate and the personal property purportedly covered by a single mortgage, at one foreclosure sale. In *Statewide Savings & Loan Association v. Canoe Hill, Inc.*,<sup>51</sup> the lender foreclosed on a mortgage covering a golf course, a restaurant, and "all fixtures and articles of personal property, now or hereafter attached to or used in connection with the premises, all of which are covered by this mortgage."<sup>52</sup> The lender's complaint in foreclosure requested that it be declared the owner of the real property and of personal property covered by the mortgage and by separate security agreements. The complaint, however, did not list or describe the personal property purportedly covered by the mortgage. At a foreclosure sale, the real property and the personal property covered by the security agreements was sold and the lender did not move for a deficiency judgment. In refusing to grant the lender any rights in the personal property it claimed was covered by the mortgage, the New York Supreme Court, Appellate Division, ruled that the lender's entitlement to the property depended on the language in the mortgage agreement.<sup>53</sup> Since the mortgage didn't specify the items of personal property it purported to cover, the court held that the lower court could not effectively adjudge the mortgagee to be the owner. In reaching its decision, the court relied heavily on the lender's decision to take separate security agreements on some personal property and concluded that this action negated an intent to include personal property under the mortgage lien.

Lenders can take two precautionary steps which will help to avoid the situation described in *Statewide Savings & Loan*. First, in some states, lenders who are taking a mortgage on both real and personal property should list the specific items of personal property securing the debt in the mortgage instrument and in any

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51. 54 A.D.2d 1018, 388 N.Y.S.2d 188 (1976), *aff'd*, 44 N.Y.2d 843, 378 N.E.2d 118, 406 N.Y.S.2d 755 (1978).

52. 54 A.D.2d at 1018, 388 N.Y.S.2d at 189.

53. *Id.* at 1019-20, 388 N.Y.S.2d at 190.



foreclosure complaint. Second, lenders might reconsider taking separate security agreements on personal property. *Statewide Savings & Loan* militates, albeit in a minor way, against the conventional wisdom of using both a mortgage and a security agreement when making a loan on mixed collateral. Assuming the lender's goal is to avoid the Deficiency Judgment Act and have only one sale of the entire business, the lender's attorney may be prejudicing his or her clients by taking too much paper.

### 3. *The Pennsylvania Dilemma*

However, this will not solve the lender's problem in Pennsylvania because in Pennsylvania generally the sheriff will advertise and sell the described real estate, but the sheriff will not include personal property. There is no established procedure for a lender to force a simultaneous foreclosure sale of real estate and personal property, even if the personal property is clearly listed in the mortgage. Therefore, suppose, upon default of a loan to a restaurant, the lender wants to take possession of the business as a whole—the real estate and all the equipment, appliances, furniture, cooking and serving utensils. What would be the best method of accomplishing the goal? If the lender forecloses on the real estate, the real estate sale will not include items of personal property that are not covered by the industrial plant doctrine. Yet this property may be vital to successful operation of the business as a going concern. Assuming the lender purchases the real estate at the foreclosure sale, he will not be able to proceed against the personal property until he obtains a deficiency judgment.<sup>54</sup> Under the Act, the debt will be discharged and no judgment will be available unless the lender can persuade the court to set a fair market value for the purchased real estate at less than the amount of the outstanding debt.<sup>55</sup>

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54. For a discussion of procedure required before a lender can proceed under the Act, see *supra* notes 7-26 and accompanying text.

55. For an example of a case in which the lender was denied the opportunity to proceed against collateral, see *McDowell Nat'l Bank v. Stupka*, 310 Pa. Super. 143, 456 A.2d 540 (1983). In *Stupka*, the court, in a somewhat Draconian scenario, held that the lender could not proceed against the debtor's construction equipment, which had been given as collateral for the loan, because the lender had not obtained a deficiency judgment against the debtor. *Id.* at 149, 456 A.2d at 543. The court required a personal judgment against the debtor, rather than an *in rem* judgment resulting from foreclosure on the real estate collateral. *Id.* at 149-50, 456 A.2d 543-44. Since the lender did not have a personal judgment, he was prohibited from proceeding under the Act to have a deficiency judgment entered against the debtor. *Id.* at 149, 456 A.2d at 543-44. Instead, the debt was discharged. *Id.* at 152, 456 A.2d at 545.



Even if the lender succeeds, the deficiency judgment procedure can take months, or even years, and the lender is in a vulnerable position during that time. He cannot sell a fully equipped business until he completes the second phase of the procedure, i.e., obtaining the personal property following a deficiency judgment. If a borrower is aware of this, he may exact concessions from the lender to which he would not otherwise acquiesce. In addition, during this period of delay, other creditors of the borrower may precipitate an untimely or unprofitable sale of the disputed property in a way that would be prejudicial to the lender.

There is a way to avoid applicability of the Act under those circumstances. The Uniform Commercial Code permits a lender to sell personal property in which he has a security interest without applicability of the Act.<sup>56</sup> Section 9-501 of the Code, which is applicable in Pennsylvania, permits a secured party to sell personal property securing a debt at a public sale and also to buy the property at that sale.<sup>57</sup> Thus, the lender could proceed under article nine and purchase the personal property himself at the public sale. Of course, he would have to be careful to bid high enough to be able to acquire the property, but not higher than it is "worth." The problem facing the lender is that he will not know how high to bid against competing bidders, because the value to the lender depends to a large extent on whether he will ultimately acquire the real estate. If the lender plans to later take possession of the real estate through foreclosure proceedings and then sell the restaurant as a turn-key operation, then the property is valuable to him. On the other hand, counters, furniture, ovens, and pots and pans, without the restaurant, are of little value. But at the time he must bid on the personal property, the lender cannot know whether he will later be the successful bidder in the foreclosure sale of the real estate.

A saving grace is that generally it is not difficult for the lender to acquire these types of items at a reasonable price at the public sale. Once he owns the personal property, the lender can foreclose on the real estate, take possession, and sell the entire business, fully equipped, without going through a deficiency judgment proceeding.

Many attorneys, representing borrowers and lenders alike, are not aware of the applicability of the Act in mixed collateral

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56. U.C.C. § 9-501(d) (1972) (codified in Pennsylvania at 13 PA. CONS. STAT. ANN. § 9501(d) (Purdon 1984)).

57. *Id.*



cases. Undoubtedly, many lenders have improperly foreclosed on going businesses without the borrower raising a deficiency judgment defense to the sale of his personal property. However, a lender should not rely on the borrower's ignorance, especially when there is an alternative strategy available. As a general rule, the lender first should proceed against personal property covered by article nine security agreements and then proceed to foreclose on real estate in order to avoid the gauntlet of the Act.

The lender would not face these problems at all if the rationale of *First Pennsylvania Bank*, as suggested above, were extended to mortgages covering mixed collateral as well as blanket mortgages. The reasoning in *First Pennsylvania Bank* seems as applicable to loans secured by mixed collateral as it is to blanket mortgages. In either case, the lender has "bargained for a specific lien" on each item of collateral and, therefore, he should be able to proceed against all the collateral at a single execution sale.<sup>58</sup> However, the superior court's decision in *Valley Trust Company* makes it unlikely that the Pennsylvania courts will follow *First Pennsylvania Bank*. The same reasons which persuaded the *Valley Trust Company* court to apply the Act to blanket mortgages might well persuade a court to continue to apply it to cases of mixed collateral. This result is unfortunate. If anything, it is more important in the case of a foreclosure on a business that a lender be able to resell quickly and in one piece than it is in a foreclosure on a blanket mortgage. Thus, there is an even greater rationale for not applying the Act to cases of mixed collateral than there is to cases of blanket mortgages. However, until Pennsylvania law in this area is changed, it is advisable for lenders to follow the suggested strategy of proceeding first against personal property and then foreclosing on real estate.

### III. CONCLUSION

#### A. *Flaws in the Act*

It is this author's position that there is a fundamental inequity in a system which has the following flaws:

(1) A lender who takes back collateral because no one else bid on it at the public foreclosure sale must give the borrower credit toward satisfaction of the debt in the amount a court says

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58. 504 Pa. at 189-90, 470 A.2d at 943-44. For a discussion of the reasoning in the *First Pennsylvania Bank* case, see *supra* notes 33-43 and accompanying text.



should have been bid for the property. The lender is stuck with the court's valuation regardless of what the property actually brings at a later sale.<sup>59</sup>

(2) In order to take over more than one property under a blanket mortgage, or to proceed against other property of the borrower, the lender must run the gauntlet of Deficiency Judgment Act procedures, a process that could take years to complete.<sup>60</sup>

(3) Deficiency judgments are required where the lender's first step is foreclosure on real estate collateral, but not when he proceeds first against other types of collateral. The viability of debtors' protection should not depend upon the order of the procedural steps taken by a lender.

(4) Similarly, the order in which the lender proceeds against real estate or other collateral in a case of mixed collateral determines whether or not the Act is applicable. If the lender first proceeds against non-real estate collateral, under the provisions of the Uniform Commercial Code, there is no deficiency judgment problem.<sup>61</sup>

(5) If the lender holds more than one mortgage on a single parcel, his election to foreclose on one mortgage or the other determines the amount of the deficiency owed by the borrower after foreclosure. In either case, there may be no bidding at the sale and the lender would wind up in possession of the same property, but the unsatisfied portion of the total debt could vary drastically.<sup>62</sup>

(6) In the case of blanket mortgages, applicability of the Act depends on whether the debtor's property is located in one county or more than one.<sup>63</sup> It is difficult to see how this result furthers the Act's goal of protecting debtors from lenders who try to take over more properties than necessary to satisfy a debt.

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59. For a discussion of the inequities of binding the lender to the court-fixed valuation of the property, see *supra* notes 22-23 and accompanying text.

60. For a discussion of the steps involved in proceeding under Pennsylvania's Act, see *supra* notes 7-26 and accompanying text.

61. For a discussion of the variations in result which can occur when the lender proceeds first under the Uniform Commercial Code, see *supra* notes 56-57 and accompanying text.

62. For an illustration of the difference between foreclosing on the second instead of the first mortgage on a property, see *supra* notes 29-32 and accompanying text.

63. For a discussion of the applicability of the Act in a blanket mortgage situation, see *supra* notes 33-42 and accompanying text.



B. *Practical Tips for Practicing Lawyers*

For the reasons stated above, this author recommends legislative changes to Pennsylvania's Deficiency Judgment Act. Until such changes, discussed below, are made, lawyers can utilize the following practical suggestions to avoid application of the Act.

(1) In cases where a loan is secured by both real and personal property, it is advisable to proceed against the personal property first. The foreclosure sale of the real estate should take place after the sale of the personal property so that the lender does not have to face the deficiency judgment procedure.

(2) In situations where the lender holds two mortgages on the same parcel, the lender should foreclose on the junior mortgage rather than the senior.

(3) The lender should avoid blanket mortgages. When a loan is secured by properties located in different counties, the lender should take separate mortgages on each property. In *First Pennsylvania Bank*, the court stated that a lender with separate mortgages on each property does not have to proceed under the Deficiency Judgment Act.<sup>64</sup> Since the viability of this has been called into question by the *Valley Trust Company* case,<sup>65</sup> an additional strategy is suggested. The lender should consider separate loans and separate notes as well as separate mortgages. Cross-collateralization of the separate mortgages, with all mortgages recorded as junior liens on each property is also suggested. In addition, each mortgage should contain a cross-default provision. Although this may prove too cumbersome in some cases, less complex versions of this strategy may be employed.

(4) Case law in Pennsylvania requires that a personal judgment be obtained against the borrower before the lender can petition the court to assign a fair market value to the property. Foreclosure does not result in a personal judgment. Therefore, if the lender anticipates that he will proceed against property other than the mortgaged property, he should institute an action in assumpsit or confession of judgment on the note as early as possible. The personal judgment must be obtained and the petition to fix a value for the property acquired at foreclosure must be filed within six months of the foreclosure proceeding or the lender loses his rights under the Act. Thus, the lender should institute

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64. 504 Pa. at 190, 470 A.2d at 944. For a further discussion of the *First Pennsylvania Bank* case, see *supra* notes 37-43 and accompanying text.

65. For a discussion of the *Valley Trust Company* case, see *supra* notes 41-43 and accompanying text.



his action to obtain a personal judgment early in order to be certain of his rights to proceed against other property of the debtor.

(5) Borrowers who want to make sure they get adequate credit for property to be sold at a sheriff's sale should have a representative bid at the sale. At best, the representative can bid up the selling price to the level of the property's fair market value and thereby ensure the borrower full credit toward the debt. At worst, the representative may be the highest bidder. But the representative's risk of having to purchase the property is minimal because a successful bidder at a sheriff's sale who withdraws his bid usually suffers no adverse consequences.<sup>66</sup> The sheriff will usually complete the sale with the next highest bidder.

### C. *Legislative Proposals*

In light of current case law and lending practices, it is time for Pennsylvania's legislature to reconsider the Deficiency Judgment Act. An analysis of the cases and current customs leads to several suggested changes. First, applicability of the Act should be strictly limited to residential mortgage foreclosures, in order to balance more fairly the competing interests of commercial borrowers and lenders. Since borrowers in business transactions have ample access to attorneys, they can protect themselves against the evils the Act was intended to prevent. Requiring lenders in commercial transactions to run through the Act's procedural gauntlet when there are other protections available to borrowers is patently inequitable.

Second, even in residential foreclosures, there seems to be no reason to require a personal judgment against a debtor before the lender can take over all of the collateral securing a loan. The lender who purchases the first property upon foreclosure should be able to proceed against other portions of the collateral even in an *in rem* action. Rather than requiring a deficiency judgment before proceeding, the law could simply require a fair value procedure. The borrower would receive a credit for the fair market value of the property deeded to the lender, and the lender would be able to proceed only against the remaining collateral for the balance of the debt.

Third, legislation should be passed that would enable lenders to sell both the real estate and related personal property in one sheriff's sale. The present system, which separates real estate

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66. For a discussion of the procedural aspects of the Act and the bidding at the sheriff's sale, see *supra* notes 7-26 and accompanying text.



sales from sales of personal property, does not encourage the highest price, and can create a deficiency judgment problem for the lender. Defaulting borrowers, as well as lenders, would benefit from a system that enabled a going business or a fully equipped property to be sold intact.

Last, if the Act is to remain applicable to business loans, at least the Act should not be applicable to business loans secured by more than one parcel of real estate or by mixed collateral. As the Pennsylvania Supreme Court stated in *First Pennsylvania Bank*, the lender “who is required to petition the court for a deficiency judgment in connection with every individual foreclosure action” on each mortgaged property “will perceive that the value of its collateral has been significantly reduced.”<sup>67</sup> As the court went on to state, “[l]ending institutions’ reluctance to extend financing under these circumstances would be likely to significantly reduce the credit available to enterprises with real estate in several counties.”<sup>68</sup> Since the lender has bargained for and the borrower has agreed to specific liens on all the collateral, the lender should be able to take over his collateral without running the gauntlet of the Deficiency Judgment Act.

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67. 504 Pa. at 190, 470 A.2d at 944.

68. *Id.*