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# Mortgage Foreclosure in Pennsylvania\*

## I. Introduction

Mortgage foreclosure is a proceeding, usually statutory, of enforcing payment of a mortgage-secured debt by taking and selling the mortgaged property.<sup>1</sup> The vast majority of mortgage foreclosures that annually occur in the United States involve residential dwellings, and a high proportion of the foreclosure victims are low-income families.<sup>2</sup> Accordingly, to insure that mortgagors were treated fairly during foreclosure proceedings, the Pennsylvania Legislature enacted Act No. 6 in 1974.<sup>3</sup> The Act has had a major impact on the law of mortgage foreclosure in Pennsylvania. Nevertheless, no study concerning the Act has been published since its enactment six years ago,<sup>4</sup> despite the substantial body of case law construing Act No. 6.<sup>5</sup> The purpose of this note, therefore, is to provide the reader with an up-to-date primer regarding this important area of Pennsylvania debtor and creditor relations.

## II. Mortgages in Pennsylvania

The ordinary mortgage consists of two instruments—the note or bond, and the mortgage instrument itself.<sup>6</sup> The mortgage is simply a security for the payment of the note, with a right of a lien on the mortgaged premises to enforce payment.<sup>7</sup> As one court succinctly stated, “The mortgagor is simply in the position of a person who owes money to another and has given him collateral as security for

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1. *Dikeman v. Jewel Gold Mining Co.*, 13 F.2d 118, 118 (9th Cir. 1926); *Realty Mortgage Co. v. Moore*, 80 Fla. 2, 12, 85 So. 155, 159 (1920).

2. See Madway, *A Mortgage Foreclosure Primer*, 8 CLEARING HOUSE REV. 146, 146 (1974), in which the author states that there were 132,335 mortgage foreclosures in the United States during 1972.

3. 41 PA. CONS. STAT. ANN. §§ 101-605 (Purdon Supp. 1979-80).

4. Act No. 6 was signed into law by the Governor on January 30, 1974.

5. See notes 70-105 and accompanying text *infra*.

6. Note, *Acceleration Clauses in Notes and Mortgages*, 88 U. PA. L. REV. 94, 96 (1939).

7. *Beaver County Bldg. and Loan Ass'n v. Winowich*, 323 Pa. 483, 489, 187 A. 481, 484 (1936); L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 54, at 53-54 (8th ed. 1928).

the payment of this obligation.”<sup>8</sup>

Mortgage instruments nearly always include an acceleration clause,<sup>9</sup> which is a clause “providing that if the mortgagor fails to pay any of his payments when due or breaches any of the other covenants in the mortgage instrument, the balance of the obligation becomes immediately due and owing.”<sup>10</sup> An acceleration clause is often inserted in the note as well.<sup>11</sup> Most mortgage instruments provide that the mortgagee will have the option to accelerate the maturity of the mortgage debt if the mortgagor fails to meet installments of principal or interest, to pay taxes or assessments, to maintain insurance upon any structures on the land, or to discharge liens against the property.<sup>12</sup> The mortgage agreement may also give the lender the option to accelerate if the mortgagor breaches a covenant to keep the property in repair or to protect it from waste.<sup>13</sup>

Pennsylvania courts have sanctioned acceleration clauses as legitimate contractual stipulations.<sup>14</sup> Such clauses, however, have been strictly construed against the mortgagees who drafted them.<sup>15</sup> For example, in *Michael Lee, Inc. v. Children’s Developmental Center, Inc.*,<sup>16</sup> the mortgage instrument contained a covenant whereby the mortgage debtor promised to keep the mortgaged premises insured. The acceleration clause in the agreement, however, did not expressly provide that the due date of the debt could be accelerated upon failure of the mortgagor to keep the premises insured. Even though the mortgagor failed to purchase the required insurance, the court nonetheless refused to permit the mortgagee to accelerate the majority of the mortgage debt. The court stated that

where the acceleration provision is not couched in language broad enough to include or apply to a covenant respecting insurance, then acceleration for default in conforming to the insurance coverage cannot be supported; that is to say, a mere breach of covenant to insure or pay over proceeds will not confer a right to immediate foreclosure in the absence of language in the mortgage authorizing foreclosure.<sup>17</sup>

Similarly, in *United States v. Angel*,<sup>18</sup> the Federal District Court for the Eastern District of Pennsylvania held that a mortgagee cannot

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8. *United States v. Angel*, 362 F. Supp. 445, 448 (E.D. Pa. 1973).

9. See generally note 6 *supra*. See also Henkel & Seltzer, *Acceleration Clauses in Mortgages: Misuse During Periods of Tight Money*, 17 AM. BUS. L.J. 441 (1980).

10. Maday, *supra* note 2, at 178.

11. Prather, *Foreclosure of the Security Interest*, 1957 U. ILL. L.F. 420, 426.

12. *Id.* at 426.

13. *Id.* See, e.g., *United States v. Angel*, 362 F. Supp. 445 (E.D. Pa. 1973).

14. E.g., *Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches v. Goldsworthy*, 253 Pa. Super. Ct. 321, 328-29, 385 A.2d 358, 362 (1978).

15. *Michael Lee, Inc. v. Children’s Developmental Center, Inc.*, 65 Pa. D. & C.2d 642 (C.P. Adams 1974).

16. *Id.*

17. *Id.* at 646.

18. 362 F. Supp. 445 (E.D. Pa. 1973).

invoke an acceleration clause or foreclose a mortgage because of a breach of covenant against waste or for maintenance and repair, unless the value of the mortgaged property has been impaired by the breach. The mortgagee has the burden of proving such an impairment.<sup>19</sup>

Another important clause in many mortgage agreements and notes in Pennsylvania is the cognovit clause, whereby the mortgagor gives the mortgagee a power of attorney to confess judgment against him in the event of his default.<sup>20</sup>

### III. The Procedure of Mortgage Foreclosure

In Pennsylvania, mortgage foreclosure is governed by the Rules of Civil Procedure,<sup>21</sup> which must be strictly followed.<sup>22</sup> The action is commenced by the filing of a complaint<sup>23</sup> in which the plaintiff must name as defendants the mortgagor, or the personal representative or heir of a deceased mortgagor, and the actual owner of the mortgaged property.<sup>24</sup> Service of the complaint is either by personal service, or by publication and mailing of the notice when personal service is not possible.<sup>25</sup>

The defendant may counterclaim<sup>26</sup> and has the opportunity at trial to set up defenses against the foreclosure.<sup>27</sup> After hearing any defenses, the court may enter judgment for the amount due the lender if the court determines that there has been a default and that the mortgagee has a right to foreclose.<sup>28</sup> The mortgagee is also entitled to recover reasonable expenses, including attorney fees, that are incurred in bringing the foreclosure action.<sup>29</sup>

Once a plaintiff obtains a judgment, notice must be given to the public that the mortgaged property is to be sold at a sheriff's sale.<sup>30</sup> The notice and advertisement of the sale are required to be in the

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19. *Id.* at 447.

20. *See, e.g.*, *General Elec. Credit Corp. v. Slawek*, \_\_\_ Pa. Super. Ct. \_\_\_, 409 A.2d 420 (1979); 13 AM. JUR. LEGAL FORMS 2d *Mortgages and Trust Deeds* § 179:130 (1973) (Pennsylvania mortgage form).

21. PA. R. CIV. P. 1141-1164 & 3180-3183.

22. *See* *First Fed. Sav. and Loan Ass'n of Greene County v. Porter*, 408 Pa. 236, 183 A.2d 318 (1962).

23. PA. R. CIV. P. 1143 & 1147.

24. *Id.* 1144.

25. *Id.* 1145.

26. *Id.* 1148.

27. *First Nat'l Bank of Jamestown v. Scofield*, 168 Pa. 407, 31 A. 1012 (1895); 25 PA. L. ENCY. *Mortgages* § 209, at 55 (1960). *See also* notes 106-113 and accompanying text *infra*.

28. PA. R. CIV. P. 1149. *Cf.* *Landau v. Western Pa. Nat'l Bank*, 445 Pa. 217, 226, 282 A.2d 335, 340 (1971) ("Judgment in a mortgage foreclosure action must be entered for a sum certain or no execution could ever issue on it.").

29. *Eastgate Enterprises, Inc. v. Bank and Trust Co. of Old York Rd.*, 236 Pa. Super. Ct. 503, 505 n.1, 345 A.2d 279, 280 n.1 (1975); 41 PA. CONS. STAT. ANN. § 406(2) (Purdon Supp. 1979-80).

30. PA. R. CIV. P. 3181(f) & 3129.

same manner and form as in the case of other real property sold at public sale to satisfy other debts or damages.<sup>31</sup>

If the sale price of the mortgaged land exceeds the mortgage debt, the mortgagor has the right to receive from the proceeds of the sale the amount in excess of the mortgage debt.<sup>32</sup> The mortgagee, however, is permitted to bid at the sheriff's sale<sup>33</sup> and, in practice, he is often the only or the highest bidder.<sup>34</sup> If the mortgagee bids no more than the unpaid amount of the obligation secured by the mortgage, he need not pay anything for the property. The bid price is merely applied to the mortgage debt.<sup>35</sup>

After the mortgaged property is sold at a public auction, the sheriff executes a deed to the purchaser;<sup>36</sup> court confirmation of the sale is not required.<sup>37</sup> The effect of a mortgage foreclosure and sale thereunder is to extinguish the mortgagor's interest in the property, and to transfer title to the purchaser as fully as it existed in the mortgagor at the date of the mortgage.<sup>38</sup> All intervening estates and interests acquired subsequent to the mortgage are also defeated.<sup>39</sup> The mortgage debtor may file a petition with the court in equity<sup>40</sup> to have the sheriff's sale set aside for inadequacy of price or irregularity in the sale;<sup>41</sup> however, "mere inadequacy of price standing alone is not a sufficient basis for setting aside a sheriff's sale."<sup>42</sup>

#### IV. The Mortgagor's Personal Liability and Deficiency Judgments

The judgment entered in an action of mortgage foreclosure is a judgment against the land (*de terris*) and imposes no personal liability upon the mortgagor against whom the judgment is obtained.<sup>43</sup> Even though a sheriff's sale may be for a price less than the debt, the sale discharges the mortgage and releases the mortgage debtor from liability, unless the mortgagor has made an independent promise to

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31. *Id.*

32. *In re* Evergreen Memorial Park Ass'n, 308 F.2d 65, 67 (3d Cir. 1962) (applying Pennsylvania law).

33. *Baker v. Bailey*, 204 Pa. 524, 54 A. 326 (1903); 25 PA. L. ENCY. *Mortgages* § 254, at 100 (1960).

34. *Madway*, *supra* note 2, at 170; *Prather*, *supra* note 11, at 429.

35. *See* note 34 *supra*.

36. PA. R. CIV. P. 3181(j) & 3135.

37. PA. R. CIV. P. 3135.

38. *Florida First Bon Capital Corp. v. Zoning Hearing Bd.*, 40 Pa. Commw. Ct. 448, 451, 397 A.2d 838, 841 (1979).

39. *Id.* at 451-52, 397 A.2d at 841.

40. *Doherty v. Adal Corp.*, 437 Pa. 109, 261 A.2d 311 (1970).

41. *Id.*

42. *Fidelity Bank v. Pierson*, 437 Pa. 541, 544, 264 A.2d 682, 684 (1970).

43. *Meco Realty Co. v. Burns*, 414 Pa. 495, 200 A.2d 869 (1964); *National Council of the Junior Order of United Am. Mechanics v. Zytnick*, 221 Pa. Super. Ct. 391, 293 A.2d 112 (1972).

pay apart from the mere giving of the mortgage.<sup>44</sup> This independent promise to pay, which makes the mortgagor personally liable, is usually incorporated in the same document as the mortgage agreement. It may be evidenced, however, by a separate written obligation such as a bond or note.<sup>45</sup> When such an independent agreement or promise exists, a foreclosure sale does not affect the mortgagee's right to realize the full extent of the indebtedness owed to him by the mortgagor, even though the foreclosure sale terminates the lien of the mortgage.<sup>46</sup>

For example, if the court enters judgment in favor of the mortgagee for \$10,000 in principal, interest, and costs due to the mortgagee under the mortgage, but the property is sold at the sheriff's sale for only \$9,000, the mortgage debt is reduced by \$9,000, thus leaving a deficiency of \$1,000 still due and unpaid. Since the mortgagor has given his personal covenant in the note or mortgage to pay the debt, the mortgagee may simultaneously<sup>47</sup> or subsequently secure a personal judgment for the deficiency against the mortgagor.<sup>48</sup> Such a judgment is commonly referred to as a deficiency judgment.<sup>49</sup>

In Pennsylvania, any personal liability of the mortgagor resulting from the sale of the mortgaged property for an amount less than the mortgage debt must be enforced by an independent action on the note or bond as if there were no mortgage.<sup>50</sup> If the mortgagee, however, was the purchaser at the sheriff's sale, he must comply with the procedure set forth in the Deficiency Judgment Act before he can bring this separate action.<sup>51</sup>

The Deficiency Judgment Act is a child of the Great Depression. During the early thirties when the Depression was at its height, there was much criticism of deficiency judgments because a mortgagee often had complete control of the bid price at the sheriff's sale. Mortgagees often purchased mortgaged property at foreclosure sales at scandalously low prices so that almost the entire amount of a mortgage debt could be taken in the form of a deficiency judgment.<sup>52</sup> Reacting to this practice, Pennsylvania and other legislatures enacted laws providing that a deficiency judgment must be limited to

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44. *Meco Realty Co. v. Burns*, 414 Pa. 495, 200 A.2d 869 (1964).

45. *See, e.g., Mollenauer v. Smith*, 51 Pa. Super. Ct. 517 (1912).

46. *In re White's Estate*, 322 Pa. 85, 185 A. 589 (1936).

47. *See Kretschman v. Stoll*, 238 Pa. Super. Ct. 51, 352 A.2d 439 (1975), in which the court held that a deficiency judgment may be entered against a mortgagor when two conditions exist: (1) the mortgagee in the mortgage foreclosure proceedings petitions for both an in rem judgment against the property and for an in personam judgment against the mortgagor; and (2) no objection is made by the mortgagor to the joinder of the two judgments.

48. *See Prather, supra* note 11, at 438.

49. *See, e.g., In re Pittsburgh-Duquesne Dev. Co.*, 482 F.2d 243, 246 (3d Cir. 1973).

50. 25 PA. L. ENCY. *Mortgages* § 273, at 124 (1960). *See generally* Skilton, *Assessing the Mortgage Debtor's Personal Liability*, 90 U. PA. L. REV. 440 (1942).

51. 42 PA. CONS. STAT. ANN. § 8103 (Purdon Supp. 1979).

52. *Prather, supra* note 11, at 438.

the difference between the mortgage debt and the "fair market value" of the mortgaged property. This may or may not be the price paid at the foreclosure sale.<sup>53</sup> These deficiency judgment statutes were held constitutional by the United States Supreme Court in *Honeyman v. Jacobs*,<sup>54</sup> in which the Court ruled that the acts did not violate the constitutional provision forbidding the impairment of contractual obligations.

The Pennsylvania Deficiency Judgment Act<sup>55</sup> provides that mortgagees who bring a foreclosure action, and who have bought the mortgaged property at the sheriff's sale, can recover a deficiency judgment only if they obtain a personal judgment and petition the court to fix the fair market value of the purchased realty no later than six months<sup>56</sup> after the sheriff's sale.<sup>57</sup> The mortgagor will be released and discharged from liability to the extent of the fair market value as determined by the court.<sup>58</sup> If the mortgagee fails to file a petition within the statutory period, the mortgagor, or any other person directly or indirectly liable to the mortgagee for payment of the debt, is released and discharged of such liability to the mortgagee.<sup>59</sup> "Accordingly, where the mortgagee who has purchased at a foreclosure sale fails to have the fair market value of the property fixed under the procedure set forth in the Act, an irrebutable presumption arises that the creditor was paid in full and in kind."<sup>60</sup>

## V. Rights of a Mortgagor During a Foreclosure Proceeding

During a foreclosure proceeding, a mortgagor is afforded significant rights and protections under Pennsylvania law. These are the mortgagor's common-law right of redemption and the rights and protections afforded to him by Act No. 6 of 1974.

### A. Right of Redemption

A defaulting mortgagor of land in Pennsylvania has the right to redeem the mortgaged property.<sup>61</sup> This right of redemption is sim-

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53. *Id.* at 438-39.

54. 306 U.S. 539 (1939). See generally Vaughan, *Reform of Mortgage Foreclosure Procedure—Possibilities Suggested by Honeyman v. Jacobs*, 88 U. PA. L. REV. 957 (1940).

Pennsylvania's Deficiency Judgment Act has also been held constitutional by the Pennsylvania Supreme Court, which ruled that the Act did not conflict with the constitutional provision prohibiting impairment of contractual obligations. *Fidelity-Philadelphia Trust Co. v. Allen*, 343 Pa. 428, 22 A.2d 896 (1941).

55. 42 PA. CONS. STAT. ANN. § 8103 (Purdon Supp. 1979).

56. *Id.* § 5522(b)(2).

57. See Note, *The 1941 Deficiency Judgment Act*, 16 TEMP. L.Q. 72 (1941-42).

58. 42 PA. CONS. STAT. ANN. § 8103(c)(4) (Purdon Supp. 1979).

59. *Federal Nat'l Mortgage Ass'n v. Guy Heavener, Inc.*, 16 Pa. Commw. Ct. 386, 328 A.2d 590 (1974).

60. *In re Sturgeon Condemnation Case*, 25 Bucks 212, 213 (Pa. C.P. 1974).

61. *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Broad St. Hosp.*, 354

ply the right to require the holder of the mortgage "to receive payment of the matured debt and to satisfy the lien."<sup>62</sup> While Pennsylvania has no statute regulating the exercise of the right of redemption, two court-made rules have developed. First, a clause in a mortgage instrument that restricts the right of redemption to the mortgagor personally is void and will not be enforced by the courts.<sup>63</sup> And second, a mortgagor's right of redemption ends with the fall of the auctioneer's hammer at the sheriff's sale of the mortgaged land.<sup>64</sup>

In contrast to the Pennsylvania rule, twenty-six states<sup>65</sup> provide a statutory right of redemption that allows additional time after the foreclosure sale, in some instances up to two years, during which the mortgagor can regain his property by paying a certain sum of money to the purchaser of the mortgaged property.<sup>66</sup> A few also provide that the mortgagor remain in possession during the statutory redemption period.<sup>67</sup>

The Pennsylvania Legislature has wisely refrained from enacting a statute authorizing redemption after a foreclosure sale. Most commentators and courts agree that sale redemption statutes are unsound primarily because they unduly prolong the period of time before a purchaser at a foreclosure sale can acquire an indefeasible title.<sup>68</sup> These statutes, therefore, discourage a buyer from paying the fair market value for property sold at a foreclosure sale. As one court has skeptically asked,

What third party would bid and pay the full market value, knowing that he cannot have the property to do with as he wishes until a set period has gone by, and that at the end of the period he may not get it, but instead may be forced to accept a payment which may or may not fully reimburse him for his outlays?<sup>69</sup>

### B. Act No. 6 of 1974

Act No. 6,<sup>70</sup> which became effective March 31, 1974, provides protective safeguards for a mortgagor before a foreclosure action on

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Pa. 123, 47 A.2d 281 (1946). See generally G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES, §§ 302-310, at 624-46 (1970).

62. Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Broad St. Hosp., 354 Pa. 123, 126, 47 A.2d 281, 282 (1946).

63. Johnston v. Gray, 16 Serg. & Rawl. 361, 365 (Pa. 1827). Accord, G. OSBORNE, *supra* note 61, § 97 at 146.

64. Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Broad St. Hosp., 354 Pa. 123, 47 A.2d 281 (1946).

65. United States v. Stadium Apartments, 425 F.2d 358, 364 (9th Cir.), cert. denied sub. nom., Lynch v. United States, 400 U.S. 926 (1970).

66. See Madway, *supra* note 2, at 149; Prather, *supra* note 11, at 431-32.

67. See Madway, *supra* note 2, at 149.

68. See, e.g., Prather, *supra* note 11, at 432.

69. United States v. Stadium Apartments, 425 F.2d 358, 365-66 (9th Cir.), cert. denied sub. nom., Lynch v. United States, 400 U.S. 926 (1970).

70. 41 PA. CONS. STAT. ANN. §§ 101-605 (Purdon Supp. 1980-81).

a residential mortgage may be instituted. Under the Act, "a mortgagee is precluded from accelerating the maturity date of the mortgage debt and commencing foreclosure proceedings, despite the existence of a default, until after the mortgagor is given notice of the default and his right to cure it."<sup>71</sup> The Act applies to all mortgages created after the passage of the Act, as well as to cases where the mortgage was executed *prior* to the effective date of the Act but the default occurred *subsequent* to that date.<sup>72</sup> The Pennsylvania Superior Court has recently held that this retroactive application of the Act is not an unconstitutional impairment of contractual obligations.<sup>73</sup>

1. *Mortgages to Which the Act Applies.*—Act No. 6 applies only to "residential mortgages."<sup>74</sup> The Act defines "residential mortgage" as mortgages in which the amount of principal is \$50,000 or less and is secured by a lien upon real estate located within Pennsylvania on which are one or two residential units.<sup>75</sup> The term, however, applies "only to transactions where the principal purpose of the transaction is the purchase of, or improvement or repair in connection with the acquisition of, residential real property . . . ."<sup>76</sup> Thus, if the principal amount of the loan is over \$50,000 or if the main purpose of the transaction is not the purchase, improvement, or repair of residential real estate, the Act will not apply. Accordingly, one court has held that when a mortgage is given not in connection with the purchase, improvement, or repair of realty, but rather to secure a loan for the purchase of a sailboat, Act No. 6 does not apply and a foreclosing mortgagee does not have to comply with the requirements of the Act.<sup>77</sup>

2. *When Notice Must Be Given.*—Before the enactment of Act No. 6, a mortgagee could accelerate the loan upon default by the mortgagor without giving notice, and acceleration could not be de-

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71. *Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches v. Goldsworthy*, 253 Pa. Super. Ct. 321, 329, 385 A.2d 358, 362 (1978). Other jurisdictions have similar curative default statutes. See, e.g., CAL. CIV. CODE § 2924(c) (West 1974); COLO. REV. STAT. ANN. § 38-39-118 (1974); ILL. ANN. STAT. ch. 95, § 57 (Smith-Hurd Supp. 1979); OR. REV. STAT. § 86.760 (1977). See generally Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act*, 6 REAL EST. L.J. 179 (1978); Note, *Foreclosures, Redemptions, and Homeowners*, 1975 U. ILL. L.F. 335; 52 DEN. L.J. 637 (1975).

72. *Market St. Nat'l Bank of Shamokin v. Staniszewski*, 2 Pa. D. & C.3d 283 (C.P. Northumb. 1977).

73. *Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches*, 253 Pa. Super. Ct. 321, 385 A.2d 358 (1978). *Contra*, *State Capital Sav. and Loan Ass'n v. Hilton*, 24 Chest. 71 (Pa. C.P. 1976).

74. 41 PA. CONS. STAT. ANN. § 101 (Purdon Supp. 1980-81).

75. *Id.*

76. *General Elec. Credit Corp. v. Slawek*, \_\_\_ Pa. Super. Ct. \_\_\_, \_\_\_, n.9, 409 A.2d 420, 424 n.9 (1979) (quoting 1978 Amendments to Act No. 6).

77. *General Elec. Credit Corp. v. Slawek*, \_\_\_ Pa. Super. Ct. \_\_\_, \_\_\_, n.9, 409 A.2d 420, 424 n.9 (1979).

feated by the mortgagor's willingness to cure the default.<sup>78</sup> Act No. 6 now requires that written notice be given to the mortgagor at least thirty days before the mortgagee may accelerate the maturity of the mortgage, commence any legal action, or take possession of any security for the mortgage.<sup>79</sup> Notice is not required, however, if the mortgagor has abandoned or voluntarily surrendered the mortgaged property,<sup>80</sup> nor must notice be given before a mortgagee confesses judgment against the mortgagor.<sup>81</sup> The notice required by the Act must be sent by registered or certified mail to the mortgagor's last known address and, if different, to the residence that is the subject of the mortgage.<sup>82</sup>

3. *Persons to Whom Notice Must Be Given*—Act No. 6 requires that notice of foreclosure be sent to a “residential mortgage debtor.”<sup>83</sup> Section 101 of the Act defines this term as “a non-corporate borrower who is obligated to a residential mortgage lender to repay in whole or in part a residential mortgage and a successive record owner of the property, if any, who gives notice thereof to the residential mortgage lender.”<sup>84</sup> This definition is broad enough to require that notice be given to any guarantor or endorser of the note or bond, and any former owner of the mortgaged property who remains liable for the mortgage debt.<sup>85</sup> Separate notices should also be given to a husband and wife when they are both liable for the indebtedness.<sup>86</sup>

4. *Contents of the Notice.*—Section 403(c) of the Act provides that the notice must clearly and conspicuously state: (1) the identity of the security document and the mortgaged property; (2) the nature of the default claimed; (3) the right of the debtor to cure the default and exactly what performance, including what sum of money, if any, must be tendered to cure the default; (4) the time within which the debtor must cure the default; (5) the method or methods by which the mortgagor's ownership or possession of the real estate may be terminated; and (6) any right of the debtor to transfer the property subject to the mortgage, or to refinance the loan, and any right of the

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78. See *Atkinson v. Walton*, 162 Pa. 219, 29 A. 898 (1894); *Robinson v. Loomis*, 51 Pa. 78 (1865). See also *Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches v. Goldsworthy*, 253 Pa. Super. Ct. 321, 329, 385 A.2d 358, 362 (1978).

79. 41 PA. CONS. STAT. ANN. § 403(a) (Purdon Supp. 1980-81).

80. *Id.* at § 403(d).

81. *General Elec. Credit Corp. v. Slawek*, \_\_\_ Pa. Super. Ct. \_\_\_, 409 A.2d 420 (1979).

82. 41 PA. CONS. STAT. ANN. § 403(b) (Purdon Supp. 1980-81).

83. *Id.* § 403(a).

84. *Id.* § 101.

85. *Auten, Disclosure Requirements and Reinstatement Rights for Residential Mortgages Under Act No. 6*, in PA. BAR INSTITUTE, PA. MORTGAGE INTEREST AND USURY LAW, ACT NO. 6 OF 1974, 19 (1974).

86. *Id.*

transferee to cure the default.<sup>87</sup>

There has been much litigation in the trial courts over what type of notice satisfies the requirements of Act No. 6.<sup>88</sup> Most courts have required that the notice specifically contain *all* of the above six items of information. For example, in *Charles H. Salmon Building & Loan Association v. Mroz*,<sup>89</sup> the court held that a notice of a mortgage foreclosure proceeding was insufficient when it failed to clearly explain that foreclosure involves acceleration of the maturity of the mortgage, that the mortgagor can cure the default up to one hour before the start of the sheriff's sale, and that the mortgagor may be obligated for attorney's fees as a result of the foreclosure.

The courts have also ruled that a notice of foreclosure under Act No. 6 is inadequate when the mortgagor's rights and obligations are spelled out in legalistic terms drawn largely from "the complex and turgid language of the statute" so as not to be readily understood by a layman.<sup>90</sup> As one court has stated, "[T]he language of the notice must be reasonably understandable to a person of average intellect."<sup>91</sup>

In *Charles H. Salmon Building & Loan Association v. Mroz*,<sup>92</sup> the court discussed the "clear and conspicuous" requirement of Act No. 6 notices. Analogizing to the definition of "conspicuous" in the Uniform Commercial Code, the court held that simply incorporating a statement of the mortgagor's rights in a letter advising of possible mortgage foreclosure proceedings is inadequate without any emphasis. In order to be conspicuous, such statements must be underscored, written in relatively large letters, written in a different color, or emphasized in some other way to catch the attention of a reader of ordinary intelligence.<sup>93</sup>

Two recent decisions, however, have properly rejected this requirement of special emphasis.<sup>94</sup> These courts have held that since Act No. 6 mandates that six items of information be conspicuously stated in the notice, to capitalize, italicize, or underline them all would be meaningless.<sup>95</sup> "Where a series of matters are of equal

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87. 41 PA. CONS. STAT. ANN. § 403(c) (Purdon Supp. 1980-81).

88. *See, e.g.*, *Beneficial Consumer Discount Co. v. Leipold*, 11 Pa. D. & C.3d 659 (C.P. York 1979); *Piper v. Oakes*, 10 Pa. D. & C.3d 722 (C.P. Adams 1979); *Mid-Penn Consumer Discount Co. v. Chamberlain*, 8 Pa. D. & C.3d 752 (C.P. Phila. 1978).

89. 6 Pa. D. & C.3d 59 (C.P. Phila. 1977).

90. *Fidelity Bond and Mortgage Co. v. Clark*, 7 Pa. D. & C.3d 742, 748 (C.P. Phila. 1978). *Accord*, *Mid-Penn Consumer Discount Co. v. Chamberlain*, 8 Pa. D. & C.3d 752 (C.P. Phila. 1979).

91. *Fidelity Bond and Mortgage Co. v. Clark*, 7 Pa. D. & C.3d 742, 747 (C.P. Phila. 1978).

92. 6 Pa. D. & C.3d 59 (C.P. Phila. 1977).

93. *Id.* at 61-2.

94. *Piper v. Oakes*, 10 Pa. D. & C.3d 722 (C.P. Adams 1979); *Federal Nat'l Mortgage Ass'n v. Ayala*, 8 Pa. D. & C.3d 712 (C.P. Phila. 1978).

95. *Id.*

importance, there is no necessity for contrast in lettering used.”<sup>96</sup>

5. *Right to Cure a Default.*—After a notice of intention to foreclose has been given by the mortgagee, Act No. 6 permits a mortgagor to cure his default at any time within one hour before the start of the sheriff’s sale, thereby avoiding acceleration and preventing the sale or other disposition of his real estate.<sup>97</sup> The Act provides that in order to cure a default a mortgage debtor must do the following:

(1) Pay or tender in the form of cash, cashier’s check or certified check, all sums which would have been due at the time of payment or tender in the absence of default and the exercise of an acceleration clause, if any;

(2) Perform any other obligation which he would have been bound to perform in the absence of default or the exercise of an acceleration clause, if any;

(3) Pay or tender any reasonable fees . . . and the reasonable costs of proceeding to foreclosure as specified in writing by the residential mortgage lender actually incurred to the date of payment.

(4) Pay any reasonable late penalty, if provided for in the security document.<sup>98</sup>

A cured default by tendering the appropriate amount or performance restores the mortgagor to the same position as if the default had not occurred.<sup>99</sup> To protect the mortgagee, however, from a mortgagor who is habitually in default, the Act provides that a default may not be cured more than three times a year.<sup>100</sup>

Not all mortgage defaults can be cured under Act No. 6. The Pennsylvania Superior Court, in *Ministers & Missionaries Benefit Board of the American Baptist Churches v. Goldsworthy*,<sup>101</sup> recently examined Act No. 6 and stated that the “ability to prevent foreclosure and avoid acceleration . . . is distinctively delimited; it necessarily presupposes the existence of a default curable in the prescribed manner.”<sup>102</sup> The court ruled that while the Act does not specify the type of default that may be cured, it nonetheless relates almost exclusively to monetary defaults.<sup>103</sup> Consequently, the court held that Act No. 6 does not allow the cure of a default based upon a conveyance of the mortgaged premises in violation of the mortgage agreement,<sup>104</sup> and, thus, the mortgagor could only prevent foreclosure by exercis-

96. Federal Nat’l Mortgage Ass’n v. Ayala, 8 Pa. D. & C.3d 712, 717-18 (C.P. Phila. 1978).

97. 41 PA. CONS. STAT. ANN. § 404(a) (Purdon Supp. 1980-81).

98. *Id.* § 404(b).

99. *Id.* § 404(c).

100. *Id.* § 404(a).

101. 253 Pa. Super. Ct. 321, 385 A.2d 358 (1978).

102. *Id.* at 332, 385 A.2d at 364.

103. *Id.* at 333, 385 A.2d at 364.

104. *Id.*

ing his right of redemption.<sup>105</sup>

## VI. Defenses to Mortgage Foreclosure

If the mortgagor is unable to cure his default, his or her attorney must then consider what defenses are available to prevent the foreclosure sale. In Pennsylvania, there are essentially two kinds of defenses to a mortgage foreclosure—statutory and contract.

### A. Statutory Defenses

One defense that can be raised is the failure of the mortgagee to comply strictly with the mortgage foreclosure provisions of the Rules of Civil Procedure,<sup>106</sup> or Act No. 6. For example, it has been held that a sheriff's sale of real estate following a mortgage foreclosure must be set aside if the mortgagee neglected to give sufficient notice of intention to foreclose as required by Act No. 6.<sup>107</sup> A technical failure to adhere to the Rules of Civil Procedure or the notice requirements of Act No. 6 should be pleaded as a defense by filing preliminary objections in the nature of a motion to strike rather than a demurrer.<sup>108</sup>

Another defense that can be advanced is the failure of the mortgagee to fulfill the disclosure requirements of the federal Truth in Lending Act.<sup>109</sup> Depending upon the type of transaction, the mortgagee may be liable to the mortgagor in damages and the loan transaction may be subject to rescission if there has been a violation of the disclosure requirements.<sup>110</sup> Similarly, a mortgagor may also allege as a defense the mortgagee's noncompliance with the statutes and regulations of the Federal Housing Administration, Farmers Home Administration, or Veterans Administration if the defendant in the foreclosure action is a participant in one of these agencies' mortgage financing programs.<sup>111</sup>

### B. Contract Defenses

Since a mortgage is simply a contract between a debtor and a creditor, a mortgagor in a foreclosure proceeding may establish a number of traditional contract defenses, including failure to prove a

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105. See notes 61-69 and accompanying text *supra*.

106. PA. R. CIV. P. 1141-1164 & 3180-3183.

107. Farmers Trust Co. v. Murray, 2 Pa. D. & C.3d 41 (C.P. Snyder 1975).

108. Piper v. Oakes, 10 Pa. D. & C.3d 722, 728 (C.P. Adams 1979); PA. R. CIV. P. 1017.

109. 15 U.S.C. §§ 1601-1665 (1977).

110. See Madway, *A Mortgage Foreclosure Primer Part II*, 8 CLEARINGHOUSE REV. 250, 250-51 (1974), for a lengthy discussion on how to use the disclosure requirements of the Truth in Lending Act as a defense in a foreclosure proceeding.

111. For a discussion of defenses based upon a mortgagee's noncompliance with the statutes and regulations of the Federal Housing Administration, Farmers Home Administration, and the Veterans Administration, see *id.* at 251-57; Madway, *supra* note 2, at 168.

default, waiver of any default,<sup>112</sup> estoppel, fraud, duress, usury, failure of consideration, and mistake.<sup>113</sup>

## VII. Conclusion

Mortgage foreclosure law generally attempts to achieve an equitable balance between the interests of the mortgage lender and the mortgagor.<sup>114</sup> To this end, the Pennsylvania Legislature and judiciary have endeavored to provide a speedy and inexpensive method by which a mortgagee can recover the total amount of the money it lent to the mortgagor while simultaneously insuring that a mortgage debtor is not deprived of his property without adequate procedural safeguards. With the passage of Act No. 6 in 1974, Pennsylvania has come close to reaching this objective.

Critics of the present system argue that a defaulting mortgagor can easily abuse the safeguards afforded to him by Act No. 6. For example, a debtor can unjustly delay the foreclosure sale by pleading a mortgagee's technical failure to comply with the notice requirements of the Act, even though he has been sufficiently informed of the lender's intention to foreclose and has ample time to cure his default so as to avoid the loss of his real estate. A mortgagor may also commit three defaults within one year and still avoid a foreclosure sale by tendering the appropriate payment or performance after each default.

Although the system does favor the mortgage debtor, this preferential treatment is fair, particularly when a residential mortgagor is the defendant in the foreclosure action. A residential mortgagor has more at stake in a foreclosure proceeding than does the mortgagee. The gravity of the interest of the residential mortgagor - the possible loss of his home - far outweighs the mortgage lender's interest in securing the repayment of its loan. Consequently, if the Pennsylvania Legislature and judiciary have failed in their attempt to give equal weight to the competing interests of the parties, it is better that they have erred in favor of the mortgagor.

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112. Cf. *First Fed. Sav. and Loan Ass'n v. Street Road Shopping Center, Inc.*, 68 Pa. D. & C.2d 751 (C.P. Bucks 1975) (mere delay of suit or neglect to exact rigorously his money upon the day it was due is not evidence of a waiver of a mortgagee's contract rights).

113. For a detailed analysis of the contract defenses available to a mortgagor in a foreclosure action, see *Madway*, *supra* note 2, at 173-78; 25 PA. L. ENCY. *Mortgages* §§ 209 & 225, at 55-57 & 68-72 (1960).

114. *Prather*, *supra* note 11, at 420.

