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Grinding Gears: Meshing Maine Mortgage Foreclosure Law and the Bankruptcy Code

Daniel L. Cummings
University of Maine School of Law

GRINDING GEARS: MESHING MAINE MORTGAGE FORECLOSURE LAW AND THE BANKRUPTCY CODE

*Daniel L. Cummings**

I. INTRODUCTION

In Maine interesting and unresolved questions often arise when a mortgagor files for bankruptcy after a judgment of foreclosure has been entered in state court but before a foreclosure sale has occurred. Specifically, what rights does the mortgagor have in the real property? And are the mortgagee's subsequent steps to complete the sale barred by the automatic stay of the Bankruptcy Code[1] ("Code")? These questions are made more difficult because Maine is a title theory state[2] and because the foreclosure sale occurs after the expiration of the statutory redemption period rather than, as in most states, before it.[3] Because a mortgagor is statutorily entitled to any surplus from a foreclosure sale,[4] this entitlement naturally piques the interest of a bankruptcy debtor, trustee, and judge. Each may have a desire to assure that a surplus is created if at all possible. Each of these considerations reveals a tension between the Code and Maine law. Unfortunately, even though the Maine bankruptcy court has had the opportunity, it has failed thus far to clarify these issues.[5]

This Article first discusses the Supreme Court case that should control these issues, which held that a debtor's property rights in bankruptcy are determined by state law. It then briefly outlines Maine mortgage foreclosure law and the applicable provisions of the Code. In order to enable courts to mesh the two fields of law without

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* Associate, Norman, Hanson & DeTroy, Portland, Me. B.S., University of Maine, 1982; J.D., University of Maine School of Law, 1989.

1. The Bankruptcy Code is found within title II of the United States Code. The automatic stay provision is found at 11 U.S.C. § 362 (1988).

2. *See* Smith v. Varney, 309 A.2d 229, 232 (Me. 1973), cited in Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973) ("[L]egal title was conveyed when he executed the mortgage and his equitable title disappeared with the expiration of the period of redemption."). The *Smith* court noted that "the accepted doctrine in Maine is that a mortgage is regarded as a conditional conveyance vesting the legal title in the mortgagee . . . . [A]ll that remain[s] in the [mortgagor] [is] the equity of redemption, i.e., the right to redeem the property by payment of the indebtedness . . . . This is known as the equitable title." Smith v. Varney, 309 A.2d at 232 (citing First Auburn Trust Co. v. Buck and Wellman, 16 A.2d 258, 137 Me. 172 (1940)).

3. *See* ME. REV. STAT. ANN. tit. 14, § 6323 (West Supp. 1990-1991).

4. *See id.* §§ 6204-B, 6324 (West Supp. 1990-1991).

5. *See, e.g., In re* Tucker, 131 B.R. 245 (Bankr. D. Me. 1991); *In re* Raymond, No. 89-20430 (Bankr. D. Me. Feb. 21, 1990); *In re* F. Oliver Brittain, No. 89-10262 (Bankr. D. Me. Dec. 29, 1989).

doing violence to either, this Article proposes a solution. First, it asserts that the entry of a foreclosure judgment limits the scope of a debtor's rights under the Code—an approach which comports with legislative intent and Supreme Court mandate. Next, this Article analyzes the extent to which the automatic stay applies to a mortgagee's efforts to conclude a foreclosure sale and suggests how courts ought to analyze a mortgagee's request for relief from stay.

In addition, this Article explains the temptation of some courts to make debtor-oriented decisions in certain cases where a surplus is possible or reinstatement is desired. Such decisions are bad precedent and run counter to existing law.[6] Finally, this Article contends that the proposed analysis provides the Maine bankruptcy court with an approach that will clarify the current confusing state of bankruptcy law surrounding mortgagees' and mortgagors' rights in bankruptcy while also harmonizing the Code and Maine law.

II. THE *BUTNER* DOCTRINE

The starting point for an analysis of this area of bankruptcy law is the premise that a bankruptcy debtor's property rights are determined by state law. This is the clear position of the United States Supreme Court.[7] Before one can ascertain a debtor/mortgagor's rights in bankruptcy, one must first analyze applicable state law to establish the parameters of existing rights. Only after such an analysis can one ascertain what affect the filing of the bankruptcy petition will have on those rights and on the rights of the mortgagee.

In *Butner v. United States,*[8] the Supreme Court rejected a federal approach to property rights in bankruptcy. The *Butner* case involved a dispute between a bankruptcy trustee and a second mortgagee over the right to rents collected from the debtor's mortgaged property during the period between the mortgagor's bankruptcy and the foreclosure sale. The Court rejected the mortgagee's argument that his rights were "determined by a federal rule of equity" rather than "by the law of the State where the property [was] located."[9]

In *Butner* a debtor had filed for bankruptcy protection under Chapter XI of the Bankruptcy Act, and the judge had approved a

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6. The Maine bankruptcy court has succumbed to these temptations on at least two occasions. *In re F. Oliver Brittain* allowed a debtor/mortgagor to retain property in a Chapter 13 case after the redemption period expired because the mortgagee failed to prove that no surplus was possible at a foreclosure sale. *See infra* notes 142-48 and accompanying text. *In re Tucker* allowed a Chapter 13 debtor to retain property after the entry of a foreclosure judgment but before the expiration of the redemption period so that the debtor could cure and reinstate the terms of the mortgage. *See infra* notes 149-53 and accompanying text.

7. Butner v. United States, 440 U.S. 48 (1979).

8. *Id. Butner* was decided under the Bankruptcy Act rather than the Bankruptcy Code.

9. *Id.* at 49.

plan that made Butner a second mortgagee. Butner did not, however, receive any express security interest in the rents earned by the mortgaged property.[10] The plan provided that an agent was to collect the rents and apply them as directed by the court. The plan was never confirmed, however, and the case was converted to a liquidation case and a trustee appointed. The property securing Butner's mortgage was sold, reducing the debt owed but leaving a deficiency. Because the trustee had accumulated significant rents prior to the sale, Butner claimed a security interest in those rents and sought to have them applied to the balance of the second mortgage.[11]

In determining the status of Butner's claim, the trial and appellate courts disagreed about both the effect and applicability of state law. The district court recognized Butner's claim as secured on the basis that state law entitled a mortgagee to rents after the mortgagor's default and upon change in possession. The district court interpreted the appointment of a federal trustee as analogous to the appointment of a receiver, which under state law satisfied the change-in-possession requirement.[12] The court of appeals reversed upon a contrary interpretation of state law.[13] The Supreme Court granted certiorari, however, to decide whether state law applied at all. The argument that state law was inapplicable had prevailed at the trial court as it had in a minority of circuits when courts in those circuits had faced similar situations.

The Supreme Court addressed the "proper interpretation of the federal statutes governing the administration of bankrupt estates."[14] The Third and Seventh Circuits had adopted a federal rule of equity, reasoning that "since the bankruptcy court has the power to deprive the mortgagee of his state-law remedy, equity requires that the right to rents not be dependent on state-court action that may be precluded by federal law."[15] The Supreme Court rejected this view, holding that "[p]roperty interests are created and defined by state law."[16] Moreover, "[t]he justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests . . . ."[17] In rejecting the Third and Seventh Circuits' approach, the Court stated that "the federal bankruptcy court should take whatever steps are necessary to ensure that *the mortgagee is afforded in federal bankruptcy court the same*

10. *Id.* at 50.
11. *Id.* at 50-51.
12. *Id.* at 51.
13. *Id.*
14. *Id.*
15. *Id.* at 53.
16. *Id.* at 55.
17. *Id.*

protection he would have under state law if no bankruptcy had ensued."[18]

In addition, the Court reasoned that the minority position would at times give a mortgagee rights that it would not have had under state law, and at other times would deprive the mortgagee of these rights.[19] The Court believed such treatment was inequitable and summarized its position by stating that "[t]he essential point is that in a *properly administered scheme* in which the basic federal rule is that *state law governs*, the primary reason why any holder of a mortgage may fail to collect rent immediately after default *must stem from state law.*"[20]

The *Butner* decision clarified the role of state law in determining property rights in bankruptcy. Under *Butner*, prior to deciding the impact of federal bankruptcy law on property rights, a court must first ascertain what the property rights are by analyzing state law.

III. MAINE MORTGAGE FORECLOSURE LAW

As we have seen, state foreclosure law determines the mortgagor's and the mortgagee's property rights after a bankruptcy filing. In Maine essentially three methods of foreclosing real estate mortgages exist: strict foreclosure,[21] power of sale foreclosure,[22] and judicial

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18. *Id.* at 56 (emphasis added).

19. *Id.*

20. *Id.* at 57 (emphases added).

21. Five variations on strict foreclosure are available by which a mortgagee can commence foreclosure with little or no judicial process. Theoretically, protection for the mortgagor is found in the one-year redemption period during which a mortgagor can redeem the real estate by paying the outstanding balance of the mortgage, or can commence its own judicial action to invoke any available defenses to the foreclosure proceedings.

A mortgagee may institute strict foreclosure proceedings under a writ of possession issued on a conditional judgment. ME. REV. STAT. ANN. tit. 14, § 6201(1) (West 1980). Specifically, the mortgagee can file a complaint claiming his right to possession; and if the court finds that the mortgagee is entitled to possession, it will enter a conditional judgment. This judgment will state that if the mortgagor pays the adjudged sum due and payable within two months of the judgment, no writ of possession will issue and the mortgage will be deemed void. *Id.* § 6252 (West 1980).

If the mortgagor consents in writing, the mortgagee can obtain possession of the mortgaged premises without judicial process. *Id.* §§ 6252, 6201(2) (West 1980). Both the mortgagee's affidavit, which should recite the fact and time of entry, and the mortgagor's written consent must be recorded by the mortgagee within thirty days after the entry is made. *Id.* § 6252.

In addition, a mortgagee can "enter peaceably and openly, if not opposed, in the presence of 2 witnesses and take possession of the premises." *Id.* § 6201(3) (West Supp. 1990-1991). Thereafter, the witnesses must sign and swear to a certificate that recites the facts and time of entry, which certificate is then recorded in the registry of deeds within thirty days after entry is made. *Id.*

Alternatively, a mortgagee may give public notice of the foreclosure in a newspaper of general circulation in the county in which the real estate is located for three successive weeks and then must record the notice in the registry of deeds within thirty

foreclosure. Judicial foreclosure is the most prevalent method,[23] and this Article will focus on the mortgagee's options after receiving a foreclosure judgment under the judicial foreclosure statute. The other two methods are less frequently used.[24]

The Maine Legislature in 1975 authorized judicial foreclosures.[25] Like other civil suits, a judicial foreclosure requires a summons and complaint. The commencement of foreclosure proceedings terminates a mortgagor's equity of redemption. After the entry of the judgment of foreclosure, however, the mortgagor is allowed a statutory redemption period of ninety days.[26] Once the statutory redemption period has expired, the mortgagee must publish a notice of foreclosure sale for three successive weeks, the first notice to be published within ninety days of the expiration of the redemption

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days of the last publication. *Id.* § 6203(1) (West Supp. 1990-1991).

Finally, a mortgagee can have an attested copy of the foreclosure notice served on the mortgagor by a sheriff and then must record both the notice and the sheriff's return in the registry of deeds within thirty days of the service. *Id.* § 6203(2) (West 1980).

22. A mortgagee of real estate of a corporation having a mortgage containing a power of sale may execute the power of sale as provided by the mortgage document, subject to some minimum statutory requirements. *Id.* § 6203-A (West Supp. 1990-1991). Maine law does not explicitly prohibit a power of sale foreclosure of a noncorporate mortgage but instead renders any such mortgage term ineffectual by force of statute. Specifically, Maine law allows the mortgagee and mortgagor to agree to any period of redemption that is not less than one year. *Id.* § 6204 (West 1980). The mortgagee must publish a notice of sale for three successive weeks in a newspaper of general circulation in the county in which the real estate is located. A copy of this notice must be served on the mortgagor at least twenty-one days prior to the date of sale. *Id.* § 6203-A.

Moreover, the deed from the sale must convey the premises subject to all restrictions, easements, encumbrances and the like that were of record prior to the mortgage. No statutory redemption period exists for this type of foreclosure. *Id.* §§ 6202, 6204 (West 1980).

23. *See* Kathleen Barry, Comment, *The Constitutionality of Maine's Real Estate Mortgage Foreclosure Statutes*, 32 ME. L. REV. 147, 148 (1980) ("[L]enders in Maine's largest city have recently abandoned all methods of foreclosure except foreclosure by civil action."). For corporate mortgages, however, mortgagees most frequently employ the power of sale provisions contained in their mortgages. *See id.* at 152.

24. Arguably, Maine's strict foreclosure statutes may fail to give mortgagors adequate notice or a sufficient right to be heard prior to depriving them of their property interests. *See* Kathleen Barry, Comment, *The Constitutionality of Maine's Real Estate Mortgage Foreclosure Statutes*, 32 ME. L. REV. 147 (1980). Power of sale foreclosure is possible only if the mortgagor is a corporation. ME. REV. STAT. ANN. tit. 14, § 6203-A (West Supp. 1990-1991).

25. P.L. 1975, ch. 522 (effective Oct. 1, 1975). This bill was entitled "An Act Insuring Due Process of Law to Consumers in the Foreclosure of Real Estate Mortgages and to Require Accounting for Surplus Therefrom." The Legislature feared that the strict foreclosure statutes would not pass constitutional muster under *Fuentes v. Shevin*, 407 U.S. 67 (1972). *See* L.D. 1283, Statement of Fact (107th Legis. 1975).

26. *See* ME. REV. STAT. ANN. tit. 14, § 6322 (West Supp. 1990-1991).

period. In addition, once the property is sold, the mortgagee must account to the mortgagor for any surplus proceeds generated.[27]

Upon the expiration of the statutory redemption period, the mortgagor's interest in the property is completely extinguished.[28] This is a consequence of Maine's adherence to the title theory, under which the mortgagee holds legal title and the mortgagor holds equitable title. At the expiration of the statutory period of redemption, however, the mortgagor's equitable title is completely extinguished, merging with the mortgagee's legal title. Thus, at that point the mortgagee holds all the attributes of complete title but is subject to a statutory obligation to sell and to account for any surplus sale proceeds.[29]

The Maine Supreme Judicial Court, sitting as the Law Court, has held that a mortgagor's rights after a foreclosure sale are more akin to a chose in action than a property right. In *Martel v. Bearce*[30] a defendant had executed on a judgment, forcing a sheriff's sale of real estate that had been levied upon. Title to the real estate, however, had passed to a municipality prior to its being levied upon and sold, causing the purchaser at the sheriff's sale to sue the defendant for return of the purchase price. The defendant argued that despite the title having passed to the municipality, the sheriff had levied upon an attachable interest in the real estate—the judgment debtor's right to challenge that title.[31] The court noted, however, that the interest of the judgment debtor had been extinguished upon the expiration of the redemption period, stating that the "former owner's right of redemption—and, in fact, his title—are extinguished. As in the case of the common law mortgagor, there remains only the contingency that he may be able . . . to demonstrate in a legal action a failure in the procedure by which his title was lost."[32] Moreover, the Law Court held that although a right to redeem is a right and interest in real property and attachable, this contingent right is not. The court stated that this right "is more a chose in action than an interest in land and no provision was made for the levy and sale of such contingent rights by [statute]."[33]

This Article contends that a mortgagor's right to surplus proceeds from a foreclosure sale is analogous to the judgment debtor's right to challenge the title. Both are merely contingent and therefore neither is a right in the property. It is with this understanding of Maine law that one must begin the inquiry into the mortgagor's and

27. *Id.* § 6324 (West Supp. 1990-1991).
28. Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973).
29. *See* Smith v. Varney, 309 A.2d 229, 232 (Me. 1973).
30. 311 A.2d 540.
31. *Id.* at 543-44.
32. *Id.* at 543.
33. *Id.* at 544.

mortgagee's rights in bankruptcy.

IV. Meshing the Bankruptcy Code with Maine Mortgage Foreclosure Property Law

When a mortgagor files for bankruptcy protection after the entry of a foreclosure judgment, the analysis of the parameters of the mortgagor's rights in bankruptcy will vary depending under which chapter of the Code the mortgagor files for protection. In a Chapter 7 liquidation case, the mortgagor may attempt to persuade a court to allow it to sell the property in order to generate a surplus, thereby creating a concomitant benefit to the estate. Although this may also be true in Chapters 11 and 13, the issue in those chapters usually involves the debtor's right to cure and reinstate the mortgage terms.

A. Chapter 7 Liquidation

Upon the filing of a Chapter 7[34] petition, an automatic stay prevents certain actions by creditors against the debtor, the debtor's property, and property of the estate.[35] A mortgagee thereupon faces the questions whether and to what extent its actions are barred by the automatic stay. Assume that the debtor/mortgagor is in default under the note and mortgage and the note has been accelerated.[36] The stay clearly applies when the mortgagee has not obtained a foreclosure judgment prior to the filing of the petition; it prevents the continuation or commencement of any action to procure such a judgment.[37] If, however, the mortgagee has obtained a foreclosure judgment, but either the redemption period has not yet expired or the foreclosure sale has not yet occurred, whether the mortgagor is protected by the stay is less clear.

It is clear, however, that the stay will not prevent the redemption period from running. The Bankruptcy Court for the District of Maine has held that the automatic stay, while applicable, does not

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34. 11 U.S.C. §§ 701-728 (1988).

35. *Id.* § 362(a) (1988). *See infra* note 39.

36. A standard mortgage contains a clause that allows the holder, upon the mortgagor's default, to demand immediate payment of the accelerated outstanding principal plus accrued interest. In Maine, without such an acceleration clause, only the arrearage can be demanded by the mortgagee. *See* Hills v. Gardiner Sav. Inst., 309 A.2d 877 (Me. 1973).

37. *See, e.g., In re* Gaskin, 120 B.R. 13, 16 (Bankr. D.N.J. 1990) ("[W]hen a bankruptcy petition is filed, an automatic stay prevents any creditor from attempting to foreclose on the debtor."); *In re* Spencer, 115 B.R. 471, 483 (Bankr. D. Del. 1990) (holding that debtor's legal title to property is protected by automatic stay); *In re* Littke, 105 B.R. 905, 909 (Bankr. N.D. Ind. 1989) ("By initiating its foreclosure action and prosecuting that action to a conclusion, [the mortgagee] has violated the automatic stay.").

toll the running of the redemption period.[38] According to that court, the automatic stay prohibits an entity from doing *acts* that it otherwise is entitled to do, but the stay "does not stay the running of any *time period.*"[39]

The redemption period, however, can be extended beyond the ninety-day state statutory period by application of section 108 of the Code.[40] That section provides that if a particular time period has not expired prior to the filing of a bankruptcy petition (e.g., a redemption period), the time period will run until the later of the original time period or sixty days from the petition date.[41] Once the redemption period has expired, however, the right of redemption is lost forever.[42]

As noted, the filing of the Chapter 7 petition does not toll the running of the redemption period. Therefore, the debtor's protection from the creditor-mortgagee depends upon whether the creditor's future actions would affect interests in the property that remain in either the bankruptcy estate or the debtor and on the nature of those retained interests. Under *Butner* the nature and extent of the debtor's interest in specific property are determined by state law.[43] In addition, property of the bankruptcy estate is derived from the debtor's rights,[44] and it is well settled that the "Bankruptcy Code does not create or enhance property rights of a debtor."[45] Therefore, upon entry of the foreclosure judgment and the expiration of the statutory redemption period, the estate is left with only those rights

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38. *In re* Thom, Inc., 95 B.R. 261, 264 (Bankr. D. Me. 1989).

39. *Id.* at 263 (emphasis added). Specifically, the *Thom* court stated:

> The effect of § 362 is to stay an entity from doing that which such entity has the power to do. An entity may be stayed from enforcing a judgment, from exercising control over property of the estate or property in possession of the estate, from enforcing liens on property of the estate, from acts to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case.

Id. The *Thom* holding regarding the effect of the automatic stay is in accord with the majority of courts. *See In re* Farmer, 81 B.R. 857, 859 (Bankr. E.D. Pa. 1988) (citing long list of cases in accord with *Thom*, which "clearly constitute the majority position."). *But see In re* Jenkins, 19 B.R. 105 (Bankr. D. Colo. 1982), *overruled by In re* Cucumber Creek Dev., Inc., 33 B.R. 820 (Bankr. D. Colo. 1983); *In re* Sapphire Inv., 19 B.R. 492 (Bankr. D. Ark. 1982); *In re* Shea Realty, Inc., 21 B.R. 790 (Bankr. D. Vt. 1982).

40. 11 U.S.C. § 108(b)(1)-(2) (1988). *See In re* Tucker, 131 B.R. 245, 245 (Bankr. D. Me. 1991); *In re* Thom, Inc., 95 B.R. at 263.

41. *See* 11 U.S.C. § 108(b)(1)-(2) (1988).

42. *See, e.g.*, St. Hilaire v. Berta, 588 A.2d 309, 310 (Me. 1991); Smith v. Varney, 309 A.2d 229, 232 (Me. 1973).

43. *See* Butner v. United States, 440 U.S. 48 (1979); *In re* Kwaak, 42 B.R. 599, 601 (Bankr. D. Me. 1984).

44. *See* 11 U.S.C. §§ 541, 1306 (1988).

45. *In re* Gull Air, Inc., 890 F.2d 1255, 1261 (1st Cir. 1989).

that the debtor would have had. Furthermore, recall that Maine law holds that the mortgagor's interest in the property is completely extinguished upon expiration of the statutory period of redemption.[46]

The consequences of the mortgagee's impending sale often create a tension between the practical interests of the estate and the mortgagee. Under the judicial foreclosure statute, the mortgagor is entitled to any surplus from the foreclosure sale. Of course if there is no equity in the property, the trustee will not care about the sale. On the other hand, if it appears that a sale may generate significant estate funds beyond encumbrances and allowable exemptions,[47] the trustee will be interested in the proceeds. Indeed, the trustee may believe that the estate can sell the property at a better price and at less cost than a mortgagee—and thus create a larger surplus. Usually the mortgagee will be uninterested in maximizing the surplus but will instead be content with a relatively quick sale that covers costs and the outstanding balance, or at least with a sale at a price sufficient to reduce its deficiency to an acceptable level. These conflicting interests often place the mortgagee and the Chapter 7 trustee in conflict.

This practical conflict must be resolved by the bankruptcy judge's examination of the applicability of the automatic stay to the impending sale. Therefore, the issue posed is whether the trustee or debtor has any rights in the property sufficient to justify permitting either one to retain or dispose of the property.[48]

Clearly, the trustee can redeem up to the later of the expiration of the original statutory redemption period or sixty days after the date of the filing of the petition.[49] Presumably, the trustee would not have the right to sell the property without redeeming first. Prior to the expiration of the redemption period, only the equity of redemption is the property of the estate. This property interest engenders certain limited rights, e.g., the right to redeem.[50] A mortgagee is prohibited by the automatic stay from continuing any legal action against property of the estate.

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46. *See* St. Hilaire v. Berta, 588 A.2d at 310.

47. The exemption provisions are found in section 522 of the Code. 11 U.S.C. § 522 (1988). Maine, however, has opted out of the federal scheme, effectively limiting a debtor to exemptions under Maine law. *See id.* § 522(b)(1); ME. REV. STAT. ANN. tit. 14, §§ 4421-4426 (West Supp. 1990-1991).

48. Of course, if no equity exists in the property, most likely neither will care if the mortgagee sells the property.

49. *See In re* Tucker, 131 B.R. 245, 245 (Bankr. D. Me. 1991); *In re* Thom, Inc., 95 B.R. 261 (Bankr. D. Me. 1989); 11 U.S.C. § 108(b) (1988).

50. In addition to the right to redeem, a debtor/mortgagor may be entitled to other rights, such as the right to possession until the right of redemption is foreclosed. These rights are delineated by state law. *See supra* notes 21-33 and accompanying text. Moreover, whatever these rights of the debtor are, the bankruptcy estate obtains those same rights but does not enjoy the right to expand upon them. *See supra* note 45 and accompanying text.

Upon expiration of the redemption period, however, the stay should prevent the foreclosure sale only if there are property interests in the estate affected by the sale. Recall, however, that at this point the right of redemption has been lost forever,[51] and the estate no longer has any interest in the property. The estate retains only the right to receive the proceeds of any surplus from the foreclosure sale. This property interest, however, should be distinguished from an interest *in the property*.[52] Although the estate or debtor has a statutory right to any surplus, this is not a right *in* the property itself. The right is strictly statutory in origin and confers no right upon a mortgagor in the real property. The statute merely imposes upon the mortgagee the duty to account to the mortgagor for any surplus.

This analysis is supported by the fact that prior to 1975 strict foreclosure was the only method available to a mortgagee.[53] Historically, upon the expiration of the redemption period under strict foreclosure, which, as noted above, is one year, the mortgagor's rights in the property were completely extinguished. The mortgagee could then do whatever it pleased with the property, including selling it, and did not have to account to the debtor for any surplus sale proceeds.[54] Only upon passage of the judicial foreclosure statute did a mortgagor gain the right to any surplus.[55] With respect to a mortgagor's interest in the property itself, however, the statute left the

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51. Smith v. Varney, 309 A.2d 229, 232 (Me. 1973) ("This right of redemption, once extinguished, cannot be revived by any court, nor can the period of redemption be abridged or enlarged by operation of law.").

52. *See In re* Raymond, No. 89-20430, slip op. at 6 (Bankr. D. Me. Feb. 21, 1990) ("The plain meaning of the language of the [foreclosure] statute indicates that where the mortgagor/Debtors have not redeemed the mortgage within the period of redemption, all of the Debtors' rights to the specific property have expired."). *See also In re* Brown, 126 B.R. 767 (N.D. Ill. 1991). The *Brown* court analyzed IRS levy and sale provisions, noting that an IRS sale is the point at which a debtor's interest is terminated, and stated that "[a]fter this point, the debtor may no longer redeem the property by paying off the tax assessment and, *although the debtor may still retain an interest in the excess sale proceeds, he retains no interest in the property itself.*" *Id.* at 766 (emphasis added). *See also In re* Roach, 824 F.2d 1370 (3d Cir. 1987). The *Roach* court concluded

> [T]hat *the right of cure* terminates in New Jersey upon the entry of a foreclosure judgment is informed not only by our analysis of the text of § 1322(b) and its legislative history, but also by our understanding of the relationship between *federal bankruptcy law and the state law context in which it operates.*

Id. at 1373 (emphasis added).

53. *See* P.L. 1975, ch. 552 § 5. *See also* Barry, *supra* note 23 at 147-48.

54. *See* Atlantic Oceanic Kampgrounds, Inc. v. Camden Nat'l Bank, 473 A.2d 884 (Me. 1984); P.L. 1975 ch. 552, § 4; ME. REV. STAT. ANN. tit. 14, § 6204-B (West Supp. 1990-1991).

55. *See* P.L. 1975, ch. 552, § 5.

law unchanged.[56] Clearly, the benefit conferred upon the mortgagor by the statute is separate and distinct from the interest in the property that the mortgagor previously retained. In essence, the statute left the property law unchanged and merely conferred upon the mortgagor a previously nonexistent *right to proceeds.*

B. Chapter 13 Debt Adjustment

1. Cure

The Chapter 13[57] debtor is different from the Chapter 7 debtor in that the Chapter 13 debtor ordinarily has nonexempt assets that he is seeking to protect.[58] Often the most important asset that a debtor hopes to retain is his residence.[59] A Chapter 13 debtor may have struggled vainly with a mortgagee to cure arrearages but simply been unable to do so in light of income limitations and other creditors' demands. Once a mortgagee institutes foreclosure proceedings, a mortgagor may decide to seek protection under the Code by filing a petition for relief under Chapter 13. The filing invokes the automatic stay, which puts the foreclosure action on hold. Section 1322 authorizes a plan that allows the debtor to cure the mortgage arrearages and effectively de-accelerate the note and resume regular payments as scheduled.[60]

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56. *Compare* Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973) *with* St. Hilaire v. Berta, 588 A.2d 309, 310 (Me. 1991).

57. 11 U.S.C. §§ 1301-1330 (1988). Chapter 13 is entitled "Adjustment of Debts of an Individual with Regular Income." As contrasted with a Chapter 7 bankruptcy case wherein the debtor essentially surrenders all nonexempt property for liquidation, a Chapter 13 case is designed to allow a debtor to retain his existing assets while still providing protection to creditors. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977); *In re Breuer*, 4 B.R. 499, 501-02 (Bankr. S.D.N.Y. 1980). As one commentator has stated:

> Chapter 13 was designed to allow an individual to devise and perform a plan to repay his debts over an extended period under the supervision and protection of the court. This chapter places a larger emphasis on favoring the consumer-debtor as against the creditor in order to improve and enhance the ability of the debtor to reorganize.

Ann B. Miller, Comment, *Chapter 13 Bankruptcy: When May A Mortgage Debtor Cure the Accelerated Mortgage Debt Using Section 1322(b)(5)?* 8 U. DAYTON L. REV. 109, 112 (1982) (footnote omitted).

58. *Id.* at 115.

59. *See* James S. Sable, *A Chapter 13 Debtor's Right to Cure Default Under Section 1322(b): A Problem of Interpretation*, 57 AM. BANKR. L.J. 127 (1983); Barry L. Zaretsky, *Some Limits on Mortgagees' Rights in Chapter 13*, 50 BROOK. L. REV. 433 (1984).

60. *See* 11 U.S.C. § 1322(b)(2), (5) (1988). *See also* 5 COLLIER ON BANKRUPTCY, § 1322 (L. King ed., 15th ed. Matthew Bender 1990). One commentator described a typical scenario regarding default, acceleration, and cure, stating:

> When a homeowner falls behind in her mortgage payments and the mortgagee declares a default, foreclosure proceedings typically begin with the mortgagee accelerating the loan. Once accelerated, the entire amount of the

If, however, for whatever reason, the mortgagor has waited until after the mortgagee has obtained a foreclosure judgment, then the issue becomes more complicated. As stated previously, the period of redemption in Maine is ninety days from the entry of the foreclosure judgment, and the automatic stay does not toll the running of this time period.[61] Only section 108 potentially affects the length of the redemption period by allowing the trustee to redeem within the later of the original ninety days or sixty days from the date of filing of the petition.[62]

In most cases the debtor will want to cure arrearages and de-accelerate the note under Section 1322 just like any Chapter 13 debtor who filed a petition *prior* to the entry of a foreclosure judgment. If the mortgagee balks at such a request, however, the debtor presumably is powerless to compel such an arrangement because at this point the bankruptcy estate retains only the right to redeem the property by payment of the full debt rather than the right to pay the debt over time.[63] It is with this understanding of Maine law that one must begin the inquiry into the mortgagor's and mortgagee's rights in bankruptcy.

Analysis of the debtor's ability to cure postfiling begins by looking at what his rights would have been had he not filed for bankruptcy. Various jurisdictions view a debtor's right to cure and de-accelerate a note and mortgage pursuant to section 1322 of the Code differently.[64] Some jurisdictions hold that a Chapter 13 debtor can cure only prior to de-acceleration.[65] Others allow the Chapter 13 debtor to cure at any time prior to entry of a foreclosure judgment,[66] while still others provide that cure can be accomplished at any time prior to the foreclosure sale.[67]

> mortgage loan, not just the arrearage owed, is due and payable immediately. To save the home from the foreclosure selling block, the homeowner must meet the virtually insurmountable task of paying off the entire loan.
>
> Homeowners facing this predicament often look to Chapter 13 of the federal Bankruptcy Code for assistance. The Code affords debtors the right to cure the default—pay off the arrearage—and thereby de-accelerate the mortgage and reinstate the original payment schedule.

Douglas A. Winthrop, Note, *The Chapter 13 Cure Provisions: A Doctrine in Need of a Cure*, 74 MINN. L. REV. 921, 921 (1990) (footnotes omitted).

61. *See supra* notes 38-40 and accompanying text.

62. *See* 11 U.S.C. § 108(b) (1988); *In re* Thom, 95 B.R. 261 (Bankr. D. Me. 1989). *See also supra* notes 40-41 and accompanying text.

63. *See supra* notes 49-50 and accompanying text. *See also In re* Johnson, 719 F.2d 270, 276 (8th Cir. 1983).

64. *See In re* Ivory, 32 B.R. 788, 790 (Bankr. D. Or. 1983) (citing cases in jurisdictions with various viewpoints). *See also* Sable, *supra* note 59, at 128-29.

65. *In re* Allen, 17 B.R. 119 (Bankr. N.D. Ohio 1981); *In re* Lapaglia, 8 B.R. 937, 944 (Bankr. E.D.N.Y. 1981); *In re* Wilson, 11 B.R. 986, 990 (Bankr. S.D.N.Y. 1981).

66. *See, e.g., In re* Maiorino, 15 B.R. 254, 257-58 (Bankr. D. Conn. 1981); *In re* Pearson, 10 B.R. 189, 193 (Bankr. E.D.N.Y. 1981).

67. *See, e.g., In re* Tucker, 131 B.R. 245 (Bankr. D. Me. 1991); *In re* Acevedo, 26

2. *Prejudgment De-acceleration and Cure*

Prior to a judgment of foreclosure, it makes inherent sense that a debtor could cure mortgage arrearages and effectively de-accelerate the mortgagee's prior acceleration and reinstate the note and mortgage. Because of the prevalence of automatic acceleration clauses, almost every Chapter 13 debtor who is in default under his mortgage and note holds a note that has already been accelerated by the time his bankruptcy petition is filed. Thus, if the debtor could not cure under such a scenario (i.e., after the filing of the petition but before entry of a foreclosure judgment), the cure provision in section 1322 would be virtually meaningless.[68]

3. *Postjudgment De-acceleration and Cure*

At the other extreme are those jurisdictions that give a debtor an almost unfettered right to cure, including cure postjudgment and up to any point prior to a foreclosure sale.[69] Courts in these jurisdictions hold that since section 1322 provides for the curing of defaults, federal law controls and allows cure despite state law that may provide only for redemption of the property. This is a curious approach because it requires courts to look initially to state law to ascertain the debtor's interest in the property, as mandated by *Butner*, but then to declare that state law is irrelevant when analyzing the cure provisions. If indeed rights in property are defined by state law, state law should continue to be relevant when analyzing the debtor's right to cure. Rather than simply ascertain whether the debtor has any rights at all in the property (rights that are then used to justify unfettered curing authority), these jurisdictions should first determine the nature of the property interest at issue and then determine cure rights in accordance with that interest.

Certain courts, however, have indicated that determining what type of interest the debtor has in the property is irrelevant to the issue of cure. These courts take the position that curing a default addresses a contractual relationship between the creditor and debtor.[70] Thus, as long as the debtor has some interest remaining in the property at the time of the filing of the petition, the Code provides for the curing of the default under the contract. Such a cure is allowable even after a judgment because a judgment "merely con-

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B.R. 994, 997 (Bankr. E.D.N.Y. 1982); *In re* James, 20 B.R. 145, 149 (Bankr. E.D. Mich. 1982).

68. *See, e.g., In re* Roach, 824 F.2d 1370, 1377 (3d Cir. 1987); *In re* Taddeo, 685 F.2d 24, 29 (2d. Cir. 1981).

69. *See, e.g., In re* Taddeo, 685 F.2d at 29; *In re* Tucker 131 B.R. at 246 (Bankr. D. Me. 1991); *In re* Johnson, 29 B.R. 104, 105 (Bankr. S.D. Fla. 1983); *In re* Acevedo, 26 B.R. at 997.

70. *See, e.g., In re* Taddeo, 685 F.2d at 26; *In re* Ivory, 32 B.R. 788 (Bankr. D. Or. 1983); *In re* Thompson, 17 B.R. 748, 751 (Bankr. W.D. Mich. 1982).

firms what the parties already knew[,]"[71] namely, that the entire amount of the debt was due and owing. Thus, these courts view a prejudgment acceleration under the note and mortgage as being no different from a foreclosure judgment itself; federal law trumps both.

Moreover, a common theme in these jurisdictions is that the broadest cure rights reflect the policy underlying the cure provisions and best foster the "fresh start" concept.[72]

4. *The Limits to Curing Pursuant to Section 1322(b)*

The task of reconciling the Code provisions with state law should have been made much easier by the Supreme Court's seminal decision in *Butner v. United States*.[73] The *Butner* court rejected any notion of a uniform federal approach to property rights in bankruptcy, instead decreeing a uniform approach to property rights in both federal and state courts within a particular state.[74] Thus, although the Code provides the structure for determining what constitutes property of the estate, state law governs the nature and extent of a debtor's interest in specific property. To that end the *Butner* court pointedly stated that "the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court *the same protection he would have under state law if no bankruptcy had ensued.*"[75] Moreover, the Court stated that such an approach would prevent a debtor from receiving "a windfall merely by reason of the happenstance of bankruptcy."[76]

Therefore, the better reasoned cases conclude that a debtor has no right to cure mortgage defaults once a judgment of foreclosure has been entered. This approach best interprets the language of the Code and dovetails with the *Butner* doctrine.

This view was ably articulated in *In re Roach*.[77] The *Roach* court concluded that the common meaning of curing a default refers to a contractual relationship. Once a judgment of foreclosure is entered, the contractual relationship is erased and the creditor's note is replaced by a judgment, which confers certain rights different from those arising under a note.[78] As noted above some courts argue that a foreclosure judgment is no different in kind from a prejudgment

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71. Zaretsky, *supra* note 59 at 447. *See also* Winthrop, *supra* note 60, at 946; *In re* Clark, 738 F.2d 869, 874 (7th Cir. 1984).

72. *See, e.g., In re* Taddeo, 685 F.2d at 29 (2d Cir. 1982); *In re* Tucker, 131 B.R. at 246; *In re* Ivory, 32 B.R. at 792.

73. 440 U.S. 48 (1979).

74. *Id.* at 55.

75. *Id.* at 56 (emphasis added).

76. *Id.* at 55 (citation omitted).

77. 824 F.2d 1370 (3d Cir. 1987).

78. *Id.* at 1377-78.

acceleration under the terms of the note because such a judgment "merely confirms what the parties already knew." It may be true that judgments often merely confirm "what the parties already knew," but that does not mean that judgments are any less significant or should be cast aside so easily.

Although the Code does not call for casting aside state judgments, this point has been missed by some courts. In *In re Ivory*,[79] for example, the court stated that the Code is replete with examples of such voiding. The *Ivory* court, however, misconstrued the nature of the statutory provisions it used to support its position. Each of the Code provisions cited by the *Ivory* court provides for the voiding of judicial *liens* under certain circumstances but in no way voids the underlying judgments.[80] These courts fail to explain adequately why a state court judgment ought to be voided. Notwithstanding the *Ivory* decision, the Code contains no support for such an approach.[81]

If bankruptcy courts adopted the view that state court judgments could be voided, other judgments would also be susceptible to voidance. The following example illustrates the Code's reluctance to void judgments. Suppose Mr. Brown is a widget reseller who purchases widgets from Alpha Company. Alpha, impressed by Brown's sales record, agrees to send him $60,000 worth of widgets to allow him to expand his business. In addition, Alpha agrees to finance the $60,000 over twenty years at 10%. Thus, Brown must pay Alpha $579 per month for twenty years.

Unfortunately, Brown is subsequently injured in a fall and cannot sell widgets until he completes his physical rehabilitation. As a result he falls six months behind on his payments to Alpha. Alpha accelerates the note and sues Brown, obtaining a judgment. After judgment, but before Alpha can execute on it, Brown files for protection under Chapter 13. He has fallen behind on his home mortgage payments as well and wishes to avoid foreclosure.

Because he has equity in two significant assets, Brown must fund a so-called 100% plan.[82] Unfortunately, due to a downturn in the demand for widgets, Brown cannot generate enough income to fund a 100% plan. He realizes, however, that if he takes the $60,000 judgment of Alpha Company out of the general unsecured pool and pays it off under the terms of the original note at $579 per month, he can spread that $60,000 over twenty years rather than over the life of

79. 32 B.R. 788 (Bankr. D. Or. 1983).

80. *Id.* at 792. The court cited 11 U.S.C. § 522(f) and § 547(b).

81. *See In re* McKinney, 84 B.R. 748 (Bankr. D. Kan. 1987). The *McKinney* court was construing the analogous Chapter 12 provision regarding cure and reinstatement. *Id.* at 751 (citing § 1222(b)(5)). The *McKinney* court explicitly stated that the section was "not so powerful a remedy that it can set aside a state court judgment." *Id.* (citing *In re* Roach, 824 F.2d 1370 (3d Cir. 1987); *In re* Maiorino, 15 B.R. 254 (Bankr. D. Conn. 1981); *In re* Davis, 16 B.R. 473, 475 (Bankr. D. Kan. 1981)).

82. *See* 11 U.S.C. § 1325(a)(4)-(5) (1988).

the plan. Most important, he could then fund a 100% plan.

Thus, Brown proposes to cure his default under the Alpha note by voiding the state court judgment and reinstating the terms of the note. In addition, he proposes to cure the arrearage through the trustee while maintaining regular payments as called for by the note directly to the creditor.

Although the above scenario may be desirable to a debtor, it is not provided for in the Code. Moreover, one can imagine the potential havoc that such an interpretation of "curing defaults" would wreak. The voidance of state court judgments is bad policy and one not embodied in the Code.[83]

Furthermore, the basis of the creditor's claim in the bankruptcy case derives from a judgment, not a contractual relationship. Although the contractual relationship gave rise to the judgment, it nonetheless was effectively terminated by the entry of judgment.[84] Employing this distinction, the *Roach* court held that the commonly understood meaning of the words "cure" and "default" in the context of section 1322 leads to the conclusion that Congress meant to authorize the curing of a default of a *contractual* relationship.[85] Moreover, the *Roach* court noted that New Jersey law holds that the mortgage is merged into the foreclosure judgment—and thus nothing remains to be cured. More important, the court stated that "even if a mortgage were not extinguished when a judgment is entered, a final state court foreclosure judgment in New Jersey establishes rights in the property *distinct from those conferred by the mortgage.*"[86]

This point is crucial in analyzing the scope of Chapter 13 cure provisions. The Supreme Court in *Butner* stated that property in-

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83. The *Roach* court stated that "[t]he legislative history of the cure provisions of § 1322(b)(3) and § 1322(b)(5), like their text, is also devoid of any suggestion that Congress intended to give home mortgage debtors the right to set aside or suspend state court judgments." *In re* Roach, 824 F.2d at 1378. As a further rationale for its position, the *Roach* court stated:

> If Congress had intended to grant such authority, we think its sensitivity to considerations of comity would have resulted in some explanation of the necessity for the intrusion on state sovereignty. In the absence of any such explanation, we can only conclude that Congress did not see cures of mortgage defaults as any threat to the integrity of state judgments.
>
> Nor can we perceive any reason why Congress might have felt it necessary or desirable to authorize the extinguishment or suspension of state judgments. Termination of the right of cure at the time of the entry of judgment, unlike termination upon contractual acceleration, does not significantly threaten the interests that Chapter 13 was designed to protect.

Id. See also In re McKinney, 84 B.R. at 751 (stating that an analogous Chapter 12 provision is "not so powerful a remedy that it can set aside a state court judgment.").

84. *See* North Bank v. Brown, 50 Me. 214, 216 (1861); Uran v. Houdlette, 36 Me. 15, 16 (1853); Pike v. McDonald, 32 Me. 418 (1851).

85. *In re* Roach, 842 F.2d at 1377.

86. *Id.* at 1377-78 (emphasis added).

terests are delineated by state law.[87] If section 1322 allows a cure after a judgment of foreclosure has been entered, the nature of the property rights is effectively altered. The *Butner* doctrine is thus rendered meaningless in Chapter 13 cases. If a court analyzes a debtor's property rights under state law and concludes that he retains only a statutory right to redeem, but then adds that he can nonetheless cure and de-accelerate under section 1322, the court is effectively concluding that the debtor actually has more rights in the property than merely a statutory right to redeem. Thus, the *Butner* doctrine is effectively circumvented.

The above approach should not result in a debtor being unable to cure even after an automatic acceleration but before a foreclosure judgment on the basis that state law may provide that a debtor has only the right to redeem, not cure. An important difference distinguishes the two situations. State law may not provide for cure, but federal law controls with regard to curing in Chapter 13. This is the truncated analysis used by courts adopting the "unfettered-curing-authority" approach. It is state law respecting *property* rights, however, that helps to determine the parameters of the federal law of curing, not state *cure* law. The *Roach* court succinctly summarized this analysis:

> Although we agree that federal law controls the scope of § 1322(b)'s authorization to cure defaults, *we do not believe that state law is irrelevant.* As we have noted, the Supreme Court has indicated that, in bankruptcy, absent a federal interest requiring a different result, "[p]roperty interests are created and defined by state law" and *"[u]niform treatment of property interests by both state and federal courts within a State* serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy."[88]

Furthermore, in the Maine bankruptcy court, the argument that the debtor's right to cure terminates upon the entry of a foreclosure judgment is even more compelling than in other jurisdictions because Maine's approach to judicial foreclosure provides for a statutory redemption period commencing immediately upon the entry of the foreclosure judgment and prior to any sale.[89] In contrast, most other jurisdictions that provide statutory redemption periods require a sale subsequent to the foreclosure judgment. In those jurisdictions the *sale* commences the redemption period. Most important, upon the expiration of the statutory redemption period in

87. Butner v. United States, 440 U.S. 48, 55 (1979).

88. *In re* Roach, 824 F.2d at 1379 (emphasis added) (quoting Butner v. United States, 440 U.S. at 55).

89. *See* ME. REV. STAT. ANN. tit. 14, § 6323 (West Supp. 1990-1991).

Maine, the debtor/mortgagor's rights in the property are completely extinguished.[90]

In addition, if a mortgagor files a Chapter 13 petition after the entry of a foreclosure judgment, the automatic stay does not toll the running of the redemption period.[91] Once the period expires, the debtor has no interest in the property. Therefore, allowing the debtor to cure postjudgment would be incongruous with Maine property law. Specifically, allowing postjudgment cure would in essence toll the running of the period of redemption. This must be the case; otherwise, the debtor would have no interest in the property upon the expiration of the redemption period, and the curing of the note default would not revest the debtor with an interest in the property. Therefore, allowing the Chapter 13 debtor to cure postjudgment means allowing the automatic stay to toll the running of the redemption period—despite prior holdings of the Maine bankruptcy court to the contrary.[92]

Assuming that the Maine bankruptcy court is correct in its prior holdings that the running of the redemption period is not tolled by the automatic stay, the conclusion that the entry of a foreclosure judgment terminates the debtor's right to cure makes sense in light of both the statutory language of the Code and Maine law. Specifically, upon entry of the foreclosure judgment, the note is merged into the judgment and the nature of the relationship between the debtor and the creditor is altered. The judgment gives a creditor rights different from those under the note, and the concept of curing defaults is inapplicable to judgments. Moreover, the inexorable march to termination of rights in the property continues despite the filing of the petition. Thus, once the period of redemption expires, the debtor has no interest remaining in the property.

Such an analysis is also in accord with *Butner*. Were the debtor able to cure and de-accelerate the note and mortgage, the *Butner* analysis would be rendered nugatory because a debtor would effectively have greater rights than he would have had under state law. These greater rights would not only be greater *cure* rights, which could be justified because federal cure law applies rather than state cure law, but would also be greater *property* rights. This could not be justified in light of *Butner*. Thus, the type of property interest remaining in the debtor at the time of the bankruptcy petition must necessarily guide a bankruptcy court in analyzing the parameters of the cure provisions. In Maine, once a foreclosure judgment is en-

90. *See* St. Hilaire v. Berta, 588 A.2d 309, 310 (Me. 1991); Smith v. Varney, 309 A.2d 229, 232 (Me. 1973).

91. *See supra* notes 38-40 and accompanying text.

92. *See e.g., In re* Tucker, 131 B.R. 245 (Bankr. D. Me. 1991); *In re* Thom, Inc., 95 B.R. 261 (Bankr. D. Me. 1989).

tered, a debtor's only right is the right to redeem.[93] Upon expiration of the statutory redemption period, the debtor has no rights left in the property. Thus, a Maine Chapter 13 debtor can only "cure" a "default" under a note and mortgage prior to the entry of a foreclosure judgment.

One commentator has argued that were the debtor not able to cure because the note and mortgage merge into the judgment (there being nothing left to cure), the debtor would be free to "modify" the mortgagee's claim.[94] According to this commentator, this would be contrary to the Code's prohibition of plans that modify claims secured by a "security interest in real property that is the debtor's principal residence."[95] Such a reading implies that although prior to a foreclosure judgment a debtor could not modify a claim secured only by his residence, the debtor could do so *after* entry of a foreclosure judgment. Thus, he concludes, the creditor is made worse off by having obtained a foreclosure judgment—an outcome that would render section 1322(b) nonsensical.[96]

This commentator bases his reasoning on a flawed reading of the relevant case law, however. The commentator cites *In re Roach* for the proposition that if a note and mortgage merge into a foreclosure judgment, the mortgage lien *ipso facto* becomes a judicial lien.[97] *Roach*, however, does not support that conclusion. The *Roach* court merely held that under New Jersey law the mortgage merged into the foreclosure judgment. The commentator apparently presumed that if the mortgage no longer existed, the mortgage lien must likewise no longer exist. Furthermore, he presumed that some type of lien must still exist, but that since the mortgage had merged with the judgment, it could not be a mortgage lien. According to this reasoning, the lien must therefore be a judicial lien.

The definition of a "judicial lien," however, does not necessarily encompass whatever lien in fact remains on the property. Even if

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93. *See, e.g., In re* Read, 131 B.R. 188 (Bankr. M.D. Ala. 1991) In *Read* the mortgagee had obtained a foreclosure judgment and had conducted a foreclosure sale prior to the filing of the Chapter 13 petition by the debtor. In Alabama the foreclosure sale commences the running of the redemption period. *Id.* at 188-89. The court noted that "[u]nder Alabama law, the only interest remaining in the mortgagor after a foreclosure sale is the right to redeem the property pursuant to the Alabama redemption statute." *Id.* at 189 (citation omitted). In addition, the court noted that an Alabama mortgagor could lose the statutory redemption right if he failed to relinquish the property within ten days of a written demand by the purchaser. *Id.* The purchaser had made such a written demand, and thus the court held that the "debtor has forfeited his last remaining right *in the property*—the statutory right to redeem." *Id.* (emphasis added). Most important, the court concluded that therefore the "property is not property of the debtor or of the estate." *Id.*

94. *See* Winthrop, *supra* note 60, at 942-43.

95. *See* 11 U.S.C. § 1322(b)(2) (1988).

96. Winthrop, *supra* note 60 at 943.

97. *Id.* at 942-43.

one no longer identifies the lien as a mortgage lien, it nonetheless remains a lien that was created by consent, until it is discharged. For this reason any lien remaining after judgment would still fit the definition of "security interest" under the Code and modifications would therefore be prohibited.[98]

The key to this analysis lies in recognizing and separating the components of a normal mortgage relationship—the note, the mortgage securing the note, and the lien, the recording of which establishes the lien's priority. The merger of the first two components into a judgment does not necessarily require that the third be automatically extinguished. Something further must be done to extinguish the lien.

More important, the commentator's point is essentially irrelevant for purposes of analyzing the issue of whether a debtor could modify the mortgagee's claim. Even if a plan could "modify" the rights of the creditor/mortgagee in some fashion, a debtor could not cure and de-accelerate and effectively reinstate the note and mortgage. At that point the debtor would be trying to "modify" a claim based upon a judgment, and not upon a note and mortgage. A mortgagee holding a judgment and lien (even if it is a judicial lien) must be paid the lesser of the value of the property or the amount of the allowed claim within the time period of the plan.[99] Thus, the argument that the Code is rendered nonsensical by such an interpretation is unpersuasive.

Moreover, the underlying premise of the commentator's analysis is flawed. He presumed that since a mortgagee holding a judgment (rather than a note) no longer has a security interest, the prohibition in section 1322(b)(2) against modification of a residential mortgage was inapplicable; this, in turn, would enable a debtor to do what he could not have done had no judgment been rendered, namely, mod-

98. *See* 11 U.S.C.A. § 101 (1979 & Supp. 1991); Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 276 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984) ("[I]t is only the right of redemption, rather than the property itself, which passes into the bankruptcy estate if the redemption period has not expired at the time of the bankruptcy petition . . . ."). *See also* First Fin. Sav. and Loan Ass'n v. Winkler, 29 B.R. 771, 775 (Bankr. N.D. Ill. 1983). The *Winkler* court stated that "even after the judgment [the mortgagee's] claim continued to be secured *only* by what originated as its agreed-upon security interest in [the debtor's] principal residence. Although now 'merged' into the judgment decree, [the mortgagee's] interest remained a 'security interest' within the meaning of Code § 101(37). . . ." *Id.* at 776. Moreover, the *Winkler* court noted that the debtor's argument that a foreclosure judgment created a judicial lien was "ingenious," and that "[t]hat ingenious argument has found one receptive judicial ear." *Id.* at 775 (citing *In re* Garner, 13 B.R. 799, 801 (Bankr. S.D.N.Y. 1981)). The court then further noted that the debtor's "contention is not only ingenious but metaphysical. [The debtor] argues [that the mortgagee] wound up with less when it obtained more . . . ." *Id.* Thus, the court stated that "[s]tripped of its speciousness, [the debtor's] argument is simply implausible." *Id.*

99. *See* 11 U.S.C. § 1325(a)(5)(B)(ii) (1988).

ify the terms of the note. The flaw in such an analysis is glaring. If the premise in the first instance is that no note or mortgage exists (these having been merged into the judgment), a debtor, even without the prohibition of section 1322(b), could not modify the terms of the note, for the note no longer exists. The only "modification" pursuant to section 1322(b) would have to be in relation to the judgment. The mortgagee with a judgment is entitled to payment to the full extent of its secured claim within the plan period—and *not* over time according to the terms of the original note.

Some courts and commentators have argued that making a debtor comply with state redemption laws and prohibiting him from using the cure provision in the Code allows state law to interfere with federal law. They note that, as a general rule, when state law interferes with federal law, state law is preempted. By extension, federal cure law, which allows a debtor to cure and reinstate a note and mortgage, should prevail.[100] The fundamental flaw in this line of reasoning is that it equates state statutory redemption laws with the concept of "cure." The common definition of "cure," even according to proponents of unfettered cure rights, relates to payment of amounts past due and reinstatement of the terms of the obligation.[101] Redemption, however, does not result in the "cure" of a default but rather prevents the property from being sold—or it rescues it from sale *by paying in full* the accelerated amount due as established by the foreclosure judgment. To hold that section 1322(b)(5) allows a cure and reinstatement of the terms of the note and mortgage at this point, or to hold that section 1322(b)(2) allows a debtor in effect to redeem over the life of a Chapter 13 plan rather than during the time provided by Maine law, would defy the explicit mandate of *Butner*.

Thus, in Maine if a foreclosure judgment has been entered, only in the unlikely event that the debtor could obtain financing to redeem the property during the state statutory redemption period could he hope to retain it.[102] Otherwise, upon expiration of the redemption period, all of the debtor/mortgagor's rights in the property are extinguished.

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100. *See, e.g.*, Sable, *supra* note 59, at 140; Miller, *supra* note 57, at 136; *In re* Taddeo, 685 F.2d 24, 29 (2d Cir. 1982).

101. *See, e.g., In re* Taddeo, 685 F.2d at 26 ("Curing a default commonly means taking care of the triggering event and returning to pre-default conditions.").

102. A recent Alabama bankruptcy court reached the same conclusion. *See In re* Read, 131 B.R. 188, 189 (Bankr. M.D. Ala. 1991). The *Read* court noted, however, that "[s]ome courts appear to *disregard state law* and allow the curing of a pre-foreclosure default through deferred payments even though the state redemption statute requires lump sum payment of the entire mortgage debt." *Id.* at 189 n.5 (emphasis added) (citation omitted). With regard to requiring a lump sum payment, the court stated that "[r]edemption by lump sum payment is not novel to the Bankruptcy Code." *Id.* (citing 11 U.S.C. § 722).

This position resolves the legal tension between Maine property law and the Code. The practical tensions, of course, remain. As in a Chapter 7 bankruptcy, the debtor may be interested in selling the property himself rather than allowing the mortgagee to sell at a foreclosure sale. If the sale of the property can create a surplus, execution of the Chapter 13 plan would be made easier. Moreover, the Chapter 13 trustee would welcome any such surplus proceeds for the purpose of satisfying other creditors. Thus, even though a Chapter 13 debtor presumably could not cure and de-accelerate a note, the same practical tension may nonetheless arise between the Code and Maine law that is present in the Chapter 7 example.

C. Chapter 11 Reorganization

For purposes of this Article, the analysis and conclusions discussed above concerning Chapter 13 cases apply to Chapter 11 cases as well. A notable difference, however, is that while the Chapter 11 debtor and the Chapter 13 debtor enjoy the same privilege of curing defaults, the Chapter 11 debtor is not limited in his ability to modify the terms of a note and mortgage, even a mortgage secured only by a debtor's residence.[103] Thus, a Chapter 11 debtor apparently is free, in effect, to both cure and reinstate a note and mortgage and simultaneously change the terms of the note and mortgage to something more favorable.[104] In addition, the Chapter 11 debtor can often reduce the "principal" of its obligation so that it equals the fair market value of the property, while the amount owed on the original obligation in excess of the value of the mortgaged property is categorized as a general unsecured claim.[105]

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103. *See* 11 U.S.C. § 1123(a)(5) (1988). This Code section provides that "a plan shall . . . provide adequate means for the plan's implementation, such as . . . [the] satisfaction or modification of *any lien* . . . [and the] curing or waving of *any default* . . . ." *Id.* § 1123(a)(5)(E)&(G) (emphasis added).

104. *See id.* § 1129(b)(2)(A)(i)(I)-(II) (1988). This section is the "cramdown" provision that allows for confirmation of a plan despite creditor objection as long as the plan is fair and equitable and does not discriminate unfairly against any particular creditor. In addition, secured creditors must be allowed to retain their liens and must receive present value payments equal to at least their allowed claim. *Id.*

105. Chapter 11 plans can provide for the impairment of creditors' claims. This essentially means that creditors' rights are altered in some fashion by the plan. *See* 11 U.S.C. § 1124 (1988). In addition, the Code defines an allowed claim as one secured up to the value of the lien securing the claim and unsecured to the extent of any excess. *Id.* § 506. Thus, a Chapter 11 debtor potentially can bifurcate a mortgagee's claim into a secured claim (which establishes the amount of the new obligation on the property) and an unsecured claim. A mortgagee, of course, may reject such a plan, in which case the debtor must demonstrate that the plan nonetheless treats the mortgagee fairly. *See id.* § 1129(a)(8), (b)(1) (1988). Finally, a mortgagee may decide to avoid such treatment by electing to have its entire claim treated as secured and foregoing any participation as an unsecured creditor. *See id.* § 1111(b)(1)(A)(i), (b)(2) (1988).

V. Relief from the Automatic Stay

The preceding sections of this Article outline Maine mortgage law and suggest how the court ought to mesh it with the Code. If this argument is valid, a mortgagee will still want to know if and to what extent it was subject to the automatic stay and under what circumstances it would need to seek relief from stay.

Under the mandate of the United States Supreme Court, a Maine bankruptcy debtor, following a foreclosure judgment, retains only a statutory right of redemption. Logically, therefore, only the redemption right should become property of the estate, not the physical property itself.[106] Prior to the expiration of the redemption period, the trustee or debtor is free to exercise the debtor's right to redeem the property by paying the entire amount owed to the mortgagee. Upon the expiration of the redemption period, however, the debtor's rights in the property are forever extinguished,[107] whereupon the property is no longer property of the estate. Therefore, neither the debtor nor the trustee has any rights to redeem the property or to sell it himself. Although both the debtor and the trustee may believe that the likelihood of a surplus is greater if one of them sells the property rather than the mortgagee, neither would have a right to conduct such a sale under Maine law. Thus, according to the rationale of *Butner*, neither should have such a right in the context of a bankruptcy.

After the expiration of the statutory redemption period, the debtor's rights are limited by statute to the right to surplus proceeds, if any, which right is property of the estate. Thus, the estate's check on any foreclosure sale must be derived from the Maine foreclosure statutes, which grant a mortgagor the right to contest a foreclosure sale based on a defect in the sale procedure or to challenge the accounting from the sale.[108]

Assuming, therefore, that upon the expiration of the redemption period the Chapter 7 trustee has no rights to dispose of the property, and that the Chapter 11 and Chapter 13 debtors and trustees have no right to de-accelerate and cure a note, attention necessarily focuses on a mortgagee's right to conduct a foreclosure sale during

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106. *See* Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 276 (8th Cir. 1983) ("[I]t is only the right of redemption, rather than the property itself, which passes into the bankruptcy estate if the redemption period has not expired at the time of [sic] the bankruptcy petition is filed.").

107. *See* St. Hilaire v. Berta, 588 A.2d 309, 310 (Me. 1991).

108. *See* Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973) (holding that after the expiration of the redemption period, the mortgagor can challenge the foreclosure by attempting "to demonstrate in a legal action a failure in the procedure by which his title was lost"); Me. Rev. Stat. Ann. tit. 14, § 6324 (West Supp. 1991-1992) (requiring that the mortgagee file a report of the sale and providing the mortgagor a right to contest the accounting); *Id.* § 6204-B (providing rights to an accounting under certain circumstances in cases of strict foreclosure).

the pendency of a bankruptcy case. Specifically, the issue is whether a mortgagee is required to obtain relief from the automatic stay and, if so, to what extent. Further, if a mortgagee is required to obtain relief, the issue becomes: Upon what standard should the bankruptcy court base its decision to grant relief?

A. The Necessity for Relief from Stay

If the period of redemption has not expired, the mortgagee may want to obtain possession of the property. Alternatively, the mortgagee may be content simply to wait for the redemption period to expire, at which time the mortgagee will likely want to publish the first notice of sale. Depending upon the time of year and the location of the property, however, the mortgagee may prefer to wait until further into the ninety-day period following the expiration of the redemption period before publishing the first notice. Such a delay may allow the mortgagee to market the property at a better time of year with the hope of garnering a more favorable sales price. Alternatively, the mortgagee may wish to conduct the foreclosure sale immediately and establish the deficiency. Even if the mortgagee purchases at the sale, it can sell the property later when the market may be better; it can then retain any "surplus" generated.[109]

If the mortgagee wishes to obtain possession of the premises to ready them for sale, or to collect rents, or for whatever other reason, it must first confirm or establish the right to such possession. Prior to the expiration of the redemption period, the mortgage document will determine who has rights to possession. If the mortgage is silent as to the mortgagee's right to possession, presumably the mortgagee has the right to possession upon default by the mortgagor.[110] Once the redemption period has expired, however, the Maine statute expressly states that "any remaining rights of the mortgagor to possession shall terminate."[111]

Prior to the expiration of the redemption period, the automatic stay may apply to bar the mortgagee's attempts to obtain possession. The stay prohibits "the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title."[112] Unless the premises have been abandoned, the mortgagee would have to institute a forcible entry and detainer action in order

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109. *See* ME. REV. STAT. ANN. tit. 14, § 6323 (West Supp. 1990-1991).

110. *See, e.g.*, First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A.2d 258 (1940); Fogg v. Twin Town Chevrolet, 135 Me. 260, 194 A. 609 (1937). *Cf.* Gilpatrick v. Chamberlain, 121 Me. 561, 118 A. 481 (1922); ME. REV. STAT. ANN. tit. 33, § 502 (West 1988).

111. ME. REV. STAT. ANN. tit. 14, § 6323 (West Supp. 1990-1991).

112. 11 U.S.C. § 362(a)(1) (1988).

to establish its right to possession.[113] Relief from the stay would be necessary prior to filing such an action.

If the mortgagee is content to wait until the expiration of the redemption period or has no rights to possession until the redemption period expires, the stay will still bar actions to obtain possession at that later point. In some cases the judgment of foreclosure will provide that a writ of possession shall issue upon the expiration of the redemption period if the property is not redeemed.[114] Enforcement of such a writ would most likely be construed to fall within the ambit of section 362(a)(2)'s prohibition of enforcing judgments.[115]

If the mortgagee is not concerned with obtaining possession prior to its foreclosure sale or has already obtained possession by a voluntary surrender, must the mortgagee nonetheless obtain relief from the stay in order either to publish the requisite notices or to conduct the actual sale? The answer should be an unequivocal "no." Under section 362(c) the automatic stay applies to acts against property of the estate "until such property is no longer property of the estate."[116] As this Article has argued, the debtor's interest—and thus the estate's interest—in the property is forever extinguished upon the expiration of the redemption period.[117] Therefore, the property is no longer property of the estate and acts against such property are no longer stayed by section 362(a).

Thus, the mortgagee should be required to obtain relief from stay only if the publication of the notice of sale or the sale itself were otherwise prohibited by section 362(a). Analysis of each subsection of section 362(a), however, clearly indicates that none of them apply to either the publication of notice or to the sale itself.

1. Subsection 362(a)(1)

This subsection states that "the . . . continuation . . . of a judicial . . . or other action or proceeding against a debtor that was . . . commenced before the commencement of the [bankruptcy] case"[118]

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113. *See* ME. REV. STAT. ANN. tit. 14, § 6014(1) (West Supp. 1990-1991) ("Evictions which are effected without resort to the provisions of [the forcible entry and detainer statutes] are illegal and against public policy.").

114. *See* JAMES B. BARNS & F. BRUCE SLEEPER, MAINE MORTGAGE FORECLOSURES: START TO FINISH I-14 (1990). The authors concede that issuance of a writ of possession in the context of a foreclosure action may not comport with the statute. *Id.*

115. *See* 11 U.S.C. § 362(a)(2) (1988). A writ of possession is served by a sheriff on the mortgagor, which allows the mortgagor to vacate the premises or else face physical ejection by the sheriff. *See* ME. REV. STAT. ANN. tit. 14, § 6005 (West 1980). Moreover, the writ of possession is issued by virtue of a judgment, and its use would therefore likely be construed as enforcing that judgment. Section 362(a)(2) specifically prohibits "the enforcement, against the debtor . . . of a judgment obtained" prior to the filing of the bankruptcy petition. 11 U.S.C. § 362(a)(2) (1988).

116. *Id.* § 362(c)(1) (1988).

117. *See supra* note 42 and accompanying text.

118. 11 U.S.C. § 362(a)(1) (1988).

is stayed by filing of a bankruptcy petition. Arguably, the publication of a notice and subsequent sale are additional steps of a judicial action against the debtor that was commenced prior to the filing of the bankruptcy petition. Yet, the more sensible approach, which is supported by a plain reading of the statute, is to regard the judicial action *against the debtor* as having been completed upon the entry of judgment of foreclosure. Certainly the notice and sale are necessary steps in the statutory foreclosure procedure. But the type of action contemplated by the stay provision effectively ended upon the entry of judgment. Thus, the action from which the debtor needed protection was already completed by the time of the filing of the bankruptcy petition—specifically, at the entry of judgment of foreclosure. For this reason, classifying the postjudgment publication of foreclosure sale as a judicial action, particularly in light of the expiration of the redemption period and its effects, is simply unwarranted.

In addition, the publication of the notice and sale involve the property and not the debtor and thus do not fall within the express language of the above subsection. The case of *In re Gull Air, Inc.*[119] supports both of these propositions.

In *Gull Air* a debtor argued that the FAA's withdrawal and reallocation of air slots violated the automatic stay. The *Gull Air* court analyzed the stay's applicability under subsections 362(a)(1) and (a)(3). The court reasoned that since the debtor's interest was completely extinguished automatically upon the expiration of a period of nonuse, the air slots were no longer property of the estate and thus section 362(a)(3) was inapplicable.[120] In addition, the court held that once the debtor's rights in the property expired, action by the FAA to reallocate the slots was not action against the debtor. Thus, section 362(a)(1) was also inapplicable.[121]

Similarly, in Maine the running and expiration of the redemption period is automatic after the judgment of foreclosure is entered. In order to terminate the debtor's right to redeem, no affirmative action is required by the creditor, the court or anyone else. The advertisement and sale of the property is analogous to the FAA's termination letter and reallocation of the air slots in *Gull Air*. Moreover, a mortgagee's actions are no more actions against the debtor than the FAA's actions. Therefore, section 362(a)(1) is inapplicable in either situation.

2. *Subsection 362(a)(2)*

This subsection states that "the enforcement, against the debtor

119. 890 F.2d 1255 (1st Cir. 1989).
120. *Id.* at 1261-62.
121. *Id.* at 1263.

or against property of the estate, of a judgment obtained before the commencement of the [bankruptcy] case"[122] is also stayed. Again, for reasons similar to those expressed above, classifying the notice of sale and sale as "enforcement" of the judgment against the debtor is unwarranted. The normal foreclosure judgment establishes that the mortgagor breached the conditions of the note and mortgage and that the mortgagee is entitled to payment or is free to conduct a foreclosure sale pursuant to the terms of the statute. In addition, the judgment ordinarily will include: (a) the issuance of a writ of possession upon expiration of the redemption period[123] and (b) the issuance of a writ of execution upon the establishment of the deficiency following the sale.[124]

Enforcing either the writ of possession in order to remove the debtor from the premises or the writ of execution in order to collect the deficiency would be enforcing a judgment against the debtor and therefore would be stayed by application of section 362(a)(2). Under either writ the mortgagee would need to obtain relief from the stay before proceeding.

In contrast, to the extent that it can be construed at all as "enforcement . . . of a judgment," the sale of the property is enforcement of a judgment against the property and not against the debtor. The sale, of course, is of property owned entirely by the mortgagee, although the mortgagee is subject to the statutory obligation to sell, and thus does not violate this subsection because the property does not belong to the estate.[125]

3. *Subsection 362(a)(3)*

This subsection states that "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" is likewise stayed.[126] Neither the notice of sale nor the sale itself is an act to obtain possession of the property. Thus, even if the estate could in some way be construed as

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122. 11 U.S.C. § 362(a)(2) (1988).

123. *See supra* notes 113-15 and accompanying text.

124. ME. REV. STAT. ANN. tit. 14, § 6324 (West Supp. 1990-1991) (providing that after a report of sale, "[a]ny deficiency shall be assessed against the mortgagor and an execution shall be issued by the court therefor").

125. In a case applying Minnesota foreclosure law, the Eighth Circuit found that upon expiration of the redemption period, Minnesota law provided that full title automatically vested in the purchaser at the foreclosure sale. Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 278 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). Moreover, the only rights that the debtor had in bankruptcy were those derived from state law, namely, the right to redeem within the applicable time period. *Id.* at 276 & n.8 (citing Georgia Pacific Corp. v. Sigma Service Corp., 22 B.R. 984 (Bankr. M.D. La. 1982), *rev'd on other ground*, 712 F.2d 962 (5th Cir. 1983)). Likewise, under Maine law upon the expiration of the redemption period, the mortgagor's title is completely divested. *See* Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973).

126. 11 U.S.C. § 362(a)(3) (1988).

having possession of the property, these acts are not violative of section 362(a)(3). Arguably, these acts could be viewed as exercising control over the property, but since it is no longer property of the estate, these acts still do not violate this subsection.[127]

B. *The Standard for Granting Relief*

If a mortgagee seeks relief from the automatic stay, he must determine which of two standards for granting this relief applies. The two standards for granting relief from stay found in section 362 of the Code are: (a) "for cause,"[128] and (b) where there is no equity in the property and the property is not necessary for an effective reorganization.[129] The only standard a bankruptcy judge should use is the "for cause" standard. Only the "for cause" standard is applicable because the standard in section 362(d)(2) concerning lack of equity in property applies "to a stay of an act against property" described in section 362(a).[130] As noted above none of the subsections found in section 362(a) applies. Thus, because the mortgagee would not be seeking relief for any act against property to which the stay applies, the section 362(d)(2) equity standard is inapplicable.

Even if the stay is construed to apply to the property, only subsection 362(a)(3) could conceivably apply. Each of the other subsections concern either the debtor or liens on the property. Moreover, subsection 362(a)(2) applies to the debtor and to property of the estate. Clearly, under Maine law the debtor, and hence the estate, no longer has any interest in the property upon expiration of the redemption period. Thus, the property would no longer be property of the estate, making section 362(a)(2) inapplicable.

Section 362(a)(3), however, by its own terms could apply only if

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127. The remaining subsections of section 362(a) are also inapplicable. Subsections 362(a)(4) and (5) refer to the enforcement of a lien against property of the debtor. *Id.* §§ 362(a)(4)-(5) (1988). Specifically, subsection (a)(4) operates as a stay of "any act to create, perfect, or enforce any lien against property of the estate." Subsection (a)(5) operates as a stay of "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case. . . ." Once the redemption period expires, however, the property is no longer property of the estate or of the debtor and therefore these subsections would not govern this situation.

The express language of subsections (6), (7), and (8) renders each of them inapplicable. Subsection (a)(6) operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." *Id.* § 362(a)(6). Subsection (a)(7) operates as a stay of "the setoff of any debt owing to the debtor that arose before the commencement of the case . . . against any claim against the debtor." *Id.* § 362(a)(7). Finally, subsection (a)(8) operates as a stay of "the commencement . . . of a proceeding before the United States Tax Court concerning the debtor." *Id.* § 362(a)(8).

128. *Id.* § 362(d)(1) (1988).

129. *Id.* § 362(d)(2) (1988).

130. *Id.*

the act were one "to obtain possession of . . . property from the estate . . . ."[131] This would be a rare case at best, since usually the debtor (and not the estate) is in possession of the property. Nonetheless, the mortgagee should invoke the "for cause" provision of section 362(d)(1) on the theory that even if the estate has possession of the property, it is not entitled to retain it because the interest of the debtor, and thus of the estate, is extinguished upon expiration of the redemption period. For a court to deny the mortgagee relief for insufficient cause and force it to prevail on the standard under section 362(d)(2) would be to miss the point. The only interest the debtor has is a statutory right to a surplus. Thus, the debtor has no equity and, even more important, no interest at all in the property.

If section 362(d)(2) were applied, however, the debtor conceivably could argue that, despite the lack of equity, the property is nonetheless necessary for an effective reorganization.[132] Such an argument is superficially appealing in that the debtor at one point had an interest in the property that would have warranted retention of the property. Upon the expiration of the redemption period, however, this interest became nonexistent. Thus, the debtor would have as much right to retain the property as he would to obtain an unrelated third party's profitable enterprise just because those profits would be helpful to the debtor's effective reorganization.

United States v. Whiting Pools, Inc.,[133] decided by the United States Supreme Court in 1983, supports this analysis. The *Whiting Pools* case involved the Internal Revenue Service (IRS), which had seized equipment of the debtor for unpaid taxes. Subsequent to the seizure, the debtor filed a Chapter 11 petition. The IRS wanted to proceed with a sale of the seized property and accordingly filed for relief from the automatic stay. The debtor, as debtor-in-possession, counterclaimed for an order requiring the IRS to turn over the seized property pursuant to section 542(a) on the grounds that the debtor intended to use the property in its reorganization. The IRS contended that the debtor did not have a sufficient interest remaining in the property after the seizure to require a turnover.[134]

Under the circumstances, the Court had to analyze the property interests of the estate and determine whether these property interests were significant enough to allow the debtor to regain possession. The Court concluded that the debtor's remaining interest in the seized property was sufficient to allow the debtor to regain possession. The Court stated, however, that the "[l]egislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some *minor interest* such as a lien or

131. *Id.* § 362(a)(3) (1988).
132. *See id.* § 362(d)(2) (1988).
133. 462 U.S. 198 (1983).
134. *Id.*

bare legal title."[135] Furthermore, the Court stated, "Of course, if a tax levy or seizure *transfers to the IRS ownership of the property seized*, § 542(a) may not apply."[136] The Court noted, however, that "[o]wnership of the [seized] property is transferred only when the property is sold to a bona fide purchaser at a tax sale."[137]

In contrast, under Maine law full title to the mortgaged property is completely transferred upon the expiration of the redemption period. At that point the debtor has *no* interest in the property, much less a "minor interest."[138] Thus, if the redemption period expires and the mortgagee takes possession of the property prior to the debtor's filing of a petition for bankruptcy, *Whiting Pools* indicates that a trustee could not force a turnover, inasmuch as the trustee could not "use, sell or lease" the property.[139] It would be incongruous that under *Whiting Pools* a trustee could not require a turnover of the property on the grounds that the estate's "interest in the property" is too minor, while in the context of section 362(d)(2) the debtor could prevent the mortgagee from acquiring possession on the basis of that very same "interest" of the estate.

VI. Recent Maine Bankruptcy Cases: The Temptation to Ignore State Law

Despite the analysis detailed in this Article, a bankruptcy trustee, debtor, and judge often face certain temptations. As noted above the bankruptcy participants may be convinced that a sale of the real property within the bankruptcy case may produce a better price than a sale conducted by the mortgagee. One temptation, therefore, will be to deny the mortgagee relief from stay and allow the debtor or trustee to sell the property.

Another prevalent temptation involves the situation where a debtor files a Chapter 13 petition after a judgment of foreclosure is entered but prior to the expiration of the redemption period, seeking an order approving a plan to allow cure of all defaults and reinstating the terms of the note and mortgage. In such cases the temptation will be to deny the mortgagee relief from stay and allow the debtor to cure defaults and reinstate the note and mortgage terms despite the impending expiration of the redemption period—effectively voiding the foreclosure judgment. As this Article contends, however, the mortgagee needs relief from stay only to the extent that it wants possession of the property in order to conduct a foreclosure sale. Alternatively, even if a bankruptcy judge were to

135. *Id.* at 204 n.8 (emphasis added).
136. *Id.* at 209 (emphasis added).
137. *Id.* at 211.
138. *See supra* text accompanying note 28.
139. Section 542 allows turnover where the trustee can use, sell, or lease property as defined in § 363. *See* 11 U.S.C. §§ 363, 542 (1988).

read section 362 unduly broadly and hold that the automatic stay applies even after the expiration of the redemption period, the court should grant relief under the "for cause" standard as a matter of course because the debtor's interest in the property will cease to exist prior to the actual cure.

These temptations have proved too alluring for the bankruptcy courts sitting in Maine to resist. *In re F. Oliver Brittain*[140] and *In re Tucker*[141] are prime examples.

The possibility of a surplus proved too great a temptation in *F. Oliver Brittain*, an unpublished opinion by the bankruptcy court devoid of any supporting authority. The *F. Oliver Brittain* case involved a motion for relief from stay filed by a mortgagee of the Chapter 13 debtor; the facts were undisputed. On May 31, 1989, the mortgagee obtained a foreclosure judgment against the debtor's real property. Absent a bankruptcy filing, the period of redemption would have expired on August 28, 1989. The debtor, however, filed a petition for relief on June 29, 1989. By application of section 108, the period of redemption was extended one day to August 29, 1989. When the mortgagee later filed for relief from stay, the redemption period had expired and the "parties agree[d] that [the] debtor [did] not have an equity of redemption but that [the] debtor [was] entitled to any surplus produced at a foreclosure sale over and above the amount the movant [was] due on the debt."[142]

The court correctly cited *In re Thom* for the proposition that the automatic stay did not suspend the running of the redemption period.[143] The court noted that "the *Thom* case . . . did not address what set of circumstances would give rise to granting or denying a motion for relief from stay."[144] Curiously, the court then baldly stated that the "issue of what property rights exist, if any, after the equity of redemption has expired *must be addressed under the circumstances of each case.*"[145] From that position the court had no choice but to complete its reasoning in a somewhat circular fashion.

The court concluded that despite the expiration of the redemption period, a mortgagee must bring a motion for relief from the automatic stay in order to conduct a foreclosure sale and thus must meet the standards found in section 362(d). In support of its conclusion, the court again stated in summary fashion that the "*Thom* case neither modified the need to bring a motion for relief from stay

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140. No. 89-10262 (Bankr. D. Me. Dec. 29, 1989).

141. 131 B.R. 245 (Bankr. D. Me. 1991).

142. *In re* F. Oliver Brittain, No. 89-10262, slip op. at 1.

143. 95 B.R. 261, 262 (Bankr. D. Me. 1989) (holding that strict time periods within which a municipality must act in order to preserve its real property tax lien continue to run despite the filing of the bankruptcy petition).

144. *In re* F. Oliver Brittain, No. 89-10262, slip op. at 2.

145. *Id.* (emphasis added).

nor the conditions imposed before the Court could grant such relief under 11 U.S.C. §362(d) and (g)."[146] The crucial question, however, was clearly left begging—i.e., whether the stay was applicable in the first instance. The court failed to support its conclusion with other authority, and it did not acknowledge, as *Butner* requires, that Maine law should be the basis for ascertaining what property interests remain upon expiration of the redemption period. Instead, the court merely stated that it found "that the possibility of a surplus is for purposes of 362(d)(2)(A) [tantamount to] an equity in property."[147] The inference is that the possibility of a surplus, being an equity, is an "interest" in the property, which interest "must be addressed under the circumstances of each case."[148] Under this reasoning, only if no possibility of a surplus exists in a particular case would it be possible to argue that no property rights exist in the debtor or in the estate.

Although the problems with the court's analysis are manifest, one is particularly troublesome. If the court defines "the possibility of a surplus" as an interest in the property, a mortgagee will likely automatically lose its motion for relief from stay if such a possibility exists (on the grounds that the debtor would then have an "equity" in the property). If, however, no such possibility exists, the mortgagee should logically prevail since the debtor would have no interest in the property. The *Brittain* court, however, also failed to address the implications of its rationale. Presumably, the debtor could still argue that, despite the lack of equity, the property is necessary for an effective reorganization. Because subsection 362(d)(2) requires that both standards be met before the mortgagee can obtain relief from stay (i.e., no equity and not necessary for an effective reorganization), the mortgagee could be denied relief from the automatic stay if the debtor is successful in arguing that the property is necessary for an effective reorganization despite the lack of equity.

In sum, the *Brittain* court failed to address the crucial first issue (which is a necessary premise to the remainder of its reasoning): whether and to what extent the debtor retained any rights in the property sufficient to justify its retaining possession. The court should then have analyzed whether and to what extent the automatic stay applied to the mortgagee's actions regarding a foreclosure sale. Only then could the court have properly addressed which standard to apply in granting relief. Significantly, the *Brittain* court cited both standards for granting relief pursuant to section 362(d), but then proceeded to ignore the "for cause" standard and analyzed the mortgagee's request for relief under the equity standard, concluding that the mortgagee had failed to carry its burden.

146. *Id.* slip op. at 3.
147. *Id.* slip op. at 2.
148. *Id.*

The other paradigmatic temptation confronting a bankruptcy court is to allow the Chapter 13 debtor, despite the expiration of the redemption period, to cure and reinstate the original terms of the note and mortgage. This is exemplified in the recent case of *In re Tucker*.[149] In *Tucker* the mortgagee obtained a foreclosure judgment, and just prior to the expiration of the redemption period, the debtors filed for Chapter 13 protection. Subsequently, by application of section 108(b), the redemption period was extended.[150] The mortgagee argued that the debtors had no right to cure, while the debtors argued that the rehabilitative provisions of Chapter 13 allowed such a cure.[151]

The *Tucker* court agreed with a Sixth Circuit case that held that a debtor has the right to cure at any time prior to a foreclosure sale.[152] In the course of its opinion, the court made the following

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149. 131 B.R. 245 (Bankr. D. Me. 1991).

150. *Id.* at 245. The *Tucker* court stated that the "issue presented is whether the Debtors have a right to cure a mortgage default and reinstate current payments after a foreclosure judgment has been entered, but before the period of redemption has expired." *Id.* This statement is misleading in that it implies that the cure of the default will actually occur before the expiration of the redemption period. The court, however, does not require that the default be cured prior to the expiration of the redemption period but merely that the petition be *filed* prior to such expiration. *Id.* at 245-46. Specifically, the court held that if a debtor files a petition before the expiration of the redemption period, the court has jurisdiction over the property and that § 1322 allows the debtor to cure through the plan. The court stated that "a Chapter 13 *plan* may cure a mortgage default and reinstate the current payments, *provided the cure is reasonable*." *Id.* at 246 (emphases added) (apparently alluding to § 1322(b)(5), which "provide[s] for the curing of any default within a reasonable time.").

Moreover, the court stated that "[t]his is so notwithstanding the fact that a foreclosure judgment has been entered prior to the debtor's filing a petition, *so long as a final order terminating the equity of redemption has not yet been entered*." *Id.* (emphasis added). This statement is confusing, as the court apparently believed that a foreclosure judgment is entered and then a "final order" is entered at the expiration of the redemption period, which order terminates the redemption period. Maine's foreclosure statute, however, merely provides for the commencement of the redemption period upon the entry of the foreclosure judgment. *See* ME. REV. STAT. ANN. tit. 14, § 6321 (West Supp. 1990-1991). Once that period has expired, the mortgagor's rights are extinguished and the mortgagee has the right to sell the property. No further order is required. *See id.* § 6322 (West Supp. 1990-1991).

In effect, therefore, the *Tucker* court appears to be holding that although the redemption period expires *after* the filing of the petition (which expiration presumably terminates the debtor's rights in the property), a Chapter 13 plan can nonetheless provide for the cure of defaults and effectively reinstate those rights by sheer force of the court's order confirming the plan. *See* 11 U.S.C. § 1327 (1988) (stating the effect of a plan's confirmation).

151. *Id.* at 245-46.

152. *Id.* at 246. The court approvingly cited *In re* Glenn, 760 F.2d 1428 (6th Cir. 1985). No court, however, should countenance the *Glenn* decision, given its usurpatory nature. Finding that Congress was not as clear as the court wished, the *Glenn* court essentially abrogated its obligation to analyze the law as it existed, bla-

curious statement: "While state law is certainly relevant, it simply dictates what property rights and interests a debtor holds."[153] Thus, the *Tucker* court implicitly adopted the erroneous notion that equates state redemption rights with the concept of cure. Specifically, the court analyzed state law and concluded that the debtors retained redemption rights but then held that those rights were irrelevant for purposes of determining cure rights. Furthermore, the court stated that federal bankruptcy law controlled the debtor's right to cure, and not state law (i.e., not the right of redemption). In effect despite the court's prior holdings to the contrary,[154] the *Tucker* decision tolls the running of the redemption period upon the filing of a bankruptcy petition. Thus, the *Tucker* decision allows a mortgagor to retain an interest in the property despite the expiration of the redemption period and thereby effectively allows a debtor to void state court judgments.

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tantly ignoring an explicit holding of the United States Supreme Court. The court stated that "[w]e wish Congress had spoken its specific intent more clearly with respect to cases involving acceleration, judgments, or sales. It did not but instead saw fit to speak only in broad terms." *Id.* at 1435. Moreover, the court stated that "[w]e despair of finding any clear-cut statutory language or legislative history that points unerringly to a construction of the statute that is free from challenge." *Id.* Thus, the *Glenn* court, in "despair" over not finding an easy answer, chose to ignore *Butner* and instead fashioned an approach to be applied uniformly throughout the circuit regardless of any particular state's law. Specifically, the court rationalized:

> *The result we reach here is, therefore, primarily a pragmatic one*—one that we believe not only works the least violence to the competing concerns evident in the language of the statute but also one that is most readily capable of use. *The event we choose as the cut-off date of the statutory right to cure defaults is the sale of the mortgaged premises.*

Id. (emphases added). The *Glenn* court at least recognized that its decision could be called into question, observing that its opinion "admittedly may form a large target for criticism . . . ." *Id.*

The court went on to list seven reasons for choosing the foreclosure sale as the point at which a Chapter 13 debtor loses his right to cure, the first of which baldly stated that the "language of the statute is, to us, plainly a compromise . . . . *Picking a date between the two extremes, is likewise a compromise of sorts.*" *Id.* (emphasis added).

Recall, however, that the *Butner* court explicitly rejected such a uniform approach to property rights. Butner v. United States, 440 U.S. 48, 55-56 (1979). Specifically, the *Butner* court stated that "[p]roperty rights are *created and defined* by state law." *Id.* at 55 (emphasis added). Furthermore, the Court stated that "[u]niform treatment of property interests *by both state and federal courts within a State* serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' " *Id.* (emphasis added) (citation omitted). In stark contrast, the *Glenn* court unashamedly stated that "[i]n so ruling *we avoid any effort to analyze the transaction in terms of state property law.*" *In re* Glenn, 760 F.2d at 1436 (emphasis added).

153. *In re* Tucker, 131 B.R. 245, 246 (Bankr. D. Me. 1991).

154. *See, e.g., In re* Thom, Inc., 95 B.R. 261 (Bankr. D. Me. 1989).

VII. Conclusion

In order to mesh state foreclosure law with the Code's cure and automatic stay provisions, bankruptcy courts should begin by analyzing the debtor's property rights under state law. This approach is mandated by *Butner*. Under Maine law once the statutory redemption period has expired, the debtor is left with no interest in the property. At this point the note and mortgage have merged into the foreclosure judgment. Bankruptcy courts should not allow the Code's cure and automatic stay provisions to give the debtor a greater interest in the property than he has under Maine law—which is nothing.

This analysis should allow the mortgagee to sell the property after the expiration of the redemption period despite the automatic stay. Furthermore, the debtor should be prevented from "curing" the note and mortgage by reinstating their original terms.

Following this approach would allow the bankruptcy courts in Maine to smoothly reconcile state and federal law in this area while carrying out the Supreme Court's mandate.