A FORECLOSURE ON CONSUMER RIGHTS? PENNSYLVANIA'S DENIAL OF COUNTERCLAIMS IN MORTGAGE FORECLOSURE ACTIONS UNDER THE TRUTH IN LENDING ACT*

I. INTRODUCTION

If homeownership is the American dream, then mortgage foreclosure is the American nightmare. While mortgage foreclosure rates have waned since the height of the 2007–2008 financial crisis, roughly one million foreclosures are still filed every year.[1] Meanwhile, mortgage foreclosure filings make up the largest share of all civil cases filed in Pennsylvania at twenty percent.[2] For 2016, Philadelphia, Pennsylvania's largest city, ranked fourth highest in mortgage foreclosure rates among all major U.S. metropolitan areas.[3] The threat of foreclosure remains a very real problem for homeowners.[4]

Homeowners often have been victims of predatory lending, but they turn to an attorney only when they face foreclosure.[5] Specifically, many homeowners do

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1. In 2016, there were 933,045 foreclosure filings (determined by tracking default notices, scheduled auctions, and bank repossessions). *U.S. Foreclosure Activity Drops to 10-Year Low in 2016*, ATTOM DATA SOLUTIONS (Jan. 12, 2017), http://www.attomdata.com/news/heat-maps/2016-year-end-u-s-foreclosure-market-report/ [perma: http://perma.cc/3QMC-EKUJ]. In 2015, the number of foreclosure filings was 1,083,572. *Nearly 1.1 Million U.S. Properties with Foreclosure Filings in 2015, Down 3 Percent from 2014 to Nine-Year Low*, REALTYTRAC (Jan. 14, 2016), http://www.realtytrac.com/news/foreclosure-trends/realtytrac-2015-year-end-u-s-foreclosure-market-report/ [perma: http://perma.cc/75FR-9965].

2. *State of Mortgage Foreclosures in Pennsylvania*, UNIFIED JUD. SYS. OF PA. (Apr. 29, 2016), http://www.pacourts.us/news-and-statistics/news?Article=900 [perma: http://perma.cc/3FMS-85SV].

3. *U.S. Foreclosure Activity Drops to 10-Year Low in 2016*, *supra* note 1. This was among "metropolitan statistical areas with a population of at least 200,000." *Id.* Those ranking above Philadelphia in foreclosure rates were, in descending order of foreclosure rate, Atlantic City, New Jersey; Trenton, New Jersey; and Rockford, Illinois. *Id.* Rounding out the top ten were Lakeland-Winter Haven, Florida; Baltimore, Maryland; Tampa-St. Petersburg, Florida; Chicago, Illinois; Columbia, South Carolina; and Miami, Florida. *Id.*

4. *See* Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. REV. 609, 639 (2016) (noting that "the foreclosure crisis continues" and providing 2016 statistics on foreclosures, delinquent mortgages, and homes that are underwater).

5. *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 60 (2005); *see also* Ahmad T. Sulaiman & Daniel Edelman, *Illinois Foreclosure Defense Strategies: An Immediate Look at the Best Practices for Assisting Distressed Homeowners in Illinois*, *in* 2009 ASPATORE SPECIAL REPORT (Aspatore Special Reports No. 27, 2009) (explaining that clients come in with a foreclosure threat and attorneys then look to statutory violations).

not understand the terms of the mortgages into which they enter.[6] As a result, homeowners often accept higher interest rates even if they qualify for lower-cost mortgages.[7] This is especially true for those without college degrees, lower-income individuals, and black and Hispanic borrowers[8]—populations often targeted by predatory lenders.[9] State and federal statutes have attempted to protect consumers from this predatory behavior. One such statute is the Truth in Lending Act (TILA), which primarily requires lenders to make certain disclosures to borrowers.[10]

Lenders' violations of TILA and other statutes are often not discovered until after foreclosure is initiated and attorneys bring claims or counterclaims under these statutes.[11] Of these, TILA claims asserting violations in the disclosure process are the most common.[12] However, Pennsylvania courts do not allow for TILA counterclaims in mortgage foreclosure actions.[13] This is because the Superior Court of Pennsylvania concluded that the language of the TILA statute does not include strictly *in rem* mortgage foreclosures.[14] Meanwhile, lenders are not limited by the supposed *in rem* nature of mortgage foreclosure actions, as they are able to bring separate personal actions in the form of deficiency judgments if the debt owed exceeds the fair market value of the property.[15]

This Comment will examine counterclaims in Pennsylvania mortgage foreclosure actions. It will compare the rationale behind barring TILA counterclaims—that mortgage foreclosures are *in rem* actions—with the scope of the Deficiency Judgment Act, which allows lenders to bring actions for

6. *See* Peggy Maisel & Natalie Roman, *The Consumer Indebtedness Crisis: Law School Clinics as Laboratories for Generating Effective Legal Responses*, 18 CLINICAL L. REV. 133, 140–41 (2011).

7. *See id.*

8. *See* A. Mechele Dickerson, *Over-Indebtedness, the Subprime Mortgage Crisis, and the Effect on U.S. Cities*, 36 FORDHAM URB. L.J. 395, 413 (2009) (noting that these groups were not only more likely to accept products they could not understand or afford, but also were less aware of other costs associated with homeownership).

9. *See id.* at 413 n.86; *see also* Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725, 732 (2005) ("[Predatory lenders] use Home Mortgage Disclosure Act data to target low-income minority neighborhoods where Hispanics and African-Americans historically have been redlined and have lost hope of qualifying for home loans.").

10. *See* Peterson, *supra* note 5, at 51–52. In the context of mortgages, TILA generally works in conjunction with the Real Estate Settlement Procedures Act (RESPA). *Id.* at 52. The Consumer Financial Protection Bureau (CFPB), administers both TILA and RESPA. CFPB Real Estate Settlement Procedures Act (Regulation X), 12 C.F.R. § 1024.1 (2017); CFPB Truth in Lending Act (Regulation Z), 12 C.F.R. § 1026.1(a) (2017). The CFPB recently introduced the TILA-RESPA Integrated Disclosure rule to clarify and consolidate disclosure requirements under both Acts. *See* 12 C.F.R. pts. 1024, 1026.

11. *See* Peterson, *supra* note 5, at 59–60 (noting that consumers often only look to an attorney when facing foreclosure); *see also* Sulaiman & Edelman, *supra* note 5 (explaining that attorneys find violations of TILA and other statutes as foreclosure defenses).

12. *Id.*

13. *See* N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987).

14. *See id.*

15. See *infra* Part II.E for an explanation of the deficiency judgment process.

deficiency judgments in mortgage foreclosure actions. This Comment will ultimately argue that an inequitable result arises from relying on an *in rem* distinction to bar a legal remedy for borrowers in residential mortgage foreclosures while sidestepping that same distinction to ensure relief for lenders.

Section II will explore the process of residential mortgage foreclosure in Pennsylvania, the history of counterclaims, the treatment of TILA claims by Pennsylvania courts, the use of similar language under other federal statutes, and the development of the Deficiency Judgment Act in Pennsylvania.[16] Section III of this Comment will argue that residential mortgage foreclosure actions are not strictly *in rem*, that the language of TILA applies to mortgage foreclosure counterclaims, and that the *in rem* distinction unfairly protects lenders from the risks associated with lending while denying homeowners much-needed remedies.[17] Finally, Section IV will conclude that Pennsylvania courts should allow for TILA counterclaims in residential mortgage foreclosure actions.[18]

II. OVERVIEW

A mortgage foreclosure action is a lender's attempt to recover on the borrower's debt by forcing the sale of a mortgaged property.[19] Borrowers have various potential defenses available in foreclosure actions.[20] The primary method is to argue that the lender violated consumer protection statutes.[21] TILA is one such statute that requires lenders to disclose information in clear, concise terms so that the borrower fully understands the transaction into which she is entering.[22] TILA provides that when a lender brings an action to collect on a debt, a borrower may bring counterclaims for TILA violations to partially or

16. *See infra* Section II.

17. *See infra* Section III.

18. *See infra* Section IV.

19. *See* Thomas J. Rueter, Note, *Mortgage Foreclosure in Pennsylvania*, 85 DICK. L. REV. 275, 275 (1981). Most lenders provide an acceleration clause in the mortgage agreement, which means that the lender has the right to demand the full amount if the borrower defaults. *Id.* at 276. A lender intending to accelerate the mortgage and foreclose would first provide notice of an intent to do so. *See* 41 PA. STAT. AND CONS. STAT. ANN. § 403 (West 2017). The lender would then bring a complaint in state court. *See* PA. R. CIV. P. 1141(a).

20. *See* Rinky S. Parwani, *Advising Your Client in Foreclosure*, 41 STETSON L. REV. 847, 861–63 (2012) (noting that among others, defenses include lack of standing, lack of notice, breach of contract, fraud, and violations of consumer protection statutes).

21. *See id.* at 862–63 ("Ways to challenge the validity of a foreclosure transaction include: challenging broker actions; unfair and deceptive trade practices; challenging violations of the Real Estate Settlement Procedures Act (RESPA), Truth in Lending Act (TILA), or Home Ownership and Equity Protection Act (HOEPA); or nonpayment of credit insurance. The Equal Credit Opportunity Act (ECOA) and Federal Housing Act (FHA) also provide opportunities for challenging foreclosures." (footnotes omitted)).

22. *See* 15 U.S.C. § 1601(a) (2012) (noting that the purpose of the subsection is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices").

fully recoup the amount of debt claimed by the lender.[23] However, Pennsylvania case law interprets TILA so as to exclude recoupment counterclaims in mortgage foreclosure actions.[24] This leaves Pennsylvania borrowers without a powerful recourse in mortgage foreclosure actions.[25]

The following Parts provide an overview of the information necessary to understand the unfair treatment of TILA recoupment claims in Pennsylvania. Specifically, Part II.A provides a summary of the Pennsylvania mortgage foreclosure process, highlighting the state courts' differing classifications of *in rem* and *de terris*. Part II.B details a defendant homeowner's ability to bring counterclaims in a mortgage foreclosure action. Part II.C addresses Pennsylvania's interpretation of recoupment counterclaims under TILA in mortgage foreclosure actions. Part II.D explores similar statutory language under another federal statute, the Fair Debt Collection Practices Act (FDCPA), to help frame the language of TILA. Finally, Part II.E explains the history of deficiency judgments, which allow a lender to bring an additional action when the sale of the property does not fully satisfy the judgment.

A. The Mortgage Foreclosure Process in Pennsylvania

The process of residential mortgage foreclosure varies widely among different states.[26] States are generally divided into judicial and nonjudicial foreclosure jurisdictions.[27] Pennsylvania is among the twenty jurisdictions in which judicial foreclosures are the primary method of foreclosing on properties.[28] And in Pennsylvania, judicial foreclosure is not just the primary method but the only method of foreclosure available.[29] Thus, mortgage

23. *See id.* § 1640(e).

24. *See* N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987) (holding that the *in rem* nature of mortgage foreclosure prevented the bringing of TILA recoupment claims).

25. *See* § 1640(a) (providing for actual damages, statutory damages up to $4,000, and reasonable costs and attorney's fees).

26. *See* Marcia Johnson & Luckett Anthony Johnson, *Defending Foreclosure Actions*, 40 REAL EST. L.J. 439, 450–52 (2012).

27. *See id.*; *see also* Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 627, 634 (2010) (referring to "judicial foreclosure states" and "nonjudicial foreclosure states"); Brian Tackenberg, Note, *Instituting Nonjudicial Foreclosure in Florida: When It Comes to Foreclosure, Florida's Judiciary Should Let Lenders Lead*, 64 FLA. L. REV. 1839, 1844 (2012) (noting that "many state legislatures bought into the judicial foreclosure system and enacted legislation requiring judicial oversight of all foreclosure actions").

28. *See* Johnson & Johnson, *supra* note 26, at 450–51. The other states that primarily or solely use a judicial foreclosure method are Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, South Carolina, and Vermont. *Id.*; *see, e.g.*, 735 ILL. COMP. STAT. ANN. 5 / 15-1106 (West 2017); N.J. STAT. ANN. § 2A:50-56 (West 2017). Nonjudicial foreclosures exercised in other states "involve a public sale of the mortgaged property pursuant to a 'power-of-sale clause' in the mortgage document—a clause that allows the mortgagee to foreclose without judicial authorization or supervision." Henry Rose, *The Due Process Rights of Residential Tenants in Mortgage Foreclosure Cases*, 41 N.M. L. REV. 407, 413–14 (2011).

29. *See* Grant S. Nelson & Gabriel D. Serbulea, *Strategic Defaulters Versus the Federal*

foreclosure is a civil action at law governed by the Pennsylvania Rules of Civil Procedure.[30]

The process for a mortgage foreclosure is as follows. The plaintiff (mortgagee), as holder of the mortgage and note, commences a foreclosure action naming the borrower (mortgagor) as defendant.[31] In a typical scenario, the mortgagee is a bank that holds the mortgage, and the mortgagor is a homeowner who is indebted under the mortgage.[32] The defendant has the ability to counterclaim[33] and to raise defenses at trial.[34] If the court holds that the plaintiff has a right to foreclose, it will determine the amount owed and enter judgment in favor of the plaintiff for that amount.[35] The mortgaged property is then sold at a sheriff's sale in order to satisfy that judgment.[36] A sheriff's sale is a process by which a property is sold to the highest bidder at a public auction.[37] The mortgagor can file a petition to set aside the sheriff's sale due to price inadequacy or an irregularity in the sale, such as lack of notice.[38] However, short of filing a petition, the mortgagor's interest in the property is then terminated by the sale.[39]

Taxpayer: A Brief for the Preemption of State Anti-Deficiency Law for Residential Mortgages, 66 ARK. L. REV. 65, 72 n.40 (2013) (providing an overview of foreclosure methods for all states, and noting that judicial foreclosure is the only method in Pennsylvania).

30. *See* Generation Mortg. Co. v. Nguyen, 138 A.3d 646, 651 (Pa. Super. Ct. 2016) ("Pennsylvania Rules of Civil Procedure 1141–1150 govern mortgage foreclosure actions.").

31. *See* Rueter, *supra* note 19, at 277.

32. *See* Erica Braudy, *Tax a Bank, Save a Home: Judicial, Legislative, and Other Creative Efforts to Prevent Foreclosures in New York*, 17 CUNY L. REV. 309, 326 (2014) (noting that "three of the five largest banks (J.P. Morgan, Bank of America, Wells Fargo) held the most one-to-four family home loans in foreclosure proceedings, with Citigroup holding the fifth most one-to-four family homes in foreclosure proceedings"); *see also* Citizens State Bank of New Castle v. Countrywide Home Loans, Inc., 949 N.E.2d 1195, 1197 (Ind. 2011) (noting that a typical real estate transaction concerns a bank or mortgage company and a homeowner), *superseded by statute*, Act of Mar. 19, 2012, Pub. L. No. 130–2012, 2012 Ind. Acts 2701.

33. PA. R. CIV. P. 1148 ("A defendant may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose.").

34. *See* Johnson & Johnson, *supra* note 26, at 530–43 (noting a variety of defenses and counterclaims available to a defendant in mortgage foreclosure actions); Rueter, *supra* note 19, at 286–87 (summarizing statutory and contract defenses available to defendants in mortgage foreclosure actions).

35. Rueter, *supra* note 19, at 277; *see* PA. R. CIV. P. 3180(a), 3257.

36. Rueter, *supra* note 19, at 277–78; *see, e.g.*, *Overview of the Sheriff Sale Process*, PHILA. SHERIFF'S OFF., http://www.officeofphiladelphiasheriff.com/en/real-estate/how-sheriffs-sales-work/overview-of-the-sheriff-sale-process [perma: http://perma.cc/SQD4-GU9D] (last visited Feb. 18, 2018).

37. *See, e.g.*, First Fed. Sav. Bank of Del. v. CPM Energy Sys. Corp., 619 A.2d 371, 375 (Pa. Super. Ct. 1993) (detailing a conversation between an auctioneer and bidders at a sheriff's sale).

38. Rueter, *supra* note 19, at 278; *see* 22 STEPHANIE A. GIGGETTS, STANDARD PENNSYLVANIA PRACTICE 2D § 121:109, Westlaw (database updated Sept. 2017) (explaining who may petition to set aside a sheriff's sale); *see, e.g.*, Allegheny County v. Golf Resort, Inc., 974 A.2d 1242, 1247–48 (Pa. Commw. Ct. 2009) (finding "irregularities in the sheriff's sale as well as a grossly inadequate sale price" that warranted setting aside the sheriff's sale).

39. Rueter, *supra* note 19, at 278; *see* Peoples Bank v. Dorsey, 683 A.2d 291, 296 (Pa. Super. Ct. 1996) (noting that "[u]ntil one hour before the 'fall of the hammer' the defaulting party may save his

Rule 1141 of the Pennsylvania Rules of Civil Procedure defines a mortgage foreclosure action as an "action to foreclose a mortgage upon any estate, leasehold or interest in land, or upon both personal property and an estate, leasehold or interest in land."[40] However, it specifically excludes an "action to enforce a personal liability."[41] This means that a foreclosure action does not impose any personal liability upon the mortgagor (the borrower) because the judgment is solely against the land.[42] The only purpose of this judgment is to "effect a judicial sale of the mortgaged property."[43] Once the property is sold at a sheriff's sale, the mortgagor's interest in the property is extinguished and the judgment is paid from the proceeds of the sale.[44] While the mortgagor is entitled to any excess amount from the sale over the mortgage debt, most often the mortgagee who brought the suit is the only or highest bidder at the sheriff's sale and bids no more than the amount of mortgage debt owed.[45] In short, this means that a foreclosure action is initiated, the court renders a judgment, the property is sold to satisfy the judgment, and often it is the mortgagee who brought the action who then purchases the property at a rate no higher than the debt owed, which is generally less than fair market value.[46] This is significant because in Pennsylvania a mortgagee may only initiate a deficiency judgment proceeding against a borrower if the mortgagee is the one to purchase the property at a sheriff's sale.[47]

1. *In Rem* Versus *de Terris*

The terms "*in rem*" (against the thing) and "*de terris*" (against the land) are often used interchangeably to describe mortgage foreclosure actions in Pennsylvania; their use indicates that the judgments concern only the land and attach no personal liability.[48] A true *in rem* proceeding is an action directly

or her property," but after that point the court cannot grant relief).

40. PA. R. CIV. P. 1141(a).

41. *Id.*

42. *See* Signal Consumer Disc. Co. v. Pirt, 16 Pa. D. & C.3d 783, 786 (Pa. Ct. Com. Pl. 1980). This means that the judgment in a foreclosure action concerns only the mortgaged property and cannot be imposed directly against the mortgagor or any of his or her other property not named in the action. *See* George B. Fraser, Jr., *Actions in Rem*, 34 CORNELL L.Q. 29, 31 (1948).

43. *Pirt*, 16 Pa. D. & C.3d at 786; *see also* 4 MARY BABB MORRIS, GOODRICH AMRAM 2D § 1141:1, Westlaw (database updated Sept. 2017).

44. Rueter, *supra* note 19, at 278.

45. *Id.*; *see also* Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as* De Facto *Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 870 (1985) (citing a study in which mortgagees purchased about three-quarters of the properties in foreclosure sales).

46. Rueter, *supra* note 19, at 277–78.

47. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8103(a) (West 2017).

48. *See, e.g.*, Reed v. S & T Bank (*In re* Reed), 274 B.R. 155, 158 (Bankr. W.D. Pa. 2002) (referring to a judgment in mortgage foreclosure as *de terris* and then going on to describe the foreclosure action as an *in rem* proceeding). For examples of cases classifying mortgage foreclosures as *in rem*, see *U.S. Bank N.A. v. Mallory*, 982 A.2d 986, 992 n.3 (Pa. Super. Ct. 2009), *Newtown Village Partnership v. Kimmel*, 621 A.2d 1036, 1037 (Pa. Super. Ct. 1993), and *Continental Bank v. Rosen*, 585

against the property itself.[49] As such, many argue that *de terris* is technically the proper designation because the action is not strictly about title to the property, rather the action is about effectuating the sale of the property to satisfy the judgment.[50] The *de terris* distinction is based on the notion that mortgage foreclosures concern the rights of parties named in the action to the property rather than absolute rights of all to the property.[51] Meanwhile, a true *in rem* proceeding would determine the rights to the property against the rest of the world, not just the mortgagor named in the suit.[52] Although Pennsylvania lower courts have often used both terms, the Supreme Court of Pennsylvania has defined a judgment in a mortgage foreclosure as *de terris*, or against the land.[53] Meanwhile, both *in rem* and *de terris* are distinguishable from *in personam* (against the person),[54] which describes a judgment that is personally binding on an individual and all her property, as opposed to a specific piece of her property.[55]

While *in rem* and *de terris* are used interchangeably to set a mortgage foreclosure apart from any type of *in personam* judgment, the distinction between the two is still important when a court bars a remedy based on the assertion that mortgage foreclosure is strictly *in rem*.[56] *De terris* has also been equated to the more commonly known term "*quasi in rem*."[57]

2. *Quasi in Rem*

Other jurisdictions have determined that mortgage foreclosures are more

A.2d 49, 51 (Pa. Super. Ct. 1991). For examples of cases classifying them as *de terris*, see *Meco Realty Co. v. Burns*, 200 A.2d 869, 871 (Pa. 1964), *superseded by statute*, 1976 Pa. Laws 586; *U.S. Bank, N.A. v. Pautenis*, 118 A.3d 386, 394 (Pa. Super. Ct. 2015); and *Signal Consumer Discount Co. v. Babuscio*, 390 A.2d 266, 270 (Pa. Super. Ct. 1978). The slight distinction between the two is that a mortgage foreclosure action does not directly concern the title to the property (*in rem*), but rather concerns whether the property should be sold to satisfy the debt (*de terris*). MORRIS, *supra* note 43.

49. *See* Fraser, *supra* note 42, at 29.

50. *See* MORRIS, *supra* note 43 ("Although a mortgage foreclosure action is often referred to as an action in rem, this designation is not strictly accurate; rather, a foreclosure action does not determine title to property, and might more correctly be described as 'de terris.'"); *see also* Dangler v. Cent. Mortg. Co. (*In re* Dangler), 75 B.R. 931, 935 (Bankr. E.D. Pa. 1987) (distinguishing a judgment against the land from an *in rem* proceeding that determines the rights to the property).

51. *See* 15 KENNETH E. GRAY, WEST'S PENNSYLVANIA PRACTICE SERIES, MORTGAGES § 2:1 (3d ed.), Westlaw (database updated Dec. 2016).

52. *See Dangler*, 75 B.R. at 935 (quoting 3 GOODRICH AMRAM 2D, § 1141:1 (1976)).

53. *See Meco Realty*, 200 A.2d at 871.

54. *See generally* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) (providing an in-depth exploration of the distinctions between *in rem* and *in personam* rights).

55. *Action*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining action *in personam*).

56. *Cf. Dangler*, 75 B.R. at 935. *Dangler* criticized *New York Guardian Mortgage Corp. v. Dietzel*, 524 A.2d 951, 953 (Pa. Super. Ct. 1987) for its assertion that mortgage foreclosures are strictly *in rem*. *Dangler*, 75 B.R. at 935. *Dietzel* held that TILA counterclaims were barred due to the *in rem* nature of mortgage foreclosures. *Dietzel*, 524 A.2d at 953. See also *infra* Part II.C.1 for a detailed explanation of *Dietzel*.

57. *See* GRAY, *supra* note 51. This Comment uses *de terris* and *quasi in rem* interchangeably.

accurately described as *quasi in rem* rather than *in rem*.[58] An action *quasi in rem* is one that names an individual rather than a property as the defendant.[59] However, the action either deals with a particular property or it subjects that property to the discharge of the claims being asserted, which distinguishes it from an *in personam* action.[60]

Illinois is one jurisdiction that recently held that mortgage foreclosures are *quasi in rem*.[61] In 2010, the Illinois Supreme Court, in *ABN AMRO Mortgage Group, Inc. v. McGahan* [62] characterized the modern mortgage foreclosure action as *quasi in rem*, clarifying past inconsistencies within its state.[63] The Illinois court defined a *quasi in rem* proceeding as an *in rem* action that affects only the interests of specific persons in a particular thing.[64]

In coming to this conclusion, the Illinois court relied heavily on an 1886 U.S Supreme Court decision, *Freeman v. Alderson*.[65] In *Freeman*, the Supreme Court stated that "all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff" constitute *quasi in rem* actions.[66] The Illinois court also referred to the *Black's Law Dictionary* definition of *quasi in rem* as an action personally brought against a defendant in which the objective is to deal with a certain property or to "subject the property to the discharge of the claims asserted."[67] While *ABN AMRO* is one of the most recent cases to address this distinction, other jurisdictions also have held that mortgage foreclosures are more correctly categorized as *quasi in rem* rather than *in rem*.[68]

58. *See, e.g.*, ABN AMRO Mortg. Grp., Inc. v. McGahan, 931 N.E.2d 1190, 1196, 1198 (Ill. 2010) (holding that in Illinois, mortgage foreclosures are *quasi in rem* rather than *in rem*); *see also* Fraser, *supra* note 42, at 36 ("Actions for specific performance or foreclosure of a mortgage are usually quasi-in-rem because the vendor or mortgagor are designated persons.").

59. *Action*, BLACK'S LAW DICTIONARY, *supra* note 55.

60. *See id.*

61. *See ABN AMRO*, 931 N.E.2d at 1196, 1198.

62. 931 N.E.2d 1190 (Ill. 2010).

63. *ABN AMRO*, 931 N.E.2d at 1195–96.

64. *Id.* at 1195.

65. *See id.* at 1196 (citing Freeman v. Alderson, 119 U.S. 185, 185–88 (1886)).

66. *Freeman*, 119 U.S. at 187–88.

67. *ABN AMRO*, 931 N.E.2d at 1195 (quoting *Action Quasi in Rem*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

68. *See, e.g.*, Assocs. Home Equity Servs., Inc. v. Troup, 778 A.2d 529, 540 (N.J. Super. Ct. App. Div. 2001) ("[A] foreclosure action is not strictly an *in rem* proceeding. It is a quasi *in rem* procedure . . . to determine not only the right to foreclose, but also the amount due on the mortgage." (citation omitted)); Huntington Mortg. Co. v. Shanker, 634 N.E.2d 641, 648 (Ohio Ct. App. 1993) ("[A] foreclosure action is a *quasi in rem* proceeding and invokes the court's *quasi in rem* jurisdiction."), *appeal dismissed mem.*, 625 N.E.2d 622 (Ohio 1994); Bank of New Glarus v. Swartwood, 725 N.W.2d 944, 956 n.14 (Wis. Ct. App. 2006) ("[A] mortgage-foreclosure action is a quasi proceeding *in rem*, [which] affect[s] not only the title to the res, but likewise, rights in and to it possessed by individuals." (alteration in original) (quoting Syver v. Hahn, 94 N.W.2d 161, 164–65 (Wis. 1959))).

B. Counterclaims in Mortgage Foreclosure Actions

When a lender initiates a mortgage foreclosure action, the borrower is able to bring counterclaims, but only in limited circumstances.[69] Rule 1148 of the Pennsylvania Rules of Civil Procedure allows a defendant to bring a counterclaim when it "arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose."[70] The policy behind Rule 1148 is judicial efficiency; it allows courts to resolve an entire controversy in one action rather than forcing a borrower to pursue separate actions.[71] The Superior Court of Pennsylvania has noted that in permitting a contractual counterclaim, Rule 1148 represents the only departure from the *de terris* nature of mortgage foreclosures.[72]

Pennsylvania courts have narrowly interpreted Rule 1148 to include only counterclaims that are "a part of or incident to the creation of the mortgage itself."[73] This means that any contracts or events that relate to the mortgage, but do not specifically arise out of the mortgage's creation itself, are excluded.[74] The most common example of barred claims involves issues concerning the purchase of the mortgaged property.[75] Fraud in the inducement to purchase the property, for example, is not a valid counterclaim under Rule 1148.[76] Further, any counterclaims concerning the mortgage after its creation are excluded, such as whether a mortgagee had a duty to mitigate damages.[77] Rule 1148 only governs counterclaims in mortgage foreclosure actions; however, a defendant would not be prohibited from raising claims unrelated to the creation of the mortgage itself in a separate new action.[78]

One counterclaim available to defendants is the common law principle of recoupment.[79] Recoupment is an equitable doctrine that allows a defendant to

69. *See* PA. R. CIV. P. 1148.

70. *Id.*

71. MORRIS, *supra* note 43, § 1148:1 (citing Provident Nat'l Bank v. Eckhardt, 12 Pa. D. & C.3d 243, 245 (Pa. Ct. Com. Pl. 1979)).

72. *See* Signal Consumer Disc. Co. v. Babuscio, 390 A.2d 266, 270 (Pa. Super. Ct. 1978). This is because Rule 1148 allows for contractual counterclaims specifically concerning the mortgage origination. *See id.*

73. Fed. Land Bank of Balt. v. Fetner, 410 A.2d 344, 347 (Pa. Super. Ct. 1979).

74. Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa. Super. Ct. 1998) ("Rule 1148 does not permit a counterclaim arising from a contract related to the mortgage, such as a contract for sale of real property.").

75. *See, e.g.*, Chrysler First Bus. Credit Corp. v. Gourniak, 601 A.2d 338, 341 (Pa. Super. Ct. 1992) (finding that counterclaims relating to the purchase agreement of the property were not a "part of or incident to the creation of" the resulting mortgage, and thus were outside the scope of Rule 1148).

76. *See id.* at 341–42 (holding that fraudulent misrepresentation was not a valid counterclaim because it "pertain[ed] to the agreement of sale . . . made prior to the mortgage").

77. *See, e.g.*, First Wis. Tr. Co. v. Strausser, 653 A.2d 688, 695 (Pa. Super. Ct. 1995) (noting that because the counterclaim for a duty to mitigate damages concerned a period after the creation of the mortgage and after the mortgagors were already in default, it was not valid under Rule 1148).

78. *Id.* at 692–93.

79. *See* GIGGETTS, *supra* note 38, § 121:64.

bring a defensive counterclaim calling for a reduction in the amount of damages that the plaintiff may recover.[80] Because recoupment is defensive in nature, it can only be asserted up to the amount of the plaintiff's claim and cannot be used to obtain any affirmative relief.[81] While the recoupment doctrine is generally used in bankruptcy proceedings, Pennsylvania common law allows for its use in mortgage foreclosure actions in limited circumstances.[82]

Recoupment is often used interchangeably with the term "setoff." Nevertheless, setoff, though related to recoupment, is a distinct principle.[83] The right of setoff is a separate type of claim that allows parties to apply their mutual debts together, or "set off" two debts against each other.[84] In other words, if a plaintiff is suing to collect a $50 debt owed by the defendant, the defendant could bring a setoff claim alleging that the plaintiff owed her a $40 debt as well, thus "setting off" all but $10 owed to the plaintiff.[85] Courts may often use the terms setoff and recoupment without differentiation, but recoupment is the type of claim that would be brought under a mortgage foreclosure, not setoff.[86]

C. Recoupment Under the Truth in Lending Act

The Truth in Lending Act was first enacted by Congress in 1968.[87] It originally granted the Board of Governors of the Federal Reserve the right to issue accompanying regulations; however, rulemaking authority was largely reallocated to the Consumer Financial Protection Bureau (CFPB) in 2011.[88] As

80. *See* 6 BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE § 75:10, Westlaw (database updated May 2017); *see also Recoupment*, BLACK'S LAW DICTIONARY, *supra* note 55.

81. *See* 20 AM. JUR. 2D *Counterclaim, Recoupment, Etc.* § 5, Westlaw (database updated Aug. 2017); *see also* Household Consumer Disc. Co. v. Vespaziani, 415 A.2d 689, 694 (Pa. 1980) (finding that recoupment is a defensive claim rather than an affirmative setoff).

82. *See* Pennington v. Wells Fargo Bank, N.A., 947 F. Supp. 2d 529, 536–37 (E.D. Pa. 2013) (noting that while generally, recoupment is considered an "improper defense to a mortgage foreclosure," it is permissible if it directly concerns the procurement of the mortgage (quoting Green Tree Consumer Disc. Co. v. Newton, 909 A.2d 811, 814–15 (Pa. Super. Ct. 2006))). Because Rule 1148 only provides for the narrow window of mortgage creation itself, the Rule does not permit recoupment counterclaims concerning the sale of the property or other related events. *See Green Tree*, 909 A.2d at 814–15.

83. *See* 4 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE 3D § 73:2, Westlaw (database updated July 2017) (noting that "the similar effect of setoff and recoupment claims . . . should not be mistaken for the premises underlying these rights").

84. *See Pennington*, 947 F. Supp. 2d at 534–35.

85. *See id.* at 534 ("The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owed A.'" (quoting Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995))).

86. *See, e.g.*, N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987) (using the language of setoff to refer to a mortgage foreclosure counterclaim). For a detailed explanation of the difference of setoff and recoupment as it applies to TILA, see *Vespaziani*, 415 A.2d at 693–97.

87. *See* Truth in Lending Act, Pub. L. No. 90–321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–67).

88. *See id.* § 105, 82 Stat. 148; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1100A, 124 Stat. 1376, 2107 (2010) (codified as amended at 15 U.S.C. §§ 1601–

such, TILA is currently primarily regulated by the CFPB through Regulation Z.[89]

TILA's primary purpose is to ensure that lenders provide a meaningful disclosure of credit terms to consumers so that consumers can make informed decisions.[90] It also protects consumers from any unfair billing and credit card practices.[91] As a remedial statute, courts generally construe TILA broadly and liberally in favor of the consumer.[92] TILA and Regulation Z require various disclosures based on the form of credit being offered.[93] Examples of disclosures required for mortgages under TILA and Regulation Z include the amount borrowed, the finance charge (the amount in interest and fees), the annual interest rate, the rate of any potential late charges, and various other disclosures, along with accompanying language explaining these rates in clear, easily understandable terms.[94]

If the creditor does not make the required disclosures under TILA, the borrower is entitled to rescind the contract, bring claims for damages, or both.[95] The borrower's right of rescission under TILA expires three years from the date of the initial transaction.[96] Rescission is a very powerful tool for borrowers, but under settled law, it can only be invoked within a strict three-year statute of repose period.[97] Thus, rescission is unavailable to borrowers if the material

67).

89. *See* Regulation Z, 12 C.F.R. § 1026.1 (2017). The Board of Governors of the Federal Reserve System still retains limited rulemaking authority for certain motor vehicle loans and other provisions. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1029 (codified as amended at 12 U.S.C. § 5519).

90. *See* 15 U.S.C. § 1601(a) (2012) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . . ."); *see also* Johnson & Johnson, *supra* note 26, at 454.

91. *See* 15 U.S.C. § 1601(a).

92. *See, e.g.*, Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 390 (3d Cir. 2002) ("Because the TILA is a remedial consumer protection statute, we have held it 'should be construed liberally in favor of the consumer.'" (quoting Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998), *rev'g* 973 F. Supp. 456 (D.N.J. 1997), *rev'd*, 229 F.3d 194 (3d Cir. 2000))).

93. Regulation Z differentiates between open-end credit, such as credit cards and home equity lines of credit, and closed-end credit, such as the traditional mortgages being discussed here, and the Regulation also provides rules for other specific forms of credit. *See* 12 C.F.R. § 226.1.

94. *See id.* § 226.18.

95. *See* 15 U.S.C. §§ 1635(a), 1640(a).

96. *See id.* § 1635(f). The right of rescission stems from a required disclosure of a three-day period immediately after signing the mortgage note that the consumer has the right to back out of the transaction. *See id.* § 1635(a). If the lender fails to disclose that right to the consumer or makes other material violations, the consumer's right to rescind extends to three years. *See id.* § 1635(f).

97. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 411–12, 419 (1998) (holding that the right of rescission could not be extended beyond three years through recoupment). More recently, the Supreme Court further clarified that a borrower need only provide written notice of his or her intention to rescind within three years rather than filing a suit within the three-year window. *See* Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 792–93 (2015). Because the right of rescission ceases to exist after three years, it is a statute of repose rather than a statute of limitations. *See In re* Cmty. Bank of N. Va., 622 F.3d 275, 301 n.18 (3d Cir. 2010).

violations of TILA are not discovered within that time frame.[98] For all practical purposes, these violations often are not discovered until the lender commences a foreclosure and the borrower seeks counsel.[99] This means that when foreclosure actions are brought three years subsequent to the mortgage origination, the borrower does not have the right of rescission as a possible remedy.[100]

A borrower also has the much broader option of bringing claims for damages under TILA for any violation of the statutory requirements.[101] For these claims, a borrower is entitled to actual damages, statutory damages, and, in the case of recoupment, attorney's fees.[102] The borrower must bring a TILA action within one year of the TILA violation.[103]

However, TILA provides for an exception to the one-year statute of limitations.[104] Under TILA, the one-year limitation does not apply when an action to collect a debt is brought more than one year from the violation, and the borrower uses TILA "as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law."[105] This means that a consumer is able to raise TILA violations as defensive recoupment or setoff claims even after the one-year limit for affirmative actions has passed.[106] So, even if a lender brings a mortgage foreclosure several years after the initial mortgage origination, the borrower may still raise a recoupment claim for TILA violations.[107] However, because TILA contains the language, "except as

98. *See Beach*, 523 U.S. at 411–12.

99. *See* Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. REV. 171, 221 (2010) ("[M]ost TILA rescission plaintiffs bring rescission actions defensively in response to foreclosure actions, many of which may have been precipitated by a job loss, separation or divorce, or illness that causes additional irreparable financial strain." (footnote omitted)). Recall that the Supreme Court has declared that the three-year right of rescission is not a statute of limitations but a statute of repose meaning that it cannot be equitably tolled. *See Beach*, 523 U.S. at 412–19; Alexandra P. Everhart Sickler, *The Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan*, 12 RUTGERS J.L. & PUB. POL'Y 463, 478–79 (2015).

100. *See Beach*, 523 U.S. at 419.

101. *See* 15 U.S.C. § 1640(a).

102. *Id.*

103. *See id.* § 1640(e). Borrowers of certain high-interest mortgages that qualify under the Home Ownership and Equity Protection Act may bring claims within three years *See id.* For all other mortgagors, the statute of limitation is one year. *See id.* Unlike the right to rescind, equitable tolling may be applied to actions for damages. *See, e.g.*, Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 505 (3d Cir. 1998), *rev'g* 973 F. Supp. 456 (D.N.J. 1997), *rev'd*, 229 F.3d 194 (3d Cir. 2000). An equitable tolling claim requires a showing of three elements: "(1) that the defendant actively misled the plaintiff; (2) which prevented the plaintiff from recognizing the validity of her claim within the limitations period; and (3) where the plaintiff's ignorance is not attributable to her lack of reasonable due diligence in attempting to uncover the relevant facts." Cetel v. Kirwan Fin. Grp., Inc., 460 F.3d 494, 509 (3d Cir. 2006).

104. *See* § 1640(e).

105. *Id.*

106. *See* Elwin Griffith, *Searching for the Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 329 (2000).

107. *See id.*

otherwise provided by State law," some jurisdictions have denied recoupment counterclaims on this basis.[108] Pennsylvania is one state that did just that.[109]

1. TILA Counterclaims Barred in *New York Guardian Mortgage Corp. v. Dietzel*

In *New York Guardian Mortgage Corp. v. Dietzel*,[110] the Superior Court of Pennsylvania examined whether a recoupment counterclaim for an alleged violation of TILA could be raised in a mortgage foreclosure action.[111] The facts are as follows. New York Guardian Mortgage Corporation (New York Guardian) had initiated a foreclosure action against Albert and Michele Dietzel for their mortgaged home.[112] In a counterclaim, the Dietzels asserted the right of recoupment for an alleged violation of TILA.[113] The trial court granted summary judgment for New York Guardian, the mortgagee, holding that it did not violate TILA, and the Dietzels appealed.[114] Among the issues on appeal was whether the trial court had erred in determining that the mortgagee had not violated TILA.[115]

The appellate court never addressed whether the mortgagee had complied with TILA, but instead focused on whether the counterclaim under TILA was valid.[116] In interpreting the statute, the appellate court focused on the language of § 1640(h) and § 1640(e).[117] The court specifically highlighted the language from § 1640(h), which states that a person cannot take an action to offset an amount that a creditor is liable for "unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court."[118] Further, the court noted the language of § 1640(h) that states that the statute does not bar a consumer from asserting a violation as a "counterclaim to an action to collect amounts owed by the consumer."[119] The court also highlighted the language in § 1640(e), noting that the statute does not bar a person from asserting a violation "in an action to collect the debt" that was

108. *See id.* (quoting 15 U.S.C. § 1640(e)).

109. *See id.* (citing N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987)).

110. 524 A.2d 951 (Pa. Super. Ct. 1987).

111. *Dietzel*, 524 A.2d at 953. The language used in this case is "set-off," but for consistency's sake "recoupment" will be used throughout this Comment.

112. *Id.* at 951–52; *see Philadelphia Courts Civil Docket Access*, CITY OF PHILA., http://fjdefile.phila.gov/efsfjd/zk_fjd_public_qry_00.zp_main_idx?uid=&o= [perma: http://perma.cc/7Q6J-LPX7] (follow "Display Civil Docket Report" hyperlink, then enter "850504299" into the Case ID field) (last visited Feb. 18, 2018).

113. *Dietzel*, 524 A.2d at 953.

114. *Id.* at 952.

115. *Id.*

116. *Id.* at 953.

117. *See id.*

118. *Id.* (emphasis omitted) (quoting 15 U.S.C. § 1640(h) (1984)).

119. *Id.* (emphasis omitted) (quoting 15 U.S.C. § 1640(h)).

brought more than one year after the violation.[120]

The court's reading of this language was that TILA only allows a person to assert a TILA claim "in an action for a money judgment either as a counterclaim to an action to collect money owed by the consumer, or in an original claim brought by the consumer."[121] According to *Dietzel*, a mortgage foreclosure action does not qualify as an action to collect money owed because it is not a personal action against the consumer.[122]

This interpretation, according to the *Dietzel* court, limits counterclaims under TILA only to actions concerning a personal judgment.[123] The court reasoned that because a mortgage foreclosure action is strictly *in rem* and concerns only the judicially enforced sale of the property, it is not a judgment for money damages.[124] A mortgage foreclosure action thus does not fall under the TILA definitions of "an action to collect amounts owed" or "an action to collect the debt."[125] Based on this rationale, the *Dietzel* court concluded that recoupment for an alleged TILA violation could not be asserted as a counterclaim in a foreclosure action.[126]

2. *In re Dangler*'s Criticism of *Dietzel*

Soon after the *Dietzel* decision was issued, the Bankruptcy Court for the Eastern District of Pennsylvania strongly criticized *Dietzel* in *Dangler v. Central Mortgage Co. (In re Dangler)*.[127] In *Dangler*, husband and wife Stephen and Ursula Dangler had signed a mortgage note with Central Mortgage Company (the mortgagee).[128] Eight years later, the Danglers filed for bankruptcy under Chapter 13 of the Bankruptcy Code.[129] The mortgagee then filed a proof of claim, alleging a secured claim for delinquent amounts owed on the mortgage and attorney's fees.[130] The Danglers asserted that the mortgagee violated TILA for failing to adequately disclose "(1) the late charges which could be imposed; (2) the security interests taken in the [Danglers'] property in the transaction; and

120. *Id.* (emphasis omitted) (quoting 15 U.S.C. § 1640(e)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*; *see* 15 U.S.C. § 1640(h), (e) (2012).

126. *Dietzel*, 524 A.2d at 953.

127. 75 B.R. 931, 935–37 (Bankr. E.D. Pa. 1987).

128. *Dangler*, 75 B.R. at 932–33.

129. *Id.* Chapter 13 of the Bankruptcy Code "permits a debtor to deal comprehensively with both unsecured and secured debts. . . . The [repayment] plan sets out . . . how the debtor desires to make payments to various creditors." 13 COLLIER ON BANKRUPTCY ¶ 1300.01, Lexis (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017). Payments to various creditors "are ordinarily made primarily from the debtor's income rather than assets, although the plan may provide for liquidation of property." *Id.*

130. *Dangler*, 75 B.R. at 933. A "proof of claim" is a creditor's statement submitted pursuant to the Bankruptcy Code to show the basis for the debt and the amount owed. *See Proof of Claim*, BLACK'S LAW DICTIONARY, *supra* note 55. A secured claim is a claim held by a creditor with a lien against a debtor's property. *See Claim*, BLACK'S LAW DICTIONARY, *supra* note 55.

(3) the initial due date of payment."[131] Subsequently, the Danglers asserted that the mortgagee's proof of claim should be reduced by $2,000.[132] As a defense, the mortgagee pointed to the recent holding in *Dietzel* and argued that it rendered the TILA claims invalid.[133]

While acknowledging that the circumstances of the two cases differed because *Dietzel* did not concern a bankruptcy, the *Dangler* court sharply criticized the rationale in *Dietzel*.[134] The *Dangler* court ultimately noted that because the case was in federal bankruptcy court, it was not required to follow a state court's differing interpretation of a federal law.[135] Further, *Dangler* concerned a proof of claim litigation in a bankruptcy court rather than a mortgage foreclosure action.[136] This did not stop the *Dangler* court from criticizing *Dietzel* for straying from Pennsylvania precedent—that TILA recoupment counterclaims were valid in mortgage foreclosure actions[137]—as well as for diverging from other jurisdictions that allow TILA counterclaims.[138]

The *Dangler* court noted that the *Dietzel* court made no attempt to distinguish an earlier Pennsylvania Supreme Court case that had allowed recoupment counterclaims.[139] *Dangler* conceded that the Pennsylvania Supreme Court case was an assumpsit action instead of a mortgage foreclosure action.[140] However, *Dangler* reasoned that the use of recoupment claims under each type of action "was equally as broad."[141] Finally, the *Dangler* court argued that the premise on which *Dietzel* relied—that mortgage foreclosure actions were strictly *in rem*—was "faulty."[142] The *Dangler* court instead described mortgage foreclosure actions as *de terris*, noting that a purchaser at a sheriff's sale does not receive any title better than what the mortgagor held at the time the mortgage was executed.[143] Ultimately, the *Dangler* court held that TILA recoupment

131. *Dangler*, 75 B.R. at 933.

132. *Id.* at 932.

133. *See id.*

134. *Id.* at 935–37.

135. *See id.* at 935, 937.

136. *Id.* at 937. This distinction is relevant because TILA's language of "an action to collect [a] debt" aligns exactly to a proof of claim, whereas a mortgage foreclosure involves one extra step of an action to force a sale of the property to collect a debt. *See id.* (quoting 15 U.S.C. § 1640(e), (h) (1984)).

137. *See id.* at 936 (citing Union Banking & Tr. Co. v. Johnston, 28 Pa. D. & C.3d 158, 164–68 (Pa. Ct. Com. Pl. 1983)); *see also* Rueter, *supra* note 19, at 286.

138. *See Dangler*, 75 B.R. at 936 (first citing First State Bank of Crossett v. Phillips, 681 S.W.2d 408 (Ark. Ct. App. 1984); and then Streets v. M.G.I.C. Mortg. Corp., 378 N.E.2d 915, 920 (Ind. Ct. App. 1978)).

139. *Id.* at 936–37 (citing Household Consumer Disc. Co. v. Vespaziani, 415 A.2d 689, 694 (Pa. 1980)).

140. *Id.* at 936. An assumpsit action is a common law claim for damages for the nonperformance of a contract. *See Assumpsit*, BLACK'S LAW DICTIONARY, *supra* note 55.

141. *Dangler*, 75 B.R. at 936; *see also Vespaziani*, 415 A.2d at 697 (holding that a TILA counterclaim constituted a recoupment claim and could be asserted in an assumpsit action).

142. *Dangler*, 75 B.R. at 935.

143. *Id.* (quoting GOODRICH AMRAM 2D, *supra* note 52, § 1141:1).

claims continued to be valid in proof of claim actions.[144] This means that borrowers may bring TILA counterclaims in bankruptcy court, but under *Dietzel* they would continue to be barred from doing so in mortgage foreclosure actions in state court.[145]

3. Aftermath of the *Dietzel* and *Dangler* Decisions

The *Dangler* court was not alone in its criticism of the *Dietzel* decision.[146] As one scholar has argued, the purpose of a foreclosure is to ensure that the mortgagee can "realize on its security."[147] Therefore, it should not matter whether the realization occurred through personal judgment or by sale of the property because either method is an action to collect a debt.[148] Further, a New Jersey intermediate appellate court case, *Associates Home Equity Services, Inc. v. Troup*,[149] criticized a party's attempt to rely on *Dietzel* to argue that a foreclosure is not a collection of debt.[150] The *Troup* court first noted that the *Dangler* court had interpreted the *Dietzel* decision as clearly erroneous.[151] The *Troup* court next held that a foreclosure is more accurately a *quasi in rem* action rather than strictly *in rem*.[152] According to *Troup*, this distinction is due to the fact that a foreclosure action not only determines the mortgagee's right to foreclose on a property, but it also determines the amount due on the mortgage.[153] Therefore, because mortgage foreclosure also concerns a judgment for the amount that the borrower owes to the mortgagee, it is *quasi in rem*.[154]

After the *Dietzel* case, there was some uncertainty concerning the scope of its holding within Pennsylvania.[155] Nearly twenty years later, the Superior Court of Pennsylvania revisited and clarified the issue of recoupment in mortgage foreclosure actions.[156] The trial court in *Green Tree Consumer Discount Co. v. Newton*[157] believed *Dietzel* to be controlling for any recoupment claims in

144. *Id.* at 937.

145. *See id.*

146. *See, e.g.*, Elwin Griffith, *Truth in Lending—Rescission and Disclosure Issues in Closed-End Credit*, 17 NOVA L. REV. 1253, 1321 (1993) (claiming that the *Dietzel* court's failure to recognize a foreclosure as a debt collection action ignored the true purpose of TILA).

147. *Id.*

148. *Id.*

149. 778 A.2d 529 (N.J. Super. Ct. App. Div. 2001).

150. *Troup*, 778 A.2d at 539–40. The New Jersey intermediate appellate court addressed the Pennsylvania *Dietzel* case because Associates Home Equity Services cited to *Dietzel* in arguing that recoupment claims were not valid in foreclosure actions. *Id.*

151. *Id.* at 540.

152. *Id.*

153. *Id.*

154. *See id.*

155. *See, e.g.*, Memorandum of Law of Plaintiff Chase Home Fin. LLC in Support of Its Motion to Dismiss Defendant's Counterclaims at 4–6, Chase Manhattan Mortg. Corp. v. Killian, No. 06-3199, 2006 WL 2444337 (E.D. Pa. July 27, 2006) (arguing that the *Dietzel* court held all counterclaims for money damages in mortgage foreclosure are invalid).

156. *See* Green Tree Consumer Disc. Co. v. Newton, 909 A.2d 811 (Pa. Super. Ct. 2006).

157. 81 Pa. D. & C.4th 209 (Pa. Ct. Com. Pl.), *rev'd*, 909 A.2d 811 (Pa. Super. Ct. 2006).

mortgage foreclosure actions.[158] As such, the trial judge claimed that he was required to follow *Dietzel* and "reluctantly granted" the mortgagee's motion for summary judgment.[159]

On appeal, the Superior Court of Pennsylvania reversed by distinguishing the case from *Dietzel*.[160] The recoupment claim in *Green Tree* was based on fraud in the inducement of a home improvement contract and mortgage, rather than TILA violations.[161] The Superior Court noted that the *Dietzel* holding was limited to the interpretation of TILA's statutory language.[162] Therefore, recoupment was not barred as a counterclaim across the board.[163] Following the *Green Tree* holding, the general understanding of Pennsylvania common law has been that recoupment is a permissible counterclaim in mortgage foreclosure cases.[164] However, recoupment counterclaims still may not be raised for TILA violations.[165]

D. Debt Collecting Under the Fair Debt Collection Practices Act

To further explore the *Dietzel* court's interpretation of "an action to collect [a] debt" under TILA, it is helpful to examine how courts have treated mortgage foreclosures under other statutes concerning actions to collect a debt. One such statute is the federal FDCPA.[166] The purpose of the FDCPA is to stop abusive debt collection practices.[167] However, the FDCPA's definitions of "debt" and "debt collector" do not specifically address mortgages.[168] This has left open the question of whether the FDCPA is applicable to mortgage foreclosure.[169] In a

158. *Green Tree*, 81 Pa. D. & C.4th at 211–12.

159. *Id.* at 214.

160. *See Green Tree*, 909 A.2d at 815–16.

161. *Id.* at 813–14.

162. *Id.* at 815–16.

163. *Id.* at 817–18.

164. *See* GIGGETTS, *supra* note 38, § 121:67.

165. *See id.*

166. *See* Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2012). Another relevant statute is Pennsylvania's counterpart to the FDCPA, the Fair Credit Extension Uniformity Act. 73 PA. STAT. AND CONS. STAT. ANN. § 2270.1 (West 2017). However, in that statute, the legislature specifically exempted mortgages from the definition of "debt," which Congress had not done for either TILA or the FDCPA. *See id.* § 2270.3 ("[T]hat money which is owed or alleged to be owed as a result of a loan secured by a purchase money mortgage on real estate shall not be included within the definition of debt.").

167. 15 U.S.C. § 1692(e) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.").

168. *See* Richard D. Gage, Note, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 FORDHAM L. REV. 283, 291 (2012).

169. *See id.* at 303. *Compare* Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 464 (6th Cir. 2013) (holding that mortgage foreclosure equates to an action to collect a debt under the FDCPA), *with* Warren v. Countrywide Home Loans, Inc., 342 F. App'x 458, 460–61 (11th Cir. 2009) (finding that mortgage foreclosure does not constitute debt collection under the FDCPA).

recent unpublished opinion, *Freedom Mortgage Corp. v. Dennis*,[170] the Superior Court of Pennsylvania held that the mortgagee, Freedom Mortgage, did not qualify as a debt collector under the FDCPA.[171] However, this was not based on the notion that mortgage foreclosure was not a debt collection, but rather that the FDCPA only applies to third-party debt collectors, and Freedom Mortgage was trying to collect a debt on its own behalf.[172] Further, the Third Circuit Court of Appeals found that FDCPA claims were valid in mortgage foreclosure actions.[173]

However, it is worth noting that among federal courts, there is a split concerning whether a mortgage foreclosure is a debt collection.[174] Some courts have found that actions to enforce a security interest do not constitute a debt collection.[175] Conversely, others have noted that the very existence of redemption rights of the mortgagee and deficiency judgments demonstrate that the purpose of foreclosures is to obtain satisfaction of the underlying debt.[176]

E. Deficiency Judgments

Under Pennsylvania's Deficiency Judgment Act, when a judgment creditor purchases the real property of the debtor at an execution proceeding for a price that is less than the debt owed, the creditor can petition the court to fix the fair market value of the property and bring a separate action to collect the remainder.[177] The scope of the Act is limited to situations where the real property is sold for less than the judgment amount and sold directly or indirectly to the judgment creditor.[178] When the creditor petitions the court for a specific fair market value for the property, the borrower is able to answer and argue that the fair market amount is really higher than the value given by the creditor (thus

170. No. 3423 EDA 2015, 2016 WL 5852352 (Pa. Super. Ct. Sept. 30, 2016), *appeal denied*, 169 A.3d 517 (Pa. 2017).

171. *Freedom Mortg.*, 2016 WL 5852352, at *3.

172. *Id.*

173. Kaymark v. Bank of Am., N.A., 783 F.3d 168, 174–79 (3d Cir. 2015) (noting that the FDCPA does not exclude foreclosure actions that fit into the FDCPA's broad definition of debt collection), *cert. denied sub nom.* Udren Law Offices, P.C. v. Kaymark, 136 S. Ct. 794 (2016), *motion to dismiss denied*, Civil Action No. 13-419, 2016 WL 7187840 (W.D. Pa. Dec. 12, 2016), *reconsideration denied*, Civil Action No. 13-419, 2017 WL 1136108 (W.D. Pa. Mar. 27, 2017).

174. *See* 1 RONALD E. MALLEN, LEGAL MALPRACTICE § 10:4, Westlaw (database updated Jan. 2017).

175. *See, e.g.*, Fouche' v. Shapiro & Massey LLP, 575 F. Supp. 2d 776, 783 (S.D. Miss. 2008) (noting that actions to enforce a security interest do not constitute debt collection).

176. *See* Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 461 (6th Cir. 2013) (concluding that mortgage foreclosure constitutes debt collection under the FDCPA). These redemption rights and deficiency judgments exist only because mortgage foreclosure actions involve the collection of a debt. *Id.*

177. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8103(a) (West 2017). The statute defines a "judgment creditor" as "[t]he holder of the judgment which was enforced by the execution proceedings." *Id.* § 8103(g).

178. *See* 13 CHRISTINE M.G. DAVIS, STANDARD PENNSYLVANIA PRACTICE 2D § 75:147, Westlaw (database updated Sept. 2017).

satisfying more of the judgment than the creditor claims).[179] The court may then hold a hearing and set a fair market value.[180] The rationale behind this method of fixing the fair market value of the real property is that the creditor should not be entitled to a windfall by buying the property for less than it is worth and also collecting on the difference between the sale price and the judgment.[181]

The following example illustrates how a deficiency judgment would function in the context of a mortgage foreclosure.[182] First, imagine a lender brings a foreclosure action on a property after the borrower has defaulted.[183] The court then enters a judgment of $100,000 for the remainder due on the mortgage.[184] The property is then put up for sale at a sheriff's sale to satisfy the judgment, and the lender purchases it for $20,000.[185] Next, the lender petitions the court for the fair market value of the property, which is determined to be $80,000.[186] The lender can then bring a new personal action against the borrower for the difference between the judgment ($100,000) and the fair market value of the property ($80,000), which is $20,000.[187] This is the purpose of requiring the lender to petition the court for the fair market value, because otherwise the lender in this example could purchase the property for a sharp discount of $20,000 and then bring a new action for the remaining $80,000 on the judgment, resulting in an unfair windfall to the lender.[188]

Deficiency judgments did not originally extend to *in rem* or *de terris* judgments under Pennsylvania case law.[189] Previously, the petition for the deficiency judgment had to be filed within a personal judgment, making any

179. § 8103(c).

180. *Id.*

181. *See* Harris Ominsky, *Deficiency Judgments in Pennsylvania: The Lender's Gauntlet Revisited*, 30 VILL. L. REV. 1130, 1131 (1985) (comparing the Act to the adage "you can't have your cake and eat it too"); *see also* Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1556–57 (2011) (explaining that some states do not allow deficiency judgments at all, some states allow for full deficiency judgment between the sale price and the debt, and some states like Pennsylvania provide "a middle-ground solution" in which the borrower owes the difference between the fair market value and the outstanding debt).

182. See Wilkinson-Ryan, *supra* note 181, at 1556–57, for another illustration and an explanation of the various approaches states take to deficiency judgments.

183. *See* PA. R. CIV. P. 1147.

184. *See* PA. R. CIV. P. 1149.

185. *See* Wilkinson-Ryan, *supra* note 181, at 1557; *see also* Prentiss Cox, *Foreclosure Reform amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 701 (2008) ("The highest 'bidder' at a foreclosure sale often is the lender.").

186. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8103(a) (West 2017). The sheriff's sale is rarely ever at market price. Cox, *supra* note 185, at 701.

187. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8103(c)(5).

188. *Cf.* Wilkinson-Ryan, *supra* note 181, at 1557 (explaining that states like Pennsylvania "have adopted a middle-ground solution where deficiency judgments are permitted, but borrowers owe only the difference between the outstanding loan and the fair market value of the house, usually a smaller amount than the actual difference between sale price and debt").

189. *See* Harold K. Don, Jr., *Trends in Pennsylvania Civil Practice and Procedure*, 71 PA. B. ASS'N Q. 47, 55–56 (2000) (referring to the "deficiency judgment trap" that required a personal judgment first).

attempt to file a deficiency judgment in a mortgage foreclosure action "void at law."[190] This concept was known as the "deficiency judgment trap."[191] Under the statute, the mortgagee had only six months after the execution of the sale to bring a separate *in personam* proceeding, obtain a judgment, and petition the court to fix the fair market value, which was often unrealistic, especially if contested by the defendant.[192] It was unrealistic because any contestation by the defendant was likely to delay the process beyond the six-month window available to the lender.[193]

In 1976, the Deficiency Judgment Act added language providing that in order to obtain a deficiency judgment the mortgagee must file a petition to fix the fair market value "as a supplementary proceeding in the matter in which the judgment was entered."[194] This was done in an unsuccessful attempt to override the case law stating that a personal judgment must be obtained first in order to file a petition in relation to that judgment.[195]

In 1997, new Pennsylvania Rules of Civil Procedure 3276 through 3291 (concerning deficiency judgments) went into effect to address this issue.[196] Rule 3277 defined "judgment" to include any judgment that is subject to the deficiency judgment provisions of Pennsylvania statutory law and "includes a judgment de terris, a judgment in rem and a judgment in personam."[197] The official note to this definition states that the purpose was to change "the practice under prior case law which did not permit the filing of the proceeding supplementary to a matter in which the judgment obtained was not in personam."[198]

Despite this change, the explanatory comments of Rule 3276 note that "[i]n allowing a deficiency judgment proceeding to be brought supplementary to an

190. *See* First Seneca Bank v. Greenville Distrib. Co., 533 A.2d 157, 161 (Pa. Super. Ct. 1987) (quoting Meco Realty Co. v. Burns, 200 A.2d 869, 871 (Pa. 1964), *superseded by statute*, Act of July 9, 1976, Pub. L. No. 142, 1976 Pa. Laws 586) (noting that because a deficiency judgment is a personal judgment, it cannot be filed in an *in rem* mortgage foreclosure action), *superseded by statute*, Act of Dec. 21, 1998, Pub. L. No. 144, 1998 Pa. Laws 1082.

191. *See* George L. Cass (updated by Anthony P. Tabasso 2012), *Deficiency Judgments*, *in* CONFESSIONS OF JUDGMENT AND DEFICIENCY JUDGMENTS IN PENNSYLVANIA 157, 189 (Pa. Bar Inst. 2012) (explaining that the Pennsylvania Superior Court held in various cases that the ability to bring a deficiency judgment was barred unless a personal judgment was obtained first).

192. *See* DUNAWAY, *supra* note 80, § 75:9.

193. *See id.*

194. *See* Cass, *supra* note 191, at 161 (quoting 42 PA. CONS. STAT. § 8103(a) (1976) (current version at 42 PA. STAT. AND CONS. STAT. ANN. § 8103(a) (West 2017))); *see also* 26 Pa. Bull. 6,069 (Dec. 21, 1996) (stating that the subsequent inclusion of the "de terris, in rem, and in personam" language was intended to implement the part of the Act that provides that the "petition shall be filed as a supplementary proceeding in the matter in which the judgment was entered" (quoting § 8103(a))).

195. *See* Cass, *supra* note 191, at 161–62, 189–90. Despite the change in the statute, courts continued to hold that the petition to fix the fair market value had to be filed through a personal judgment and could not be done in a mortgage foreclosure proceeding. *Id.* at 189.

196. *See id.* at 162; *see also* 26 Pa. Bull. at 6,068–72.

197. 26 Pa. Bull. at 6,069.

198. *Id.*

action *de terris* or *in rem*, the character of the action is not altered."[199] A deficiency judgment proceeding is designed only to fix the fair market value of the property and does not impose any personal liability.[200] Any personal action would have to be pursued by the mortgagee through a new *in personam* action after the value of the property had been set.[201]

The foregoing explanation establishes varying points of view regarding TILA counterclaims in mortgage foreclosures. The above Overview also explores the distinction between *in rem* and *de terris* used in these views, and it provides an examination of statutory language under the Fair Debt Collection Practices Act as well as a comparison to Pennsylvania's Deficiency Judgment Act.

III. DISCUSSION

Pennsylvania courts should allow defendants in mortgage foreclosure actions to bring TILA recoupment counterclaims. Defendants are currently unable to bring TILA recoupment claims, based on the rationale that foreclosure actions are *in rem* and TILA claims apply only to *in personam* actions.[202] However, there is substantial authority supporting the notion that mortgage foreclosure actions are more accurately described as *de terris* or *quasi in rem* rather than *in rem*.[203] Meanwhile, lenders in foreclosure actions are able to petition courts to fix the fair market value of the mortgaged property and bring a new *in personam* action to collect the balance of debt against the debtors under the Deficiency Judgment Act.[204]

The differing treatment of the *in rem* distinction unfairly favors plaintiff lenders over defendant homeowners.[205] This distinction does not bar lenders from ultimately holding borrowers personally liable, the distinction does prohibit borrowers from asserting a valuable defense.[206] In recognizing this inequity, Pennsylvania courts should accept TILA recoupment claims in mortgage foreclosure actions.

The following Parts will argue that mortgage foreclosures are not strictly *in rem*, but rather are more accurately labeled as *de terris* under Pennsylvania law. Further, whether *de terris* or *in rem*, mortgage foreclosure actions still meet the statutory requirements for recoupment counterclaims under TILA. Finally, this Section will argue that it is inequitable for courts to allow lenders a remedy under the Deficiency Judgment Act while barring a remedy available to

199. PA. R. CIV. P. 3276 editors' explanatory comment.

200. *Id.*

201. *See* Don, *supra* note 189, at 55–56.

202. *See* N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987).

203. See *supra* Parts II.A.1 and II.A.2 for a discussion of *in rem*, *de terris*, and *quasi in rem*.

204. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8103(a) (West 2017).

205. See *infra* Part III.C for a discussion of the *in rem*/*in personam* treatments for deficiency judgments versus TILA recoupment claims.

206. See *infra* Part III.C for a discussion concerning the *in rem* distinction or lack thereof between different types of claims.

borrowers through TILA.

A. Mortgage Foreclosure Actions Are Not Strictly in Rem

Pennsylvania courts have interpreted mortgage foreclosure actions as strictly *in rem* proceedings.[207] However, there is substantial authority, both within Pennsylvania and beyond, that mortgage foreclosure actions are not strictly *in rem*.[208] A mortgage foreclosure action in Pennsylvania should be more accurately described as either *de terris* or *quasi in rem*[209] because the purpose of the foreclosure action is to effect the sale of the property in order to satisfy the judgment rather than strictly to obtain title to the property.[210] Not only has the Pennsylvania Supreme Court defined the action as *de terris*,[211] but Pennsylvania statutory language still maintains the usage of *de terris* language under the Deficiency Judgment Act.[212]

The *Dietzel* court barred TILA counterclaims on the basis that "strictly . . . *in rem*" mortgage foreclosures did not meet the definition of debt collection under TILA.[213] However, mortgage foreclosure actions are more accurately described as *de terris* in Pennsylvania, a term more comparable to *quasi in rem*, rather than strictly *in rem*.[214] It is true that a mortgage foreclosure action *in rem* or *de terris* is distinct from a personal action.[215]

However, *Dietzel*'s reliance on the "strictly" *in rem* definition of mortgage foreclosure as "solely to effect a judicial sale of the mortgaged property" ignores the crucial *de terris* distinction.[216] The purpose of the foreclosure action *is* to effect a judicial sale but only *after* a court has entered a judgment for the amount owed on the mortgage.[217] The sale of the property satisfies the debt owed to the plaintiff, which is not determined until judgment is rendered.[218] Because the foreclosure action determines both the amount owed and the right to foreclose on the property, it cannot be strictly *in rem*.[219] A strictly *in rem* proceeding would

207. *See, e.g.*, *Dietzel*, 524 A.2d at 953.

208. See *supra* Parts II.A.1 and II.A.2 for descriptions of *de terris* and *quasi in rem*.

209. *See* Meco Realty Co. v. Burns, 200 A.2d 869, 871 (Pa. 1964) (*de terris*), *superseded by statute*, Act of July 9, 1976, Pub. L. No. 142, 1976 Pa. Laws 586; ABN AMRO Mortg. Grp., Inc. v. McGahan, 931 N.E.2d 1190, 1196 (Ill. 2010) (*quasi in rem*).

210. *See* MORRIS, *supra* note 43.

211. *Meco Realty*, 200 A.2d at 871.

212. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8103(g) (West 2017) (defining a judgment under the Deficiency Judgment Act as *in personam*, *de terris*, or *in rem*).

213. N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987). See *supra* Part II.C.1 for a discussion of *Dietzel*.

214. See *supra* Parts II.A.1 and II.A.2 for a discussion of *in rem*, *de terris*, and *quasi in rem*.

215. *See* PA. R. CIV. P. 1141 (defining "action" as including an action to foreclose a mortgage on an estate, leasehold, or land interest, but excluding an action to enforce personal liability).

216. *See Dietzel*, 524 A.2d at 953.

217. See *supra* Part II.A for an analysis of the mortgage foreclosure process in Pennsylvania.

218. See *supra* Part II.A for an explanation of the mortgage foreclosure and sheriff's sale process in Pennsylvania.

219. See *supra* Part II.A.1 for a discussion on the distinction between *in rem* and *de terris*.

only concern title to the property, not a judgment for debt owed to the plaintiff.[220] *De terris* more accurately combines the amount that the borrower owes to the plaintiff with the right to foreclose in order to collect on that amount.[221] Once this *in rem*/*de terris* distinction is made, the language within TILA allowing for recoupment claims more accurately reflects the true nature of mortgage foreclosure actions.[222]

When viewing a mortgage foreclosure through the lens of a *de terris* action, it becomes more broadly understood as an action to collect a debt through the sale of the mortgaged property. TILA uses the exact language of "an action to collect the debt" in allowing for recoupment or setoff counterclaims.[223] The *Dietzel* court held that as an *in rem* action, a mortgage foreclosure could not be an action to collect a debt;[224] however, as a *de terris* action, a mortgage foreclosure is just that—a debt collection through the sale of a mortgaged property.[225] Because a mortgage foreclosure *is* in fact an action to collect a debt owed, it clearly falls within the definition of the TILA statute.[226] As such, Pennsylvania courts should allow recoupment counterclaims for TILA violations in mortgage foreclosure actions.

B. Whether in Rem *or* de Terris*, Mortgage Foreclosures Meet the Definition of Debt Collecting Under TILA*

The holding of the *Dietzel* court, that recoupment counterclaims in mortgage foreclosures do not qualify under the language of TILA, is an incorrect interpretation of the Act.[227] The sections of TILA that concern recoupment claims use broad language such as "an action to collect the debt" and "an action to collect amounts owed by the consumer."[228] Unlike the FDCPA, which specifically defines terms like "debt" and "debt collector,"[229] TILA provides for no such definitions.[230] Meanwhile, because TILA is a remedial statute by nature, courts should interpret it liberally in favor of consumers.[231] The New Jersey appellate court did just that in *Troup* when it noted that in complying with the

220. See *supra* Part II.A.1 for an analysis of *in rem* actions.

221. See *supra* Part II.A.1 for an explanation of *de terris* actions.

222. *See* 15 U.S.C. § 1640(e) (2012) ("This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action . . . .").

223. *Id.*

224. N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 953 (Pa. Super. Ct. 1987).

225. See *supra* Part II.A.1 for a discussion of the distinction between *in rem* and *de terris*.

226. *See* 15 U.S.C. § 1640(e).

227. See *supra* Part II.C.1 for a discussion of *Dietzel*.

228. *See* 15 U.S.C. §§ 1640(e), (h). See *supra* Part II.C for a review of recoupment under TILA.

229. *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5)–(6).

230. *See* Truth in Lending Act, 15 U.S.C. § 1602. Note that while "debt" is used in various definitions, it is never defined itself.

231. *See* Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998) ("TILA is a remedial statute and should be construed liberally in favor of the consumer."), *rev'g* 973 F. Supp. 456 (D.N.J. 1997), *rev'd*, 229 F.3d 194 (3d Cir. 2000).

remedial nature of TILA and other consumer protection statutes, recoupment claims should not be barred just because they are brought within mortgage foreclosure proceedings.[232] Because TILA provides such broad language, Pennsylvania courts should find that the language in TILA encompasses mortgage foreclosures in recoupment claims just as various other jurisdictions have done.[233]

Furthermore, Pennsylvania courts and the Third Circuit Court of Appeals have both construed mortgage foreclosure to fall under the purview of the FDCPA as long as the mortgagee meets the definition of a "debt collector."[234] It is true that other jurisdictions have found that mortgage foreclosures do not fall within the FDCPA for reasons similar to *Dietzel*, but that rationale ignores the purpose of legislation like the FDCPA and TILA.[235] Both acts are consumer protection acts, and as such are to be construed liberally in favor of the consumer.[236] While the statutory language clearly varies among the different federal and state laws, it is counterproductive to the purpose of consumer protection statutes that Pennsylvania courts would allow claims under the FDCPA that concern mortgage foreclosure as a form of debt collection, but prohibit recoupment counterclaims under TILA. The idea that the supposed *in rem* quality of the foreclosure is not "an action to collect [a] debt" or "amounts owed"[237] defies the policies underlying these remedial statutes that are supposed to protect the consumers from lender violations.

C. Mortgagees Have Protections from the in Rem *Distinction, While Mortgagors Lack Protections Due to the* in Rem *Distinction*

Even if mortgage foreclosure actions were truly *in rem* in Pennsylvania, equity and fairness between the mortgagee and mortgagor demand that courts allow mortgagors to bring recoupment counterclaims for TILA violations. Under the Deficiency Judgment Act, mortgagees essentially have the best of both worlds.[238] If the sale price of the mortgaged property is not enough to satisfy the judgment, the mortgagee can petition the court to fix the fair market value and then bring a separate *in personam* action against the mortgagor for the remainder of the debt.[239] Thus, the *in rem*/*in personam* distinction does not bar a

232. Assocs. Home Equity Servs., Inc. v. Troup, 778 A.2d 529, 540 (N.J. Super. Ct. App. Div. 2001) ("In our view, it would be fundamentally unfair and contrary to the remedial goals expressed by these statutes to preclude the recoupment remedy simply because it is invoked in a foreclosure proceeding.").

233. See *supra* Part II.C.3 for an explanation of the treatment of recoupment counterclaims under TILA in Pennsylvania.

234. See *supra* Part II.D for an explanation of debt as defined by the FDCPA.

235. See *supra* Part II.D for a discussion of which jurisdictions have determined that mortgage foreclosure is classified as a debt collection under the FDCPA.

236. *See* Jensen v. Pressler & Pressler, 791 F.3d 413, 421 (3d Cir. 2015) (FDCPA); Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 390 (3d Cir. 2002) (TILA).

237. 15 U.S.C. § 1640(e), (h) (2012).

238. See *supra* Part II.E for a discussion of the history of deficiency judgments in Pennsylvania.

239. See *supra* Part II.E for an explanation of the process of deficiency judgments.

mortgagee from fully collecting on the judgment.[240] Meanwhile, that very same distinction bars a mortgagor from bringing a recoupment counterclaim for TILA violations.[241]

At the time *Dietzel* was decided, this inequity essentially did not exist. *Dietzel* was decided in 1987,[242] while the Pennsylvania Rules of Civil Procedure concerning deficiency judgments were not enacted until 1997.[243] Prior to the enactment of the Rules, deficiency judgments could not be brought within mortgage foreclosure actions under the rationale that foreclosures are not *in personam* actions.[244] The *in rem* classification given by courts effectively barred mortgagees from filing for a deficiency judgment because lenders had to bring a separate personal action before they could petition the court, and this realistically could not be done within the statutory six-month timeframe.[245] Meanwhile, the same *in rem* classification stopped mortgagors from bringing recoupment counterclaims for TILA violations.[246] So, following *Dietzel*, both mortgagees and mortgagors were effectively barred from certain forms of relief due to the distinction between *in rem*, *de terris*, and *in personam* actions.

The balance shifted with the addition of the new Pennsylvania Rules of Civil Procedure.[247] The new Rules superseded prior common law by specifically defining deficiency judgments to include actions *in rem*, *de terris*, or *in personam*.[248] Following this change, a mortgagee now has the right to petition the court for fair market value of the property within the foreclosure proceeding *and* bring a separate personal judgment against the mortgagor.[249] This means that the supposed "*in rem*" nature of the mortgage foreclosure action does not stop a lender from bringing a subsequent personal liability action against the mortgagor.[250]

If the distinction between *in rem* and *in personam* has been removed from the Deficiency Judgment Act, Pennsylvania courts should remove that same distinction from their interpretation of TILA recoupment claims. It is true that the Rules of Civil Procedure state that the *de terris* or *in rem* nature of the mortgage foreclosure is not altered by allowing a deficiency judgment in those

240. See *supra* Part II.E for an explanation of the *in rem*/*in personam* distinctions in the context of deficiency judgments.

241. See *supra* Part II.C.1 for a discussion of *Dietzel*, which barred TILA recoupment claims in mortgage foreclosure proceedings.

242. N.Y. Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951 (Pa. Super. Ct. 1987).

243. See *supra* Part II.E for the history of the Deficiency Judgment Act.

244. See *supra* Part II.E for a discussion of the Deficiency Judgment Act.

245. See *supra* Part II.E for a discussion of the deficiency judgment trap.

246. See *supra* Part II.C for an explanation of TILA recoupment claims barred due to the *in rem* nature of mortgage foreclosure.

247. *See* PA. R. CIV. P. 3276–91.

248. See *supra* Part II.E for a discussion of the history of the Deficiency Judgment Act in Pennsylvania.

249. See *supra* Part II.E for a discussion of the Deficiency Judgment Act.

250. See *supra* Part II.E for a discussion of Rule 3276's impact on deficiency judgment actions.

actions because the mortgagee still has to bring a new personal action.[251] Furthermore, it is also the case that a mortgagor may bring a separate new action against a mortgagee for TILA violations.[252] However, in practice, mortgagors often are not aware of TILA violations until the mortgagees have initiated foreclosure prompting the mortgagors to hire an attorney.[253] The statute of limitations on TILA claims is only one year for new actions.[254] Therefore, a mortgagor would have to obtain a mortgage, default on payment, and receive notice of foreclosure all within the first year in order to bring a separate action, which is an unlikely timeframe. In effect, this means that the only way to bring TILA damage claims is through a recoupment counterclaim in the foreclosure action, when the one-year limitation is waived.[255]

As a counterclaim, a TILA violation would be very effective for Pennsylvania homeowners in foreclosure. Rule 1148 and court interpretation already limit counterclaims to those arising out of the origination of the mortgage.[256] This excludes any claims concerning the purchase of the property, the servicing of the mortgage, and countless other related claims.[257] Because TILA is primarily a disclosure statute, most violations occur at the time of the signing of the mortgage and concern disclosure within or attached to the mortgage.[258] Therefore, TILA recoupment claims provide a perfect example of counterclaims that satisfy Rule 1148 because they would stem from the origination of the mortgage itself. Pennsylvania courts should honor the consumer protection purpose behind TILA by allowing consumers to access the powerful tool of TILA recoupment claims.

IV. CONCLUSION

Homeowners facing mortgage foreclosure should have the ability to bring counterclaims. When a lender has violated consumer protection laws, and then attempts to foreclose, the homeowner deserves the chance to raise those violations in the form of recoupment counterclaims. The statutory language in TILA clearly permits recoupment counterclaims in mortgage foreclosures, and Pennsylvania courts should as well. Mortgage foreclosures are not strictly *in rem*—there is substantial authority supporting the notion that mortgage

251. PA. R. CIV. P. 3276.

252. See *supra* notes 69–78 and accompanying text for an explanation of a borrower's right to bring counterclaims under Rule 1148.

253. *See* Sulaiman & Edelman, *supra* note 5 (explaining that in seeing a particular client, the "first step was to set up a defense to foreclosure; and after examining the client's document file, [they] found that there was fraud under TILA").

254. See *supra* notes 87–109 and accompanying text for a discussion of TILA claims. Recall that this discussion focuses on TILA claims for damages, not the separate three-year rescission right.

255. See *supra* Part II.C for an explanation of recoupment claims under TILA and the one-year statute of limitations for affirmative claims.

256. See *supra* Part II.B for a discussion of the limitations of counterclaims under Rule 1148.

257. See *supra* Part II.B for a discussion of the various types of restricted counterclaims under Rule 1148.

258. See *supra* Part II.C for an explanation of TILA as a disclosure statute.

foreclosure actions are more accurately described as *de terris* or *quasi in rem*. Even so, by allowing for this *in rem* distinction to bar TILA recoupment claims, while ensuring that the same *in rem* distinction does not prevent lenders from filing for deficiency judgments, Pennsylvania has created an inequitable situation for homeowners. This could be easily remedied if the courts overturn *Dietzel* and permit TILA recoupment counterclaims in mortgage foreclosure actions.