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Kathleen M. Magone

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CASENOTES

FIRST STATE BANK v. CHUNKAPURA: NEW LIMITATIONS ON TRUST INDENTURES

Kathleen M. Magone

I. INTRODUCTION

Commercial lenders loan money to the people of this state in order to receive a return on that investment. Commonly, lenders receive real estate as collateral. Examples of collateral instruments include mortgages¹ and trust indentures.² Debtors enter into loans with the expectation that they will repay the loans fully in a timely fashion. When this expectation fails, lenders hope to realize a return on their investment through foreclosure on the collateral.

When a Montana debtor defaults under a trust indenture, the lender's options statutorily include advertisement and sale of the real estate by the trustee or judicial foreclosure upon the mortgage.³ Under a judicial foreclosure of a mortgage, the debtor receives any proceeds of the foreclosure sale exceeding the amount due the lender and the costs of the sale, thus restoring a portion of the debtor's equity.⁴ Frequently, however, the sale does not gener-

1. See MONT. CODE ANN. §§ 71-1-201 to -235 (1987).

2. Also known as "trust deeds" or "deeds of trust." See MONT. CODE ANN. §§ 71-1-304 to -321 (1987).

3. MONT. CODE ANN. § 71-1-304(3) (1987):

A trust indenture executed in conformity with this part may be foreclosed by advertisement and sale in the manner hereinafter provided or, at the option of the beneficiary, by judicial procedure as provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust indenture.

Another form of financing arrangement common in Montana, the purchase money mortgage, does not allow the lender to seek a deficiency. See MONT. CODE ANN. § 71-1-232 (1987). This note contains no discussion of purchase money mortgage agreements.

4. MONT. CODE ANN. § 71-1-222 (1987):

Proceedings in foreclosure suits. (1) There is but one action for the recovery of debt or the enforcement of any right secured by mortgage upon real estate, which action must be in accordance with the provisions of this part. In such action the court may, by its judgment, direct:

(a) a sale of the encumbered property (or so much thereof as may be necessary);

(b) the application of the proceeds of the sale; and

ate enough revenue to make even the lender whole.⁵ In this situation, the debtor loses both his real estate and any equity he may have in the property. Further, the lender may attempt to recover a personal judgment against the debtor for the deficiency.⁶ With a deficiency judgment in hand, the lender may execute on other real estate of the debtor.⁷

This note examines *First State Bank v. Chunkapura*⁸ and its effect on statutorily established trust indentures and resultant deficiency judgments in Montana. Montana historically has statutorily allowed deficiency judgments to lenders for defaults following judicial foreclosure on most mortgages and, until recently, trust indentures. The Montana Supreme Court's decision in *Chunkapura* has effectively changed property law in this state with respect to such foreclosures.

II. BACKGROUND

Montana traditionally acted as a "one-action" foreclosure state⁹ until the enactment of the Small Tract Financing Act (STFA)¹⁰ in 1963. Under the one-action rule, if a debtor defaults, the creditor can rely only on judicial foreclosure. The creditor also

(c) the payment of the costs of the court, the expenses of the sale, and the amount due the plaintiff.

(2) If it appears from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases on which execution may be issued.

(3) No person holding a conveyance from or under the mortgagor of the property mortgaged or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action. The judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

See also MONT. CODE ANN. § 71-1-225 (1987):

Surplus money from sale. If there be surplus money remaining after the payment of the amount due on the mortgage, lien, or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it and in the meantime may direct it to be deposited in court.

5. Montana real estate prices have been significantly lower in the past decade. For a discussion of factors generally causing low sale prices at foreclosure sales, see Platt, *Deficiency Judgments in Oregon Loans Secured by Land: Growing Disparity Among Functional Equivalents*, 23 WILLAMETTE L. REV. 37, 40 (1987).

6. MONT. CODE ANN. § 71-1-222(2) (1987).

7. MONT. CODE ANN. § 71-1-222(2) (1987).

8. ___ Mont. ___, 734 P.2d 1203 (1987).

9. MONT. REV. CODE § 93-6001 (1947) (now MONT. CODE ANN. § 71-1-222(1) (1987)).

10. MONT. CODE ANN. §§ 71-1-301 to -319 (1987) (Small Tract Financing Act of Montana).

may request a deficiency judgment against the debtor.¹¹ All state legislatures adopting the one-action theory employed a dual rationale to support this theory: to limit the related claims against the debtor to one action, and to force the lender to execute upon the mortgaged real estate before seeking other property of the debtor.¹² After judicial foreclosure, the debtor enjoys a one-year right of redemption and may continue to live upon the property for that period of time.¹³ If the debt exceeds the sale price, the lender may then receive the right to a deficiency judgment against the debtor for the difference between the outstanding debt and the actual sale price, less costs.¹⁴

The Montana Legislature enacted the STFA in 1963.¹⁵ Under the STFA, lenders lost their rights to deficiency judgments when the trustee foreclosed non-judicially.¹⁶ In return, they acquired nearly immediate access to the property securing the loan. Under non-judicial trustee foreclosure, debtors lost their one-year right of redemption but no longer needed fear a personal deficiency judgment. The STFA applies to transactions involving property up to fifteen acres in size¹⁷ and makes trust indentures available to secure loans. Under this proceeding, a third person/private trustee holds the title to the real estate until the debtor has entirely paid the lender. Statutorily, the trust indenture is generally considered a mortgage and thus subject to all mortgage law.¹⁸ In the event of a default, the trustee may foreclose nonjudicially and sell the property, thus avoiding the costs and time involved in a judicial foreclosure.¹⁹ The lender choosing this option may not seek a deficiency judgment; similarly, the debtor has no right of redemption.²⁰ Language in the STFA also refers to the lender's al-

11. G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* 598-600 (1985).

12. *Id.*

13. MONT. CODE ANN. §§ 25-13-802, 71-1-228, -229 (1987).

14. MONT. CODE ANN. § 71-1-222 (1987).

15. MONT. CODE ANN. §§ 71-1-301 to -319 (1987).

16. *Chunkapura*, ___ Mont. at ___, 734 P.2d at 1204.

17. Originally the STFA covered property up to three acres (MONT. CODE ANN. § 71-1-302 (1963)); this was amended in 1974 to fifteen acres (MONT. CODE ANN. § 71-1-302 (1974)).

18. MONT. CODE ANN. § 71-1-305 (1987) states:

Trust indenture considered to be mortgage on real property. A trust indenture is deemed a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with the provisions of this part, in which event the provisions of this part shall control. For the purpose of applying the mortgage laws, the grantor in a trust indenture is deemed the mortgagor and the beneficiary is deemed the mortgagee.

19. MONT. CODE ANN. § 71-1-313 (1987).

20. MONT. CODE ANN. §§ 71-1-317 to -319 (1987).

ternative option to utilize judicial foreclosure and sale,²¹ thus treating the trust indenture as a mortgage under the Montana statutes.²²

As a result of the enactment of the STFA, Montana's institutional lenders probably have utilized trust indentures more than any other mortgage instrument.²³ Lenders, employing the new option primarily in residential situations, have nearly immediate access to the real estate following foreclosure by the trustee. Thus, the lenders need not wait a year for assets that may have become greatly devalued through the actions of potentially bitter or destructive debtors or other forces. The debtors benefit because no deficiency judgments can result against them personally. However, under the STFA the lenders still had two apparent choices: nonjudicial foreclosure by the trustee, or judicial foreclosure under the statutory mortgage procedure, including a possible deficiency judgment and the debtors' right of redemption.²⁴

Chunkapura was the first case interpreting the lender's statutory option to choose between non-judicial foreclosure by the trustee or judicial foreclosure as provided for mortgages. The debtor in that case challenged the commonly held assumption that a lender could statutorily foreclose under mortgage procedures and receive a deficiency judgment against the debtor. Because of the widespread use of trust indentures in Montana for both commercial and residential loans, the majority's decision in *Chunkapura* carries potentially great weight. Additionally, the decision provides ammunition for the constant criticism of judicial social legislation.

A. *First State Bank v. Chunkapura*

1. *Facts and Procedure*

The Chunkapuras entered into a loan, for which a trust indenture was executed to evidence the collateral arrangement, with First State Bank of Forsyth in 1980, and subsequently defaulted in 1986.²⁵ The bank sought judicial foreclosure and a deficiency judgment.²⁶ The parties agreed on a judicial foreclosure, with the issue of the deficiency judgment to be decided later.²⁷ After the sale following the judicial foreclosure, the bank contended that under sec-

21. MONT. CODE ANN. § 71-1-304(3) (1987).

22. MONT. CODE ANN. § 71-1-305 (1987).

23. *Chunkapura*, ___ Mont. at ___, 734 P.2d at 1205.

24. MONT. CODE ANN. § 71-1-304(3) (1987).

25. *Chunkapura*, ___ Mont. at ___, 734 P.2d at 1203-04.

26. *Id.* at 1204.

27. *Id.*

tion 71-1-304(3) of the Montana Code Annotated, it had the option of choosing between nonjudicial sale by the trustee (with no deficiency judgment and no right of redemption) and judicial foreclosure as a mortgage under the provisions of section 71-1-222 (with a resulting deficiency judgment and one-year right of redemption).²⁸ The Chunkapuras, conversely, believed that under the STFA no deficiency judgment could be allowed, no matter which option the lender selected.²⁹ At the close of the trial in district court, Judge Sande decided that no deficiency judgment would be awarded to the bank.³⁰ From that decision, the plaintiff appealed.

2. *The Decision*

A majority of the Montana Supreme Court affirmed the lower court's decision, holding that language of the STFA allowed no deficiency judgments under a trust indenture, whether sold by the trustee or foreclosed judicially as a mortgage.³¹ Therefore, no deficiency judgment or right of redemption would ever result. Upon rehearing, the majority limited the decision to apply only to trust indentures on occupied, single-family residential property.³²

3. *The Court's Analysis*

The *Chunkapura* decision stated that the actual remedies following judicial foreclosure of a trust indenture were not clear, and so determined that the lack of clarity required judicial interpretation.³³ Following the direction suggested by the appellate briefs, the decision examined the existence of deficiency judgments in eight western states and related limitations on deficiency judgments.³⁴

Five of those states allow deficiency judgments following judicial foreclosure but provide statutorily for determination of the fair market value of the property when evaluating the amount of the deficiency judgment. Under this approach, the amount of the deficiency judgment is limited to the difference between the outstanding debt and the fair market value of the property, regardless of a lower price received at the judicial foreclosure sale.³⁵ Similarly, in

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at ____, 734 P.2d at 1208.

32. *Id.* at ____, 734 P.2d at 1211.

33. *Id.* at ____, 734 P.2d at 1206.

34. *Id.* at ____, 734 P.2d at 1206-08.

35. *Id.* at ____, 734 P.2d at 1207.

Washington, the lender may request a deficiency judgment following judicial foreclosure, but legislation allows the court to establish an "upset" price based on fair market value.³⁶ If the foreclosure sale price is less than the upset price, the upset price will be credited toward the debtor to diminish the deficiency judgment against him.³⁷

The two remaining states surveyed by the court, Oregon and Alaska, fall into the same category as Montana in that none of the three has statutory fair market value or upset provisions limiting deficiency judgments following judicial foreclosure sales. Oregon statutes distinguish between commercial and non-commercial trust indentures and allow deficiency judgments following judicial foreclosures of only commercial trust indentures.³⁸ Alaska statutes and case law allow deficiency judgments following judicial foreclosure of any trust indenture without any limitations.³⁹ Montana's statutes contain no reference to fair market value in relation to deficiency judgments.⁴⁰

Thus the majority concluded that statutory fair market value or upset provisions protect the debtor in most states permitting deficiency judgments following judicial foreclosures.⁴¹ The court characterized this lack of debtor protection in Montana as the crux of the problem in the *Chunkapura* case.⁴² The court considered that the Chunkapuras purchased the property during an inflationary period, and that the value of property in Montana has depreciated considerably.⁴³ As the bank was the only bidder at the foreclosure sale, the decision stated that the actual sale price of the property might have been less than its fair market value.⁴⁴ Under this analysis, the lender would receive a much larger deficiency judgment against the debtor (the difference between the actual debt and the sale price) than would be allowed in states with fair market value or upset statutes. The court stated that the one-year right of possession allotted to the Chunkapuras following the judicial foreclosure sale had some value, but found the actual right of redemption itself without value.⁴⁵

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at ____, 734 P.2d at 1208.

40. *Id.*

41. *Id.*

42. *Id.* at ____, 734 P.2d at 1208.

43. *Id.*

44. *Id.*

45. *Id.*

The court reasoned that if the Chunkapuras redeemed their property within the statutorily allowed year, the lender could utilize its deficiency judgment against that newly redeemed land.⁴⁶ The debtors would again be liable for the difference between the original inflated price and the price obtained at the judicial foreclosure sale, potentially requiring sale of the property once again.⁴⁷ The majority concluded that the legislature could not have intended this result.⁴⁸ Under the court's analysis of the legislature's intent, the STFA acted as a "quid pro quo" arrangement, where the lender utilizing a trust indenture automatically lost any right to a deficiency judgment in return for earlier access to the property, and the debtor automatically lost his one-year right to redemption in return for complete relief from potential deficiency judgments.⁴⁹

The majority concluded that if the STFA allowed the lender a choice between nonjudicial foreclosure by the trustee and traditional foreclosure of the trust indenture as a mortgage, the result in this situation would be inequitable and contrary to the intent of the legislature.⁵⁰ Therefore, in order to prevent an unfair result, the decision endorsed Judge Sande's holding and confirmed that deficiency judgments would not be allowed under trust indentures in the STFA, whether the property was sold by the trustee or following judicial foreclosure.⁵¹

4. *The Dissent*

Justice Weber, joined by Justice Gulbrandson, strongly disagreed with the majority's holding.⁵² Justice Weber pointed out that the clear and unambiguous language of the STFA made the intent of the legislature obvious and that no judicial interpretation was necessary.⁵³ He next stated that, although legislative modification to include a provision for fair market value would be timely, the Montana Supreme Court should apply the statutes only as they currently exist, not attempt to legislate in the courtroom.⁵⁴

Continuing his dissent, Justice Weber commented that the majority was, in effect, modifying a contract, thereby eliminating a

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at ____, 734 P.2d at 1209-10.

53. *Id.* at ____, 734 P.2d at 1209.

54. *Id.* at ____, 734 P.2d at 1210.

remedy for one party that was a condition in existence when the contract was made.⁵⁵ He also pointed out that the debtors had promised to pay all of the money borrowed; with the majority's decision in effect, mortgagors would have to pay only if the fair market value of the property exceeded the debt.⁵⁶ Justice Weber further stated that the majority's holding constituted an unjust taking of a property right from the lender.⁵⁷ He concluded by urging the majority to leave legislation out of the courtroom and enforce the clear and obvious meaning of the statute.⁵⁸

5. *Applications and Implications*

As Justice Weber pointed out in the dissent, a court's first step in determining legislative intent is to rely on the clear and unambiguous language of the legislation.⁵⁹ When that language is plain and precise, the court should go no further and should do no interpretation at all. Montana case law sets up a clear precedent for courts to follow when analyzing statutes. In one decision, the court concisely stated the rules of statutory construction long adhered to by the court⁶⁰:

In construing a statute, the intent of the legislature is controlling. Such intention must first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further and apply any other means of interpretation. Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the Court to construe. The function of the Court is simply to ascertain and declare what in terms or in substance is contained in the statute and not insert what is omitted.⁶¹

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at ____, 734 P.2d at 1209.

60. *Security Bank & Trust Co. v. Connors*, 170 Mont. 59, 550 P.2d 1313 (1976) (citing *Dunphy v. Anaconda Co.*, 151 Mont. 76, 438 P.2d 660 (1968) and cases cited therein and citing MONT. REV. CODE §§ 93-401-15 to -16 (1947)). See also MONT. CODE ANN. § 1-2-101 (1987):

Role of the judge—preference to construction giving each provision meaning. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

61. *Connors*, 170 Mont. at 66-67, 550 P.2d at 1317.

The Montana Supreme Court has reinforced this formula repeatedly.⁶² Initially, then, the court must examine the words of the statute for their plain meaning. If the statutory language is clear, the court need proceed no further in its analysis and application of the legislature's intent.

When viewed closely, the STFA contains no ambiguity. Rather, its language and meaning, when read as a whole, are clear and plain. Section 71-1-304(3) of the Montana Code Annotated provides the lender with an obvious choice: (1) a nonjudicial foreclosure by the trustee with no deficiency judgment or right of redemption or (2) a judicial foreclosure as a mortgage with a resultant deficiency judgment and right of redemption. It states: "A trust indenture executed in conformity with this part may be foreclosed by advertisement and sale in the manner hereinafter provided or, at the option of the beneficiary, by judicial procedure as provided by law for the foreclosure of mortgages on real property."⁶³ Applying logical grammatical analysis⁶⁴ to the statute, a reader finds two options for the lender set apart by the conjunction "or."⁶⁵ The placement of the conjunction allows no other interpretation of this section.

Additionally, the legislature obviously used the phrase "advertisement and sale" as a term of art throughout the STFA,⁶⁶ applying it specifically to the option of nonjudicial foreclosure by the trustee.⁶⁷ Montana's mortgage foreclosure statutes do not contain the term.⁶⁸ To further differentiate between the two options, section 71-1-304(3) refers the reader specifically to the mortgage law process for judicial foreclosure of a trust indenture. Based on the

62. *State Bar v. Krivec*, ___ Mont. ___, ___, 632 P.2d 707, 710 (1981) (stating that "[t]he function of the court in construing the legislation is simply to ascertain and state what terms or matters are contained in the legislation"); *Bay v. State Dep't of Admin.*, ___ Mont. ___, ___, 688 P.2d 1, 4 (1984) (stating that "[r]ules of statutory construction have no application if the language of the statute is clear and unambiguous" and "it is the province of courts to construe and apply the law as they find it and to maintain its integrity as it has been written by a coordinate branch of the state government. When the terms of the statute are plain, unambiguous, direct and certain, it speaks for itself and there is no room for construction." (citations omitted)); *Matter of the Estate of Baier*, 173 Mont. 396, 401, 567 P.2d 943, 946 (1977) (stating that "it is simply the duty of the Supreme Court to construe the law as it finds it.").

63. MONT. CODE ANN. § 71-1-304(3) (1987) (emphasis added). See *supra* note 3.

64. *State Bar v. Krivec*, ___ Mont. ___, 632 P.2d 707 (1981).

65. MONT. CODE ANN. § 71-1-304(3) (1987). For an earlier Montana Supreme Court discussion of the importance of the word "or" in a statute, see *In re McDonald*, 50 Mont. 348, 146 P. 942 (1915). See also *infra* text accompanying notes 78-80.

66. MONT. CODE ANN. §§ 71-1-313, -315, -317 (1987).

67. MONT. CODE ANN. §§ 71-1-313 to -320 (1987).

68. MONT. CODE ANN. §§ 71-1-101 to -235 (1987).

well-accepted principle that the court must determine legislative intent by considering legislation as a whole,⁶⁹ that distinct and specialized usage of the phrase as a term of art must prevail through the entire STFA.

Three sections of the STFA other than section 71-1-304(3) distinguish between the nonjudicial foreclosure action by the trustee (advertisement and sale) and the traditional judicial mortgage foreclosure procedure. Section 71-1-311 refers to "the foreclosure of a trust indenture by advertisement and sale *or by judicial procedure*" in relation to the time for foreclosure.⁷⁰

Section 71-1-313 sets forth conditions for foreclosure of a trust indenture "*by advertisement and sale.*"⁷¹ Finally, section 71-1-317 states that "[w]hen a trust indenture executed in conformity with this part is foreclosed *by advertisement and sale*, no other or further action, suit or proceeding shall be taken or judgment entered for any deficiency"⁷² This continually distinctive statutory use of the phrase "advertisement and sale" in the STFA can only indicate the legislature's intent to distinguish that procedure from the traditional mortgage foreclosure procedure. No other construction is reasonable from the four corners of the act, and a reasonable construction of statutes must be adopted whenever possible.⁷³

Additionally, in 1968, when affirming the STFA's constitutionality, the Montana Supreme Court differentiated between the two processes, stating:

The Act permits the use of a trust indenture in place of the conventional real estate mortgages, trust deeds or other security instruments when the property involved encompasses less than three acres; the use of trust indentures is optional—not mandatory. The instrument may be foreclosed by judicial procedure *or by advertising and sale* as is provided in the statute. . . . There is no deficiency judgment connected with the sale, nor is there any right of redemption.⁷⁴

Thus the court distinguished grammatically between the foreclosure by judicial procedure under mortgage law and foreclosure by the trustee using an advertisement and sale, denying a deficiency

69. *State v. Magnuson*, ___ Mont. ___, 682 P.2d 1365 (1984); *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1980); *State v. Meader*, 184 Mont. 32, 601 P.2d 386 (1979).

70. MONT. CODE ANN. § 71-1-311 (1987) (emphasis added).

71. MONT. CODE ANN. § 71-1-313 (1987) (emphasis added).

72. MONT. CODE ANN. § 71-1-317 (1987) (emphasis added).

73. *Montana Power Co. v. Cremer*, 182 Mont. 277, 596 P.2d 483 (1979).

74. *Great Falls Nat'l Bank v. McCormick*, 152 Mont. 319, 322, 448 P.2d 991, 993 (1968) (emphasis added).

judgment and right of redemption only for the latter.

Logic dictates application of the first steps of statutory construction (reliance on plain language and reasonable construction to harmonize with other sections of the act), as well as adherence to the court's statements in the earlier case on the STFA. Therefore, section 71-1-317 of the Montana Code Annotated, disallowing deficiency judgments after foreclosure by advertisement and sale, can apply solely to nonjudicial foreclosures by trustees, not to traditional judicial foreclosures utilizing the mortgage process.

Only if the court cannot determine legislative intent from the plain meaning of the words used in a statute or an act may it go on to apply other rules of construction.⁷⁵ Clearly that step was not necessary in *Chunkapura*. However, a further step in statutory construction, when required, is the court's examination of the legislative history of the statute or act in question.⁷⁶ The minutes of the January 30, 1963 meeting of the Banking and Insurance Committee on Senate Bill 99 (the basis for the STFA) include statements by supporters of the bill.⁷⁷ No opponents of the bill appeared at the meeting. Two individuals,⁷⁸ neither of them members of the Senate, expressed a specific belief that Senate Bill 99 eliminated the debtor's right of redemption and the lender's right to a deficiency judgment. If that belief was echoed by the legislature in enacting the STFA, obviously an inherent conflict exists between the plain language of the act and the legislative intent. It is important to note, however, that speeches made by unelected citizen supporters of a bill are not necessarily indicative of the legislature's intent. No senators' statements appear concerning their understanding of the deficiency judgment/right of redemption feature.

Further, the speech of H. J. Luxan, one of the citizen speakers,

75. *Missoula County v. American Asphalt, Inc.*, ___ Mont. ___, ___, 701 P.2d 990, 992 (1985).

76. *Thiel v. Taurus Drilling Ltd.*, 1980-II, ___ Mont. ___, ___, 710 P.2d 33, 35 (1985); *Department of Revenue v. Puget Sound Power & Light Co.*, 179 Mont. 255, 263, 587 P.2d 1282, 1287 (1978).

77. Speakers included Clarence Sullivan, president of the Montana Home Association, R. C. Wetherall, vice-president and managing officer of Empire Savings & Loan Association in Bozeman, and H. J. Luxan, an attorney appearing on behalf of the Montana Home Association. The Montana Home Association's membership included, according to Mr. Luxan's statement, "mortgage lending officers of fifty banks and savings and loan associations throughout Montana, and other individuals and firms directly interested in Montana's residential housing industry." *Hearings on S.B. 99 Before the Senate Banking and Insurance Comm.*, 1963 Leg. (remarks of H.J. Luxan).

78. Mr. Wetherall and Mr. Luxan both stated that S.B. 99 denied any right of redemption or right to a deficiency judgment. *Id.* (remarks of R.C. Wetherall and H.J. Luxan).

stated that Senate Bill 99 came largely from a similar act in Utah "considered to be among the best."⁷⁹ Close reading of the Utah statutes and subsequent case law⁸⁰ counters Mr. Luxan's belief that the bill as written would completely deny deficiency judgments and rights of redemption. Section 71-1-304(3) of the Montana Code Annotated bears a remarkable similarity to section 57-1-23 of the Utah Code Annotated, enacted in 1961.⁸¹

Although the Montana statute section is somewhat shorter than the Utah statute upon which it was modelled, the similarities are obvious. Montana legislators appear to have substituted the "advertisement and sale" term of art for the Utah language governing the trustee's power of sale. Otherwise, beginning with the crucial "or," the language of the two statutes is almost identical. Section 57-1-32 of the Utah Code Annotated allows deficiency judgments following foreclosure by advertisement and sale, the same term the legislators substituted for the Utah trustee's power of sale. It follows logically, then, that Montana's STFA section 71-1-317 disallows deficiency judgments *only* following sales of property under trust indentures *by advertisement and sale by the trustee*. Thus that statutory prohibition against deficiency judgments does not apply to trust indentures foreclosed judicially as a mortgage. Therefore, the information gleaned from the legislative history provides no clear opposition to the plain language analysis.

The general rule in Montana is well established: there is one

79. Luxan speech to the Banking and Insurance Committee of the Montana Senate, (January 30, 1963) at 3.

80. See *Security Title Co. v. Payless Builders Supply*, 17 Utah 2d 179, 181, 407 P.2d 141, 142 (1965), stating:

Under the provisions of Sec. 57-1-23, U.C.A. 1953, as amended, it is made optional with the beneficiary of the trust deed whether to foreclose the trust property after a breach of an obligation in a manner provided for foreclosure of mortgages or to have the trustee proceed under the power of sale provided therein.

81. The Utah section states:

A power of sale is hereby conferred upon the trustee which the trustee may exercise and under which the trust property may be sold in the manner hereinafter provided, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust deed.

UTAH CODE ANN. § 57-1-23 (1986).

The Montana section states:

A trust indenture executed in conformity with this part may be foreclosed by advertisement and sale in the manner hereinafter provided or, at the option of the beneficiary, by judicial procedure as provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust indenture.

MONT. CODE ANN. § 71-1-304(3) (1987).

action to foreclose upon a debt, a mortgage foreclosure.⁸² The STFA contains the only exception. However, a trust indenture under the STFA is considered a mortgage unless inconsistent with other provisions of the STFA. A careful reading of the entire act as a whole reveals no inconsistency. Because the legislative intent of the STFA is clear and unambiguous textually, the court need only apply the language, not interpret it.⁸³ Montana case law states that when statutory language is "plain, unambiguous, direct, and certain, there is nothing left for the Court to construe. In such case, the function of the Court is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted."⁸⁴ However, the decision did not follow the traditional structure of statutory analysis; instead, it construed the statute contrary to its plain meaning in order to avoid an inequitable result in the *Chunkapura* case.

Historically, courts have exercised a more accepted alternative approach, achieving equally fair results on a case-by-case basis.⁸⁵ Plaintiffs traditionally could appeal either to courts of law⁸⁶ (which applied established laws to factual situations for clear-cut, predictable results) or to courts of equity⁸⁷ (which acted to achieve equitable results on a case-by-case basis). As one treatise states:

It was possible for a man to have a claim which equity would enforce but common law would not, and vice versa. For example, the common law tended to treat a deed of land as valid, if it was executed in proper form. In equity, however, the deed was good only if it was free from undue influence, fraud, or deceit. A claim based on a deed might win or lose, depending on which courtroom door the plaintiff went in. Courts of common law ignored doctrines of equity, and equity courts would dismiss a case if the plaintiff had an "adequate remedy at law."⁸⁸

Those separate courts eventually merged,⁸⁹ but contemporary courts still sit either as courts of law or of equity.⁹⁰ In the *Chunkapura* decision, the majority apparently attempted to act as

82. MONT. CODE ANN. § 71-1-222 (1987).

83. *Yearout v. Rainbow Painting*, ___ Mont. ___, ___, 719 P.2d 1258, 1259 (1986); *Bay v. State Dep't of Admin.*, ___ Mont. ___, ___, 688 P.2d 1, 4 (1984); *Gallatin County v. D & R Music & Vending, Inc.*, ___ Mont. ___, ___, 676 P.2d 779, 782 (1984).

84. *Reese v. Reese*, 196 Mont. 101, 104, 637 P.2d 1183, 1185 (1981) (citation omitted). See also MONT. CODE ANN. § 1-2-101 (1987).

85. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 25-27 (1985).

86. *Id.*

87. *Id.*

88. *Id.* at 27.

89. *Id.* at 398.

90. *Id.*

a court of law to achieve an equitable result. However, instead of changing statutory law, the majority could have protected the debtors' interests in a traditionally acceptable manner simply by acting as a court of equity for this case.

The court's analysis surveys the legislative response to inadequate foreclosure prices, focusing on the fair market value statutes specifically.⁹¹ The majority offers no rationale for that approach, which deviates from traditional statutory construction analysis. The decision implies that Montana, not having legislatively established similar provisions, has no protections for the debtor. Having addressed that legislative survey, the court does not apply its conclusion clearly to the *Chunkapura* case, and thus leaves the reader curious as to the purpose for the decision's legislative digression. The wiser choice would have been for the court to consider *judicial* responses to the debtor's situation and view equitable possibilities.

Courts during the Great Depression assumed a role of equity to protect debtors from inadequate foreclosure sales prices, thus preventing the debtors from effectively having to pay the debt twice: first with the property collateralizing the loan, and later with remaining real or personal property under a deficiency judgment.⁹² The court's equitable powers were considerable and included the discretion to approve or vacate judicial foreclosure sales and to grant or deny deficiency judgments on a case-by-case basis.⁹³ This approach provided debtor protection without the court assuming a legislative function. The judicial method of debtor protection was clearly different and separate from legislative action, although both were directed toward the same end.

Montana courts have established a strong equity tradition, so the idea is not new in this state. Sitting in equity, the Montana Supreme Court has reversed a mortgage foreclosure based on the lender's breach of fiduciary duty.⁹⁴ Similarly, it has given equitable relief against judgments obtained by extrinsic fraud.⁹⁵ It sat in equity on the existence of a debt when a mortgage lien was not enforceable and the security for a note was lost.⁹⁶ Finally, the court spoke to the equitable relief available to a petitioner in probate court who requested conveyance of property and that a deed be

91. *Chunkapura*, ___ Mont. at ___, 734 P.2d at 1206-08.

92. See generally Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 870-901 (1980); and NELSON & WHITMAN, *supra* note 11, at 594-98.

93. Washburn, *supra* note 93, at 870-01.

94. *First Nat'l Bank v. Sant*, 161 Mont. 376, 387, 506 P.2d 835, 841 (1973).

95. *Minter v. Minter*, 103 Mont. 219, 229, 62 P.2d 233, 236-37 (1936).

96. *Moore v. Capital Gas Corp.*, 117 Mont. 148, 155, 158 P.2d 302, 305 (1945).

declared a mortgage.⁹⁷

A Depression-era case in Montana, *Fox v. Curry*,⁹⁸ contains language indicating that a low price at a judicial sale was not of itself sufficient for the court to overturn a foreclosure sale. This holding, however, does not preclude future Montana courts from sitting in equity or from overturning subsequent individual foreclosure situations on an equitable case-by-case basis when the facts warrant such action. Courts sitting in equity provide relief equally as effective for individual debtors as the relief enacted by legislatures, yet avoid acting as a legislature.

Aside from the obvious "separation of powers" argument,⁹⁹ a court acts in a time-honored manner when it establishes precedent or carves out an exception to legislation on a case-by-case basis. If a legislature disapproves of the court's decisions, it can react by enacting specific contrary legislation binding upon the court. But the proper function of a court sitting in equity is to prevent inequitable results under a statute *one case at a time*, not to change the statute. The *Chunkapura* decision simply utilized an incorrect method to protect the debtor.

The majority could easily have achieved precisely the same result by sitting as a court of equity. The decision then would have represented common law precedent, rather than a change in the statute. Additionally, this approach would have obviated the necessity for a rehearing limiting the decision. Because the court utilized a legislative approach and overruled a statute rather than applying it in an equitable fashion, the decision created a potentially inequitable result on a grand scale in Montana. This necessitated a rehearing limiting the initial broad holding so that lenders now are denied deficiency judgments only following foreclosure of trust indentures secured by occupied, single-family residential property.

In an earlier case concerning inheritance and notice of probate under Montana's laws of intestacy, the Montana Supreme Court affirmed the district court, stating that "if the laws of intestate succession work to the detriment of certain classes of individuals, it is for the legislature, and not the courts, to rectify."¹⁰⁰ Arguably, if the laws allowing deficiency judgments following judicial foreclosure of trust indentures work to the detriment of certain classes of individuals (e.g., debtors), those laws, too, are for the legislature

97. *In re Day's Estate*, 119 Mont. 547, 551-52, 177 P.2d 862, 865 (1947).

98. *Fox v. Curry*, 96 Mont. 212, 222, 29 P.2d 663, 665 (1934).

99. For a good discussion of this hotly debated issue in light of recent cases, see Lopach, *The Montana Supreme Court in Politics*, 48 MONT. L. REV. 267 (1987).

100. *Matter of Estate of Brewington*, ___ Mont. ___, ___, 568 P.2d 133, 136 (1977).

and not the courts to rectify.

Collaterally, the *Chunkapura* decision, while reflecting a concern for real-estate debtors affected by Montana's economic crunch, includes no provision for the equally important right of lenders. The debtor should be allowed to have his equity protected and to receive full value for the property; the lender must be allowed to collect its security interest as easily as possible. While the *Chunkapura* decision (and fair market value statutes) clearly protect the debtor, no equivalent consideration is accorded the lender. For example, should a third party purchase the property at an exceedingly low price, the lender, without a deficiency judgment against the debtor, would suffer a substantial loss of its money. In effect, this decision acts as a windfall to all debtors with trust indentures in depressed times, allowing them to walk away from debts. Public policy prohibits unfair enrichment of one party at the expense of the other. Any well-considered legislation or judicial decision should, accordingly, weigh the comparative needs and rights of the lender and debtor.

III. CONCLUSION

Under the traditional statutory construction analysis, the legislative intent of the STFA is obvious and unambiguous. Plainly the lender may choose between nonjudicial foreclosure by the trustee (with no right of redemption and no deficiency judgment) or judicial foreclosure as a mortgage (with a resulting right of redemption and deficiency judgment allowed). Because the *Chunkapura* majority attempted to legislate and overrule a statute in order to achieve an equitable result, the first decision was unfair due to the breadth of its holding, necessitating a limitation in the rehearing. Had the majority chosen to sit in equity, the debtors could have been relieved of potentially harsh results under the STFA, the credibility of the court would not have been questioned, and the clarity of the STFA need not have been considered at all.