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PREDATORY LOANS SECURED BY INTERESTS IN REAL ESTATE (EQUITABLE MORTGAGES): A DISCUSSION OF *ZAMAN V. FELTON*

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INTRODUCTION

A predatory loan is a financial transaction that may consist of an unsecured "payday loan,"[1] "negative amortization,"[2] "hidden balloon payments,"[3] "packing,"[4] second mortgage,[5] and a variety of other

1. *Predatory Lending*, NACA, https://www.consumeradvocates.org/for-consumers/predatory-lending (last visited Sept. 6, 2021).

2. In a "negative amortization" transaction, the monthly payments are less than the interest due and therefore the payments do not decrease the balance of the loan; after each payment, the principal amount increases. *The Negatives of Negative Amortization Loans*, GA. DEP'T BANKING & FIN., https://dbf.georgia.gov/sites/dbf.georgia.gov/files/imported/vgn/images/portal/cit_1210/11/20/64961103NegativeMortgage.pdf (last visited Sept. 6, 2021).

3. "Hidden balloon payments" is a somewhat misleading phrase because the "balloon" payment is normally spelled out in the transaction documents, but an unsophisticated borrower does not realize that the periodic payments will not satisfy the debt and a large balance becomes due when the "balloon" bursts. *See Home Equity Scams*, NCDOJ, https://ncdoj.gov/protecting-consumers/mortgages-home-loans/home-equity-scams/ (last visited Sept. 6, 2021).

4. "Packing" includes various unanticipated costs to an unsophisticated borrower, including insurance premiums for various risks. *See id.*

5. Second mortgages are subject to N.J. STAT. ANN. §§ 17:11C-76–83 (West 2021) formerly in scattered sections of N.J. STAT. ANN. § 17:11A. Recognition of a second mortgage as a potentially predatory transaction was spelled out in *Westervelt v. Gateway Financial Services*, as follows: "The Act recognizes that second mortgagors are frequently persons seeking loans of last resort, that they are usually in no position to bargain over the terms of the loan or to have any real idea what they might bargain about. The Act recognizes that lenders of last resort are frequently persons whose methods ought to attract careful scrutiny and that their customers are peculiarly unfit to perform that function." Westervelt v. Gateway Fin. Serv., 464 A.2d 1203, 1206 (N.J. Super. Ct. Ch. Div. 1983).

substantive provisions and forms of transactions.[6] A predatory loan has been defined variously, including "any lending practice that imposes unfair or abusive loan terms on a borrower."[7]

While the definition of a predatory loan may vary, I submit that a predatory loan is simply when the predator is driven by greed and the victim is driven by need, resulting in an improvident transaction.

A predatory loan also includes an "equitable mortgage."[8] The phrase, itself, is misleading because there is no mortgage; a mortgage is implied as a matter of equitable relief. *Nowosleska v. Steele*, without mentioning the phrase "equitable mortgage," set aside a default judgment in a situation where defendant conveyed her property, then subject to a foreclosure sale, where "[t]he facts suggest that defendants have lost a house valued at $405,000 in exchange for payment of debts totaling only $145,000."[9] The opinion noted that "the loss of the home may have resulted from predatory lending practices . . . [and vacated] the default judgment . . . so that the dispute can be resolved on the merits, and, if necessary appropriate legal and equitable adjustments be made."[10]

The concept of an equitable mortgage "is founded upon that cardinal maxim in equity which regards as done that which has been agreed to be, and ought to have been done."[11] *Zaman v. Felton* also noted that "[t]here are numerous authorities for the proposition that an absolute conveyance intended as security for an obligation will be treated as a mortgage."[12]

This article discusses the features that distinguish an equitable mortgage from a bona fide mortgage or a sale and lease-back transaction. Like a bona fide mortgage or sale and lease-back, an equitable mortgage—which frequently includes a deed, whether to be held in escrow pending a default, or recorded prior to default—includes the conveyance or grant of an interest in real property together with the concurrent intent that the grantor has the right to re-purchase that

6. Essex Prop. Serv. v. Wood, 587 A.2d 1337, 1341 n.1 (N.J. Super. Ct. Law Div. 1991) (noting that this type of transaction may be presented in "many varieties").

7. Bill Fay, *What is Predatory Lending?*, DEBT.ORG, www.debt.org/credit/predatory-lending (last visited Sept. 6, 2021).

8. There are other bases upon which an equitable mortgage may be based. "Our courts of equity will impose an equitable mortgage to enforce an oral promise to give a mortgage, where the promisee has partly performed by lending money in reliance on the promise and has otherwise relied on the promise." Paglianite v. Lingala, No. A-1310-18T3, 2020 WL 2562927, at *4 (N.J. Super. Ct. App. Div. 2020) (citing Cauco v. Galante, 84 A.2d 712, 713 (N.J. 1951)). This discussion, however, relates only to equitable mortgages resulting from predatory transactions.

9. Nowosleska v. Steele, 946 A.2d 1097, 1101 (N.J. Super. Ct. App. Div. 2008).

10. *Id.* at 1098.

11. *Zaman* v. Felton, 98 A.3d 503, 513 (N.J. 2014).

12. *Id.* (citations omitted).

interest.[13] The significant difference is that when the terms of a bona fide mortgage loan has been defaulted by a borrower, the default permits the lender-mortgagee (or an assignee of the mortgagee) to foreclose the interest included in the mortgage.[14] The end result of that foreclosure is to foreclose, or "cut off," the mortgagor's right of redemption, i.e., the right to redeem, or re-purchase, the interest given to secure repayment.[15] But in an "equitable mortgage," the predatory lender attempts to avoid the procedural requirements, costs, and time required to foreclose a mortgage by already having a deed. The attempted avoidance of the requirement to foreclose is a *sine qua non* of an equitable mortgage and distinguishes it from a bona fide mortgage. That avoidance results in "clogging the equity of redemption;" i.e., no foreclosure proceeding is required on the failure of the grantor to exercise the right of redemption – the lender already has legal title to the interest in real estate, and the right to redeem, or re-purchase, the property has been "clogged."[16] Furthermore, if the transaction had been formulated as a true mortgage loan, and if there were a sale by a Sheriff (or other officer) following a foreclosure,[17] any surplus funds (after satisfaction of the liens of

13. The Court, in *Zaman*, found that the *transaction* was not concurrent; a contract of sale was executed on June 16, 2007, and the closing was on June 23, 2007, at which time two documents were executed, a lease and an option to repurchase the property. *Id.* at 507, 510. Although the Court held that the instruments were not concurrent, the Court did not find that that fact precluded the possibility that the *intent* of the transaction was an equitable mortgage. *Id.* at 513-14. Even if the defeasance or contract to reconvey is executed after the deed, it may be treated as part of a single transaction if executed pursuant to an agreement which antedates the execution of the deed. *See Kline v. McGuckin*, 24 N.J. Eq. 411, 413-14 (N.J. Ch. 1874).

14. *See* Thomas P. Wert, *Commercial Foreclosures in Lien Theory States*, ABA, https://www.americanbar.org/content/dam/aba/events/tort_trial_insurance_practice/anatomy_of_the_mortgage_trial_part_2_trial_and_post_trial_phases_1.doc (last visited Sept. 6, 2021).

15. *See* Hardyston Nat'l Bank of Hamburg v. Tartamella, 267 A.2d 495, 496 (N.J. 1970). The borrower who grants a mortgage continues to hold legal title and must be made a party to the foreclosure proceeding and has the right to redeem (re-purchase) the security according to law. But on the conclusion of a foreclosure, when the borrower has not redeemed the security, that right has been foreclosed and legal title passes to the successful bidder following a foreclosure sale. *See id.* at 497-98.

16. Humble Oil & Refin. Co. v. Doerr, 303 A.2d 898, 905–06 (N.J. Super. Ct. Ch. Div. 1973). The process has also been called "equity stripping," "equity skimming," "deed theft" and sometimes more accurately "foreclosure rescue scam." *See* Pooja Dave, *Seven Foreclosure Scams to Watch Out For*, FORBES (June 11, 2007, 11:20 AM), https://www.forbes.com/2007/06/11/foreclosure-scam-credit-pf-education-in_pd_0611investopedia_inl.html?sh=1dd2a2c639af. *Vreeland v. Dawson*, 151 A.2d 62, 66 (N.J. Sup. Ct. Ch. Div. 1959) stated that "[t]he decisions make no sharp distinction between a resulting trust and an equitable mortgage . . . . [and that] the transaction may be characterized as a combination of resulting trust and mortgage."

17. N.J. STAT. ANN. § 2A:50–19 (West 2021).

judgment creditors and other encumbrancers) would be payable to, or for the benefit of, the grantor/mortgagor.[18] But, if the equity of redemption has been clogged, there is no sale and no possibility of any surplus funds (the excess of the value of the security over the balance due on the mortgage) benefitting the grantor/mortgagor.[19]

As noted by the Court in *Zaman*, the concept of equitable mortgage is a long-standing principle in New Jersey jurisprudence.[20] For instance, in *Griffin v. Griffin*, the Court declared that the conveyance of a deed to a creditor would be deemed an equitable mortgage upon the complainant paying the debt for which the deed was pledged.[21] *Griffin* was followed by *Gale's Executors v. Morris*, which held that an equitable mortgage may be created by a deposit of "title deeds."[22] There have been numerous cases on the subject in New Jersey, including *O'Brien v. Cleveland*, which recognized that "New Jersey courts of equity have long recognized the doctrine of equitable mortgage."[23]

The case probably most-often cited in New Jersey, with regard to clogging the equity of redemption, is *Humble Oil and Refining Company v. Doerr*.[24] *Humble Oil* held that the doctrine, which bars a mortgagee from clogging the mortgagor's equity of redemption and prohibits the

18. *Id*. at § 2A:50–37 (West 2021).

19. Those surplus funds, even if payable to other lien holders of the grantor (i.e., even if not payable directly to the grantor) would be for the benefit of the grantor to the extent of satisfaction of those debts. When the equity of redemption has been clogged and the statutory requirement of a sale has been avoided, the inequitable and inevitable consequence is that *there is no possibility of any surplus funds and hence no possibility of any benefit to the grantor*. This will be considered in this article relating to the "remedies" available to the grantor of an equitable mortgage.

The grantor of the interest in real estate will be referred to in this article as the "grantor" and the person acquiring that interest, i.e., nominally the lender, will be referred to as the "predator. The grantor (or grantor's successor/s in interest) may be the plaintiff in an action to void the transaction, or the predator (or predator's assignee/s) may be the plaintiff in an action to confirm ownership of that interest or to compel a conveyance if the predator has an option to obtain title. The predator may or may not have been the source of the funds transferred to the grantor and may or may not be the person to whom performance of the right to re-purchase the interest is due. *See Frink v. Adams*, 36 N.J. Eq. 485 (Ch. 1883) (involving a third party who acquired an interest from the predator for a fair market value).

20. *See* Zaman v. Felton, 98 A.3d 503, 513. (N.J. 2014).

21. Griffin v. Griffin, 18 N.J. Eq. 104, 106 (N.J. Ch. 1866). *See also* discussion *infra* Part II.

22. Executors of Gale v. Morris, 29 N.J. Eq. 222, 224 (N.J. Ch. 1878).

23. O'Brien v. Cleveland, 423 B. R. 477, 489 (Bankr. D.N.J. 2010) *(*citing Rutherford Nat'l Bank v. H.R. Bogle & Co. 114 N.J. Eq. 571 (N.J. Ch. 1933)). Several cases related to the subject are cited in the Appendix. *See infra* Appendix.

24. Humble Oil & Refin. Co. v. Doerr, 303 A.2d 898 (N.J. Super. Ct. Ch. Div. 1973).

mortgagee from taking an option to purchase the property, also barred the mortgagor's guarantor from taking such option.[25]

Although *Humble Oil* may be the most-often cited case with regard to clogging the equity of redemption, *Zaman*, must be the most authoritative, having been decided by the New Jersey Supreme Court. In *Zaman,* the Court held that:[26]

> We reverse the portion of the Appellate Division's opinion that affirmed the trial court's dismissal of Felton's claim that the parties' agreements constituted a single transaction that gave rise to an equitable mortgage. We adopt the eight-factor standard for the determination of an equitable mortgage set forth by the United States Bankruptcy Court in *O'Brien v. Cleveland*, 423 B.R. 477, 491 (Bankr. D.N.J.2010). We remand to the trial court for application of that standard to this case, and, in the event that the trial court concludes that an equitable mortgage was created by the parties, for the adjudication of two of Felton's statutory claims based on alleged violations of consumer lending laws, as well as several other claims not adjudicated by the trial court.

The eight factors stated in *O'Brien* are:[27]

(1) Statements by the homeowner or representations by the purchaser indicating an intention that the homeowner continues ownership;

(2) A substantial disparity between the value received by the homeowner and the actual value of the property;

(3) Existence of an option to repurchase;

(4) The homeowner's continued possession of the property;

25. *Id.* at 916.

26. Zaman v. Felton, 98 A.3d 503, 506 (N.J. 2014).

27. *O'Brien* quoted those eight factors from the *National Consumer Law Center, Truth in Lending*. *See* NATIONAL CONSUMER LAW CENTER, TRUTH in LENDING 48 (6th ed. 2007), 48–49. There are discussions that suggest that another factor is the existence of a debt. MYRON C. WEINSTEIN, LAW OF MORTGAGES (29 N.J. Prac. Series, 2d ed. 2020). To the contrary, *Vreeland v. Dawson* held that, "there may be a valid mortgage in the absence of a personal liability on the part of the transferor or mortgagor to repay … but the transaction is just as much a security device as where the mortgagee holds a bond." Vreeland v. Dawson, 151 A.2d 62, 66–67 (N.J. Super. Ct. Ch. Div. 1959) (citations omitted).

> (5) The homeowner's continuing duty to bear ownership responsibilities, such as paying real estate taxes or performing property maintenance;
>
> (6) Disparity in bargaining power and sophistication, including the homeowner's lack of representation by counsel;
>
> (7) Evidence showing an irregular purchase process, including the fact that the property was not listed for sale or that the parties did not conduct an appraisal or investigate title; and
>
> (8) Financial distress of the homeowner, including the imminence of foreclosure and prior unsuccessful attempts to obtain loans.

Those factors are to be weighed by the fact finder, but no New Jersey appellate case has determined the amount of "weight" to be given to any of those factors.[28] They are intended, as stated in *Zaman*, to be a "comprehensive and practical standard to guide trial courts as they determine whether a particular transaction, or series of transactions, gives rise to an equitable mortgage."[29] This article discusses those factors.

As a beginning point, note especially the fact that the transaction had been completed in *Zaman*, that the victim had received the funds, and

28. The trial court (in *Zaman* on remand, in an opinion not submitted for publication, Docket No. OCN-L-4301-08, Law Div. 2014), found the eight factors were weighed as either "great weight," "very little weight," "little weight," or "moderate weight." The judge in *O'Brien* briefly recited only seven relevant facts that "lead this court to conclude that the transaction in the present case is an equitable mortgage[,]" although the decision cited, *Brown v. Grant Holding, LLC,* stated only six factors. O'Brien v. Cleveland, 423 B.R. 477, 491 (Bankr. D.N.J. 2010); Brown v. Grant Holding, LLC, 394 F. Supp. 2d 1090, 1097-99 (D. Minn. 2005). "This court need not find proof of every one of the so-called *McGill* factors in order to find that an equitable mortgage existed in this case. No particular factor is required to find an equitable mortgage and different courts have stressed different factors in examining whether an equitable mortgage should be found." Carter v. Second Chance Program, Inc., No. 06-CH-26787 (Ill. Cir. Ct. Dec. 23, 2008) (citing *McGill v. Biggs,* 434 N.E.2d 772, 774–76 (Ill. App. Ct. 1982). The court in *McGill* stated the following factors that have been considered by Illinois courts: "the existence of an indebtedness, the close relationship of the parties, prior unsuccessful attempts for loans, the circumstances surrounding the transaction, the disparity of the situations of the parties, the lack of legal assistance, the unusual type of sale, the inadequacy of consideration, the way the consideration was paid, the retention of the written evidence of the debt, the belief that the debt remains unpaid, an agreement to repurchase, and the continued exercise of ownership privileges and responsibilities by the seller." *McGill*, 434 N.E.2d at 774. Whichever factors are relevant and the weight to be given to each, is of course, dependent on the facts of each case; they are "guides" for a trial court.

29. *Zaman*, 98 A.3d at 514. For a discussion on the *O'Brien* factors see *infra* Section I.

that it was voluntary (as the jury found in *Zaman*).[30] The Court explained that "[t]he jury's determination that Felton knowingly sold her property does not itself resolve the question of whether the parties created an equitable mortgage" but that it "may, however, be relevant to one or more of the *O'Brien* factors in the court's inquiry . . . ."[31] The point is that it is no defense to the claim of an equitable mortgage that the transaction had been completed, that the grantor conveyed the interest voluntarily, or that the grantor received some value. If those facts would have been determinative, there would have been no reason for the Court to remand the Zaman case for consideration of the eight factors. From another perspective, there is no cause of action for an attempted predatory loan transaction.

As explained, the eight *O'Brien* factors are intended to guide the court in objectively determining the intent of the parties. I submit that factors one and three are particularly related in determining whether the transaction was intended to be a financing transaction or an absolute conveyance.

I. DISCUSSION OF THE EIGHT FACTORS

A. O'Brien Factors One (Statements by the Homeowner[32] or Representations by the Purchaser Indicating an Intention that the Homeowner Continues Ownership) and Three (Existence of an Option to Repurchase)

The key word in the title of *O'Brien* factor number one is "intention."[33] "A court of equity will give this deed effect according to the intention of the parties at the time it was made . . . . This is familiar law."[34] More recently, the concept was stated as follows:

> While it is true that it does not require express words to create an equitable mortgage, where the intention to create such a lien is evident, yet it must clearly appear from the instrument or the surrounding circumstances, at the time of entering into the same, that the maker of the instrument intended that the property

30. *Id*. at 509.

31. *Id*. at 514–15.

32. The words are misleading. The word "homeowner" would more appropriately be designated as "grantor" and the "purchaser" would more appropriately be designated as "grantee" or, as in this discussion, "predator."

33. *O'Brien*, 423 B.R. at 491.

34. Crane v. Decamp, 21 N.J. Eq. 414, 416–17 (N.J. 1869) (internal citations omitted).

> therein described is to be held, given or transferred as security for the obligation.[35]

To the same effect, *James Talcott, Inc. v. Roto American Corp.*, said that "[t]he character of the instrument is determined by the intention of the parties at the time of its execution."[36]

There are three time-elements to these factors: 1) statements made at the time of negotiating and during the transaction, 2) conduct of the parties subsequent to the transaction, and 3) testimony at a trial. Consideration (as evidence) of the statements made at the time of negotiating and during the transaction *ipso facto* means that they are not subject to the parol evidence rule, notwithstanding that those statements are intended, at least by the grantor, to contradict the apparently-absolute deed (and presumably an affidavit of title and/or affidavit of consideration). Likewise, testimony by the predator in favor of the deed being absolute would be contradicted by the right of the grantor to re-purchase the security. "This is peculiarly the kind of case in which proof of extrinsic facts may lend definitive meaning to the language of the writings of the parties."[37] Avoidance of the parol evidence rule[38] is also justified by the strong public policy of voiding a transaction that clogs the equity of redemption.[39]

The testimony is, of course, subject to determinations of credibility. It should be expected that the grantor will testify that the transaction was not intended to be an absolute conveyance, but rather a financing transaction, and that the right of the grantor to re-purchase the security *per se* dispels testimony by the predator of an intent to own the property. The predator should be expected to testify that the transaction was intended to be an absolute sale.[40] It should also be anticipated that the argument on behalf of the grantor would be that the right to repurchase the security is not in contradiction of the documents but supports the concept of an equitable mortgage.[41]

Unlike commercial transactions in which a buyer may get the opportunity to "try out" a commodity, there is no justification for an

35. *J.W. Pierson Co. v. Freeman,* 166 A. 121, 123 (N.J. 1933).

36. James Talcott, Inc. v. Roto American Corp, 302 A.2d 147, 157 (N.J. Super. Ct. Ch. Div. 1973).

37. Welsh v. Griffith-Prideaux, Inc., 158 A.2d 529, 535 (N.J. Super. Ct. App. Div. 1960) (citing Atl. N. Airlines, Inc. v. Schwimmer, 96 A.2d 652 (N.J. 1953))*; see also* Wilbur v. Jones, 86 A. 769 (N.J. 1912) (discussing the parol evidence rule in the context of evidence used in a proceeding to foreclose a mortgage).

38. The rule is not applicable to statements or conduct subsequent to the transaction.

39. *See supra* Introduction.

40. If the predator testified otherwise, there would apparently be no contest.

41. *See supra* Section I.

absolute conveyance to reserve the right of possession to real property interests to the grantor. Of course, this must be distinguished from a sale with either a retained license or use and occupancy agreement.[42] Neither of those transactions reserves the right of re-purchase to the grantor; they simply grant temporary possession to the holder of the rights for a stated purpose and/or period.[43]

As noted in *Essex Property Services v. Wood*, these transactions take shape in various forms, but a common denominator in an equitable mortgage is the intent of the grantor to re-acquire title.[44] For example, in *D'Agostino v. Maldonado*, defendant prepared five documents: a Letter of Agreement, an Agreement and Declaration of Trust, a Warranty Deed to Trustee, an Assignment of Beneficial Interest in Trust and an Option Agreement.[45] The one-year option for plaintiff to recover title to the Property required plaintiff to pay defendant $400,000.00.[46]

I submit that there is no more credible evidence that the transaction was intended to be a security transaction (and that an absolute conveyance was not intended) than the option to re-purchase the interest granted. Indeed, the grantor's option to repurchase is an overwhelming impediment to the predator's claim of an intent to own the security.

B. O'Brien Factor Two (Substantial Disparity Between the Value Received by the Homeowner and the Actual Value of the Property)

I submit that the disparity in value between the value received by the grantor and the value of the interest conveyed is a critical factor in objectively determining whether a transaction is a predatory transaction. Specifically, if the value received by the grantor as a result of the transaction was substantially equal to the value of the interest conveyed, there would have been no ascertainable loss[47] and no unfairness or abuse taken of the grantor, notwithstanding that the equity of redemption had been clogged.[48]

Cases relating to the disparity in value between the amount lent and the value of the security being a critical factor include:

42. *E.g.*, Nowosleska v. Steele, 946 A.2d 1097, 1099 (N.J. App. Div. 2008).
43. *See id.*
44. Essex Property Servs. v. Wood, 587 A.2d 1337, 1341 n.1 (N.J. Super. Ct. Law Div.1991).
45. D'Agostino v. Maldonado, 78 A.3d 527, 532 (N.J. 2013).
46. *Id.*
47. The phrase "ascertainable loss" is more than coincidental. *See infra* Section II.
48. *See* Humble Oil & Refin. Co. v. Doerr, 303 A.2d 898 (N.J. Super Ct. Ch. Div. 1990).

- *Talcott, Inc. v. Roto American Corp.*: "To prevent undue advantage through inadequacy of consideration, courts of equity are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor conditional sale, but a mortgage, and that the grantor and grantee have merely the rights and are subject only to the obligations of the mortgagor and mortgagee."[49]

- *Humble Oil*: "There are precedents which hold that the court should deny specific performance where the consideration is grossly inadequate."[50]

- *Nowoleska v. Steele*: "The facts suggest that defendants have lost a house valued at $405,000 in exchange for payment of debts totaling only $145,000.00."[51]

- *Howard v. Diolosa*: After the collection of rents, "[Diolosa] would have paid his $ 25,000.00 loan and the real estate taxes. . . . [and] would have a home now worth $ 150,000 to $ 200,000 in five years without any personal outlay."[52]

- *D'Agostino*: "[D]efendant obtained title to plaintiffs' home, valued at $480,000, for ten dollars. . . ."[53]

- *O'Brien*: "The property had a value of over $800,000; however, the Defendant 'purchased' it for only $555,232."[54]

- *Sitogum Holdings, Inc. v. Ropes*: discussed the concept in the terms of "substantive unconscionability" in holding the subject option contract void. The option price to purchase the property was $800,000 and the sale price was $1,500,000.[55]

On the other hand, when there is no proof of the value of the property conveyed as compared to the value received by the grantor, this factor may militate against a finding of an equitable mortgage, although the ultimate consideration of that factor may relate to the applicable

49. Talcott, Inc. v. Roto American Corp., 302 A.2d 147, 157 (N.J. Ch. 1973).
50. *Humble Oil*, 303 A.2d at 904.
51. Nowoleska v. Steele, 946 A.2d 1097, 1101 (N.J. Super. Ct. App. Div. 2008).
52. Howard v. Diolosa, 574 A.2d 995, 999 (N.J. Super. Ct. App. Div. 1990).
53. D'Agostino v. Maldonado, 78 A.3d 527, 530 (N.J. 2013).
54. O'Brien v. Cleveland, 423 B.R. 477, 491 (Bankr. D.N.J. 2010).
55. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921–26 (N.J. Super. Ct. Ch. Div. 2002).

remedies. *Johnson v. Novastar Mortgage, Inc*., "born of an alleged foreclosure rescue scam," on a motion to dismiss plaintiff's (grantor's) complaint, recited the applicability of the eight *O'Brien* factors and denied the motion although the court noted that "the Amended Complaint does not state the actual value of the property compared to the $175,000 loan" concluding that "this factor is neither for or against the creation of an equitable mortgage."[56]

As the trial court judge noted in *Zaman* on remand, "No evidence was placed before the court as to the value of the property . . . . Frequently, qualified real estate appraisers are called as expert witnesses in these types of disputes . . . "and therefore found that this factor was accorded "very little weight."[57]

The cost to recover title is another significant element in this factor. Specifically, if the cost to exercise the option to repurchase is substantially equal to the value received by the grantor, adjusted for the time value for the use of the funds (essentially "interest") plus the value of any improvements and carrying costs, then the improvidence of the transaction would be abated, or even obliterated. That is, if the net figures are substantially similar to the adjusted amount advanced in the transaction, it would not have been predatory and there would be no justification to void the transaction upon the failure by the grantor to have re-purchased the property.[58]

When the value received by the grantor is comparable to the value of the property conveyed, the principle of *damnum absque injuria* is applicable; the grantor has sustained no legally cognizable loss.

56. Johnson v. Novastar Mortg., Inc., 698 F. Supp. 2d 463, 464, 470 (D.N.J. 2010).

57. The trial court's findings were affirmed on appeal without a discussion of the factors but noting that "the reasons set forth by the trial judge [were] thorough and well-reasoned . . . ." *Zaman v. Felton*, No. A-2607-14T1, 2016 WL 830805, at *2 (N.J. Super. Ct. App. Div. Mar. 4, 2016).

58. This distinguishes a non-predatory transaction from the point in footnote 19, i.e., the issue of a surplus from a foreclosure sale is irrelevant. *See supra* note 19 and accompanying text. The adjusted repurchase cost may be significant in determining whether the transaction was predatory, notwithstanding that a transaction including an equitable mortgage is *void ab initio*. Although the transaction may be *void ab initio*, that is the conclusion after the consideration of the factors relating to the transaction, and the adjusted repurchase cost may be a factor, not a conclusion.

C. O'Brien Factor Eight (Financial Distress of the Homeowner, Including the Imminence of Foreclosure and Prior Unsuccessful Attempts to Obtain Loans)[59]

There are three factors in this "one" factor. They are: 1) financial distress of the grantor, 2) the imminence of foreclosure, and 3) prior unsuccessful attempts to obtain loans.

1. Financial Distress

In cases considering equitable mortgages, the grantor is customarily "in financial distress," i.e., "needy." Examples of cases illustrating the financial distress of the grantor include:

- *Zaman*: the trial court on remand found that Mrs. Felton "was facing the foreclosure of her property and was unsuccessful in obtaining any relief from various refinancing attempts."[60]
- *D'Agostino*: Plaintiff, Anthony D'Agostino "lost his job and suffered a series of financial setbacks … had accrued a new series of debts, and the property was cited by local authorities for housing code violations."[61]

Cases have held that financial distress of the grantor also relate to the intent of the grantor; to wit, that the grantor is shorn of the reason to irrevocably convey the property by virtue of the necessitous situation.

2. The Imminence of Foreclosure

This factor is misleading but it was included because of the context of the sources, i.e., the facts in the cases from which the eight factors arose; both *O'Brien*[62] and *Zaman*[63] involved the attempt to avoid foreclosures.[64] *Essex Property Services* is another example of an equitable

59. *See supra* note 32 and accompanying text.

60. Zaman v. Felton, 98 A.3d 503, 514 (N.J. 2014).

61. D'Agostino v. Maldonado, 78 A.3d 527, 531–32 (N.J. 2013).

62. "Sean and Nicole O'Brien [] filed a chapter 13 bankruptcy on March 7, 2003, in an attempt to save their home from foreclosure." O'Brien, 423 B.R. 477, 483 (Bankr. D.N.J. 2010).

63. *Zaman*, 98 A.3d at 506 ("In 2007, defendant Barbara Felton faced foreclosure proceedings with respect to her unfinished, uninhabitable home and the land on which it was situated.").

64. This is the basis for that class of predatory loan cases in which the courts have labelled the transaction as a "foreclosure rescue scheme." *See id.* at 517.

mortgage resulting from a homeowner subject to foreclosure.[65] But when it is realized that the concept of an equitable mortgage is a type of predatory loan, it becomes readily observable that financial distress, *of whatever nature*, is the appropriate consideration and that the need does not have to result from the imminence of foreclosure of the grantor's home.[66] The need may result from medical expenses, to make badly needed repairs to a home, avoid repossession, the threat of an involuntary bankruptcy, or other every-day living expenses. The essence of this factor is simply that the grantor was "necessitous."[67]

3. Prior Unsuccessful Attempts to Obtain Loans

This factor, in my opinion, should be given virtually no weight because the grantor may have made reasonable efforts to obtain funds and been unsuccessful, or, when under a dire compulsion to realize funds (and in some instances, such as in *O'Brien*) may have thought themselves to have been unqualified for conventional financing and feel compelled to enter into the predatory transaction at the first chance.[68] And in some instances, such as in *Essex Property Services*, the grantor may be approached by the predator or introduced by a third party to the predator.[69] For those reasons, the grantor may believe that the funds are not available elsewhere, nor appreciate the ability to find the funds from a legitimate lender in time to satisfy the dire need. Indeed, although the predator may be thought of as a lender of "last resort" (usually inducing otherwise prohibitive terms), the predator may indeed become the lender of "first resort" to one in dire need of funds.

D. O'Brien Factor Four (Homeowner's Continued Possession of the Property)

Continued possession by a grantor may be consistent with absolute sales; they are appropriately accompanied by a use and occupancy agreement or a leaseback - but those agreements are usually intended to

65. *See* Essex Prop. Servs., Inc. v. Wood, 587 A.2d 1337, 1338–39. (N.J. Super. Ct. Law Div. 1991).

66. *See* Humble Oil & Refin. Co. v. Doerr, 303 A.2d 898, 909–10 (N.J. Super Ct. Ch. Div. 1990). The transaction in *Humble Oil* involved a property on which a commercial business was operated. And, in *Humble Oil*, the opinion cited several cases and authorities for the proposition that "[t]he same rule [of voiding a transaction where the right of redemption had been clogged] applies to pledges of personal property." *Id.* at 906.

67. *See id.* at 907, 916.

68. *See* O'Brien v. Cleveland, 423 B.R. 477, 483 (Bankr. D.N.J. 2010).

69. *See Essex Prop. Servs., Inc.*, 587 A.2d at 1339.

be for a limited duration, unlike the grantor having the right to repurchase the property.[70]

New Jersey cases stating that continued occupancy by the grantor is a criterion to determine that a transaction created an equitable mortgage include:

- *O'Brien*: "… whether the foreclosee continued occupancy."[71]
- *Zaman*: "New Jersey courts have repeatedly found that sale-leaseback arrangements made to avoid foreclosure are in fact equitable mortgages."[72]

E. O'Brien Factor Seven (Evidence Showing an Irregular Purchase Process, Including the Fact That the Property Was Not Listed for Sale or That the Parties Did Not Conduct an Appraisal or Investigate Title)

As suggested by this heading, the "irregular purchase process" is not all inclusive; it *includes* the absence of a listing with a broker, an appraisal, and/or title search.[73]

When the grantor feels an imminent need for funds, the grantor is susceptible to avoid taking the time to list property for sale or to pursue a bona fide mortgage. That feeling will, instead, lead the grantor to find a ready, willing and able lender, and make the grantor susceptible to the apparent, or professed, purpose of "saving" the needy grantor from some perceived imminent financial disaster. (Like the contrary considerations in point IV C [prior unsuccessful attempts to obtain loans], the property may have been listed for sale, but time may have run out.)

Although there is no requirement that a property be listed for sale with a broker in an ordinary transaction, I submit that it is, by far, so

70. *See* Zaman v. Felton, 98 A.3d 503, 513 (N.J. 2014) ("Ordinarily, the conveyance of a property accompanied or followed by a leaseback transaction is precisely what it purports to be: a sale in which the parties separately agree that the seller will become the tenant, and the buyer will become the landlord, in accordance with the terms of a lease. However, 'New Jersey courts have repeatedly found that sale-leaseback arrangements made to avoid foreclosure are in fact equitable mortgages.'" (quoting Johnson v. Novastar Mortg., Inc., 698 F. Supp. 2d 463, 469 (D.N.J. 2010))).

71. *O'Brien*, 423 B.R. at 490.

72. *Zaman,* 98 A.3d at 513 (citing Johnson v. Novastar Mortg. Inc., 698 F. Supp. 2d 463 (D.N.J. 2010)).

73. *See O'Brien*, 423 B.R. at 491 (noting that "[e]vidence showing an irregular purchase process[] include[es] the fact that the property was not listed for sale or that the parties did not conduct an appraisal or investigate title").

common that the absence of a listing agreement is a significant (but not *per se*) indication of an irregular purchase process.

Negotiations (or the lack of negotiations) between the parties suggest another indication of an irregular purchase process. Likewise, the transaction proceeding without a deposit ("down-payment") may be an indication of an irregular purchase process; it may be the result of the grantor's imminent need for the loan proceeds.

The absence of an appraisal may be irrelevant, especially when the disparity between the amount of the loan and the value of the security is obvious - or is at least apparent. The predator may have relied on an "eyeball" self-evaluation, search engine opinions of value, or real estate tax-assessed values. And the terms of the transaction may be of additional value to the predator; for example, the grantor paying rent, taxes, and other carrying costs while still in possession. Eliminating the time and expense of an appraisal may also have been a consideration of the predator.

The failure to investigate title before completing the transaction also suggests that the transaction was intended to be a loan, inasmuch as the transaction affording the grantor the right to re-purchase the security suggests that title might end up where it began, i.e., with the grantor. There would be no detriment to the predator from a defect in title if the grantor repurchases the property.

On the other hand, if the predator did investigate title before completing the transaction and records a deed before the grantor repurchases the property, it may be suggestive of a savvy predator who contemplates that the grantor, being in dire financial circumstances at that time will also be unable to re-purchase the interest conveyed within the time given for re-purchase.[74]

F. O'Brien Factor Five (Homeowner's Continuing Duty to Bear Ownership Responsibilities, Such as Paying Real Estate Taxes or Performing Property Maintenance)

Although an owner may pass these obligations onto a tenant, when they are combined with the fact that the tenant conveyed the property to the predator while retaining the right to re-purchase the property, they strongly suggest that the transaction was intended to be a financing

74. A savvy predator would record the deed at the first opportunity in order to minimize, or eliminate, intervening interests that would reduce or eliminate the value of the security. The word "savvy" does not necessarily mean "experienced." This may be the first instance of the predator making this type of loan.

transaction rather than a bona fide lease.[75] The result of the grantor continuing those obligations is akin to there having been no conveyance, and that the grantor was instead performing these responsibilities both as before and in contemplation of the grantor's resuming ownership. It can also be readily conceived that the transaction could include the grantor's obligation to continue payments on a mortgage, and it might be induced if an existing mortgage was callable on sale/conveyance.

G. O'Brien Factor Six (Disparity in Bargaining Power and Sophistication, Including the Homeowner's Lack of Representation by Counsel)

There are three distinct factors in this point. They are 1) disparity in bargaining power, 2) disparity in sophistication, and 3) the grantor's lack of representation by counsel.

1. Disparity in Bargaining Power

"Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result."[76] No citation should be necessary to make the practical point that a needy grantor does not have the time or ability to be selective, and the greater the urgency, the needy grantor becomes more susceptible to a predatory lender and less able to seek either other lenders or better terms. On the other hand, there is no compulsion on the part of the predator. The predator unquestionably has the opportunity to reject the transaction—or to offer appropriate (i.e., non-predatory) terms rather than take undue advantage of a needy person. Although the terms of a predatory transaction are not fungible, the needs referred to in Point IV B (the imminence of foreclosure) compel the grantor to proceed with the terms then available.

It is hard (at best) to conceive that the grantor has any significant "bargaining power" in negotiating the terms of the transaction. The consequence is that this consideration will almost always (if not always) weigh in favor of the grantor.

75. N.J. Ct. R. 6:3-4(b), Summary Actions Between Landlord and Tenant, requires a complaint for possession to include the following: "When the landlord acquired title from the tenant or has given the tenant an option to purchase the property, the complaint shall recite those facts." R. 6:3-4(b). That requirement followed publication of the opinion in *Essex Property Services v. Wood*, in an effort to ferret out predatory transactions and highlight the possibility of a predatory transaction to a judge.

76. *Shell Oil Co. v. Marinello,* 307 A.2d 598, 601 (N.J. 1973).

2. Sophistication of the Parties

"Sophistication" of the grantor is, in my opinion, of minimal significance. Judge Lyons, in *O'Brien*, noted that:[77]

> The O'Briens are not typical victims. On the contrary, Mr. O'Brien is a sophisticated, educated and experienced business person. He has a bachelor's degree in accounting and has worked in a variety of sales and marketing jobs earning a six-figure income. Mrs. O'Brien is a college graduate and teaches school."

"Sophistication" is far, far, subordinate to the compulsion to complete the transaction based on the dire need for the proceeds of the transaction.[78]

3. The Homeowner's Lack of Representation by Counsel

Representation by counsel does not ameliorate the grantor's dire need for the funds, nor change the terms of the transaction. That is, the grantor is compelled by the need, contrary to any advice that may have been offered by counsel to abort the transaction. That advice is likely to be ignored when the grantor is under the pressure that brought the grantor to the predator (or, conceivably, brought the predator to the grantor) in the first place. Therefore, representation by counsel is, in my opinion, of minimal significance.

A further factor is that even when the grantor has been represented by counsel, the ability of counsel to recognize that the transaction is an equitable mortgage may come into play. The concept of an equitable mortgage is, based on my discussion of the subject with experienced attorneys, not well known.[79] But, again, it is subordinate to the grantor's urgent need.

77. *O'Brien*, 423 B.R. at 484.

78. *O'Brien* also noted that "the disclosure requirements of [the Truth in Lending Act] do not consider the sophistication of the borrower." *O'Brien*, 423 B.R. at 495; *see also* Truth in Lending Act (TILA), 15 U.S.C. § 1601.

79. Evidence of the unfamiliarity of the concept of an equitable mortgage is also manifested by the several cases in which an attorney represented the grantor and which have considered the liability of the grantor's lawyer on the basis of malpractice. That issue is beyond the scope of this discussion.

II. THE REMEDIES TO A GRANTOR IN A PREDATORY TRANSACTION INVOLVING THE GRANT OF AN INTEREST IN REAL PROPERTY

A. Voiding the Conveyance (Restoring Title to the Grantee)

"For centuries it has been the rule that a mortgagor's equity of redemption cannot be clogged and that he cannot, as a part of the original mortgage transaction, cut off or surrender his right to redeem. Any agreement which does so is void and unenforceable as against public policy."[80]

The consequence of a void transaction is that the deed given as "security" is subject to defeasance as a matter of equity. In *O'Brien*, the court held that Plaintiffs were entitled to "an order voiding the deed."[81] Or, as in *Humble Oil*, the option that Plaintiff sought to enforce was held to be unenforceable.[82] Or, as in *Essex Property Services*, the purported lease was found not to be a bona fide lease and the relief sought in a summary action for possession against the grantor was denied.[83]

As noted above, the phrase "equitable mortgage" is misleading because there is no mortgage; a mortgage is implied as a matter of equitable relief. And, because there is no mortgage, there would be no foreclosure process enabling the grantor to resume ownership.[84] Instead, the court would have to fashion an equitable remedy.[85]

80. Humble Oil & Refin. Co. v. Doerr, 303 A.2d 898, 905 (N.J. Super Ct. Ch. Div. 1990).

81. *O'Brien*, 423 B.R. at 489.

82. *Humble Oil*, 303 A.2d at 905.

83. *See* Essex Prop. Servs., Inc. v. Wood, 587 A.2d 1337, 1340 (N.J. Super. Ct. Law Div. 1991).

84. A foreclosure would unduly prolong the remedy to the grantor and incur additional expenses without justification, after the transaction has been found to have been an equitable mortgage and therefore void. A foreclosure would also potentially involve additional parties, whereas the action in which the transaction was held to be void would presumably involve only the grantor, the predator and conceivably a grantee (including a subsequent mortgagee) from the predator. Presumably, the grantor would file a lis pendens to avoid subsequent interests, but other potential claimants are beyond the scope of this discussion.

85. The remedy is not rescission. D'Agostino v. Maldonado, 78 A.3d 527, 543 n.4 (N.J. 2013). As noted in *D'Agostino*, "Although defendant characterizes this remedy as 'rescission,' that description is imprecise. A void contract is '[a] contract that is of no legal effect, so that there is really no contract in existence at all. . . . A party's election to void a contract is sometimes termed as rescission: either '[a] party's unilateral unmaking of a contract for a legally sufficient reason,' or '[a]n agreement by contracting parties to discharge all remaining duties of performance and terminate the contract.'" *Id.* (quoting BLACK'S LAW DICTIONARY 374, 1420–21 (9th ed. 2009); *see also Rutgers Cas. Ins. Co. v. LaCroix*, 946 A.2d 1027, 1035 (N.J. 2008) (explaining rescission remedy for insurance contract misrepresentation). Neither of these two events occurred here. The remedy in this case is more accurately termed a declaration that the transaction was void and a restoration

With reference to title, the court may order that the predator (or any grantee/assignee who has been made a party to the action) execute a deed[86] to the grantor, and that any subsequent mortgagee (who has been made a party to the action) execute a cancellation of the mortgage. Alternatively, especially with reference to a hostile predator, the court may execute an order in recordable form, as was done in *O'Brien*.

B. Conditions for Restoring Title to the Grantor

Because there was a benefit to the grantor of whatever proceeds were received at the time of the transaction, and possibly after the transaction (such as rent free possession), equitable relief requires that the court take an accounting as a condition of restoring title to the grantor.[87] "[T]here is no error in the decree directing a reconveyance of this ten acre lot, upon payment of the amount secured by such former conveyance."[88]

Some of the elements to be taken into account include (as noted in Point II) the cost to exercise the option to repurchase, the time value for the use of the funds (essentially "interest") plus the value of any improvements and carrying costs.[89]

C. Additional Remedies to the Grantor: The Consumer Fraud Act

The Consumer Fraud Act (CFA) may be made applicable by a myriad of other consumer protection acts, in particular as relevant to this discussion, the New Jersey Home Ownership Security Act. It provides that "Any violation of this act constitutes an unlawful practice under . . . [N.J.S.A.] C.56:8-1 et seq . . . ."[90] Note, though, that the specific violations of that act must be met and that "Any borrower may seek damages under the provisions of section 7 of [the CFA] . . . or subparagraph (a) of paragraph (1) of subsection b. of this section, but not both."[91]

D'Agostino, is the most significant New Jersey case relating to the remedies available to the grantor. In *D'Agostino,* the Court applied the Consumer Fraud Act (CFA) to a "mortgage foreclosure rescue plan."[92]

of plaintiffs' title. Zaman v. Felton, 98 A.3d 503, 517 (N.J. 2014). Because it technically is not a "rescission," there is no requirement that the grantor make a timely objection to the transaction. *Id.* at 518–19.

86. *Id.* at 514. The deed should be a bargain and sale deed, with covenants against the acts of the grantor. *Id.*

87. *See generally* O'Brien v. Cleveland, 423 B.R. 477, 484 (Bankr. D. N.J. 2010).

88. Crane v. Decamp, 21 N.J. Eq. 414, 417 (1869).

89. *See supra* Section II.

90. N.J. STAT. ANN. 46:10B-29(a)(1) (West 2004).

91. *Id.*

92. D'Agostino v. Maldonado, 78 A.3d 527, 531 (N.J. 2013).

The trial court held that defendant committed an unconscionable commercial practice and that plaintiffs suffered an ascertainable loss.[93] The trial court voided the transaction and calculated damages by determining the equity in the home that plaintiffs lost to defendant, subtracting the value of defendant's improvements to the property and trebling the net amount pursuant to the CFA and subtracted the value of the equity returned to plaintiffs from the trebled damages.[94]

The Appellate Division affirmed the trial court's decision that defendant had violated the CFA but held that plaintiffs had failed to demonstrate an ascertainable loss because the court's equitable remedy (i.e., voiding the transaction) had effectively restored the interest in the property to plaintiffs.[95] The Appellate Division remanded the case on the issue of damages and both parties filed cross-petitions for certification in the Supreme Court.[96]

The Court granted certification and reversed the Appellate Division on the issue of damages and held that plaintiffs were entitled to a money judgment in addition to voiding the transaction and restoring title to plaintiffs.[97] The rationale was that the Legislative intent was to impose a penalty by means of the CFA, and that simply to restore title would have imposed no penalty.[98]

There was a dissent from the majority opinion, relating to the issue of damages. The dissenting opinion said that:[99]

> [T]he concept of ascertainable loss is a threshold showing . . . [it] is not part of the manner in which the damages sustained are proven and therefore not the basis on which treble damages are calculated . . . [and that] . . . [b]y conflating the two separate and distinct concepts, the majority . . . invites trial courts to inject speculation into what should be routine calculations of damages and has encouraged [the trial courts] to search out ways to impose treble damages that far exceed the CFA's punitive purpose.

In essence, the dissent held that an ascertainable loss was an element of the cause of action, but not the measure of damages and that by reason of restoration of title to plaintiffs, without proof of actual damages, the

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 531–32.
98. *Id.* at 543–44.
99. *Id.* at 552–53 (2013) (Hoens, J., concurring in part, dissenting in part).

award of a money judgment produced a windfall to the plaintiffs.[100] The majority faulted that approach and held that:[101]

> When an unconscionable commercial practice has caused the plaintiff to lose money or other property, that loss can satisfy both the 'ascertainable loss' element of the CFA claim and constitute 'damages sustained' for purposes of the remedy imposed under the CFA.

The Court noted that "[t]he damages are the 'ascertainable loss' (referred to in sentence one [of N.J.S.A. 56:8-19]), which is to be trebled");"[102] and that "In short, the statute and our case law envision that a plaintiff's loss of money or property may constitute the requisite 'ascertainable loss' –entitling the plaintiff to collect damages –and the 'damages sustained' for purposes of N.J.S.A. 56:8-19, which are to be trebled."[103] With reference to the calculation of damages, the Court said that:[104]

> In a given case, the same quantifiable loss of money or other property, suffered by the plaintiff as a result of the defendant's CFA violation, may serve both purposes in the analysis, consistent with the statute's remedial intent and the requirement of proving damages with certainty. The dissent's concern that our holding in this regard derives from a misinterpretation of N.J.S.A. 56:8-19 is therefore unfounded.

There are two considerations that make the majority opinion compelling: 1) simply voiding the transaction and restoring title to plaintiffs would impose no penalty to the predator (contrary to the intent of the CFA) – it would simply be a wag of the finger and making the predator do what should not have been done in the first place, and 2) the calculation of damages is prophetic in that the greater the disparity in value between the proceeds of the transaction and the value of the interest granted shows the measure of abuse foisted on the needy grantor.[105] That abuse is the ascertainable loss.

100. *Id.*
101. *Id.* at 542 (majority opinion).
102. *Id.*
103. *Id.*
104. *Id.*
105. The damages should be offset by any enhancement added by the predator to the value of the interest re-conveyed to plaintiff, as was done in *D'Agostino.* The Court, however, left open the question of whether the enhancement should be applied before the

Another element of damages, i.e., an ascertainable loss, would be the cost to satisfy any liens that the predator may have imposed on the property.

D. Additional Remedies Available to the Grantor

As noted by the Court in *Zaman*, the grantor (Felton) asserted numerous counterclaims, alleging fraud, slander of title, the Consumer Fraud Act and violations of other federal and state consumer protection statutes including the Fair Foreclosure Act.[106] The *O'Brien* opinion also considered legal malpractice, conspiracy, the Truth in Lending Act and the New Jersey Home Ownership Security Act, conversion, and usury.[107]

CONCLUSION

Because the concept of an equitable mortgage is ancient and precedes the suggested factors of *O'Brien v. Cleveland, Zaman v. Felton* and a myriad of other cases, one may wonder on what basis the historical concept developed to such suggested finite criteria. One (perhaps over-simplified) answer is that "I know it when I see it."[108] Some cases have been based on the fact that the equity has been clogged by avoiding the need of a foreclosure, but as I hope has been shown in this discussion, the significance of the eight factors should yield to a simple equitable concept of a predator taking an undue advantage of a necessitous person—a predatory transaction.

damages had been trebled, or after, "under the broad guidelines of the law." *Id.* at 546. The trial court's award of attorneys' fees and costs was unchallenged. *See id.*

106. Zaman v. Felton, 98 A.3d 503, 506–07 (N.J. 2014).

107. *See generally* O'Brien v. Cleveland, 423 B.R. 477 (Bankr. D. N.J. 2010). As an aside, if the grantor redeemed the property at an unconscionable cost (usury) or after other consumer protection violations had been committed, although the concept of an equitable mortgage would not be involved, the grantor may nevertheless have resort to some of these relief provisions. *Id.* at 490–91.

108. In the 1964 Supreme Court case, *Jacobellis v. Ohio* this phrase was used by Justice Potter Stewart to describe his threshold test for obscenity. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

APPENDIX

(New Jersey Cases and treatises dealing with the subject)

1. Rodman v. Zilley, 1 N.J. Eq. 320 (N.J. Ch. 1831).
2. Griffin v. Griffin, 18 N.J. Eq. 104 (N.J. Ch. 1866).
3. Crane v. Decamp, 21 N.J. Eq. 414 (N.J. 1869).
4. Kline v. McGuckin, 24 N.J. Eq. 411 (N.J. Ch. 1874).
5. Executors of Gale v. Morris, 29 N.J. Eq. 222 (N.J. Ch. 1878).
6. Frink v. Adams, 36 N.J. Eq. 485 (N.J. Ch. 1883).
7. Doughty v. Miller, 50 N.J. Eq. 529 (N.J. Ch. 1892).
8. Strieby v. Clinton Hill Lumber & Mfg. Co., 52 N.J. Eq. 576 (N.J. Ch. 1894).
9. Cummings v. Jackson, 55 N.J. Eq. 805 (N.J. 1897).
10. Bullowa v. Orgo, 41 A. 494 (N.J. Ch. 1898).
11. Page v. Martin, 20 A. 46 (N.J. 1890).
12. Fretz v. Roth, 59 A. 676 (N.J. Ch. 1905), *rev'd*, 64 A. 152 (N.J. 1906).
13. Griffen v. Cooper, 68 A. 1095 (N.J. Ch. 1908).
14. Wilbur v. Jones, 86 A. 769 (N.J. 1912).
15. Papsco v. Novak, 121 A. 518 (N.J. Ch. 1923), *aff'd*, 123 A. 926 (N.J. 1924).
16. Williams v. M. E. Blatt Co., 123 A. 362 (N.J. 1923).
17. J. A. Migel, Inc. v. Bachofen, 126 A. 396 (N.J. 1924).
18. McKlosky v. Kobylarz, 132 A. 497 (N.J. Ch. 1926).
19. J.W. Pierson Co. v. Freeman, 166 A. 121 (N.J. 1933).
20. Rutherford Nat. Bank v. H.R. Bogle & Co., 169 A. 180 (N.J. Ch. 1933).
21. Mansfield v. Hammond, 176 A. 354 (N.J. 1935).
22. McFarland v. Withers, 191 A. 808 (N.J. Ch. 1937).
23. Antonucci v. Gravina, 34 A.2d. 78 (N.J. Ch. 1943).
24. De Caro v. De Caro, 97 A.2d 658 (N.J.1953).
25. Vreeland v. Dawson, 151 A.2d 62 (N.J. Super. Ct. Ch. Div. 1959).
26. Dorman v. Fisher, 155 A.2d 11 (N.J. 1959).
27. Welsh v. Griffith-Prideaux, Inc., 158 A.2d 529 (N.J. Super. Ct. App. Div. 1960).
28. Smith v. Shattls, 169 A.2d 503 (N.J. Super. Ct. App. Div. 1961).
29. Brodzinsky v. Pulek, 182 A.2d 149 (N.J. Super. Ct. App. Div. 1962).
30. Hardyston Nat'l Bank v. Tartamella, 267 A.2d 495 (N.J. 1970).
31. She Shell Oil Co. v. Marinello, 307 A.2d 598 (N.J. 1973).
32. James Talcott, Inc. v. Roto Am. Corp., 302 A.2d 147 (N.J. Super. Ct. Ch. Div. 1973).
33. Humble Oil & Refin. Co. v. Doerr, 303 A.2d 898 (N.J. Super. Ct. Ch. Div. 1973).

34. Howard v. Diolosa, 574 A.2d 995 (N.J. Super Ct. App. Div. 1990), *cert. denied*, 585 A.2d 409 (N.J. 1990).
35. Essex Prop. Servs., Inc. v. Wood, 587 A.2d 1337 (N.J. Super. Ct. Law Div. 1991).
36. Assocs. Home Equity Servs., Inc. v. Troup, 778 A.2d 529 (N.J. Super. Ct. App. Div. 2001).
37. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915 (N.J. Super. Ct. Ch. Div. 2002).
38. Nowosleska v. Steele, 946 A.2d 1097 (N.J. Super. Ct. App. Div. 2008).
39. O'Brien v. Cleveland, 423 B.R. 477 (Bankr. D.N.J. 2010).
40. Johnson v. NovaStar Mortg., Inc., 698 F. Supp. 2d 463 (D.N.J. 2010).
41. Gonzalez v. Wilshire Credit Corp., 25 A.3d 1103 (N.J. 2011).
42. D'Agostino v. Maldonado, 78 A.3d 527 (N.J. 2013).
43. Zaman v. Felton, 98 A.3d 503 (N.J. 2014).
44. Reibman v. Myers, 164 A.3d 1080 (N.J. Super. Ct. App. Div. 2017).
45. Williams v. Hudson City Sav. Bank, No. A-2276-15T1, 2018 WL 1095306 (N.J. Super. Ct. App. Div. Mar. 1, 2018).
46. One West Bank, F.S.B. v. Musallam, No. A-3711-16T3, 2018 WL 2979144 (N.J. Super. Ct. App. Div. June 14, 2018).

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1. McGill v. Biggs, 434 N.E.2d 772 (Ill. App. Ct. 3d Dist. 1982).
2. Brown v. Grant Holding, LLC, 394 F. Supp. 2d 1090 (D. Minn. 2005).
3. Carter v. Second Chance Program, Inc., No. 2006-CH-26787 (Ill. Cir. Ct. Dec. 23, 2008).
4. 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 569 § 1193 et. seq. (5th ed. 1941).
5. 29 NEW JERSEY PRACTICE SERIES, LAW OF MORTGAGES § 8.1 et. seq. (2d ed.).
6. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 141 (1826).
7. 1 WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 479 (5th ed. 1876).
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