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PRACTICE AND PROCEDURE

I. State Court Jurisdiction over National Banks

Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Co.[1] is a major case, not only in South Carolina, but also nationwide, because it significantly increases national banks' vulnerability to suit in state court. The decision construed the federal venue statute governing such suits[2] finding that a foreign bank was "located" in South Carolina for jurisdiction purposes when its only presence in the state was an agency relationship with an independent financing company. As an essential part of that holding, the court found that the bank's activities through the financing company were sufficient to constitute branch banking within the meaning of the federal law.[3]

The *Southland* decision is significant for two reasons. First, all previous cases interpreting the venue statute have dealt with the legality of requiring a bank chartered in one county of a state to defend an action in another county,[4] which is very different from asserting jurisdiction over a bank with no other presence in the state than an unacknowledged agency relationship. Second, defining "branch" to include agency relationships suggests even further possibilities for the expansion of state court jurisdiction over national banks.

The facts of *Southland* are important as an indicator of how far the new interpretation of "branch" can be extended. Mellon Bank had entered into an agreement with a local financing company, Associates Financial Services, under which money from the bank was to be used to finance retail purchases of mobile homes in South Carolina.[5] Many of the sales so financed were handled by a local dealer, Southland Mobile Homes. The suit arose when Mellon Bank allegedly agreed to release to Southland some of its

1. 270 S.C. 527, 244 S.E.2d 212 (1978), *cert. denied*, 99 S. Ct. 266 (1979). One Justice dissented to the denial of certiorari on the ground that whether Mellon Bank was engaged in branch banking as a consequence of its agency relationship with Associates presented a new issue for the Court. 99 S. Ct. at 267 (Blackmun, J., dissenting).

2. 12 U.S.C. § 94 (1976).

3. *Id.* § 36(f).

4. Two major cases interpreting the venue statute to allow suit in counties other than the county of charter are Citizens and Southern Nat'l Bank v. Bougas, 434 U.S. 35 (1977) and Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied*, 423 U.S. 1048 (1976).

5. Brief of Respondent at 2.

bad debt reserve and then failed to do so after Southland had expanded operations in reliance thereon.[6] Southland claimed damages of $742,000 against both Mellon Bank and Associates. The financing company cross-claimed against Mellon Bank, a Pennsylvania corporation, which objected to jurisdiction.

In holding that Mellon Bank was subject to jurisdiction in South Carolina, the supreme court's reasoning followed a series of progressive interpretations of the federal statutes involved. The jurisdictional statute, 28 U.S.C. section 1348, gives federal district courts original jurisdiction in certain types of action and provides for state court jurisdiction in the following language: "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively *located.*"[7] Similarly, the venue statute, 12 U.S.C. section 94, employs the word "located":

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases.[8]

Noting that the interpretation of both statutes hinges on "located", the court concluded that if Mellon Bank was found to be located within the state, it would be properly subject to the jurisdiction of South Carolina courts.[9]

Drawing on the case law of South Carolina and other jurisdictions, the supreme court observed that a national bank has been held to be located in any county of the state in which it maintains a branch office.[10] The definition of a branch is stated in 12 U.S.C. section 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.[11]

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6. *Id.* at 3 n.6.
7. 28 U.S.C. § 1348 (1976) (emphasis added).
8. 12 U.S.C. § 94 (1976) (emphasis added).
9. 270 S.C. at 531, 244 S.E.2d at 214.
10. *Id.* at 530, 244 S.E.2d at 213.
11. 12 U.S.C. § 36(f) (1976).

The court commented that the use of "include" in the above definition indicates that the listed requirements are merely representative and do not preclude other possibilities. Moreover, because the characteristics are listed in the disjunctive, only one need be present to find the existence of a branch.[12]

With these statutory interpretations as a background, the court examined the facts. The court's holding that Mellon Bank was engaged in branch banking was based on its finding that, through its agent, Associates, the bank exercised detailed control over the lending transactions involving Mellon money. In the words of the lower court:

> [T]he Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, . . . loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places of procedure.[13]

Because Mellon was engaged in branch banking, the bank was therefore "located" within the state for jurisdictional purposes.

The court's interpretation of the federal venue statute is supported by both logic and case law. Nevertheless, the decision seems to contain a significant jump in reasoning because previous judicial interpretations of "located" merely concerned venue in another county when there was already a clear basis for jurisdiction within the state. Here, however, the question arises whether a state must also find the presence of minimum contacts and assert an additional basis of jurisdiction under its long-arm statute. The court does not address this question, but it seems to treat the wording of the federal statute as indicating that a long-arm statute is unnecessary because the statute states that national banks are to be "deemed citizens of the States in which they are respectively located."[14] Thus, if this language is given its ordinary meaning, the provisions for obtaining jurisdiction over state banks should be applicable to national banks when they are found to be "located" within the state.

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12. 270 S.C. at 531, 244 S.E.2d at 214. *See also* First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122 (1969), *reh. denied,* 396 U.S. 1047 (1970).

13. 270 S.C. at 531-32, 244 S.E.2d at 214.

14. 28 U.S.C. § 1348 (1976).

The supreme court in *Southland* stated that the lower court had found the existence of minimum contacts, but the supreme court did not appear to rely on that fact for the assertion of jurisdiction. The court's position appeared to be that jurisdiction was proper under the federal statutes unless those statutes granted the bank an exemption.[15] The unanswered question, in both the *Southland* opinion and other case law, is whether the legislation in question was intended to operate as an express grant of jurisdiction to the states or merely to prevent national banks from claiming diversity in actions otherwise properly before state courts. It has been held that the same statutes entitle national banks to be treated as citizens of states where they are "located" for purposes of establishing diversity in federal court,[16] but treatment in the state court context has not been addressed. It is difficult to conceive a situation in which a bank could engage in any of the activities constituting branch banking without generating minimum contacts, but the possibility might exist if the bank's activities were limited to a single transaction. Considering the expansive interpretation of "branch" in *Southland,* this issue eventually may require resolution.

Southland widens an inconsistency within the federal venue statute between the requirements for venue in federal and state court. That section of the statute that applies to federal courts uses "established," rather than "located," as the key requirement of jurisdiction. Federal courts have consistently interpreted "established" to refer solely to the place where the bank is chartered,[17] and until recently, state courts usually interpreted "located" in the same manner.[18] These interpretations were felt to bestow a privileged status on national banks at the expense of plaintiffs, because unlike state banks and corporations, national banks could conduct business in locations where they were sheltered from suit.[19] Although the privilege in federal court remains intact, recent interpretations of "located" have eroded the protection formerly accorded national banks sued in state court.

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15. 270 S.C. at 532, 244 S.E.2d at 214. The applicable South Carolina long-arm statute is S.C. CODE ANN. § 36-2-803 (1976).

16. Continental Nat'l Bank of Memphis v. Buford, 191 U.S. 119, 123-24 (1903); Cupo v. Community Nat'l Bank & Trust Co., 438 F.2d 108, 110 (2d Cir. 1971).

17. Citizens & Southern Nat'l Bank v. Bougas, 434 U.S. 35, 40-41 (1977).

18. Steinberg, *Citizens & Southern Nat'l Bank v. Bougas—Achieving Justice Under the Venue Provision of the National Bank Act,* 12 GA. L. REV. 161, 161 (1978).

19. *Id.* at 162.

Citizens and Southern National Bank v. Bougas[20] determined that a bank was "located," not only where it was chartered, but also in any county where it operated a branch.[21] In its expanded interpretation of "branch," *Southland* would seem to have eliminated any remaining vestige of a venue shelter in state court.

The venue shelter that remains in federal court is difficult to justify in view of the purpose of Congress in legislating jurisdiction and venue for national banks. If Congress' intention was to prevent "untoward interruption of a national bank's business . . . from compelled production of bank records for distant litigation,"[22] why should that objective be preserved in federal court but abandoned in favor of the convenience of the plaintiff in state court? The question is especially difficult to answer because there is no longer any great disruption of business caused by requiring a bank to produce records at a remote location.[23] *Southland* should cause courts to question the reasons for interpreting "established" differently from "located" and, consequently, to question the basis for perpetuating the federal venue shelter.

The expanded definition of what constitutes a "branch" in *Southland* is that aspect of the decision that will be most important to the future development of this area of the law. The decision invites speculation about what other types of banking activities, carried on by a bank without a chartered presence in the state, could be used as a basis for exerting jurisdiction. Future cases will focus on the interpretation of those activities listed in 12 U.S.C. section 36(f) as defining a branch: lending money, receiving deposits, or accepting payment of checks. If these activities are carried on through an agent, *Southland* indicates, first, that a crucial element in finding the existence of a branch is the degree of control exercised by the foreign bank and, second, that courts will look beneath the surface to determine the true nature of transactions. In view of *Southland,* the purchase of commercial paper, in particular, must be viewed as leaving a national bank vulnerable to suit.[24]

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20. 434 U.S. 35 (1977).

21. *Id.* at 38-39.

22. *Id.* at 44 (citing Mercantile Nat'l Bank at Dallas v. Langdeau, 371 U.S. 555, 561-62 & n.12 (1963) and First Nat'l Bank of Charlotte v. Morgan, 132 U.S. 141, 145 (1889)).

23. Steinberg, *supra* note 18, at 176.

24. Mellon Bank attempted to characterize its transactions with Southland Mobile Homes as the mere purchase of commercial paper. Brief of Appellant at 4. *But see* Michigan Nat'l Bank v. Robertson, 372 U.S. 591 (1963).

Besides *Southland* there is little case law defining a branch bank; what there is, however, indicates a liberal interpretation. In *First National Bank in Plant City v. Dickinson,*[25] two off-premises services offered by a bank were found to constitute branch banking: an armored car carrying a teller and a receptacle for the receipt of packages containing cash or checks for deposit. In *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System,*[26] a proposal by a mortgage company, a wholly owned subsidiary of C & S National Bank, to establish offices in various Georgia cities was held to be clearly an attempt by the bank to establish branches. *Independent Bankers* is especially significant because the court was willing to pierce the corporate veil of the subsidiary corporation to attribute the proposed activities to the parent bank.

As a result of *Southland,* national banks are no longer protected in South Carolina state court by the restrictions on suits against them that they once enjoyed under the federal venue statute. There is even a possibility that a national bank could be sued in state court on a transaction not sufficient to support a finding of minimum contacts if the transaction falls within those activities listed as defining a branch bank. This issue, as well as the problem of refining the definition of "branch," will be the focus of future cases. It remains to be seen what impact *Southland* will have on the venue shelter still existing for national banks in federal court.

II. THE SOUTH CAROLINA "DOOR-CLOSING" STATUTE

In *Nix v. Mercury Motor Express, Inc.*[27] the South Carolina Supreme Court interpreted section 15-5-150 of the South Carolina Code[28] in terms of subject matter jurisdiction to avoid trial of a cause of action with no real relationship to the state. The case concerned an attempt to bring suit in South Carolina on a claim arising from a multi-state fact situation. A collision occurred in Virginia between a truck driven by an employee of Mercury Motor Express, Inc., which is a foreign corporation licensed in South Carolina, and a car occupied by Mr. and Mrs. Hawkins, residents of Massachusetts. Mrs. Hawkins died in the accident

25. 396 U.S. 122 (1969), *reh. denied,* 396 U.S. 1047 (1970).
26. 516 F.2d 1206 (D.C. Cir. 1975).
27. 270 S.C. 477, 242 S.E.2d 683 (1978).
28. S.C. CODE ANN. § 15-5-150 (1976).

and her estate sued Mercury and the truck driver Edwards in South Carolina for her wrongful death. Plaintiff Nix was a Hampton County, South Carolina resident with no prior connection with the deceased and was appointed administrator solely for the purpose of bringing suit in this state. Mr. Hawkins also brought actions in his own behalf against Mercury and Edwards. When the lower court refused to grant Mercury a change of venue from Hampton County to Florence County, the location of Mercury's principal place of business in the state, the defendants appealed and the issue of subject matter jurisdiction was first raised.[29]

In a three-to-two decision, the supreme court dismissed the action against Mercury for lack of subject matter jurisdiction. Change of venue was granted to defendant Edwards, who was a resident of Florence County.[30] The decision concerning Mercury was based on the court's interpretation of two South Carolina statutes.

The first statute relied upon was section 15-5-150 of the 1976 Code, which states:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court:
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> (1) By any resident of this State for any cause of action; or
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> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this state.[31]

The second provision of the statute was clearly not applicable, but despite the South Carolina residency of administrator Nix, the court found that the statute required a finding of lack of subject matter jurisdiction in the case. According to the majority, Nix could not rely on his own residency, but for purposes of bringing the action, stood in the position of the deceased. Because Mrs. Hawkins would have been barred by section 15-5-150 had she lived, so was her administrator.[32]

The court did not dispute that the deceased could have assigned a fractional share of her cause of action to a state resident, but refused to find that such an assignment would have avoided the "door-closing" effect of the statute. The majority concluded

29. 270 S.C. at 480-81, 242 S.E.2d at 684.
30. *Id.* at 480, 242 S.E.2d at 684.
31. S.C. CODE ANN. § 15-5-150 (1976).
32. 270 S.C. at 483, 242 S.E.2d at 685.

that the same disability would have remained because section 15-15-60[33] "operates to prevent any such assignment from placing the assignee on higher ground than his assignor."[34] The specific language of section 15-15-60 states: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any setoff or other defense existing at the time of, or before notice of, the assignment."[35] The interpretation of section 15-15-60 to apply to jurisdictional requirements, rather than substantive rights and defenses, was the second essential element in the majority's reasoning. This interpretation was not supported by citations to South Carolina cases, although several Virginia cases[36] were cited for the proposition that the right of an administrator to maintain an action for wrongful death depends on whether the deceased could have maintained an action for injury had he survived.

The dissent vigorously objected to the two statutory interpretations upon which the majority based its decision. In the opinion of the dissent, because Nix was a properly appointed administrator whose appointment was not subject to challenge at this stage of the proceedings, his South Carolina residency satisfied section 15-5-150 and permitted jurisdiction.[37] Furthermore, the "door-closing" statute would not have barred the deceased in South Carolina had she lived because it is permissible in this state for a plaintiff to defeat the statute by assigning a fractional share of his claim to a state resident.[38] According to the dissent's interpretation of section 15-15-60, such an assignment would not have been affected by the deceased's residency because that statute merely preserves a setoff or other defenses of a defendant and does not address the question of subject matter jurisdiction. Thus, in the view of the dissent there was nothing in either statute relied on by the majority to prevent administrator Nix from asserting his own South Carolina residency for purposes of establishing jurisdiction.[39]

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33. S.C. CODE ANN. § 15-15-60 (1976).

34. 270 S.C. at 483, 242 S.E.2d at 685.

35. S.C. CODE ANN. § 15-15-60 (1976).

36. Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969); Virginia Electric & Power Co. v. Decatur, 173 Va. 153, 3 S.E.2d 172 (1939).

37. 270 S.E. at 484-88, 242 S.E.2d at 685-88 (Ness, J., dissenting).

38. *See* Doremus v. Atlantic Coast Line Ry., 242 S.C. 123, 130 S.E.2d 370 (1963); Chapman v. Southern Ry., 230 S.C. 210, 95 S.E.2d 170 (1956); Ridgeland Box Mfg. Co. v. Sinclair Ref. Co., 216 S.C. 20, 56 S.E.2d 585 (1949).

39. 270 S.C. at 487, 242 S.E.2d at 687 (Ness, J., dissenting).

While the majority's decision may be consistent with the purpose behind the "door-closing" statute, the dissenting opinion is better supported by both logic and South Carolina precedent. The majority referred to section 15-5-150 as a jurisdictional statute, but it is likely that the actual purpose of the statute was to codify the common law doctrine of *forum non conveniens*[40] under which an action could be dismissed, even though jurisdiction was proper, if the trial could be conducted more fairly and efficiently at another location. In *Nix,* jurisdiction over Mercury could have been asserted under section 15-9-340, which provides for substituted service of process on any motor carrier licensed by the Public Service Commission.[41] Because Virginia, where the cause of action arose, was undoubtedly a more suitable place for trial than South Carolina, the majority was correct in applying section 15-5-150 to obtain a dismissal. The opinion should, however, have stated the court's true rationale clearly and interpreted the statute in terms of *forum non conveniens,* instead of straining the language to find lack of subject matter jurisdiction.

Support can be found for interpreting section 15-5-150 as a codification of *forum non conveniens,* although not in South Carolina case law. In *Szantay v. Beech Aircraft Corporation,*[42] a federal district court sitting in South Carolina noted the lack of both legislative history and judicial interpretation and decided to treat the statute as embodying the common law doctrine. In addition, a scholarly treatment of a federal South Carolina case has advanced a *forum non conveniens* interpretation of the same statute as a means of dismissing cases in which minimum contacts are arguably present but the forum is otherwise totally disinterested.[43]

The court's decision in *Nix* to dismiss for lack of subject matter jurisdiction may have been motivated primarily by practi-

40. See notes 38-39 and accompanying text *supra.*

41. S.C. CODE ANN. § 15-9-340 states: "If the defendant be a motor vehicle carrier, as defined in § 58-23-10, jurisdiction may be acquired by service of two copies of the summons and complaint upon the secretary of the Public Service Commission . . . ."

42. 349 F.2d 60 (4th Cir. 1965). *Szantay* is noted in Recent Decisions, 17 S.C.L. REV. 631 (1965).

43. Sedler, *The Truly Disinterested Forum in the Conflict of Laws: Ratliff v. Cooper Laboratories,* 25 S.C.L. REV. 185, 189-91 (1973). Sedler discusses Ratliff v. Cooper Laboratories, 444 F.2d 745 (4th Cir. 1971), which involved an out-of-state injury and all out-of-state parties. The case was dismissed on a finding of no minimum contacts, but Sedler contends the result would have been the same with the presence of minimum contacts under a *forum non conveniens* interpretation of section 15-5-150.

cal considerations. If the case had been tried it probably would have presented complicated choice of law problems that the court wished to avoid. It is interesting, however, that a conflict would not have existed between the two states' statutes of limitation. Although the South Carolina statute runs for six years[44] and the Virginia statute only for two years,[45] because the action was commenced within two years, South Carolina would not have been faced with the decision of whether to try a case barred in the state where the cause of action arose.[46] Conflicts in substantive law may have existed, but the most common and understandable reason for dismissing a case was not present. The effect of the South Carolina court's action was to deny the plaintiff a forum entirely, because the Virginia statute had run by the time the dismissal was handed down. Assuming that the court did wish to avoid trial of the case, the court's interpretation of section 15-5-150 in terms of subject matter jurisdiction then can be explained. At an appellate stage, *forum non conveniens* objections have been waived, and lack of subject matter jurisdiction is one of the few ways in which a dismissal can be obtained.

Whatever the court's motivation, it is clear from the *Nix* opinion that a South Carolina administrator with no prior connection with the deceased cannot assert his own residency as a basis for jurisdiction in the state. The inconsistency between this holding and the statutory language making the administrator the only real party in interest in a wrongful death action[47] was not addressed by the court. The opinion also clearly stated that section 15-5-150, the "door-closing" statute, refers to subject matter jurisdiction. This interpretation seems contrary to the probable legislative intent and may have been motivated primarily by a desire to avoid trial of the particular case. Although it

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44. S.C. CODE ANN. § 15-3-530 (1976).

45. VA. CODE § 8.01-244 (1950).

46. The accident occurred on December 8, 1974, and the action was commenced on November 27, 1976. Record at 1.

47. S.C. CODE ANN. § 15-51-20 (1976) states:

> Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person.

Id.

would not have allowed dismissal in *Nix*, a *forum non conveniens* interpretation of the statute probably would have been ultimately preferable because it gives courts considerably more flexibility and discretion in determining what cases to try. The supreme court unintentionally may have locked itself into a subject matter jurisdiction interpretation that was never the intention of the legislature.

Another matter specifically ruled on in the *Nix* decision was the scope of section 15-15-60, concerning the status of an assignee of a cause of action. According to the majority, the statute pertains to jurisdictional requirements as well as to substantive rights, although this interpretation is without prior support in the case law. In connection with the interpretation of section 15-15-60, the validity of the practice of assigning fractional shares of causes of action to obtain jurisdiction in the state was indirectly addressed. While precedents allowing the practice were not overruled, their continued vitality is very doubtful because any jurisdictional advantage that might be obtained by an assignment is negated by the court's holding concerning section 15-15-60. The question of the validity of making assignments may come before the court again, but the probable outcome seems clear.

III. DEFICIENCY JUDGMENT AS AN INCIDENT OF A MORTGAGE FORECLOSURE

Perpetual Building and Loan Association v. Braun[48] concerns a pleading technicality that is not only of practical interest because it involves a very common type of action, but also of theoretical interest because arguably it raises an issue of due process. The case developed from a mortgage foreclosure action brought by the respondent as mortgagee. The complaint prayed for the property to be sold, for a receiver to be appointed, and for "such other relief as might be just and proper."[49] There was no prayer for a deficiency judgment. After the special referee determined the debt to be $950,000, the circuit judge ordered the sale of the property. The sale was carried out and a deficiency of $171,835.32 remained as the unpaid balance of the debt. At this point the issue of a deficiency judgment first entered the proceedings, as the trial judge awarded the deficiency on motion of the respondents.[50]

48. 270 S.C. 338, 242 S.E.2d 407 (1978).
49. *Id.* at 340, 242 S.E.2d at 408.
50. *Id.*

The South Carolina Supreme Court, in a four-to-one decision, held that the trial judge had not abused his discretion in granting the deficiency judgment, despite the lack of a specific prayer for that relief.[51] In reaching this conclusion, the majority considered the question from two viewpoints: (1) whether the lower court had jurisdiction to render the judgment, and (2) whether the action was permitted under South Carolina law.

On the question of jurisdiction, the court rejected the mortgagor's contention that a foreclosure action is a proceeding *in rem* and cannot support a personal judgment. This finding is supported by South Carolina case law.[52] The majority asserted the proposition that a deficiency judgment is sufficiently incidental to a foreclosure proceeding that it can be granted under a prayer for general relief with no specific notice to the defendant. While there is authority elsewhere in the country for that position,[53] it is questionable whether there was even supporting dicta, as claimed by the majority, in the one South Carolina case cited, *McConnell v. Barnes.*[54] The holding in *McConnell,* that a foreclosure decree by itself was not sufficient to allow the mortgagee to rank his claim as a judgment against the estate of the debtor, is more consistent with the *Braun* dissent's contention that the present decision is without support in South Carolina case law.[55]

The majority in *Braun* also found nothing in the South Carolina statutes to prevent the rendering of a post-sale deficiency judgment. The debt was established prior to the sale, as required by section 29-3-630[56] and the court relied on this fact to find that the defendant should not have been surprised by the award of the deficiency. Not only does a deficiency judgment not require a specific prayer, the majority also found an indication in section 15-39-760[57] that it may only be denied when it is expressly waived. Section 15-39-760, regarding requirements for leaving the bidding open for 30 days, provides as follows: "The provisions of 15-39-720 to 15-39-750 shall not apply to any suit brought for foreclosure

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51. *Id.* at 339, 343, 242 S.E.2d at 407-08, 409.

52. Anderson v. Pilgrim, 30 S.C. 499, 9 S.E. 587 (1888).

53. Shepherd v. Pepper, 133 U.S. 626 (1890); *see generally* 55 AM. JUR. 2d *Mortgages* § 909 (1971); 92 C.J.S. *Vendor & Purchaser* § 448 (1955 & Cum. Supp. 1978).

54. 142 S.C. 112, 140 S.E. 310 (1927).

55. 270 S.C. at 343-45, 242 S.E.2d at 409-10 (Lewis, C.J., dissenting).

56. S.C. CODE ANN. § 29-3-630 (1976) states: "No sale . . . shall be valid to pass the title of the land mortgaged unless the debt for which the security is given shall be first established by the judgment of some court of competent jurisdiction . . . ."

57. S.C. CODE ANN. § 15-39-760 (1976).

if the complaint therein states that no personal or deficiency judgment is demanded and that any right to such judgment is expressly waived."[58] The court also relied on section 29-3-660,[59] which appears to give a court express authority to render a deficiency judgment *after* sale of the property. That statute states: "In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises."[60] The statute does not, however, state that a deficiency may be awarded without a request for it in the complaint.

The dissent's primary concern was the lack of notice to the defendant. Pointing out that there is no South Carolina precedent for finding that a deficiency judgment is such an incident of a mortgage foreclosure that it can be supported by a prayer for general relief, the dissenting chief justice preferred to place the consequences of failure to assert a claim for a deficiency judgment on the plaintiff. Additionally, the dissent expressed the concern that a defendant, relying on the fact that foreclosure was the only relief requested in the pleadings, might default and become liable for a deficiency judgment that had not been fully litigated.[61]

Braun addresses a fundamental problem of pleading practice. While it is inefficient and even unfair to insist that technical rules always be strictly observed, even under the most liberal system the least that must be required is that the defendant be given proper notice of the plaintiff's claim. The South Carolina court has decided in *Braun* that a prayer for general relief gives sufficient notice and the decision, while novel in this state, is supported in the general body of law.[62] As evidenced by the age of the United States Supreme Court decision[63] that supports *Braun,* there is no reason to believe South Carolina is moving in new directions in the area of pleading requirements.

While the facts of *Braun* support the court's conclusion that there was no prejudice to the defendant by the post-sale judgment, could there be circumstances that would result in such prejudice? In the case of a default judgment, the dissent's concern

58. *Id.*
59. *Id.* § 29-3-660 (1976).
60. *Id.*
61. 270 S.C. at 345, 242 S.E.2d at 410 (Lewis, C.J., dissenting).
62. See note 53 *supra.*
63. Shepherd v. Pepper, 133 U.S. 626 (1890).

seems justified, and until the court refuses to award a deficiency in that situation, attorneys should take care to avoid a default or their clients might be precluded from litigating the amount of the debt. Another possible problem raised by this decision concerns the time period during which a motion for a deficiency after sale would be allowed. At some point the plaintiff should either be estopped or required to bring a separate action. Otherwise, the judgment would not become final and the defendant could not be certain that the extent of his liability had been settled. The court does not address either of these problems, and their resolution will have to await future decisions.

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