

UTAH'S "ONE-ACTION" RULE

By

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I. PURPOSE AND APPLICABILITY OF THE ONE-ACTION RULE

Utah's one-action rule is modeled after a California statute and is set forth in Utah Code Ann. § 78B-6-901. The statute provides, in pertinent part, that "[t]here is only one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate" While the statute is specific to mortgages, it is generally recognized that the one-action rule applies to trust deeds as well.² "[T]he effect of the one-action rule is to limit a creditor's means of enforcing its debt but not the right to recover"³ In other words, the rule dictates the procedure by which a creditor may collect a debt secured by realty.⁴ The one-action rule implements a "security first" approach, whereby the secured creditor first must exhaust its real property security interest before suing the debtor personally.⁵ The only recognized exception to this rule is where the secured creditor chooses to foreclose its mortgage or trust deed judicially, in which case the lender may assert both a claim for judicial foreclosure and a claim for a personal judgment, both in the "one-action."

II. CONSEQUENCES OF VIOLATING THE ONE-ACTION RULE

Generally, the result of bringing suit in violation of the one-action rule is that the action will be dismissed. This is because, under Utah law "there is no personal liability on the part of the mortgagor until after foreclosure or sale of the security and then only for the deficiency then remaining unpaid; a mortgagee may not have a personal judgment against the mortgagor until the

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² See City Consumer Servs., Inc. v. Peters, 815 P.2d 234, 236 (Utah 1991) (so holding).

³ Id.

⁴ See id. at 235 ("The rule ... essentially dictates the procedure by which a creditor may collect a debt in the case of a debtor's default."); APS v. Briggs, 927 P.2d 670, 673 (Utah Ct. App. 1996) ("The purpose of the one-action rule is to regulate the procedure of recovery of a secured creditor, not to deny the creditor's contract right to recover on its loan.") (citations omitted).

⁵ See In re property located at 2793 South 3095 West, West Valley City, Utah 84119, 2000 UT App. 116 ¶ 7, 1 P.3d 1116, 1118 ("Under the one-action rule, the creditor must rely upon his security before [otherwise] enforcing the debt.") (citations omitted).

security first has been exhausted.”⁶ This reasoning, which consistently has been followed and restated since at least 1936, seems to suggest that the only adverse consequence that a creditor might face in bringing suit in contravention of the one-action rule is the risk that its suit will be dismissed without prejudice, and that it might be ordered to pay the defendant’s attorney fees.

Some jurisdictions, including California, however, have concluded that the one-action rule “is susceptible of a dual application – it may be interposed by the debtor as an affirmative defense, or it may become operative as a sanction. If the debtor successfully raises the [rule] as an affirmative defense, the creditor will be forced to exhaust the security before he may obtain a money judgment against the debtor for any deficiency. If the debtor does not raise the [one-action rule] as an affirmative defense, he may still invoke it as a sanction against the creditor on the basis that the latter by not foreclosing on the security in the action brought to enforce the debt, has made an election of remedies and waived the security.”⁷

Bacon v. Raybould,⁸ an 1886 decision by the Territorial Supreme Court of Utah, seems to suggest that Utah would follow this California rule. Bacon’s age and territorial pedigree make it somewhat questionable as precedent. Further, the case is potentially distinguishable. In that case, the mortgagee had obtained his personal judgment based upon “an affidavit that his mortgage had become nugatory by the action of the mortgagor.”⁹ Nevertheless, the court held that the mortgagee’s “electing to pursue his remedy by attachment was a waiver of his remedy upon his mortgage.”¹⁰ The court further held that allowing the mortgagee to proceed with his claim against the collateral “would be a nullification of” the statutory one-action rule.¹¹

On the other hand, in Howard v. J.P. Paulson,¹² the Supreme Court suggests that the doctrine of election of remedies generally would not preclude a lien-holder from proceeding first to obtain personal judgment and thereafter pursuing his remedy against mortgaged real property because “such remedies are concurrent and not inconsistent and do not come within the doctrine of election.”¹³ The Howard court further declares that the one-action rule “does not in anyway affect the doctrine of election”¹⁴ This case, however, was not a one-action rule case. Accordingly, the above-quoted discussion is ambiguous dictum, at best.

⁶ National Loan Investors, L.P. v. Givens, 952 P.2d 1067, 1071 (Utah 1998) (citations omitted); First Nat’l Bank of Coalville v. Boley, 90 Utah 341, 344 , 61 P.2d 621, 623 (1936) (same); Bank of Ephraim v. Davis, 581 P.2d 1001, 1003 (Utah 1978) (“The underlying purpose of the single-action statute is to preclude the creditor from waiving the security and suing directly on the contract to pay money and hold the debtor rather than the security primarily liable.”); Smith v. Jarman, 61 Utah 125, 138, 211 P. 962, 967 (1922) (“So long, therefore, as a fund created by contract of the parties to pay the debt remains intact, no personal action will lie.... The provisions of the statute are therefore directly contrary to the common law by which the creditor had the right to waive the security and bring a personal action.”).

⁷ Walker v. Community Bank, 518 P.2d 329, 332 (Cal. 1974).

⁸ 4 Utah 357, 10 P. 481 (1886)

⁹ Bacon, 4 Utah at 359-60, 10 P. at 482-83.

¹⁰ Id.

¹¹ Id.

¹² 41 Utah 490, 127 P. 284 (1912).

¹³ 41 Utah 490, 497, 127 P. 284, 286

¹⁴ Id.

Finally, in APS v. Briggs,¹⁵ the Utah Court of Appeals held that “a creditor may not seek a personal judgment against a [maker or] comaker of a debt secured solely by mortgage upon real estate” From this premise, the court of appeals distended: “Because APS could not proceed against Pulsipher personally until [the real] property was foreclosed or lost, the statute of limitations did not run on APS’ claim, and Pulsipher’s motion to dismiss on the ground that the statute of limitations had run should have been denied.”¹⁶ This holding suggests that Utah’s one-action rule is jurisdictional and that it absolutely bars suit (even where it is not affirmatively raised by the debtor as a defense), such that it is not capable of the dual interpretations suggested by the California decisions and by Bacon.

Nonetheless, in light of the Bacon decision and given, further, that “Utah and California have interpreted their one-action statutes almost uniformly,”¹⁷ there is a significant risk that a Utah trial court and/or the Utah appellate courts might adopt California’s dual applicability interpretation of the one-action rule. In this regard, to the extent a creditor’s suit might be subject to the one-action rule, if the defendant/obligor fails to raise the rule as an affirmative defense and the creditor obtains a personal judgment, the suit might have the effect of waiving and releasing the creditor’s security interest.¹⁸

III. APPLICABILITY OF THE ONE-ACTION RULE TO PROPERTY OUTSIDE OF UTAH

Where the promissory note is governed by Utah law or comparative law principles implicate Utah law under a choice of law analysis, a question arises as to whether the borrower can raise the one-action rule either as an affirmative defense or as a sanction where the real property security for the note is not located in Utah. There is no clear answer to this question under Utah precedents.

The applicable statutory language is that “[t]here is only one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate” Utah Code Ann. § 78B-6-901. Read literally, the statute might support an argument that a creditor whose claim is secured by real estate outside of the State of Utah must seek to enforce the promissory note in the same action as the mortgage foreclosure.

¹⁵ 927 P.2d 670 (Utah App. 1996).

¹⁶ Id. at 674.

¹⁷ Id.

¹⁸ Whether this “sanction” would apply only once the creditor has obtained judgment or whether it may be applicable as early as the filing of suit could be the matter of some debate. The California cases that have considered this question generally have concluded that “the mere commencement of an action by the creditor that does not include a foreclosure of all the real property security is not in violation of the rule since the creditor may dismiss the action before judgment or amend the complaint to include a foreclosure of all the security.” Kirkpatrick v. Westamerica Bank, 65 Cal. App. 4th 982, 998, 76 Cal. Rptr. 2d 876, 880 (Cal. Ct. App. 1998); see also Security Pac. Nat’l Bank v. Wozab, 800 P.2d 557, 563 (Cal. 1990) (“When a secured creditor violates [the statutory one-action rule] by *obtaining judgment* on the debt before foreclosing upon the security, he is deemed to have waived the security.”) (emphasis added). The Kirkpatrick court concluded that an election of remedies does not occur with respect to the one-action rule until either (i) under the doctrine of *res judicata*, at the time of entry of final judgment, or (ii) under the doctrine of estoppel, when actions taken by the creditor (*e.g.*, pre-judgment attachment or extrajudicial setoff) are such that permitting the creditor to seek an alternative remedy would prejudice or work substantial injury to the debtor. Id. at 990, 881.

On the other hand, one could argue very plausibly that the statute applies only where the real property collateral is located in the State of Utah. Indeed, part 9 of chapter 6 of title 78B of the Utah Code governs “Mortgage Foreclosure.” Where the “mortgage” at issue covers property outside of the State of Utah and is governed by another state’s law, the Utah foreclosure statute arguably is inapplicable. Additionally, after declaring that “[t]here is only one action . . .,” the statute further explains: “and that action shall be in accordance with the provisions of this chapter [chapter 6 of title 78B of the Utah Code].” Utah Code Ann. § 78B-6-901. Of course, chapter 6 is inapplicable and cannot govern a foreclosure upon property located in another state.

This view is supported by interpretations of the one-action rule in other one-action rule states. For example, under the laws of Nevada, the one-action rule does not apply to any act or proceeding to enforce a mortgage or other lien upon real property located outside of the state, provided that the extra-territorial proceeding does not result in a personal judgment against the debtor.¹⁹ Similarly, California’s one-action rule does not apply where the property involved is outside the state.²⁰ On this subject, the California Supreme Court declared:

The first point to be considered is whether the action is maintainable on the note without foreclosure of the mortgage on land in another state, in the absence of a showing that the security is worthless. The defendant relies on section 726 of the Code of Civil Procedure as indicative of at least a policy that an action on the note is not maintainable in this state where the mortgage covers land in another state without an allegation and proof that the security had first been applied to the discharge of the debt secured. Section 726 of that code provides for but one action for the recovery of a debt secured by mortgage, which shall be in accordance with the provisions of part 2, title 10, chapter 1 of the Code of Civil Procedure. It is beyond dispute that those provisions deal with procedure only and cannot operate extraterritorially. (*Colton v. Salomon*, 67 N. J. L. 73 [50 Atl. 588]; *Maxwell v. Ricks*, 294 Fed. 255 [42 A. L. R. 460].) This court has declared that the section applies only to mortgages on land in this state (*Felton v. West*, 102 Cal. 266 [36 Pac. 676]), and the section will not operate to defeat an action on the note alone where the mortgage involves real property in another state or country. (*McGue v. Rommel*, 148 Cal. 539, 545 [83 Pac. 1000]; *Denver Stockyards Bank v. Martin*, 177 Cal. 223 [170 Pac. 428]; see note, 42 A. L. R. 483.) Consequently the statement that the plaintiff “may not waive its security” and sue on the note, has no application in the present case. The question whether the plaintiff has waived its security is one properly for the courts of the state of Iowa in the

¹⁹ See, e.g., Nev. Rev. Stats. § 40.430(4)(c). But c.f. *Bonicamp v. Vazquez*, 120 Nev. 377, 91 P.3d 584 (2004) (holding that creditor forfeited its lien upon Nevada real property by obtaining personal judgment in Colorado prior to foreclosing upon the property in Nevada).

²⁰ See *Oft Exploration, Inc. v. Williford Energy Corp. (In re Oft Exploration, Inc.)*, 1997 U.S. Dist. LEXIS 4715, at *7 (N.D.Cal. Apr. 11 1997) (holding that “California’s ‘one form of action’ rule does not apply in this case because the property involved is located outside of California”); *First-Trust Joint Stock Land Bank v. Meredith*, 5 Cal. 2d 214, 217-18, 53 P.2d 958, 1960 (1936) (collecting California authorities) (same).

event the plaintiff institutes a foreclosure proceeding in that state after having brought its action on the note alone in this state.²¹

Unfortunately, Utah's courts have not addressed this question. Further, as intimated in the above quote, it is possible that obtaining personal judgment in Utah may effect a legal forfeiture of a secured creditor's rights in real estate collateral located in another state. It almost certainly would if the state in question subscribes to a one-action rule like that of Utah, Nevada and California.²² Entry of judgment in Utah also may effect a forfeiture if Utah law is applied and recognized as a defense in an extra-territorial foreclosure proceeding.

IV. APPLICABILITY OF THE ONE-ACTION RULE TO GUARANTORS

In 2006, the Utah Supreme Court held that Utah's "one-action rule does not apply to suits against guarantors of payment."²³ In doing so, Utah's high court specifically rejected the guarantor's argument that all foreclosure rules apply to guarantors. This holding is consistent with an earlier opinion issued by the United States Bankruptcy Court for the District of Utah.²⁴

As such, the one-action rule generally does not bar a secured creditor from filing a complaint against and obtaining a judgment against a guarantor before foreclosing on real property securing the guaranteed obligation. Indeed, under Utah law, "a guarantor's obligation is separate and distinct from a debtor's obligation."²⁵ The Utah Supreme Court has explained that "a *guarantee of payment* is absolute, and the guaranteed party need not fix its losses by pursuing its remedies against the debtor or the security before proceeding directly against the guarantor."²⁶

²¹ First-Trust Joint Stock Land Bank v. Meredith, 5 Cal. 2d 214, 217-18, 53 P.2d 958, 1960 (1936) (emphasis added). See also Oft Exploration, Inc. v. Williford Energy Corp. (In re Oft Exploration, Inc.), 1997 U.S. Dist. LEXIS 4715, at *7 (N.D.Cal. Apr. 11 1997) (holding that "California's 'one form of action' rule does not apply in this case because the property involved is located outside of California").

²² See Bonicamp v. Vazquez, 120 Nev. 377, 91 P.3d 584 (2004) (holding that creditor forfeited its lien upon Nevada real property by obtaining personal judgment in Colorado prior to foreclosing upon the property in Nevada).

²³ Machock v. Fink, 2006 UT 30, ¶ 14, 137 P.3d 779, 783.

²⁴ See SLC Ltd. V v. Bradford Group West, Inc. (In re SLC Ltd. V), 152 B.R. 755, 769 (Bankr. D. Utah 1993) (Boulden, J.) (holding that "the one-action rule does not prevent a creditor on a debt secured by real property from pursuing an action against the guarantors based on the guarantee without first foreclosing on the security").

²⁵ Sur. Life Ins. Co. v. Smith, 892 P.2d 1, 3 (Utah 1995).

²⁶ Strevell-Paterson Co. v. Francis, 646 P.2d 741, 743 (Utah 1982) (emphasis in original); Machock v. Fink, 2006 UT 30, 137 P.3d 779, 783 (holding that "the one-action rule does not prevent creditors from bringing suit against a guarantor of payment prior to foreclosure"); see also Continental Bank & Trust Co. v. Utah Sec. Mortg., Inc., 701 P.2d 1095, 1098 (Utah 1985) (holding enforceable a guaranty agreement in which the guarantor agreed that the lender may release or surrender the underlying collateral).

California's appellate courts likewise have concluded that guarantors generally cannot claim the protections of the one-action rule.²⁷ This is significant because, as the Utah Supreme Court has recognized, "California decisions are especially helpful to us in interpreting Utah's one-action statute, because Utah's statute is patterned after California's one-action statute, and because Utah and California have interpreted their one-action statutes almost uniformly."²⁸

In contrast, however, the one-action rule *does* protect a "co-maker" of a debt instrument, even if the co-maker did not provide any of the security for the note.²⁹ This is consistent with the majority rule, which extends the protection of the one-action rule to co-makers, but does not extend it to guarantors.³⁰

Likewise, the "one-action" rule may apply to and protect a guarantor if, according to the plain language of the deed of trust or mortgage, the obligations secured include the obligation of the guarantor. This is because, by its plain language, the one-action rule applies to "the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate" Utah Code Ann. § 78B-6-901.

V. APPLICABILITY OF UTAH'S DEFICIENCY STATUTE TO PROTECT GUARANTORS

Notwithstanding that the one-action rule generally does not extend to guarantors, the protections of the deficiency statute do encompass guarantors. Indeed, the Utah Supreme Court specifically has held that the trust deed deficiency statute can be raised as a defense by guarantors. In Surety Life Insurance Co. v. Smith,³¹ the Utah Supreme Court acknowledged that the guarantor's obligations were separate and distinct from the debtor's obligation and, further, that the guarantor's obligations "[we]re not obligations for which the trust deed was given as security"³² The Surety Life court nevertheless concluded that "this distinction has no relevance under section 57-1-32," because "the [Utah Trust Deed] Act does not concern itself with which contract or instrument the action is founded on. Rather the issue is whether the action is one 'to recover the balance due upon the obligation for which the trust deed was given as security.'"³³

²⁷ See Loeb v. Christie, 57 P.2d 1303, 1303 (Cal. 1936) ("On many occasions it has been declared by this court to be the rule that the guarantor's liability may be enforced without first resorting to the mortgage security."); Kelley v. Upshaw, 246 P.2d 23, 39 (Cal. 1952) ("The mortgage was not security for [the guarantor]'s promise, but only for the promissory note, to which he was not a party.... "The mortgage only affects the remedy against the mortgagor" or primary debtor.... It never has been, nor has it ever been declared to be the law in this state, that a mortgagee may not take security other and in addition to his mortgage security, and if the contract with the giver of such security permits, may not enforce his debt from this third party without reference to the mortgagor and his security.' ") (citations omitted).

²⁸ APS, 927 P.2d at 674.

²⁹ APS, 927 P.2d at 674.

³⁰ See, e.g., Developers Small Bus. Inv. Corp. v. Hoeckle, 395 F.2d 80, 84-85 (9th Cir. 1968) (holding that the one-action rule would not preclude suit against guarantors under either New Jersey or California law).

³¹ 892 P.2d 1 (Utah 1995).

³² Id. at 6.

³³ Id. (quoting Utah Code Ann. § 57-1-32).

Ultimately, the Surety Life court held: “Because the case brought by Surety [against the defendant/guarantors] is an action to recover the balance due on the indebtedness secured by the trust deed, it is the very type of action contemplated by the Act. Accordingly, the Act’s three-month statute of limitations applies to bar Surety from bringing this deficiency action [against the guarantors].”³⁴ In dictum, the Surety Life court added that, even if the action filed against the guarantors had been timely, “the [Utah Trust Deed] Act’s fair value credit would have required Surety to credit the fair market value toward the deficiency, thereby preventing Surety from receiving a double recovery from the Smiths as either guarantors or debtors.”³⁵

The apparent inconsistency as to the treatment of guarantors under the one-action rule versus the deficiency statute is explained by a careful and logical analysis of the two statutes. In this regard, the California Supreme Court explained:

A logical distinction may be made between the cases where the creditor proceeded against the guarantor before subjecting the trust deed security to the payment of the primary obligation and one where, as in the present action, the creditor has sold the security and applied the proceeds in payment of the primary obligation before suing the guarantor. In the latter situation, since the amount for which judgment may be entered against the principal debtor is fixed by [the deficiency statute], to require the guarantor to pay a larger amount would seem to violate the statutory mandate that his obligation must be neither larger in amount nor in other respects more burdensome than that of the principal.³⁶

This distinction is supported by a comparison of the plain language of the two statutes and the policy behind the deficiency statute, *i.e.*, to prevent the lender from receiving a double recovery. Utah’s deficiency statute covers any action to recover “the balance due upon the obligation” secured by the trust deed. A guarantor’s promise and agreement to pay the debts of another, whether it is an unconditional “guaranty of payment” or a conditional “guaranty of collection”, cannot subject the guarantor to liability in greater amount than the principal obligor. Furthermore, to the extent a statute of limitation bars suit against the debtor, the guarantor is entitled to raise the statute of limitations as a defense. In other words, the guarantor cannot be required to pay more than the principal debtor owes, nor can judgment be obtained against the guarantor when the debtor has an absolute defense.

Because the deficiency statute governs whether a “balance” is due and, if so, the proper amount, the deficiency statute would protect a guarantor just the same as it would the principal debtor, because an action against either is an action to recover “the balance due upon the [debtor’s] obligation” following non-judicial foreclosure of the trust deed.

The plain language and policy underlying the one-action statute do not support a similar conclusion. “The underlying purpose of the single-action statute is to preclude the creditor from waiving the security and suing directly on the contract to pay money and hold the debtor rather

³⁴ Id. at 7.

³⁵ Id. at 7-8.

³⁶ Everts v. Matteson, 132 P.2d 476, 481 (Cal. 1942)

than the security primarily liable.”³⁷ “So long, therefore, as a fund created by contract of the parties to pay the debt remains intact, no personal action will lie.”³⁸ Thus, in contrast with the deficiency statute, the one-action rule does not dictate whether and how much a debtor must pay, it merely “regulates the procedure by which a creditor may sue for a debt secured by a mortgage on real estate.”³⁹ In other words, the effect of the one-action rule is procedural rather than substantive.⁴⁰ If the guarantor has made a “guaranty of payment” rather than a “guaranty of collection,” then the lender has bargained for the right to proceed directly against the guarantor, irrespective of whether he has made attempts to collect from the debtor or from any security pledged by the debtor. The Utah Supreme Court has so held in the context of a guaranteed loan secured by personalty.⁴¹ Under such circumstances, the one-action rule should not be applied to prevent suit against the guarantor. Indeed, once the creditor has collected from the guarantor, the guarantor will be subrogated to the rights of and step into the shoes of the creditor vis-à-vis the debtor and the real property security.⁴²

³⁷ Givens, 952 P.2d at 1071.

³⁸ Jarman, 61 Utah at 138, 211 P. at 967.

³⁹ Id.

⁴⁰ But c.f. footnote 15 and accompanying text.

⁴¹ Strevell-Paterson Co. v. Francis, 646 P.2d 741, 743 (Utah 1982) (affirming judgment against guarantor of indebtedness where lender had not first sought recourse against the personalty securing the underlying loan) (emphasis in original); see also Continental Bank & Trust Co. v. Utah Sec. Mortg., Inc., 701 P.2d 1095, 1098 (Utah 1985) (holding enforceable a guaranty agreement in which the guarantor agreed that the lender may release or surrender the underlying collateral).

⁴² See Kennedy v. Bank of Ephraim, 594 P.2d 881, 884-85 (Utah 1979) (holding that guarantor who had paid in full the underlying indebtedness was subrogated to the rights of the creditor paid, and entitled to judgment against the debtors for the full amount he was required to pay the creditor); Mead Corp. v. Dixon Paper Co., 907 P.2d 1179, 1182 (Utah App. 1995) (“Under Utah law, ‘a guarantor, upon payment of the guaranteed obligation, has a right of subrogation to any collateral pledged as security.’”) (citations omitted); Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105, 108 (Utah App. 1987) (same).