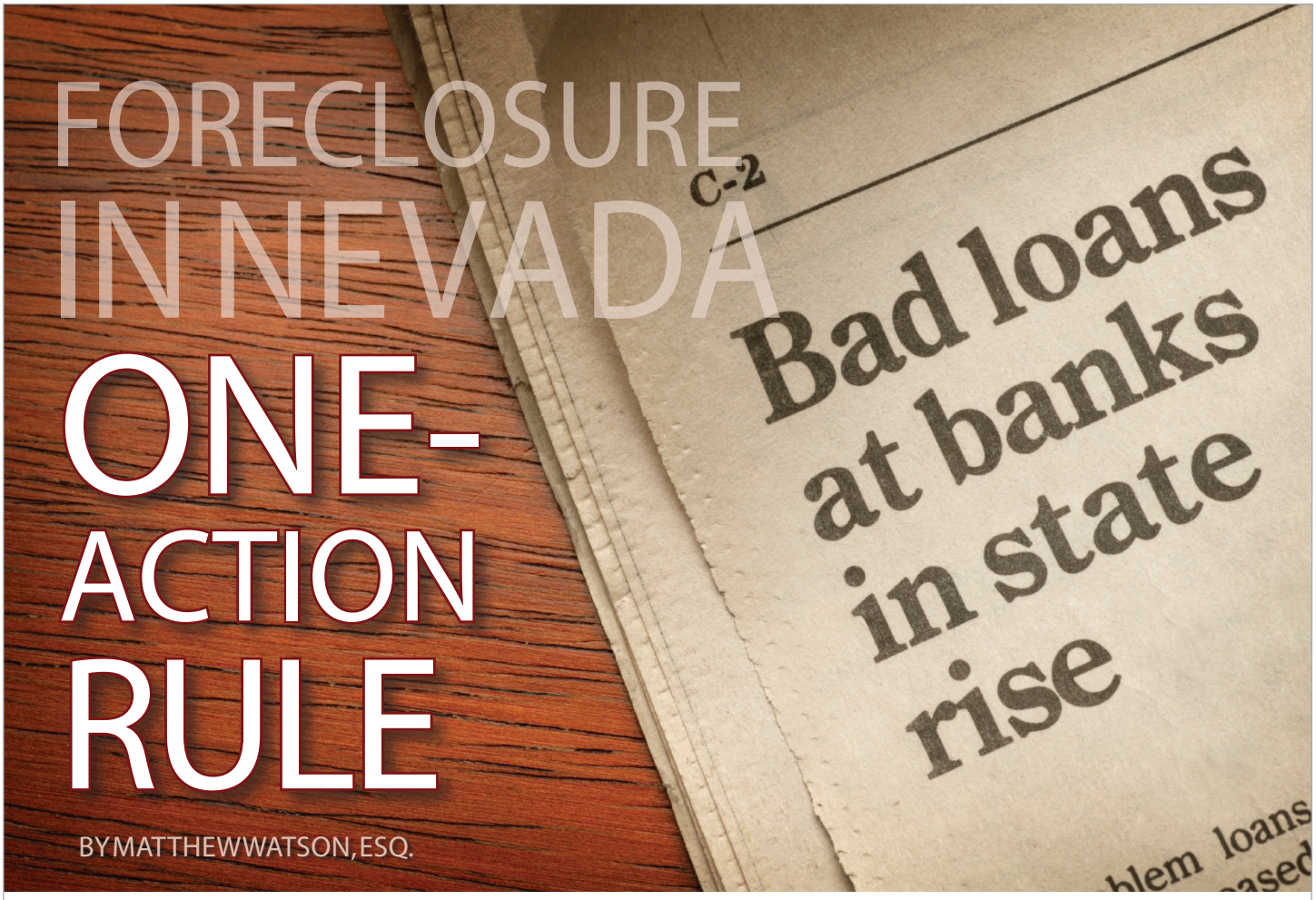

FORECLOSURE IN NEVADA
ONE-ACTION RULE

BY MATTHEW WATSON, ESQ.

With the recent downturn in the national economy and tightening of credit markets, questions from lenders to real estate lawyers have changed from something like "can you help us to document a construction loan?" to "how do we foreclose on a deed of trust in Nevada?"[1] This unfortunate reality has prompted many lawyers who previously focused on real estate lending, or who may not do much real estate work at all, to learn about workouts and foreclosures.

One of the first things foreclosing lenders often ask is whether Nevada has a one-action rule. Many lenders are familiar with one-action rules from other states, but will need the Nevada rule explained. Nevada's one-action rule, set forth in NRS 40.430, says that "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate. That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive."[2] In other words, the lender generally must complete the foreclosure process, or "exhaust the security before recovering from the debtor personally," before pursuing the borrower for the payment of the debt. *Bonicamp v. Vazquez.*[3]

Violating the rule by bringing an action against the borrower before completing a foreclosure vests in the borrower an affirmative defense against the action.[4] Raising the affirmative defense will result, on a motion by any party, in the dismissal of the action without prejudice or the granting of a continuance and order by the court to amend the pleadings such that the action does not violate the one-action rule.[5] Should the borrower not raise the defense, and the action proceed to a final judgment, the entry of the final judgment will discharge the lien encumbering the real property.[6] Once the real property security is lost, the lender can no longer foreclose and is left only with a judgment against the borrower. The borrower can therefore use the one-action rule as a shield or a sword, with potentially devastating results for a lender.[7]

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ONE ACTION RULE

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Most guarantors of real estate-secured loans can, and often do, waive the benefits of the one-action rule.[8] Guarantors that are not permitted to waive the one-action rule are guarantors of loans for which the principal balance never exceeds $500,000, a loan from the seller of real property secured by the real property that is sold, loans secured by real property that is primarily used for the production of farm products, and loans secured by real property upon which the owner maintains his principal residence with not more than one residential structure and on which not more than four families reside.[9] If a guarantor has properly waived the one-action rule, then the lender may bring a separate action against that guarantor before completing a foreclosure without violating the rule. In practice, this would allow a lender to sue the guarantor either before or concurrently with a foreclosure proceeding.

There are several exceptions to what constitutes an "action."[10] They include the appointment of a receiver, enforcing a security interest in an assignment of rents, exercising a power of sale (a nonjudicial foreclosure), and a useful catch-all of anything "which does not include the collection of the debt or realization of the collateral securing the debt."[11] Though the list does not purport to be exclusive, and the statute does not define the term "action," the court in *Bonicamp* cited the long list of exceptions in the statute, noted that the actions brought in that case were not in the list, and held that they were actions for the purposes of NRS 40.430. The safer view is that anything not specifically listed in NRS 40.430(4) as not constituting an action is an action and should be avoided. This includes, as it did in *Bonicamp*, an action brought in another state. Bringing any type of action against a borrower or guarantor before completing a foreclosure should be carefully considered given the potential harm should the lender not properly follow the statute.

Once the foreclosure is complete and the real property is sold at a trustee's sale, the lender may bring an action for a deficiency judgment, which will result in a personal judgment against the borrower in the amount of the deficiency.[12] That action must be brought within six months after the date of the foreclosure sale, or if there is more than one parcel of property, more than one interest in the real property or more than one deed of trust, within six months after the date of foreclosure sale of the last parcel, but in any event not

later than two years after the initial foreclosure sale.[13] The deficiency judgment is the lesser of :

(i) the amount by which the debt exceeds the fair market value of the real property as of the date of the sale; and

(ii) the amount by which the debt exceeds the amount for which the real property was sold at the sale, in each case with interest from the date of sale.

The one-action rule has many traps for the unwary. Be careful when foreclosing on a loan secured by real property, and think twice or even three times before bringing any sort of action against the borrower, guarantor or any other party to any of the loan documents before completing a foreclosure. NL

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1 This article presumes that the lender's security interest is created by a deed of trust rather than a mortgage.
2 NRS 40.430(1).
3 *Bonicamp v. Vazquez*, 120 Nev. 377, 91 P.3d 584, 586 (2004). Not all defaults, however, will permit a lender to foreclose. *See Manke v. Prautsch*, 81 Nev. 261, 401 P.2d 680 (1965) (foreclosure not permitted when default did not impair the security for the debt).
4 NRS 40.435(2).
5 Id.
6 NRS 40.435(3).
7 See, e.g., *Bonicamp* 91 P.3d at 586.
8 NRS 40.495(2).
9 NRS 40.430(4).
10 NRS 40.430(4).
11 NRS 40.430(a), (b), (e) & (m).
12 NRS 40.455.
13 NRS 40.455(2).