

Defending California Real Estate Foreclosures

California has a complex web of foreclosure and anti-deficiency laws that circumscribe enforcement of obligations secured by real estate. The "one action/security first" rule provides that there can be only one form of action for the recovery of any debt or the enforcement of any right secured by a mortgage upon real property.



"Even if a lender does resort to its security first, the creditor's right to a judgment may be limited."

The one action/security first rule is designed to protect borrowers. In the event of default, a secured creditor can bring only one lawsuit to enforce its security interest in real estate and collect its debt. Moreover, the creditor must first exhaust all of its real estate collateral before obtaining a monetary deficiency judgment against the debtor personally. There are two fundamental purposes underlying the one action/security first rule: preventing a multiplicity of lawsuits against the debtor and requiring exhaustion of the security before a resort to the debtor's unencumbered assets.

The one action/security first rule can serve as either a shield or a sword. As a shield it may be asserted as an affirmative defense if the secured creditor omits any part of the real estate collateral from a judicial proceeding. The consequence of the affirmative defense is that the secured creditor must exhaust all of its security before obtaining a monetary judgment on the debt. As a sword, the rule can be invoked in the form of a sanction against the secured creditor. If the debtor does not raise the one action/security first 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. When the secured creditor sues on the obligation and seeks a personal money judgment against the debtor without seeking, in that lawsuit, foreclosure of the mortgage or deed of trust, the secured creditor makes an election of remedies, electing the single remedy of a personal action, and waives its right to foreclose on the collateral or to sell the security under a power of sale.

Even if a lender does resort to its security first, the creditor's right to a judgment against the borrower for any deficiency may be limited or barred by the anti-deficiency protections

provided under California law. A deficiency judgment is a personal judgment against the debtor for recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale. California law limits any monetary judgment sought for the balance due on an obligation secured by real property to an amount not greater than the amount by which the total indebtedness due at the time of sale exceeded the fair market value of the real property plus interest from the date of sale. California law prohibits a deficiency judgment on a purchase money note.

In a judicial foreclosure (where the foreclosure process is engaged pursuant to a lawsuit filed with a court), the creditor may obtain a deficiency judgment against the debtor. However, the real property sold in a judicial foreclosure proceeding will be subject to the debtor's right of redemption for a period of three months after the date of sale, if the proceeds of the sale are sufficient to satisfy the secured indebtedness with interest and the costs of the action and of the sale, and for one year after the date of sale, if the proceeds are not sufficient to satisfy the secured indebtedness with interest and the costs of the action and of the sale. In contrast, the sale of real property under a power of sale in a non-judicial foreclosure is not subject to redemption.

In a non-judicial foreclosure, the debtor must be provided with notice of default and no sale may be set until three months after the notice of default. (Twenty days notice of sale is required.) Reinstatement of a monetary default under the terms of an obligation secured by a deed of trust or mortgage may be made at any time no later than five business days prior to the date of sale set forth in the initial recorded notice of sale.

Most importantly, the borrower is relieved from any personal liability on the debt. Thus, in the event of a default, the borrower stands to lose only the real estate at issue since he or she specifically chose to place it at risk, leaving the creditor to carry the burden of any additional loss in value if the amount of the debt exceeds the value of the real estate pledged as security for the loan. For its part, the creditor gains the certainty of a quick, inexpensive and efficient remedy. —SOCAL

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