

2003

James R. Russell and Raylene Russell v. J. Scott Lundberg : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES R. RUSSELL and RAYLENE
RUSSELL, for themselves and for all
other similarly situated individuals and
entities;

Plaintiffs/Appellants,

v.

J. SCOTT LUNDBERG; et. al.,

Defendants/Appellees.

Appeal No. 20030938-CA

BRIEF OF APPELLANTS

**APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, THE HONORABLE LESLIE A. LEWIS**

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**UTAH COURT OF APPEALS
BRIEF**

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COMPLETE LIST OF ALL PARTIES IN DISTRICT COURT

The parties missing from the caption of the case are the defendants: 1) Lundberg & Associates, a Professional Corporation; 2) Backman Title Company, a Utah Corporation; 3) Backman-Stewart Title Services, Ltd., a Utah Limited Partnership; 4) Canyon Anderson; 4) Rodney Services Company, a Utah Corporation; and John Does 1 through 10.

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JURISDICTIONAL STATEMENT

Jurisdiction in this Court is proper under Utah Code Ann. § 78-2a-2(j).

ISSUES PRESENTED

The issues presented for review are:

1. Whether the trial court erred as a matter of law in dismissing the Russell's claim for breach of fiduciary duty because no fiduciary duty was owed to them or the other trustors/borrowers.
2. Whether the court erred as a matter of law in ruling that the Lundberg defendants did not owe the Russells the duty to deal with them honestly or the duty to foreclose the trust deed in conformity with the Utah foreclosure statute.
3. Whether the court erred as a matter of law in ruling that the non-judicial foreclosure statute, Title 57, Chapter 1, Utah Code Ann., did not have the purpose of protecting the Russells and the other trustors/borrowers and that the Lundberg defendants did not violate this statute by charging costs that were inflated above the actual costs incurred by Scott Lundberg as the trustee.
4. Whether the court erred as a matter of law by ruling that Scott Lundberg was not a party to the trust deeds in which he was the original trustee in the Russell's case and either the original trustee or the substituted trustee for the putative class members; was not bound by the terms of the trust deeds, including the limitation to the actual costs incurred in the foreclosures; and he could not be held liable for breach of these contracts and breach

of the covenant of good faith and fair dealing.

5. Whether the court erred as a matter of law in ruling that the Lundberg defendants owed no duty to charge the foreclosure fees and only the actual costs incurred in the foreclosures as set forth in the regulations of FNMA, FHLMC, the VA, the FHA and the private servicing agreements.

6. Whether the court erred as a matter of law in ruling that the defendants did not unjustly enrich themselves, that no restitution of the costs in excess of the actual costs incurred by the defendants should be made, and that no restitution of the fees and costs charged in excess of the those allowed by the regulations and private servicing contracts should be made.

7. Whether the court erred as a matter of law in ruling that the Lundberg defendants did not engage in a constructive fraud against the Russells and the other homeowners in charging fees and costs in excess of the actual costs and fees allowed by the trust deeds, the regulations and private servicing agreements and the Utah foreclosure statute, Title 57, Chapter 1, Utah Code Ann.

8. Whether the court erred as a matter of law that the Lundberg defendants did not affirmatively defraud the Russells and the other trustors/borrowers by charging fees and costs in excess of the actual costs and fees allowed by the trust deeds, the regulations and private servicing agreements and the Utah foreclosure statute, Title 57, Chapter 1, Utah Code Ann.

9. Whether the court erred as a matter of law that the Lundberg defendants did not negligently misrepresent the amounts that could be legally charged for costs and fees of foreclosure to the Russells and the other trustors/borrowers by charging fees and costs in excess of the actual costs and fees allowed by the trust deeds, the regulations and private servicing agreements and the Utah foreclosure statute, Title 57, Chapter 1, Utah Code Ann.

10. Whether the court erred as a matter of law that the defendants were not engaged in a civil conspiracy.

11. Whether the court erred as a matter of law that the defendants did not violate the Utah Unfair Practices Act, Utah Code Ann. § 13-5-1, et seq.

12. Whether the court erred as a matter of law in dismissing the claim for punitive damages.

Each of these issues were defended by the Russells at the trial court. See Memorandums in Opposition to Motions of Lundberg and Backman Stewart. R. 196, 220, 719, 784, 914, 956, 960 and 1004. Since each of these issues were decided on summary judgment or on a motion to dismiss, the facts are viewed in a light most favorable to the Russells and no deference is given to the trial court's conclusions and the conclusions are reviewed for correctness. Blue Cross & Blue Shield v. State of Utah, 779 P.2d 634, 636-37 (Utah 1989).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE
APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL.**

Utah Code Ann. §§ 57-1-20 to 32. (Utah non-judicial power of sale foreclosure statute.)

STATEMENT OF THE CASE

II. NATURE OF THE CASE.

The plaintiffs are Utah home owners. Mr. Lundberg and Lundberg & Associates act as the foreclosing trustee in thousands of non-judicial foreclosures each year in Utah. They conducted three foreclosures on the plaintiffs' home. Backman Title Company and/or Backman-Stewart Title Services, Ltd. provide title work and a title insurance product known as a "trustee's sale guarantee" to the Lundberg defendants for each of the foreclosures. Canyon Anderson is the president of Backman Title Company who negotiated Backman's contract with the Lundberg defendants. Rodney Services Company is a corporation created by Scott Lundberg and owned by him and his children.

The Lundberg defendants are limited by the regulations of FNMA, FHLMC, the VA and the FHA to a certain amount, typically \$550.00 to \$650.00, for non-judicial foreclosure fees. Mr. Lundberg was limited to the same amount of fees by servicing agreements with mortgage servicing companies and lenders who hire him to act as the foreclosing trustee. In the case of the Russells, the foreclosure fees were limited by a servicing agreement to the same amount allowed by FNMA regulations. These same regulations and servicing agreements limited the amount that could be charged for foreclosure costs to the actual costs incurred in each foreclosure.

Utah Code Ann. § 57-1-21, et. seq., also limited the costs that could be charged by a

trustee to the actual costs incurred. The Russells trust deed, which was a standard FNMA trust deed, also limited the costs that could be charged to the actual costs incurred.

The Lundberg defendants used various methods to enhance the amount that they charged in each of the thousands of foreclosures, including the three foreclosures on the Russell's home, to an amount above those allowed by the regulations, the servicing contracts, the trust deeds and the Utah foreclosure statute. These methods focused on charging inflated costs which were substantially above the actual costs incurred by the Lundberg defendants. These inflated costs included:

- a. The payment of costs for posting of notices of trustee's sales that were almost twice the amount charged Lundberg by the persons posting the notices;
- b. The payment of inflated costs to the Intermountain Commercial Record, and possibly other newspapers, for publishing the notices of trustee's sales and the kickback of portions of the inflated costs to the Lundberg defendants; and
- c. The payment of premiums for title work, including the trustee sale guarantees, with the kickback of up to 30% of these premiums to the Lundberg defendants.

III. COURSE OF PROCEEDINGS IN TRIAL COURT.

The trial court dismissed all fifteen of the Russell's causes of action over a series of orders.¹ The orders are:

¹ All fifteen causes of action applied to the Lundberg defendants, including Rodney Services. The fifth, sixth, eighth, thirteenth, fourteenth and fifteenth causes of action were directed towards the Backman-Stewart defendants.

1. Memorandum Decision entered September 30, 2002 and consequent order of dismissal and partial summary judgment of October 30, 2002 and October 16, 2002. The decision was based upon the Motion for Partial Summary Judgment of the Lundberg defendants and the Motion to Dismiss of the Backman-Stewart defendants. The Lundberg Partial Summary Judgment dismissed the first (breach of fiduciary duty), second (constructive fraud), third (breach of contract) and fourth (breach of the covenant of good faith and fair dealing) causes of action with prejudice. The Backman-Stewart Order of Dismissal dismissed the fifth (restitution-mistake of fact), sixth (restitution-mistake of law) and thirteenth (civil conspiracy) causes of action without prejudice (subsequently dismissed with prejudice by the Order of November 4, 2003).

2. Memorandum Decision entered August 14, 2003 and resulting summary judgment and judgment on the pleadings of September 8, 2003 on behalf of the Lundberg defendants and Rodney Services and summary judgment for Backman-Stewart defendants of October 1, 2003. The Lundberg summary judgment dismissed the first four causes of action with prejudice against Rodney Services. It also dismissed the fifth (restitution-mistake of fact), sixth (restitution-mistake of law), seventh (tortious payment of money), eighth (unjust enrichment), ninth (wrongful collection), tenth (liability for intended consequences), eleventh (affirmative fraud), twelfth (negligent misrepresentation), thirteenth (civil conspiracy), fourteenth (Utah Unfair Practices Act), and fifteenth (punitive damages) causes of action with prejudice against the Lundberg defendants, including Rodney

Services.² The Backman-Stewart summary judgment dismissed the eighth, fourteenth and fifteenth causes of action with prejudice.

3. Order of Dismissal with Prejudice of November 4, 2003. This order dismissed the fifth, sixth, and thirteenth causes of action against the Backman-Stewart defendants with prejudice.

III. STATEMENT OF FACTS.

A. Loan on the Russell's home and foreclosures.

1. On August 8, 1997, Mr. and Mrs. Russell entered into a mortgage on their home. Among the documents that they executed were an Adjustable Rate Note, with a Rider B, and a Deed of Trust, copies of which are attached to the Complaint as Exhibit "A" thereto. R.29. Para. 4, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002 (incorporating allegations of Russell's Complaint). R.124.

2. Lundberg was appointed the original trustee under the terms of the trust deed. Para. 5, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.124. The Loan was sold to another lender and Lundberg continued to serve as the trustee after the sale. Id. at para. 7.

3. The Russells defaulted under the terms of the loan documents and foreclosure was commenced by the Lundberg defendants as trustee under the Deed of Trust. Para. 8 & 9, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002 (incorporating

² The order also denied the motion for class certification of the Russells.

allegations of Russell's Complaint). R.125.

4. Mr. Lundberg, as the trustee under the trust deed, set the Russell's home for sale. Para. 10, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.125.

5. Mr. and Mrs. Russell cured the default on or about April 23, 1998 by paying the missed payments on the mortgage, interest, and the fees and costs charged to the beneficiary by the Lundberg defendants. Para. 11, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.126. This payment included the following monies, as the foreclosure fees and costs billed to the lender by the Lundberg defendants:

A.	Trustee sale guarantee	\$767.00
B.	Recording of Substitution of Trustee	10.00
C.	Recording of Notice of Default	12.00
D.	Certified mail	93.00
E.	Attorneys fees	425.00
F.	Publication of Notice of Sale	83.07
G.	Posting of Notice of Sale	40.00
H.	Recording of Cancellation of Notice of Default	<u>12.00</u>
		\$1,442.07

See response to para. 12 of the Complaint in Answers of Lundberg and Rodney Services.

R.51 and R.76. See also Lundberg letter of September 14, 2001. R.247.

6. Mr. and Mrs. Russell again defaulted on their mortgage and another foreclosure was commenced by the Lundberg defendants as trustee under the Deed of Trust. Para. 12 & 13, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002 (incorporating allegations of Russell's Complaint). R.126.

7. Mr. Lundberg, as the trustee under the trust deed, set the Russells' home for

sale. Para. 14, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.126.

8. Mr. and Mrs. Russell cured the second default on or about August 3, 1999 by paying the missed payments on the mortgage, interest, and the fees and costs charged to the beneficiary by the Lundberg defendants. Para. 15, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.126. This payment included the following monies, as the foreclosure fees and costs billed to the lender by the Lundberg defendants:

A.	Trustee sale guarantee	\$760.00
B.	Recording of Notice of Default	10.00
D.	Certified mail	62.00
E.	Attorneys fees	550.00
F.	Publication of Notice of Sale	115.00
G.	Posting of Notice of Sale	40.00
H.	Recording of Cancellation of Notice of Default	<u>10.00</u>
		\$1,547.00

See response to para. 14 of the Complaint in Answers of Lundberg and Rodney Services. R.52 and R.76. See also Lundberg letter of September 14, 2001. R.247.

9. Mr. and Mrs. Russell defaulted a third time under the terms of the loan documents and another foreclosure was commenced by the Lundberg defendants as trustee under the Deed of Trust. Para. 16 & 17, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002 (incorporating allegations of Russell's Complaint). R.126 & 127.

10. Mr. Lundberg, as the trustee under the trust deed, set the Russells' home for sale. Para. 18, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.127.

11. Mr. and Mrs. Russell cured the default on or about November 3, 2000 by paying the missed payments on the mortgage, interest, and the fees and costs charged to the

lender by the Lundberg defendants. Para. 19, Lundberg Mem. in Spt. of Summary Judgment of Mar. 19, 2002. R.127. This payment included the following monies, as the foreclosure fees and costs billed to the lender by the Lundberg defendants:

A.	Trustee sale guarantee	\$757.00
B.	Recording of Notice of Default	10.00
D.	Certified mail	43.00
E.	Attorneys fees	550.00
F.	Publication of Notice of Sale	143.40
G.	Posting of Notice of Sale	65.00
H.	Recording of Cancellation of Notice of Default	<u>10.00</u>
		\$1,578.40

See response to para. 16 of the Complaint in Answers of Lundberg and Rodney Services.

R.52 and R.77. See also Lundberg letter of September 14, 2001. R.247.

B. The foreclosure business of the Lundberg defendants and the Backman-Stewart defendants.

12. The Lundberg defendants conduct several thousand trust deed foreclosures each year against Utah home owners such as the Russells. See Answers of Lundberg and Rodney Services to paragraphs 18 & 30 of Complaint. R.53, 56, 78 &80.

13. Most of the home mortgages that are foreclosed by the Lundberg defendants fall under the rules and regulations of the Veterans Administration (“VA”), the Federal Housing Administration (“FHA”), or under non-mortgage insured loans, called conventional loans. See Answers of Lundberg and Rodney Services to paragraph 30 of Complaint. R.56 & R.80.

14. The VA, FHA, and lenders and loan servicers of conventional loans have

guidelines and regulations that limit the amount that the Lundberg defendants can charge for trustee's fees and foreclosure costs. See Answers of Lundberg and Rodney Services to paragraph 30 of Complaint. R.56 & R.80.³ These regulations also limit the costs that can be charged to the actual costs incurred by the trustee. Id.

15. Lundberg handled the three foreclosures on the Russells' home pursuant to an agreement with Aames Capital Corp. ("Aames"), the servicer of the Russells' mortgage, a copy of which is attached to the Russell's Addendum of Facts. R.963. Lundberg also foreclosed the Russell's home pursuant to a letter entitled "Aames Attorney Performance Expectations" also attached to the Addendum. R.963.

16. According to the Aames contract, Lundberg could only charge the fees and costs in the Russells' foreclosures allowed by FNMA. Para. 2 of Agreement. R.963

17. Attached to the Addendum is a copy of The National Mortgage Servicer's Reference Directory, produced in discovery by Lundberg, that sets forth the fees and costs allowed by FNMA, FHLMC, the VA and FHA. R.919. See also R.236-243. Only the reasonable out-of-pocket costs; i.e. the actual costs incurred, are allowed by FNMA. FNMA does not allow overhead expenses of the trustee, secretarial charges, notary fees, postage, photocopying charges, and certified copy charges. The trustee is not allowed to charge the

³ The fees were between \$450.00 and \$650.00. See fee charts. Dennis A. Jankowski, The National Mortgage Servicer's Reference Directory, Vernon Enterprises (17th Ed.), p. 1-22 & 1-23 FNMA fee chart, p. 2-14 & 2-15 FHLMC fee chart, p. 3-83 VA fee chart, p. 4-11 - 4-13, HUD (FHA) fee chart. R. 236-243.

borrower, such as the Russells, more to reinstate the loan than the amount allowed by FNMA. Id. at I-21. R.922.⁴

18. Lundberg wrote a summary of Utah foreclosure law published in The National Mortgage Servicer's Reference Directory. It is attached to the Russell Addendum of Facts. R.923. In his summary, Mr. Lundberg sets out the "allowable fees" under Utah foreclosure law. He writes "[t]he lender may recover fees, costs and advances provided they are reasonable, actually incurred and permitted by the documents." [Emphasis added.] Id. R.927.

19. Lundberg knew that he was proscribed from charging the Russells for the artificially inflated posting and publishing costs. See Reference Directory. R.927. Lundberg knew that he could charge only the actual costs of the TSG's to him. He could not keep the kickbacks or commissions paid to him for the TSG business from the title company. Id. The trust deed prohibited him from charging more for these costs than he actually incurred. FNMA prohibited him from doing so. The Utah foreclosure statute prohibited from doing so. He knew it and wrote in his summary for all other Utah foreclosure trustees to read that they had to limit their charges to the "actual costs" incurred and "the costs allowed by the trust deed." Id.

C. Excess charges.

1. Rodney Services Company.

⁴ FHLMC, VA, FHA have similar restrictions in foreclosures of their trust deeds.

20. Rodney Services was created by Scott Lundberg in May, 2000. Maren L. Dalton Aff. at para. 4&5. R.655.⁵

21. Mr. Lundberg owned 89% of Rodney Services and his son, Derek, owned 11%. After this lawsuit was filed, Mr. Lundberg changed the ownership of Rodney to his children with 12.5% each and his wife, Laurie, with 25%. Dalton Aff. at para. 5. R.655.

22. Mr. Lundberg claims to have not received any compensation from Rodney. However, he admits to receiving the profits of Rodney. Lundberg Aff. of April 22, 2003, at para. 7. R.663.

23. Rodney is located in the same building as Lundberg's foreclosure firm. Compare the addresses of Rodney and Lundberg on the invoice attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "C" thereto. R.772. The building is owned by Mr. Lundberg.

2. Excess charges for posting of foreclosure notices.

24. Mr. Lundberg charged the Russells \$40.00 for the posting of the notices in each of the first two foreclosures. Response to interrogatory number 15, attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "B" thereto. R.759.

⁵ Ms. Dalton claims to be the president and managing officer of Rodney Services. She is one of the daughters of Mr. Lundberg. Prior to the existence of Rodney, she posted the Russells' house in the 1998 foreclosure and billed for her services in her maiden name, Maren Lundberg. See computer printouts (p.3, line 7) of foreclosure activity on the Russells' house produced by Lundberg in response to requests for production, April 6, 1998 entry, which printouts are attached to plaintiff's Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "A" thereto. R.736.

25. Both of these foreclosures were completed before Rodney was formed. Dalton Aff. para. 13 & 16. R.657 & 658.

26. Rodney charged the Russells \$65.00 to post the notices in the third foreclosure. Response to interrogatory number 15, attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "B" thereto. R.759. See also Rodney invoice # 501 attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "C" thereto. R.772.

27. Rodney paid Mr. Lundberg's wife, Laurie Lundberg, \$35.00 to post the foreclosures. See Rodney statement, history of payment and Check # 1150, attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "D" thereto. R.774 & 775. Thus, Rodney was charging \$30.00 more to post houses than it was paying the people who posted them. This overcharge was a practice used by Rodney in all foreclosures. Dalton Aff. para. 7. R.656. Prior to the formation of Rodney, Lundberg was charging \$5.00 to \$10.00 more than he was paying the persons posting the homes on which he was foreclosing. See charges to the Russells for the first two foreclosures, above.

28. Lundberg was paid up to \$550.00 as his fee for each foreclosure on the Russell's home. See charges to the Russells in para. 5, 8 and 11, above. He was paid up to \$650.00 as his fee for handling other foreclosures. See Reference Directory, R.236-243. The \$550.00 charged on the Russell's foreclosures was the maximum amount allowed by the Aames servicing agreement. See para. 16 & 17, above. Managing the posting of

foreclosures was part of the services for which Mr. Lundberg was paid his trustee's fee. Prior to the creation of Rodney, Mr. Lundberg's employees performed the simple task of sending a copy of the foreclosure notice to the person posting the notice as part of their work for which Lundberg was paid the \$550.00 - \$650.00. After Rodney was formed, Lundberg's employees took the same step of sending the notice, but it was sent to Rodney.

29. Rodney was set up as a "middle man." It was set up to enable Lundberg to charge for these services which should have been included in his trustee's fee. He formed Rodney to hid the fact that \$30.00 of the \$65.00 charged by Rodney was in excess of the actual costs of posting. This overcharge went into his pocket as profit, or rent paid to him as Rodney's landlord, or went into the pockets of his wife and children as the owners of Rodney. The \$30.00 added up to a substantial amount given the fact that Mr. Lundberg conducted thousands of Utah foreclosures each year.

3. Excess charges for publication costs.

30. Mr. Lundberg charged the Russells \$83.07 and \$115.00 for publishing the notices in each of the first two foreclosures. Response to interrogatory number 15, attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit "B" thereto. R.758. Both of these foreclosures were completed before Rodney was formed. Dalton Aff. para. 13 & 16. R.657 & 658.

31. Rodney charged the Russells \$143.00 to publish the notices in the third foreclosure. Response to interrogatory number 15, attached to the Opp. Mem. to March 12,

2003 Motion of Rodney Services as Exhibit “B” thereto. R. 758.

32. The amount of the publishing was increased by about \$30.00 in the third foreclosure. This \$30.00 was an administrative fee charged by Rodney. Dalton Aff. para. 8. R.656. Rodney performed no service to earn the \$30.00 other than the faxing of the notice to the newspaper. Prior to the formation of Rodney, Lundberg’s employees sent a copy of the foreclosure notice to the newspaper for publication as part of the foreclosure work for which Lundberg was paid his fee of \$550.00 to \$650.00. Again, Rodney was acting as a middle man to artificially inflate the publication costs by \$30.00, which \$30.00 went into the back pocket of Lundberg, or his family. Rodney performed no service other than the same minimal service for which Lundberg was already paid \$550.00 to \$650.00 to perform. This \$30.00 per foreclosure added up to a substantial amount with the thousands of foreclosures handled by Lundberg each year.

33. Rodney operated for a period charging this administrative fee for publishing. Dalton Aff. para. 9. R.656. Rodney, thereafter, negotiated a \$30.00 kickback from the Intermountain Commercial Record whereby the Record would publish Lundberg’s notices at the higher rate of \$143.00 and then pay a “commission” back to Rodney of \$30.00. Id. Attached to the Opp. Mem. to March 12, 2003 Motion of Rodney Services as Exhibit “D” thereto, R.773, is a list of 45 \$30.00 kickbacks, totaling \$1,350.00, paid to Rodney by the Intermountain Commercial Record for a seven day period in October 2000. (The \$30.00 kickback marked “521” was for the publication of one of the Russells’ notices. This number

comports with the same number identifying the other charges made by Rodney to the Russells and is the reason that Rodney circled the number "521" on the exhibit.)

4. Trustee Sale Guarantee fees.

34. The Backman-Stewart defendants are in the title insurance business and provide title services to the Lundberg defendants in connection with their foreclosures. See response to para. 19 of Complaint in Lundberg Answer. R.53.

35. Utah Code Ann. § 57-1-19, et. seq. provides that the trustee conducting the foreclosure give notice to individuals that have recorded requests for notice. Prior to the middle 90's, it was the custom of trustees to order foreclosure reports from title companies such as the Backman-Stewart defendants that identified the persons to whom notice had to be given under the Utah Code. These foreclosure reports typically cost between \$200.00 to \$300.00. See response to para. 20 of Complaint in Lundberg Answer. R.54.

36. Occasionally, a title company would fail to identify someone to whom notice was required. If the person who was missed challenged the foreclosure, title to the property would be tainted and the person who purchased the property at the foreclosure sale, would be damaged. See response to para. 21 of Complaint in Lundberg Answer. R.54.

37. In the middle 90's, the large quasi-government entities that would package, secure and sell large pools of mortgages to investors, FNMA and FHLMC, required the title insurance industry to come up with a product that would insure against the failure to properly identify the persons to whom notice should be sent. See response to para. 22 of

Complaint in Lundberg Answer. R.54.

38. In response, the title insurance industry produced an insurance product, universally called “the Trustee’s Sale Guarantee” (“TSG”). Like the foreclosure reports, the TSG identified all of the persons to whom notice of the trustee’s foreclosure had to be sent under state law, and under Federal law when Federal tax liens were recorded against the property. However, the TSG had an insurance element, in that the title insurer, for whom the title company was an agent, insured that the people identified in the TSG were the correct persons that needed to receive notice. If the title company missed someone who should have received notice, the title insurer would pay the loss. See response to para. 23 of Complaint in Lundberg Answer. R.54.

39. The title company and the title insurer charged a premium for this insurance. The premium was calculated as a percent of the principal of the loan that was being foreclosed. The premium was typically \$250.00 to \$300.00 more than the cost of foreclosure reports. In the case of the Russells, they were charged between \$757.00 and \$767.00 for the TSGs. See response to para. 24 of Complaint in Lundberg Answer. R.54.

40. The amount of the TSG premium is determined by the title insurer. The agent for the insurer who issues the TSG charges according to the rates determined by the insurer. Because of the competitive nature of the title industry, the premiums charged for TSGs by competing insurers are within a couple of dollars of each other. Once the premium is determined by the insurer, the premium is filed with the Utah State Insurance Department.

All that the insurer needs to do to raise or lower the premium is file a new premium with the Department. The Utah Insurance Commission does not determine the amount that the title company can charge. See response to para. 24 of Complaint in Lundberg Answer. R.54.

41. Prior to late 2000 or early 2001, Lundberg obtained a 30% limited partnership interest in Backman-Stewart. See para. 16 of Lundberg's facts in Mem. in Spt. of his April 22, 2003 Motion. R.600.

42. Lundberg was paid 30% of the premiums for the TSG's referred to Backman-Stewart. Lundberg's check to Backman-Stewart would be sent as payment for a number of the TSG's and a return check was immediately cut from Backman-Stewart to Lundberg for 30% of the these specific trustee sale guarantees. (The discovery necessary to set this fact was disputed and summary judgment was granted over the Russell's Rule 56(f) motion and objection.)

43. Lundberg admits that he received commissions (money, kickbacks) from Backman-Stewart in recognition of the large volume of TSG business that he referred to Backman-Stewart. See para. 18 & 19 of Lundberg's facts in Mem. in Spt. of his April 22, 2003 Motion. R.600 & 601.

44. In August, 2000, Lundberg and Canyon Anderson, the President of Backman-Stewart became worried about the direct splitting of premiums with Lundberg because of an investigation that was being conducted by the Utah Insurance Commission. See Lundberg letter to Canyon Anderson, dated August 8, 2000, concerning "Commission

income” attached to Lundberg’s responses to requests for production. R. 770(a)-771. See also Lundberg “Commission Contract” with Backman-Stewart. R. 768-69. Lundberg and Backman-Stewart came up with a plan by which Backman-Stewart would continue to pay commissions to Lundberg because of his referral of TSG business, but Lundberg would also take an ownership interest in Backman-Stewart.⁶

45. In this letter and contract, Lundberg recognized that it was illegal to split the TSG premiums with him unless he “contributes to the search and examination of the title or other services connected with it.” Id. He attempted to meet this test by stating in the letter that he would sign the trustee sale guarantees and perform “title clearing work.” Id.

46. Mr. Lundberg, however, does not sign the TSG’s. For example, the TSG’s on each of the Russell’s foreclosures were all prepared, reviewed and issued by employees of Backman-Stewart and then delivered to Lundberg. Lundberg performed no work on the TSG’s. Nor did he contribute to the search and examination of the title. See TSG’s attached

⁶ The Russells do not know the amount of “commissions” that were paid to Lundberg by Backman-Stewart. He refused to reveal this amount in discovery and summary judgment was granted over the Russell’s Rule 56(f) motion and objection. The “commissions” were substantial. Mr. Lundberg identified in discovery that one month after this suit was filed, he stopped the payment of commissions to him for the TSG’s, although he continued to place all of his TSG work with Backman-Stewart. To keep his income stream coming from Backman-Stewart, he started collecting \$15,000 per month as “attorney’s fees” for “title curative” work, although such work was actually performed for the lenders, not the title company. (See para. 47, below and R. 748.) Mr. Lundberg also refused to provide a history of attorney work performed or his billing records. He also started taking a salary of \$4,000.00 per month at this time as an officer of Backman-Stewart. See answer to Interrogatory No. 4. R.748.

to Russell's Addendum of Facts, R.928-955. Not one of them were signed by Lundberg. They were all signed by representatives of the title company.⁷

47. Mr. Lundberg's title clearing work was performed for the lenders who paid him directly to do the work. He never performed title clearing work for Backman-Stewart. Title clearing work is required by lenders who send loans to Lundberg for foreclosure, not the title company. It has no benefit for the title company. This work consists of Lundberg's employees calling on other loans that are still of record even though they were paid off by the lender's loan. The Aames letter agreement concerning "Aames Attorney Performance Expectations" with Lundberg states that Lundberg is working for Aames, the lender, for title clearing. R.963. The letter identifies the "partnership" between Lundberg and Aames and the need "to protect Aames interest" and to "advise Aames of any issue that could cause a delay or jeopardize Aames' lien position." *Id.* The letter states that Aames has a "swat team" set up to work with its attorneys who handle foreclosures, such as Lundberg, to clear up any title problems that could "jeopardize Aames' lien position." *Id.* This is "title clearing." It is performed for the lender, not the title company.

5. Payment of excess charges by the Russells and the other Utah borrowers.

48. Lundberg charged the lender the amount of the posting and publication costs

⁷ Even if Mr. Lundberg would have signed the TSG's, it would not overcome the requirement of the Utah Insurance Code on splitting title commissions, that such a split can be made only with a person who actually performs the title search. Utah Code Ann. § 31A-23-404. Lundberg, admittedly, never searched any titles.

for each of the Russell's foreclosures. Lundberg Aff. of March 18, 2002, para. 21. R.148. Lundberg also charged the lender the amount of the costs for the title work and the trustee sales' guarantees. Id. These charges were the actual amounts paid by Lundberg to Backman-Stewart, Rodney and the Commercial Record. They were not reduced by the amount of the kickbacks and commissions paid by the title company and the Intermountain Commercial Record to Lundberg and Rodney. The charges for posting was, likewise, not reduced by the \$30.00 paid to Rodney in excess of the amount paid to the person actually posting the notices. See Lundberg's letter to the Russells' counsel of September 14, 2001, which identifies the amount charged to the Russells to bring their loan current and stop each of the three foreclosures. R. 776. The amount set forth in the letter as the costs of posting and publication is the full amount of these costs without reduction for the kickbacks, commissions or overcharges.

49. Lundberg also sent a letter to the Russells in each foreclosure outlining the amount that needed to be paid in order to stop the foreclosures, which letter included all of his costs, including the inflated costs. Lundberg Aff., para. 24, 31, and 39. R. 666, 668 and 670. See also Lundberg's letter to Russells' counsel of September 14, 2001, breaking out the costs. R. 776.

50. The Russells were required to pay these inflated costs and were also required to pay the full amount of the trustee's fee allowed by the agency regulations and the Aames servicing contract before the foreclosures would be terminated and the trust deeds

“reinstated.” R. 776. The other Utah borrowers had to pay these inflated costs to stop Mr. Lundberg’s foreclosures.

SUMMARY OF ARGUMENT

As the trustee under the terms of the trust deed, Mr. Lundberg owed the Russells a number of duties. These duties included the duty to act honestly towards them in the foreclosures, the duty to foreclose in conformity with the Utah foreclosure statute and charge only the actual costs of foreclosure under the statute. The duties included a fiduciary duty because of the existence of a fiduciary relationship with the Russells at the time of the foreclosure. Mr. Lundberg, as the trustee under the trust deed, also owed the Russells the duties within the contract. Finally, he owed the Russells the duty to not charge more in costs than the actual costs allowed by the regulations of FNMA, FHLMC, VA, FHA and the servicing agreements he had with the servicers and lenders.

Fact issues certainly existed that established these duties. The trial court took the right to determine these fact issues from the jury.

To the extent that the Court determines that a contractual duty did not exist, the alternative claim for unjust enrichment should be maintained.

By engaging in the kickbacks, Lundberg, Backman-Stewart, the Commercial Record, Rodney and their principals established a monopoly for the foreclosure services work. This monopoly had at its heart the kickbacks that locked out other title companies and newspapers. This violated the Utah Unfair Practices Act.

Mr. Lundberg clearly knew that he could only charge the costs that he actually incurred in the foreclosures. He is the expert on foreclosures in Utah. He wrote the section on Utah foreclosure law in the desk book used by other trustees. In his writing, he instructed other trustees to limit their costs to those actually incurred. Nevertheless, he formed a dummy corporation to artificially inflate the foreclosure costs through nonexistent “administrative costs.” He took kickbacks from providers of title work and newspapers for their services. The net result was that the costs that borrowers had to pay to stop the foreclosures on their homes were much more than the actual costs incurred by Mr. Lundberg. The jury should be able to consider punitive damages against Mr. Lundberg and the other defendants.

ARGUMENT

I. The trial court erred when it determined that Mr. Lundberg owed no duty to the Russells as the foreclosing trustee.

Mr. Lundberg argued to the trial court that he, as a trustee, owed no duty to the trustors, the Russells, by statute, contract, or at common law absent some significant personal relationship that arose with the Russells at the time the trust deed was signed. The trial court agreed with this argument and dismissed the various claims of the Russells.

The Russells contend that Mr. Lundberg owed them the high duty of a fiduciary under Utah common law. The Russells further contend that Mr. Lundberg at least owed them the duty to foreclose their home consistent with the Utah foreclosure statute and consistent with the contractual requirements of the trust deed. Mr. Lundberg certainly owed

the Russells the duty to not defraud them.

A. Mr. Lundberg owed the Russells the high duty of a fiduciary.

The duty owed by a foreclosing trustee to the trustors of a trust deed has been considered in a number of cases before Utah's appellate courts. In Blodgett v. Martsch, 590 P.2d 298, 301-03 (Utah 1978), the Utah Supreme Court determined that in the typical trust deed transaction there were two opportunities for a fiduciary duty to arise. The first opportunity was when the trust deed was signed. The second was at the time the trust deed was foreclosed.

The Utah Supreme Court held that "the duty of the trustee under the trust deed was greater than the mere obligation to sell the pledged property in accordance with the default provision of the trust deed instrument, it is a duty to treat the trustor fairly and in accordance with a high punctilio of honor." Blodgett v. Martsch, 590 P.2d at 302. The Court reasoned that the trustee owed the trustor this fiduciary duty because of the lack of court oversight in the non-judicial foreclosure process and the consequent prospect and ease of unfair dealing and overreaching by the trustee. Id.

The unfair dealing and overreaching of a foreclosing trustee for the benefit of his own pocket is what this case is all about. Mr. Lundberg was not happy with the \$450 to \$650 in trustee's fees to which he was limited by his contract with the lender/servicer, Aames.⁸ He

⁸ The Aames contract adopted the FNMA limitation of \$550 for fees and the requirement of only charging for actual costs incurred by the trustee. The other agencies for whom Mr. Lundberg foreclosed, FHLMC, the VA, and the FHA have similar

wanted more. He formed a dummy corporation, owned by himself and his family, to charge more for publication of the foreclosure notices and posting of the notices than was actually charged by the people posting and publishing the notices. The dummy corporation tried to hide the excess charges as “administrative fees.” However, the only service provided by the dummy corporation to earn the administrative fee was to fax a copy of the foreclosure notice to the newspaper who published the notice and to the person who posted the notice. This simple act of faxing the notice was part of the foreclosure process for which Mr. Lundberg was paid \$450.00 to \$650.00 in fees.

Mr. Lundberg also took a \$30 kickback from the Intermountain Commercial Record on each notice sent to the Record for publication. He called them “commissions.” Mr. Lundberg also took “commissions” from Backman-Stewart for the “large level of business sent to this title company. The business that he provided was the TSG’s that Lundberg was required to obtain by the lenders, which TSG’s cost the Russells about \$757.00 in each foreclosure.

The inflated foreclosure costs that Mr. Lundberg collected were substantial. He admits to performing thousands of foreclosures each year on the homes of Utah residents. He used the same practices in all of the foreclosures. The \$60 in excess costs for publishing and posting on thousands of foreclosures each year would add up to hundreds of thousands

limitations.

of dollars.⁹

Mr. Lundberg never revealed how much in “commissions” that he received from Backman-Stewart for the TSG’s. But, we know that one month after this suit was filed, he and Mr. Canyon Anderson of Backman-Stewart changed his compensation from commissions to \$15,000 per month in attorney’s fees (that he never kept track of by assignment or services performed) and \$4,000 per month as an officer and director of Backman-Stewart. See para. 44, above.

The Utah Supreme Court refined its position taken in Blodgett on a trustee’s fiduciary duty in First Security Bank of Utah v. Banberry Crossing, 780 P.2d 1253 (Utah 1989). The Court held that in cases: 1) where the trustor reposes trust or confidence in the trustee and relies on the trustee’s guidance; 2) where the trustee could exercise extraordinary influence over the trustor; or 3) where the trustee stands in a dominant position to the trustor, the trustee would have a fiduciary duty to act on behalf of the trustor. Id. at 1256.¹⁰

The Russells were faced with the same dilemma with which every borrower is faced who must stop foreclosure of their home. They had to pay the amount of foreclosure costs demanded by the trustee. They had no control over the amount of these costs. They had no knowledge of the actual amount of the costs. They had no knowledge that Lundberg had

⁹ The summary of “commissions” paid to Mr. Lundberg for a short seven day period from the Commercial Record alone totaled \$1,350. See fact para. 33.

¹⁰ This Court followed the Utah Supreme Court’s analysis of the foreclosing trustee’s fiduciary duty in Five F v. Heritage Savings Bank, 81 P.3d 105, 108 (Ut. App. 2003).

artificially inflated the costs. They simply had to pay the costs in order to terminate the foreclosure and save their home.

Mr. Lundberg sent the initial notice of default for each foreclosure from his office. It had his address on it and identified him as the foreclosing trustee. He sent the notice of sale from his office. It listed him as the foreclosing trustee. When it came time to cure the default, the Russells called his office to determine what they had to pay. They were given the figure by Mr. Lundberg's assistant. The Russells relied on this figure as the amount honestly owed under Utah law to cure the default and stop the foreclosures.

Mr. Lundberg clearly stood in a dominant position to the Russells. He exercised extraordinary influence over them as he held the future ownership of their home in his hands. The Russells relied on his guidance as to the amount of costs that they had to legally pay in order to stop the foreclosures. The Banberry Crossing test of fiduciary duty was met.

Mr. Lundberg argued that he could not be held to a fiduciary duty unless he had a personal relationship with the Russells at the time the trust deeds were signed. The trial court agreed. However, this is not the test of fiduciary duty set out in Banberry, which test can be met from the facts that arise during foreclosure. It is also a dangerous position for the courts of the state of Utah to take from a public policy point of view. In today's society, trustees are chosen by the lenders. Trustors have no input about the person who is to act as the trustee. The trustor needs the protection of a fiduciary to protect him or her from dishonest activities, such as the pocketing of excess moneys for costs not actually incurred

by the trustee.

The Utah Legislature contemplated that the trustee would be a person who would act honestly towards the trustor. Utah Code Ann. § 57-1-21 permits only persons or entities with credentials of trustworthiness, such as attorneys, to act as trustees. The Utah Supreme Court believed that the reason for this requirement was the high level of trust reposed in the trustee by the trustor and the beneficiary. Blodgett v. Martsch, 590 P.2d at 302.

B. Mr. Lundberg owed the Russells the lesser duty of foreclosing their home in a manner consistent with the Utah foreclosure statute.

The Utah Supreme Court stated in Banberry Crossing that “the trustee’s duty to the beneficiary does not imply that the trustee may ignore the trustor’s rights and interests.” First Security Bank of Utah v. Banberry Crossing, 780 P.2d at 1256. This Court held in Five F that this meant that the trustee owed the trustor the duty to be honest and to at least follow the Utah foreclosure statute during the foreclosure even if the trustor could not establish the higher duty of a fiduciary. Five F. v. Heritage Savings Bank, 81 P.3d at 108.¹¹

Mr. Lundberg was not honest with the Russells. Further, he did not follow the Utah foreclosure statute when he charged inflated costs that were well above his actual costs incurred in the foreclosures.

¹¹The duty of honesty and fairness is supported in other areas of commercial and real property law. In Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980), the Utah Supreme Court held that a real estate agent hired by the seller may not owe a fiduciary duty to the buyer, but he owed the buyer a duty of “honesty, integrity, truthfulness, reputation, and competency.”

The Utah Code contains numerous protections for trustors/borrowers.¹² The protections are designed to protect the trustor's right to due process before the taking of his or her real property. The protections are also designed to protect the trustor from excess foreclosure fees and costs. To meet these objectives, the protections include a detailed method of giving notice to the trustor, to any other party who recorded a request for notice with the County Recorder, and to the general public. Utah Code Ann. § 57-1-24, 25 & 26. The notice provisions are designed to develop interest in the upcoming sale in order to obtain the highest price possible and decrease the risk of a deficiency against the trustor.

The trustor's protections also include the right to a public auction, the right of the trustor to direct the order by which the trust property should be sold if it consists of several lots, the duty of the trustee to obtain irrevocable offers, and the right to payment of any monies in excess of the amount due the lender and junior lienholders. Utah Code Ann. § 57-1-27, 28 & 29.

¹²The Utah courts have recognized that the trust deed foreclosure sections of the Utah Code were designed to protect the trustor/borrower. Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1161 (Utah 1987), “[t]he statutes governing foreclosure sales under trust deeds protected the interests of plaintiffs [trustors] up to the moment that the property was sold and a trustee’s deed issued.”; Jones v. Johnson, 761 P.2d 37, 41 (Utah Ct. App. 1988), “[t]he detailed procedural requirements for a trustee’s sale of real property under Utah Code Ann. § 57-1-23 to 34 (1986) are intended to protect the debtor/trustor”; Blodgett v. Martsch, 590 P.2d 298, 303 (Utah 1978), the duty of the trustee is to act on behalf of the trustors with diligence and good faith consistent with his primary obligation to assure the payment of the secured debt; and First Security Bank v. Felger, 658 F.Supp. 175, 183 (D.Utah 1987), the purpose of the trust deed foreclosure statute is to protect the borrower.

Of paramount importance to the trustor/borrower is the protection afforded in Utah Code Ann. §57-1-29 that the trustee shall pay from the sale's proceeds his fees and costs that are **actually** incurred in the foreclosure, but not to exceed the fees and costs allowed by the trust deed. Mr. Lundberg's fees are set by the VA, FHA, FNMA, FHLMC and servicing agreements at between \$450.00 and \$650.00. In the Russell's case Mr. Lundberg's fees were set as the highest amount allowed by FNMA pursuant to the Aames contract. He illegally increased the money that he was paid by charging costs that were artificially inflated above the actual costs incurred by him.

Another critical protection granted to the trustor/borrower is the right to cure the default of the trust deed, stop the foreclosure and save his or her home by paying the amount of the default, plus "costs and expenses **actually** incurred in enforcing the terms of the obligation or trust deed, and the trustee's and attorney's fees **actually** incurred . . ." Utah Code Ann. § 57-1-31(1).¹³ The Russells cured each of their three foreclosures. Mr.

¹³ Mr. Lundberg argued to the trial court that Section 57-1-31, requiring the trustor to pay only the amount of fees, costs and expenses that are **actually** incurred is evidence that he has no statutory duty to be honest and fair with the trustor because the statute says that the trustor shall pay the beneficiary the amount of the obligation plus all such fees, costs and expenses actually incurred. Opp. Mem. at 14. Mr. Lundberg ignores the fact that he bills the lender for his inflated costs. The lender then tells the borrower, such as the Russells, to pay these costs in order to stop the foreclosure. In the Russell's case, Mr. Lundberg also sent a letter to them in each foreclosure outlining the amount that needed to be paid in order to terminate the foreclosure. The fact that the trustor pays Lundberg's fees and inflated costs to the beneficiary rather than to Mr. Lundberg is a distinction without meaning. What is important is the fact that Lundberg creates the pumped-up fees and they are paid by the lender if the borrower does not save the home from foreclosure or they are paid by the borrower if the home is saved, as in the Russells' case.

Lundberg, however, did not charge them the costs actually incurred in the foreclosures. He charged them the pumped up costs that had hidden commissions (kickbacks) and administrative costs for his dummy corporation, which administrative costs were incurred for the very same work for which he was paid the \$550.00 in fees for handling each foreclosure.

Finally, the amount of a deficiency judgment that can be obtained against a trustor is limited to “the amount by which the amount of the indebtedness with interest, **costs, and expenses of sale, including trustee’s and attorney’s fees**, exceeds the fair market value of the property as of the date of the sale.” Utah Code Ann. § 57-1-32. [Emphasis added.] This provision presumes that the costs, expenses and fees of the trustee are not illegally inflated. If they are illegally inflated then the purpose of this section, to limit the amount of a deficiency, is defeated.

C. Mr. Lundberg owed the Russells the duty to not defraud them.

In Banberry Crossing, the Utah Supreme Court stated that “[o]bviously, a trust deed trustee may not scheme to defraud a trustor.” First Security Bank of Utah v. Banberry Crossing, 780 P.2d at 1256. Fraud can be committed by an affirmative misrepresentation or by an omission of a material fact where there is a duty to speak. Sugarhouse Fin. Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980). Lundberg committed both types of fraud. He sent a letter to the Russells in each foreclosure with the amount necessary to cure the default. This amount included his illegally inflated costs. He also told the lender the amount

necessary to cure the default, which included his excessive costs. The lender then, relying on Lundberg's statements, told the Russells to pay the pumped-up costs in order to stop the foreclosures.

Lundberg also owed the Russells the duty to deal fairly with them. First Security Bank of Utah v. Banberry Crossing, 780 P.2d at 1256. He owed them the duty to charge only his actual costs under the Utah foreclosure statute, the trust deed, and the regulations of FNMA as adopted by the Aames servicing contract. He hid the fact that he had artificially jacked up his costs through kick-backs and administrative fees to a dummy corporation; that the costs were not his actual out of pocket costs. This constituted fraud by non-disclosure.¹⁴

D. Mr. Lundberg owed the Russells the duty to not negligently misrepresent the amount of his actual costs.

The trial court dismissed the Russells' claim for negligent misrepresentation based

¹⁴ To establish fraud, the Russells must prove by clear and convincing evidence: 1) a representation (or non-disclosure with a duty to disclose); 2) concerning a material fact; 3) which was false; 4) which Lundberg knew to be false or was made recklessly knowing that the Russells had insufficient knowledge about the representation; 5) for the purpose of inducing the Russells to act thereon; 6) that was reasonably relied on by the Russells; 7) in ignorance of its truth; 8) to their injury. Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982). Mr. Lundberg represented the costs to be something other than his actual costs or he failed to reveal that the costs were not his actual costs as required by the trust deed, Utah law, and the Aames contract. He knew of the misrepresentation, or should have realized that the Russells would have no idea about his actual costs. He made the representation, or omission, for the purpose of inducing the Russells to pay the inflated costs. The Russells relied on the representation, or omission, by paying the inflated costs and their reliance was reasonable.

upon the same reason that it dismissed the fraud claim; that no duty was owed by Mr. Lundberg to the Russells to accurately represent the amount of his actual costs. As argued above, Mr. Lundberg owed the Russells the duty to accurately represent his actual costs and collect no more costs than those he actually incurred. Christenson v. Commonwealth Land Title Co., 666 P.2d 302 (Utah 1983). He breached this duty, either intentionally (fraud) or negligently (negligent misrepresentation).

E. Mr. Lundberg owed the Russells the duty to abide by the terms of the trust deed in foreclosing their home.

The Russell trust deed was a uniform FNMA/FHLMC trust deed.¹⁵ Mr. Lundberg is a party to the trust deed. He was the original trustee. He gave permission to the lender to use him as the trustee. Lundberg affidavit. R. 173 & 74. He was bound by its terms.¹⁶

Mr. Lundberg argued that he was not a party to this contract. The trial court agreed with him. This position is contrary to his own act of agreeing to act as the trustee, agreeing to be named as such in the trust deed, and agreeing to abide by the foreclosure requirements

¹⁵The vast majority of trust deeds used in standard consumer first mortgages are such uniform trust deeds because the loans are pooled and packaged by large securities firms, such as Merrill Lynch, and sold as mortgaged backed securities in the securities markets. To assure the investors who purchase the securities that their rights are consistent among the numerous trust deeds that make up the pools, both FNMA and FHLMC require that standard trust deeds be used.

¹⁶In the cases where he is not the original trustee, Mr. Lundberg agrees to be a substituted trustee and a Substitution of Trustee is recorded pursuant to Utah Code Ann. § 57-1-22. He is then bound to the obligations of the trustee under the trust deed. Indeed, paragraph 23 of the trust deed states that the substituted trustee shall “succeed to all [the prior trustee’s] title, estate, rights, powers and duties.” R.39.

in the body of the trust deed.¹⁷ This Court considered whether a trustee was a party to a contract by acting as the trustee of a trust deed in Five F. v. Heritage Savings Bank, 81 P.3d at 109. This Court held that so long as the trustee abided by his contractual duties and the requirements of the Utah foreclosure statute, he could not be held liable for breaching his contractual duties. Further, this Court ruled that a claim against the trustee for unjust enrichment was improper because the trustor had an action for breach of contract and breach of the implied covenant of good faith and fair dealing if the trustee failed to follow the Utah foreclosure statute.

Both the lender for the Russells and Mr. Lundberg claimed the benefit of the default provisions of the contract when they foreclosed on the Russells. Yet, they denied the Russells the protections of the trust deed. These protections included the duty to pay the actual foreclosure costs if they reinstate the trust deed by curing the default, para. 18; the duty, at the trustee's sale, to pay the actual costs of the trustee, para. 21; and the duty of the trustor to reimburse the trustee for his fees "permitted by applicable law" and his actual costs, para. 35. The trust deed does not authorize the trustee to inflate his costs above the actual costs incurred by him. Mr. Lundberg, thereby, breached the terms of the trust deed.

F. Mr. Lundberg owed the Russells the duty to abide by the implied covenant of good faith and fair dealing.

¹⁷ The trustee is granted certain rights and incurs certain duties under various provisions of paragraphs 21 to 35 of the trust deed. R. 39 & 40. The trust deed clearly treats him as a party to the contract.

Mr. Lundberg argued and the trial court agreed that he was not a party to a contract by his position as the trustee under the trust deed. They concluded that the implied covenant of good faith and fair dealing did not, therefore, apply to him.

Every contract is subject to an implied covenant of good faith and fair dealing. Brehany v. Nordstrom, 812 P.2d 49, 55 (Utah 1991). This Court held that a trust deed, as a contract, was subject to such a covenant. Five F. v. Heritage Savings Bank, 81 P.3d at 109. This Court also held that, so long as the trustee forecloses in conformity with the contractual requirements of the trust deed and the Utah foreclosure statute, there can be no breach of the implied covenant. However, Mr. Lundberg did not foreclose in conformity with the requirements of the Russells' trust deed or the Utah foreclosure statute. He violated the protections of both in order to collect more money, as illegally inflated costs, than allowed by the statute or by the contract. He, thereby, violated the implied covenant of good faith and fair dealing.

G. Mr. Lundberg owed a duty to not collect more than the \$450 to \$550 in fees and his actual costs for each foreclosure under the Aames servicing contract and the regulations of FNMA.

Mr. Lundberg's fees were set by VA, FHA, FNMA and FHLMC at \$450.00 to \$550.00 per foreclosure. Only costs actually incurred were allowed. See fee charts. Dennis A. Jankowski, *The National Mortgage Servicer's Reference Directory*, Vernon Enterprises (17th Ed.), p. 1-22 & 1-23 FNMA fee chart, p. 2-14 & 2-15 FHLMC fee chart, p. 3-83 VA fee chart, p. 4-11 - 4-13, HUD (FHA) fee chart. R. 236-243. Lenders and servicing

companies also restricted his fees and his costs to the actual costs. In the Russells' situation, Lundberg was limited to the fees and costs allowed by FNMA pursuant to the contract between Aames, the lender/servicer, and Lundberg. Aames contract at R. 963. He was paid the maximum fee allowed by the FNMA guidelines. FNMA allowed only the actual costs incurred. He was paid more than what was allowed because his costs were bumped up by the kickbacks and administrative fees of his dummy corporation.

Lundberg owed the Russells the duty to not charge more than allowed under the Aames contract and FNMA. He breached that duty.

II. Fact issues exist that make summary judgment inappropriate.

The Utah Supreme Court recognized in Blodgett that whether a confidential relationship or fiduciary duty existed was an issue usually involving facts that had to be sorted out by the jury. Blodgett v. Martsch, 590 P.2d at 302. Whether the foreclosing trustee in Blodgett, owed a fiduciary duty to the trustors was a question of fact and summary judgment was held to be inappropriate. Id at 304.

In Banberry Crossing, the Utah Supreme Court set forth a test of whether the trustee owed a fiduciary duty to the trustor. The Court expressly noted that the existence of such a duty would be implied from the factual situation of a particular case. First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d at 1256.

The Russells set forth the following facts that should be viewed in a light most favorable to them. Blue Cross & Blue Shield v. State of Utah, 779 P.2d at 637: 1) Lundberg

was the trustee under a trust deed that limited the costs that he could charge to his actual costs; 2) the Utah foreclosure statute limited his costs to actual costs; 3) the servicing contract with Aames limited the costs to actual costs; 4) he owed a duty of honesty towards the Russells and possibly the higher duty of a fiduciary; 5) he almost doubled the price of posting the foreclosure notices by assessing an administrative fee for Rodney Services, a corporation owned by him and his children (the profits of which went into his pocket); 6) Rodney charged a similar administrative fee for publishing the notices; 7) the only action taken by Rodney to earn the administrative fee was faxing the notices to the persons posting and publishing the notices, which action was the same taken by Lundberg's staff prior to Rodney's existence, and which action was part of the foreclosure process for which Lundberg was paid \$550 for each foreclosure; 8) Lundberg took kickbacks from the Commercial Record for publishing his notices; 9) Lundberg took "commissions" from Backman-Stewart for providing the TSG's on his foreclosures, which commissions were substantial; 10) Lundberg admitted in the section on Utah foreclosure law that he wrote for the desk reference book used in the industry by other trustees that he was limited to collecting only his actual costs; 11) the regulations of FNMA, FHLMC, VA, FHA limited Lundberg to his actual costs; 12) he and Canyon Anderson of Backman-Stewart were worried about violating the Utah Insurance Code by splitting the premiums on the TSG's and were worried about an investigation by the Utah Insurance Department so they exchanged letters and prepared a contract that tried to hide the split of commissions by

claiming that Lundberg would sign the TSG's and perform title clearing work to justify the split of the TSG premiums; 13) Lundberg never signed the TSG's, they were signed by insurance agents of Backman-Stewart (this argument by Lundberg is irrelevant because the insurance code required that actual work be performed in searching the title before a premium could be split and Lundberg never searched titles); 14) Lundberg never performed title clearing work for Backman-Stewart, which work was required by the lenders such as Aames' requirement in its contract with Lundberg; 15) after this suit was filed and served, Lundberg and Backman-Stewart tried to hid the kickbacks for the TSG's even deeper by starting to pay Lundberg \$15,000.00 per month for legal work (for which he never kept time sheets or allocated fees by project) and \$4,000.00 per month as a salary as an officer of Backman-Stewart; and 16) the Russells and the other Utah borrowers whose homes were at risk of loss by Lundberg's foreclosures had to pay the artificially inflated fees in order to stop the foreclosures.

The view of the foregoing facts in a light most favorable to the Russells leads one to believe that Lundberg violated the trust deed, violated Utah's foreclosure statute, violated the rules of FNMA, FHLMC, VA, and FHA, and violated the duty of honesty owed to the trustors. These facts also leads one to believe that Lundberg was in a fiduciary relationship with the trustors, including the Russells, because he stood in a dominant position by controlling the loss of their homes, he knew of the amount of the costs and what could be legally charged, and he knew that he was gouging the trustors.

The trial court ignored these facts and granted summary judgment.

III. In the alternative, Mr. Lundberg was unjustly enriched by collecting more costs than he actually incurred in the foreclosures.

The Russells claim that Mr. Lundberg was unjustly enriched. The elements of unjust enrichment are: 1) the defendant received a benefit; 2) the defendant knew of the benefit; 3) it is unjust under the circumstances for the defendant to retain the benefit Davies v. Olson, 746 P.2d 264, 269 (Utah App. 1987).

However, unjust enrichment is available only where there is no remedy under a contract. Five F. v. Heritage Savings Bank, 81 P.3d at 109. The trial court held that Mr. Lundberg was not a party to the contract, the trust deed. The Russells alleged unjust enrichment as an alternative cause of action if a contractual remedy at law was not available. The facts demonstrate that Mr. Lundberg received a benefit in the form of the inflated costs, he knew of the benefit and that it is unjust for him to retain the benefit. If the Court determines that there is no contractual claim at law, then an equitable claim for unjust enrichment should be preserved.

IV. The defendants violated the Utah Unfair Practices Act.

The defendants argued that the Utah Unfair Practices Act (“UUPA”) did not apply to the facts. The trial court agreed and dismissed the Russell’s claim.

The purpose of the UUPA is to prevent unfair competition, especially through discrimination in the price of a product that tends to substantially lessen competition or tends to create a monopoly. Burt v. Woollsulate, Inc. 146 P.2d 203 (Utah 1944); and Utah Code

Ann. § 13-5-3(1)(a). The Act only allows differentials in price where the differences are the result of cost savings in the creation of each item of product because of the large quantity of product that is ordered by a particular customer. Utah Code Ann. § 13-5-3(1)(b)(I). In order to qualify for this exception, the cost of manufacture of each item must be decreased by the large quantity of product. Id. Where there is no savings in the cost of manufacture of a product because of the quantity, then a transaction is not exempt from the Act. Id.

Lundberg argued that because of the large number of TSG's that he ordered, the cost of preparing them decreased and his commission is payment for this decrease. However, Lundberg offers no evidence of such a decrease. Logic also does not support his claim. The primary cost of the TSG's is the cost of the title search on the home that is being foreclosed. The steps that the title company needs to complete for each title search are the same regardless of the number of TSG's that are prepared. Each house and the state of its title is unique. The title needs to be searched on each house in the same manner whether one TSG is issued or 1,000 TSG's are issued on different properties. Thus, the TSG's do not qualify for the exemption of Section 13-5-3(1)(b)(I).

The commissions or kickbacks paid to Lundberg by Backman-Stewart and also by the Intermountain Commercial Record substantially lessen competition or tend to create a monopoly. Lundberg handles thousands of foreclosures in the state of Utah each year. He sends all of his TSG work to Backman-Stewart because of the commission that he receives. The commission actually translates into a much lower price for the title work than the same

title product would cost from another title company. Because of the commission and the resulting lower price, Lundberg has chosen to send all of his TSG work to Backman-Stewart. This has created a monopoly for the TSG work on thousands of foreclosures each year in the state of Utah. The other title companies cannot compete because they will not engage in the illegal kickbacks paid to Lundberg.

The defendants argued that the Russells do not have standing to complain about the violation of the Act. He correctly points out that the Russells do not sell TSGs. He also argues that they are not purchasers of TSGs. He contends that Lundberg is the purchaser. Yet, the Russells and the other borrowers who ultimately pay Lundberg's inflated TSG costs in order to save their homes are the parties who are actually purchasing the TSGs. They pay for the TSGs. Lundberg does not. Lundberg passes the cost of the TSGs on to them, albeit an inflated cost that does not account for the kickback that Lundberg receives for the TSGs.

Rodney argued that it was not involved in anti-competitive acts that would make it liable under the UUPA. Rodney, however, is the conduit through which kickbacks and illegal discounts for posting and publication by the Commercial Record are funneled to Lundberg or his family. These kickbacks are not offered to other attorneys who publish their legal notices with the Commercial Record. Neither are the posting discounts offered to others.

Rodney is liable for this price discrimination. Indeed, Utah Code Ann. § 13-5-6 expressly ties any person or entity who aids or abets in the discrimination to liability for the

scheme.

V. The defendants engaged in a civil conspiracy.

The trial court dismissed the Russell's claim for civil conspiracy because it ruled that the acts of the defendants were lawful.

A elements of a civil conspiracy are: 1) the combination of two or more persons; 2) with an object to be accomplished; 3) a meeting of the minds to accomplish the object; 4) one or more unlawful, overt acts; and 5) damages. Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah 1987). Mr. Lundberg, Mr. Anderson, and their companies engaged in a scheme to kickback portions of the premiums on TSGs. The kickbacks resulted in a cost of the TSG's much less than their cost assessed to the borrowers/trustors in order to save their homes from foreclosure. Mr. Lundberg and Rodney engaged in a scheme of phoney, unnecessary administrative expenses that almost doubled the price of posting the foreclosure notices. Mr. Lundberg, Rodney and the Commercial Record engaged in a scheme of similar unnecessary administrative expenses and kickbacks that inflated the cost of publication. These acts were overt and, as argued above, unlawful. A civil conspiracy occurred.

VI. Punitive damages should be awarded against Mr. Lundberg.

The trial court dismissed the claim for punitive damages.

Punitive damages may be awarded if the Russells establish by clear and convincing evidence that Mr. Lundberg's acts were willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward their rights.

Utah Code Ann. § 78-18-1. Mr. Lundberg knew that he was limited to collecting only actual costs incurred in his foreclosures. He held himself out as an expert in the industry. He prepared a summary of Utah foreclosure law in The National Mortgage Servicer's Reference Directory, a desk book used by other trustees in their foreclosures. He wrote in the Directory that "[t]he lender may recover fees, costs and advances provided they are reasonable, actually incurred and permitted by the documents." [Emphasis added.] R.927. Notwithstanding this knowledge, Mr. Lundberg formed a dummy corporation owned by his family to hid unnecessary administrative fees that doubled the cost of posting. The corporation also took kick backs from the Commercial Record for publication and charged a similar unnecessary administrative fee for faxing the notice to the Commercial Record.

Mr. Lundberg and Canyon Anderson of Backman-Stewart created a commission, which was simply a kickback, for the large volume of TSG work provided by Lundberg. These commissions hid the actual cost of the TSGs to Mr. Lundberg which was much lower than the costs charged to the borrowers/trustors. They changed the form of the kickbacks several times in response to the state of Utah's investigation of their splitting of title insurance premiums and in response to this lawsuit.

The elements of punitive damages exist in this case. The jury should have the right to consider such damages.

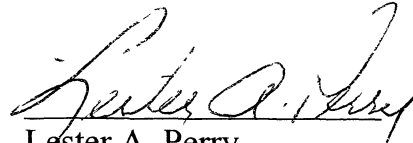
CONCLUSION

The Court should reverse the decision of the trial court, reinstate the claims of the

Russells, and remand the matter for trial.

Dated this 29th day of July, 2003.

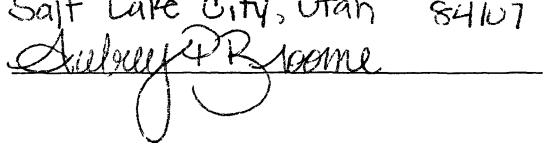
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CERTIFICATE OF SERVICE

I certify that on the 30th day of July, 2004, two true and correct copies of the foregoing brief of the appellants were mailed, postage prepaid, to each of the following:

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ADDENDUM

1. Utah Code Ann. §§ 57-1-20 to 34.
2. Memorandum Decision filed September 30, 2002.
3. Order Dismissing Without Prejudice Certain Claims Against the Backman Defendants filed October 10, 2002.
4. Partial Summary Judgment for Lundberg Defendants filed October 30, 2002.
5. Memorandum Decision filed August 14, 2003.
6. Order Granting the Lundberg Parties' Motion for Summary Judgment on the Remaining Causes of Action in Plaintiffs' Complaint, Granting Rodney Service Co.'s Motion for Summary Judgment, Granting the Backman Defendants' Motion for Judgment on the Pleadings, and Denying Plaintiffs' Motion to Certify Class filed September 8, 2003.
7. Order Granting Summary Judgment in Favor of the Backman Stewart Defendants on Remaining Claims filed October 1, 2003.
8. Order of Dismissal with Prejudice filed November 4, 2003.

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**UTAH CODE
ANNOTATED**

1953

**VOLUME 5D
2000 REPLACEMENT**

Titles 54 to 57

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(2) "Trustor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with Sections 57-1-20 through 57-1-36 and conveying real property to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" has the same meaning as set forth in Section 57-1-1.

(6) "Trust property" means the real property conveyed by the trust deed.

History: L. 1961, ch. 181, § 1; 1988, ch. 155, § 4.

NOTES TO DECISIONS

ANALYSIS

Mortgage distinguished.
Trustee must be identified in instrument.

Mortgage distinguished.

Unlike a trust deed, a mortgage in Utah is not a title-conveying instrument. The mortgagor retains legal title, and the mortgagee's interest is a lien on the property to secure payment of a debt. *General Glass Corp. v. Mast Constr. Co.*, 766 P.2d 429 (Utah Ct. App. 1988).

A trust deed is similar to a mortgage in that it is given as security for the performance of an obligation. However, a trust deed is a convey-

ance by which title to the trust property passes to the trustee. Upon default, the trustee has power to sell the property to satisfy the trustor's debt to the beneficiary. *First Sec. Bank v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989); *Interstate Land Corp. v. Patterson*, 797 P.2d 1101 (Utah Ct. App. 1990).

Trustee must be identified in instrument.

Purported deed of trust recorded by savings and loan association was ineffective as a title-conveying instrument where it did not identify or name the trustee, who was the grantee under the deed. *General Glass Corp. v. Mast Constr. Co.*, 766 P.2d 429 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 54A Am. Jur. 2d Mortgages § 146 et seq. **C.J.S.** — 59 C.J.S. Mortgages § 5 et seq.

57-1-20. Transfers in trust of real property — Purposes — Effect.

Transfers in trust of real property may be made to secure the performance of an obligation of the trustor or any other person named in the trust deed to a beneficiary. All right, title, interest and claim in and to the trust property acquired by the trustor, or his successors in interest, subsequent to the execution of the trust deed, shall inure to the trustee as security for the obligation or obligations for which the trust property is conveyed in like manner as if acquired before execution of the trust deed.

History: L. 1961, ch. 181, § 2.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 6.

57-1-21. Trustees of trust deeds — Qualifications.

- (1) (a) The trustee of a trust deed shall be:
- (i) any member of the Utah State Bar;
 - (ii) any depository institution as defined in Section 7-1-103, or insurance company authorized to do business in Utah under the laws of Utah or the United States;
 - (iii) any corporation authorized to conduct a trust business in Utah under the laws of Utah or the United States;
 - (iv) any title insurance or abstract company authorized to do business in Utah under the laws of Utah;
 - (v) any agency of the United States government; or
 - (vi) any association or corporation which is licensed, chartered, or regulated by the Farm Credit Administration or its successor.
- (b) Subsection (1) is not applicable to a trustee of a trust deed existing prior to the effective date of this chapter, nor to any agreement that is supplemental to that trust deed.
- (2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

History: L. 1961, ch. 181, § 3; 1963, ch. 110, § 1; 1969, ch. 162, § 1; 1985, ch. 64, § 1; 1996, ch. 182, § 25.

Amendment Notes. — The 1996 amendment, effective July 1, 1996, added the Subsection (1)(a) and (1)(b) designations, redesignating former Subsections (1)(a) to (f) as (1)(a)(i) to (vi); substituted “depository institution as defined in Section 7-1-103” for “bank, building and loan association, savings and loan association” in Subsection (1)(a)(ii); and made related and stylistic changes.

tion” in Subsection (1)(a)(ii); and made related and stylistic changes.

“Effective date of this chapter.” — The phrase “effective date of this chapter,” in Subsection (1)(b), first appeared in this section as amended by L. 1985, ch. 64, § 1. That act (L. 1985, ch. 64) took effect on April 29, 1985.

Cross-References. — Utah State Bar, § 78-51-1.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages §§ 5, 78.

57-1-22. Successor trustees — Appointment by beneficiary — Effect — Substitution of trustee — Recording — Form.

(1) The beneficiary may appoint a successor trustee at any time by filing for record in the office of the county recorder of each county in which the trust property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the power, duties, authority, and title of the trustee named in the deed of trust and of any successor trustee.

(2) The substitution shall:

- (a) identify the trust deed by stating the names of the original parties thereto, the date of recordation, and the book and page where the same is recorded or the entry number;
- (b) include the legal description of the trust property;
- (c) state the name of the new trustee; and

(d) be executed and acknowledged by all of the beneficiaries under the trust deed or their successors in interest

(3) If not previously recorded, at the time of recording the notice of default, the successor trustee shall file for record the substitution of trustee, and a copy thereof shall be sent in the manner provided in Section §7-1-26 to all persons to whom a copy of the notice of default would be required to be mailed by Section 57-1-26. In addition thereto, a copy shall be sent to the prior trustee by regular mail to his last-known address.

(4) A substitution of trustee shall be sufficient if made in substantially the following form

Substitution of Trustee

(insert name and address of new trustee)

is hereby appointed successor trustee under the trust deed executed by _____ as trustor, in which _____ is named beneficiary and _____ as trustee, and filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____ County, (or filed for record _____ (month/day/year), with recorder's entry No _____, _____ County), Utah

(Insert legal description)

Signature _____

(Certificate of Acknowledgment)

History: L. 1961, ch. 181, § 4; 1981, ch. 100, § 1; 1989, ch. 88, § 1; 2000, ch. 75, § 23. ment, effective May 1, 2000, updated the date lines in the form in Subsection (4)

Amendment Notes. — The 2000 amend

COLLATERAL REFERENCES

C.J.S. — 59 C J S Mortgages § 79

57-1-23. Sale of trust property — Power of trustee — Foreclosure of trust deed.

A power of sale is hereby conferred upon the trustee which the trustee may exercise and under which the trust property may be sold in the manner hereinafter provided, after a breach of an obligation for which the trust property is conveyed as security, or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust deed.

History: L. 1961, ch. 181, § 5.

NOTES TO DECISIONS

ANALYSIS

Joint tenancies
Mortgage foreclosure method
Procedural requirements
Cited

Joint tenancies.

The rule that a joint tenancy is severed by one tenant's conveyance applies not only to voluntary conveyances, but also to involuntary conveyances pursuant to judicial rules *Jolley v Corry*, 671 P2d 139 (Utah 1983)

Where a joint tenant defaulted on her obligation to a mortgagee, her subsequent purchase of the property at a judicial sale was deemed to be for the benefit of all cotenants *Jolley v Corry*, 671 P2d 139 (Utah 1983)

Mortgage foreclosure method.

Defendant could not claim error where plain-

tiff sought to foreclose on a trust deed in the manner provided for foreclosure of mortgages, even though, in selecting the alternative remedy, plaintiff obtained costs and attorney fees far in excess of those provided for in § 57-1-31 *Security Title Co v Payless Bldrs Supply*, 17 Utah 2d 179, 407 P2d 141 (1965)

Procedural requirements.

The detailed procedural requirements for a trustee's sale of real property under §§ 57-1-23 through 57-1-34 are intended to protect the debtor/trustor, and provide protections that substitute for the six month right of redemption guaranteed in judicial mortgage foreclosures *Jones v Johnson*, 761 P2d 37 (Utah Ct App 1988)

Cited in *Timm v Dewsnap*, 1999 UT 105, 990 P2d 942

COLLATERAL REFERENCES

C.J.S. — 59A C J S Mortgages §§ 599, 600

A.L.R. — Failure to keep up insurance as

justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A L R 3d 774

57-1-24. Sale of trust property by trustee — Notice of default.

The power of sale conferred upon the trustee may not be exercised until

(1) the trustee first files for record, in the office of the recorder of each county where the trust property or some part or parcel thereof is situated, a notice of default, identifying the trust deed by stating the name of the trustor named therein and giving the book and page where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of his election to sell or cause to be sold the property to satisfy the obligation,

(2) not less than three months has thereafter elapsed; and

(3) after the lapse of at least three months the trustee shall give notice of sale as provided in this act

History: L. 1961, ch. 181, § 6; 1967, ch. 131, § 1; 1989, ch. 88, § 2.

Meaning of "this act." — Laws 1961, ch. 181 enacted §§ 57-1-19 through 57-1-36

NOTES TO DECISIONS

ANALYSIS

Three-month time period
Cited

Three-month time period.

Former Bankruptcy Rule 601 (see now 11

U S C § 362), which provides that the filing of a bankruptcy petition shall operate as a stay of any act to enforce a lien against property in custody of the bankruptcy court, does not suspend the running of the three-month time period required by this section *McCarthy v*

Lewis, 615 P.2d 1256 (Utah 1980).

Trustee's sale was upheld, even though notice of the sale was mailed only two months after an amended notice of default was recorded, because there was no showing that the procedural irregularity resulted from fraud or unfair dealing, and all parties were afforded the rights and

protections the statutory requirements for a nonjudicial foreclosure were intended to ensure. *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217 (Utah Ct. App. 1990).

Cited in *Nyman v. McDonald*, 966 P.2d 1210 (Utah Ct. App. 1998).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 621 et seq.

57-1-25. Notice of trustee's sale — Description of property — Time and place of sale.

(1) The trustee shall give written notice of the time and place of sale particularly describing the property to be sold:

(a) by publication of the notice, at least three times, once a week for three consecutive weeks, the last publication to be at least ten days but not more than 30 days prior to the sale, in some newspaper having a general circulation in each county in which the property to be sold, or some part thereof, is situated; and

(b) by posting the notice, at least 20 days before the date of sale, in some conspicuous place on the property to be sold and also in at least three public places of each city or county in which the property to be sold, or some part thereof, is situated.

(2) The sale shall be held at the time and place designated in the notice of sale which shall be between the hours of 9 a.m. and 5 p.m. and at the courthouse of the county in which the property to be sold, or some part thereof, is situated.

(3) The notice of sale shall be sufficient if made in substantially the following form:

Notice of Trustee's Sale

The following described property will be sold at public auction to the highest bidder, payable in lawful money of the United States at the time of sale, at the _____ in _____, _____ County, Utah, on _____ (month/day/year), at _____.m. of said day, for the purpose of foreclosing a trust deed executed by _____ and _____, his wife, as trustors, in favor of _____, covering real property located at _____, and more particularly described as:

(Insert legal description)

(Certificate of Acknowledgment, if recorded)

Dated _____ (month/day/year).

Trustee

History: L. 1961, ch. 181, § 7; 1981, ch. 100, § 2; 1989, ch. 88, § 3; 2000, ch. 75, § 24.
Amendment Notes. — The 2000 amend-

ment, effective May 1, 2000, updated the date lines in the form in Subsection (3) and made stylistic changes.

NOTES TO DECISIONS

Error in notice.**—Validity of sale.**

Validity of a sale was not affected by a typographical error in a notice dated October 1, 1983, which indicated that the sale would take

place on October 28, 1982, where the notice did not confuse bidders or result in an undervaluation of the property. *Concepts, Inc v First Sec Realty Servs, Inc*, 743 P2d 1158 (Utah 1987).

COLLATERAL REFERENCES

C.J.S. — 59A C J S Mortgages § 608 et seq

57-1-26. Requests for copies of notice of default and notice of sale — Mailing by trustee or beneficiary — Publication of notice of default.

- (1) (a) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed may, at any time subsequent to the filing for record of the trust deed and prior to the filing for record of a notice of default thereunder, file for record in the office of the county recorder of any county in which any part or parcel of the trust property is situated, a duly acknowledged request for a copy of any notice of default and notice of sale. The request shall set forth the name and address of the person or persons requesting copies of such notices and shall identify the trust deed by stating the names of the original parties thereto, the date of filing for record thereof, the book and page where the same is recorded or the recorder's entry number, and the legal description of the trust property. The request shall be in substantially the following form:

REQUEST FOR NOTICE

Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____ County, (or filed for record _____ (month/day/year), with recorder's entry number _____, _____ County), Utah, executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, be mailed to _____ (insert name) _____ at _____ (insert address) _____

(Insert legal description)

Signature _____

(Certificate of Acknowledgement)

- (b) Upon filing for record of a request for notice, the recorder shall index the request in the mortgagor's index, mortgagee's index, and abstract record. Except as provided in this section, the trustee under any such deed of trust is not required to send notice of default or notice of sale to any person not filing a request for notice as described herein.
- (2) Not later than ten days after recordation of a notice of default, the trustee or beneficiary shall mail, by certified or registered mail, with postage

prepaid, a copy of such notice with the recording date shown thereon, addressed to each person whose name and address are set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request. At least 20 days before the date of sale, the trustee shall mail, by certified or registered mail, with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request.

(3) Any trust deed may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder be mailed to any person a party thereto at the address of the person set forth therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as provided in this section.

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by the trustor has been recorded as provided in this section, a copy of the notice of default shall be published at least three times, once a week for three consecutive weeks, in a newspaper of general circulation in each county in which the trust property, or some part thereof, is situated, such publication to commence not later than ten days after the filing for record of the notice of default. In lieu of this publication, a copy of the notice of default may be delivered personally to the trustor within the ten days or at any time before publication is completed.

(5) No request for a copy of any notice filed for record pursuant to this section, nor any statement or allegation in any such request, nor any record thereof, shall affect the title to trust property or be considered notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title or interest in, or lien or claim upon, the trust property.

History: L. 1961, ch. 181, § 8; 1980, ch. 57, § 1; 1981, ch. 100, § 3; 1989, ch. 88, § 4; 2000, ch. 75, § 25.

ment, effective May 1, 2000, updated the date lines in the form in Subsection (1)(a) and made stylistic changes.

Amendment Notes. — The 2000 amend-

NOTES TO DECISIONS

Cited in First Sec. Bank v. Felger, 658 F. Supp. 175 (D. Utah 1987); Hall v. NACM Inter-mountain, Inc., 1999 UT 97, 988 P.2d 942.

57-1-27. Sale of trust property by public auction — Postponement of sale.

(1) On the date and at the time and place designated in the notice of sale, the trustee or the attorney for the trustee shall sell the property at public auction to the highest bidder. The trustee, or the attorney for the trustee, may conduct the sale and act as the auctioneer. The trustor, or his successor in interest, if present at the sale, may direct the order in which the trust property shall be sold, if the property consists of several known lots or parcels which can be sold to advantage separately. The trustee or attorney for the trustee shall follow these directions. Any person, including the beneficiary or trustee, may

bid at the sale. Each bid is considered an irrevocable offer, and if the purchaser refuses to pay the amount bid by him for the property sold to him at the sale, the trustee, or the attorney for the trustee, may again sell the property at any time to the highest bidder. The party refusing to pay the bid price is liable for any loss occasioned by the refusal, including interest, costs, and trustee's and reasonable attorneys' fees. The trustee or the attorney for the trustee may thereafter reject any other bid of that person.

(2) The person conducting the sale may, for any cause he considers expedient, postpone the sale up to a period not to exceed 72 hours. If the last hour of the postponement falls on a Saturday, a Sunday, or a legal holiday, the sale may be postponed until the same hour of the next day which is not a Saturday, a Sunday, or a legal holiday. The person conducting the sale shall give notice of the postponement by public declaration at the time and place last appointed for the sale. No other notice of the postponed sale is required, unless the sale is postponed for longer than 72 hours beyond the date designated in the notice of sale. In the event of a longer postponement, the sale shall be cancelled and renoticed in the same manner as the original notice of sale is required to be given.

History: L. 1961, ch. 181, § 9; 1985, ch. 68, § 1; 1988, ch. 82, § 1.

NOTES TO DECISIONS

Fair market value bid.

A trust deed beneficiary's offer of "fair market value" for property sold at a trustee's sale was the equivalent of a fixed dollar offer and was therefore a bid for purposes of Subsection (1). As the only bid, it was also the highest bid, and

the trustee was required by the statute to accept it. Thus the trustee was not permitted to postpone, cancel, or renote the sale pursuant to Subsection (2). *Thomas v. Johnson*, 801 P.2d 186 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 622 et seq. property subject to order of foreclosure and sale
A.L.R. — Mortgagor's interference with as contempt of court 54 A.L.R.3d 1242

57-1-28. Sale of trust property by trustee — Payment of bid — Trustee's deed delivered to purchaser — Recitals — Effect.

(1) The purchaser at the sale shall pay the price bid as directed by the trustee and upon receipt of payment, the trustee shall execute and deliver his deed to such purchaser. The trustee's deed may contain recitals of compliance with the requirements of Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described therein, including recitals concerning any mailing, personal delivery, and publication of the notice of default, any mailing and the publication and posting of the notice of sale, and the conduct of sale. These recitals constitute prima facie evidence of such compliance and are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice.

(2) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the trustor and his successors in interest and of all persons claiming by, through,

or under them, in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

History: L. 1961, ch. 181, § 10; 1985, ch. 68, § 2.

NOTES TO DECISIONS

Cited in Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158 (Utah 1987).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 645 et seq.

57-1-29. Proceeds of trustee's sale — Disposition.

The trustee shall apply the proceeds of the trustee's sale, first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's and attorney's fees actually incurred not to exceed the amount which may be provided for in the trust deed, second, to payment of the obligation secured by the trust deed, and the balance, if any, to the person or persons legally entitled to the proceeds, or the trustee, in his discretion, may deposit the balance of the proceeds with the clerk of the district court of the county in which the sale took place. Upon depositing the balance, the trustee shall be discharged from all further responsibility and the clerk shall deposit the proceeds with the state treasurer subject to the order of the district court.

History: L. 1961, ch. 181, § 11; 1997, ch. 215, § 7.

Amendment Notes. — The 1997 amendment, effective July 1, 1997, deleted "county"

before "clerk" and inserted "district court of the" near the end of the first sentence; substituted "state" for "county" in the second sentence; and made stylistic changes throughout.

NOTES TO DECISIONS

Duties of trustee.

A trustee under trust deed has an affirmative duty to uphold his statutory responsibilities, and may not ignore those responsibilities in

order to assist certain interest holders at the expense of others. *Randall v. Valley Title*, 681 P.2d 219 (Utah 1984).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 664 et seq.

57-1-30. Sale of trust property by trustee — Corporate stock evidencing water rights given to secure trust deed.

Shares of corporate stock evidencing water rights used, intended to be used, or suitable for use on the trust property and which are hypothecated to secure an obligation secured by a trust deed may be sold with the trust property, or any part thereof, at the trustee's sale in the manner provided in this act.

History: L. 1961, ch. 181, § 12.

Meaning of "this act." — See note under same catchline following § 57-1-24

57-1-31. Trust deeds — Default in performance of obligations secured — Reinstatement — Cancellation of recorded notice of default.

(1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in the obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of the obligation or of the trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under the trust deed, if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of the trust deed (including costs and expenses actually incurred in enforcing the terms of the obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than that portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him a request to the trustee to execute, acknowledge, and deliver a cancellation of the recorded notice of default under the trust deed; and any beneficiary under a trust deed, or his assignee, who, for a period of 30 days after such demand, refuses to request the trustee to execute and deliver this cancellation is liable to the person entitled to such request for all damages resulting from this refusal. A release and reconveyance given by the trustee or beneficiary, or both, or the execution of a trustee's deed constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of default under a trust deed is, when acknowledged, entitled to be recorded and is sufficient if made and executed by the trustee in substantially the following form:

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____ County, (or filed of record _____ (month/day/year), with recorder's entry No. _____, _____ County), Utah, which notice of default refers to the trust deed executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, and filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____

County, (or filed of record _____ (month/day/year), with recorder's entry No. _____, _____ County), Utah.

(legal description)

Signature of Trustee _____

History: L. 1961, ch. 181, § 13; 1967, ch. 131, § 2; 1981, ch. 100, § 4; 1985, ch. 68, § 3; 2000, ch. 75, § 26.

Amendment Notes. — The 2000 amend-

ment, effective May 1, 2000, updated the date lines in the form in Subsection (2) and made stylistic changes throughout the section.

NOTES TO DECISIONS

ANALYSIS

Amendment.

— Applicability.

— Effect.

Debt acceleration.

Default not cured.

Reinstatement.

Amendment.

—Applicability.

The 1985 amendment to this section could not be retroactively applied to a contractual transaction entered into before the amendment, where the amendment affected the debtor's substantive contractual rights by eliminating his right to cure a default under his trust deed and note by paying only the amount in default. *Washington Nat'l Ins. Co. v. Sherwood Assocs.*, 795 P.2d 665 (Utah Ct. App. 1990).

—Effect.

The 1985 amendment of this section changed the law to require the debtor to pay the entire amount of the note in order to cure his default in a judicial foreclosure proceeding. *Washington Nat'l Ins. Co. v. Sherwood Assocs.*, 795 P.2d 665 (Utah Ct. App. 1990).

Debt acceleration.

Debt acceleration is a substantive right because it provides a beneficiary with the power to bring a single foreclosure action upon default, thereby satisfying the entire obligation and discharging the note, rather than bringing repeated collection actions each time a trustor defaults. The beneficiary thereby avoids the burden of repeated foreclosures as well as the risk that the security for the debt, the property,

will be consumed by legal fees, court costs, unpaid interest, etc., before the debt is satisfied. *Progressive Acquisition, Inc. v. Lytle*, 806 P.2d 239 (Utah Ct. App. 1991).

"Deacceleration" is the undoing of the acceleration itself. The parties are returned to their preacceleration status as if the beneficiary of the trust deed had not opted to accelerate the entire debt. The default, however, remains unchanged and the notice of default would still be in effect. A beneficiary could still foreclose, but it would only be for the amount of the delinquent payments, costs, and so forth. The note would remain in effect to the extent not satisfied from the sale proceeds and the trustor would retain any property not sold to satisfy the delinquency. *Progressive Acquisition, Inc. v. Lytle*, 806 P.2d 239 (Utah Ct. App. 1991).

Default not cured.

The plaintiff had no duty to fulfill his offer to treat the defendants' default as cured when that offer was predicated upon payment of the arrearage, taxes, and insurance, and only the arrearage had been paid. *Grossen v. DeWitt*, 1999 UT App 167, 982 P.2d 581.

Reinstatement.

"Reinstatement," as it is used in this section, is the curing of the default. In other words, the parties are returned to their former status as if the default had never occurred. If a trustor subsequently defaults again, the beneficiary must begin new foreclosure proceedings. It may not rely on the previous notice of default and declaration of acceleration. *Progressive Acquisition, Inc. v. Lytle*, 806 P.2d 239 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 547.

57-1-32. Sale of trust property by trustee — Action to recover balance due upon obligation for which trust deed was given as security — Collection of costs and attorney's fees.

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section.

History: L. 1961, ch. 181, § 14; 1985, ch. 68, § 4.

NOTES TO DECISIONS

ANALYSIS

Attorney fees
Deficiency judgment
Exclusive remedy
Multiple liens
Notice
One action rule
Out of state lands
Preemption by federal law
Prevailing party
Procedural failure
Purpose of section
Cited

Attorney fees.

Trial court did not err in granting debtors attorney fees and costs as the prevailing party, because, although a judgment was entered against them, they prevailed on the only contested issue at trial. *Occidental/Nebraska Fed Sav Bank v Mehr*, 791 P2d 217 (Utah Ct App 1990).

Deficiency judgment.

When a creditor takes more than one item of security upon an obligation secured by a trust deed, the creditor is not precluded from making use of that additional security merely because the creditor has not sought a deficiency judgment within three months of a nonjudicial sale of one of the items covered by the trust deed property, nor is the creditor required to seek a deficiency judgment under this section in order

to maintain its right to the additional security, so long as the security is applied toward the debt owed on the original loan. *Phillips v Utah State Credit Union*, 811 P2d 174 (Utah 1991).

A "sold out nonforeclosing junior lienor," who became unsecured by a senior lienor's foreclosure, was not pursuing a "deficiency judgment" and therefore, was not limited by the fair market value provision of this section from pursuing its claim against the debtor personally. *City Consumer Servs, Inc v Peters*, 815 P2d 234 (Utah 1991).

The protections of the Utah Trust Deed Act (§§ 57-1-19 to 57-1-36) apply to any action to recover the balance due on an obligation secured by a trust deed, following a nonjudicial foreclosure sale, and makes no distinction whether it is brought against the debtor or a guarantor, thus, the three month statute of limitations applied to bar an action against the guarantors of an obligation and, even if the action had been timely filed, the fair value credit would have required plaintiff to credit the fair market value toward the deficiency preventing a double recovery from defendants as either guarantors or debtors. *Surety Life Ins Co v Smith*, 892 P2d 1 (Utah 1995).

Exclusive remedy.

This section provides the exclusive remedy for securing a deficiency judgment following a sale of real property under a trust deed, thereby precluding the pursuance of any other remedy once the sale has been made. *Cox v Green*, 696

P.2d 1207 (Utah 1985); *Concepts, Inc. v. First Sec. Realty Servs., Inc.*, 743 P.2d 1158 (Utah 1987).

Multiple liens.

The burden of protecting property subject to multiple liens is on the debtor, not on the junior lienholder. *Sanders v. Ovard*, 838 P.2d 1134 (Utah 1992).

Notice.

The primary purpose of the three-month limitation period contained in this section is satisfied when the foreclosing party provides notice to the debtor that a deficiency will be sought by filing the action. *Standard Fed. Sav. & Loan Ass'n v. Kirkbride*, 821 P.2d 1136 (Utah 1991).

One-action rule.

A pretrial stipulation between a debtor and the debtor's junior lienholder to limit the junior lienholder's judgment to the difference between the debt owed and the fair market value of the property at the time of sale was meant to apply to the deficiency judgment after sale, as provided by this section, so when the trial court later ruled that the junior lienholders were entitled to collect against the underlying obligation, as their security had been extinguished through the intervening trustee's sale by the senior lienholder, the one-action rule (§ 78-37-1) did not limit the junior lienholder's judgment because defendants' conduct was not blameworthy. *Sanders v. Ovard*, 838 P.2d 1134 (Utah 1992).

Out-of-state lands.

Deficiency judgment protection requiring that fair market value of property at time of sale be used as setoff is not extended to debtors whose obligations are secured by trust deeds on land outside Utah. *Bullington v. Mize*, 25 Utah 2d 173, 478 P.2d 500, 44 A.L.R.3d 910 (1970).

Preemption by federal law.

The three-month limitation of this section could not be used to bar the Small Business Administration's post-foreclosure deficiency action against guarantor, as to do so would violate the well-established maxim that the United States is exempt from application of state statutes of limitation. *United States v. Johnson*, 946 F. Supp. 915 (D. Utah 1996).

Prevailing party.

If a party seeking a deficiency judgment can convince the court that the debt exceeds the fair market value of the property, then that party is entitled to a deficiency judgment and prevails under this section; however, if the party defending such an action successfully maintains that the fair market value of the property equals or exceeds the total indebtedness, then that party prevails. *First S.W. Fin. v. Sessions*, 875 P.2d 553 (Utah 1994).

Procedural failure.

This section, which gives a creditor three months after a sale of property under a trust deed to bring an action for any amounts remaining unpaid, does not permanently bar further proceedings any time some procedural failing results in the dismissal of a properly filed action. *Standard Fed. Sav. & Loan Ass'n v. Kirkbride*, 821 P.2d 1136 (Utah 1991).

Purpose of section.

The purpose of this section is to protect the debtor, who in a nonjudicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency. *First Sec. Bank v. Felger*, 658 F. Supp. 175 (D. Utah 1987).

This section limits only the rights of the beneficiary under the trust deed that was foreclosed — it does not affect the rights and obligations of parties to other trust deeds. The statute does not purport to address the status of obligations secured by junior trust deeds following a trustee sale pursuant to a senior trust deed. *G. Adams Ltd. Partnership v. Durbano*, 782 P.2d 962 (Utah Ct. App. 1989).

By its terms and legislative history, this section provides a remedy for a creditor facing a defaulting debtor; where debtors did not default on creditor's mortgage, section was inapplicable. *Associates Fin. Servs. v. Slaugh*, 850 P.2d 1278 (Utah 1993).

Cited in *Christenson v. Jewkes*, 761 P.2d 1375 (Utah 1988); *Thomas v. Johnson*, 801 P.2d 186 (Utah Ct. App. 1990); *Citicorp Mtg., Inc. v. Hardy*, 834 P.2d 554 (Utah 1992); *SLC Ltd. V v. Bradford Group W., Inc.*, 152 Bankr. 755 (Bankr. D. Utah 1993).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 674 et seq.
A.L.R. — Excessiveness or adequacy of attor-

neys' fees in matters involving real estate, 10 A.L.R.5th 448.

57-1-33. Repealed.

Repeals. — Laws 1994, ch 172, § 2 repeals upon satisfaction of an obligation secured by a trust deed, effective May 2, 1994
 § 57-1-33, as enacted by Laws 1961, ch 181,
 § 15, requiring reconveyance of trust property

57-1-33.1. Reconveyance of a trust deed.

(1) (a) When an obligation secured by a trust deed has been satisfied, the trustee shall, upon written request by the beneficiary, reconvey the trust property.

(b) At the time the beneficiary requests a reconveyance under Subsection (1)(a), the beneficiary shall deliver to the trustee or the trustee's successor in interest the trust deed and the note or other evidence that the obligation securing the trust deed has been satisfied.

(2) The reconveyance under Subsection (1) may designate the grantee as "the person or persons entitled thereto."

History: C. 1953, 57-1-33.1, enacted by L. 1995, ch. 185, § 1.

57-1-34. Sale of trust property by trustee — Foreclosure of trust deed — Limitation of actions.

The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed.

History: L. 1961, ch. 181, § 16.

COLLATERAL REFERENCES

C.J.S. — 59A C J S Mortgages § 603

57-1-35. Trust deeds — Transfer of secured debts as transfer of security.

The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor.

History: L. 1961, ch. 181, § 17.

COLLATERAL REFERENCES

C.J.S. — 59 C J S Mortgages § 336 et seq

57-1-36. Trust deeds — Instruments entitled to be recorded — Assignment of a beneficial interest.

Any trust deed, substitution of trustee, assignment of a beneficial interest under a trust deed, notice of default, trustee's deed, reconveyance of the trust

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES R. RUSSELL and RAYLENE	:	MEMORANDUM DECISION
RUSSELL, for themselves and for	:	
all other similarly situated	:	CASE NO. 020901052
individuals and entities,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
J. SCOTT LUNDBERG; LUNDBERG &	:	
ASSOCIATES, a Professional	:	
Corporation; BACKMAN TITLE	:	
COMPANY, a Utah Corporation;	:	
BACKMAN-STEWART TITLE SERVICES,	:	
LTD., a Utah Limited Partnership;	:	
CANYON ANDERSON; RODNEY SERVICE	:	
COMPANY, a Utah Corporation;	:	
and JOHN DOES 1 through 10,	:	
	:	
Defendants.	:	

This matter came before the Court for hearing on August 22, 2002, in connection with the Lundberg Parties' Motion for Partial Summary Judgment and Defendants Backman Title Company, Backman-Stewart Title Services, Ltd. and Canyon Anderson's Motion to Dismiss. At the conclusion of the hearing, the Court indicated that it would take the matter under advisement to further consider the arguments, the relevant case law and statutes and the written submissions of the parties. Since taking the Motions under advisement, the Court has had an opportunity to consider or reconsider the law, all relevant pleadings, facts and the oral

arguments in this case. Now being fully advised, the Court enters the following Memorandum Decision.

LEGAL ANALYSIS

The Court first considers the Lundberg parties' Motion for Partial Summary Judgment. This Motion pertains to the first four causes of action asserted in the plaintiffs' Complaint: Breach of Fiduciary Duty, Constructive Fraud (as a result of the alleged breach of fiduciary duty), Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

The first issue before the Court is whether the plaintiffs can establish as a matter of law that defendant J. Scott Lundberg, the trustee under their Trust Deed, owed them a fiduciary duty. After carefully reviewing all of the cases cited by both sides, the Court determines that a fiduciary relationship can arise between a trustee and a trustor, but only under certain circumstances.

To be precise, the case of Blodgett v. Martsch, 590 P.2d 298 (Utah 1978), stands for the premise that a fiduciary relationship between a trustee and a trustor arises only when the trustee and trustor have a confidential relationship. In other words, there must be more to the relationship between the trustee and trustor than the "mere utilization of trust deed in the loan transaction." Id. at 302.

In Blodgett, the confidential relationship was established because the trustors (the Blodgetts) had a "significant previous business history as borrowers and depositors" at the bank, that was the original trustee under the Blodgetts' trust deed. Id. at 300. The court emphasized that the Blodgetts and the bank were not "strangers." Based on this set of facts, the court found a confidential relationship and therefore a fiduciary relationship to have existed between the bank and the Blodgetts.

In contrast, it is undisputed that the plaintiffs and Mr. Lundberg were complete strangers. They had never met and had no relationship whatsoever. As the Lundberg parties' counsel pointed out during oral argument, Mr. Lundberg was just a name to the plaintiffs. Based on these undisputed facts, the Court finds as a matter of law that Mr. Lundberg (and, as a corollary, the remaining Lundberg parties) had no confidential relationship with the plaintiffs. In the absence of such a relationship, the Court concludes as a matter of law that the Lundberg parties had no fiduciary duty to the plaintiffs.

The Court wants to make it clear that in reaching this conclusion, the Court considered, but was unpersuaded by the plaintiff's argument that a fiduciary relationship automatically arises simply by virtue of the trustee holding that title. The Court was similarly unpersuaded by the plaintiffs' argument that

the trust deed foreclosure statutes have the primary purpose of protecting the trustor and therefore impose an independent fiduciary duty. To the contrary, the Court agrees with the Lundberg parties that it is the protection of the beneficiary that is the focus of these statutes. Moreover, the few procedural duties (not fiduciary duties) that are set forth in the statute that may be construed as being for the protection of the trustor (such as giving notice and selling the foreclosed property to the highest bidder, etc.) were all complied with in this case. Accordingly, having found that the Lundberg parties owed no fiduciary duty to the plaintiffs, the Court grants their Motion for Partial Summary Judgment as to the first two causes of action.

The Court next considers the plaintiffs' claims that the Lundberg parties had a contractual duty and the duty of good faith and fair dealing. The Court determines that Mr. Lundberg, as the trustee, was not a contracting party with the plaintiffs, but merely a facilitator of the contract between the plaintiffs and the beneficiary of the trust deed. Mr. Lundberg gave no consideration on this contract and asked for none. In general, Mr. Lundberg did not bargain with respect to the contract and only became aware of the trust deed when the plaintiffs defaulted and the beneficiary implemented the foreclosure proceedings. Therefore, the Court concludes as a matter of law that the Lundberg parties had no

contractual duties that could have been breached. As a corollary, since there was no contract between the plaintiffs and the Lundberg parties had no contractual duty, there was also no duty or covenant of good faith and fair dealing. Accordingly, the Court grants summary judgment to the Lundberg parties on the third and fourth causes of action.

Next, the Backman defendants move to dismiss the plaintiffs' mistake and civil conspiracy claims for failure to state these claims with sufficient particularity. The Court has closely examined these claims and concludes that they are not set forth with the particularity required under the rules. As it stands, the plaintiffs' pleadings leave to conjecture vital information such as precisely who was involved and in what specific scheme. The plaintiffs' responding memorandum tries to flesh out the additional facts that provide the basis for these mistake and conspiracy claims. However, as the Backman defendants' point out, the claims must be set forth with sufficient particularity in the pleadings, not in memos. Having found that the factual basis of the plaintiffs' Fifth, Sixth and Thirteenth Causes of Action is not set forth with sufficient particularity, the Court dismisses these claims **without prejudice** under Utah Rules of Civil Procedure 9(b). This dismissal is predicated solely on Rule 9(b) and not on the Backman defendants' alternative argument of dismissal under Rule

12(b)(6). In other words, the Court's inquiry ended when it found that the claims were not sufficiently stated. The Court did not assess the merit of these claims under Rule 12(b)(6).

Counsel for the Lundberg parties and the Backman defendants should prepare Orders on their respective Motions. The Lundberg parties' Order should indicate that their Motion is granted in the entirety. The Backman defendants' Motion should indicate that their Rule 9(b) Motion is granted, but that the dismissal is without prejudice.

Dated this 27th day of September, 2002.

51
LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 30 day of September, 2002:

Lester A. Perry
Attorney for Plaintiff
4276 S. Highland Drive
Salt Lake City, Utah 84124

R. Willis Orton
Daniel J. McDonald
Jason W. Beutler
Attorneys for Defendants Backman Title,
Backman-Stewart Title, and Canyon Anderson
60 E. South Temple, Suite 1800
P.O. Box 45120
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Gary A. Weston
Richard M. Hymas
Attorneys for Defendants Lundberg
and Lundberg & Associates
60 E. South Temple, Suite 1100
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R. Willis Orton (2484)
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KIRTON & McCONKIE
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P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone. (801) 328-3600

Attorneys for Defendants Backman Title
Company, Backman-Stewart Title Services, Ltd.
and Canyon Anderson

... *M. Snare* ...

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

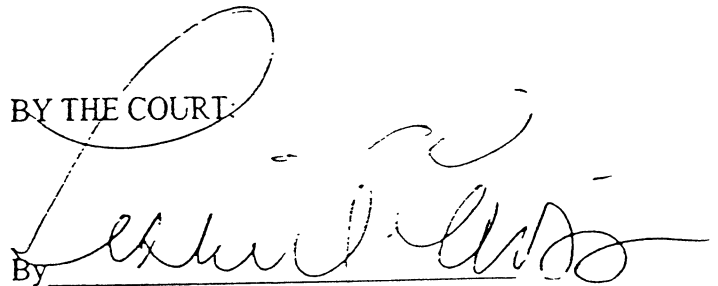
JAMES R. RUSSELL and RAYLENE	:	ORDER DISMISSING WITHOUT
RUSSELL, for themselves and for all other	:	PREJUDICE CERTAIN CLAIMS
similarly situated individuals and entities;	:	AGAINST THE BACKMAN
	:	DEFENDANTS
Plaintiffs,	:	
vs.	:	Civil No. 020901052
	:	
J SCOTT LUNDBERG, LUNDBERG &	:	Judge Leslie A. Lewis
ASSOCIATES, a Professional Corporation;	:	
BACKMAN TITLE COMPANY, a Utah	:	
Corporation, BACKMAN-STEWART	:	
TITLE SERVICES, LTD. , a Utah Limited	:	
Partnership, CANYON ANDERSON,	:	
RODNEY SERVICES COMPANY, a Utah	:	
Corporation, and JOHN DOES 1 through	:	
10.	:	
	:	
Defendants	:	

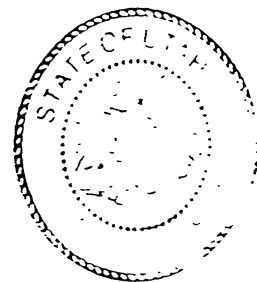
Defendants Backman Title Company, Backman-Stewart Title Services, Ltd. and Canyon Anderson (collectively the "Backman Defendants") filed a Motion to Dismiss Portions of the Complaint. This motion came on for hearing before the Honorable Leslie A. Lewis on August 22, 2002. Plaintiff was represented by Lester A. Perry. Defendants Lundberg and Lundberg & Associates were represented by Gary A. Weston and Richard M. Hymas. The Backman Defendants were represented by R. Willis Orton. Defendant Canyon Anderson was present in the courtroom. Having heard argument of counsel and having considered the memoranda filed by the parties, on September 30, 2002, the court, for good cause shown, issued its Memorandum Decision disposing of the Backman Defendants' motion. Therefore, based upon the Memorandum Decision,

IT IS HEREBY ORDERED that, pursuant to Rule 9(b), Utah Rules of Civil Procedure, the Backman Defendants' Motion to Dismiss is granted, and the Fifth, Sixth and Thirteenth Causes of Action of Plaintiff's Complaint are hereby dismissed without prejudice.

DATED this 10th day of October, 2002.

BY THE COURT:

By 
Leslie A. Lewis
District Judge



Approved as to form:

By _____

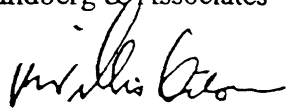
Lester A. Perry

Attorneys for Plaintiff

By _____

Gary A. Weston

Attorneys for Defendants Lundberg
and Lundberg & Associates

By _____


R. Willis Orton

Attorneys for the Backman Defendants

Approved as to form:

By _____

Lester A. Perry

Attorneys for Plaintiff

By _____

Gary A. Weston

Attorneys for Defendants Lundberg
and Lundberg & Associates

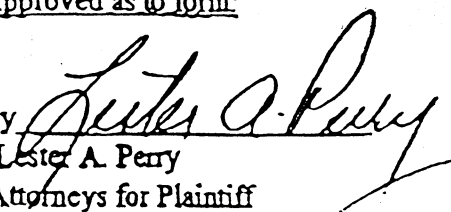
By _____

R. Willis Orton

Attorneys for the Backman Defendants

Approved as to form:

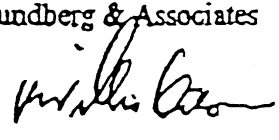
By


Lester A. Perry
Attorneys for Plaintiff

By

Gary A. Weston
Attorneys for Defendants Lundberg
and Lundberg & Associates

By



R. Willis Orton
Attorneys for the Backman Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER DISMISSING CERTAIN CLAIMS AGAINST THE BACKMAN STEWART DEFENDANTS to be mailed, postage prepaid, this 9th day of October, 2002, to:

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124-2634

Gary Weston
Richard M. Hymas
Nielsen & Senior
Suite 1100, Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Ronald C. Paul

\\MAVPC\DOCS\DOCS 6456531

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Telephone: (801) 532-1900
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FILED DISTRICT COURT
Third Judicial District

OCT 30 2002

SALT LAKE COUNTY
[Signature]
Deputy Clerk

Attorneys for Defendants
J. Scott Lundberg and Lundberg & Associates

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, SALT LAKE DEPARTMENT

JAMES R. RUSSELL and RAYLENE
RUSSELL, for themselves and for all other
similarly situated individuals and entities,

Plaintiffs,

v.

J. SCOTT LUNDBERG, LUNDBERG &
ASSOCIATES, a Professional Corporation,
BACKMAN TITLE COMPANY, a Utah
Corporation, BACKMAN-STEWART TITLE
SERVICES, LTD., a Utah Limited
Partnership, CANYON ANDERSON,
RODNEY SERVICES COMPANY, a Utah
Corporation, and JOHN DOES 1 through 10,

Defendants

PARTIAL SUMMARY JUDGMENT
FOR LUNDBERG DEFENDANTS

Civil No 020901052

Hon. Leslie A. Lewis

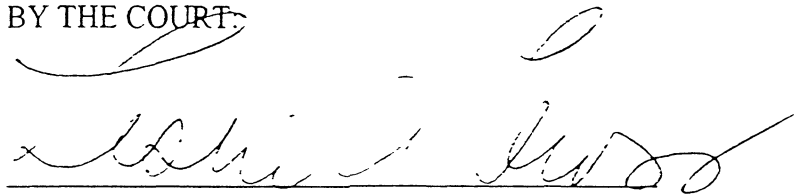
The Motion of the Defendants J. Scott Lundberg and Lundberg & Associates for partial summary judgment on Plaintiffs' First, Second, Third and Fourth Causes of Action of their Complaint came on regularly for hearing before the Honorable Leslie A. Lewis on the 22nd day of

August, 2002, with Gary A. Weston and Richard M. Hymas of the firm of Nielsen & Senior appearing on behalf of said Defendants, and Lester A. Perry of the firm of Hoole & King appearing on behalf of Plaintiffs. The Court heard argument on the Motion, and reviewed the pleadings and memoranda filed by the respective parties. Determining that there are no genuine issues of fact to be determined by trial, that Plaintiffs have no cause of action against said Defendants under the First, Second, Third and Fourth Causes of Action of Plaintiffs' Complaint, and that said Defendants are entitled to judgment as a matter of law, the Court has so ruled in its Memorandum Decision filed September 30, 2002.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Partial Summary Judgment of Defendants J. Scott Lundberg and Lundberg & Associates is granted in its entirety and said Defendants are hereby awarded judgment dismissing, with prejudice, the First, Second, Third and Fourth Causes of Action of Plaintiff's Complaint.


DATED this 30th day of October, 2002.

BY THE COURT:



LESLIE A. LEWIS
DISTRICT COURT JUDGE

APPROVED AS TO FORM:



Lester A. Perry
Hoole & King
Attorneys for Plaintiffs

AUG 14 2003

SALT LAKE COUNTY
By M. Small
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES R. RUSSELL and RAYLENE	:	MEMORANDUM DECISION
RUSSELL, for themselves and for	:	
all other similarly situated	:	CASE NO. 020901052
individuals and entities,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
J. SCOTT LUNDBERG; LUNDBERG &	:	
ASSOCIATES, a Professional	:	
Corporation; BACKMAN TITLE	:	
COMPANY, a Utah Corporation;	:	
BACKMAN-STEWART TITLE SERVICES,	:	
LTD., a Utah Limited Partnership;	:	
CANYON ANDERSON; RODNEY SERVICE	:	
COMPANY, a Utah Corporation;	:	
and JOHN DOES 1 through 10,	:	
	:	
Defendants.	:	

This matter came before the Court for hearing on June 18, 2003, in connection with the following Motions: Rodney Services Company's (Rodney's) Motion for Summary Judgment; Defendants Backman Title Company, Backman-Stewart Title Services, Ltd. and Canyon Anderson's (collectively referred to as the Backman defendants' Motion for Judgment on the Pleadings; the Lundberg parties' Motion for Judgment on the Remaining Causes of Action in Plaintiffs' Complaint and plaintiffs' Motion to Certify Class. At the conclusion of the hearing on the aforementioned Motions, the Court took the matter under advisement. The Court has now had

an opportunity to consider the moving and responding memoranda on these Motions, having reviewed the relevant case law and in light of the oral argument in this case, rules as stated herein.

LEGAL ANALYSIS

Because the Lundberg parties' Motion for Summary Judgment, Rodney's Motion for Summary Judgment and the Backman defendants' Motion for Judgment on the Pleadings overlap in certain respects, the Court will analyze all three Motions in tandem. The Lundberg parties bring their Motion following the Court granting their prior Motion for Partial Summary Judgment, dismissing the plaintiffs' first four causes of action. As counsel for the Lundberg parties emphasized during oral argument, the Court's decision to grant partial summary judgment on the plaintiffs' first four causes of action as to the Lundberg parties has certain ramifications to Rodney's Motion for Summary Judgment as it pertains to the plaintiff's first four causes of action against it. Although counsel summarized the factual underpinnings of the Court's September 30, 2002, Memorandum Decision, during oral argument, it is important to underscore certain of these facts herein.

First, the Court's initial decision established that the Lundberg parties never served as counsel or otherwise entered into a legal or business relationship with the plaintiffs. The Lundberg parties did not make any representations and did not communicate

with the plaintiffs when their trust deed was executed. The Lundberg parties only communicated with the plaintiffs after they defaulted. The Court found as a matter of law on agreed facts that the Lundberg parties did not have a confidential or a contractual relationship with the plaintiffs and therefore had no fiduciary or contractual duties (including no common law duties) towards them.

Because the facts surrounding Rodney's involvement with the plaintiffs is analogous to the Lundberg parties' involvement, the Court's reasoning in its initial Memorandum Decision is equally applicable to Rodney. In fact, Rodney's connection to the plaintiffs is even more tenuous because while Mr. Lundberg may have held the distinction of being a trustee under the plaintiffs' Trust Deed, Rodney's sole connection to the plaintiffs was posting and publishing of the Third Notice of Trustee's Sale in connection with the third foreclosure of the plaintiffs' Trust Deed. Rodney's responsibility in posting and publishing the plaintiffs' Notice carries with it no implied fiduciary or contractual duties or even the type of statutory obligations that the Court found were imposed on Mr. Lundberg. Therefore, the Court grants summary judgment to Rodney on the plaintiffs' first four causes of action.

The plaintiffs' remaining claims as to the Lundberg parties, Rodney and the Backman defendants, which are addressed in the

various Motions for Summary Judgment and Motion for Judgment on the Pleadings, are as follows: (5 ¹, ²) Restitution Based on Mistake of Fact, (6) Restitution Based on Mistake of Law; (7) Tortious Payment of Money³; (8) Unjust Enrichment; (9) Wrongful Collection; (10) Liability for Intended Consequences; (11) Actionable Fraud; (12) Negligent Misrepresentation; (13) Civil Conspiracy; (14) Utah Unfair Practices Act; (15) Punitive Damages.

The Court begins in reverse by ruling that there is no independent cause of action for punitive damages. Therefore, the plaintiffs' Fifteenth Cause of Action for punitive damages is procedurally inappropriate. In addition, an assessment of the conduct alleged indicates that the plaintiffs cannot prove the degree of culpability and egregiousness necessary to justify an award of punitive damages. Therefore, the Court grants summary judgment to the Lundberg parties and Rodney on this cause of action.

The Court next concludes that the Utah Unfair Practices Act has no application to the facts of this case. Foremost, the

¹ The number in parenthesis designates the number of the cause of action

² The Court previously granted the Backman defendants' Motion to Dismiss the plaintiffs' Fifth, Sixth and Thirteenth Causes of Action

³ The Seventh, Ninth, Tenth, Eleventh and Twelfth Causes of Action were addressed only in the Lundberg parties' and Rodney's Motion for Summary Judgment

plaintiffs are not competitors of the various defendants and therefore lack standing to assert the UPA. Moreover, the plaintiffs have not asserted facts from which this Court could find that the defendants' practices had the effect of injuring or destroying competition. As counsel pointed out during oral argument, the UPA contemplates sales at less than cost to achieve a monopoly and destroy competition. The plaintiffs claim that the defendants charged more than the actual cost. This claim belies any applicability of the UPA. Therefore, the Court grants the defendants' Motions for Summary Judgment and Motion for Judgment on Pleadings on the plaintiffs' Fourteenth Cause of Action.

The Court grants the Lundberg parties' and Rodney's Motions for Summary Judgment as they pertain to the plaintiffs' Seventh, Ninth and Tenth Causes of Action. The Court agrees that these causes of action have no foundation in Utah law. However, to the extent that these are claims sounding in tort, the Court's decisions concerning the lack of duty are dispositive to these claims. (The Court reiterates that the few procedural duties that are statutory and which could be construed as being for the protection of trustors (the plaintiffs) were complied with in this case).

The plaintiffs' remaining claims as to the Lundberg parties and Rodney all center on the premise that these defendants inflated

certain costs stemming from the plaintiffs' foreclosure in a manner that ran afoul of Utah Code Annotated §§57-1-29 and 31, which limits costs that can be charged in a foreclosure to the actual costs incurred. Based on this premise, the plaintiffs assert a variety of claims, including (1) mistake of law and fact (because they did not know that the costs were allegedly inflated); (2) fraud and negligent misrepresentation (based on alleged misrepresentations that the amounts billed to the lender were the amounts actually incurred); (3) that the various defendants engaged in a conspiracy to inflate actual costs and (4) that the defendants were unjustly enriched as a result of the inflated costs.

The plaintiffs concede that the foregoing claims would be vitiated if the Court finds that the Lundberg parties did not violate the law when they (1) charged the original cost of a Trust Deed Sale Guarantee (TSG) without deducting a commission they subsequently received from Backman-Stewart⁴ and (2) when they delegated the responsibility of publishing and posting to Rodney and passed along the cost of Rodney's administrative fee on these

⁴ The Lundberg parties have provided an Affidavit attesting that these commissions stemmed from an ownership interest in Backman-Stewart and due to the large volume of business that the Lundberg parties provided to Backman-Stewart. It is undisputed that the amount charged by the Lundberg parties for the TSGs reflects the amount they actually paid for them. Importantly, the plaintiffs have not disputed that there was no set commission paid for each TSG purchased.

services. To be clear, the plaintiffs allege that these practices resulted in their lender (and in turn them) being charged foreclosure costs that were inflated and which did not reflect "actual costs."

Before launching into the analysis of whether the Lundberg parties' practices are lawful, the Court notes that all of the parties agreed during oral argument that there are no factual disputes concerning what these practices are, only the legal significance of the same.

The Court begins by analyzing the costs of posting and publication by Rodney. It is significant that while the plaintiffs suggest that the Lundberg parties did not need to delegate the responsibility of posting and publication to Rodney, they have not cited the Court to any legal authority that a trustee is precluded from engaging a third-party to perform some of the work necessary for a non-judicial foreclosure. In fact, the Court's own legal research has not yielded any such legal authority perhaps because there is no legal basis to require a trustee to single-handedly perform all of the duties accompanying a foreclosure.

Further, it is an economic reality that there are costs related to the engagement of a third-party to perform services. There has been no assertions that Rodney is a charitable endeavor formed to provide gratuitous posting and publication services.

Instead, Rodney is a business and is clearly allowed to make a profit on its transactions. The only issue that the Court can perceive in terms of profit is whether the administrative fee being charged by Rodney is reasonable, particularly given the tangential business relationship between Rodney and the Lundberg parties. However, the plaintiffs have not raised this issue and, in fact, do not contest the reasonableness of Rodney's fee. The Court's understanding of the plaintiffs' position is that they only contest the assessment of the administrative fee in the first place and the fact that the fee was passed along to the lender (and in turn to them).

Because the plaintiffs cannot provide the legal basis to preclude a trustee's delegation of responsibilities and the inevitable increase in costs resulting therefrom⁵, their argument as to the propriety of the fee being passed along must fail as a matter of law. As the Lundberg parties point out, their **actual** cost for Rodney's posting services, for instance, was \$65.00 (which included the \$30.00 administrative fee). This actual cost was then charged to the lender and was the amount that the plaintiffs were required to pay the lender to reinstate their loan. Because the

⁵ The plaintiffs also do not dispute that there is no legal authority requiring the trustee to handle the foreclosure at the lowest cost possible, only at a reasonable cost

\$65.00 was the "actual cost" borne by the Lundberg parties, the plaintiffs cannot claim that the Lundberg parties or Rodney's practices in regards to the posting/publication costs are unlawful or that the costs were "inflated" simply by virtue of Rodney being retained to perform services that the Lundberg parties had previously performed in-house.

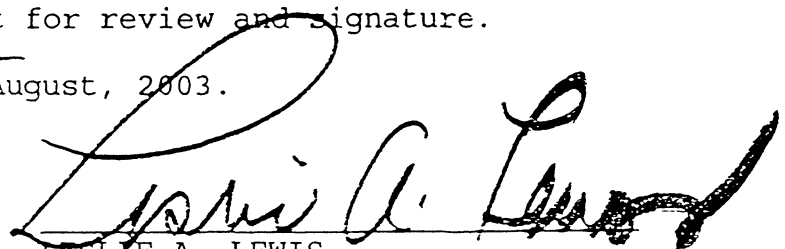
Similarly, the Court is not persuaded that the Lundberg parties were required to deduct the cost of a potential commission from the price of the TSG. It is uncontroverted that these commissions were not predetermined. Rather, the commissions were assessed periodically and had no correlation to a specific TSG. Overall, the Court is satisfied that the plaintiffs have demonstrated no legal entitlement to a discount as a result of the Lundberg parties' possibly garnering a commission for the volume of business they provide to Backman-Stewart. The fact remains that the plaintiffs paid the "actual cost" of the TSG, a cost they would have had to pay if an entity other than the Lundberg parties had been involved.

Based on the foregoing, the Court determines that neither the Lundberg parties nor Rodney inflated or padded the "actual costs" that were charged to the plaintiffs' lender and which the lender in turn charged to the plaintiffs. These defendants' practices were lawful and do not provide a basis for recovery under the causes of

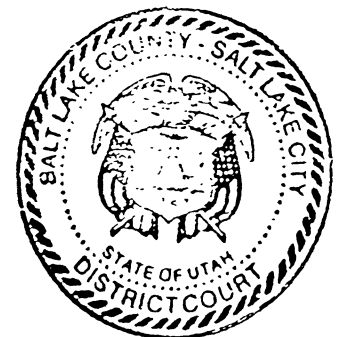
action identified above. Accordingly, the Court grants the Lundberg parties' Motion for Summary Judgment, grants Rodney's Motion for Summary Judgment and grants the Backman-Stewart defendants' Motion for Judgment on the Pleadings. Since this ruling results in the majority, if not all⁶, of the plaintiffs' claims being disposed of, the Court is satisfied that there is no need or legal basis for granting the plaintiffs' Motion for Class Certification. Accordingly, the Motion for Class Certification is denied.

Counsel for the Lundberg parties is to prepare an Order consistent with, but not limited to, this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 14th day of August, 2003.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



⁶ Since the Motion for Judgment on the Pleadings only addressed the Fourteenth Cause of Action and the Court's prior dismissal dealt with three other causes of action, it appears that a few of the plaintiffs' claims against the Backman-Stewart defendants may remain active

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 14 day of August, 2003:

Lester A. Perry
Attorney for Plaintiff
4276 S. Highland Drive
Salt Lake City, Utah 84124

R. Willis Orton
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Jason W. Beutler
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Backman-Stewart Title, and Canyon Anderson
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Salt Lake City, Utah 84145-0120

Gary A. Weston
Richard M. Hymas
Attorneys for Defendants Lundberg
and Lundberg & Associates
60 E. South Temple, Suite 1100
Salt Lake City, Utah 84111

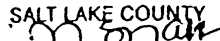
 M. Swadi

Gary A. Weston USB No. 3435
Richard M. Hymas USB No. 1612
NIELSEN & SENIOR
60 East South Temple, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913

Attorneys for Defendants
J. Scott Lundberg and Lundberg & Associates

FILED DISTRICT COURT
Third Judicial District

SEP 8 2003

By 
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, SALT LAKE DEPARTMENT

JAMES R. RUSSELL and RAYLENE :
RUSSELL, for themselves and for all other :
similarly situated individuals and entities, :

Plaintiffs, :

v. :

J. SCOTT LUNDBERG, LUNDBERG & :
ASSOCIATES, a Professional :
Corporation, BACKMAN TITLE :
COMPANY, a Utah Corporation, :
BACKMAN-STEWART TITLE :
SERVICES, LTD., a Utah Limited :
Partnership, CANYON ANDERSON, :
RODNEY SERVICES COMPANY, a Utah :
Corporation, and JOHN DOES 1 through :
10, :

Defendants. :

ORDER GRANTING THE
LUNDBERG PARTIES' MOTION
FOR SUMMARY JUDGMENT
ON THE REMAINING CAUSES
OF ACTION IN PLAINTIFFS'
COMPLAINT, GRANTING RODNEY
SERVICE CO.'S MOTION FOR
SUMMARY JUDGMENT,
GRANTING THE BACKMAN
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS,
AND DENYING PLAINTIFFS'
MOTION TO CERTIFY CLASS

Civil No. 020901052

Hon. Leslie A. Lewis

The Motion for Summary Judgment on the Remaining Causes of Action in Plaintiffs' Complaint filed by Defendants J. Scott Lundberg and Lundberg & Associates [“the Lundberg Parties”], the Motion for Summary Judgment filed by Rodney Services Co. [“Rodney”], the

Motion for Judgment on the Pleadings filed by Backman Title Co., Backman-Stewart Title Services, Ltd., and Canyon Anderson [“the Backman Defendants”], and the Motion to Certify Class filed by Plaintiffs came on regularly for hearing before the Honorable Leslie A. Lewis on June 18, 2003. Lester A. Perry of the firm of Hoole & King appeared on behalf of Plaintiffs, Gary A. Weston and Richard M. Hymas of the firm of Nielsen & Senior appeared on behalf of the Lundberg Parties and Rodney, and R. Willis Orton of the firm of Kirton & McConkie appeared on behalf of the Backman Defendants.

The Court heard arguments on the motions, and reviewed the memoranda, affidavits and exhibits filed by the respective parties in support of, and in opposition to, the motions. Having duly considered the matter, the Court has determined and ruled in its Memorandum Decision filed August 14, 2003, that there are no genuine issues of material fact with respect to the causes of action against Defendants that are the subject of the dispositive motions before the Court; that Plaintiffs are unable to prevail against Defendants on any of those causes of action and that Defendants are entitled to judgment on those causes of action as a matter of law, and that, given the Court’s ruling on the dispositive motions, there is no need or legal basis for certifying the class as requested by Plaintiffs. Based upon the foregoing, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. First Four Causes of Action Against Rodney. In its Memorandum Decision dated September 30, 2002, the Court determined that, based upon applicable law and the undisputed evidence presented in connection with the Lundberg Parties’ prior Motion for Partial Summary Judgment, the Lundberg Parties did not have any confidential or contractual relationship with Plaintiffs, and therefore had no fiduciary, contractual or common law duties to

Plaintiffs. The statutory duties that Scott Lundberg owed to Plaintiffs in his capacity as trustee under Plaintiffs' trust deed (which duties were fully satisfied by Lundberg) did not create on the part of the Lundberg Parties any fiduciary, contractual or common law duties to Plaintiffs. As a result, the Court granted partial summary judgment against Plaintiffs and in favor of the Lundberg Parties on Plaintiffs' first cause of action for breach of fiduciary duty, second cause of action for constructive fraud based on breach of fiduciary duty, third cause of action for breach of contract, and fourth cause of action for breach of the covenant of good faith and fair dealing.

The prior ruling by the Court provides support with respect to Rodney's Motion for Summary Judgment as to the first four causes of action in Plaintiffs' Complaint against Rodney. The undisputed evidence presented in connection with Rodney's motion established that at no time did Rodney do business with Plaintiffs, make any representations to or have any communications with Plaintiffs, otherwise deal with Plaintiffs, or have any confidential or contractual relationship with Plaintiffs. Based upon that undisputed evidence, the Court has determined that Rodney had no fiduciary, contractual or common law duties to Plaintiffs as a matter of law. As a result, Rodney is entitled to judgment against Plaintiffs on the first four causes of action in Plaintiffs' Complaint, and summary judgment in favor of Rodney on those first four causes of action is hereby granted.

2. **Fifteenth Cause of Action for Punitive Damages Against the Lundberg Parties and Rodney.** Plaintiffs' fifteenth cause of action against the Lundberg Parties and Rodney for punitive damages is procedurally defective and inappropriate as there is no independent cause of action for punitive damages under Utah law. In addition, even if Plaintiffs were able to prevail on any of their other causes of action against the Lundberg Parties or

Rodney, the evidence presented regarding the conduct of those defendants, when viewed in the light most favorable to Plaintiffs, lacks the degree of culpability and egregiousness necessary to support or justify an award of punitive damages as a matter of law. Therefore, the Lundberg Parties and Rodney are entitled to summary judgment on the fifteenth cause of action in Plaintiffs' Complaint, and summary judgment is hereby granted in favor of the Lundberg Parties and Rodney on that cause of action.

3. **Fourteenth Cause of Action for Violations of the Utah Unfair Practices Act Against Defendants.** Plaintiffs' fourteenth cause of action against Defendants is for alleged violations of the Utah Unfair Practices Act ["UPA"], but the UPA does not apply in this case. Plaintiffs are not competitors of any of the Defendants. It is undisputed that Plaintiffs did not sell or buy a Trust Deed Sale Guarantee ["TSG"] or other title product or service, and therefore were not competing sellers or disfavored buyers of the TSGs and other title products and services that were sold by Backman-Stewart and purchased by the Lundberg Parties. In addition, Plaintiffs have not alleged, and no evidence has been presented to suggest, that the commissions paid by Backman-Stewart to the Lundberg Parties or any other practices of the Defendants have damaged Plaintiffs in any way. Because Plaintiffs have not suffered any distinct or palpable injury as a result of the commissions received by the Lundberg Parties from Backman-Stewart, Plaintiffs lack standing to assert claims under the UPA against Defendants.

The UPA prohibits an entity from selling goods or services at less than cost where the result of such pricing is the establishment of a monopoly or the destruction of competition. Plaintiffs have presented no facts showing that Defendants' practices had the effect of lessening competition or creating a monopoly. To the contrary, Plaintiffs allege that the amount the

Lundberg Parties charged the lender or beneficiary under Plaintiffs' trust deed for the TSGs that they bought from Backman Title was more -- not less -- than the Lundberg Parties were required to pay for those TSGs. That claim belies the applicability of the UPA to the facts of this case.

Backman-Stewart's action in paying commissions to the Lundberg Parties in recognition of Lundberg's ownership interest in Backman-Stewart and for the large amount of business that the Lundberg Parties' provided to Backman-Stewart does not violate the UPA. Based upon the undisputed evidence and applicable law, all of the Defendants are entitled to judgment against Plaintiffs on the fourteenth cause of action in Plaintiffs' Complaint, and judgment in favor of Defendants on that cause of action is hereby granted.

4. Seventh, Ninth and Tenth Causes of Action for Alleged Tortious Payment of Money, Wrongful Collection and Liability for Intended Consequences Against the Lundberg Parties and Rodney. Plaintiffs' seventh cause of action for tortious payment of money, their ninth cause of action for wrongful collection, and their tenth cause of action for liability for intended consequences have no foundation in Utah law, and therefore fail to state a claim against the Lundberg Parties or Rodney upon which relief may be granted. Moreover, even if these causes of action were recognized under Utah law as legitimate claims sounding in tort, the Court's determination that the Lundberg Parties and Rodney owed no fiduciary, contractual or common-law duty to Plaintiffs precludes Plaintiffs from recovering against the Lundberg Parties and Rodney on these claims as a matter of law.

Based upon the undisputed evidence and applicable law, the Lundberg Parties and Rodney are entitled to, and are hereby granted, summary judgment against Plaintiffs on the seventh, ninth and tenth causes of action in Plaintiffs' Complaint.

5. Fifth, Sixth, Eighth, Eleventh, Twelfth and Thirteenth Causes of Action

Against the Lundberg Parties and Rodney. Plaintiffs' fifth cause of action for restitution based on mistake of fact, their sixth cause of action for restitution based on mistake of law, their eighth cause of action for unjust enrichment, their eleventh cause of action for fraud, their twelfth cause of action for negligent misrepresentation, and their thirteenth cause of action for civil conspiracy are all based on the premise that the Lundberg Parties and Rodney inflated certain costs stemming from the foreclosure of Plaintiffs' trust deed in a manner that ran afoul of Utah Code Ann. § 57-1-29 and § 57-1-31, which limits costs that can be charged in a foreclosure to the actual costs incurred. Plaintiffs assert that they are entitled to restitution based on mistake of fact and mistake of law because they did not know that the costs were allegedly inflated; that the Lundberg Parties and Rodney were unjustly enriched as a result of the receipt by them of the alleged inflated costs; that Plaintiffs are entitled to recover for fraud and negligent misrepresentation based on alleged misrepresentations that the amounts billed to the lender were the amounts actually incurred; and that the Lundberg Parties and Rodney engaged in a conspiracy to inflate the actual costs.

Plaintiffs concede that the foregoing claims would be vitiated if the Court finds that the Lundberg Parties did not violate the law when they (1) charged the original cost of a TSG without deducting a commission they subsequently received from Backman-Stewart and (2) when they delegated the responsibility of publishing and posting to Rodney and passed along to the lender the cost of Rodney's administrative fee and other charges for providing these services

The Court is not aware of any legal authority that provides that a trustee is precluded from engaging a third-party to perform some of the work necessary for a non-judicial foreclosure.

Indeed, the law does not require a trustee to single-handedly perform all of the duties associated with such a foreclosure. There also is no legal requirement that a trustee handle a foreclosure at the lowest cost possible. Such costs simply must be reasonable. Accordingly, based upon the undisputed evidence presented, there was nothing unlawful in the Lundberg Parties's action in hiring Rodney to perform posting and publication services for it, and in paying Rodney for its services. There also is nothing unlawful in Rodney making a profit on the services that it provides. Plaintiffs have not argued, and have not presented any evidence to suggest, that the administrative fee and other amounts charged by Rodney for its services, and paid by the Lundberg Parties, were unreasonable.

Because the Plaintiffs cannot provide any legal basis for precluding a trustee's delegation of responsibilities associated with a non-judicial foreclosure and incurring the reasonable costs resulting therefrom, their argument as to the propriety of the fee being passed along to the lender and then to Plaintiffs fails as a matter of law. It is undisputed that the actual cost for Rodney's posting services was \$65.00, which included a \$30.00 administrative fee. It similarly is undisputed that the actual cost to the Lundberg Parties for Rodney's publication services was \$143.40, the same amount paid by Rodney to the newspaper that published the notices, and that Rodney received a commission of \$30.00 from the newspaper, making it unnecessary for Rodney to charge the Lundberg Parties any additional administrative fee for its services. The exact amount of these actual costs paid by the Lundberg Parties was charged to the lender, which was the same amount that Plaintiffs were required to pay to the lender to reinstate their loan. Because the amount paid by Plaintiffs for these "actual costs" was the same amount paid by the Lundberg Parties, as well as by the lender, Plaintiffs cannot claim that the practices of the Lundberg Parties

and Rodney with respect to the posting and publication services were unlawful. These costs were not “inflated” simply because Rodney was retained to perform services that the Lundberg Parties previously had performed in-house.

Similarly, the Lundberg Parties were not required to deduct the cost of a potential commission that they might later receive from Backman-Stewart from the price that they paid for the TSGs in determining the amount that would be billed to the lender for the TSGs. The commissions paid by Backman-Stewart were not predetermined, were paid periodically, and had no direct correlation to a specific TSG. Plaintiffs were not entitled to a discount on the amount that they were required to pay to the lender for the TSGs purchased by the Lundberg Parties in connection with the foreclosure of their trust deed because of the possibility that the Lundberg Parties might receive a commission in the future based on the large volume of business that they provided to Backman-Stewart and Lundberg’s ownership interest in Backman-Stewart.

It is undisputed that the amounts paid by Plaintiffs to reimburse the lender for the actual cost of the TSGs was the same amount that they would have been required to pay if any other person or entity serving as trustee had purchased the TSGs in connection with the foreclosure of Plaintiffs’ trust deed.

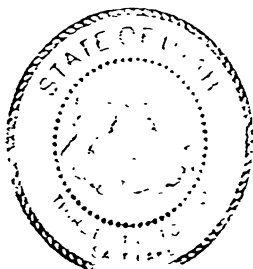
Based on the undisputed facts before the Court and applicable law, the Court determines that neither the Lundberg Parties nor Rodney inflated or padded the “actual costs” that were charged to the Plaintiffs’ lender and which the lender in turn charged to Plaintiffs. Accordingly, the practices of the Lundberg Parties and Rodney that have been challenged by Plaintiffs in this action were lawful, and provide no basis for recovery under Plaintiffs’ claims for mistake of fact, mistake of law, unjust enrichment, fraud, negligent misrepresentation, or civil conspiracy.

Moreover, because Plaintiffs did not confer a benefit on Rodney, there is no legal basis for their claims against Rodney for restitution based on mistake of fact or mistake of law or for unjust enrichment. In addition, because Rodney made no representations to Plaintiffs of any kind, Plaintiffs may not prevail against Rodney on their claims for fraud and negligent misrepresentation.

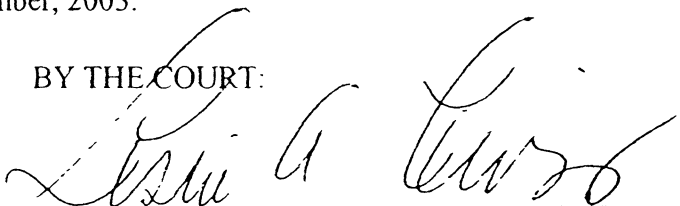
For the reasons set forth herein, the Lundberg Parties and Rodney are entitled to summary judgment as a matter of law on the fifth, sixth, eighth, eleventh, twelfth and thirteenth causes of action in Plaintiffs' Complaint, and summary judgment is hereby granted in favor of the Lundberg Parties and Rodney on those causes of action.

6. **Motion for Class Certification.** The Court's action in granting the Lundberg Parties' Motion for Summary Judgment on the Remaining Claims in Plaintiffs' Complaint, Rodney's Motion for Summary Judgment, and the Backman Parties' Motion for Judgment of the Pleadings effectively disposes of all of the causes of action against the Lundberg Parties and Rodney and most of the causes of action against the Backman Parties. As a result, there is no need or legal basis for granting Plaintiffs' Motion for Class Certification. Accordingly, the Motion for Class Certification is hereby denied.

DATED this 5th day of September, 2003.



BY THE COURT:

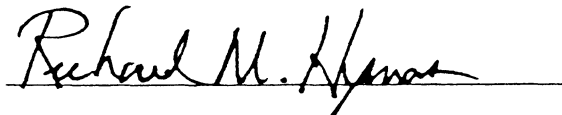

HONORABLE LESLIE A. LEWIS
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2003, I served upon all parties the foregoing **ORDER GRANTING THE LUNDBERG PARTIES' MOTION FOR SUMMARY JUDGMENT ON THE REMAINING CAUSES OF ACTION IN PLAINTIFFS' COMPLAINT, GRANTING RODNEY SERVICE CO.'S MOTION FOR SUMMARY JUDGMENT, GRANTING THE BACKMAN DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, AND DENYING PLAINTIFFS' MOTION TO CERTIFY CLASS** by causing a true and correct copy thereof to be mailed via first-class United States mail, postage prepaid, to the following:

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, UT 84124-2634

R. Willis Orton
Kirton & McConkie
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Richard M. Hansen", is written over a horizontal line.


On September 3, 2003, Defendants Backman Title Company, Backman-Stewart Title Services, Ltd. and Canyon Anderson (collectively the “Backman Stewart Defendants”), by and

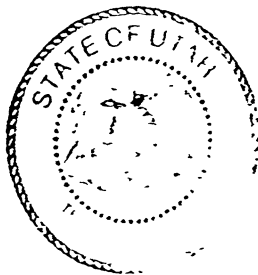
through their attorneys of record, filed a Motion for Summary Judgment on Plaintiffs' Remaining Claims with supporting memorandum. On September 9, 2003, Plaintiffs, through their counsel, submitted a Memorandum in Opposition to the Backman Stewart Defendants' Motion for Summary Judgment, in which they admit that "[b]ased on the Court's memorandum decision of August 14, 2003, the plaintiffs cannot defend against the motion of the Backman Stewart Defendants." Backman Stewart Defendants then filed a Notice to Submit the matter for decision. Therefore, for good cause shown,

IT IS HEREBY ORDERED THAT defendants Backman Title Company, Backman-Stewart Title Services, Ltd., and Canyon Anderson are entitled to, and are hereby granted, summary judgment against Plaintiffs on the Eighth and Fifteenth Causes of Action in Plaintiffs' Complaint and those claims are dismissed with prejudice.

DATED this 22nd day of September, 2003.


BY THE COURT:

By 
Leslie A. Lewis
District Court Judge



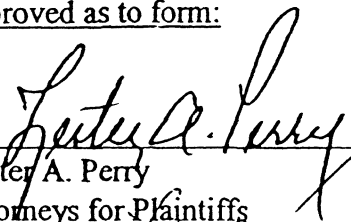
Approved as to form:

By _____
Lester A. Perry
Attorneys for Plaintiffs


By  _____
R. Willis Orton
Attorneys for the Backman Stewart Defendants

Approved as to form:

By


Lester A. Perry
Attorneys for Plaintiffs

By


R. Willis Orton

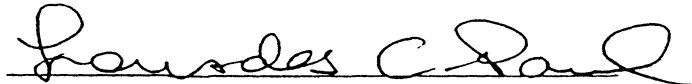
Attorneys for the Backman Stewart Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ORDER**
GRANTING SUMMARY JUDGMENT IN FAVOR OF THE BACKMAN STEWART
DEFENDANTS ON REMAINING CLAIMS, to be mailed, postage prepaid, this 11th day of
September, 2003, to:

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124-2634

Gary A. Weston
Richard M. Hymas
Nielsen & Senior
Suite 1100, Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Lawrence C. Paul", written over a horizontal line.

R. Willis Orton (2484)
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

Attorneys for Defendants Backman Title
Company, Backman-Stewart Title Services, Ltd.
and Canyon Anderson

FILED DISTRICT COURT
Third Judicial District

NOV 4 2003

SALT LAKE COUNTY
By Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAMES R. RUSSELL and RAYLENE
RUSSELL, for themselves and for all other
similarly situated individuals and entities;

Plaintiffs,

vs.

J. SCOTT LUNDBERG; LUNDBERG &
ASSOCIATES, a Professional Corporation;
BACKMAN TITLE COMPANY, a Utah
Corporation; BACKMAN-STEWART
TITLE SERVICES, LTD., a Utah Limited
Partnership; CANYON ANDERSON;
RODNEY SERVICES COMPANY, a Utah
Corporation; and JOHN DOES 1 through
10,

Defendants.

**ORDER OF DISMISSAL WITH
PREJUDICE**

Civil No. 020901052

Judge Leslie A. Lewis

Based on the accompanying Stipulation for Order of Dismissal, good cause appearing
therefor,

IT IS HEREBY ORDERED that plaintiffs' Fifth, Sixth and Thirteenth Causes of Action of the Complaint as against defendants Backman Title Company, Backman-Stewart Title Services, Ltd. and Canyon Anderson are dismissed with prejudice, each of the parties to bear their own costs.

DATED this 18 day of October, 2003.

BY THE COURT:

By SL
Leslie A. Lewis
District Court Judge

Approved as to form:

By Lester A. Perry
Lester A. Perry
Attorneys for Plaintiffs

By R. Willis Orton
R. Willis Orton
Attorneys for Defendants Backman
Title Company, Backman-Stewart Title
Services, Ltd. and Canyon Anderson