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Financial Services

California Court of Mortgage Servicing Alert: Borrowers May Now Obtain Attorney's Fees For Preliminary Injunctions Issued Under The Homeowner Bill of Rights Act

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On June 12, 2015, a California Court of Appeal held that borrowers may recover attorney's fees upon obtaining a preliminary injunction under the Homeowner Bill of Rights Act ("HBOR"). The statute deems a borrower a "prevailing party" eligible for reasonable attorney's fees and costs if the borrower "obtained injunctive relief or was awarded damages." Until now, it was an open question whether "injunctive relief" meant only a permanent injunction, issued after an adjudication on the merits or also included a preliminary injunction.

Monterossa v. Superior Court (No. C077683; June 12, 2015) __ Cal.App.4th __, 2015 WL 3653319, holds that "injunctive relief" "plainly incorporates both preliminary and permanent injunctive relief" and HBOR's language, purpose, and legislative history "demonstrate the Legislature intended to authorize an award of attorney fees and costs when a preliminary injunction issues." In so construing HBOR, the decision departs from prior case law, which in traditional civil litigation generally required entry of a judgment on the merits before any attorney fees could be awarded.

There are at least three obvious problems with granting attorney's fees where a borrower obtains only preliminary injunctive relief. First, preliminary injunction hearings are "necessarily hasty and abbreviated," with "no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses." (*Sole v. Wyner* (2007) 551 U.S. 74, 84.) The plaintiff-borrower largely controls the timing of the preliminary injunction. He or she may marshal all the evidence he or she needs before filing suit or moving for a preliminary injunction. The loan servicer and its counsel have only a short period in which to review the loan file, develop and document facts demonstrating compliance with HBOR with admissible evidence, usually through declarations that must be vetted and verified.

Second, in the foreclosure context, preliminary injunctions are freely granted even on showings that would not ordinarily suffice because the balance of hardships weighs so heavily in the borrower/homeowner's favor. Courts are supposed to issue preliminary injunctions only upon a finding that a borrower is likely to prevail on the merits of his or her claim, but often issue preliminary injunctions in the foreclosure context on lesser showings.

Third, a borrower's allegations may prove unfounded after trial on the merits. For this reason, the United States Supreme Court has repeatedly refused to interpret fee shifting statutes as authorizing fees for preliminary injunctions. Because "ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it," courts generally do not "go[] so far as to force a vindicated defendant" to pay for the burden of being subjected to an interim remedy by a plaintiff whose claims ultimately prove, upon full examination, to be without merit. (*Ruckelshaus v. Sierra Club* (1983) 463 U.S. 680, 685.)

The *Monterossa* opinion does not adequately appreciate these problems—indeed, it does not recognize them at all. Unless the California Supreme Court grants review or depublishes

the opinion, mortgage servicers are likely to see an increased number of lawsuits alleging "dual tracking" and other acts prohibited by HBOR. Mortgage servicers now face the prospect of paying the borrower's attorney's fees and costs if the servicers lose a preliminary injunction motion on an HBOR claim. As a result, those motions will have to be litigated more fully, requiring more time and expense at the very beginning of HBOR suits. Also, servicers should now take extra precautions to carefully document compliance with HBOR so that oppositions to preliminary injunction motions can be prepared quickly and thoroughly with as little disruption and effort as possible.

For more information, contact Mary Kate Sullivan (mks@severson.com, (415) 677-5607), Suzanne M. Hankins (smh@severson.com, (949) 225-7968), or any of the other attorneys in Severson & Werson's Financial Services Practice Group (<http://www.severson.com/parea/financial-services/>)

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SEVERSON.COM

SAN FRANCISCO
One Embarcadero Center
Suite 2600
San Francisco, California 94111
415.398.3344 Phone
415.956.0439 Fax

ORANGE COUNTY
19100 Von Karman Avenue
Suite 700
Irvine, California 92612
949.442.7110 Phone
949.442.7118 Fax