



California Court of Appeals Expands a Borrower's Right to Attorneys' Fees Under the Homeowner Bill of Rights: *Hardie v. Nationstar* and *Bustos v. Wells Fargo*

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I. INTRODUCTION

Although it has been in effect since January 1, 2013, California's Homeowner Bill of Rights ("HOBR") is still working its way through the trial and appellate courts, with parties searching for clarification on many of its vague and ambiguous provisions. One issue ripe for interpretation is the question: under what circumstance is the borrower entitled to attorneys' fees? Civil Code¹ sections 2924.12(h) and 2924.19(h) give the court the discretion to award reasonable attorneys' fees and costs to the "prevailing borrower," who is defined as a borrower who "obtained injunctive relief or was awarded damages."² There is no question that the court has the discretion to award borrowers who obtained a judgment for damages on their HOBR claims, their reasonable fees. Likewise, under the Court of Appeal's 2015 decision in *Monterossa v Superior Court*,³ it is equally as clear that a borrower obtaining a preliminary injunction under HOBR is entitled to move for recovery of attorneys' fees for bringing an injunction, even if the borrower does not ultimately prevail on the merits of the lawsuit. However, until recently, servicers have often successfully argued that borrowers who obtain a temporary restraining order ("TRO") are not entitled to attorneys' fees just for obtaining the TRO, as a TRO is not within the scope of the term "injunctive relief."

II. THE NEW DECISIONS

Two recently published decisions by the Court of Appeal, *Hardie v. Nationstar* and *Bustos v. Wells Fargo*,⁴ have concluded that borrowers prevailing at a TRO hearing are eligible for attorneys' fees and costs under HOBR because a TRO should be considered a form of injunctive relief.⁵ The decisions in *Hardie* and *Bustos* will undoubtedly increase the motivation for borrowers claiming violations of HOBR to seek TROs.

A TRO is an injunction in the sense that it enjoins a particular act pending a hearing on a preliminary injunction.⁶ However, it is distinguishable from an injunction in the following ways:

1. A TRO may be issued *ex parte* and, sometimes, even without notice (*e.g.* where a foreclosure sale is just days or even hours away) as its purpose is to preserve the status quo.
2. In contrast to the *ex parte* TRO proceeding, a hearing on the preliminary injunction is a full evidentiary hearing giving all parties the opportunity to present arguments and evidence.⁷
3. A bond is not essential for a TRO, but is for a preliminary injunction that is not effective until the undertaking is filed.⁸
4. The TRO is transitory in nature and terminates automatically when a preliminary injunction is issued or denied.⁹ When issued without notice, the TRO is only supposed to last for 15 days, though, for good cause, the court can set its expiration for up to 22 days from the date of issuance.¹⁰

The most troubling aspect of the TRO is the short notice required prior to the *ex parte* hearing. In California State courts, a borrower need only provide telephonic notice by 10:00 a.m.

the day before of an 8:30 a.m. TRO hearing and, as noted, in emergency situations, no notice need to be given at all. With fewer than 24-hours' notice required, most telephonic, email, or faxed TRO notices do not make it to the right personnel in time for counsel to be retained to appear at the hearing. Even if counsel is hired, he or she often does not have sufficient information to effectively oppose the TRO. Making matters worse, judges, faced with little time or information, "rubber stamp" TROs to stop foreclosure sales, believing that a short continuance until the preliminary injunction hearing will not cause the servicer significant harm.

III. HOW CAN SERVICERS AVOID LIABILITY FOR ATTORNEYS' FEES AND COSTS UNDER THE *HARDIE* AND *BUSTOS* RULE?

The *Hardie* and *Bustos* decisions highlight the servicer's need for internal procedures to quickly identify when a TRO is being noticed and to immediately funnel it to the legal department or other appropriate person so that counsel can be hired. With the referral to outside counsel, we suggest including (1) the status of any current loss mitigation discussions, (2) if possible, copies of loss mitigation notes, applications, denials, and the like, (3) any known bankruptcy information, and (4) contact information for the person responsible for postponing the sale. With this information, outside counsel can then quickly determine whether the TRO is likely to be granted. In such a case counsel may recommend postponing the foreclosure sale. Postponing the sale will allow counsel to prepare an opposition and, when appropriate, argue that the TRO should be denied because there is no risk of "immediate" harm.

Most California lawsuits include, in addition to the typical HOBR claims, causes of action for negligent loan modification review, promissory estoppel, wrongful foreclosure, and the like. A TRO that is based on non-HOBR claims does not trigger the borrower's immediate right to attorneys' fees. With that in mind, if the court is inclined to grant the TRO, counsel may consider asking the court to clarify that the TRO is based on the non-HOBR claims. Judges often grant TROs thinking there is no harm to the lender. If the distinction is pointed out, some judges may still grant the TRO but *not* the HOBR claims to avoid triggering borrowers' rights to attorneys' fees. Along the same lines, if the servicer cannot hire counsel in time to oppose the TRO, counsel can later argue, in opposition to the preliminary injunction, that the TRO was granted based on the non-HOBR claims.

IV. FINAL THOUGHTS AND A (SMALL) SILVER LINING

In recognition of the obvious negative implications of its ruling, the *Hardie* court did provide one important, positive constraint on potential abuses. Specifically, the court confirmed that an attorney fee award under HOBR is *not mandatory* just because injunctive relief was granted:

Furthermore, the award of attorney's fees under section 2924.12 is discretionary. (§2924.12, subd. (h) [fees "may" be awarded].) By permitting, rather than requiring a court to award attorney's fees, section 2924.12 allows courts to avoid awards that would be inequitable or unconstitutional. The ex parte nature of the proceedings, the relative merits of the TRO application, and a party's ultimate ability to obtain statutory compliance through imposition of an injunction are relevant factors the court may consider in determining whether to award fees.¹¹

Prior to the *Hardie* decision, many courts viewed an attorney fee award as mandatory under HOBR. At least now, servicers can cite to *Hardie* for reasons why, even if a TRO or preliminary injunction is granted, the court can still deny the borrower's request for attorneys' fees.

Despite this saving clause, the *Hardie* and *Bustos* decisions increase the likelihood that borrowers will seek TROs and, if they prevail, move for fees. Again, the best recourse for the other side is to immediately hire counsel to oppose the TRO and, if it is going to be granted, seek to clarify that the TRO is based on the non-HOBR claims. In addition, counsel may consider persuading the court to condition the TRO or preliminary injunction on the posting of a bond. That way, if the borrowers fail to timely post the bond, counsel can argue that the injunction never took effect and, therefore, the borrowers are not the prevailing party under sections 2924.12(h) or 2924.19(h).

Another option may be in cases where subsequent facts are developed to show that the TRO was improperly granted, such as when they are based on misrepresentations by the borrower that the short time frame for response did not allow the servicer or investor to present their arguments at the hearing, or where the TRO was issued without notice of the hearing. In such instances, it may be possible to move the court to dissolve the TRO or preliminary injunction. If all that fails, counsel may be able to argue that the court should exercise its discretion to deny all or a part of the borrower's fee request.

Both decisions in *Hardie* and *Bustos* discussed one final option—legislative action. While addressing the potential

unfairness in awarding attorneys' fees following an often-unopposed TRO, the courts indicated that they are bound by the language of the statute. While the differences between a TRO and a preliminary injunction may provide "sound policy reasons for prohibiting attorneys' fees on a TRO application, such determinations are reserved for the Legislature."¹² In other words, if you do not like the statute, take it up with the Legislature!

In conclusion, servicers and investors should make sure that their staff is trained on what constitutes *ex parte* notice in California and what to do when they receive such a notice. That is the first line of defense in seeking to avoid the risk of attorneys' fees and costs under HOBR.

Endnotes

- 1 All code sections cited herein are to the California Civil Code unless otherwise indicated.
- 2 Civil Code section 2924.12(h) applies to servicers who conduct more than 175 annual qualifying foreclosures a

- year. Section 2924.19(h) applies to those who conduct 175 or fewer annual qualifying foreclosures.
- 3 *Monterossa v. Superior Court*, 237 Cal. App. 4th 747 (2015).
- 4 *Hardie v. Nationstar Mortg. LLC*, 32 Cal. App. 5th 714 (2019); *Bustos v. Wells Fargo Bank, N.A.*, 2019 WL 4051751, at *1 (Cal. Ct. App. Aug. 28, 2019).
- 5 *Hardie*, 32 Cal. App. 5th 714; *Bustos*, 2019 WL 4051751, at *1.
- 6 *Chico Feminist Women's Health Ctr. v. Scully*, 208 Cal. App. 3d 230, 237 n.1 (1989).
- 7 Cal. Civ. Proc. Code § 527.
- 8 *Id.* § 529.
- 9 *Landmark Holding Grp. v. Superior Court*, 193 Cal. App. 3d 525, 529 (1987).
- 10 Cal. Civ. Proc. Code § 527(d).
- 11 *Hardie v. Nationstar Mortg. LLC*, 32 Cal. App. 5th 714, 718 (2019).
- 12 *Bustos v. Wells Fargo Bank, N.A.*, 2019 WL 4051751, at *14 (Cal. Ct. App. Aug. 28, 2019) (citing *Hardie*, 32 Cal. App. 5th at 724).

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