WRIGHT, FINLAY & ZAK, LLP

THE WFZ QUARTERLY

Summer 2019 Issue Vol. 4, No. 2

A LOAN SERVICER'S FAILURE TO TIMELY RESCIND ITS NOTICE OF DEFAULT COULD VIOLATE FDCPA

By Joan C. Spaeder-Younkin, Esq. and T. Robert Finlay, Esq.

In this Issue

1 A Loan Servicer's Failure to Timely Rescind its Notice of Default Could Violate FDCPA

3 California Court of Appeals Lets Receivers Loan Jump in Front of Lender's Previously First Lien

5 Upcoming Industry Events

6 If You Charge Default Interest, You'll Want to Read This!

8 WFZ Profile: Jonathan D. Fink, Esq., Partner

9 California Court of Appeals Expands a Borrowers' Right to Attorneys' Fees Under HOBR

11 WFZ Firm News

→ Brian J. Wagner Helps Expand the Firm's New Mexico Practice!

California law requires that, upon reinstatement of a loan or other cure of a default, the lender or loan servicer must record a rescission of the Notice of Default. Recently, in *Randall v Ditech Financial, LLC*, (2018) 23 Cal. App. 5th 804, the California Court of Appeals for the Fourth District weighed in on what can happen if the servicer fails to timely record the rescission.

The facts of the *Randall* case are fairly similar to most foreclosure cases. Randall defaulted on the loan, causing Ditech to record a Notice of Default, followed by a Notice of Sale. Prior to the foreclosure sale, Randall paid $20,664.36 to reinstate the loan. Ditech accepted the payments, but did not cancel the foreclosure sale. Despite repeated requests by Randall that Ditech cancel the foreclosure sale, including submitting a "Notice of Error", Ditech failed to cancel the sale. Finally, after Randall filed suit alleging that Ditech failed to cancel the sale and had overcharged Randall to reinstate the loan. On the day of the scheduled foreclosure sale (39 days after accepting reinstatement), Ditech cancelled the sale and rescinded the Notice of Default.

Despite the cancelation and rescission, Randall continued their lawsuit for violations of, among other laws, the Federal Fair Debt Collection Practices Act ("FDCPA"). Specifically, Randall alleged that Ditech inflated the amount necessary to reinstate the loan and then improperly continued with the foreclosure sale, despite Randall's reinstatement. The trial court sustained Ditech's demurrer to the Complaint, finding that Randall failed to state sufficient facts to constitute a viable claim. Randall appealed.

Continued on page 2

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

Loan Servicer's Failure to Rescind NOD (continued from page 1)

The Court of Appeals reversed, finding that Randall had pled sufficient facts to state a cause of action. After initially determining that Randall had sufficiently plead facts that Ditech was a "debt collector," the Court acknowledged that nonjudicial foreclosure activity, "the purpose of which is to "retake and resell the security, not to collect money from the borrower (*Vien-Phuong Thi Ho v. ReconTrust Company, NA* (9th Cir. 2017) 858 F.3rd 568, 571), such as sending a notice of default or notice of trustee's sale, is *not* actionable under 15 U.S.C. §1692f(1). However, the Court went on to find that, where the loan servicer allegedly *overcharges* the borrower to reinstate the loan and continues to charge default fees and costs for a loan that is not in default, it is attempting to collect money rather than foreclosure activity, which is actionable under §1692f(1). Since Randall alleged that Ditech overcharged him, this was sufficient for the Court to find that Ditech is a "debt collector" within the meaning of the FDCPA.

Further, the Court found that, for purposes of 15 U.S.C. §1692f(6), mortgage loan servicers, as enforcers of security instruments, are "debt collectors" citing *Dowers v. Nationstar Mortgage, LLC* (9th Cir. 2017) 852 F.3d 964, 969. Section 1692f(6) applies to "any business the principal purpose of which is the enforcement of a security interest," and prohibits "taking or threatening to take nonjudicial action to effect dispossession or displacement of property" when the debt collector has no intention of taking possession of the property, or holds "no present right to possession of the property claimed as collateral through an enforceable security instrument." Because Randall alleged that Ditech did not halt its nonjudicial foreclosure activity until well after the loan was reinstated, even after the lawsuit was filed, the Court found that Randall stated an actionable claim under §1692f(6).

Finally, Ditech's alleged conduct was also sufficient to state a violation of the UCL, California *Business & Professions Code* §17200 *et seq.*, which "prohibits, and provides civil remedies for, 'unfair competition' including 'any unlawful, unfair or fraudulent business act or practice." The UCL's unlawful prong borrows the underlying violation of other laws to make an actionable claim under the UCL. Here, the violations of the FDCPA provided the unlawful conduct to state an actionable claim under the UCL.

The Court did not rule that Ditech actually violated any laws. Instead, it merely determined that the alleged conduct was sufficient to withstand demurrer. Nevertheless, the lesson for loan servicers to avoid FDCPA and corresponding UCL violations is to promptly rescind a Notice of Default after receiving reinstatement. While this case did not focus on the trustee, it is conceivable that a borrower will next allege that the trustee, knowing about the reinstatement, was no longer "enforcing the security" and, as a result, by failing to rescind the Notice of Default violated the FDCPA.

Joan C. Spaeder-Younkin, Esq.
jyounkin@wrightlegal.net

Joan Spaeder-Younkin is a Senior Associate in WFZ's California office.

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.

How to Unsubscribe: *To unsubscribe from* ***THE WFZ QUARTERLY****, please send an email to wfznews@wrightlegal.net with the word "unsubscribe" in the Subject line.*

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

CALIFORNIA COURT OF APPEALS LETS RECEIVERS LOAN JUMP IN FRONT OF LENDER'S PREVIOUSLY FIRST LIEN

by Ruby J. Chavez, Esq. and Jonathan D. Fink, Partner: Wright, Finlay & Zak, LLP

One of the earliest lessons we learn about the taking of real property security for a loan is the rule of "First in time is first in right." In other words, absent an agreement to the contrary by the senior secured party, an earlier recorded lien will have priority over a later recorded one. Indeed, many loans would not be made at all unless the lender was assured of being in first position on the real property security.

A recent decision by a Court of Appeal in California recognizes another exception to the rule—one that does *not* require the senior lender's acquiescence and, in fact, one that can be imposed even over the senior lender's objections.

In the case of *City of Sierra Madre v. Hildreth,* the borrowers, owners of residential real property in the City of Sierra Madre ("the City") had engaged in years of unpermitted work on their real property, apparently with the notion of building a tasting room and wine cellar. Their various projects generated several warnings and orders from the City to stop the work, all of which the borrowers ignored. It was only when their projects led to the encroachment on adjoining property and a serious subsidence of the land that the City got around to filing an action against the homeowners and asked the court to approve the appointment of a receiver as the borrowers refused to comply with the City's orders and were continuing to perform unpermitted work.

The lawsuit also named the beneficiary of the senior deed of trust securing a loan on the property, who was unaware of, and had not approved, the unpermitted work by the borrowers. The beneficiary did not oppose the City's application for a receiver and the trial court approved the appointment, finding that unpermitted construction at the property caused a public nuisance under the City's municipal code as well as under the California Health & Safety Code. The receiver determined that significant remediation was required to undo the damage caused by the borrowers' unpermitted work and obtained estimates of what the remediation would cost. To fund the remediation, the receiver then proposed borrowing $250,000.00 from an institutional lender and securing the loan with *a first priority* receiver's certificate. Despite the beneficiary's objection to the undermining of its senior lien position, the court authorized the first priority receiver's certificate. The court provided the beneficiary with the option of funding the work itself; however, the beneficiary declined to do so. The beneficiary appealed the order granting the super-priority lien.

Among the primary arguments raised by the beneficiary on appeal was that there was no California statute that expressly authorizes a super-priority lien in favor of a court appointed receiver, let alone for a lender from whom the receiver has obtained a loan for the benefit of the receivership property. The beneficiary pointed out that the Court of Appeal for the Fourth District of California in *City of Chula Vista v. Gutierrez*, 207 Cal. App. 4th 681 had already rejected the claim that *Health & Safety Code* §17980.7 provided for such a lien, and noted that if the legislature intended to provide a priority lien it would have done so. Nonetheless, on February 26, 2019, the Court of Appeal for the Second Appellate District of California ruled that, under *Code of Civil Procedure* §§ 564 and 568, as well as case law going back to 1915, a court has broad authority to approve super-priority liens in aid of a receivership in an appropriate case.

Continued on page 4

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

Receivers (continued from page 3)

Although the Court of Appeal noted that the granting of super-priority liens should be infrequent and may bring about harsh consequences, it did not find that the trial court abused its discretion in awarding a super-priority lien in this case. The Court of Appeal considered that the homeowners refused to abate the nuisance on the property, the beneficiary chose to take no action, neither the homeowner nor the beneficiary chose to fund the remediation, and no lender would loan money to the receiver for the remediation unless it was secured by a super-priority lien on the property. In the end, the Court of Appeal found that courts have the discretion to determine the priority of receivership certificates, citing a 1915 case entitled *Title Ins. & Trust Co. v. California Development Co.* (1915) 171 Cal. 227, 233 where the California Supreme Court affirmed a decision giving receiver's certificate priority over the other indebtedness on the property. The Court of Appeal distinguished the *Chula Vista* case on its facts, which involved an attempt by the receiver to recover its attorney fees from the senior lender (rather than the value of the property since the receiver had neglected to record its court-approved lien) years after that lender had already foreclosed on the property and sold it to a third party.

In considering the equitable arguments that the beneficiary did not contribute to the nuisance and that the once performing loan would be stripped to nothing or next to nothing, due to a receivership it did not request, the Court of Appeal simply pointed to the fact that the property had minimal value or perhaps even negative value absent the remediation. It was not in dispute that the minimal value was caused by the homeowner's actions and arguably by the City's inaction. Even though the beneficiary was not the cause—or even aware of the unpermitted construction, the Court of Appeal concluded by stating that it is untenable for the beneficiary to bear none of the costs of the remediation and yet receive a windfall once the receiver had paid to have the work done. The Court of Appeal glossed over the beneficiary's arguments that it was inequitable for the parties that contributed to the years of unpermitted construction, the homeowners and/or the City, to not be made to bear the cost and risk of the remediation instead of doing so by displacing and drastically reducing the senior beneficiary's equity position in the property. It should be noted that the receiver has also indicated his intent to seek to recover his fees and costs from the proceeds he holds from the sale of the property, leaving the beneficiary with no recovery from the sale of the property. However, the beneficiary's position is that the Judgment entered in the trial court limits him to seeking repayment of his fees and expenses from the borrowers.

The risk going forward is that other cities will emulate the City of Sierra Madre by going into court to seek authority to have a receiver appointed to remedy code violations or nuisances by using the beneficiary's equity as the guarantor of payment. Receivers will have little to no incentive not to spend whatever monies they deem fit to remediate these properties, up to and above the entire value of the property as long as a court approves. It is inevitable that the receiver will also seek to invoke the super-priority lien for recovery of his or her own fees. For their part, courts generally will continue to defer to the receiver, who is supposed to be a neutral party.

A senior lienholder facing a code violation riddled property has several good options though. At minimum, it (or its loan servicer) needs to remain vigilant in order to detect and, if possible, prevent borrowers who are committing waste on the security, whether by engaging in unpermitted work or otherwise. This is especially true where the senior lienholder learns of any code violations by, or nuisance claims against, the borrowers before a lawsuit is filed by the governmental entity and before a receiver is ever sought, let alone appointed. Once it learns of such violations or claims, the senior lienholder needs to be proactive in working with the borrowers and, where involved, the appropriate governmental entities to attempt to address and resolve the issues. ***This is true even if the borrower is still residing in the property and the lender has not yet completed its' foreclosure. Too many servicers have gotten themselves in trouble taking a "hands off" to approach to pre-foreclosure code violations***.

Continued on page 5

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

Receivers (continued from page 4)

The senior lienholder should also weigh carefully the costs of funding any cure against the existing *and potential* equity in the security to evaluate whether it is cost-effective to do so with the realization that, if it does not do so itself, a super-priority lien might deprive it of any recovery from the security. If the senior lienholder will not be funding the cure itself, it needs to be more diligent in the litigation and, if grounds exist, seek to oppose the receiver from the start rather than seeking to limit the receiver's authority after he or she has already been appointed. If the senior lienholder loses its priority as a result, and there is insufficient equity left to repay the loan, there might still be remedies it can pursue against the borrowers, *e.g.* for fraud or waste but that only helps if the borrowers have other assets with sufficient equity. While foreclosure by the senior lienholder before a lawsuit by the governmental entity can be filed and/or a receiver can be appointed, might seem tempting in these scenarios, the foreclosure process is not always so nimble or quick and, more importantly, once the senior lienholder forecloses, it becomes the one directly on the hook for the remediation and the costs of any receivership.

While there are no guarantees of success here, a failure to be proactive and/or to vigorously oppose where grounds exist greatly increases the risk of loss of the senior lien position. Absent diligence and a strong stand, the senior lienholder might well find itself with a deed of trust that has now merely become only suitable for framing.

If you have any questions about the *City of Sierra Madre* decision, its impact on your servicing practices or a particular loan involving code violations, please feel free to contact Ruby Chavez at rchavez@wrightlegal.net or Robert Finlay at rfinlay@wrightlegal.net.

Ruby J. Chavez, Esq.
rchavez@wrightlegal.net

Jonathan D. Fink, Esq.
jfink@wrightlegal.net

Jonathan Fink is a Partner in WFZ's California Office.

UPCOMING INDUSTRY EVENTS

Date	Organization	Event	Location
July 15-17	CMBA	47th Annual Western Secondary Market Conference	San Francisco, CA
July 21-24	ALFN	17th Annual Leadership Conference	Incline Village, NV
July 25-26	CMA	2019 Summer Seminar	San Diego, CA
July 31 – Aug. 1	REOMAC	Annual Education Summit and Expo	Aurora, CO
August 11-13	CMBA	Mortgage Innovators Conference	San Diego, CA
August 21-23	ATA	32nd Annual ATA Convention	Maricopa, AZ
August 25-28	WBA	2019 Education Summit & Regulatory Compliance Conference	Huntington Beach, CA
September 4-6	CMBA	22nd Annual Western States CREF Conference	Las Vegas, NV
September 15-17	MBA	Risk Management, QA & Fraud Prevention Forum	Chicago, IL
September 22-24	MBA	Regulatory Compliance Conference	Washington, DC
September 23-25	Five Star	Five Star Conference and Expo	Dallas, TX
October 6-9	WBA	2019 Lenders & Chief Credit Officers Conference	Dana Point, CA
October 24-25	CMA	2019 Fall Seminar	Las Vegas, NV

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

IF YOU CHARGE DEFAULT INTEREST, YOU'LL WANT TO READ THIS!

by Taylor E. Hubbard, Esq. and T. Robert Finlay, Esq.

Default interest is intended to compensate a lender for the additional cost and delay resulting from a borrower's default on the loan. Default Interest Rate provisions come in all sizes and are found in many different types mortgage loans. While these provisions are not prohibited, courts often view them with a suspicious eye. As discussed in this article, Bankruptcy courts in particular, do not like Default Interest Rate provisions. Fortunately, this one has a happy ending.

On March 6, 2019, in *East West Bank v. Altadena Lincoln Crossing, LLC* (C.D. Cal., Mar. 6, 2019, No. 2:17-BK-14276-BB) 2019 WL 1057044, the United States District Court for the Central District of California reversed the Bankruptcy Court, holding that California's liquidated damages statute does not apply to, or invalidate, a lender's Default Interest Rate ("DIR") provision. The Court then upheld the DIR provision, finding that there was a reasonable relationship between the default interest charged and the anticipated damages to the lender caused by the default. While this is a very positive result for California lenders, the decision is on further appeal. So stay tuned!

By way of background, in 2005, Altadena Lincoln Crossing, LLC ("Altadena") obtained a loan from East West Bank ("EWB") to finance a construction project, repayment of which was secured by a deed of trust on the property. The heavily negotiated loan agreement contained an industry standard generic provision increasing the annual interest rate by 5% in the event of Altadena's default. While the loan agreement was heavily negotiated, the DIR provision was not discussed. Ultimately, Altadena failed to repay the loan upon maturity in 2009, triggering the DIR provision. After eight years and thirteen forbearance agreements, EWB commenced foreclosure proceedings, resulting in Altadena filing for Bankruptcy.

In its objections to EWB's proof of claim for its loan, Altadena argued that the DIR provision constituted an unreasonable and unenforceable penalty under California's liquidated damages statute found in California *Civil Code* § 1671(b). *Civil Code* § 1671(b) provides that "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was ***unreasonable*** under the circumstances existing ***at the time*** the contract was made."

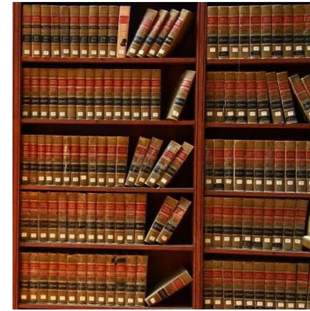
The Bankruptcy Court ruled that the DIR provision was unreasonable and, as a result, was an unenforceable penalty under § 1671(b). The Bankruptcy Court noted that a liquidated damages clause is considered unreasonable if the clause bears no reasonable relationship to the actual damages which the parties could have anticipated would result from a breach at the time the contract was made. Additionally, the amount of liquidated damages must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. Here, because EWB used an industry standard and generic DIR provision and did not even discuss the provision during negotiations, the Bankruptcy court concluded that the DIR provision was not included in the loan agreement pursuant to "reasonable endeavor" by the parties to estimate the actual damages EWB would suffer as a result of Altadena's default.

Continued on page 7

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

If You Charge Default Interest (continued from page 6)

EWB wisely chose to bypass the Bankruptcy Appellate Panel ("BAP") and, instead, appealed the decision to the Federal Court's Central District. On appeal, the Central District Court overturned the prior decision, holding that not only is § 1671(b) inapplicable, even if it was, its application would not invalidate EWB's DIR provision.



Relying on California Supreme Court precedent dating back to the 1894 case entitled *Thompson v. Gorner* (1894) 104 Cal. 168, which held that a lender was entitled to charge the higher post-default interest rate that the parties had agreed upon at the time of the origination of the loan, the Court agreed with EWB's position that a prospective increase in interest rate of a fully matured loan upon default is not subject to a § 1671(b) analysis. Additionally, the Court refused to view the DIR provision as a penalty and instead likened the provision to an additional contract or agreement for an alternative performance (pay a higher interest rate upon default) in the event that the original anticipated performance (repay the full loan amount upon maturity) does not occur. Specifically, the Court stated:

> This case is similar to *Thompson* in all material respects. In each case, at issue was a loan where the borrower had paid the interest due monthly, but when the loan matured and the principal was due, the borrower did not satisfy the full obligation under the note. In both cases, pursuant to the loan agreement, the interest rate increased upon the failure to pay the principal amount when due. These are the material facts upon which the California Supreme Court found no unenforceable penalty and instead found that the agreement provided for an alternative performance that was not subject to the § 1671(b) analysis.

Moreover, the Court found that "[i]n *Thompson*, higher interest was assessed ... only on the amounts in default," and therefore, because Altadena, like the borrower in *Thompson*, defaulted on a fully matured obligation, the higher interest rate was assessed only on the defaulted amount, making the present case indistinguishable from *Thompson*. As such, the Court concluded that § 1671(b) was not applicable to the default interest rate provision at issue in on appeal.

Notwithstanding the fact that § 1671(b) was found to be inapplicable, the Court also took issue with the Bankruptcy Court's legal conclusions with respect to its application of § 1671(b) to the DIR provision in question. Notably, the Court pointed out that the Bankruptcy Court misinterpreted the "reasonable endeavor" language as a requirement that the DIR provision actually be subject to negotiation by the parties prior to contract formation. This misinterpretation ultimately led to Bankruptcy Court's improper conclusion that the industry standard and generic DIR provision was unenforceable because the parties never engaged in any negation regarding its inclusion in the loan agreement. The Court expressly held that:

> There is no requirement that the parties negotiate a liquidated damages provision for it to be enforceable; instead, the "reasonable endeavor" requirement means only that a liquidated damages provision must be reasonable in light of the potential harm that could result from a breach, as that harm could be anticipated at the time of contract formation.

After finding that § 1671(b) did not apply, the Court focused its analysis on whether Altadena met its burden of establishing that the 5% DIR increase was not, at the time of contract formation, a reasonable estimate of the potential harm to EWB if Altadena defaulted.

Continued on page 8

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

If You Charge Default Interest (continued from page 7)

In concluding that Altadena failed to meet its burden, the court looked to the expert testimony provided by the parties. The Court was ultimately convinced by EWB's uncontradicted expert testimony that detailed how a borrower's default reduces the value of the lending bank's asset (i.e., the "loan") in a measurable economic way. The expert testimony led the Court to conclude that the diminution in value of the loan as an asset held by EWB was within the range of actual damages that the parties could have anticipated would flow from a breach and that such increase in the interest rate upon default is a common method of recouping the type of loss incurred by a lender upon a borrower's default.

The Bankruptcy Court's Order may have initially felt like a blow to lenders throughout California, however, thanks to the Court's opinion on appeal, those feelings were short lived. However, before running out to include DIR provisions in every loan, please keep in mind that (1) the DIR must be a "reasonable estimate" of the potential harm to the lender caused by the default; and (2) Altadena has appealed the decision to the 9th Circuit Court of Appeals. Stay tuned for more once the 9th Circuit rules.

Taylor E. Hubbard, Esq.
thubbard@wrightlegal.net

Taylor Hubbard is an Associate in WFZ's California office.

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.

WFZ PROFILE:
JONATHAN D. FINK, ESQ.
PARTNER

Jonathan D. Fink, Esq.
jfink@wrightlegal.net

Jonathan D. Fink is a partner at Wright, Finlay & Zak and has been with the firm for over 10 years. He has practiced in the fields of bank & finance, commercial, and real estate litigation since 1985, representing a diverse variety of financial institutions and other businesses both in State and Federal Court (including the Bankruptcy Courts), as well as in alternative dispute resolution proceedings. For several years, he served as a Temporary Judge for the Los Angeles County Superior Court system.

Mr. Fink has extensive appellate experience in both State and Federal Courts, having handled in excess of 150 appeals. He has been responsible for numerous amicus briefs on appeals protecting the interests of non-party clients. Mr. Fink has passed the appellate practice test and is awaiting formal certification as an appellate specialist. He currently oversees most of the Firm's appellate cases.

Mr. Fink has written and lectured extensively on various practice areas. He is also the editor of the *WFZ Quarterly Newsletter*.

Mr. Fink is a member of the California State Bar and has been admitted to all State and Federal courts in California as well as the Bar of the United States Supreme Court. He has been a member of the Los Angeles County Bar Association's Federal Courts Committee and its Provisional Remedies Committee, and the California State Bar Federal Courts Committee and its Consumer Financial Services Committee. Mr. Fink is a member of the William P. Gray Legion Lex Inn of Court.

When not practicing law, Mr. Fink is an avid traveler, having explored all seven continents and various islands in between. He is also a walking restaurant guide and a lover of art, history, literature, and music.

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

CALIFORNIA COURT OF APPEALS EXPANDS A BORROWERS' RIGHT TO ATTORNEYS' FEES UNDER HOBR

HARDIE V. NATIONSTAR

By T. Robert Finlay, Esq. of Wright, Finlay & Zak, LLP

Although it has been effective since January 1, 2013, California's Homeowner's Bill of Rights (HOBR) is still working its way through the trial and appellate courts, with parties searching for clarification on many of its unclear provisions. One issue ripe for interpretation is under what circumstance is the borrower the prevailing party and entitled to attorneys' fees. *Civil Code* Sections 2924.12(i) and 2924.19(h)[1] give the court the discretion to award reasonable attorney fees and costs to the "prevailing borrower," who is defined as a borrower that "obtained injunctive relief or was awarded damages." There is no question that borrowers who prevail on their HOBR claims at trial are entitled to their fees. Likewise, under the Court of Appeals' 2015 decision in *Monterossa v Superior Court*[2], it is equally as clear that borrowers obtaining a preliminary injunction under HOBR are entitled to their fees in bringing the injunction even if the borrower does not ultimately prevail on the merits of their lawsuit. But, 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 it was not within the scope of the term "injunctive relief." Unfortunately, the Court of Appeals recently published decision in *Hardie v Nationstar*[3] determined that borrowers prevailing on a TRO hearing are eligible for attorneys' fees and costs under HOBR because a TRO should be considered a form of injunctive relief. This decision 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 preliminary injunction. *Chico Feminist Women's Health Center v. Scully*, (1989) 208 Cal.App.3d 230, 237, fn. 1. However, it is distinguishable 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. Civ. Proc. Code (CCP) § 527;

3. A bond is not essential for a TRO unlike a preliminary injunction which is not effective until the undertaking is filed. *CCP* § 529;

4. The TRO is transitory in nature and terminates automatically when a preliminary injunction is issued or denied. *Landmark Holding Group v. Superior Court*, (1987) 193 Cal.App.3d 525, 529. When issued without notice, the TRO is only supposed to last for 15 days, though, for good cause, the Court can set the expiration for up to 22 days from the date of issuance. CCP § 527(d).

Continued on page 10

[1] *Civil Code* Section 2924.12(i) applies to servicer's who conduct more than 175 qualifying foreclosures a year. Section 2924.19(h) applies to those under 175 annual qualifying foreclosures.

[2] *Monterossa v Superior Court*, (2015) 237 Cal.App.4th 747.

[3] *Hardie v. Nationstar Mortgage LLC*, 2019 WL 947085 (5th Dist., Feb. 27, 2019)

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

Borrower's Right to Attorneys' Fees Under HOBR (continued from page 9)

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 am the day before an 8:30 am TRO hearing and, as noted, in emergency situations, no notice might need to be given at all. With less than 24 hours' notice required, most telephonic, email or fax TRO notices do not make it to the right internal personnel to hire counsel in time 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, many judges "rubber stamp" TROs to stop foreclosure sales, believing that a short continuance until the Preliminary Injunction hearing, will not cause the servicer significant harm.

How can servicers avoid being subjected to attorneys' fees and costs under the *Hardie* Rule?

The *Hardie* decision highlights 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 they can hire counsel. 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, etc.; (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 which case counsel may recommend postponing the foreclosure sale. Postponing the sale will allow counsel to 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, etc. A TRO based on non-HOBR claims does not trigger the borrower's immediately right to attorneys' fees. With that in mind, if the court is inclined to grant the TRO, counsel should ask the court to clarify that the TRO is based on the non-HOBR claims. Judges often blindly 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 on the HOBR claims to avoid triggering Borrower's right 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.

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."

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 should still deny the borrowers request for attorneys' fees.

Continued on page 11

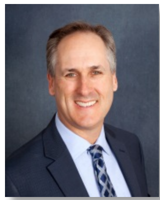
The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.

Borrower's Right to Attorneys' Fees Under HOBR (continued from page 10)

Despite this "saving" clause, the *Hardie* decision increases the likelihood that borrowers will seek TROs and, if they prevail, move for fees. Again, the best recourse 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 should always push the court to condition the TRO or Preliminary Injunction on the posting of a bond. That way, if the borrower fails to timely post the bond, counsel can argue that the injunction never took effect and, therefore, the borrower is not the prevailing party under Section 2924.12(i) or 2924.19(h). Another option, if subsequent facts are developed to show that the TRO was improperly granted (*e.g.* based on misrepresentations by the borrower that the short time frame for response did not allow the servicer or investor to present at the hearing, or where the TRO was issued without notice of the hearing), is to move to dissolve the TRO or Preliminary Injunction. If all that fails, counsel can still argue that the court should exercise its "discretion" to deny all or a part of the borrower's fee request.

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 notice. That is the first line of defense in seeking to avoid the risk of attorneys' fees and costs under HOBR.

If you have any questions regarding this article, a particular case or California's Homeowner's Bill of Rights (HOBR), please feel free to contact Robert Finlay @ rfinlay@wrightlegal.net.



T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.

WFZ FIRM NEWS

BRIAN J. WAGNER HELPS EXPAND THE FIRM'S NEW MEXICO PRACTICE!

We are pleased to announce that Brian J. Wagner, Partner, has been admitted to practice in the State of New Mexico! Mr. Wagner's practice focuses on the representation of lenders, banks, loan servicers and credit unions in litigation and transactional matters. His experience ranges from advising companies on the front end of transactions and when necessary, through a jury trial or appeal. He is also licensed to practice in California and Texas. Mr. Wagner joins Natalie C. Lehman in representing our clients in the Land of Enchantment!

© 2019 Wright, Finlay & Zak, LLP
THE WFZ QUARTERLY is published quarterly and distributed via email. The views expressed in this newsletter should not be relied upon as legal advice. Please consult your own counsel before relying on any information provided in this newsletter. If you have any questions, comments or suggestions for future articles, please send an email to wfznews@wrightlegal.net.

The information contained in this Newsletter is for informational purposes only and is not intended as legal advice. Before taking any action on issues addressed in this Newsletter, please contact WFZ directly.