

# You Can Claim Legal Fees, Correct?

What You Want Isn't Necessarily What You Will Get

BY BRUCE J., BERGMAN © Bruce J. Bergman, 1994

was a very large sum or a more mod-

f New York is any example, there is a burgeoning problem regarding a lender's ability to recoup legal fees in the foreclosure case - and it is well worthy of remedial action.



Bruce J. Bergman

The underlying issue is the meaning of the widely employed standard paragraph 7 in the Fannie Mae/Freddie Mac Uniform Instrument [Lender's Right To Protect Its Rights In The Property; Mortgage Insurance]. The clause is glaringly less than ideal and some courts are arriving increasingly at that conclusion.

While this may seem to be a discussion of some technical nicety, it is indeed practical and translates into meaningful numbers.

A brief overview of general legal fee concepts will serve to help readers appreciate the importance of this discussion. Recognize that the impact is greater in judicial foreclosure states and of more significance where legal fee precepts are not controlled by statutes.

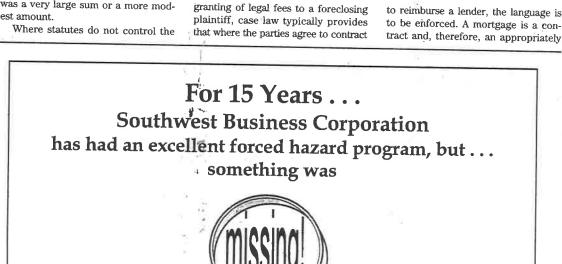
Although, of course, there are nuances and complications, the subject most often is really rather simple.

Getting what you pay for

If a lender or servicer can recapture legal fees through the mortgage, foreclosure case, then to some extent - or completely - it is reimbursed and It need not pay counsel for the foreclosure.

Stated alternatively, the lender gets back what it has already paid its attorneys, or what it will be called upon to remit at the conclusion of the case. Howsoever it is phrased, it is cerainly pleasing for a lender or servicer not to incur legal expense in a foreclosure action, whether or not this

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worded clause in the mortgage (it may be insufficient if it appears only in the note) will generally be the basis of an award of legal fees.

In many judicial foreclosure states, that award comes at the stage when the judgment of foreclosure and sale is sought.

#### Staking your claim

Even if it can be approached at some other plateau in the foreclosure case, counsel applying for fees must demonstrate to the court that the predicate of the appropriate language appears in the mortgage.

Usually there then must be a presentation of the amount of time expended for services, the reasonableness of the time, as well as the reasonableness of the charges for that time invested.

The court is then empowered to include in the judgment of foreclosure and sale an assessment of the value



meruit basis, that is, what the legal effort was worth.

Although sometimes that amount is less then counsel has sought, and less then servicer and counsel believe it is worth, it can also be precisely what has been requested. Whatever the sum is, the potential that this will be welcome to servicer and counsel is certainly there.

#### Changes in judgment

To be sure, the value of insertion of legal fees in the judgment varies over time.

Prior to 1987, when there tended to be more generous equity in real estate, selling the property at the foreclosure sale for the full upset price occurred more often than not. Since the upset price typically contained the legal fees (as awarded in the judgment), it meant automatically that the lender was reimbursed for that expense.

With the downturn in the real estate market, however, foreclosure sale purchasers became less frequent and when they did bid, it was often at a reduced price. In those latter instances, inclusion of a legal fee amount in the judgment lost meaning because there was nobody to pay the amount computed.

Of course, this has been changing and will change still more as the market recovers. Thus, legal fees will onceagain become increasingly important.

The worst problem the lender or servicer should encounter, then, is a judge who is less generous than lenders or servicers would prefer in evaluating the worth of the legal services. But that is not the only predicament.

#### Interpreting 'paragraph 7'

Recalling that there must be a clause in the mortgage sufficient to support the award, turn to the omnipresent standard paragraph 7 in the Fannie Mae/Freddie Mac form which, as far as is relevant here, reads as follows:

"If I do not keep my promises and agreements made in this Security Instrument, or someone, including me, begins a legal proceeding that may significantly affect Lender's rights in the Property (such as a legal proceeding in bankruptcy, in probate, for condemnation or to enforce laws or regulations), Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Lender must give notice before Lender may take any of these actions. Although Lender may take action under this paragraph 7, Lender does not have to do so."

If the noted language is broken down into its elements, it can be argued that it says and means that if the borrower fails to keep any agreement (such as the obligation to pay), then the lender can do whatever is necessary to protect its rights in the property, including expending legal

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he court (is) empowered to include in the judgment of foreclosure and sale an assessment of the value of the legal work (based on) what it was worth.

fees in a foreclosure. That is the view lenders and servicers would espouse.

#### An opposing view

A coherent argument can also be made, even if we disagree with it, that all this language does not apply specifically to a mortgage foreclosure brought by the lender. This counter position is further buttressed by other clauses in the mortgage which *do* specifically refer to mortgage foreclosure, and yet do not in those areas talk about recompense for legal fees.

Judges have taken this precise position before and continue on occasion to do so. They are saying that the clause at issue refers to actions

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Authorized Value Added Remarketer other than the lender's own foreclosure. Whether this is genuinely a trend, how widely its mischief will spread may be op¢n<sup>\*</sup>to conjecture. Whatever its extent, it does no good deed for lenders and Servicers.

#### Adding a clause

Rhetorically it could be asked, how difficult is it to prepare a simple clause providing that in the event a lender or servicer begins a mortgage foreclosure action it is entitled to be repaid reasonable legal fees expended in prosecuting the action?

The ready answer is "not very difficult." Why the language in the Fannie Mae/Freddie Mac form is so obscure, unclear or ambiguous is most perplexing indeed. If the intention was for lenders to recover legal expense (which we think, by the way, it was), then the draftsmanship should have been much better. It certainly *could* have been.

Assuming Fannie Mae/Freddie Mac don't become independently excited by this article, in the end this problem is solved with a simple clause inserted in a rider appended to the mortgage.

Lenders or servicers who may originate mortgages should consider attending to this as soon as possible. It will consume but à moment's time. This may not be br critical importance this very day, but it will become more meaningful in the months and years to come.

It is certainly worth thinking about.



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