MILLER STARR REGALIA

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Not So Fast, Counselor: When Attorney's Fees May Be Recovered In Connection With A Real Property Secured Debt

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Two decisions reported elsewhere in this issue examine the same narrow aspect of attorney's fees recovery in wrongful foreclosure cases arising out of the standard form of deed of trust customarily used in residential mortgage transactions in California. In *Hart v. Clear Recon Corp*., the court of appeal reversed an award of attorney's fees to the lender as the "prevailing party" against the borrower-related parties asserting wrongful foreclosure; in that case, the court of appeal refused to find that Paragraph 9 of the uniform deed of trust, which authorizes the lender to recover costs of preserving security and protecting the lender's rights in the property, was an "attorney's fees provision" within the meaning of the California reciprocal attorney's fees statute, Civ. Code, § 1717, and held it could not be used by the lender as a basis for recovering attorney's fees against parties who had not signed the note or the deed of trust. In *Chacker v. JPMorgan Chase Bank, N.A.*, the court of appeal also reversed an award of attorney's fees to the lender under Paragraph 9 of the uniform instrument, holding that while Paragraph 9 would authorize the lender to recover attorney's fees incurred to *defend* against the borrower's action to enjoin a non-judicial foreclosure, it did not support a separate award of attorney's fees recoverable against the plaintiff borrower under Civ. Code, § 1717, but only allowed the lender's attorney's fees to be added to the borrower's promissory obligation, i.e., as an additional amount secured by the deed of trust.

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