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The Massachusetts Consumer Protection Act: The Importance Of A Proper Response For A Residential Lender Or Mortgage Servicer Responding To A Borrower’s ‘Chapter 93’ Demand Letter

The Massachusetts Consumer Protection Act (Gen. Law Ch. 93A) affords consumers – including residential borrowers – a private right of action to seek injunctive relief and damages caused by unfair or deceptive acts and practices. A lender or servicer liable under Chapter 93A is exposed to (i) actual damages caused by the unfair or deceptive act or practice, (ii) *mandatory* double or treble damages if a court finds the act or practice was knowing or willful, and (iii) *mandatory* recovery of attorneys’ fees and costs regardless of the amount of damages actually caused (even if the act or practice was not knowing or willful). Most times, a residential borrower must send a 30-day demand letter to the lender/servicer before filing a lawsuit that contains a Chapter 93A claim.¹ The demand letter must identify the claimant and reasonably describe the unfair or deceptive act or practice and the injury suffered, as well as demand relief. A recipient of a demand letter has the opportunity to respond within 30 *calendar* days of the mailing or delivery of the letter. The demand letter, and the 30-day response period, is a jurisdictional prerequisite to filing suit in most cases involving residential borrowers and other consumers. The goal of this demand-response process is to educate the parties and foster a reasoned settlement if at all possible.

¹ The demand letter requirement does not apply to borrowers asserting a Chapter 93A violation in a counterclaim (e.g., in response to an eviction action) or crossclaim or if a prospective respondent does not maintain a place of business or keep assets within Massachusetts. Nonetheless, respondent lender/servicer may make a written offer of relief and pay the rejected tender into court as soon as practicable after receiving notice of an action commenced under Chapter 93A. The demand letter/response process applies to consumer-to-business claims (Section 9); it does not apply to business-to-business claims (Section 11) or claims brought by the Massachusetts Attorney General (Section 4).

Importance of Conducting a Thorough Investigation and Responding Properly to a Chapter 93A Demand Letter

A lender/servicer receiving a Chapter 93A demand letter has an affirmative duty to investigate the facts and consider legal precedent to determine whether or not to make a written tender of settlement in response to the demand letter. A thorough investigation and reasoned response cannot be overstated. That is because, beyond potentially being the impetus for a pre-litigation settlement, Chapter 93A ties (i) an *improper* response to additional liability and (ii) a *proper* response to potentially significant limitations of liability.

- > *Additional Liability.* The failure to provide a written tender of settlement in response to a Chapter 93A letter can itself expose a lender/servicer to double or treble damages (even if the act or practice was not knowing or willful, which is the standard for imposing such multiple damages). This will occur if the refusal to grant relief was made in bad faith with knowledge or reason to know that the act or practice complained ran afoul of Chapter 93A. The failure to conduct a thorough investigation and/or respond to a demand letter may be viewed as circumstantial evidence of bad faith.
- > *Limiting Liability.* If a lender/servicer does provide a written tender of settlement in response to a Chapter 93A letter, and a sender rejects it, a court – *if it later finds the tender reasonable in relation to the injury actually suffered* – must limit the borrower’s recovery to the relief tendered in the response, as well as preclude the borrower from recovering any attorneys’ fees and costs incurred *after* rejecting the tender. Most times, this would prevent a borrower from recovering attorneys’ fees and costs from the filing of the complaint through trial, which can be significant. This limitation holds true even if (i) the borrower prevails at trial or on summary judgment and (ii) the borrower proves that the recipient engaged in knowing and willful unfair or deceptive acts or practices. Also, offering a reasonable tender (that is rejected) may take away the leverage the borrower’s counsel inherently has under Chapter 93A’s mandatory recovery of attorneys’ fees and costs provision. A lender/servicer conducting a thorough investigation is in a better position to make an offer a court will deem reasonable in relation to the injury suffered.
- > To perfect the argument to limit liability and attorneys’ fees based on a reasonable written tender that was rejected, a lender/servicer must formally file the written tender with an affidavit concerning its rejection with the court. This filing requirement prevents the response letter from being deemed a settlement communication protected from discovery. As such, the response should be written carefully as it may be used as an admission, for cross-examination, etc.

Procedure when a Demand Letter is Received

Generally, a lender/servicer receiving a demand letter should consult with their counsel to take the following steps:

- > Implement a “legal hold” as a demand letter most likely triggers an affirmative duty to prevent spoliation of evidence.
- > Thoroughly investigate the facts and law underlying the claims in the demand letter and respond in writing within the 30-day period.
 - > If additional time is needed, a lender/servicer should obtain the borrower’s assent to an extension of time to respond and document that agreement in writing. Unilaterally sending a standard delay letter most likely will not suffice.
 - > If the demand letter is not clear or if additional information is required from the borrower to analyze the claims, a lender/servicer should request clarity and/or additional information. This, of course, may be coupled with an agreed-to extension of time to respond. According to Massachusetts case law, a borrower has an affirmative duty to cooperate with a lender’s or

servicer's investigation and analysis of the claims. Many times, sending a *preliminary* response letter reminding the borrower of that duty and asking for additional time, information, or documents necessary to conduct a proper analysis may be necessary. This would be followed by a *final* response letter that may contain a written tender of settlement.

- > If, after its analysis is complete, a lender/servicer decides not to provide a tender, a response letter should explain in detail why no tender is being offered (to rebut claims of bad faith and perhaps show the sender that the claims in the letter are not as worthy as once thought).
- > If a written tender of settlement is provided but rejected by a sender and a lawsuit is filed, be sure to formally file the written tender with an affidavit concerning its rejection with the court.

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