

Just When You Thought It Was Safe to Lend Again: Mortgage Late Fee Class Actions**John T. Brooks***Partner*

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Last week, five class actions were filed in California against various mortgage lenders and loan servicers. Added to the recent spate of ATM overdraft fee class actions, 2010 is adding up to a dangerous year for the financial services industry.

The latest wave of class actions target allegedly improper late fees on mortgage payments. Citing Civil Code section 2954.4(b), the plaintiffs allege that the defendant lenders and mortgage loan servicers illegally applied late payments to the oldest overdue payment, rather than to the currently due installment. Civ. Code 2954.4(b), which applies to mortgages on single-family, owner-occupied dwellings, provides:

“A late charge may not be imposed on any installment which is paid or tendered in full on or before its due date, or within 10 days thereafter, even though an earlier installment or installments, or any late charge thereon, may not have been paid in full when due. For the purposes of determining whether late charges may be imposed, any payment tendered by the borrower shall be applied by the lender to the most recent installment due.”

The alleged result of the challenged practice is that the borrower ends up being assessed a late fee for the currently due installment, while there would be no late fee if the payment were credited to the current payment. In a worst case scenario, the complaints allege that a borrower can end up being assessed multiple late fees after having fallen behind on loan payments because each new payment is credited to an overdue installment rather than the current installment, begetting a series of late fees.

If plaintiffs are successful in pursuing this theory of liability, the damages exposure for lenders and mortgage servicers could be substantial. Every mortgage lender and loan servicer should examine its late fee practices to ensure that late fees are disclosed clearly and enforced consistent with the loan agreement and all applicable laws.