Homeowner Bill of Rights

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CALIFORNIA HOMEOWNER BILL OF RIGHTS
COLLABORATIVE
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Homeowner Bill of Rights Collaborative

• Partnership of four housing advocacy organizations, led by the [National Housing Law Project](http://www.nationalhousinglaw.org) (NHLP), and includes [Western Center on Law & Poverty](http://www.westcen.org), [National Consumer Law Center](http://www.consumerlaw.org), and [Tenants Together](http://www.tenants.org).

• Funded by the [Office of the California Attorney General](http://www.oag.ca.gov) under the [National Mortgage Settlement](http://www.federalmortgagesettlement.com).

• We offer free training, technical assistance, litigation support, and legal resources to California’s consumer attorneys and the judiciary on all aspects of the new California Homeowner Bill of Rights, including its new tenant protections.

• Visit our web site at [www.calhbor.org](http://www.calhbor.org)
What is the Homeowner Bill of Rights

- A series of bills enacted in 2012 to protect homeowners and tenants in connection with foreclosures
- Homeowner bills: AB 278 and SB 900
- Tenant bill: AB 2610
- Effective January 1, 2013
Summary of Homeowner Provisions

- Requires servicers to provide notice to borrowers and servicemembers of their right to foreclose.
- Restricts the practice known as “dual tracking.”
- Mandates the lender provide a single point of contact to the borrower.
- Adopts civil penalties of up to $7500 per loan for multiple and repeated recordings of unverified foreclosure documents.
- Authorizes borrowers to seek redress of “material” violations of most provisions.
- Attorney’s fees awarded to prevailing borrowers.
Purpose

- Enacted to bring fairness, accountability, and transparency to the state’s foreclosure process.
- Will provide California’s responsible homeowners with meaningful access to loan modification programs like HAMP and the national mortgage settlement that are helping borrowers avoid unnecessary foreclosures and that are the key to restoring our housing market.
- Levels the playing field by expanding servicing standards imposed on the largest five servicers to other servicers in California.
Key Limitations

- Only applies to first liens on owner-occupied, 1-4 unit properties
- Exemption for borrowers in active bankruptcy
- No substantive right to loan modification
- Limited protections for borrowers who had prior review
- Lower requirements for small servicers
Pre-NOD Outreach (All Servicers)

- No NOD until 30 days after contact or attempts to contact borrower failed and servicer due diligence:
  - First class letter;
  - Telephone calls;
  - Certified letter;
  - Toll-free number; and
  - Website with loss mitigation information

- CC 2923.5 (small servicers) and CC 2923.55 (large servicers)

- CC 2923.5 (all servicers) after 1/1/18

- Enforceable through PRA
Pre-NOD Outreach (Large Servicers)

- Until 2018, a mortgage servicer may not record a notice of default until it has informed the borrower of his right to request copies of documents proving the mortgage servicer’s right to foreclose on the property.
  - These documents include the deed of trust, promissory note, payment history, and last assignment of the loan.
- The mortgage servicer must also inform the borrower of any applicable protections provided to her under the Servicemembers Civil Relief Act if the borrower is a servicemember or dependent.
- Enforceable through PRA
A notice of default, notice of sale, or trustee’s deed upon sale **may not be recorded while a complete loan modification application is pending.** All mortgage servicers will be subject to this general prohibition, and it does not sunset. CC 2923.6 (large servicers); CC 2924.18 (small servicers); CC 2924.11 (after 1/1/18)

- If the borrower’s application for a foreclosure prevention alternative is **approved**, the lender cannot record a notice of default, notice of sale, or conduct a trustee’s sale so long as the borrower remains in compliance with the terms of the modification. CC 2924.11 (LS); CC 2924.18 (SS)
Due Process Reforms During Review

- **Written Acknowledgment Letter (CC 2924.10)**
  - Must be sent 5 business days after receipt
  - Must include
    - Description of process and relevant timelines
    - Any missing documents
    - Deadlines to submit missing documentation
    - Expiration dates for submitted documents

- Small servicers exempt
- Enforceable by PRA
- Sunsets 1/1/18
Due Process Reforms During Review

- Denial Letter (CC 2923.6)
  - Specific reasons for denial, including:
    - Specific reason for investor restriction
    - NPV inputs;
    - If applicable, a finding that the borrower defaulted on a prior loan mod
    - If applicable, description of other foreclosure prevention alternatives

- Small servicers exempt
- Sunsets 1/1/18
- Enforceable by PRA
Due Process Reforms During Review

- Single Point of Contact (CC 2923.7)
  - Triggered by borrower’s modification request or request for another foreclosure alternative
  - Allows team approach
- No sunset
- Enforceable through PRA
- Small servicers exemption
Due Process Reforms During Review

- Must rescind NOD or NTS when borrower executes a permanent foreclosure prevention alternative (CC 2924.11(d))
- No fees for reviewing for foreclosure prevention alternatives CC 2924.11(e)
- No late fees while:
  - Reviewing for foreclosure prevention alternative
  - Borrower making timely modification payments
  - CC 2924.11(f)
- Enforceable through PRA
- Small servicer exemption
Due Process Reforms During Review

Mortgage servicers that conduct more than 175 foreclosures annually must establish an appeals process, and the borrower shall have at least 30 days to appeal a denial for error before a notice of default, notice of sale, or trustee’s deed upon sale is recorded. (CC 2923.6)

• If the appeal is denied, the servicer can record its notice of default, notice of sale, or trustee’s deed upon sale after 15 days.

• If loan modification is offered, foreclosure may proceed if borrower doesn’t accept within 14 days.

• This provision will sunset in 2018.
Prior Loan Modification Applications

The mortgage servicer is not required to consider an application for a loan modification by a borrower who was reviewed for a loan modification or was afforded a fair opportunity for review, unless the borrower can show a material change in her financial circumstances. CC 2923.6(g)
Post-NOD Outreach

If a borrower does not submit a complete application for a loan modification prior to the recording of a notice of default, the servicer must send a notice within 5 days of recording the notice of default. This 5-day notice informs the borrower of that servicer’s loan modification application process. This provision will sunset in 2018.
Accuracy of Documents

- An infamous component of the foreclosure crisis is a practice known as robosigning, where representatives of a financial institution process foreclosure documents without ever verifying them for accuracy.
Accuracy of Documents

- Throughout the foreclosure process, the mortgage servicer is required to ensure that all documents in support of the foreclosure have been verified for accuracy, are complete, and are supported by competent and reliable evidence. CC 2924.17
  - $7,500 civil penalty per mortgage or deed for instances of multiple and repeated inaccurate filings of foreclosure documents in an action brought by a public prosecutor.
• Servicers must provide written notice of new trustee sale date when sale postponed more than 10 days (sunsets 1/1/18)

• Standing requirement
  ○ Entity initiating foreclosure must hold the beneficial interest under the deed of trust. CC 2924(a)(6)

• Not expressly enforceable through PRA
Enforcement

- CC 2924.12 – large servicers (sunsets 1/1/18)
- CC 2924.19 – small servicers (sunsets 1/1/18)
- CC 2924.12 – all servicers (after 1/1/18)

- Injunctive relief before recording of trustee’s deed
- Damages after trustee’s deed is recorded
- Attorney’s fees/costs
Enforcement

- Safe harbor for AG settlement signatories
- Protections for Bona Fide Purchasers
- Corrected violations
- PRA for “material” violations
- Public enforcement
Interplay with Other Programs

- HAMP
- GSE/FHA/RD/VA Loss Mitigation
- National Mortgage Settlement
- OCC Consent Decrees
- CFPB Mortgage Servicing Rules
Section 2924.12(g) – Signatories to the NMS

- Signatories to the NMS liable under HBOR but may be subject to different standards
- Under section 2924.12(g), while NMS is in effect, the signatories need only follow the terms of the NMS to avoid liability.
- Allows signatories to avoid multiple rule sets and administrative burden of complying with conflicting loss mitigation rules under the NMS and HBOR but preserves HBOR remedies for individuals.
Signatories’ Liability Under HBOR

- Signatories face lawsuits if they do not follow the terms of the NMS with “respect to the individual borrower.”
  - Compliance under NMS is not measured with respect to individual borrowers. There is no individual remedy under NMS.
  - HBOR legislative intent was to give individual homeowners a meaningful opportunity to avoid foreclosure and a means to enforce it.
Dual Tracking Claims - Prior Modification Applications

- If servicer already reviewed borrower for a loan modification or afforded the borrower fair opportunity for review, subsequent requests for modifications not subject to dual tracking protections (CC 2923.6(g))
  - Unless there is a material change in borrower’s financial circumstances

- What is “material” change?

- What is “fair opportunity”?
A dual tracking claim under HBO requires a complete loan modification application

Obtaining Injunctive Relief Against Pending Sale

**Preliminary Injunction Standards**
- Federal Court: *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) (sliding scale – likelihood of success, irreparable harm, balance of equities, and public interest)
  - Need to put on proof – cannot rely solely on complaint
  - Can rely on verified complaint

**Loss of home is irreparable harm**
- *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass’n*, 840 F.2d 653, 661 (9th Cir. 1988); Civ. Code § 3387
Obtaining Injunctive Relief Against Pending Sale

- **Immediate sale date?**
  - Seek TRO on ex-parte notice

- **Bond**
  - Some courts use FMR value or mortgage payment amount
    - Should not set at unpaid principal balance
  - Court has discretion to waive
  - Examples in HBOR cases
    - Singh ($1,000 one time bond)
    - Bitker (no bond)
Barriers to Claims Under HBOR

- Foreseeable Servicer assertions aimed at blocking claims under the Homeowner Bill of Rights
  - Preemption
  - Tender Requirement
Preemption

• Servicer may argue preemption under federal banking laws

• Split on preemption under former CC 2923.5
  o HOLA (field preemption for federal savings associations)—
  ✷ Dodd-Frank Act: no HOLA preemption after 7/2011
Civil Code 2923.55 – preempted by federal law?

- **Split on preemption (cont)**
  - NBA (conflict preemption for national banks) –
    - Dodd-Frank Act – Barnett standard after 7/2011
Tender

- Generally, tender is required in a challenge to a foreclosure.
- Exception to tender requirement established when it would be inequitable to require tender.
- Strong trend towards no tender in pre-sale challenges.
Tender: Post-Sale

- Courts rely on equitable principles in determining whether to require tender.
  - Tender required
  - Tender not required
    - If sale was void (e.g. trustee did not have power to conduct sale), *Dimock v. Emerald Properties*, 81 Cal. App. 4th 868 (2000)
    - If loan was reinstated, *Bank of Am. v. La Jolla Group*, 129 Cal. App. 4th 706 (2005)
The language and intent of HBOR indicate that the tender rule does not apply

- “If a trustee’s deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation” of HBOR. This injunction “shall remain in place and any trustee’s sale shall be enjoined” until the court determines that the violations have been remedied. Cal. Civ. Code 2924.12(a)

- “After a trustee’s deed upon sale has been recorded [a servicer] shall be liable to a borrower for actual economic damages...” Cal. Civ. Code 2924.12(b)

- “The purpose of the act... is to ensure that... borrowers... have a meaningful opportunity to obtain available loss mitigation options” 2012 Cal. Legis. Serv. Ch. 87 (SB 900)
Relief Under Other Laws

- Remember non-HBOR causes of action
  - CC 2924.12(g): The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

- Pre-Sale
  - FHA Loss Mitigation Requirements

- Both Pre- and Post-Sale
  - Promissory Estoppel/CC 2924g(c)
  - Breach of Contract
  - Wrongful Foreclosure
  - UCL
FHA Loans – Failure to Follow Loss Mitigation

- FHA Loss Mitigation Rules (24 CFR 203.500-.681)
  - Face to face meeting requirement, 24 C.F.R. 203.604, gets most publicity
  - Others – 24 C.F.R. 203.605 – duty to mitigate
  - Regulations incorporated into note/deed of trust
Post-Sale Remedies

- Actual economic damage and penalties only under HBOR
- But remember non-HBOR wrongful foreclosure cause of action that may exist to overturn completed sale
  - CC 2924.12(g): The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.
Lender Promise to Postpone/Cancel Sale
(Promissory Estoppel and CC 2924g)

- **Clear Promise**
  - Has lender promised to postpone sale?

- **Detrimental Reliance**
  - Forego bankruptcy options?
  - Took out another loan?

- **No tender required**
  - *Aharonoff v. AHMSI*, 2012 WL 1925568 (Cal. Ct. App. May 29, 2012) (breach of agreement to postpone sale; applying CC 2924g(c))
• Borrowers on permanent mods have wrongful foreclosure/breach of K claims

• What about trial mods?
  ○ Countersigned TPPs:
    ▪ *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012);
  ○ TPPs not countersigned by servicer:
WF - Improper Substitution of Trustee


- Robosigning
  - CC 2924.17 for foreclosures after 1/13

- Backdating
• Lack/Invalidity of Assignment of Deed of Trust
  ○ Entity initiating foreclosure must hold the beneficial interest under the deed of trust (CC 2924(a)(6)) (effective 1/1/13)

• But assignments of deeds of trust do not need to be recorded.
Unfair Competition Law (UCL)

- Three prongs: unlawful, unfair, and fraudulent
- Pre-2013 dual tracking may be unfair under the UCL, even if HBOR does not cover the particular timeframe
- Remedies: restitution and injunctive relief
  - For unlawful prong cases, UCL remedies are in addition to pre-existing remedies
  - UCL “HBOR” unlawful prong claim for injunctive relief post-sale?
Attorney’s Fees

- **Prevailing party fee award under CC 2924.12/19**
  - “A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.”
  - TROs and PIs sufficient for prevailing party status

- **Keep contemporaneous time records**
• Seek to enjoin foreclosure sale pending appeal

• Evaluating your case for appeal

• Orders on TROs and preliminary injunctions are immediately appealable

• We can help
  • Contact HBOR implementation team before you appeal
Resources

- HBOR Implementation Team
  - Call or email us for assistance!
  - Contact list at http://www.calhbor.org/about-us/
- CEB Mortgages, Deeds of Trust, and Foreclosure Litigation
- NCLC Foreclosure Manual
- Resources and training calendar on calhbor.org
- Questions?
California Homeowner Bill of Rights Signed Into Law

California Governor Jerry Brown recently signed landmark legislation restricting dual-tracking, where a lender forecloses even though the borrower is seeking a loan modification to save the home. The Homeowner Bill of Rights also guarantees struggling homeowners a single point of contact at their lender and direct access to decision makers. Additionally, the legislation imposes civil penalties on fraudulently signed mortgage documents and requires mortgage servicers to document their right to foreclose. This article discusses these protections and how homeowners may benefit from the new law, which goes into effect on January 1, 2013.

Background

In prior years, the California legislature failed to pass similar legislation to end dual-tracking. This year’s success stems largely from the backing of the state Attorney General’s office. Further, supporters noted that the nation’s five largest mortgage servicers already are subject to similar standards under the national mortgage settlement that was announced in February 2012. On July 2, the legislation passed 54-26 in the Assembly and 25-13 in the Senate. The governor signed the Homeowner Bill of Rights into law on July 11.

Dual Tracking

The law significantly restricts dual-tracking, where banks foreclose on homeowners while they simultaneously negotiate loan modifications. When the law goes into effect in 2013, mortgage servicers must give homeowners who complete a loan modification application a yes or no decision on loan modification before initiating foreclosure on a first lien through recording a notice of default. If the servicer receives a loan modification application after the notice of default, the servicer may not record a notice of trustee sale or conduct a foreclosure sale while the loan modification application is pending.

Protections During the Loan Modification Application Process

In addition to prohibiting dual-tracking, the law includes other provisions similar to those in the national mortgage settlement that protect borrowers during the loan modification process. The mortgage servicer may not charge a fee to process a loan modification application and may not collect any late fees during the loan modification process. When a borrower submits a loan modification application, the mortgage servicer must, within five days of receipt, send a written acknowledgment that includes:

(1) A description of the loan modification process, including an estimate of when a decision on the loan modification will be made after a complete application has been submitted by the borrower and the length of time the borrower will have to consider an offer of a loan modification or other foreclosure prevention alternative.

(2) Any deadlines, including deadlines to submit missing documentation, that would affect the processing of a loan modification application.

(3) Any expiration dates for submitted documents.

(4) Any deficiency in the borrower’s loan modification application.

When the Modification Is Approved

When a loan modification application is approved, the mortgage servicer must suspend the foreclosure process. In addition, if the borrower has executed and is in compliance with a forbearance plan, a trial modification, or a permanent modification, the servicer must stop the foreclosure process, rescind any existing notice of default, and cancel any pending trustee sales. If servicing of the loan is transferred, the new servicer must honor any previously approved loan modifications.

When the Modification Is Denied

When a loan modification application is denied, the mortgage servicer must notify the borrower in writing of the reasons for the denial, including:

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3. Those servicers are Ally/GMAC, Bank of America, Citibank, and Wells Fargo.
4. For more about the national mortgage settlement, see http://www.nationalmortgagesettlement.com.
5. The bill defines “mortgage servicer” as a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis (including collecting and crediting periodic loan payments), managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner’s authorized agent. Act of July 11, 2012, ch. 86, § 2 (to be codified at CaL. CIv. Code § 2920.5).
6. “Mortgage servicer” also means a subservicing agent to a master servicer by contract. Id.
7. Homeowner Bill of Rights, supra note 1, § 7 (to be codified at CaL. CIv. Code § 2923.6).
8. Id. § 14(b) (to be codified at CaL. CIv. Code § 2924.11(b)).
9. Homeowner Bill of Rights, supra note 1, § 14(f) (to be codified at CaL. CIv. Code § 2924.11(f)).
10. Id. § 13(a)(1) (to be codified at CaL. CIv. Code § 2924.10(a)(1)).
11. Id. § 13(a)(2) (to be codified at CaL. CIv. Code § 2924.10(a)(2)).
12. Id. § 13(a)(3) (to be codified at CaL. CIv. Code § 2924.10(a)(3)).
13. Id. § 13(a)(4) (to be codified at CaL. CIv. Code § 2924.10(a)(4)).
14. Id. § 14 (to be codified at CaL. CIv. Code § 2924.11).
15. Id.
16. Id. § 14(g) (to be codified at CaL. CIv. Code § 2924.11(g)).
(1) The deadline and instructions for how to appeal the denial;\(^1\)

(2) If the denial was based on investor disallowance, the specific reasons for the investor disallowance;\(^2\)

(3) If the denial is the result of net present value (NPV) calculations, the monthly gross income and property value used to calculate the NPV and a statement that the borrower may obtain the NPV inputs;\(^3\)

(4) A description of and application instructions for other foreclosure prevention alternatives for which the borrower may be eligible.\(^4\)

Even if the borrower’s loan modification application is denied, a notice of default may not be recorded until the later of:

(1) 31 days after the borrower receives the denial notice;\(^5\)

or

(2) 15 days after the conclusion of the appeal process, if the borrower appeals the denial.\(^6\)

**When No Modification Is Requested**

The lender may initiate the foreclosure process if the borrower does not apply for a loan modification prior to the notice of default. In that case, however, the mortgage servicer must still, within five days of the recording of the notice of default, inform the borrower in writing:

(1) That the borrower may be evaluated for a foreclosure prevention alternative.\(^7\)

(2) Whether the borrower is required to submit an application to be considered for a foreclosure prevention alternative.\(^8\)

(3) The means and process by which a borrower may obtain an application for a foreclosure prevention alternative.\(^9\)

**New Notice Requirements**

The Homeowner Bill of Rights also requires additional notices before foreclosure. Existing law requires the mortgage servicer to contact the borrower by phone or in person at least 30 days before initiating foreclosure.\(^10\)

Under the new law, a mortgage servicer also must send the borrower a statement that:

(1) If the borrower is a servicemember or a dependent of the servicemember, he or she may be entitled to protections under the federal Servicemembers Civil Relief Act.\(^11\)

(2) The borrower may request (i) a copy of the promissory note; (ii) a copy of the deed of trust and any assignments; and (iii) a copy of the borrower’s payment history since the borrower was last less than 60 days past due.\(^12\)

The servicer must include a declaration of compliance in the notice of default, and the notice of default may not be recorded until the mortgage servicer complies with these requirements.

When a foreclosure sale is postponed by at least 10 business days, the lender must provide the borrower with written notification of the new sale date within five business days of the postponement.\(^13\) Under existing law, a new notice of sale is not required if the new date is within one year of the original sale date.\(^14\)

**Documentation of Authority to Foreclose**

In *Gomes v. Countrywide*, the California Court of Appeal held that a borrower does not have a right to determine whether the owner of a promissory note has authorized its nominee to initiate the foreclosure process.\(^15\) In response to *Gomes*, the Homeowner Bill of Rights gives borrowers the opportunity to request that the mortgage servicer document its right to foreclose.\(^16\) The law also explicitly states that no foreclosure may be initiated unless the entity conducting the foreclosure is the holder of the beneficial interest under the deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest under the deed of trust.\(^17\)

Before recording or filing foreclosure documents such as a notice of default, notice of trustee sale, assignment of deed of trust, or a substitution of trustee, the mortgage servicer must ensure that it has reliable evidence to substantiate the borrower’s default and the servicer’s right to foreclose.\(^18\) In addition to the private right of action described below, government entities can seek civil penalties of $7,500 per deed of trust in cases involving multiple and repeated violations of this provision.\(^19\)

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\(^{12}\) Homeowner Bill of Rights, supra note 1, § 6(b)(1)(A) (to be codified at Cal. Civ. Code § 2923.55(b)(1)(A)).

\(^{13}\) Id. § 6(b)(1)(B) (to be codified at Cal. Civ. Code § 2923.55(b)(1)(B)).

\(^{14}\) Id. § 12(a)(1) (to be codified at Cal. Civ. Code § 2924.9(a)(1)).

\(^{15}\) Id. § 12(a)(2) (to be codified at Cal. Civ. Code § 2924.9(a)(2)).

\(^{16}\) Id. § 12(a)(3) (to be codified at Cal. Civ. Code § 2924.9(a)(3)).

Single Point of Contact

Under the new law, if a borrower requests a loan modification, the mortgage servicer must assign a single point of contact for the borrower. The single point of contact is responsible for:

1. Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.35
2. Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.37
3. Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.38
4. Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.39
5. Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary.40

The contact must remain assigned to the borrower until all loss mitigation options are exhausted.41 The contact also must transfer a borrower to a supervisor upon request of the borrower, if the contact has a supervisor.42

Private Right of Action

The Homeowner Bill of Rights creates a private right of action for borrowers, who may now enjoin a pending trustee’s sale or recording of the trustee’s deed if the mortgage servicer violates the law’s requirements.43 The injunctive relief remains in place until the mortgage servicer corrects the violation.44 If a trustee’s sale is completed in violation of the law’s requirements, a borrower may recover actual damages, or in the case of willful, intentional, or reckless violations, the greater of treble actual damages or $50,000.45

This private right of action includes an attorney’s fees provision.46 A borrower is deemed a prevailing party if the borrower was awarded damages or obtained injunctive relief.47 Under this provision, a temporary restraining order or a preliminary injunction is sufficient for a fee award, even if the injunction is lifted following compliance by the servicer.48

Exemptions for Small Lenders

Mortgage servicers who foreclose on fewer than 175 properties a year are exempt from the single point of contact requirements and most of the new notice requirements.49 The law still, however, restricts dual tracking and requires small lenders to verify their right to foreclose.50 A private right of action is available to enforce these requirements.51

Conclusion

With the passage of the Homeowner Bill of Rights, California became the first state in the nation to write the national mortgage settlement into state law. Consumer advocates hope that the law will spur other states to pass similar legislation. For example, in Oregon, the state’s outgoing attorney general has proposed new rules to regulate the processing of loan modifications.52 The Bulletin will continue to follow these developments and provide periodic updates.

35§ 17200 (2012).
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40§ 17200 (2012).
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52§ 17200 (2012).

Assembly Bill No. 278

CHAPTER 86

An act to amend and add Sections 2923.5 and 2923.6 of, to amend and repeal Section 2924 of, to add Sections 2920.5, 2923.4, 2923.7, 2924.17, and 2924.20 to, to add and repeal Sections 2923.55, 2924.9, 2924.10, 2924.18, and 2924.19 of, and to add, repeal, and add Sections 2924.11, 2924.12, and 2924.15 of, the Civil Code, relating to mortgages.

[Approved by Governor July 11, 2012. Filed with Secretary of State July 11, 2012.]

LEGISLATIVE COUNSEL’S DIGEST


(1) Existing law, until January 1, 2013, requires a mortgagee, trustee, beneficiary, or authorized agent to contact the borrower prior to filing a notice of default to explore options for the borrower to avoid foreclosure, as specified. Existing law requires a notice of default or, in certain circumstances, a notice of sale, to include a declaration stating that the mortgagee, trustee, beneficiary, or authorized agent has contacted the borrower, or has tried with due diligence to contact the borrower, or that no contact was required for a specified reason.

This bill would add mortgage servicers, as defined, to these provisions and would extend the operation of these provisions indefinitely, except that it would delete the requirement with respect to a notice of sale. The bill would, until January 1, 2018, additionally require the borrower, as defined, to be provided with specified information in writing prior to recordation of a notice of default and, in certain circumstances, within 5 business days after recordation. The bill would prohibit a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default or, until January 1, 2018, recording a notice of sale or conducting a trustee’s sale while a complete first lien loan modification application is pending, under specified conditions. The bill would, until January 1, 2018, establish additional procedures to be followed regarding a first lien loan modification application, the denial of an application, and a borrower’s right to appeal a denial.

(2) Existing law imposes various requirements that must be satisfied prior to exercising a power of sale under a mortgage or deed of trust, including, among other things, recording a notice of default and a notice of sale.

The bill would, until January 1, 2018, require a written notice to the borrower after the postponement of a foreclosure sale in order to advise the borrower of any new sale date and time, as specified. The bill would provide that an entity shall not record a notice of default or otherwise initiate the
foreclosure process unless it is the holder of the beneficial interest under
the deed of trust, the original or substituted trustee, or the designated agent
of the holder of the beneficial interest, as specified.

The bill would prohibit recordation of a notice of default or a notice of
sale or the conduct of a trustee’s sale if a foreclosure prevention alternative
has been approved and certain conditions exist and would, until January 1,
2018, require recordation of a rescission of those notices upon execution of
a permanent foreclosure prevention alternative. The bill would, until January
1, 2018, prohibit the collection of application fees and the collection of late
fees while a foreclosure prevention alternative is being considered, if certain
criteria are met, and would require a subsequent mortgage servicer to honor
any previously approved foreclosure prevention alternative.

The bill would authorize a borrower to seek an injunction and damages
for violations of certain of the provisions described above, except as
specified. The bill would authorize the greater of treble actual damages or
$50,000 in statutory damages if a violation of certain provisions is found
to be intentional or reckless or resulted from willful misconduct, as specified.
The bill would authorize the awarding of attorneys’ fees for prevailing
borrowers, as specified. Violations of these provisions by licensees of the
Department of Corporations, the Department of Financial Institutions, and
the Department of Real Estate would also be violations of those respective
licensing laws. Because a violation of certain of those licensing laws is a
crime, the bill would impose a state-mandated local program.

The bill would provide that the requirements imposed on mortgage
servicers, and mortgagees, trustees, beneficiaries, and authorized agents,
described above are applicable only to mortgages or deeds of trust secured
by residential real property not exceeding 4 dwelling units that is
owner-occupied, as defined, and, until January 1, 2018, only to those entities
who conduct more than 175 foreclosure sales per year or annual reporting
period, except as specified.

The bill would require, upon request from a borrower who requests a
foreclosure prevention alternative, a mortgage servicer who conducts more
than 175 foreclosure sales per year or annual reporting period to establish
a single point of contact and provide the borrower with one or more direct
means of communication with the single point of contact. The bill would
specify various responsibilities of the single point of contact. The bill would
define single point of contact for these purposes.

(3) Existing law prescribes documents that may be recorded or filed in
court.

This bill would require that a specified declaration, notice of default,
note of sale, deed of trust, assignment of a deed of trust, substitution of
trustee, or declaration or affidavit filed in any court relative to a foreclosure
proceeding or recorded by or on behalf of a mortgage servicer shall be
accurate and complete and supported by competent and reliable evidence.
The bill would require that before recording or filing any of those documents,
a mortgage servicer shall ensure that it has reviewed competent and reliable
evidence to substantiate the borrower’s default and the right to foreclose,
including the borrower’s loan status and loan information. The bill would, until January 1, 2018, provide that any mortgage servicer that engages in multiple and repeated violations of these requirements shall be liable for a civil penalty of up to $7,500 per mortgage or deed of trust, in an action brought by specified state and local government entities, and would also authorize administrative enforcement against licensees of the Department of Corporations, the Department of Financial Institutions, and the Department of Real Estate.

The bill would authorize the Department of Corporations, the Department of Financial Institutions, and the Department of Real Estate to adopt regulations applicable to persons and entities under their respective jurisdictions for purposes of the provisions described above. The bill would provide that a violation of those regulations would be enforceable only by the regulating agency.

(4) The bill would state findings and declarations of the Legislature in relation to foreclosures in the state generally, and would state the purposes of the bill.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) California is still reeling from the economic impacts of a wave of residential property foreclosures that began in 2007. From 2007 to 2011 alone, there were over 900,000 completed foreclosure sales. In 2011, 38 of the top 100 hardest hit ZIP Codes in the nation were in California, and the current wave of foreclosures continues apace. All of this foreclosure activity has adversely affected property values and resulted in less money for schools, public safety, and other public services. In addition, according to the Urban Institute, every foreclosure imposes significant costs on local governments, including an estimated nineteen thousand two hundred twenty-nine dollars ($19,229) in local government costs. And the foreclosure crisis is not over; there remain more than two million “underwater” mortgages in California.

(b) It is essential to the economic health of this state to mitigate the negative effects on the state and local economies and the housing market that are the result of continued foreclosures by modifying the foreclosure process to ensure that borrowers who may qualify for a foreclosure alternative are considered for, and have a meaningful opportunity to obtain, available loss mitigation options. These changes to the state’s foreclosure process are essential to ensure that the current crisis is not worsened by unnecessarily adding foreclosed properties to the market when an alternative to foreclosure may be available. Avoiding foreclosure, where possible, will
help stabilize the state’s housing market and avoid the substantial, corresponding negative effects of foreclosures on families, communities, and the state and local economy.

(c) This act is necessary to provide stability to California’s statewide and regional economies and housing market by facilitating opportunities for borrowers to pursue loss mitigation options.

SEC. 2. Section 2920.5 is added to the Civil Code, to read:

2920.5. For purposes of this article, the following definitions apply:

(a) “Mortgage servicer” means a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting periodic loan payments, managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner’s authorized agent. “Mortgage servicer” also means a subservicing agent to a master servicer by contract. “Mortgage servicer” shall not include a trustee, or a trustee’s authorized agent, acting under a power of sale pursuant to a deed of trust.

(b) “Foreclosure prevention alternative” means a first lien loan modification or another available loss mitigation option.

(c) (1) Unless otherwise provided and for purposes of Sections 2923.4, 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, 2924.18, and 2924.19, “borrower” means any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative program offered by, or through, his or her mortgage servicer.

(2) For purposes of the sections listed in paragraph (1), “borrower” shall not include any of the following:

(A) An individual who has surrendered the secured property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.

(B) An individual who has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.

(C) An individual who has filed a case under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case, or granting relief from a stay of foreclosure.

(d) “First lien” means the most senior mortgage or deed of trust on the property that is the subject of the notice of default or notice of sale.

SEC. 3. Section 2923.4 is added to the Civil Code, to read:

2923.4. (a) The purpose of the act that added this section is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower’s mortgage servicer, such as loan modifications or other alternatives to foreclosure. Nothing in
the act that added this section, however, shall be interpreted to require a particular result of that process.

(b) Nothing in this article obviates or supersedes the obligations of the signatories to the consent judgment entered in the case entitled United States of America et al. v. Bank of America Corporation et al., filed in the United States District Court for the District of Columbia, case number 1:12-cv-00361 RMC.

SEC. 4. Section 2923.5 of the Civil Code is amended to read:

2923.5. (a) (1) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until both of the following:

(A) Either 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (e).

(B) The mortgage servicer complies with paragraph (1) of subdivision (a) of Section 2924.18, if the borrower has provided a complete application as defined in subdivision (d) of Section 2924.18.

(2) A mortgage servicer shall contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgage servicer shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgage servicer shall schedule the meeting to occur within 14 days. The assessment of the borrower’s financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of “borrower” pursuant to subdivision (c) of Section 2920.5.

(c) A mortgage servicer’s loss mitigation personnel may participate by telephone during any contact required by this section.

(d) A borrower may designate, with consent given in writing, a HUD-certified housing counseling agency, attorney, or other adviser to discuss with the mortgage servicer, on the borrower’s behalf, the borrower’s financial situation and options for the borrower to avoid foreclosure. That contact made at the direction of the borrower shall satisfy the contact requirements of paragraph (2) of subdivision (a). Any loan modification or workout plan offered at the meeting by the mortgage servicer is subject to approval by the borrower.

(e) A notice of default may be recorded pursuant to Section 2924 when a mortgage servicer has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower
occurred despite the due diligence of the mortgage servicer. For purposes of this section, “due diligence” shall require and mean all of the following:

1. A mortgage servicer shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

2. (A) After the letter has been sent, the mortgage servicer shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file.

   (B) A mortgage servicer may attempt to contact a borrower using an automated system to dial borrowers, provided that, if the telephone call is answered, the call is connected to a live representative of the mortgage servicer.

   (C) A mortgage servicer satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower’s primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.

3. If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgage servicer shall then send a certified letter, with return receipt requested.

4. The mortgage servicer shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.

5. The mortgage servicer has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

   (A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

   (B) A list of financial documents borrowers should collect and be prepared to present to the mortgage servicer when discussing options for avoiding foreclosure.

   (C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgage servicer.

   (D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(f) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(g) This section shall apply only to entities described in subdivision (b) of Section 2924.18.

(h) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 5. Section 2923.5 is added to the Civil Code, to read:

2923.5. (a) (1) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until both of the following:
(A) Either 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (e).

(B) The mortgage servicer complies with subdivision (a) of Section 2924.11, if the borrower has provided a complete application as defined in subdivision (f) of Section 2924.11.

(2) A mortgage servicer shall contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgage servicer shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgage servicer shall schedule the meeting to occur within 14 days. The assessment of the borrower’s financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of “borrower” pursuant to subdivision (c) of Section 2920.5.

(c) A mortgage servicer’s loss mitigation personnel may participate by telephone during any contact required by this section.

(d) A borrower may designate, with consent given in writing, a HUD-certified housing counseling agency, attorney, or other adviser to discuss with the mortgage servicer, on the borrower’s behalf, the borrower’s financial situation and options for the borrower to avoid foreclosure. That contact made at the direction of the borrower shall satisfy the contact requirements of paragraph (2) of subdivision (a). Any loan modification or workout plan offered at the meeting by the mortgage servicer is subject to approval by the borrower.

(e) A notice of default may be recorded pursuant to Section 2924 when a mortgage servicer has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgage servicer. For purposes of this section, “due diligence” shall require and mean all of the following:

1. A mortgage servicer shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

2. (A) After the letter has been sent, the mortgage servicer shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file.

(B) A mortgage servicer may attempt to contact a borrower using an automated system to dial borrowers, provided that, if the telephone call is
answered, the call is connected to a live representative of the mortgage servicer.

(C) A mortgage servicer satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower’s primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.

(3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgage servicer shall then send a certified letter, with return receipt requested.

(4) The mortgage servicer shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.

(5) The mortgage servicer has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

(A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

(B) A list of financial documents borrowers should collect and be prepared to present to the mortgage servicer when discussing options for avoiding foreclosure.

(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgage servicer.

(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(f) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(g) This section shall become operative on January 1, 2018.

SEC. 6. Section 2923.55 is added to the Civil Code, to read:

2923.55. (a) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until all of the following:

(1) The mortgage servicer has satisfied the requirements of paragraph (1) of subdivision (b).

(2) Either 30 days after initial contact is made as required by paragraph (2) of subdivision (b) or 30 days after satisfying the due diligence requirements as described in subdivision (f).

(3) The mortgage servicer complies with subdivision (c) of Section 2923.6, if the borrower has provided a complete application as defined in subdivision (h) of Section 2923.6.

(b) (1) As specified in subdivision (a), a mortgage servicer shall send the following information in writing to the borrower:

(A) A statement that if the borrower is a servicemember or a dependent of a servicemember, he or she may be entitled to certain protections under the federal Servicemembers Civil Relief Act (50 U.S.C. Sec. 501 et seq.) regarding the servicemember’s interest rate and the risk of foreclosure, and counseling for covered servicemembers that is available at agencies such as Military OneSource and Armed Forces Legal Assistance.
(B) A statement that the borrower may request the following:
   (i) A copy of the borrower’s promissory note or other evidence of indebtedness.
   (ii) A copy of the borrower’s deed of trust or mortgage.
   (iii) A copy of any assignment, if applicable, of the borrower’s mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose.
   (iv) A copy of the borrower’s payment history since the borrower was last less than 60 days past due.

(2) A mortgage servicer shall contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgage servicer shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgage servicer shall schedule the meeting to occur within 14 days. The assessment of the borrower’s financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(c) A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of “borrower” pursuant to subdivision (c) of Section 2920.5.

(d) A mortgage servicer’s loss mitigation personnel may participate by telephone during any contact required by this section.

(e) A borrower may designate, with consent given in writing, a HUD-certified housing counseling agency, attorney, or other adviser to discuss with the mortgage servicer, on the borrower’s behalf, the borrower’s financial situation and options for the borrower to avoid foreclosure. That contact made at the direction of the borrower shall satisfy the contact requirements of paragraph (2) of subdivision (b). Any foreclosure prevention alternative offered at the meeting by the mortgage servicer is subject to approval by the borrower.

(f) A notice of default may be recorded pursuant to Section 2924 when a mortgage servicer has not contacted a borrower as required by paragraph (2) of subdivision (b), provided that the failure to contact the borrower occurred despite the due diligence of the mortgage servicer. For purposes of this section, “due diligence” shall require and mean all of the following:

   (1) A mortgage servicer shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

   (2) (A) After the letter has been sent, the mortgage servicer shall attempt to contact the borrower by telephone at least three times at different hours
and on different days. Telephone calls shall be made to the primary telephone number on file.

(B) A mortgage servicer may attempt to contact a borrower using an automated system to dial borrowers, provided that, if the telephone call is answered, the call is connected to a live representative of the mortgage servicer.

(C) A mortgage servicer satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower’s primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.

(3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgage servicer shall then send a certified letter, with return receipt requested, that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(4) The mortgage servicer shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.

(5) The mortgage servicer has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

(A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

(B) A list of financial documents borrowers should collect and be prepared to present to the mortgage servicer when discussing options for avoiding foreclosure.

(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgage servicer.

(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(g) This section shall not apply to entities described in subdivision (b) of Section 2924.18.

(h) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(i) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 7. Section 2923.6 of the Civil Code is amended to read:

2923.6. (a) The Legislature finds and declares that any duty that mortgage servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a pooling and servicing agreement, and that a mortgage servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan for which both of the following apply:
(1) The loan is in payment default, or payment default is reasonably foreseeable.

(2) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis.

(b) It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority.

(c) If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower’s mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee’s sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee’s sale until any of the following occurs:

(1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired.

(2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.

(3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower’s obligations under, the first lien loan modification.

(d) If the borrower’s application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer’s determination was in error.

(e) If the borrower’s application for a first lien loan modification is denied, the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee’s sale until the later of:

(1) Thirty-one days after the borrower is notified in writing of the denial.

(2) If the borrower appeals the denial pursuant to subdivision (d), the later of 15 days after the denial of the appeal or 14 days after a first lien loan modification is offered after appeal but declined by the borrower, or, if a first lien loan modification is offered and accepted after appeal, the date on which the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

(f) Following the denial of a first lien loan modification application, the mortgage servicer shall send a written notice to the borrower identifying the reasons for denial, including the following:

(1) The amount of time from the date of the denial letter in which the borrower may request an appeal of the denial of the first lien loan modification and instructions regarding how to appeal the denial.
If the denial was based on investor disallowance, the specific reasons for the investor disallowance.

If the denial is the result of a net present value calculation, the monthly gross income and property value used to calculate the net present value and a statement that the borrower may obtain all of the inputs used in the net present value calculation upon written request to the mortgage servicer.

If applicable, a finding that the borrower was previously offered a first lien loan modification and failed to successfully make payments under the terms of the modified loan.

If applicable, a description of other foreclosure prevention alternatives for which the borrower may be eligible, and a list of the steps the borrower must take in order to be considered for those options. If the mortgage servicer has already approved the borrower for another foreclosure prevention alternative, information necessary to complete the foreclosure prevention alternative.

In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower’s financial circumstances since the date of the borrower’s previous application and that change is documented by the borrower and submitted to the mortgage servicer.

For purposes of this section, an application shall be deemed “complete” when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.

Subdivisions (c) to (h), inclusive, shall not apply to entities described in subdivision (b) of Section 2924.18.

This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 8. Section 2923.6 is added to the Civil Code, to read:

2923.6. (a) The Legislature finds and declares that any duty mortgage servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a pooling and servicing agreement, and that a mortgage servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan for which both of the following apply:

1) The loan is in payment default, or payment default is reasonably foreseeable.
(2) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis.

(b) It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority.

c) This section shall become operative on January 1, 2018.

SEC. 9. Section 2923.7 is added to the Civil Code, to read:

2923.7. (a) Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact.

(b) The single point of contact shall be responsible for doing all of the following:

(1) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.

(2) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.

(3) Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.

(4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.

(5) Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary.

(c) The single point of contact shall remain assigned to the borrower’s account until the mortgage servicer determines that all loss mitigation options offered by, or through, the mortgage servicer have been exhausted or the borrower’s account becomes current.

(d) The mortgage servicer shall ensure that a single point of contact refers and transfers a borrower to an appropriate supervisor upon request of the borrower, if the single point of contact has a supervisor.

(e) For purposes of this section, “single point of contact” means an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described in subdivisions (b) to (d), inclusive. The mortgage servicer shall ensure that each member of the team is knowledgeable about the borrower’s situation and current status in the alternatives to foreclosure process.

(f) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(g) (1) This section shall not apply to a depository institution chartered under state or federal law, a person licensed pursuant to Division 9 (commencing with Section 22000) or Division 20 (commencing with Section 50000) of the Financial Code, or a person licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and
Professions Code, that, during its immediately preceding annual reporting period, as established with its primary regulator, foreclosed on 175 or fewer residential real properties, containing no more than four dwelling units, that are located in California.

(2) Within three months after the close of any calendar year or annual reporting period as established with its primary regulator during which an entity or person described in paragraph (1) exceeds the threshold of 175 specified in paragraph (1), that entity shall notify its primary regulator, in a manner acceptable to its primary regulator, and any mortgagor or trustor who is delinquent on a residential mortgage loan serviced by that entity of the date on which that entity will be subject to this section, which date shall be the first day of the first month that is six months after the close of the calendar year or annual reporting period during which that entity exceeded the threshold.

SEC. 10. Section 2924 of the Civil Code, as amended by Section 1 of Chapter 180 of the Statutes of 2010, is amended to read:

2924. (a) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until all of the following apply:

(1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:

(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.

(B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.

(C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.
(D) If the default is curable pursuant to Section 2924c, the statement specified in paragraph (1) of subdivision (b) of Section 2924c.

(2) Not less than three months shall elapse from the filing of the notice of default.

(3) Except as provided in paragraph (4), after the lapse of the three months described in paragraph (2), the mortgagee, trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f.

(4) Notwithstanding paragraph (3), the mortgagee, trustee, or other person authorized to take sale may record a notice of sale pursuant to Section 2924f up to five days before the lapse of the three-month period described in paragraph (2), provided that the date of sale is no earlier than three months and 20 days after the recording of the notice of default.

(5) Until January 1, 2018, whenever a sale is postponed for a period of at least 10 business days pursuant to Section 2924g, a mortgagee, beneficiary, or authorized agent shall provide written notice to a borrower regarding the new sale date and time, within five business days following the postponement. Information provided pursuant to this paragraph shall not constitute the public declaration required by subdivision (d) of Section 2924g. Failure to comply with this paragraph shall not invalidate any sale that would otherwise be valid under Section 2924f. This paragraph shall be inoperative on January 1, 2018.

(6) No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.

(b) In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4.

(c) A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

(d) All of the following shall constitute privileged communications pursuant to Section 47:
(1) The mailing, publication, and delivery of notices as required by this section.

(2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

(e) There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments on the obligation owed to the beneficiary and secured by the deed of trust or mortgage subject to the notice of default. However, the failure to include an actually known default shall not invalidate the notice of sale and the beneficiary shall not be precluded from asserting a claim to this omitted default or defaults in a separate notice of default.

SEC. 11. Section 2924 of the Civil Code, as amended by Section 2 of Chapter 180 of the Statutes of 2010, is repealed.

SEC. 12. Section 2924.9 is added to the Civil Code, to read:

2924.9. (a) Unless a borrower has previously exhausted the first lien loan modification process offered by, or through, his or her mortgage servicer described in Section 2923.6, within five business days after recording a notice of default pursuant to Section 2924, a mortgage servicer that offers one or more foreclosure prevention alternatives shall send a written communication to the borrower that includes all of the following information:

(1) That the borrower may be evaluated for a foreclosure prevention alternative or, if applicable, foreclosure prevention alternatives.

(2) Whether an application is required to be submitted by the borrower in order to be considered for a foreclosure prevention alternative.

(3) The means and process by which a borrower may obtain an application for a foreclosure prevention alternative.

(b) This section shall not apply to entities described in subdivision (b) of Section 2924.18.

(c) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(d) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 13. Section 2924.10 is added to the Civil Code, to read:

2924.10. (a) When a borrower submits a complete first lien modification application or any document in connection with a first lien modification application, the mortgage servicer shall provide written acknowledgment of the receipt of the documentation within five business days of receipt. In its initial acknowledgment of receipt of the loan modification application, the mortgage servicer shall include the following information:

(1) A description of the loan modification process, including an estimate of when a decision on the loan modification will be made after a complete application has been submitted by the borrower and the length of time the borrower will have to consider an offer of a loan modification or other foreclosure prevention alternative.
(2) Any deadlines, including deadlines to submit missing documentation, that would affect the processing of a first lien loan modification application.

(3) Any expiration dates for submitted documents.

(4) Any deficiency in the borrower’s first lien loan modification application.

(b) For purposes of this section, a borrower’s first lien loan modification application shall be deemed to be “complete” when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.

(c) This section shall not apply to entities described in subdivision (b) of Section 2924.18.

(d) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(e) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 14. Section 2924.11 is added to the Civil Code, to read:

2924.11. (a) If a foreclosure prevention alternative is approved in writing prior to the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default under either of the following circumstances:

1. The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

2. A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

(b) If a foreclosure prevention alternative is approved in writing after the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of sale or conduct a trustee’s sale under either of the following circumstances:

1. The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

2. A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

(c) When a borrower accepts an offered first lien loan modification or other foreclosure prevention alternative, the mortgage servicer shall provide the borrower with a copy of the fully executed loan modification agreement or agreement evidencing the foreclosure prevention alternative following receipt of the executed copy from the borrower.

(d) A mortgagee, beneficiary, or authorized agent shall record a rescission of a notice of default or cancel a pending trustee’s sale, if applicable, upon the borrower executing a permanent foreclosure prevention alternative. In the case of a short sale, the rescission or cancellation of the pending trustee’s sale shall occur when the short sale has been approved by all parties and
proof of funds or financing has been provided to the mortgagee, beneficiary, or authorized agent.

(e) The mortgage servicer shall not charge any application, processing, or other fee for a first lien loan modification or other foreclosure prevention alternative.

(f) The mortgage servicer shall not collect any late fees for periods during which a complete first lien loan modification application is under consideration or a denial is being appealed, the borrower is making timely modification payments, or a foreclosure prevention alternative is being evaluated or exercised.

(g) If a borrower has been approved in writing for a first lien loan modification or other foreclosure prevention alternative, and the servicing of that borrower’s loan is transferred or sold to another mortgage servicer, the subsequent mortgage servicer shall continue to honor any previously approved first lien loan modification or other foreclosure prevention alternative, in accordance with the provisions of the act that added this section.

(h) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(i) This section shall not apply to entities described in subdivision (b) of Section 2924.18.

(j) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 15. Section 2924.11 is added to the Civil Code, to read:

2924.11. (a) If a borrower submits a complete application for a foreclosure prevention alternative offered by, or through, the borrower’s mortgage servicer, a mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent shall not record a notice of sale or conduct a trustee’s sale while the complete foreclosure prevention alternative application is pending, and until the borrower has been provided with a written determination by the mortgage servicer regarding that borrower’s eligibility for the requested foreclosure prevention alternative.

(b) Following the denial of a first lien loan modification application, the mortgage servicer shall send a written notice to the borrower identifying with specificity the reasons for the denial and shall include a statement that the borrower may obtain additional documentation supporting the denial decision upon written request to the mortgage servicer.

(c) If a foreclosure prevention alternative is approved in writing prior to the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default under either of the following circumstances:

(1) The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

(2) A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder,
and mortgage insurer, as applicable, and proof of funds or financing has
been provided to the servicer.
(d) If a foreclosure prevention alternative is approved in writing after
the recordation of a notice of default, a mortgage servicer, mortgagee, trustee,
beneficiary, or authorized agent shall not record a notice of sale or conduct
a trustee’s sale under either of the following circumstances:
(1) The borrower is in compliance with the terms of a written trial or
permanent loan modification, forbearance, or repayment plan.
(2) A foreclosure prevention alternative has been approved in writing by
all parties, including, for example, the first lien investor, junior lienholder,
and mortgage insurer, as applicable, and proof of funds or financing has
been provided to the servicer.
(e) This section applies only to mortgages or deeds of trust as described
in Section 2924.15.
(f) For purposes of this section, an application shall be deemed “complete”
when a borrower has supplied the mortgage servicer with all documents
required by the mortgage servicer within the reasonable timeframes specified
by the mortgage servicer.
(g) This section shall become operative on January 1, 2018.
SEC. 16. Section 2924.12 is added to the Civil Code, to read:
2924.12. (a) (1) If a trustee’s deed upon sale has not been recorded, a
borrower may bring an action for injunctive relief to enjoin a material
violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or
2924.17.
(2) Any injunction shall remain in place and any trustee’s sale shall be
enjoined until the court determines that the mortgage servicer, mortgagee,
trustee, beneficiary, or authorized agent has corrected and remedied the
violation or violations giving rise to the action for injunctive relief. An
enjoined entity may move to dissolve an injunction based on a showing that
the material violation has been corrected and remedied.
(b) After a trustee’s deed upon sale has been recorded, a mortgage
servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable
to a borrower for actual economic damages pursuant to Section 3281,
resulting from a material violation of Section 2923.55, 2923.6, 2923.7,
2924.9, 2924.10, 2924.11, or 2924.17 by that mortgage servicer, mortgagee,
trustee, beneficiary, or authorized agent where the violation was not corrected
and remedied prior to the recordation of the trustee’s deed upon sale. If the
court finds that the material violation was intentional or reckless, or resulted
from willful misconduct by a mortgage servicer, mortgagee, trustee,
beneficiary, or authorized agent, the court may award the borrower the
greater of treble actual damages or statutory damages of fifty thousand
dollars ($50,000).
(c) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized
agent shall not be liable for any violation that it has corrected and remedied
prior to the recordation of a trustee’s deed upon sale, or that has been
corrected and remedied by third parties working on its behalf prior to the
recordation of a trustee’s deed upon sale.
(d) A violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 by a person licensed by the Department of Corporations, Department of Financial Institutions, or Department of Real Estate shall be deemed to be a violation of that person’s licensing law.

(e) No violation of this article shall affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice.

(f) A third-party encumbrancer shall not be relieved of liability resulting from violations of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 committed by that third-party encumbrancer, that occurred prior to the sale of the subject property to the bona fide purchaser.

(g) A signatory to a consent judgment entered in the case entitled United States of America et al. v. Bank of America Corporation et al., filed in the United States District Court for the District of Columbia, case number 1:12-cv-00361 RMC, that is in compliance with the relevant terms of the Settlement Term Sheet of that consent judgment with respect to the borrower who brought an action pursuant to this section while the consent judgment is in effect shall have no liability for a violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.

(h) The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

(i) A court may award a prevailing borrower reasonable attorney’s fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.

(j) This section shall not apply to entities described in subdivision (b) of Section 2924.18.

(k) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 17. Section 2924.12 is added to the Civil Code, to read:

2924.12. (a) (1) If a trustee’s deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.5, 2923.7, 2924.11, or 2924.17.

(2) Any injunction shall remain in place and any trustee’s sale shall be enjoined until the court determines that the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent has corrected and remedied the violation or violations giving rise to the action for injunctive relief. An enjoined entity may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied.

(b) After a trustee’s deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of Section 2923.5, 2923.7, 2924.11, or 2924.17 by that mortgage servicer, mortgagee, trustee, beneficiary, or
authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee’s deed upon sale. If the court finds that the material violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent, the court may award the borrower the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000).

(c) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee’s deed upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the recordation of the trustee’s deed upon sale.

(d) A violation of Section 2923.5, 2923.7, 2924.11, or 2924.17 by a person licensed by the Department of Corporations, Department of Financial Institutions, or Department of Real Estate shall be deemed to be a violation of that person’s licensing law.

(e) No violation of this article shall affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice.

(f) A third-party encumbrancer shall not be relieved of liability resulting from violations of Section 2923.5, 2923.7, 2924.11, or 2924.17 committed by that third-party encumbrancer, that occurred prior to the sale of the subject property to the bona fide purchaser.

(g) The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

(h) A court may award a prevailing borrower reasonable attorney’s fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.

(i) This section shall become operative on January 1, 2018.

SEC. 18. Section 2924.15 is added to the Civil Code, to read:

2924.15. (a) Unless otherwise provided, paragraph (5) of subdivision (a) of Section 2924, and Sections 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.18 shall apply only to first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. For these purposes, “owner-occupied” means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes.

(b) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 19. Section 2924.15 is added to the Civil Code, to read:

2924.15. (a) Unless otherwise provided, Sections 2923.5, 2923.7, and 2924.11 shall apply only to first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more
than four dwelling units. For these purposes, “owner-occupied” means that
the property is the principal residence of the borrower and is security for a
loan made for personal, family, or household purposes.

(b) This section shall become operative on January 1, 2018.

SEC. 20. Section 2924.17 is added to the Civil Code, to read:

2924.17. (a) A declaration recorded pursuant to Section 2923.5 or, until
January 1, 2018, pursuant to Section 2923.55, a notice of default, notice of
sale, assignment of a deed of trust, or substitution of trustee recorded by or
on behalf of a mortgage servicer in connection with a foreclosure subject
to the requirements of Section 2924, or a declaration or affidavit filed in
any court relative to a foreclosure proceeding shall be accurate and complete
and supported by competent and reliable evidence.

(b) Before recording or filing any of the documents described in
subdivision (a), a mortgage servicer shall ensure that it has reviewed
competent and reliable evidence to substantiate the borrower’s default and
the right to foreclose, including the borrower’s loan status and loan
information.

(c) Until January 1, 2018, any mortgage servicer that engages in multiple
and repeated uncorrected violations of subdivision (b) in recording
documents or filing documents in any court relative to a foreclosure
proceeding shall be liable for a civil penalty of up to seven thousand five
hundred dollars ($7,500) per mortgage or deed of trust in an action brought
by a government entity identified in Section 17204 of the Business and
Professions Code, or in an administrative proceeding brought by the
Department of Corporations, the Department of Real Estate, or the
Department of Financial Institutions against a respective licensee, in addition
to any other remedies available to these entities. This subdivision shall be
inoperative on January 1, 2018.

SEC. 21. Section 2924.18 is added to the Civil Code, to read:

2924.18. (a) (1) If a borrower submits a complete application for a first
lien loan modification offered by, or through, the borrower’s mortgage
servicer, a mortgage servicer, trustee, mortgagee, beneficiary, or authorized
agent shall not record a notice of default, notice of sale, or conduct a trustee’s
sale while the complete first lien loan modification application is pending,
and until the borrower has been provided with a written determination by
the mortgage servicer regarding that borrower’s eligibility for the requested
loan modification.

(2) If a foreclosure prevention alternative has been approved in writing
prior to the recordation of a notice of default, a mortgage servicer, mortgagee,
trustee, beneficiary, or authorized agent shall not record a notice of default
under either of the following circumstances:

(A) The borrower is in compliance with the terms of a written trial or
permanent loan modification, forbearance, or repayment plan.

(B) A foreclosure prevention alternative has been approved in writing
by all parties, including, for example, the first lien investor, junior lienholder,
and mortgage insurer, as applicable, and proof of funds or financing has
been provided to the servicer.
(3) If a foreclosure prevention alternative is approved in writing after the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of sale or conduct a trustee’s sale under either of the following circumstances:

(A) The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

(B) A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

(b) This section shall apply only to a depository institution chartered under state or federal law, a person licensed pursuant to Division 9 (commencing with Section 22000) or Division 20 (commencing with Section 50000) of the Financial Code, or a person licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code, that, during its immediately preceding annual reporting period, as established with its primary regulator, foreclosed on 175 or fewer residential real properties, containing no more than four dwelling units, that are located in California.

(c) Within three months after the close of any calendar year or annual reporting period as established with its primary regulator during which an entity or person described in subdivision (b) exceeds the threshold of 175 specified in subdivision (b), that entity shall notify its primary regulator, in a manner acceptable to its primary regulator, and any mortgagor or trustor who is delinquent on a residential mortgage loan serviced by that entity of the date on which that entity will be subject to Sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.12, which date shall be the first day of the first month that is six months after the close of the calendar year or annual reporting period during which that entity exceeded the threshold.

(d) For purposes of this section, an application shall be deemed “complete” when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.

(e) If a borrower has been approved in writing for a first lien loan modification or other foreclosure prevention alternative, and the servicing of the borrower’s loan is transferred or sold to another mortgage servicer, the subsequent mortgage servicer shall continue to honor any previously approved first lien loan modification or other foreclosure prevention alternative, in accordance with the provisions of the act that added this section.

(f) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(g) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 22. Section 2924.19 is added to the Civil Code, to read:
2924.19. (a) (1) If a trustee’s deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.5, 2924.17, or 2924.18.

(2) Any injunction shall remain in place and any trustee’s sale shall be enjoined until the court determines that the mortgage servicer, mortgagee, beneficiary, or authorized agent has corrected and remedied the violation or violations giving rise to the action for injunctive relief. An enjoined entity may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied.

(b) After a trustee’s deed upon sale has been recorded, a mortgage servicer, mortgagee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of Section 2923.5, 2924.17, or 2924.18 by that mortgage servicer, mortgagee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee’s deed upon sale. If the court finds that the material violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, beneficiary, or authorized agent, the court may award the borrower the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000).

(c) A mortgage servicer, mortgagee, beneficiary, or authorized agent shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee’s deed upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the recordation of the trustee’s deed upon sale.

(d) A violation of Section 2923.5, 2924.17, or 2924.18 by a person licensed by the Department of Corporations, the Department of Financial Institutions, or the Department of Real Estate shall be deemed to be a violation of that person’s licensing law.

(e) No violation of this article shall affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice.

(f) A third-party encumbrancer shall not be relieved of liability resulting from violations of Section 2923.5, 2924.17 or 2924.18, committed by that third-party encumbrancer, that occurred prior to the sale of the subject property to the bona fide purchaser.

(g) The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

(h) A court may award a prevailing borrower reasonable attorney’s fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or damages pursuant to this section.

(i) This section shall apply only to entities described in subdivision (b) of Section 2924.18.
(j) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

SEC. 23. Section 2924.20 is added to the Civil Code, to read:

2924.20. Consistent with their general regulatory authority, and notwithstanding subdivisions (b) and (c) of Section 2924.18, the Department of Corporations, the Department of Financial Institutions, and the Department of Real Estate may adopt regulations applicable to any entity or person under their respective jurisdictions that are necessary to carry out the purposes of the act that added this section. A violation of the regulations adopted pursuant to this section shall only be enforceable by the regulatory agency.

SEC. 24. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 25. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.
June 2013 Newsletter

Complete Loan Modification Application Requirement in the Homeowner Bill of Rights

HBOR prohibits a foreclosing entity from recording a NOD, NTS, or conducting a foreclosure sale while a complete loan modification application is pending. CC §§ 2923.6, 2924.10. Submitting a “complete” application is therefore essential to any borrower’s dual tracking claim. Sections 2923.6(h), 2924.18(d), and 2924.10(b) provide some statutory guidance on defining a “complete” application, but they use identical language:

For purposes of this section, an application shall be deemed “complete” when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.

If a borrower is applying for a HAMP modification, compliance with the HAMP handbook requirements should satisfy the complete application requirement. The HAMP handbook lists the documentation comprising a complete HAMP initial package: a Request for Mortgage Assistance (RMA) form (available at www.HMPadmin.com), tax forms (IRS Form 4506-T or 4506T-EZ), evidence of income, and the Dodd-Frank Certification. See Making Home Affordable, Handbook for Servicers of Non-GSE Mortgages, v.4.2, ch. II, secs. 4 & 5 (May 1, 2013). Once the borrower submitted a complete HAMP package, the borrower should satisfy the completed loan modification application under HBOR.

Very few courts have considered what constitutes a “complete application” or which documents a servicer may reasonably request. In Singh v. Bank of America, N.A., 2013 WL 1858436 (E.D. Cal. May 2, 2013), the court granted a preliminary injunction stopping a foreclosure sale based on a § 2923.6 dual tracking allegation. There the borrowers alleged they had submitted a complete application to Bank of America and “BoA [did] not dispute Plaintiff’s assertion.” Id. at *2.
Reasonable timeframe specified by the mortgage servicer

If the borrower failed to submit a complete application initially, disputes may also arise over whether the servicer provided a “reasonable timeframe” for the borrower to provide the missing documents to complete the application. A servicer has to provide a written response to the borrower within five business days of receiving documentation which the borrower believes to be a complete application. CC § 2924.10(a). The servicer must alert the borrower if documentation is missing, which documents are missing, if there are any expiration dates for the documents already submitted (requiring the borrower to collect and re-submit updated documents), and any deadlines to submit missing or additional documentation. CC § 2924.10(a)(1)-(4). Whatever “timeline” the servicer sets, then, must at least be communicated to the borrower within five business days from receipt of the borrower’s original submission.

To preserve a dual-tracking claim, then, the borrower must respond to a servicer’s reasonable requests for additional documentation. A recent decision from Northern District of California illustrates the importance of responding to documentation requests, as the court denied a preliminary injunction in a dual-tracking case specifically because the borrower failed to meet her servicer’s deadline. Lindberg v. Wells Fargo Bank N.A., 2013 WL 1736785, at *3 (N.D. Cal. Apr. 22, 2013). In Lindberg, the borrower simply said that Wells asked for “additional documents and the same documents over and over again.” Id. The court was unsympathetic even though Wells Fargo required the borrower to submit a “checklist of documents” within six days, and all documents had to be dated within the past 30 days. Id. The borrower admitted she was unable to gather this information in the six-day timeframe but did not appear to challenge the deadline as unreasonable. The court did not comment on this tight deadline, simply writing that “plaintiff did not submit a completed loan modification application in response to this letter” and denied the borrower’s request for a preliminary injunction. Id. at *3-4.
Material change in financial circumstances

Borrowers who had been previously reviewed for a loan modification are generally not eligible to receive HBOR’s dual tracking protections, unless there is a material change in financial circumstances. CC § 2923.6(g). Two cases illustrate how borrowers who had prior loan modification reviews can still obtain dual-tracking protections by demonstrating a change in financial circumstances. In *Bitker v. Suntrust Mortgage Inc.*, No. 13cv656-CAB (WMC) (S.D. Cal. Mar. 29, 2013) (more fully summarized below), the court granted the borrower a TRO, finding she had sufficiently demonstrated a “material change in her financial circumstances,” documented the change, and submitted her information to her servicer, renewing her modification application. Under § 2923.6(g) then, her servicer should have stopped all foreclosure proceedings while they re-evaluated her for a loan modification. The plaintiffs in *Winterbower v. Wells Fargo Bank, N.A.*, 2013 WL 1232997 (C.D. Cal. Mar. 27, 2013), on the other hand, made the same § 2923.6(g) argument but did not get a TRO. These borrowers wrote a letter telling their servicer that they had “decreased their expenses from $25,000 per month down to $10,000 per month.” The court agreed with defendant Wells Fargo that this letter did not meet the “documentation” and “submission” requirements in § 2923.6(g). *Id.* at *3.

Extension of HAMP and GSE-HAMP Programs


Summaries of Recent Cases

State Cases

Authority to Foreclose, CC § 2932.5, UCL Standing, and QWR Requirements

Jenkins v. JP Morgan Chase Bank, N.A., __ Cal. App. 4th __, 2013 WL 2145098 (May 17, 2013): A borrower may not prevent a FC by alleging, without a “specific factual basis,” that the beneficiary or the beneficiary’s agent does not have the authority to foreclose. This would effectively place an additional requirement on foreclosing entities (to prove their authority to foreclose) on top of the existing statutory requirements. Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1154-57 (2011). Nor do foreclosing entities need to prove they hold the promissory note to proceed with a nonjudicial FC. Debrunner v. Deutsche Bank Nat’l Trust Co., 204 Cal. App. 4th 433, 440-42 (2012). Finally, the foreclosing party does not require an actual beneficiary interest in both the promissory note and the DOT. Cal. Civ. Code § 2924 (a)(1) (giving broad authorization to foreclose to a “trustee, mortgagee, or beneficiary, or any of their authorized agents . . . .”).

California CC § 2932.5 pertains to mortgagees, granting their assignees the power to sell if the assignment is “duly acknowledged and recorded.” By contrast, DOTs give trustees the power to sell or transfer title. The recording requirements in § 2932.5, then, do not apply to assignments of DOTs, but only to mortgages. This reading of § 2932.5, while currently consistent with California state court rulings, has been questioned and rejected by federal courts. The California Supreme Court has yet to explicitly rule on the issue (see In re Cruz, below).

Under California’s Unfair Competition Law (UCL), a plaintiff must demonstrate (1) an injury in fact (lost money or property); (2) caused by the unfair competition. Cal. Bus. & Prof. Code § 17204. The initiation of FC proceedings can show a “diminishment of a future property interest” and qualify as an economic injury, supporting the first part of a UCL claim.
Injury and causation are also at the heart of a qualified written request (QWR)-based RESPA claim. 12 U.S.C. § 2605(e)(1)). Under federal pleading standards, a plaintiff must plead “specific facts” related to the QWR and show “pecuniary damages.” Allen v. United Fin. Mortg. Corp., 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009). The alleged harm must stem from the RESPA violation itself, rather than from the loan default. It would be difficult to show causation if a QWR was submitted after default and NOD because, in that circumstance, the alleged harm likely stemmed from the default itself rather than from a deficient QWR response.

**SOL Tolling and Lender Liability for Broker’s Fraud**

**Fuller v. First Franklin Fin. Corp., __ Cal. App. 4th __, 2013 WL 2326729 (May 1, 2013):** Under the doctrine of fraudulent concealment, a statute of limitations can toll if defendant’s concealment “has caused a claim to grow stale.” Arroyo v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1192 (2013). A plaintiff must show, “with the same particularity as with a cause of action for fraud:” 1) when they discovered the facts giving rise to the claim; 2) how they discovered those facts; and 3) why they did not discover the fraud earlier. Asking general questions about the loan at a closing does not indicate that borrowers were—or should have been—aware of a broker or appraiser’s deceptive practices. A borrower’s financial naiveté may be considered in evaluating an alleged deceptive and predatory real estate deal.

After a borrower first learns of deceptions or misappraisals, they may spend time negotiating with the original lender, finding a new lender, or attempting a loss mitigation strategy. They may, therefore, fail to immediately contact an attorney or otherwise act on their knowledge of the fraud. As a matter of law, these actions are reasonable and should not negatively affect the timeliness of a borrower’s claim.

Fraud claims rooted in allegations that a lender conspired with a broker to deceive or mislead borrowers, or that a broker acted as the lender’s agent in arranging deceptive loans both deserve to survive a demurrer.

allegation that a lender participated in a scheme to over-appraise properties, preying upon unqualified borrowers to bulk up the bundles of mortgages eventually sold to investors, is sufficiently particular. So too is an allegation that a lender gave their broker an undisclosed kickback from closing costs.

**Trial Period Plans: Enforceable Contracts and the Statute of Frauds Defense**


*Aurora Loan Servs. v. Akins*, 2013 WL 1876137 (Cal. App. Div. Super. Ct. Apr. 26, 2013): On an appeal from an unlawful detainer judgment, tenant argued that plaintiff’s 3-day notice to quit was improper under Cal. Civ. Proc. Code § 1161a(c) (requiring at least the length of the periodic tenancy for notices given to tenants after foreclosure). The trial court found defendant to be a bona fide, month-to-month tenant, but did not find the 3-day notice to vacate insufficient. The Court of Appeal found this to be in error and reversed the judgment because a tenant with a month-to-month tenancy should have received at least a 30-day notice.
Federal Cases

Financial Institution’s Duty of Care

Yau v. Deutsche Bank Nat’l Trust Co. Am., 2013 WL 2302438 (9th Cir. May 24, 2013): The Ninth Circuit remanded the case to decide whether the district court should have given plaintiffs the opportunity to add a negligence claim in light of Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872 (2013), which was decided after the district court’s initial ruling granting the bank’s motion to dismiss and denying leave to amend. The court discussed the split among California courts of appeal on the rigidity of the “general rule” from Nymark that the typical lender-borrower relationship does not give rise to a duty of care. By contrast, Jolley held that, due to public policy considerations expressed in the HBOR legislation, there is a triable issue of fact whether certain circumstances may give rise to a reasonable duty of care owed by a lender to a borrower. The court declined to resolve the conflict, but remanded the case for the district court to make that determination in the first instance.

Trial Period Plans: When a Servicer Must Offer a Permanent Modification

Young v. Wells Fargo Bank, N.A., __ F.3d __, 2013 WL 2165262 (1st Cir. May 21, 2013): A borrower’s compliance with a TPP contractually requires their servicer to offer a permanent loan modification. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 565-66 (7th Cir. 2012). Section 3 of the TPP in this case specified when Wells Fargo had to offer the permanent modification:

Provided I make timely payments during the Trial Period and both the Lender and I execute the Modification Agreement, I understand that my first modified payment will be due on the Modification Effective Date (i.e. on the first day of the month following the month in which the last Trial Period Payment is due).
This statement would reasonably lead the borrower to believe that the permanent loan modification would arrive and be in effect before the last day of the TPP. Compare this statement to the TPP’s Section 2.G.:

[The TPP] is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed.

Wells cited Section 2.G. as proof that they did not have to offer the permanent loan modification until some undefined time after the “effective date.” The court said Wells could not use Section 2.G. to “advance the unreasonable proposition that they can unilaterally render large swaths of the TPP nugatory.” The ambiguity between these two TPP sections was enough to survive a motion to dismiss.

“Debt Collector” Under California’s Rosenthal Act

In re Landry, ___ B.R. ___, 2013 WL 2211628 (Bankr. E.D. Cal. May 15, 2013): The incorporation of some of the provisions of the FDCPA into California’s Rosenthal Act does not mean the two laws, or their analyses, are identical. “Debt collector” has a much broader definition in the Rosenthal Act. The FDCPA refers to third-party debt collectors, whereas the Rosenthal Act indicates that any party acting to collect any debt (secured or unsecured) in the ordinary course of business can be a “debt collector.” This definition encompasses “a creditor attempting to collect any consumer debt owed to that creditor.” Since a loan servicer acts as a creditor’s agent in servicing the loan (debt) and foreclosing if necessary, the servicer is also considered a “debt collector” under the Rosenthal Act. A debt secured by real or personal property is no less a “debt” under the Rosenthal Act or FDCPA, and it remains a “debt” even after foreclosure proceedings begin. Foreclosure is simply a method of debt collection.

Trespass and Wrongful Eviction Claims in Lockout Case

Makreas v. First Nat’l Bank of N. Cal., 2013 WL 2436589 (N.D. Cal. June 4, 2013): After foreclosure, the bank changed the locks on the
borrower’s property instead of filing an unlawful detainer action. The borrower sued for trespass, wrongful eviction, conversion, forcible detainer, wrongful foreclosure, among other claims. The court granted summary judgment for the borrower on the trespass and wrongful eviction claims.

On the trespass claim, the court said that the borrower need only demonstrate peaceful possession, not “lawful possession,” to state a trespass claim. Here, the court granted summary judgment to the borrower on the trespass claim because he proved peaceful possession and trespass: 1) he kept a “reasonably significant amount of personal property” at the location; 2) he notified the trespassing party of his intent to possess the property and; 3) the trespassing party changed the locks without his permission.

The court also granted summary judgment for the borrower on the wrongful eviction claim because a successful trespass claim provides the basis for a successful wrongful eviction claim.

The court also denied the defendants’ motion for summary judgment on the plaintiff’s IIED claim and allowed the claim to proceed. The court noted that the act of foreclosure, by itself, does not rise to the “outrageous” threshold required by IIED claims, but locking out someone who was in peaceful possession of a property can be considered “outrageous” conduct. See Davenport v. Litton Loan Servicing, LP, 725 F. Supp. 2d 862, 884 (N.D. Cal. 2010).

Preemption; Res Judicata

**Hopkins v. Wells Fargo Bank, N.A.,** 2013 WL 2253837 (E.D. Cal. May 22, 2013): A national bank such as Wells Fargo cannot claim HOLA preemption simply because it bought a loan that originated with a federal savings association. If the conduct in question occurred after the bank became the successor-in-interest to the originating federal savings association, then the bank cannot claim HOLA preemption. See Gerber v. Wells Fargo Bank, N.A., 2012 WL 413997, at *4 (D. Ariz. Feb. 9, 2012) (holding that the National Banking Act applies to the conduct of national banks, regardless of loan origination).
If a foreclosing bank brings a successful unlawful detainer action against a borrower, and the “sole basis” for establishing the bank’s right to possession was proving “duly perfected” title, then a subsequent wrongful foreclosure claim against the bank is barred by res judicata if the basis for that claim is also validity of title.

**Promissory Estoppel**

*Panaszewicz v. GMAC Mortg., LLC*, 2013 WL 2252112 (N.D. Cal. May 22, 2013): There are four elements to promissory estoppel: 1) a clear and unambiguous promise; 2) reliance on that promise; 3) reliance that is reasonable and foreseeable; and 4) actual injury to the alleging party. Elements (2) and (4) are referred to collectively as “detrimental reliance.” If a borrower alleges that a servicer promised and then refused to postpone a FC sale, a borrower must show detrimental reliance by demonstrating a change in their activity instigated by the promise. They can do this by showing “preliminary steps” (like filing at TRO to stop the FC, or initiating a bankruptcy petition) which they withdrew because of the promise. It would be insufficient for a borrower to claim that they *would* have taken different action *if* the promise to postpone the sale had not been made.

A borrower may set aside the sale if they are able to cure their default and reinstate their loan prior to the FC sale. Absent such reinstatement, a borrower’s recovery under a promissory estoppel theory is limited to damages.

**Wrongful Foreclosure; HOLA Preemption**

*Nguyen v. JP Morgan Chase Bank N.A.*, 2013 WL 2146606 (N.D. Cal. May 15, 2013): A claim for wrongful foreclosure may be brought before the foreclosure sale if: plaintiff seeks to enjoin the sale alleging inaccurate or false mortgage documents and if plaintiff has received a NTS. Losing a home to foreclosure constitutes irreparable harm and injunctive relief is appropriate in that situation.

In assessing whether a foreclosing entity had the requisite power to foreclose, a court may take judicial notice of the existence of foreclosure documents, but should “not as a matter of law accept their contents as absolute.” If a borrower can allege problems in the chain of title with
enough specificity to challenge a servicer’s version of events, there is a triable issue of fact whether or the servicer (or other foreclosing entity) had the authority to foreclose. Servicers do have the power to foreclose, but only as the beneficiary’s “authorized agent.” CC § 2924(a)(1). If the beneficiary’s identity is unclear or disputed, this authorization would be difficult to prove; a servicer cannot claim they were the “authorized” agent of an unknown party.

Addressing the argument that § 2923.5 is preempted by federal law, the court chose the Home Owner Loan Act preemption analysis over the National Banking Act rubric even though JP Morgan Chase is a national bank. See DeLeon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (holding that if the loan originated with a federal savings association, a court should subject any successor-in-interest, even a national bank, to HOLA preemption). The court quickly found § 2923.5 preempted by HOLA on the basis that “an overwhelming number of federal courts” have deemed its notice and disclosure requirements as affecting the processing and servicing of mortgages.

CC § 2932.5’s Applicability to Deeds of Trust

In re Cruz, 2013 WL 1805603 (Bankr. S.D. Cal. Apr. 26, 2013): A federal bankruptcy court should follow decisions of intermediate state appellate courts (Lewis v. Tel. Employees Credit Union, 87 F.3d 1537 (9th Cir. 1996)) unless there is contrary controlling authority. Dimidowich v. Bell & Howell, 803 F.2d 1473 (9th Cir. 1986). The issue in this case is whether CC § 2932.5 applies to both mortgage and deed of trust assignments. State courts have consistently applied the statute exclusively to mortgages and the California Supreme Court denied review of, and declined to depublish, three Court of Appeal cases adopting this view. Ultimately, this court believed § 2932.5 applies to both DOTs and mortgages, but was extremely hesitant to predict how the California Supreme Court would rule on the issue. The court asked the parties to submit supplemental briefings on whether or not the court should discretionarily abstain from hearing this case.
CC § 2923.6 Dual Tracking Claim: Change in Financial Circumstances

Bitker v. Suntrust Mortg. Inc., No. 13cv656-CAB (WMC) (S.D. Cal. Mar. 29, 2013): The court granted the homeowner’s TRO application pursuant to the Homeowner Bill of Rights, citing her “reasonable chance of success on the merits . . . particularly as [her § 2923.6 claim] relate[s] to Defendants’ conduct during the loan modification proceedings.” Even though the homeowner was previously reviewed for a loan modification, the court held that she sufficiently demonstrated a “material change in her financial circumstances,” that allowed her to trigger § 2923.6’s dual tracking protection. The court agreed with previous decisions that foreclosure constitutes irreparable harm.

The court did not find a bond appropriate for two reasons. First, there is no “realistic harm” posed to the defendants in temporarily halting the foreclosure because their interests are secured by the DOT. Second, the court found that waiver of the bond was appropriate because the case “involves the enforcement of a public interest.”

Out of State Cases

Protecting Tenants at Foreclosure Act: Timing of Eviction

Fifth Third Mortg. Co. v. Foster, 2013 WL 2145931 (Ill. App. Ct. May 14, 2013): Under the Protecting Tenants at Foreclosure Act, purchasers at foreclosure sales may not commence eviction actions against tenants with leases until after the expiration of the lease. This holding is similar to that in Fontaine v. Deutsche Bank Nat’l Trust Co., 372 S.W.3d 257 (Tex. App. 2012), where the court remanded an eviction case to hear evidence on whether tenant had a “bona fide” lease under the PTFA.

HAMP 30-Day Foreclosure Postponement Requirements

Nivia v. Bank United, __ So. 3d __, 2013 WL 2218013 (Fla. Dist. Ct. App. May 22, 2013): HAMP Supplemental Directive 10-02 (Mar. 24, 2010) requires that a servicer or mortgagee postpone a foreclosure sale until 30 days after they notify a borrower of a modification denial. This 30-day postponement is not required if the borrower requested a
modification after the foreclosure date had already been established and the borrower’s application was denied because they were ineligible under HAMP.
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Leah Simon-Weisberg is the Legal Director of Tenants Together. Before joining TT, Leah was the managing attorney of the Anti-Predatory Lending and Home Mortgage Foreclosure Prevention Practice at Community Legal Services in East Palo Alto (CLSEPA). Leah previously served as co-Executive Director of the Eviction Defense Network (EDN) in Los Angeles, California. At EDN, Leah litigated over 1,000 unlawful detainer cases on behalf of tenants facing eviction in Los Angeles County. Leah has extensive experience providing education to legal service providers and tenants facing eviction.

Madeline Howard is a staff attorney with Western Center on Law and Poverty based in San Francisco. She focuses on tenant-in-foreclosure issues as part of the Homeowner Bill of Rights Collaborative. Madeline most recently worked as a staff attorney in the San Jose and San Francisco offices of Bay Area Legal Aid, where she represented low-income tenants against landlords and major lending institutions.

The HBOR Collaborative is funded by the Office of the California Attorney General under the national Mortgage Settlement. The Collaborative is a partnership of four organizations, National Housing Law Project, National Consumer Law Center, Tenants Together and Western Center on Law and Poverty. We offer free training, technical assistance, litigation support, and legal resources to California’s consumer attorneys and the judiciary on all aspects of the new California Homeowner Bill of Rights, including its tenant protections. The goal of the Collaborative is to ensure that California’s homeowners and tenants receive the intended benefits secured for them under the Homeowner
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