

**March 2016 Newsletter**

**In this issue:**

Newsletters are back on a new quarterly schedule!

Recent case summaries, including *Yvanova*, *Coker*, *Saterbak*, and more

Updated foreclosure practice guide, including a new table of contents

**California Foreclosure Defense Practice Guide  
(Updated through March 2016)**

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In July 2012, California Governor Jerry Brown signed the Homeowner Bill of Rights (HBOR).<sup>1</sup> This landmark legislation was created to combat the foreclosure crisis and hold banks accountable for exacerbating it.<sup>2</sup> HBOR became effective on January 1, 2013, on the heels of the National Mortgage Settlement.<sup>3</sup> This practice guide provides an overview of the legislation, quickly developing case law, and related state-law causes of action often brought alongside HBOR claims. Finally, the guide surveys common, HBOR-related litigation issues.

## I. Homeowner Bill of Rights

A few months before HBOR became law, 49 state attorneys general agreed to the National Mortgage Settlement (NMS) with five of the country's largest mortgage servicers.<sup>4</sup> The servicers agreed to provide \$20 billion worth of mortgage-related relief to homeowners and to abide by new servicing standards meant to address some of the worst foreclosure abuses.<sup>5</sup> Under the NMS, state attorneys general can sue noncompliant banks, but borrowers cannot.<sup>6</sup> The California

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<sup>1</sup> Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., Attorney General Kamala D. Harris Announces Final Components of California Homeowner Bill of Rights Signed into Law (Sept. 25, 2012), *available at* <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-final-components-california-homeown-0>.

<sup>2</sup> See A.B. 278, 2011-2012 Sess., Proposed Conf. Rep. 1, at 18 (June 27, 2012), *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0251-0300/ab\\_278\\_cfa\\_20120702\\_105700\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0251-0300/ab_278_cfa_20120702_105700_asm_floor.html) (“Some analysts and leading economists have cited a failure by banks to provide long term and sustainable loan modifications as a single reason that the foreclosure crisis continues to drag on.”).

<sup>3</sup> State of Cal. Dep't of Justice, Office of the Attorney Gen., Servs. & Info., California Homeowner Bill of Rights, <http://oag.ca.gov/hbor>.

<sup>4</sup> The U.S. Department of Justice, HUD, and state attorneys general filed claims against the five signatories (Ally/GMAC, Citigroup, Bank of America, JP Morgan Chase, and Wells Fargo) for deceptive and wrongful foreclosure practices. See Complaint at 21-39, *United States v. Bank of Am.*, No. 1:12-cv-00361-RMC (D.D.C. Mar. 12, 2012), *available at* [https://d9klfgibkqcuc.cloudfront.net/Complaint\\_Corrected\\_2012-03-14.pdf](https://d9klfgibkqcuc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf).

<sup>5</sup> For example, “robo-signing” and dual tracking. See Servicing Standards Highlights 1-3, <https://d9klfgibkqcuc.cloudfront.net/Servicing%20Standards%20Highlights.pdf>.

<sup>6</sup> See, e.g., *Citi Consent Judgment Ex. E*, § J(2), *United States v. Bank of Am.*, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at* [https://d9klfgibkqcuc.cloudfront.net/Consent\\_Judgment\\_Citibank-4-11-12.pdf](https://d9klfgibkqcuc.cloudfront.net/Consent_Judgment_Citibank-4-11-12.pdf) (“An

Legislature passed HBOR to give borrowers a private right of action to enforce these protections in court<sup>7</sup> and to apply these requirements to all servicers, not just the five NMS signatories.<sup>8</sup> These protections include pre-NOD outreach and single point of contact requirements and restrictions on dual-tracking.

There are significant limits to HBOR's application. First, HBOR applies only to foreclosures of first liens on owner-occupied, one-to-four unit properties.<sup>9</sup> Advocates should plead the "owner-occupied" requirement in the complaint,<sup>10</sup> but only one plaintiff need comply with it.<sup>11</sup> Second, HBOR only provides procedural protections to foster alternatives to foreclosure; nothing in HBOR requires a loan modification.<sup>12</sup> Third, HBOR offers fewer protections for borrowers

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enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee.”).

<sup>7</sup> See CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013); see also A.B. 278, *supra* note 2, at 22 (After California's nonjudicial foreclosure process was hit with the foreclosure crisis, this “place[ed] an overwhelming amount of authority and judgment in the hands of servicers . . . .”).

<sup>8</sup> Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., California Homeowner Bill of Rights Takes Key Step to Passage (June 27, 2012), <http://oag.ca.gov/news/press-releases/california-homeowner-bill-rights-takes-key-step-passage> (“The goal of the Homeowner Bill of Rights is to take many of the mortgage reforms extracted from banks in a national mortgage settlement and write them into California law so they could apply to all mortgage-holders in the state.”).

<sup>9</sup> See, e.g., *Rijhwani v. Wells Fargo Bank, N.A.*, 2015 WL 3466608, at \*18-19 (N.D. Cal. May 30, 2015) (HBOR not applicable to foreclosure on junior loan, even if both loans is owned by the same lender). “Owner-occupied’ means that the property is the principal residence of the borrower.” CAL. CIV. CODE § 2924.15(a) (2013).

<sup>10</sup> Failure to do so may be grounds for dismissal of HBOR claims. See, e.g., *Banuelos v. Nationstar Mortg., LLC*, 2014 WL 1246843, at \*3 (N.D. Cal. Mar. 25, 2014); *Kouretas v. Nationstar Mortg. Holdings, Inc.*, 2013 WL 6839099, at \*3 (E.D. Cal. Dec. 26, 2013); *Patel v. U.S. Bank*, 2013 WL 3770836, at \*6 (N.D. Cal. July 16, 2013) (dismissing, with leave to amend, borrower’s CC § 2923.5 pre-foreclosure outreach claim because borrowers had not alleged that the property was “owner-occupied”). *But cf.* *Cerezo v. Wells Fargo Bank, N.A.*, 2013 WL 4029274, at \*7 (N.D. Cal. Aug. 6, 2013) (finding failure to allege the “owner-occupied” element not fatal to borrower’s claim where defendant servicer had requested judicial notice of their NOD declaration in which defendant did not dispute owner-occupancy).

<sup>11</sup> *Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at \*5 (N.D. Cal. Aug. 7, 2014); *Agbowo v. Nationstar Mortg.*, 2014 WL 3837472, at \*5-6 (N.D. Cal. Aug. 1, 2014). Notably, the “owner-occupied” requirement may be different under HAMP rules, which is important for pre-HBOR causes of action dealing with TPP agreements. See, e.g., *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 306-07 (2014) (finding that “temporarily renting out [borrower’s] home” did not prevent him from demonstrating the home was still his “primary residence” as defined by HAMP).

<sup>12</sup> CAL. CIV. CODE § 2923.4(a) (2013).

with small servicers.<sup>13</sup> Fourth, when the National Mortgage Settlement (NMS) was in effect, a signatory who is NMS-compliant with respect to the individual borrower may assert compliance with the NMS as an affirmative defense.<sup>14</sup> Servicers have attempted to argue that, to allege HBOR claims, a borrower must plead a servicer's noncompliance with the NMS in the borrower's complaint. Courts have roundly rejected this tactic.<sup>15</sup> Relatedly, there is also a "safe harbor" provision protecting servicers that remedy their HBOR violations before completing the foreclosure by recording a trustee's deed upon sale.<sup>16</sup> Though still somewhat unsettled, "correct[ing] and remed[ying]" an HBOR violation should require rescinding any improperly recorded

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<sup>13</sup> Compare § 2924.12 (listing sections with a private right of action against large servicers), with § 2924.19 (listing sections with a private right of action against small servicers, defined as servicers that conducted fewer than 175 foreclosures in the previous fiscal year, as determined by CAL. CIV. CODE § 2924.18(b)). "Large servicers" are commonly known banks and the entities listed on the California Department of Business Oversight's website, available at [http://www.dbo.ca.gov/Laws & Regs/legislation/ca\\_foreclosure\\_reduction\\_act.asp](http://www.dbo.ca.gov/Laws & Regs/legislation/ca_foreclosure_reduction_act.asp). Advocates can verify a lesser-known servicer's licensing on that Department's webpage, available at <http://www.dbo.ca.gov/fsd/licensees/>, or can simply ask a servicer how many foreclosures they have conducted in the previous fiscal year.

<sup>14</sup> CAL. CIV. CODE § 2924.12(g) (2013). The NMS consent judgment was entered on April 4, 2012 and remains in effect for three and half years until October 2015.

<sup>15</sup> See *Gilmore v. Wells Fargo Bank*, 75 F. Supp. 3d 1255, 1262 (N.D. Cal. 2014) (rejecting servicer's argument that its NMS compliance is presumed and finding NMS compliance an affirmative defense to be proved by the servicer); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*7 (C.D. Cal. Nov. 19, 2014) (HBOR immunity based on NMS compliance is an affirmative defense best asserted by servicer at summary judgment, not as part of a motion to dismiss); *Segura v. Wells Fargo Bank, N.A.*, 2014 WL 4798890, at \*5-6 (C.D. Cal. Sept. 26, 2014) (same); *Stokes v. Citimortgage*, 2014 WL 4359193, at \*8 (C.D. Cal. Sept. 3, 2014) (same); *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*4 (N.D. Cal. May 13, 2014) (same); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*9 (N.D. Cal. Mar. 3, 2014) (same); cf. *Gilmore v. Wells Fargo Bank, N.A.*, 2014 WL 3749984, at \*3-4 (N.D. Cal. July 29, 2014) (Servicer's dual tracking and failure to provide borrower with an online portal to check his application status violated the NMS and prevented servicer from invoking the safe harbor to defend a preliminary injunction.); *Sese v. Wells Fargo Bank, N.A.*, No. 2013-00144287-CU-WE (Cal. Super. Ct. July 1, 2013) (granting a PI on borrower's dual tracking claim because servicer's offering of a modification does not, by itself, prove compliance with the NMS and because dual tracking violates the NMS, making servicer liable to a HBOR dual tracking claim).

<sup>16</sup> CAL. CIV. CODE §§ 2924.12(c), 2924.19(c) (2013). If the servicer waited until after a trustee's deed is recorded to correct the violation, the servicer becomes liable for damages between the date of the recording and the date the trustee's deed and foreclosure notices were rescinded. See *McLaughlin v. Aurora Loan Services*, 2015 WL 1926268, at \*4 (C.D. Cal. Apr. 28, 2015).

Notice of Default (NOD) or Notice of Trustee Sale (NTS).<sup>17</sup> Fifth, relief (in either the pre-sale injunctive form or as post-sale damages) is only available for a servicer’s “material” HBOR violations.<sup>18</sup> Courts have differed widely on what constitutes a material violation.<sup>19</sup> Some have concluded that materiality is a factual question that should not be resolved at the pleading stage.<sup>20</sup> Others suggest that every violation that undermines the purpose of HBOR is a material violation.<sup>21</sup> Other courts have considered whether it is plausible that the violation caused harm to the plaintiff.<sup>22</sup> Sixth, only “borrowers,” as defined by HBOR,

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<sup>17</sup> See *Hestrin v. Citimortgage*, 2015 WL 847132, at \*1 (C.D. Cal. Feb. 25, 2015) (finding that “the possibility [of a servicer’s] remediation does not render an ongoing breach moot” and that only rescinding an improperly recorded NOD could moot a borrower’s dual tracking claim); *Diamos v. Specialized Loan Servicing, LLC*, 2014 WL 3362259, at \*5 (N.D. Cal. July 7, 2014) (servicer’s rescinding of dual tracked NTS mooted borrower’s dual tracking claim); *Jent v. N. Tr. Corp.*, 2014 WL 172542, at \*6 (E.D. Cal. Jan. 15, 2014) (servicer’s rescinding of an improper NOD protected it from borrower’s negligence claim based on a CC 2923.55 violation); *Leonard v. JP Morgan Chase*, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (servicer’s rescission of NTS, but not NOD, insufficient to remedy dual tracking violation); *Pugh v. Wells Fargo Home Mortg.*, No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (A servicer must rescind a dual tracked NTS before moving forward with foreclosure; simply denying borrower’s modification application does not remedy a dual tracking violation.). *But cf.* *Gilmore v. Wells Fargo Bank*, 75 F. Supp. 3d 1255, 1265-66 (N.D. Cal. 2014) (rejecting borrower’s attempt to force servicer to rescind a dual tracked NTS because rescission is not a “remedy” under HBOR, but interpreting borrower’s cause of action as one for injunctive relief, rather than dismissing the claim).

<sup>18</sup> CAL. CIV. CODE §§ 2924.12(a), 2924.19(a) (2013). Neither statute defines a “material” violation.

<sup>19</sup> See *Rahbarian v. JP Morgan Chase*, 2015 WL 2345395, at \*3 (E.D. Cal. May 14, 2015) (listing various approaches and declining to choose a single test because plaintiff’s allegation that he would have qualified for loan modification absent the violation would satisfy any test).

<sup>20</sup> See, e.g., *Hestrin v. Citimortgage, Inc.*, 2015 WL 847132, at \*3 n.4 (C.D. Cal. Feb. 25, 2015); *Garcia v. PNC Mortg.*, 2015 WL 534395, at \*4-5 (N.D. Cal. Feb. 9, 2015); *Hixson v. Wells Fargo Bank*, 2014 WL 3870004, at \*6 (N.D. Cal. Aug. 6, 2014).

<sup>21</sup> *Green v. Wells Fargo Bank, N.A.*, 2015 WL 2159460, at \*3 (N.D. Cal. May 7, 2015); *Hendricks v. Wells Fargo Bank, N.A.*, 2015 WL 1644028, at \*8-9 (C.D. Cal. Apr. 14, 2015); *Rizk v. Residential Credit Solutions., Inc.*, 2015 WL 573944, at \*12 (C.D. Cal. Feb. 10, 2015).

<sup>22</sup> *Compare Mackensen v. Nationstar Mortg.*, 2015 WL 1938729 (N.D. Cal. Apr. 28, 2015) (finding material violation when the complaint alleged that Nationstar’s SPOC violation resulted in his inability to accept the loan modification offer); *Hestrin*, 2015 WL 847132, at \*3 (finding servicer’s failure to perform the required pre-NOD outreach under CC 2923.55 a material HBOR violation, rejecting servicer’s argument that borrower must plead that the outreach would have led him to avoid default) *with* *Colom v. Wells Fargo*, 2014 WL 5361421, at \*1-2 (N.D. Cal. Oct. 20, 2014) (servicer’s failure to cite NPV numbers in a denial letter, and the SPOC’s failure to return emails and phone calls not considered “material” violations of HBOR).

may sue under the statute.<sup>23</sup> This limitation may exclude borrowers in active bankruptcy,<sup>24</sup> but courts have found standing when the HBOR violation occurred prior to filing of bankruptcy.<sup>25</sup> Successors-in-interest who inherit the property may also find it difficult to assert HBOR's protections.<sup>26</sup> Finally, HBOR exempts bona fide purchasers from liability.<sup>27</sup>

### A. Pre-NOD Outreach Requirements

HBOR continued the existing requirement that a servicer may not record a notice of default (NOD) until 30 days after contacting,<sup>28</sup> or diligently attempting to contact, the borrower to discuss alternatives to foreclosure.<sup>29</sup> The statutes provide specific instructions on the nature and content of the communication.<sup>30</sup>

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<sup>23</sup> CAL. CIV. CODE § 2920.5(c) (2013).

<sup>24</sup> CAL. CIV. CODE § 2929.5(c)(2)(C).

<sup>25</sup> See *Foronda v. Wells Fargo Home Mortg., Inc.*, 2014 WL 6706815, at \*8 (N.D. Cal. Nov. 26, 2014) (rejecting section 2920.5(c) argument when HBOR violation predated bankruptcy filing, even though bankruptcy remained pending); *Withers v. J.P. Morgan Chase Bank N.A.*, 2014 WL 3418367, at \*5 (N.D. Cal. July 11, 2014) (rejecting section 2920.5(c) argument “because Plaintiff did not have a bankruptcy case pending when the Notice of Trustee’s Sale was recorded”).

<sup>26</sup> See *Van Zandt v. Select Portfolio Servicing, Inc.*, 2015 WL 574357 (N.D. Cal. Feb. 10, 2015) (denying TRO because plaintiff was not the borrower but successor to the borrower); *Zanze v. Cal. Capital Loans Inc.*, No. 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (The mortgage note indicated that plaintiff, through his capacity as trustee, was a “borrower” with standing to allege a dual tracking claim.); *cf. McLaughlin v. Aurora Loan Services*, 2015 WL 1926268, at \*7-9 (C.D. Cal. Apr. 28, 2015) (rejection argument that plaintiff was not a “borrower” unless she reaffirms the discharged mortgage loan); *Chaghouri v. Wells Fargo Bank, N.A.*, 2015 WL 65291 (N.D. Cal. Jan. 5, 2015) (rejecting section 2920.5 argument when servicer treated the plaintiff as “borrowers” in the Notice of Default). Senate Bill 1150, introduced in the California legislature in early 2016, seeks to expand the definition of “borrower” to include certain types of successors-in-interest.

<sup>27</sup> CAL. CIV. CODE §§ 2924.12(e), 2924.19(e).

<sup>28</sup> Contact is specifically required 30 days *before* recording an NOD. If a servicer fulfills this requirement and then does not contact borrower within the 30 days *leading up to* the NOD, that is not a violation of either the pre-HBOR or HBOR version of the law. See *Rosberg v. Bank of Am., N.A.*, 219 Cal. App. 4th 1481, 1494 (2013).

<sup>29</sup> See CAL. CIV. CODE §§ 2923.5(a) & 2923.55(a) (2013) (applying to small and large servicers, respectively). For specific due diligence requirements, see §§ 2923.5(e)(1)-(5) & 2923.55(f)(1)-(5) (2013). Refer to CEB, CALIFORNIA MORTGAGES, DEEDS OF TRUST, AND FORECLOSURE LITIGATION (4th. ed. 2016), for a more detailed explanation of the similarities and differences between pre-existing law and HBOR.

<sup>30</sup> See *McNeil v. Wells Fargo Bank, N.A.*, 2014 WL 6681604, at \*4 (N.D. Cal. Nov. 25, 2014) (allowing borrowers to assert a pre-NOD outreach claim based on servicer’s

With each version of the law, some courts accept bare assertions that a borrower was never contacted pre-NOD as sufficient to pass the pleading stage,<sup>31</sup> while others require more specific allegations to overcome a servicer's NOD declaration attesting to its due diligence.<sup>32</sup> Because the statute requires the servicer to initiate specific contact, *borrower*-initiated loan modification inquiries, or general contact, does not satisfy the pre-NOD contact requirements.<sup>33</sup>

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failure to provide borrowers with a copy of the note, identify the loan beneficiary, or any assignment or accounting of the loan); *Maomanivong v. Nat'l City Mortg., Co.*, 2014 WL 4623873, at \*8-9 (N.D. Cal. Sept. 15, 2014) (servicer's failure to discuss every foreclosure alternative available, not just the fact that borrower must be delinquent to qualify for one, led to borrower's valid pre-NOD outreach claim).

<sup>31</sup> See *Tavares v. Nationstar Mortg., LLC*, 2014 WL 3502851, at \*6-7 (S.D. Cal. July 14, 2014); *Garcia v. Wells Fargo Bank, N.A.*, 2014 WL 458208, at \*4 (N.D. Cal. Jan. 31, 2014); *Cerezo v. Wells Fargo Bank, N.A.*, 2013 WL 4029274, at \*7 (N.D. Cal. Aug. 6, 2013); *Intengan v. BAC Home Loans Servicing, LP*, 214 Cal. App. 4th 1047, 1057-58 (2013) (overruling trial court's sustaining of servicer's demurrer to borrower's 2923.5 claim because borrower disputed veracity of NOD declaration); *Skov v. Bank Nat'l Ass'n*, 207 Cal. App. 4th 690, 696 (2012) (same).

<sup>32</sup> See *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*2-4 (E.D. Cal. Oct. 2, 2013) (reading a CC 2923.5 claim into borrower's pleading based on his allegations that: 1) servicer never made pre-NOD contact; 2) borrower was available by phone and mail; and 3) borrower's answering machine recorded no messages from servicer); *Weber v. PNC Bank, N.A.*, 2013 WL 4432040, at \*5 (E.D. Cal. Aug. 16, 2013) (Borrower successfully pled servicer did not and *could not* have possibly contacted borrower pre-NOD because: 1) borrower's home telephone number remained the same since loan origination; 2) servicer had contacted borrower in the past; 3) answering machine recorded no messages from servicer; and 4) borrower never received a letter from servicer.). *But see* *Caldwell v. Wells Fargo Bank, N.A.*, 2013 WL 3789808, at \*6 (N.D. Cal. July 16, 2013) (finding borrower unlikely to prevail on her CC 2923.5 claim, relying on servicer's NOD declaration that it had attempted to contact borrower with "due diligence" before recording the NOD); *but cf.* *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*3-4 (C.D. Cal. Oct. 24, 2014) (failing to find that servicer's inaccurate NOD declaration prejudiced borrower, and granting servicer's MTD).

<sup>33</sup> See, e.g., *Castillo v. Bank of Am.*, 2014 WL 4290703, at \*5 (N.D. Cal. Aug. 29, 2014) (modification eligibility discussions do not, by themselves, satisfy the requirements of CC 2923.55); *Woodring v. Ocwen Loan Servicing, LLC*, 2014 WL 3558716, at \*3-4 (C.D. Cal. July 18, 2014) (finding borrower's multiple, pre-NOD modification applications not fatal to her CC 2923.55 claim because servicer failed to "respond meaningfully" to these applications and no real foreclosure alternative discussion took place); *Mungai v. Wells Fargo Bank*, 2014 WL 2508090, at \*10-11 (N.D. Cal. June 3, 2014) (considering borrower's modification application submission and servicer's acceptance letter "coincidental contact" that did not absolve servicer of its obligation to reach out to borrower "via specific means about specific topics"). *But see* *Maomanivong*, 2014 WL 4623873, at \*8-9, n.9 (Borrower-initiated contact can meet statutory requirements.); *Johnson v. SunTrust Mortg.*, 2014 WL 3845205, at \*4 (C.D. Cal. Aug. 4, 2014) (dismissing borrower's CC 2923.55 claim because he admitted to multiple, pre-NOD discussions with servicer regarding his financial situation and loan modification options. That servicer did not explicitly inform borrower about the

HBOR’s pre-NOD outreach requirements expand upon existing communication requirements. For example, the former Civil Code Section 2923.5 only applied to deeds of trust originated between 2003 and 2007; HBOR removed this time limitation.<sup>34</sup> Borrowers who successfully brought claims under the pre-HBOR law were limited to postponing a foreclosure until the servicer complied with the outreach requirements.<sup>35</sup> Enjoining a sale is still a remedy, but HBOR makes damages available after a foreclosure sale.<sup>36</sup>

HBOR requires a number of additional outreach requirements from large servicers. These servicers must alert borrowers that they may request documentation demonstrating the servicer’s authority to foreclose.<sup>37</sup> They are also required to provide *post*-NOD outreach if the borrower has not yet exhausted the loan modification process.<sup>38</sup>

## **B. Single Point of Contact**

Large servicers must also provide borrowers with a single point of contact, or “SPOC.” Specifically, “upon request from a borrower who requests a foreclosure prevention alternative, the . . . servicer shall promptly establish a [SPOC]”<sup>39</sup> and provide borrower with a “direct

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face-to-face meeting opportunity, or provide HUD information, does not violate CC 2923.55.).

<sup>34</sup> Compare CAL. CIV. CODE § 2923.5 (2012), with §§ 2923.5 & 2923.55 (2013).

<sup>35</sup> See, e.g., *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 214 (2010) (“The right of action is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.”).

<sup>36</sup> CAL. CIV. CODE §§ 2924.12 & § 2924.19 (2013) (applying to large and small servicers, respectively).

<sup>37</sup> Compare § 2923.5 (2013) (small servicers), with § 2923.55(b)(1)(B) (2013) (large servicers). See *Rahbarian v. JP Morgan Chase*, 2014 WL 5823103, at \*3 (E.D. Cal. Nov. 10, 2014) (finding borrower’s assertion that he never received the notices required by CC 2923.55 sufficient to state a claim and rejecting servicer’s argument that its NOD declaration—which did not discuss this new disclosure aspect of CC 2923.55—signified its compliance with the statute); *Johnson*, 2014 WL 3845205, at \*4 (finding a viable pre-NOD outreach claim where borrower pled he never received written notice regarding his option to request loan documents).

<sup>38</sup> CAL CIV. CODE § 2924.9 (2013) (requiring servicers that routinely offer foreclosure alternatives to contact the borrower within five days of NOD recordation, explain those alternatives, and explain exactly how to apply).

<sup>39</sup> § 2923.7 (2013); see *Pura v. Citimortgage, Inc.*, 2015 WL 81980, at \*1 (C.D. Cal. Jan. 2, 2015) (finding a viable SPOC claim where borrower spoke with servicer representatives, but was never assigned an identifiable SPOC); *Lapper v. Suntrust Mortg., N.A.*, 2013 WL 2929377, at \*3 (C.D. Cal. June 7, 2013) (finding borrower’s

means of communication” with that SPOC.<sup>40</sup> Some servicers have argued the statutory language requires borrowers to specifically request a SPOC to be assigned one. Though this argument initially gained some traction,<sup>41</sup> several federal district courts have recently rejected it, finding a borrower’s request for a foreclosure alternative triggers servicer’s duty to assign a SPOC.<sup>42</sup>

The SPOC provision was intended to reduce borrowers’ frustrations as they attempt to contact their servicers and to gain useful information about the loan modification process. SPOCs may be a “team” of people, not necessarily a single person.<sup>43</sup> Many courts have considered SPOC “shuffling” and there appears to be no clear pattern on this issue; some find that incessant SPOC reassignments constitute a valid SPOC claim,<sup>44</sup> while others require borrower to plead that, not only were SPOCs shuffled, but that none of the SPOCs could perform

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allegation that she never received a SPOC sufficient to show a likelihood of success on the merits for a TRO).

<sup>40</sup> CAL CIV. CODE § 2923.7 (2013); *Johnson*, 2014 WL 3845205, at \*6 (Borrower adequately pled his SPOC claim by alleging no one from his SPOC “team” was directly reachable.).

<sup>41</sup> *See, e.g.*, *Rizk v. Residential Credit Solutions, Inc.*, 2015 WL 573944, at \*9 (C.D. Cal. Feb. 10, 2015) (agreeing with servicer that borrower had to specifically request a SPOC to trigger servicer’s SPOC obligations and dismissing borrower’s claim).

<sup>42</sup> *See, e.g.*, *Hild v. Bank of Am., N.A.*, 2015 WL 401316, at \*7 (C.D. Cal. Jan. 29, 2015); *McFarland v. JP Morgan Chase Bank*, 2014 WL 4119399, at \*11 (C.D. Cal. Aug. 21, 2014); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 1000 (N.D. Cal. 2014); *Mungai v. Wells Fargo Bank*, 2014 WL 2508090, at \*10 (N.D. Cal. June 3, 2014); *cf. Hendricks v. Wells Fargo Bank, N.A.*, 2015 WL 1644028, at \*9 (C.D. Cal. Apr. 14, 2015) (no request required for claim that SPOC was inadequate if a SPOC was assigned); *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*6 (C.D. Cal. Oct. 24, 2014) (To fulfill SPOC duties and comply with HBOR’s dual tracking rules, a SPOC must necessarily be appointed before an NOD is recorded.); *Hixson v. Wells Fargo Bank*, 2014 WL 3870004, at \*5, n.4 (N.D. Cal. Aug. 6, 2014) (Servicer’s argument that borrower must specifically request a SPOC is mooted by servicer’s assignment of SPOCs.); *see also* Cal. Assem. Floor Analysis, AB 278 (2011-2012 Reg. Sess.), July 2, 2012, p. 5, ¶ (9) (conference committee amendments “[p]rovide for a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact”).

<sup>43</sup> CAL. CIV. CODE § 2923.7(e) (2013).

<sup>44</sup> *See, e.g.*, *Cortez v. Citimortgage Inc.*, 2014 WL 7150050, at \*6 (C.D. Cal. Dec. 11, 2014) (finding a shuffling of SPOCs prohibited by statute, noting that borrower did not allege she was reassigned to “different members of a team which comprised her SPOC; she alleges that the SPOCs themselves changed”); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*9 (C.D. Cal. Nov. 19, 2014) (shuffling SPOCs and the SPOCs’ inability to relay deadlines and requests for missing documents constitute SPOC violations); *see also* *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*6 (C.D. Cal. Oct. 24, 2014) (finding servicer’s computer-generated form letters insufficient evidence that borrower was appointed a “team” of SPOCs).

their statutory duties.<sup>45</sup> To bring a valid claim based on SPOC shuffling, advocates should allege SPOC violations with as much specificity as possible.<sup>46</sup>

In either the “team” or individual form, SPOCs must provide the borrower with information about foreclosure prevention alternatives,<sup>47</sup> deadlines for applications, how and where a borrower should submit their application, and must alert the borrowers if any documents are missing.<sup>48</sup> Critically, the SPOC must have access to the information and servicer personnel “to timely, accurately, and adequately inform the borrower of the current status of the [application]”<sup>49</sup> and be able to

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<sup>45</sup> Johnson v. PNC Mortgage, 80 F. Supp. 3d 980, 986-88 (N.D. Cal. 2015) (finding a viable claim (alleged as a UCL claim) where none of borrower’s many “assigned” SPOCs could perform SPOC duties); Hild v. Bank of Am., N.A., 2015 WL 401316, at \*7 (C.D. Cal. Jan. 29, 2015) (A mere shuffling of SPOCs does not constitute a violation, but denying servicer’s MTD borrower’s SPOC claim because none of the SPOCs performed their statutory duties.); Johnson v. Bank of Am., 2015 WL 351210, at \*5-6 (N.D. Cal. Jan. 23, 2015) (same); Rahbarian v. JP Morgan Chase, 2014 WL 5823103, at \*4 (E.D. Cal. Nov. 10, 2014) (simple allegation that servicer shuffled SPOCs, without more factual information, insufficient to state a SPOC violation); Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at \*7 (C.D. Cal. July 9, 2014) (granting a PI based on borrower’s allegations he was shuffled from SPOC to SPOC and none could provide him with the status of his modification application); Diamos v. Specialized Loan Servicing, LLC, 2014 WL 3362259, at \*4 (N.D. Cal. July 7, 2014) (Borrower pled viable SPOC claim where none of servicer representatives had the “knowledge or authority” to perform SPOC duties (complaint dismissed on jurisdictional grounds.)); Mann v. Bank of Am., N.A., 2014 WL 495617, at \*4 (C.D. Cal. Feb. 3, 2014) (finding shuffling SPOCs to violate the statute; even if the SPOCs were a team, no member of the team was able to perform the required duties). *But cf.* Boring v. Nationstar Mortg., LLC, 2014 WL 2930722, at \*3 (E.D. Cal. June 27, 2014) (rejecting borrower’s argument that multiple SPOCs, none of whom could perform SPOC duties, stated a valid CC 2923.7 claim).

<sup>46</sup> See Hestrin v. Citimortgage, 2015 WL 847132, at \*4, n.6 (C.D. Cal. Feb. 25, 2015) (granting servicer’s MTD borrower’s SPOC claim because the borrower did not state the “who, what, or when” of the alleged SPOC violation, including descriptions of conversations with different representatives).

<sup>47</sup> Nasseri v. Wells Fargo Bank, N.A., \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7429447, at \*5 (N.D. Cal. Nov. 23, 2015) (holding that advising borrower to apply for a loan modification when the loan had exceeded the total number of modifications allowed by the investor and failure to set up a borrower with the correct type of payment method under a forbearance agreement to violate CC 2923.7).

<sup>48</sup> CAL. CIV. CODE § 2923.7(b)(1)-(2); see Garcia v. Wells Fargo Bank, N.A., 2014 WL 458208, at \*4 (N.D. Cal. Jan. 31, 2014) (finding SPOC’s failure to follow up on loan modification request to violate CC 2923.7).

<sup>49</sup> CAL. CIV. CODE § 2923.7(b)(3)-(4) (2013). *Compare* Colom v. Wells Fargo, 2014 WL 5361421, at \*1-2 (N.D. Cal. Oct. 20, 2014) (denying borrower’s SPOC claim because the SPOC’s failure to return phone calls and emails was not shown to be a material violation of SPOC duties and because borrower was ultimately informed of his application’s status by the denial letter), *with* McLaughlin v. Aurora Loan Services,

make important decisions like stopping a foreclosure sale.<sup>50</sup> At least one court has held that a servicer cannot avoid SPOC obligations by simply claiming there is “nothing to communicate” after denying borrower’s application.<sup>51</sup> Because SPOC violations are independent from dual tracking violations, borrowers may proceed on SPOC claims even if there is no dual tracking violation.<sup>52</sup>

### C. Dual Tracking

In addition to mandating outreach and communication, the California Legislature has reined in dual tracking, the practice of evaluating a borrower for a modification while simultaneously proceeding with a foreclosure. If the borrower has submitted a complete loan modification application, HBOR prohibits the servicer from “recording” an NOD or NTS, or “conducting” a foreclosure sale.<sup>53</sup> Courts disagree on the meaning of this statutory language.<sup>54</sup>

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LLC, 2014 WL 1705832, at \*5 (C.D. Cal. Apr. 28, 2014) (denying motion to dismiss because borrower sufficiently alleged that SPOC did not timely return borrower’s calls and emails).

<sup>50</sup> CAL. CIV. CODE § 2923.7(b)(5) (2013); *Segura v. Wells Fargo Bank, N.A.*, 2014 WL 4798890, at \*6-7 (C.D. Cal. Sept. 26, 2014) (finding a valid SPOC claim where borrowers alleged servicer representative falsely informed borrowers the sale would be postponed).

<sup>51</sup> *Arbib v. Nationstar Mortg.*, 2014 WL 6612414, at \*6 (S.D. Cal. Nov. 19, 2014) (rejecting servicer’s argument that an unresponsive SPOC had “nothing to communicate” where borrower alleged the SPOC failed to consider updated financial information).

<sup>52</sup> See *McLaughlin v. Aurora Loan Services*, 2015 WL 1926268, at \*7 (C.D. Cal. Apr. 28, 2015) (listing cases); *Salazar v. U.S. Bank Nat’l Ass’n*, 2015 WL 1542908, at \*3-7 (C.D. Cal. Apr. 6, 2015); *Mann v. Bank of Am., N.A.*, 2014 WL 495617, at \*3-4 (C.D. Cal. Feb. 3, 2014).

<sup>53</sup> CAL. CIV. CODE §§ 2923.6(c) (large servicers), 2924.18 (small servicers) (2013).

<sup>54</sup> Compare *Foronda v. Wells Fargo*, 2014 WL 6706815, at \*6 (N.D. Cal. Nov. 26, 2014) (scheduling and refusing to postpone a sale is “conducting” a sale and prohibited by statute), *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5 (C.D. Cal. Jan. 3, 2014) (finding the *servicing* of an NOD and NTS on borrowers to violate CC 2923.6), *Pittell v. Ocwen Loan Servicing, LLC*, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (dual tracking protections require a servicer to postpone or cancel an impending sale, regardless of the exact statutory language), and *Singh v. Wells Fargo Bank, N.A.*, No. 34-2013-00151461-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Feb. 24, 2014) (finding servicer’s notice to borrower that a sale had been briefly postponed (but would ultimately occur) as “conducting a sale” and a dual tracking violation), with *Arbib*, 2014 WL 6612414, at \*7 (no dual tracking claim where servicer repeatedly threatened to record an NOD, but had not actually done so), *Johnson v. SunTrust Mortg.*, 2014 WL 3845205, at \*5 (C.D. Cal. Aug. 4, 2014) (merely keeping a sale ‘scheduled’ (*i.e.*,

Regardless of whether postponing a sale is considered “conducting” a sale, however, injunctive relief based on dual tracking claims is still possible when the sale has been postponed.<sup>55</sup>

## 1. Timing logistics

Dual tracking protections apply even if the loan modification application was submitted prior to 2013, as long as the servicer moved forward with a foreclosure after January 1, 2013, with the application still pending.<sup>56</sup> The borrower must submit an application within the reasonable timeframe specified by the servicer, and HBOR does not include additional deadlines or timetables related to application submission: a borrower may therefore submit an application up to the day of the sale, and a servicer may not avoid HBOR liability by imposing its own internal deadlines if those deadlines are unreasonable.<sup>57</sup> Servicers may maintain internal policies with regards

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refusing to cancel it) does not violate CC 2923.6), *and* *McLaughlin v. Aurora Loan Servs.*, 2014 WL 1705832, at \*6 (C.D. Cal. Apr. 28, 2014) (finding that only a *recording* of an NTS, not simply *servicing* an NTS or scheduling a sale, violates HBOR’s dual tracking statute).

<sup>55</sup> *See, e.g.*, *Young v. Deutsche Bank Nat’l Trust Co.*, 2013 WL 3992710, at \*2 (E.D. Cal. Aug. 2, 2013) (allowing borrowers leave to amend their complaint to include a dual tracking claim even though servicer had voluntarily postponed the sale and was negotiating a modification with borrowers); *Leonard v. JP Morgan Chase Bank, N.A.*, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014) (granting preliminary injunction even though servicer postponed the sale).

<sup>56</sup> *See Boring v. Nationstar Mortg.*, 2014 WL 66776, at \*4 (E.D. Cal. Jan. 7, 2014) (application submitted in 2012); *Ware v. Bayview Loan Servicing, LLC*, 2013 WL 6247236, at \*5-6 (S.D. Cal. Oct. 29, 2013) (application submitted in 2010); *Lapper v. Suntrust Mortg., N.A.*, 2013 WL 2929377, at \*1-2 (C.D. Cal. June 7, 2013) (application submitted sometime in 2011 or 2012); *Singh v. Bank of Am., N.A.*, 2013 WL 1858436, at \*2 (E.D. Cal. May 2, 2013) (application submitted in 2012).

<sup>57</sup> *See Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*5 (N.D. Cal. Apr. 16, 2014) (rejecting servicer’s argument that borrower’s application does not deserve dual tracking protection because servicer does not offer modifications to borrowers who submit their applications less than seven days before a foreclosure sale); *Valbuena v. Ocwen Loan Servicing*, 237 Cal. App. 4th 1267, 1274-75 (2015) (Even though the borrower submitted additional documents after the servicer’s deadline of seven business days prior to date of scheduled foreclosure sale, borrower adequately pled a complete application by “alleging the submission of the loan modification application three days after receipt of the Offer Letter, and the transmittal of the additional documents requested by Ocwen on the date of request.”); *see also Penermon v. Wells Fargo Home Mortg.*, 2014 WL 4273268, at \*4 (N.D. Cal. Aug. 28, 2014) (finding a viable dual tracking claim where borrower alleged she submitted a complete application within one month of receiving servicer’s request for additional documents; borrower did not need to allege the specific date

to their ultimate denial or grant of a modification, including a policy denying all applications submitted on the eve of sale, but that servicer would still need to notify the borrower of the denial in writing, and wait for the appeal period to pass (or process borrower’s appeal) before proceeding with foreclosure.

Within five business days of receiving a loan modification application –“or any document in connection with a[n] . . . application”– the servicer must provide borrowers with written acknowledgement of receipt that includes a description of the modification process, pertinent deadlines, and notification if documents are missing.<sup>58</sup> If a servicer offers a modification, borrowers have 14 days to accept or reject that offer before the servicer can move ahead with foreclosure.<sup>59</sup> When an application is denied, the servicer must explain appeal rights, give specific reasons for investor-based denials, report NPV numbers, and describe foreclosure alternatives still available.<sup>60</sup> Further, servicers may not proceed with the

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she submitted the application, or that it complied with servicer’s internal submission deadline to bring a dual tracking claim).

<sup>58</sup> CAL. CIV. CODE § 2924.10(a) (2013); *Hestrin v. Citimortgage*, 2015 WL 847132, at \*4 (C.D. Cal. Feb. 25, 2015) (finding a viable claim by inferring servicer did not timely acknowledge receipt of borrower’s application because borrower submitted the application 25 days before receiving a response); *Pura v. Citimortgage, Inc.*, 2015 WL 81980, at \*1 (C.D. Cal. Jan. 2, 2015) (finding a viable claim where servicer never acknowledged any of borrower’s application materials in writing); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*10 (C.D. Cal. Nov. 19, 2014) (finding a viable claim where servicer failed to alert borrower it required utility bills to verify her address, then later denied her application for failing to provide those bills). *But see Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*7 (C.D. Cal. Oct. 24, 2014) (dismissing borrower’s claim for failure to plead any harm suffered from a clear violation of CC 2924.10).

<sup>59</sup> CAL. CIV. CODE § 2923.6(c)(2) (2013). A borrower’s counteroffer, or request to continue negotiations, is considered a rejection of servicer’s offer. *See Johnson v. PNC Mortg.*, 2014 WL 6629585, at \*6 (N.D. Cal. Nov. 21, 2014). A reinstatement plan is not a modification offer under this section. *See Gardenswartz v. Suntrust Mortg. Inc.*, 2015 WL 900638, at \*4-5 (C.D. Cal. Mar. 3, 2015).

<sup>60</sup> CAL. CIV. CODE § 2923.6(f) (2013); *see Weber v. PNC Bank*, 2015 WL 269473, at \*5 (E.D. Cal. Jan. 21, 2015) (finding a valid dual tracking claim where servicer used incorrect income figures to miscalculate borrowers’ NPV numbers, denied their modification, and vaguely dismissed their appeal); *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*5 (N.D. Cal. May 13, 2014) (borrower pled viable dual tracking claim based on servicer’s failure to provide reason for modification denial or notice of appeal rights). *But see Colom v. Wells Fargo*, 2014 WL 5361421, at \*1 (N.D. Cal. Oct. 20, 2014) (finding servicer’s failure to cite NPV numbers or explain other foreclosure alternatives in borrower’s denial letter did not violate CC 2923.6(f) because the denial was not predicated on the NPV test and borrower did not show why servicer’s failure to list alternatives was a material violation). This provision

foreclosure until 31 days after denying borrower's application, in writing,<sup>61</sup> or 15 days after denying borrower's appeal.<sup>62</sup> Servicers are prohibited from charging borrowers late fees during either the application or appeal processes.<sup>63</sup> HBOR creates a procedural framework for requiring a decision on pending loan modification applications before initiating or proceeding with a foreclosure, but the statute does not require any particular result from that process.<sup>64</sup>

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only applies to loan *modification* applications, not to other foreclosure prevention alternatives. *See Ware*, 2013 WL 6247236, at \*5 (S.D. Cal. Oct. 29, 2013) (granting servicer's motion to dismiss borrower's CC 2923.6(f) claim because servicer was not required to give reasons for a short sale denial).

<sup>61</sup> CAL. CIV. CODE § 2923.6(d) (2013); *see Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5 (C.D. Cal. Jan. 3, 2014) (denying MTD because the borrower received denial only seven days before sale); *Vasquez v. Bank of Am., N.A.*, 2013 WL 6001924, at \*6, 9 (N.D. Cal. Nov. 12, 2013) (denying servicer's motion to dismiss because servicer recorded an NTS without waiting the 30-day appeal period after denying borrower's application); *Monterrosa v. PNC Bank, No. 34-2014-00162063-CU-OR-GDS* (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (granting borrower's preliminary injunction because servicer recorded an NTS before providing a written denial of borrower's pending modification application).

<sup>62</sup> CAL CIV. CODE § 2923.6(e)(1)-(2) (2013); *see Lane v. Citimortgage*, 2014 WL 5036512, at \*1 (E.D. Cal. Oct. 7, 2014) (granting a TRO because borrower pled servicer planned to continue with sale before responding to borrower's timely appeal and because servicer may have denied borrower based on incorrect information); *McLaughlin v. Aurora Loan Services, LLC*, 2014 WL 1705832, at \*6 (C.D. Cal. Apr. 28, 2014) (finding a dual tracking violation when servicer moved forward with foreclosure during pending appeal). *But see Lane v. Citimortgage, Inc.*, 2014 WL 6670648, at \*4 (E.D. Cal. Nov. 21, 2014) (dissolving the court's previous TRO (*see above*) and denying a PI because servicer *had* formally denied borrower's appeal before the TRO and had postponed the sale for more than 15 days post-denial, complying with the statute).

<sup>63</sup> CAL. CIV. CODE § 2924.11(f) (2013); *see also Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS* (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (finding a viable fee-related claim where borrower pointed to servicer's written notice his account was "incurring delinquency related fees and charges" while his modification application was pending). *But see Beck v. Ocwen Loan Servs., LLC*, 2015 WL 519052, at \*3 (C.D. Cal. Feb. 6, 2015) (rejecting borrowers' fee claim because they alleged only that servicer threatened to charge fees during the modification process, not that servicer *actually* exacted those fees).

<sup>64</sup> CAL. CIV. CODE § 2923.4 (2013) ("Nothing in this act that added this section, however, shall be interpreted to require a particular result of that process."); *Young v. Deutsche Bank Nat'l Tr. Co.*, 2013 WL 4853701, at \*2 (E.D. Cal. Sept. 10, 2013) (rejecting borrower's claim that offered modification was unreasonable or not in good faith); *Caldwell v. Wells Fargo Bank, N.A.*, 2013 WL 3789808, at \*5-6 (N.D. Cal. July 16, 2013); *cf. Dotter v. JP Morgan Chase Bank, No. 30-2011-00491247* (Cal. Super. Ct. Orange Cnty. Oct. 31, 2013) (*TPP contract*, not HBOR, required servicer to offer a permanent modification similar to TPP and "better than" original loan agreement.).

## 2. “Complete” applications

Court decisions to date have illustrated the importance of submitting a “complete” application to trigger HBOR’s dual tracking protections. The grant or denial of a TRO or preliminary injunction has often turned on whether the borrower had a complete modification application.<sup>65</sup> An application may be complete even if the servicer states that it may request further documentation.<sup>66</sup> Some courts have declined to decide the “completeness” of an application during the pleading stages of litigation.<sup>67</sup> Recently, courts have considered

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<sup>65</sup> Compare *Gilmore v. Wells Fargo Bank, N.A.*, 2014 WL 3749984, at \*5 (N.D. Cal. July 29, 2014) (granting the PI and finding “at least serious questions” going to the completeness of borrower’s application where servicer verbally requested unnecessary information from borrower in a confusing manner), and *Masset v. Bank of Am., N.A.*, 2013 WL 4833471, at \*2-3 (C.D. Cal. Sept. 10, 2013) (granting a TRO in part because borrower produced emails from the servicer, acknowledging receipt of an application and stating “no further documentation” was required), with *Lindberg v. Wells Fargo Bank, N.A.*, 2013 WL 1736785, at \*3 (N.D. Cal. Apr. 22, 2013) (denying TRO when borrower failed to respond to servicer’s request for further documentation); see also *Stokes v. Citimortgage*, 2014 WL 4359193, at \*7 (C.D. Cal. Sept. 3, 2014) (denying borrowers’ dual tracking claim because, even though they pled compliance with HAMP document requirements, they did not provide every document requested by servicer); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 998-99 (N.D. Cal. 2014) (granting borrower leave to amend her claim to explicitly state she submitted a “complete” application, but noting servicer’s neglect to inform borrower that her application was *incomplete*).

<sup>66</sup> *McKinley v. CitiMortgage, Inc.*, 2014 WL 651917, at \*4 (E.D. Cal. Feb. 19, 2014) (holding the fact that servicer “may hypothetically request additional information in the future does not render implausible [borrower’s] claim that the loan modification application was complete”); *Flores v. Nationstar*, 2014 WL 304766, at \*4 (C.D. Cal. Jan. 6, 2014) (determining borrower had successfully alleged he submitted a “complete” application by complying with servicer’s additional document requests over the course of two months).

<sup>67</sup> See, e.g., *Hestrin v. Citimortgage*, 2015 WL 847132, at \*3 (C.D. Cal. Feb. 25, 2015) (accepting borrower’s assertion that he submitted a “complete” application sufficient and denying servicer’s MTD); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*7 (C.D. Cal. Dec. 19, 2014) (borrower need not use specific statutory language in asserting that her application was “complete”); *Gonzales v. Citimortgage*, 2014 WL 7927627, at \*1 (N.D. Cal. Oct. 10, 2014) (finding whether borrower submitted enough information to constitute a “complete” application *despite* using an incorrect form, according to the servicer, is a factual issue giving rise to “serious questions” on the merits of borrower’s dual tracking claim and granting her PI); cf. *Penermon*, 2014 WL 2754596, at \*11 (granting borrower leave to amend her claim to explicitly state she submitted a “complete” application, but noting servicer’s neglect to inform borrower that her application was *incomplete*); *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636 (C.D. Cal. Oct. 22, 2013) (determining that the completeness of an application is a triable issue of fact, allowing borrower’s ECOA claim (which has the same “complete” definition as HBOR’s dual tracking provision) to survive the pleading stage). *But see*

whether servicers may request duplicative or unnecessary information, and/or falsely claim documents were not received, to assert that an application was incomplete, thereby escaping dual tracking liability. So far, courts have sided with borrowers on this issue.<sup>68</sup>

### 3. Subsequent applications

To prevent abuse, HBOR's dual tracking protections do not apply to borrowers who submit multiple applications, unless the borrower experienced a material change in financial circumstances and documented and submitted that change to their servicer.<sup>69</sup> Even though borrowers often reapply with increased income, a decline in income can also constitute a material change in financial circumstances.<sup>70</sup> For borrowers who had prior reviews,<sup>71</sup> this provision is critical because a second application under that circumstance will still trigger dual tracking protections. Alleging a change in financial circumstances in a complaint, rather than in a second modification application, does not fulfill the "document" and "submit" requirements under the statute.<sup>72</sup> Courts have differed over the degree that a

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Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at \*7 (C.D. Cal. July 18, 2014) (dismissing borrower's dual tracking claim because borrower did not allege the dates she submitted her "complete" applications to servicer, or any documents showing servicer deemed her applications "complete").

<sup>68</sup> See, e.g., Dias v. JP Morgan Chase NA, 2015 WL 1263558, at \*5 (N.D. Cal. Mar. 19, 2015) (rejecting servicer's argument that application was not complete in hindsight when servicer failed to notify borrower a need for additional documents before NTS was recorded); Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at \*4-5 (C.D. Cal. Oct. 24, 2014) (rejecting as "absurd" servicer's assertion that borrower's application was incomplete because servicer representative told borrower he should ignore servicer's form letter stating that all requested documents were not received); Gilmore, 2014 WL 3749984, at \*5 (granting a PI and finding "at least serious questions" going to the completeness of borrower's application where servicer verbally requested unnecessary information from borrower in a confusing manner).

<sup>69</sup> See CAL. CIV. CODE 2923.6(g) (2013).

<sup>70</sup> See Dias v. JP Morgan Chase, N.A., 2015 WL 1263558, at \*5 (N.D. Cal. Mar. 19, 2015) (borrower sufficiently pled \$2,000 decline in monthly income as material change); Valentino v. Select Portfolio Servicing, Inc. 2015 WL 575385, at \*4 (N.D. Cal. Feb. 10, 2015) (finding "no basis to conclude that a reduction in income cannot satisfy the "material change" requirement of section 2923.6(g)").

<sup>71</sup> These reviews could have occurred pre-2013. CAL. CIV. CODE § 2923.6(g) (2013); see Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at \*2, 6-9 (N.D. Cal. Nov. 12, 2013).

<sup>72</sup> See Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at \*6 (C.D. Cal. July 9, 2014); Rosenfeld v. Nationstar Mortg., LLC, 2013 WL 4479008, at \*4 (C.D. Cal. Aug. 19, 2013). *But cf.* Hixson v. Wells Fargo Bank, 2014 WL 3870004, at \*5 (N.D. Cal. Aug. 6, 2014) (that borrower's complaint, not her new application, omitted

borrower must document a change in financial circumstances, most accepting specific dollar-amount specificity,<sup>73</sup> and a minority accepting a borrower's simple assertion that a change was documented as part of a subsequent, complete application.<sup>74</sup> Courts have also extended dual tracking protections to borrowers who can show that their servicer voluntarily agreed to review a subsequent application,<sup>75</sup> or that the

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the amount of rent she was now collecting does not moot her dual tracking claim based on a material change in financial circumstances).

<sup>73</sup> See, e.g., *Gilmore v. Wells Fargo Bank*, 75 F. Supp. 3d 1255, 1264-65 (N.D. Cal. 2014) (borrower's subsequent application specifying a \$5,400/month income increase and a \$1,000/month decrease in expenses sufficiently stated a dual tracking claim); *Penaloza v. Select Portfolio Servicing, Inc.*, 2014 WL 6910334, at \*10 (C.D. Cal. Dec. 8, 2014) (borrower demonstrated material change in circumstances with an income increase of \$5,500 per month and a \$1,500 decrease in monthly expenses); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*8 (C.D. Cal. Nov. 19, 2014) (accepting borrower's assertion that she notified servicer of an \$8,000 increase in monthly income as part of a subsequent application as adequately alleging she "documented" and "submitted" a material change in financial circumstances, though she did not explain the specific reasons behind the increase); cf. *Rosenfeld v. Nationstar Mortg., LLC*, 2014 WL 457920, at \*4 (C.D. Cal. Feb. 3, 2014) (finding that the borrower subsequently satisfied the documentation requirement when she pled that she wrote the servicer that she eliminated her credit card debt). *But see* *Winterbower v. Wells Fargo, N.A.*, 2013 WL 1232997, at \*3 (C.D. Cal. Mar. 27, 2013) (denying TRO when borrowers simply wrote their servicer that they decreased their expenses from \$25,000/month to \$10,000/month).

<sup>74</sup> *Lee v. Wells Fargo Bank, N.A.*, 34-2013-00153873-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 25, 2014) (finding that evidence of a material change in financial circumstances is not required at the pleadings stage). *But see* *Williams v. Wells Fargo Bank, N.A.*, 2014 WL 1568857, at \*5 (C.D. Cal. Jan. 27, 2014) (court declined to find a documented change in financial circumstances in a letter citing borrowers' monthly income and declaring that their expenses have increased); *Sevastyanov v. Wells Fargo Bank, N.A.*, No. 30-2013-00644405-CU-OR-CJC (Cal. Super. Ct. Orange Cnty. July 24, 2013) (finding borrower's bare statement that their income and expenses had "changed" insufficient to trigger dual tracking protections). *But cf.* *Stokes v. Citimortgage*, 2014 WL 4359193, at \*6 (C.D. Cal. Sept. 3, 2014) (Borrower's submission of previously requested tax returns does not, by itself, constitute a material change in financial circumstances.).

<sup>75</sup> See *Norris v. Bayview Loan Servicing, LLC*, 2016 WL 337381, at \*3 (C.D. Cal. Jan. 25, 2016); *Curtis v. Nationstar Mortg. LLC*, 2015 WL 4941554, at \*2 (N.D. Cal. Aug. 19, 2015) ("If the servicer voluntarily undertakes to review a loan modification application, a borrower may avail him or herself of the protections afforded under Cal. Civ. Code § 2923.6."); *Dias v. JP Morgan Chase NA*, 2015 WL 1263558, at \*5 (N.D. Cal. Mar. 19, 2015) (finding it unlikely borrower submitted subsequent application for the purpose of delay when application solicited by servicer); *Vasquez v. Bank of Am., N.A.*, 2013 WL 6001924, at \*9 (N.D. Cal. Nov. 12, 2013) (allowing borrower's dual tracking claim to survive a motion to dismiss because servicer solicited borrower's second application and CC 2923.6(g) only specifies that servicers are not "obligated" to review subsequent applications); *Isbell v. PHH Mortg. Corp.*, No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013) (CC 2923.6(g) does not extinguish dual tracking protections if the servicer chooses to

servicer never reviewed borrower's previous applications.<sup>76</sup> Another court views the § 2923.6(g) safe harbor as an affirmative defense, not an element of a CC 2923.6 claim.<sup>77</sup> Even if the servicer declines to review a subsequent application due to insufficient evidence of material change in financial circumstances, the servicer must still provide the borrower of a denial stating that reason.<sup>78</sup>

#### 4. Other dual tracking protections

HBOR also provides protections for borrowers approved for a temporary or permanent loan modification or other foreclosure alternative. A servicer may not record an NOD as long as the borrower remains compliant with an approved loss mitigation plan.<sup>79</sup> If a plan is approved after an NOD is recorded, a servicer may not proceed with the foreclosure process as long as the borrower is plan-compliant.<sup>80</sup> The servicer must also rescind the NOD and cancel a pending sale.<sup>81</sup>

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review borrower's subsequent application.); *see also* Foronda v. Wells Fargo, 2014 WL 6706815, at \*7 (N.D. Cal. Nov. 26, 2014) (court found viable dual tracking claim where servicer requested that borrower resubmit her already existing application, then scheduled and refused to postpone a sale); *cf.* Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at \*12 (C.D. Cal. Feb. 10, 2015) (Servicer's solicitation of multiple applications, coupled with its denial of those applications based on their contents, rather than on missing documents, gives rise to dual tracking claim even where it was unclear if borrower submitted "complete" applications).

<sup>76</sup> *See, e.g.*, Johnson v. Bank of Am., 2015 WL 351210, at \*4-5 (N.D. Cal. Jan. 23, 2015) (finding servicer never gave borrower a fair opportunity to be evaluated because it denied the application for lack of documents, not on its merits, and because servicer had previously acknowledged borrower's application as complete); Cooksey v. Select Portfolio Servs., Inc., 2014 WL 2120026, at \*2 (E.D. Cal. May 21, 2014) (finding it "unlikely" servicer evaluated borrower's previous applications, or that borrower was ever "afforded a fair opportunity to [be] evaluated," and granting borrower's TRO based on a dual tracking claim).

<sup>77</sup> Norris v. Bayview Loan Servicing, LLC, 2016 WL 337381, at \*3 (C.D. Cal. Jan. 25, 2016).

<sup>78</sup> *Id.*; *see also* Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808, at \*5-6 (N.D. Cal. July 16, 2013) (Wells Fargo evaluated borrower's second application based on Wells Fargo's internal policy of denying modification to borrowers who previously defaulted on a modification. The court found this process constituted an "evaluation" and fulfilled the requirements of CC 2923.6.).

<sup>79</sup> CAL. CIV. CODE § 2924.11(a)(1) (2013).

<sup>80</sup> § 2924.11(b) (2013); *see also* Taylor v. Bank of Am., N.A., No. 34-2013-00151145-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 22, 2014) (denying servicer's demurrer to borrower's dual tracking claim because servicer received proof of short sale financing before foreclosing). *But see* Beck v. Ocwen Loan Servs., LLC, 2015 WL 519052, at \*2 (C.D. Cal. Feb. 6, 2015) (dismissing borrower's dual tracking claim

## D. HBOR's Interplay with the CFPB Mortgage Servicing Rules

Created by the Dodd-Frank Act,<sup>82</sup> the Consumer Financial Protection Bureau's (CFPB) new mortgage servicing rules add to and amend the existing federal framework provided by the Real Estate Settlement and Procedures Act (RESPA) and the Truth in Lending Act (TILA),<sup>83</sup> and became effective January 10, 2014. Whether a borrower may allege RESPA violations for servicer conduct occurring after January 10, 2014, but related to a complete modification application submitted *before* January 10, 2014, is unclear.<sup>84</sup> As advocates weigh whether to bring RESPA claims using the new rules (for servicer conduct occurring after January 10, 2014), they should consider whether HBOR actually gives greater protection, or better remedies, to their client.<sup>85</sup> Advocates should consider that the CFPB rules only provide for damages under various RESPA statutes. Borrowers cannot use the CFPB rules to stop a foreclosure sale,<sup>86</sup> but injunctive relief *is* available under HBOR. On the other hand, a pre-foreclosure cause of action for damages is available under RESPA but unavailable under HBOR. The contrast between the two sets of laws is highlighted in

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because they did not allege they received a fully executed copy of their TPP agreement from their servicer, as required by the TPP's language).

<sup>81</sup> CAL. CIV. CODE § 2924.11(d) (2013).

<sup>82</sup> Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>83</sup> RESPA is codified as "Regulation X," at 12 C.F.R. § 1024; TILA as "Regulation Z," at 12 C.F.R. § 1026.

<sup>84</sup> *Compare* White v. Wells Fargo Bank, N.A., 2015 WL 1842811, at \*4 (E.D. Mich. Apr. 22, 2015) (finding that even if borrower submitted the application before January 10, 2014, the new RESPA regulations could still apply to servicer's foreclosure that took place after effective date), *with* Kiplinger v. Selene Fin. LP, 2015 WL 9255564 (W.D. Mich. Dec. 18, 2015) (finding new Reg X did not apply to an application submitted two days prior to effective date); Lage v. Ocwen Loan Servicing, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7294854, at \*6-11 (S.D. Fla. Nov. 19, 2015) (same).

<sup>85</sup> Very few of the CFPB rules preempt more protective state laws so advocates will generally be able to select whichever law (or combination of laws) is more tailored to their client's situation. A notable exception includes rules involving the transferring of servicing rights. *See* 12 C.F.R. § 1024.33(d) (effective Jan. 10, 2014).

<sup>86</sup> *See generally* NAT'L CONSUMER LAW CTR., FORECLOSURES AND MORTGAGE SERVICING § 3.2.10.4 (2015) (discussing case law but arguing injunctive relief should be available under RESPA). *But see* discussion *infra* section II.D (using the UCL to enforce RESPA).

their pre-foreclosure outreach requirements and dual tracking provisions.

The CFPB has created an absolute freeze on initiating foreclosure activity: servicers must wait for borrowers to become more than 120 days delinquent before recording the notice of default.<sup>87</sup> HBOR, by contrast, only prevents servicers from recording a notice of default for 30 days after servicer made (or attempted to make) contact with a delinquent borrower.<sup>88</sup> HBOR specifies that pre-NOD contact be made “in person or by telephone,” to discuss foreclosure alternatives,<sup>89</sup> but the CFPB requires two separate forms of contact. First, a servicer must make (or attempt) “live contact” by a borrower’s 36th day of delinquency.<sup>90</sup> Next, by the borrower’s 45th day of delinquency, a servicer must make (or attempt) written contact.<sup>91</sup> HBOR requires a post-NOD notice,<sup>92</sup> where the CFPB does not. While most California foreclosures are non-judicial, the CFPB rules also apply to judicial foreclosures in California, while HBOR does not.

Generally, HBOR provides greater dual tracking protections. First, borrowers may submit more than one modification application under HBOR, if they can document and submit a material change in financial circumstances to their servicer.<sup>93</sup> By contrast, the CFPB rules allow only one foreclosure alternative application, no matter how significantly a borrower’s financial circumstances may change after that application.<sup>94</sup> Second, borrowers have no deadline under HBOR: as long as a borrower submits a complete first lien loan modification application before a foreclosure sale, the servicer cannot move ahead

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<sup>87</sup> 12 C.F.R. § 1024.41(f) (effective Jan. 10, 2014).

<sup>88</sup> CAL. CIV. CODE §§ 2923.5, 2923.55 (2013); *see* discussion *supra* section I.A.

<sup>89</sup> § 2923.55(b)(2) (2013). Servicers must also send written notice that a borrower may request certain documents, but that notice need not explain foreclosure alternatives. § 2923.55(b)(1)(a)(B).

<sup>90</sup> 12 C.F.R. § 1024.39(a) (effective Jan. 10, 2014).

<sup>91</sup> § 1024.39(b) (effective Jan. 10, 2014).

<sup>92</sup> CAL. CIV. CODE § 2924.9(a) (2013). The notice is only required if the borrower has not yet “exhausted” modification attempts. *Id.*

<sup>93</sup> § 2923.6(g); *see also* discussion *supra*, section I.C.2.

<sup>94</sup> 12 C.F.R. § 1024.41(i) (effective Jan. 10, 2014). This rule excludes all subsequent applications even if the first application was for a non-modification foreclosure alternative, like a short sale. *Id.* A borrower may, however, submit a new application to a new servicer after a servicing transfer. [Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41\(i\)-1.](#)

with the sale while the application is “pending.”<sup>95</sup> The CFPB rules provide complete dual tracking protections to borrowers who submit their application in their first 120 days of delinquency or before their loan is referred to foreclosure.<sup>96</sup> Post-NOD, however, CFPB protections are dictated by when a borrower submits his or her complete loan modification. If submitted more than 37 days pre-sale, a servicer cannot conduct the sale until making a determination on the application,<sup>97</sup> but only borrowers who submit their application 90 or more days pre-sale are entitled to an appeal of this decision.<sup>98</sup> By contrast, all borrowers (with large servicers)<sup>99</sup> receive an appeal opportunity under HBOR.<sup>100</sup> Borrowers who submit their application less than 37 days before a scheduled foreclosure sale receive no dual tracking protections from the CFPB rules.<sup>101</sup> Some CFPB dual tracking rules are more protective than HBOR, however: a “facially complete application” (where a servicer receives all requested information but later determines that more information or clarification is necessary), for instance, must be treated as “complete” as of the date that it was facially complete.<sup>102</sup> HBOR contains no such distinctions and leaves the “completeness” of an application up to the servicer and to the courts.<sup>103</sup>

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<sup>95</sup> CAL. CIV. CODE § 2923.6(c) (2013). Servicers may maintain policies of denying those applications, but they must comply with the denial and appeal timelines and procedures outlined in the dual tracking provisions. *See supra* discussion in section I.C.1.

<sup>96</sup> Servicers cannot even begin the foreclosure process in this case, until making a determination on borrower’s application and allowing the 14-day appeal period to pass. 12 C.F.R. § 1024.41(f)(2) (effective Jan. 10, 2014).

<sup>97</sup> § 1024.41(g) (effective Jan. 10, 2014). Servicers must notify borrowers of their evaluation within 30 days of receiving borrower’s complete application. § 1024.41(c); *see* *Lage v. Ocwen Loan Servicing*, 2015 WL 631014, at \*2-3 (S.D. Fla. Feb. 11, 2015) (finding a viable RESPA claim where servicer did not evaluate borrower’s application until two months after borrower’s application submission).

<sup>98</sup> § 1024.41(h) (effective Jan. 10, 2014).

<sup>99</sup> Borrowers with small servicers do not receive an appeal period. *Compare* CAL. CIV. CODE § 2924.18 (2013) (explaining dual tracking protections applied to borrowers with small servicers), *with* § 2923.6 (2013) (explaining dual tracking protections for borrowers with large servicers).

<sup>100</sup> *See* § 2923.6(d) (2013). Under the CFPB rules, borrowers who do receive an appeal opportunity have only 14 days to appeal. 12 C.F.R. § 1024.41(h)(2) (effective Jan. 10, 2014). California borrowers have 30 days to appeal a denial. CAL. CIV. CODE § 2923.6(d) (2013).

<sup>101</sup> *See* 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).

<sup>102</sup> § 1024.41(c)(2)(iv) (effective Jan. 10, 2014).

<sup>103</sup> *See* discussion *supra* section I.C.2.

Advocates should note that in December 2014 the CFPB issued proposed rules that would add to and amend the existing servicing regulations.<sup>104</sup> Major proposed revisions include protections for successors-in-interest, more regulations governing servicing transfers, and a rule requiring servicers to notify borrowers when applications are “complete.”

## II. Non-HBOR Causes of Action

Because HBOR limits injunctive relief to actions brought before the trustee’s deed upon sale is recorded,<sup>105</sup> advocates with post-foreclosure cases should explore whether other claims could overturn a completed foreclosure sale. HBOR explicitly preserves remedies available under other laws.<sup>106</sup>

### A. Wrongful Foreclosure Claims

Wrongful foreclosure claims (which can set aside or “undo” foreclosure sales)<sup>107</sup> are important for borrowers who were unable to bring pre-sale claims. At least until the Homeowner Bill of Rights was enacted, claims challenging the foreclosing party’s authority to foreclose<sup>108</sup> are unavailable before the sale because courts are hesitant to add new requirements to the non-judicial foreclosure statutes.<sup>109</sup> As

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<sup>104</sup> Bureau of Consumer Financial Protection, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176 (Dec. 15, 2014). NHLPP submitted comments to these proposed rules in March, 2015, in collaboration with the California Reinvestment Coalition. The rules are expected to be finalized in Summer 2016.

<sup>105</sup> See CAL. CIV. CODE §§ 2924.12(a)(1) & 2924.19(a)(1) (2013). It is a closer and unsettled question whether injunctive relief is available post-sale, but before a trustee’s deed upon sale is recorded. See, e.g., *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6-7 (N.D. Cal. Apr. 16, 2014) (declining to determine at the pleading stage what type of remedy is available in this situation, but noting that some remedy should be available for a dual tracking violation and denying servicer’s motion to dismiss).

<sup>106</sup> See CAL. CIV. CODE §§ 2924.12(h) & 2924.19(g) (2013).

<sup>107</sup> See CEB, *supra* note 29, §§ 7.67A, 10.75, & 10.76, for descriptions of the different bases for wrongful foreclosure claims.

<sup>108</sup> Only certain entities possess the “authority to foreclose”: the beneficiary under the deed of trust, the original or properly substituted trustee, or the authorized agent of the beneficiary. CAL. CIV. CODE § 2924(a)(6) (2013).

<sup>109</sup> See *Rahbarian v. JP Morgan Chase*, 2014 WL 5823103, at \*9 (E.D. Cal. Nov. 10, 2014) (dismissing pre-sale wrongful foreclosure/CC 2924(a)(6) claim based on robo-

a result, most wrongful foreclosure claims are brought after the sale.<sup>110</sup> Advocates may find it easier to challenge the validity of the foreclosure in a post-sale unlawful detainer action,<sup>111</sup> where the servicer must affirmatively demonstrate proper authority.<sup>112</sup> Borrowers may obtain full tort recovery under a wrongful foreclosure claim, including moving expenses, lost rental income, damage to credit, and emotional distress.<sup>113</sup>

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signing allegations as premature); *Saterbak v. JP Morgan Chase Bank, N.A.*, \_\_\_ Cal. App. 4th \_\_\_, 2016 WL 1055062 (Mar. 16, 2016) (borrower lacked standing to bring pre-sale challenge as to authority to foreclose; distinguishing *Yvanova* as post-foreclosure case); *Gomes v. Countrywide Home Loans*, 192 Cal. App. 4th 1149, 1154 (2011) (“Because of the exhaustive nature of this [statutory] scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.”) (quoting *Lane v. Vitek Real Estate Indus. Group*, 713 F. Supp. 2d 1092, 1098 (2010)). Courts sometimes describe these unsuccessful claims as “preemptive.” *See, e.g., Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 82 (2013) (describing “preemptive” actions as those that require the foreclosing entity to prove its authority to foreclose, without alleging a specific factual basis attacking that authority).

<sup>110</sup> *See, e.g., Glaski v. Bank of Am. N.A.*, 218 Cal. App. 4th 1079 (2013). Pre-sale wrongful foreclosure claims are also possible, if less frequent. *See Nguyen v. JP Morgan Chase Bank N.A.*, 2013 WL 2146606, at \*4 (N.D. Cal. May 15, 2013) (A claim for wrongful foreclosure may be brought pre-sale if plaintiff alleges inaccurate or false mortgage documents and if plaintiff has received a notice of trustee sale.); *cf. Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, at \*6 (S.D. Cal. July 31, 2013) (allowing pre-default foreclosure-related claims because economic injury (due to drastically increased mortgage payments) was “sufficient to satisfy the ripeness inquiry.”). *But cf. Rosenfeld v. JP Morgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 961 (N.D. Cal. 2010) (finding a pre-sale wrongful foreclosure claim premature); *Vega v. JP Morgan Chase Bank, N.A.*, 654 F. Supp. 2d 1104, 1113 (E.D. Cal. 2009). Wrongful foreclosure issues may also be resolved in bankruptcy. *In re Takowsky*, 2014 WL 5861379 (B.A.P. 9th Cir. Nov. 12, 2014).

<sup>111</sup> Not only is this tactic often easier, but it is sometimes necessary to avoid *res judicata* issues in any subsequent wrongful foreclosure action. *See, e.g., Hopkins v. Wells Fargo Bank, N.A.*, 2013 WL 2253837, at \*4-5 (E.D. Cal. May 22, 2013) (barring a wrongful foreclosure claim because servicer had already established duly perfected title in a UD action). Advocates can refer to the HBOR Collaborative’s [Defending Post-Foreclosure Evictions](#) practice guide for more information on litigating title in the context of a post-foreclosure UD. The Collaborative also has a [webinar](#), and a [PLI segment on this issue titled “Eviction Defense after Foreclosure.”](#)

<sup>112</sup> *See Bank of N.Y. Mellon v. Preciado*, 224 Cal. App. Supp. 1, 9-10 (2013) (reversing UD court’s judgment for plaintiff because plaintiff had failed to show compliance with CC 2924 –specifically, plaintiff failed to explain why DOT and Trustee’s Deed listed two different trustees); *U.S. Bank v. Cantartzoglou*, 2013 WL 443771, at \*9 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (If the UD defendant raises questions as to the veracity of title, plaintiff has the affirmative burden to prove true title.); *Aurora Loan Servs. v. Brown*, 2012 WL 6213737, at \*5-6 (Cal. App. Div. Super. Ct. July 31, 2012) (voiding a sale where servicer could not demonstrate authority to foreclose and refusing to accept a post-NOD assignment as relevant to title).

<sup>113</sup> *See Miles v. Deutsche Bank Nat’l Tr. Co.*, 236 Cal. App. 4th 394, 409 (2015).

## 1. Assignments of the note and deed of trust

Only the holder of the beneficial interest may substitute a new trustee, assign the loan, or take action in the foreclosure process.<sup>114</sup> A beneficiary's assignee must obtain an assignment of the deed of trust before moving forward with the foreclosure process.<sup>115</sup> While foreclosing entities have always required the authority to foreclose, HBOR codified this requirement in Civil Code Section 2924(a)(6) for notices of default recorded after January 1, 2013.

*Glaski*: A notable California Court of Appeal case, *Glaski v. Bank of Am. N.A.*, 218 Cal. App. 4th 1079 (2013), allowed a borrower to challenge a foreclosure by alleging very specific facts to show that the foreclosing entity was not the beneficiary. In so doing, the court had to grant borrower standing to challenge the assignment of his loan, which was attempted after the closing date of the transferee-trust.<sup>116</sup> This failed assignment attempt rendered the assignment void, not voidable, and led to the wrong party foreclosing.<sup>117</sup>

*Post-Glaski*: *Glaski* initially gave hope to many borrowers whose loans had been improperly securitized. The case, though, was roundly rejected by the other Court of Appeal districts and by federal district courts.<sup>118</sup>

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<sup>114</sup> See CAL. CIV. CODE § 2924(a)(6) (2013).

<sup>115</sup> See *Nguyen v. JP Morgan Chase Bank, N.A.*, 2013 WL 2146606, at \*5 (N.D. Cal. May 15, 2013) (denying motion to dismiss wrongful foreclosure claim because foreclosing assignee could not demonstrate that it received an assignment from the original beneficiary).

<sup>116</sup> *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1094 (2013).

<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., *In re Davies*, 565 F. App'x 630, 633 (9th Cir. 2014) (declining to follow *Glaski*); *In re Sandri*, 501 B.R. 369, 374-77 (Bankr. N.D. Cal. 2013) (rejecting the *Glaski* court's reasoning and siding with the majority of California courts that have found borrowers have no standing to challenge problems with the authority to foreclose); *Rubio v. US Bank, N.A.*, 2014 WL 1318631, at \*8 (N.D. Cal. Apr. 1, 2014) (same); *Diunugala v. JP Morgan Chase Bank, N.A.*, 2013 WL 5568737, at \*8 (S.D. Cal. Oct. 3, 2013) (same); *Mendoza v. JP Morgan Chase Bank, N.A.*, 228 Cal. App. 4th 1020, 1034 (2014) (same), *depublished and review granted*, 337 P.3d 493 (Cal. 2014); cf. *Kan v. Guild Mortg. Co.*, 230 Cal. App. 4th 736 (2014) (declining to consider the *Glaski* holding, distinguishing it as challenging a *completed* foreclosure, and noting that even the *Glaski* court did not take issue with the long-standing principle

Yvanova: Despite other courts' almost universal rejection of *Glaski*, the California Supreme Court partly vindicated *Glaski* in *Yvanova v. New Century Mortgage*. In *Yvanova*, the Court granted review on the question whether a foreclosed borrower standing to challenge an assignment as void.<sup>119</sup> The court held that "a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." In doing so, the Court expressly rejected prior Court of Appeal cases that held to the contrary.<sup>120</sup> However, *Yvanova* declined to rule on what defects would render an assignment void and left the question unresolved. The Court also declined to speculate on how its ruling impacts pre-foreclosure challenges.

Post-Yvanova: After *Yvanova*, the California Court of Appeal in *Saterbak v. JP Morgan Chase* declined to extend *Yvanova* to pre-sale challenges.<sup>121</sup> The Court also held that a late transfer into the securitized trust, the defect alleged in *Glaski*, only rendered the transfer voidable, not void.<sup>122</sup>

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that borrowers may not bring pre-foreclosure actions that impose additional requirements to the statutory foreclosure structure).

<sup>119</sup> *Yvanova v. New Century Mortg.*, 62 Cal. 4th 919 (2016).

<sup>120</sup> *Id.* slip op. at 25 n.13 ("We disapprove *Jenkins v. JPMorgan Chase Bank, N.A.*, supra, 216 Cal.App.4th 497, *Siliga v. Mortgage Electronic Registration Systems, Inc.*, supra, 219 Cal.App.4th 75, *Fontenot v. Wells Fargo Bank, N.A.*, supra, 198 Cal.App.4th 256, and *Herrera v. Federal National Mortgage Assn.*, supra, 205 Cal.App.4th 1495, to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void.").

<sup>121</sup> *Saterbak v. JP Morgan Chase Bank, N.A.*, \_\_ Cal. App. 4th \_\_, 2016 WL 1055062, at \*4 (Mar. 16, 2016) ("Because *Saterbak* brings a preforeclosure suit challenging Defendant's ability to foreclose, *Yvanova* does not alter her standing obligations.") *But see* *Lundy v. Selene Fin., LP*, 2016 WL 1059423 (N.D. Cal. Mar. 17, 2016) (predicting that the California Supreme Court would extend *Yvanova* to pre-foreclosure challenges without citing *Saterbak*).

<sup>122</sup> *Saterbak*, 2016 WL 1055062, at \*4 (declining to follow *Glaski* because the New York case *Glaski* relied on was later overturned); *see also* *Morgan v. Aurora Loan Servs.*, \_\_ F. App'x \_\_, 2016 WL 1179733 (9th Cir. Mar. 28, 2016) (holding a late transfer into trust is voidable – not void – under New York law).

## 2. Substitutions of trustee

Only the original trustee or a properly substituted trustee may carry out a foreclosure, and unlike assignments of a deed of trust, substitutions of trustee must be recorded.<sup>123</sup> Without a proper substitution of trustee, any foreclosure procedures (including sales) initiated by an unauthorized trustee are void.<sup>124</sup> Courts have upheld challenges when the signer of the substitution may have lacked authority or the proper agency relationship with the beneficiary.<sup>125</sup> Courts have also allowed cases to proceed when the substitution of trustee was allegedly backdated.<sup>126</sup>

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<sup>123</sup> CAL. CIV. CODE § 2934a (2012). The statute provides a very relaxed standard governing the timing of this recording. The substitution may be executed and recorded after the substituted trustee records the NOD, if a copy of the substitution and an affidavit are mailed to the borrower. § 2934a(c). But even this disclosure requirement may be contracted around in the DOT. *See Ram v. Onewest Bank, FSB*, 234 Cal. App. 4th 1, 16 (2015).

<sup>124</sup> *See, e.g., Dimock v. Emerald Props. LLC*, 81 Cal. App. 4th 868, 876 (2000) (finding the foreclosing entity had no power to foreclose because the substitution of trustee had never been recorded as required by section 2934a); *Pro Value Props., Inc. v. Quality Loan Servicing Corp.*, 170 Cal. App. 4th 579, 581 (2009). *But see Maomanivong v. Nat'l City Mortg., Co.*, 2014 WL 4623873, at \*6-7 (N.D. Cal. Sept. 15, 2014) (denying borrower's CC 2924(a)(6) claim because the acting trustee eventually recorded a proper substitution in compliance with CC 2934a(c), even if after it recorded an NOD); *Ram*, 234 Cal. App. 4th at 17-18 (finding an NOD allegedly signed by an incorrect trustee not prejudicial to the borrowers because they received all pertinent information to rectify their default, rendering the sale voidable, not void).

<sup>125</sup> *See Engler*, 2013 WL 6815013, at \*6 (allowing borrowers to assert a claim based on an improperly substituted trustee: MERS was the listed beneficiary but the signature on the substitution belonged to an employee of the *servicer*, not an employee of MERS); *Patel v. U.S. Bank, N.A.*, 2013 WL 3770836, at \*1, 7 (N.D. Cal. July 16, 2013) (allowing borrowers' pre-sale wrongful foreclosure claim, based partly on robo-signing allegations pertaining to the substitution of trustee and assignment of the DOT, to proceed); *Halajian*, 2013 WL 593671, at \*6-7 (warning that if the MERS "vice president" executing the foreclosure documents was not truly an agent of MERS, then she "was not authorized to sign the assignment of deed of trust and substitution of trustee [and] both are invalid"); *Tang v. Bank of Am., N.A.*, 2012 WL 960373, at \*11 (C.D. Cal. Mar. 19, 2012); *Sacchi*, 2011 WL 2533029, at \*24 (denying servicer's motion to dismiss because an unauthorized entity executed a substitution of a trustee). *But see Ram*, 234 Cal. App. 4th at 13-14 (granting MTD in part because borrowers agreed that the substituted trustee maintained an agency relationship with the original trustee when it recorded the NOD, even if it was before the substitution was executed).

<sup>126</sup> *See Makreas v. First Nat'l Bank of N. Cal.*, 856 F. Supp. 2d 1097, 1100 (N.D. Cal. 2012).

### 3. Unconscionability of original loan

A court may set aside a foreclosure sale if the underlying loan was unconscionable. For example, the California Court of Appeal reinstated a claim to set aside a sale when the borrowers, who had limited education and English proficiency, took out a loan with monthly payments exceeded their income by \$1,000 per month.<sup>127</sup>

### 4. Procedural foreclosure notice requirements

Attacks on completed foreclosure sales based on noncompliance with notice requirements are rarely successful. Borrowers need to demonstrate prejudice from the notice defect<sup>128</sup> and must tender the unpaid principal balance of the loan.<sup>129</sup> Courts have also considered HBOR violations under a wrongful foreclosure claim.<sup>130</sup>

### 5. Loan modification related claims

If the servicer foreclosed when the borrower was compliant with a loan modification, the borrower may bring a wrongful foreclosure claim

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<sup>127</sup> *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982 (2016).

<sup>128</sup> *See, e.g., Siqueiros v. Fed. Nat'l Mortg. Ass'n*, 2014 WL 3015734, at \*4-5 (C.D. Cal. June 27, 2014) (servicer's failure to mail borrower NOD and NTS directly contributed to the loss of borrower's home); *Passaretti v. GMAC Mortg., LLC*, 2014 WL 2653353, at \*12 (Cal. Ct. App. June 13, 2014) (improper notice of sale prejudiced the borrower a great deal since he was unable to take any action to avoid the sale (the court found it important that borrower had previously cured his defaults)). One court seemed to limit prejudice *only* for claims that attacked a procedural aspect of the foreclosure process, rather than a substantive element like an improper assignment. *See Deschaine v. IndyMac Mortg. Servs.*, 2014 WL 281112, at \*11 (E.D. Cal. Jan. 23, 2014) (The presumption that a foreclosure was conducted properly "may only be rebutted by substantial evidence of prejudicial procedural irregularity." "On a motion to dismiss, therefore, a [borrower] must allege 'facts showing that [he was] prejudiced by the alleged procedural defects,'" or that a "violation of the statute[s] themselves, and not the foreclosure proceedings, caused [his] injury.").

<sup>129</sup> *See, e.g., Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112 (2011). For a brief description of prejudice, refer to section II.A.1; for a full discussion of tender, refer to section III.C.

<sup>130</sup> *See Salazar v. U.S. Bank Nat'l Ass'n*, 2015 WL 1542908, at \*3-9 (C.D. Cal. Apr. 6, 2015) (analyzing CC 2923.6 and 2923.7 violations brought under wrongful foreclosure claim); *Munguia v. Wells Fargo Bank, N.A.*, 2015 WL 1475996, at \*9 (C.D. Cal. Mar. 30, 2015) (construing HBOR causes of action as one for wrongful foreclosure "to the extent that [borrower] seeks to set aside the completed sale of the property").

to set aside the sale.<sup>131</sup> In addition, violation of HAMP's dual-tracking prohibition may also form the basis for a wrongful foreclosure claim.<sup>132</sup>

## 6. FHA loss mitigation rules

Servicers of FHA loans must meet strict loss mitigation requirements, including a face-to-face meeting with the borrower, before they may accelerate the loan.<sup>133</sup> Borrowers may bring equitable claims to enjoin a sale or to set aside a completed sale based on a servicer's failure to comply with these requirements; monetary damages, however, are currently unavailable.<sup>134</sup>

## 7. Misapplication of payments or borrower not in default

A borrower may bring a wrongful foreclosure claim if the servicer commenced foreclosure when the borrower was not in default or when borrower had tendered the amount in default.<sup>135</sup> If the foreclosure

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<sup>131</sup> See *Chavez v. Indymac Mortg. Servs.*, 219 Cal. App. 4th 1052, 1062-63 (2013) (holding that the borrower stated a wrongful foreclosure claim based on the servicer's breach of the modification agreement); *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001, 1017 (2012) (finding that the borrower may state a wrongful foreclosure claim when the servicer foreclosed while the borrower was in compliance with the modification agreement). Besides an attendant breach of contract claim, borrowers may also have HBOR claims under these facts. See CAL. CIV. CODE § 2924.11 (2013) (prohibiting foreclosure action where borrower is compliant with a written foreclosure prevention alternative).

<sup>132</sup> *Majd v. Bank of Am.*, 243 Cal. App. 4th 1293, 1302-04 (2015).

<sup>133</sup> 12 U.S.C. § 1715u(a) (2012) ("Upon default of any mortgage insured under this title [12 U.S.C. § 1707 *et seq.*], mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure."); see also *Pfeifer v. Countrywide Home Loans*, 211 Cal. App. 4th 1250, 1267-78 (2012) (finding the face-to-face meeting a condition precedent to foreclosure). For a more in depth review of FHA loss mitigation requirements, see Nat'l Consumer Law Ctr., *Foreclosures* § 3.2 (4th ed. 2012).

<sup>134</sup> See *Pfeifer*, 211 Cal. App. 4th at 1255 (allowing borrowers to enjoin a pending sale); *Fonteno v. Wells Fargo Bank, N.A.*, 228 Cal. App. 4th 1358 at \*8 (2014) (extending *Pfeifer* to allow borrowers to bring equitable claims to set aside a completed sale); see also *Urenia v. Public Storage*, 2014 WL 2154109, at \*7 (C.D. Cal. May 22, 2014) (declining to dismiss borrower's wrongful foreclosure claim on the grounds that *Pfeifer* only contemplates pre-sale injunctions).

<sup>135</sup> See *In re Takowsky*, 2014 WL 5861379, at \*4-8 (B.A.P. 9th Cir. Nov. 12, 2014) (affirming the bankruptcy court's decision to recognize borrower's wrongful foreclosure claim when borrower had tendered the amount due on the notice of default).

commenced on or after 2013, this conduct may also form the basis for an HBOR claim under Civil Code Section 2924.17.<sup>136</sup>

## B. Contract Claims

Breach of contract claims have succeeded against servicers that foreclose while the borrower is compliant with a Trial Period Plan (TPP)<sup>137</sup> or permanent modification.<sup>138</sup> An increasing number of state

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<sup>136</sup> Servicers may not record a document related to foreclosure without ensuring its accuracy and that it is supported by “competent and reliable evidence.” Before initiating foreclosure, a servicer must substantiate borrower’s default and servicer’s right to foreclose. CAL. CIV. CODE § 2924.17(a)-(b) (2013). While straight robo-signing claims under this statute have generally failed (see *Mendoza v. JP Morgan Chase Bank, N.A.*, 228 Cal. App. 4th 1020 (2014), *depublished and review granted*, 337 P.3d 493 (Cal. 2014) for an example), some borrowers have successfully asserted CC 2924.17 claims unrelated to robo-signing. See, e.g., *Henderson v. Ocwen Loan Servicing*, 2014 WL 5461955, at \*3 (N.D. Cal. Oct. 27, 2014) (rejecting servicer’s argument that CC 2924.17 requires an allegation of widespread and repeated robo-signing and finding that the NOD could not have been “supported by competent and reliable evidence” because borrower was never in default); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 997-98 (N.D. Cal. 2014) (denying servicer’s motion to dismiss borrower’s CC 2924.17 claim based on servicer’s failure to credit her account with accepted mortgage payments, evidence that servicer failed to substantiate her default); *Rothman v. U.S. Bank Nat’l Ass’n*, 2014 WL 1648619, at \*7 (N.D. Cal. Apr. 24, 2014) (allowing borrowers to state a CC 2924.17 claim based on an incorrect NOD which included inappropriate fees and charges, and rejecting servicer’s argument that CC 2924.17 only applies to robo-signing claims).

<sup>137</sup> See, e.g., *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883-84 (9th Cir. 2013) (HAMP participants are contractually obligated to offer borrowers a permanent modification if the borrower complies with a TPP by making required payments and by accurately representing their financial situation.); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*5 (N.D. Cal. Dec. 23, 2014) (servicer improperly failed to send borrower a permanent loan modification, or a notification that he did not qualify for a permanent modification, and foreclosed on borrower after borrower complied with the TPP and returned signed copies of the TPP); *Harris v. Bank of Am.*, 2014 WL 1116356, at \*4-6 (C.D. Cal. Mar. 17, 2014) (breach of contract claim based on TPP agreement); *Karimian v. Caliber Home Loans Inc.*, 2013 WL 5947966, at \*3 (C.D. Cal. Nov. 4, 2013) (“Having entered into the TPP, and accepted payments, CitiMortgage could not withhold a permanent modification simply because it later determined that plaintiff did not qualify for HAMP.”); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 799 (2013).

<sup>138</sup> See, e.g., *Moreno v. Wells Fargo Home Mortg.*, 2014 WL 5934722, at \*7 (E.D. Cal. Nov. 12, 2014) (denying servicer’s MTD borrowers’ oral contract claim where borrowers made a lump-sum payment and servicer began withdrawing monthly payments but never modified the mortgage as agreed); *Desser v. US Bank*, 2014 WL 4258344, at \*7 (C.D. Cal. Aug. 27, 2014) (leaving a servicer to decide whether to execute and return the final agreement to borrower unfairly imbues servicer with complete control over contract formation; borrower’s acceptance of the modification creates a contract); *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001, 1013-

and federal courts have found that TPP agreements require servicers to offer permanent modifications to TPP-compliant borrowers.<sup>139</sup> This is now established law in both California state court and the Ninth Circuit.<sup>140</sup> Claims based on the deed of trust have also succeeded when the servicer refused to accept payments or honor a permanently modified loan.<sup>141</sup>

## 1. The statute of frauds defense

Servicers have invoked the statute of frauds to defend these contract claims.<sup>142</sup> In *Corvello v. Wells Fargo Bank*, for example, a borrower's oral TPP agreement modified her written deed of trust, so her servicer argued statute of frauds.<sup>143</sup> The Ninth Circuit reasoned the borrower's full TPP performance allowed her to enforce the oral agreement, regardless of the statute of frauds.<sup>144</sup>

The statute of frauds defense has also failed when a servicer merely neglects to execute a permanent modification agreement by signing the final documents.<sup>145</sup> In that case, the borrower's modified payments, servicer's acceptance of those payments, and the language of the TPP

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14 (2012) (finding the language and intent of a permanent modification forms an enforceable contract even if the agreement is not countersigned by the servicer; once the borrower performs under that contract by making payments, the servicer must perform as well).

<sup>139</sup> See, e.g., *Corvello*, 728 F.3d at 883-84; *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 925-28 (2013); *West*, 214 Cal. App. 4th at 799; see also *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 233 (1st Cir. 2013) (servicer must offer permanent modification before the Modification Effective Date); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 565-66 (7th Cir. 2012).

<sup>140</sup> See *id.*; see also *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 305-06 (2014) (allowing a borrower to amend his complaint to allege not only TPP payments, but continued HAMP eligibility to plead valid contract and wrongful foreclosure claims).

<sup>141</sup> See *Morales v. Nationstar Mortg. LLC*, 2014 WL 6603166, at \*4-5 (S.D. Cal. Nov. 19, 2014) (servicer rejected payments after servicing transfer).

<sup>142</sup> The statute of frauds requires agreements concerning real property to be memorialized in writing. *Chavez v. Indymac Mortg. Servs.*, 219 Cal. App. 4th 1052, 1057 (2013).

<sup>143</sup> *Corvello*, 728 F.3d at 882, 885.

<sup>144</sup> *Id.* at 885.

<sup>145</sup> Ordinarily, agreements subject to the statute of frauds must also be signed "by the party to be charged" with breach of contract. *Harris v. Bank of Am., N.A.*, 2014 WL 1116356, at \*6 (C.D. Cal. Mar. 17, 2014).

and permanent modification estopped the servicer from asserting the statute of frauds.<sup>146</sup>

Other courts have declined to dismiss a case based on a statute of frauds defense on the ground that a signed TPP or permanent modification agreement may be found in discovery.<sup>147</sup> Another court explained that a TPP does not fall within the statute of frauds because it only contains the *promise* of a permanent modification, and does not, by itself, actually modify the underlying loan documents.<sup>148</sup>

## 2. Non-HAMP breach of contract claims

Breach of contract claims are also possible outside the HAMP context.<sup>149</sup> In 2013, a California Superior Court held that *Corvello* and *Barroso* could apply to borrower's breach of contract claim even though those cases dealt with *HAMP* TPPs and permanent modifications, while the "Loan Workout Plan" relied upon by this borrower was a "proprietary" modification, created by the servicer, not HAMP.<sup>150</sup> The borrower argued there was no material difference between a HAMP TPP and the agreement at issue, for the two contracts used almost identical language. Indeed, the *Corvello* court relied on the *language* in the TPP agreement, not the fact that it was created by HAMP, to find a valid breach of contract claim.<sup>151</sup> The court agreed and overruled

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<sup>146</sup> *Chavez*, 219 Cal. App. 4th at 1057-61; *see also* *Tirabassi v. Chase Home Fin. LLC*, 2015 WL 1402016, at \*4-6 (C.D. Cal. Mar. 24, 2015) (implied contract); *Moya v. CitiMortgage, Inc.*, 2014 WL 1344677, at \*3 (S.D. Cal. Mar. 28, 2014); *Harris*, 2014 WL 1116356, at \*6.

<sup>147</sup> *See, e.g.*, *Orozco v. Chase Home Fin. LLC*, 2011 WL 7646369, at \*1 (Bankr. E.D. Cal. Aug. 16, 2011); *Chavez*, 219 Cal. App. 4th at 1062.

<sup>148</sup> *Chavez*, 219 Cal. App. 4th at 1062.

<sup>149</sup> *See, e.g.*, *Menan v. U.S. Bank, Nat'l Ass'n*, 924 F. Supp. 2d 1151, 1156-58 (E.D. Cal. 2013) (finding a "Forbearance to Modification Agreement" document an enforceable contract and that defendant breached the agreement by failing to cancel the NOD); *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49, 71-72 (2013) (finding an agreement under the HomeSaver Forbearance Program an enforceable contract obligating servicer to consider borrower for foreclosure alternatives in "good faith," relying on the reasoning in *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780 (2013)).

<sup>150</sup> *Hamidi v. Litton Loan Servs. LLP*, No. 34-2010-00070476-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 10, 2013).

<sup>151</sup> *See Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883-85 (9th Cir. 2013). At least one federal court has expressed suspicion that the HAMP nature of the TPP at issue in *Corvello* did not affect the outcome in that case. *Beck v. Oewen Loan Servs., LLC*, 2015 WL 519052, at \*3 (C.D. Cal. Feb. 6, 2015) (distinguishing *Corvello* as applying only to *HAMP* TPP agreements and noting Treasury Directive 09-01, which

servicer's demurrer.<sup>152</sup> More recently, another Superior Court held that borrowers successfully couched a seemingly proprietary TPP, an "FNMA Apollo Trial Period Program," as a HAMP TPP, citing servicer's HAMP participation and that the TPP was "offered as a HAMP modification."<sup>153</sup> The court found that nothing in the TPP itself contradicted this allegation, and treated the TPP as a HAMP TPP, concluding that servicer was obligated to offer a permanent modification after borrowers' successful TPP completion.<sup>154</sup> A federal district court and the California Court of Appeal have also found viable deceit, promissory estoppel, and negligence claims based on a borrower's proprietary TPP agreement.<sup>155</sup>

Conversely, in a recent California federal district court case, the borrower argued that *Corvello's* reasoning applied to her Workout Agreement and Foreclosure Alternative Agreement. But because neither contract contained the mandatory language found in *Corvello's* HAMP agreement (servicer "will provide" a modification), the court found *Corvello* inapposite.<sup>156</sup> A California Superior Court came to a similar conclusion.<sup>157</sup>

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imposes rules on HAMP contracts that do not govern proprietary contracts, but declining to dismiss borrower's contract claim without further discussion on the TPP's language).

<sup>152</sup> *Hamidi*, No. 34-2010-00070476-CU-OR-GDS ("After reviewing *Barroso* [citation], the court concludes that [borrower's] allegations can be construed to state breach of the implied covenant of good faith and fair dealing, as well as breach of contract, notwithstanding the absence of [servicer's] signature on the Loan Workout Plan."); see also *Natan v. Citimortgage*, 2014 WL 4923091, at \*2 (C.D. Cal. Oct. 1, 2014) (finding that nothing in *Corvello* suggests that borrowers must be HAMP eligible to bring contract-related claims based on TPPs – it was the *language* of the TPP in *Corvello* that was determinative, not the fact it was a HAMP TPP).

<sup>153</sup> *Dominguez v. Nationstar Mortg., LLC*, No. 37-2013-00077183-CU-OR-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 19, 2014).

<sup>154</sup> *Id.* If a proprietary TPP does not closely track the HAMP language or framework, courts are more skeptical of contract claims. See *Nava v. JP Morgan Chase*, 2014 WL 6886071, at \*2, n.1 (C.D. Cal. Nov. 25, 2014) (allowing borrower's contract claim to move passed the pleading stage, but noting it was disinclined to find that servicer owed borrower a permanent modification because the TPP's language merely stated that borrower's TPP default "eliminate[d] the opportunity for a final loan modification").

<sup>155</sup> See, e.g., *Natan*, 2014 WL 4923091, at \*2 (promissory estoppel claim survived MTD, even assuming borrowers were not HAMP eligible, where TPP was "hopelessly ambiguous"); *Akinshin v. Bank of Am., N.A.*, 2014 WL 3728731, at \*4-8 (Cal. Ct. App. July 29, 2014) (unpublished decision finding viable deceit, promissory estoppel, and negligence claims based on a proprietary TPP).

<sup>156</sup> *Morgan v. Aurora Loan Servs., LLC*, 2014 WL 47939, at \*4-5 (C.D. Cal. Jan. 6, 2014), *aff'd*, \_\_\_ F. App'x \_\_\_, 2016 WL 1179733 (9th Cir. Mar. 28, 2016). But see *Beck*,

As the above cases illustrate, the enforceability of a non-HAMP trial modification agreement – and whether it promises a permanent modification – will depend on the precise language of that particular agreement. Claims based on *permanent* proprietary modifications are easier to assert since these agreements contain no condition precedent triggering a servicer obligation, as trial period plans do.<sup>158</sup>

### 3. Promissory estoppel claims

Because promissory estoppel claims are exempt from the statute of frauds,<sup>159</sup> borrowers often bring them when there is no written modification agreement. To state a claim, borrowers must show not only that the servicer promised a benefit (like postponing the sale,<sup>160</sup> not reporting a default to a credit reporting agency,<sup>161</sup> or offering a

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2015 WL 519052, at \*3 (declining to dismiss borrower’s contract claim without further discussion on the language in her proprietary TPP, noting that *Morgan* focused on the language in a HAMP TPP compared to the borrower’s FAA and WAG at issue).

<sup>157</sup> See *Pittell v. Ocwen Loan Servicing, LLC*, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (distinguishing the proprietary agreement at issue with the situations in *West* and *Corvello* in three ways: 1) this borrower made only two of three TPP payments; 2) the TPP dictated that servicer “may” grant borrower a permanent modification upon TPP completion, not “will”; and 3) the proprietary agreement received no outside support from HAMP directives).

<sup>158</sup> See, e.g., *Le v. Bank of New York Mellon*, 2014 WL 3533148, at \*4 (N.D. Cal. July 15, 2014) (finding a valid contract claim based on servicer’s failure to accept borrower’s permanently modified payments).

<sup>159</sup> See *Postlewaite v. Wells Fargo Bank N.A.*, 2013 WL 2443257, at \*4 (N.D. Cal. June 4, 2013) (While the statute of frauds may apply to loan modification agreements, it does not apply to promises to postpone a foreclosure sale.); *Ren v. Wells Fargo Bank, N.A.*, 2013 WL 2468368, at \*3-4 (N.D. Cal. June 7, 2013) (reasoning that promises to refrain from foreclosures do not require written documentation); *Secrest v. Sec. Nat’l Mortg. Loan Trust 2002-2*, 167 Cal. App. 4th 544, 555 (2008).

<sup>160</sup> See *Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*4 (N.D. Cal. Apr. 14, 2014) (allowing promissory estoppel claim to proceed when servicer induced borrower to default to qualify for loan modification and promised not to foreclose during review).

<sup>161</sup> See, e.g., *Cockrell v. Wells Fargo Bank, N.A.*, 2013 WL 3830048, at \*4 (N.D. Cal. July 23, 2013) (finding a valid PE claim where servicer convinced borrower to go into default to qualify for a modification and promised to take no negative actions against borrower for doing so; the servicer reported borrower to credit rating agencies). Compare *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411 (2015) (statement that no sale is currently scheduled is not a promise that sale would not happen in the future).

permanent modification<sup>162</sup>) and went back on that promise, but that the borrower detrimentally relied on that promise. Some courts require borrowers to demonstrate specific changes in their actions to show reliance,<sup>163</sup> while others take for granted that the borrowers *would* have acted differently absent servicer's promise.<sup>164</sup> If the claim *is* based

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<sup>162</sup> See, e.g., *McNeil v. Wells Fargo Bank, N.A.*, 2014 WL 6681604, at \*4 (N.D. Cal. Nov. 25, 2014) (denying servicer's MTD borrowers' PE claim based on servicer's agreement to modify borrower's mortgage and then breach of the agreed-to terms by improperly inflating borrowers' escrow); *Alimena v. Vericrest Fin., Inc.*, 964 F. Supp. 2d 1200, 1216 (E.D. Cal. 2013) (advising borrowers to amend their complaint to allege they fulfilled all TPP requirements, including their continuous HAMP eligibility throughout the TPP process, to successfully plead two promissory estoppel claims based on two separate TPP agreements, each promising to permanently modify the loan if borrower fulfilled TPP requirements); *Passaretti v. GMAC Mortg., LLC*, 2014 WL 2653353, at \*6-7 (Cal. Ct. App. June 13, 2014) (finding a valid promissory estoppel claim based on servicer's assurance it would "work on a loan modification" with borrower if borrower participated in a repayment plan, ultimately paying over \$50,000); see also *Fernandez v. Bank of Am., N.A.*, 2015 WL 1456748, at \*7 (C.D. Cal. Mar. 30, 2015) (allowing PE claim when permanent modification offered significantly differed from TPP). *But see Fairbanks v. Bank of Am., N.A.*, 2014 WL 954264, at \*4-5 (Cal. Ct. App. Mar. 12, 2014) (a verbal promise to permanently modify upon successful completion of a verbal TPP is conditional because it is based on a future event (TPP completion), so the promise is ambiguous).

<sup>163</sup> See, e.g., *Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*2 (N.D. Cal. Apr. 14, 2014) (Borrower's decision to become delinquent, in reliance on servicer's promise it would not foreclose during modification evaluation, was enough to show detrimental reliance.); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*10-12 (N.D. Cal. Mar. 3, 2014) (Borrowers demonstrated detrimental reliance by not appearing at the actual foreclosure sale due to lack of notice, where they would have placed a "competitive bid."); *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*6 (C.D. Cal. Jan. 3, 2014) (Borrowers demonstrated detrimental reliance by pointing to their signed short sale agreement, which they ultimately rejected in reliance on servicer's promise that a modification was forthcoming.); *Panaszewicz v. GMAC Mortg., LLC*, 2013 WL 2252112, at \*5 (N.D. Cal. May 22, 2013) (requiring a borrower to show pre-promise "preliminary steps" to address an impending foreclosure and then a post-promise change in their activity); *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411 (2015) (borrower may not rely on earlier statement that no sale is scheduled when Wells Fargo specifically told the borrower that sale was going forward); *Jones v. Wachovia Bank*, 230 Cal. App. 4th 935, 948-49 (2014) (finding that borrowers' informal, unrealized plans to borrow reinstatement funds from a friend and/or seek a sale postponement insufficient to show detrimental reliance); *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 222, 229-30 (2011) (finding that foregoing a Chapter 13 bankruptcy case was sufficiently detrimental).

<sup>164</sup> See, e.g., *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*5 (E.D. Cal. Dec. 3, 2014) (PE claim survived MTD where, relying on servicer's promise not to foreclose during TPP, borrowers opted for the TPP instead of pursuing other foreclosure alternatives); *Curley v. Wells Fargo & Co.*, 2014 WL 2187037, at \*2-3 (N.D. Cal. May 23, 2014) (Borrower successfully argued, as part of his motion for leave to add a promissory fraud claim, that he passed up opportunities to file bankruptcy, obtain private financing, or sell his home, relying on servicer's promise

in a written TPP agreement (sometimes brought in conjunction with a breach of contract claim),<sup>165</sup> the court may count the TPP payments themselves as reliance and injury.<sup>166</sup> Even though a promissory estoppel claim may not, in most cases, overturn a completed sale,<sup>167</sup> if the lender promised to postpone a foreclosure sale, a Section 2924g(c) claim could cancel the sale.<sup>168</sup> This type of claim does not require a borrower to show detrimental reliance.<sup>169</sup>

#### 4. Breach of the covenant of good faith & fair dealing

Every contract contains an implied covenant of good faith and fair dealing, “meaning that neither party will do anything which will injure the right of the other to receive the contract’s benefits.”<sup>170</sup> Advocates have been successful with these claims (sometimes brought alongside breach of contract claims), by asserting that servicers have frustrated borrowers’ realization of the benefits of their TPP or permanent modification agreements.<sup>171</sup> Borrowers have also succeeded on an

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to offer a permanent modification after TPP completion.); *Faulks v. Wells Fargo & Co.*, 2014 WL 1922185, at \*5 (N.D. Cal. May 13, 2014) (accepting borrower’s assertion that he chose not to pursue “other alternatives” to foreclosure as adequate detrimental reliance); *West v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 804-05 (2013) (finding plaintiff’s allegation that she would have pursued other options if not for servicer’s promise to stop the foreclosure, sufficient detrimental reliance).

<sup>165</sup> See *Harris v. Bank of Am., N.A.*, 2014 WL 1116356 (C.D. Cal. Mar. 17, 2014) and *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005 (N.D. Cal. Mar. 12, 2014) for discussions on pleading a PE claim in the alternative with a breach of contract claim.

<sup>166</sup> See *Alimena v. Vericrest Fin., Inc.*, 964 F. Supp. 2d 1200, 1218 (E.D. Cal. 2013).

<sup>167</sup> See *Aceves*, 192 Cal. App. 4th at 231.

<sup>168</sup> A trustee “shall postpone the sale in accordance with . . . [*inter alia*] . . . mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee. CAL. CIV. CODE § 2924g(c)(1)(C) (2005). See *Chan v. Chase Home Fin.*, 2012 WL 10638457, at \*11 (C.D. Cal. June 18, 2012) (holding tender not required under 2924g(c) when servicer foreclosed after agreeing to postpone sale); *Aharonoff v. Am. Home Mortg. Servicing*, 2012 WL 1925568, at \*4 (Cal. Ct. App. May 29, 2012) (allowing a 2924g(c) claim to cancel the sale when Wells Fargo representative conducted trustee sale despite promises to put the sale on hold).

<sup>169</sup> See *Aharonoff*, 2012 WL 1925568 at \*4 (allowing CC 2924g claim without requiring (or discussing) detrimental reliance).

<sup>170</sup> *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 928-29 (2013).

<sup>171</sup> See, e.g., *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*5 (N.D. Cal. Dec. 23, 2014) (finding a viable good faith claim based on servicer’s failure to permanently modify after borrower complied with the TPP, frustrating borrower’s ability to benefit from the TPP agreement); *Silkes v. Select Portfolio Servicing*, 2014 WL 6992144, at

implied covenant claim based on the deed of trust when the servicer encouraged them to default in order to receive a loan modification but failed to follow through on a modification.<sup>172</sup> The claim may also succeed when the servicer interferes with the right to reinstate.<sup>173</sup>

## C. Tort Claims

### 1. Negligence

Until very recently, servicers that mishandled modification applications were immune to negligence claims because, under normal

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\*5 (Cal. Ct. App. Dec. 11, 2014) (finding a viable claim where servicer refused to accept modified payments and instead tripled borrower's escrow, which was not agreed to in the modification); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*4-5 (E.D. Cal. Dec. 3, 2014) (valid claim where servicer foreclosed during TPP and before due-date to submit additional TPP documents expired); *Henderson v. Ocwen Loan Servicing*, 2014 WL 5461955, at \*4 (N.D. Cal. Oct. 27, 2014) (Servicer improperly refused to accept borrower's automated, permanently modified mortgage payments, lied about returning payments, and failed to correct an improper default.); *Lanini v. JP Morgan Chase Bank*, 2014 WL 1347365, at \*6 (E.D. Cal. Apr. 4, 2014) (valid claim based on servicer offering borrowers a TPP knowing borrower's property was too valuable to qualify for a permanent mod); *Curley v. Wells Fargo & Co.*, 2014 WL 988618, at \*5-8 (N.D. Cal. Mar. 10, 2014) (borrower's good faith claim based on their TPP agreement survived summary judgment); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1409-10 (2014) (allowing borrower's good faith claim because servicer allegedly foreclosed before borrowers' third and final TPP payment was due, frustrating borrowers' ability to realize the benefits of that agreement); *Bushell*, 220 Cal. App. 4th at 929 (Servicer frustrated borrower's ability to benefit from a successful TPP agreement in finally receiving a permanent modification offer.).

<sup>172</sup> *Dias v. JP Morgan Chase NA*, 2015 WL 1263558, at \*6 (N.D. Cal. Mar. 19, 2015); *Castillo v. Bank of Am.*, 2014 WL 4290703, at \*4 (N.D. Cal. Aug. 29, 2014) (successfully arguing that servicer's representation that missing mortgage payments would "assist" borrower's modification process interfered with his ability to pay his loans under the DOT); *Vasquez v. Bank of Am., N.A.*, 2013 WL 6001924, at \*14 (N.D. Cal. Nov. 12, 2013) (allowing borrower's good faith claim based on the same scenario as that in *Cockrell*, noting that servicer "consciously and deliberately frustrated the parties' common purpose" outlined in the DOT). *But see* *Fevinger v. Bank of Am.*, 2014 WL 3866077, at \*5 (N.D. Cal. Aug. 4, 2014) (agreeing to forestall foreclosure if borrower stopped making mortgage payments is mere "encouragement," and does not deprive the borrower of realizing the benefits of their DOT); *Cockrell v. Wells Fargo Bank, N.A.*, 2013 WL 3830048, at \*3-4 (N.D. Cal. July 23, 2013) (declining to find a good faith claim where servicer *encouraged* borrowers to become delinquent on their mortgage to qualify for a modification, but did not *actively interfere with* their ability to perform on their DOT).

<sup>173</sup> *See, e.g., Siqueiros v. Fed. Nat'l Mortg. Ass'n*, 2014 WL 3015734, at \*6-7 (C.D. Cal. June 27, 2014) (viable good faith and fair dealing claim based on servicer's failure to provide borrower with an accurate reinstatement amount, frustrating her ability to benefit from the DOT by reinstating and avoiding foreclosure).

circumstances, a lender does not owe a duty of care to a borrower.<sup>174</sup> The decision in *Jolley v. Chase Home Finance, LLC*, was the first published opinion that started to shift this state of the law. The *Jolley* court proposed that the general no-duty rule may be outdated, citing HAMP, SB 1137, and HBOR, as indicative of an evolving public policy toward the creation of a duty. *Jolley* involved a construction loan, not a residential loan, but suggested it may be appropriate to impose a duty of care on banks, encouraging them to negotiate loan modifications with borrowers and to treat borrowers fairly in this process.<sup>175</sup> “Courts should not rely mechanically on the ‘general rule’ that a duty of care does not exist, and the loan modification process itself can create a duty of care relationship.”<sup>176</sup>

A recent, published, Court of Appeal case has advanced this negligence theory further, applying it specifically to residential loans. In *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014), the court found that, though a servicer is not obligated to initiate the modification process or to offer a modification, once it agrees to engage in that process with the borrower, it owes a duty of care not to mishandle the application or negligently conduct the modification process.<sup>177</sup> Though most courts have, in the past, failed to find a duty of care created by engaging in the modification process,<sup>178</sup> *Alvarez* has significantly shifted the legal landscape on the negligence issue.<sup>179</sup>

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<sup>174</sup> See *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231 Cal. App. 3d 1089, 1096 (1991) (“[A] financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.”).

<sup>175</sup> *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 902-03 (2013).

<sup>176</sup> *Id.* at 903; see also, e.g., *Harris v. Bank of Am., N.A.*, 2014 WL 1116356, at \*13-14 (C.D. Cal. Mar. 17, 2014) (finding *Jolley* applicable, not distinguishable, because like *Jolley*, this case involved “ongoing loan servicing issues”); *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005, at \*6-11 (N.D. Cal. Mar. 12, 2014) (denying motion to dismiss negligence claim and finding that the economic loss rule does not bar recovery); *Ware v. Bayview Loan Servicing, LLC*, 2013 WL 6247236, at \*9 (S.D. Cal. Oct. 29, 2013) (denying motion to dismiss borrower’s negligence claim because servicer may owe a duty of care to maintain proper records and timely respond to modification applications); *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148, at \*5-7 (E.D. Cal. Oct. 11, 2013) (deeming servicer’s solicitation of plaintiff-owner’s loan modification application as giving rise to a duty to treat her with reasonable care).

<sup>177</sup> *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941, 945-50 (2014).

<sup>178</sup> See, e.g., *Benson v. Ocwen Loan Servicing, LLC*, 562 F. App’x 567, 570 (9th Cir. 2014) (distinguishing *Jolley* as a construction loan case); *Ragland v. U.S. Bank Nat’l Ass’n*, 209 Cal. App. 4th 182, 207 (2012) (finding no duty because the issue of loan modification falls “within the scope of [servicer’s] conventional role as a lender of

Though *Alvarez* has been the main catalyst of change for negligence claims, the shift began even earlier than *Alvarez*, with the court's

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money"); *cf.* *Kramer v. Bank of Am., N.A.*, 2014 WL 1577671, at \*9 (E.D. Cal. Apr. 17, 2014) ("The Court recognizes a duty of care during the loan modification process upon a showing of either a promise that a modification would be granted or the successful completion of a trial period."); *Sun v. Wells Fargo*, 2014 WL 1245299, at \*4 (N.D. Cal. Mar. 25, 2014) (A duty may arise when a TPP or mod is offered, but the "mere engaging" in the modification process is a traditional money lending activity.); *Newman v. Bank of N.Y. Mellon*, 2013 WL 5603316 (E.D. Cal. Oct. 11, 2013) (dismissing borrower's negligence claim because there was no TPP in place, acknowledging that a clear promise to modify or trial agreement *may* have created a duty of care).

<sup>179</sup> *See, e.g.*, *MacDonald v. Wells Fargo Bank, N.A.*, 2015 WL 1886000, at \*5-6 (N.D. Cal. Apr. 24, 2015) (listing post-*Alvarez* cases and noting that *Alvarez* marked "a sea change of jurisprudence on this issue"); *Meixner v. Wells Fargo Bank, N.A.*, 101 F. Supp. 3d 938, 951-55 (E.D. Cal. 2015) (following *Alvarez*); *Duran v. Bank of Am., N.A.*, 2015 WL 794672, at \*10 (C.D. Cal. Feb. 24, 2015) (following *Alvarez* to find a viable negligence claim where servicer's admitted but uncorrected clerical error led to a modification denial); *Johnson v. PNC Mortgage*, 80 F. Supp. 3d 980, 984-86 (N.D. Cal. 2015) (following *Alvarez* and finding a negligence claim where servicer used inflated income numbers to calculate borrower's modification, resulting in unaffordable payments); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*11 (C.D. Cal. Dec. 19, 2014) (following *Alvarez* to find that servicer breached its duty of care by losing one application and wrongfully denying a second for missing documents while simultaneously acknowledging that application as "complete"); *Gilmore v. Wells Fargo Bank*, 75 F. Supp. 3d 1255, 1266-68 (N.D. Cal. 2014) (citing *Alvarez*, and finding that servicer breached its duty of care by recording an NTS and scheduling a sale while a complete application was pending); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*12 (C.D. Cal. Nov. 19, 2014) (following *Alvarez* where servicer allegedly solicited borrowers HAMP applications knowing she could not qualify and then lost or mishandled the applications); *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*8-10 (C.D. Cal. Oct. 24, 2014) (following *Alvarez* and inferring that servicer mishandled borrower's application by telling borrower both that documents were missing and that his application was complete); *Segura v. Wells Fargo Bank, N.A.*, 2014 WL 4798890, at \*12-13 (C.D. Cal. Sept. 26, 2014) (citing *Alvarez* and finding servicer was obligated to handle borrowers' application with "reasonable care," and denying servicer's MTD borrowers' negligence claim); *cf.* *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*6-7 (N.D. Cal. Dec. 23, 2014) (denying servicer's MTD borrower's constructive fraud claim, finding servicer owed borrower a duty of care once it entered into a TPP with borrower, and breached that duty by foreclosing while borrower was TPP compliant); *Sokoloski v. PNC Mortg.*, 2014 WL 6473810, at \*8 (E.D. Cal. Nov. 18, 2014) (relying on *Jolley*, rather than *Alvarez*, but finding servicer's offer of a permanent modification, through the TPP, created a duty of care). *But see* *Geake v. JP Morgan Chase Bank*, 2015 WL 331104, at \*6-7 (C.D. Cal. Jan. 23, 2015) (distinguishing *Alvarez* and declining to find a duty of care where transferee servicer (after a servicing transfer) refused to permanently modify borrower's loan based on a TPP with the transferor servicer, sent borrower confusing communications, and refused to answer borrowers' questions); *Campos-Riedel v. JP Morgan Chase*, 2014 WL 6835203, at \*5 (E.D. Cal. Dec. 3, 2014) (declining to find a duty of care where servicer sent NOD and NTS to borrower's ex-husband, from whom she had properly assumed the loan years before).

decision in *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49 (2013). Though that court declined to follow *Jolley* to find a general duty of care, it allowed borrower to amend her complaint to state a claim for negligent misrepresentation instead of negligence. It held that servicers owe a duty *not to misrepresent* the status of borrower's loan modification application or of a foreclosure sale. Indeed, some courts had already started to apply this reasoning to negligence claims before *Alvarez* was decided.<sup>180</sup>

Borrowers may of course also bring negligence claims outside of, or tangentially related to, the modification process. But there too, borrowers must usually demonstrate that the servicer owed the borrower a duty of care and breached it.<sup>181</sup> And though it is technically a rule of evidence, at least two courts have allowed advocates to allege claims under a negligence *per se* theory.<sup>182</sup>

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim against the servicer,<sup>183</sup> and possibly the servicer representatives.<sup>184</sup> An

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<sup>180</sup> See, e.g., *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*5-6 (N.D. Cal. May 13, 2014) (applying the *Biakanja* factors to find servicer owed borrower a duty of care once it accepted borrower's modification application); *Akinshin v. Bank of Am., N.A.*, 2014 WL 3728731, at \*7-8 (Cal. Ct. App. July 29, 2014) (reversing the trial court's grant of servicer's demurrer to borrower's negligence claim based on *Lueras* reasoning).

<sup>181</sup> See, e.g., *Mahoney v. Bank of Am., N.A.*, 2014 WL 2197068, at \*7 (S.D. Cal. May 27, 2014) (finding a duty of care to accurately credit borrower's mortgage payments and to provide a reinstatement amount); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*14 (N.D. Cal. Mar. 3, 2014) (finding a valid negligence claim related to servicer's SPOC violations); *Barber v. CitiMortgage*, 2014 WL 321934, at \*3-4 (C.D. Cal. Jan. 2, 2014) (Borrower successfully pled a negligence claim related to servicer's imposition of an escrow even though she provided proof of her property tax payments. If borrower was *actually* current on her taxes, then servicer owed her a duty of care not to impose an unnecessary escrow.); *Hampton v. US Bank, N.A.*, 2013 WL 8115424, at \*3-4 (C.D. Cal. May 7, 2013) (finding a duty of care to accurately credit borrower's accounts with her payment to "cure her default").

<sup>182</sup> *Weber v. PNC Bank*, 2015 WL 269473, at \*5-6 (E.D. Cal. Jan. 21, 2015) (finding a viable negligence claim based on a negligence *per se* theory because borrowers are members of the class of people meant to be protected by HBOR's dual tracking statutes; and 2) borrowers need not prove servicer owed them a duty of care since the doctrine "borrows' statutes to prove duty of care."); *Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS* (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (reframing borrower's negligence *per se* claim as a negligence claim and allowing it to survive servicer's demurrer).

<sup>183</sup> See *Khan v. ReconTrust Co.*, 81 F. Supp. 3d 867, 874-75 (N.D. Cal. 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); *Morris v. Residential Credit Solutions, Inc.*, 2015 WL 428114, at \*5-10 (E.D. Cal. Feb. 2, 2015)

intentional wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress claim,<sup>185</sup> though borrowers have been somewhat more successful in alleging emotional distress *damages* related to other types of claims.<sup>186</sup>

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(granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); *Johnson v. Bank of Am.*, 2015 WL 351210, at \*7 (N.D. Cal. Jan. 23, 2015) (Servicer misrepresented to borrower on five occasions that her applications were complete, only to later deny receipt of those applications, or reject the applications themselves due to missing documents.); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*9 (C.D. Cal. Dec. 19, 2014) (finding borrower was not required to double-check county property records to confirm servicer's misrepresentation that no foreclosure would occur, and a viable fraudulent misrepresentation claim); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD borrower's fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money, citing servicer's foreclosure before the deadline for filing additional documents expired.); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1410 (2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 793-94 (2013) (same). *But see Fairbanks v. Bank of Am., N.A.*, 2014 WL 954264, at \*2-3 (Cal. Ct. App. Mar. 12, 2014) (distinguishing *West* as applying to a written TPP agreement, and finding borrowers here failed to allege their fraud claim, based on a verbal TPP, with specificity).

<sup>184</sup> *See, e.g., Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5-6 (C.D. Cal. Jan. 3, 2014) (allowing borrower to impose fraud liability on a SPOC); *Fleet*, 229 Cal. App. 4th at 1411-12 (Borrowers successfully alleged a fraud claim against servicer representatives who assured borrowers their TPP payments were received and credited, and that a foreclosure sale would not occur, which of course it did.).

<sup>185</sup> *See Smith v. JP Morgan Chase*, 2014 WL 6886030, at \*4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer put borrower into default though she was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay \$20,000 she did not owe to stop the wrongful foreclosure); *Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182, 203-05 (2012).

<sup>186</sup> *See, e.g., Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*4 (N.D. Cal. Apr. 14, 2014) (allowing borrower's promissory estoppel claim, which alleged severe emotional distress as part of her damages, to survive servicer's motion to dismiss); *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005, at \*9 (N.D. Cal. Mar. 12, 2014) (allowing borrower to claim emotional distress damages related to her negligence claim, invoking an exception to the economic loss doctrine); *Barber v. CitiMortgage*, 2014 WL 321934, at \*4 (C.D. Cal. Jan. 2, 2014) (allowing borrower to allege emotional distress as part of her damages to her breach of contract claim);

## 2. Fraud and Negligent Misrepresentation

Claims for fraud or negligent misrepresentation hinge on a material misrepresentation of fact that causes harm to the plaintiff. In the loss mitigation context, this could include a misrepresentation that the servicer has contractual authority to modify the loan, a foreclosure sale has been canceled, that a loan modification application has been deemed complete and is under active review, or that a borrower is qualified for a loan modification and should refrain from taking other steps to cure the default and avoid foreclosure.

Examples of fraud and misrepresentation claims stated include (1) misrepresenting contractual authority for loan modification;<sup>187</sup> (2) reneging on promise that the borrower qualified for and will receive loan modification;<sup>188</sup> (3) foreclosure will not take place during loan modification review;<sup>189</sup> (4) falsely stating that loan modification application was complete.<sup>190</sup>

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Goodman v. Wells Fargo Bank, N.A., 2014 WL 334222, at \*3 (Cal. Ct. App. Jan. 30, 2014) (same).

<sup>187</sup> See Pulley v. Wells Fargo Bank, 2015 WL 1393417 (N.D. Cal. Mar. 26, 2015).

<sup>188</sup> See Khan v. ReconTrust Co., 81 F. Supp. 3d 867, 874-75 (N.D. Cal. 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); Bushell v. JP Morgan Chase Bank, N.A., 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify).

<sup>189</sup> Morris v. Residential Credit Solutions, Inc., 2015 WL 428114, at \*5-10 (E.D. Cal. Feb. 2, 2015) (granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); Curley v. Wells Fargo & Co., 2014 WL 7336462, at \*8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); Medrano v. Caliber Home Loans, 2014 WL 7236925, at \*9 (C.D. Cal. Dec. 19, 2014) (finding a viable fraudulent misrepresentation claim and rejecting argument that borrower cannot satisfy justifiable reliance without checking county property records for rescission of sale to confirm servicer's misrepresentation that no foreclosure would occur); Blankenchip v. Citimortgage, Inc., 2014 WL 6835688, at \*6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD borrower's fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money, citing servicer's foreclosure before the deadline for filing additional documents expired.); Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976, at \*5-6 (C.D. Cal. Jan. 3, 2014) (allowing fraud when NTS was served on the borrower even though a SPOC told the borrower no action will be taken in 60 days); Fleet v. Bank of Am., 229 Cal. App. 4th

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim against the servicer,<sup>191</sup> and possibly the servicer representatives.<sup>192</sup> An intentional wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress

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1403, 1410 (2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 793-94 (2013) (same).

<sup>190</sup> *Johnson v. Bank of Am., N.A.*, 2015 WL 1387478 (N.D. Cal. Mar. 24, 2015)

<sup>191</sup> *See Khan v. ReconTrust Co.*, 81 F. Supp. 3d 867, 874-75 (N.D. Cal. 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); *Morris v. Residential Credit Solutions, Inc.*, 2015 WL 428114, at \*5-10 (E.D. Cal. Feb. 2, 2015) (granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); *Johnson v. Bank of Am.*, 2015 WL 351210, at \*7 (N.D. Cal. Jan. 23, 2015) (Servicer misrepresented to borrower on five occasions that her applications were complete, only to later deny receipt of those applications, or reject the applications themselves due to missing documents.); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*9 (C.D. Cal. Dec. 19, 2014) (finding borrower was not required to double-check county property records to confirm servicer's misrepresentation that no foreclosure would occur, and a viable fraudulent misrepresentation claim); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD borrower's fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money, citing servicer's foreclosure before the deadline for filing additional documents expired.); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1410 (2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 793-94 (2013) (same). *But see Fairbanks v. Bank of Am., N.A.*, 2014 WL 954264, at \*2-3 (Cal. Ct. App. Mar. 12, 2014) (distinguishing *West* as applying to a written TPP agreement, and finding borrowers here failed to allege their fraud claim, based on a verbal TPP, with specificity).

<sup>192</sup> *See, e.g., Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5-6 (C.D. Cal. Jan. 3, 2014) (allowing borrower to impose fraud liability on a SPOC); *Fleet*, 229 Cal. App. 4th at 1411-12 (Borrowers successfully alleged a fraud claim against servicer representatives who assured borrowers their TPP payments were received and credited, and that a foreclosure sale would not occur, which of course it did.).

claim,<sup>193</sup> though borrowers have been somewhat more successful in alleging emotional distress *damages* related to other types of claims.<sup>194</sup>

The complaint also must provide factual support for the assertion that statements at issue were misrepresentations of fact, rather than merely concluding that the representations were false.<sup>195</sup>

Another difficult element of these claims is showing that the plaintiff justifiably relied on the misrepresentations. Justifiable reliance may be refuted if the lender can point to evidence that should have aroused suspicion or disbelief in the plaintiff regarding the accuracy of the misrepresentations.<sup>196</sup> For example, one court found a lack of justifiable reliance on statements that her loan was “in underwriting” and “under review” and thus a foreclosure would not proceed where the complaint also contained allegations that the application had been denied prior to foreclosure, the file was closed, and the plaintiff had “actual knowledge” of the scheduled foreclosure sale. The court found that these alleged facts rendered it unjustifiable for plaintiff to forego taking the actions “she deemed necessary to avoid the foreclosure sale” because the plaintiff “was on notice of problems to frustrate the notion of her justifiable reliance.”<sup>197</sup>

Finally, another challenge to these types of claims is the heightened pleading standard to state fraud claims, at least in federal court. Recall that these claims must be pled with particularity, not just plausibility. One example of this is that in a fraud claim against a

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<sup>193</sup> See *Smith v. JP Morgan Chase*, 2014 WL 6886030, at \*4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer put borrower into default though she was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay \$20,000 she did not owe to stop the wrongful foreclosure); *Ragland v. U.S. Bank Nat’l Ass’n*, 209 Cal. App. 4th 182, 203-05 (2012).

<sup>194</sup> See, e.g., *Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*4 (N.D. Cal. Apr. 14, 2014) (allowing borrower’s promissory estoppel claim, which alleged severe emotional distress as part of her damages, to survive servicer’s motion to dismiss); *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005, at \*9 (N.D. Cal. Mar. 12, 2014) (allowing borrower to claim emotional distress damages related to her negligence claim, invoking an exception to the economic loss doctrine); *Barber v. CitiMortgage*, 2014 WL 321934, at \*4 (C.D. Cal. Jan. 2, 2014) (allowing borrower to allege emotional distress as part of her damages to her breach of contract claim); *Goodman v. Wells Fargo Bank, N.A.*, 2014 WL 334222, at \*3 (Cal. Ct. App. Jan. 30, 2014) (same).

<sup>195</sup> *Khan v. CitiMortgage Inc.*, 975 F. Supp. 2d 1127, 1141 (E.D. Cal. 2013).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

corporation, a plaintiff must “allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.”<sup>198</sup> California state courts, on the other hand, have allowed plaintiffs to proceed without specific details if the information is in the possession of the servicer.<sup>199</sup>

### 3. Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress (IIED) can be difficult to plead, as it requires some pretty extreme facts. The elements of the tort of intentional infliction of emotional distress are:

(1) [E]xtreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.<sup>200</sup>

A number of California courts have held that the act of foreclosing on a home (absent other circumstances) is not the kind of extreme conduct that supports an intentional infliction of emotional distress claim.<sup>201</sup>

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<sup>198</sup> Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991).

<sup>199</sup> See Miles v. Deutsche Bank Nat'l Tr. Co., 236 Cal. App. 4th 394 (2015) (explaining that “in an era of electronic signing, it is often unrealistic to expect plaintiffs to know the who-and-the-what authority when mortgage servicers themselves may not actually know the who-and-the-what authority”); West v. JP Morgan Chase Bank, N.A., 214 Cal. App. 4th 780, 793 (2013) (holding that “identification of the Chase Bank employees who spoke with West on those dates is or should be within Chase Bank's knowledge”); Boschma v. Home Loan Center, Inc. 198 Cal. App. 4th 230, 248 (2011) (“While the precise identities of the employees responsible ... are not specified in the loan instrument, defendants possess the superior knowledge of who was responsible for crafting these loan documents.”).

<sup>200</sup> Quinteros v. Aurora Loan Servs., 740 F. Supp. 2d 1163, 1172-73 (E.D. Cal. 2010).

<sup>201</sup> See Harvey G. Ottovich Revocable Living Trust Dated May 12, 2006 v. Wash. Mut., Inc., 2010 WL 3769459 (N.D. Cal. Sept. 22, 2010); Mehta v. Wells Fargo Bank, N.A., 737 F. Supp. 2d 1185, 1204 (S.D. Cal. 2010) (“The fact that one of Defendant

Without other aggravating circumstances showing outrageousness, an intentional infliction of emotional distress claim will fail.<sup>202</sup> However, the court in *Ragland* found that an intentional, unlawful foreclosure conducted in bad faith could be outrageous enough to sustain a claim for IIED.<sup>203</sup> Post-foreclosure lockouts may also serve as a basis for an IIED claim.<sup>204</sup>

#### D. UCL Claims

California's Unfair Competition Law (UCL) provides another opportunity for borrowers to obtain restitution or to stop or postpone a foreclosure<sup>205</sup> if they can show the servicer engaged in an unlawful, unfair, or fraudulent practice.<sup>206</sup>

Unlawful prong claims are based on a violation of an underlying statute, but may be brought regardless of whether that underlying statute provides a private right of action.<sup>207</sup> For example, borrowers have used UCL claims to challenge allegedly unlawful assignments, even though the underlying statute does not provide a right of

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Wells Fargo's employees allegedly stated that the sale would not occur but the house was sold anyway is not outrageous as that word is used in this context").

<sup>202</sup> *Singh v. Wells Fargo Bank*, 2011 WL 66167, at \*8 (E.D. Cal. Jan. 7, 2011).

<sup>203</sup> *Ragland v. U.S. Bank Nat. Ass'n*, 209 Cal. App. 4th 182, 204-05 (2012) (comparing an unlawful foreclosure to the deliberate, unlawful eviction that supported a claim for IIED in *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1045 (2009)); *see also* *Smith v. JP Morgan Chase*, 2014 WL 6886030, at \*4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer put borrower into default though she was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay \$20,000 she did not owe to stop the wrongful foreclosure); *Rowen v. Bank of Am., N.A.*, 2013 WL 1182947 (C.D. Cal. Mar. 18, 2013) (allowing IIED claim when servicer conducted foreclosure after admitting mistake with account that led to the default and then proceeded to assure the borrower that she was not in default).

<sup>204</sup> *Makreas v. First Nat'l Bank of N. Cal.*, 2013 WL 2436589 (N.D. Cal. June 4, 2013).

<sup>205</sup> CAL. BUS. & PROF. CODE § 17203 (2004). For a full explanation of UCL claims and available remedies in the foreclosure context, see CEB, *supra* note 29, § 12.27.

<sup>206</sup> *See* CAL. BUS. & PROF. CODE § 17200 (2012). Conduct can be unlawful, or unfair, or fraudulent to be liable under the UCL. *See West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 805 (2013) (The statute was written "in the disjunctive . . . establish[ing] three varieties of unfair competition . . .").

<sup>207</sup> *See Rose v. Bank of Am.*, 57 Cal. 4th 390, 395-96 (2013) (holding that the federal Truth in Savings Act is enforceable through an UCL claim, even though TISA provides no private right of action); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 562 (1998).

action.<sup>208</sup> An “unlawful” UCL claim may also be based on statutory violations *with* a private right of action,<sup>209</sup> and even common law causes of action.<sup>210</sup> In addition, because UCL’s remedies are cumulative to existing remedies, an unlawful prong claim might provide injunctive relief for HBOR violations even after the trustee’s deed is recorded.<sup>211</sup> Such post-sale relief would be unavailable under HBOR’s statutory remedies.<sup>212</sup> Additionally, advocates should be able to use the UCL to enforce the new CFPB servicing rules, which became effective January 10, 2014, to obtain pre-sale injunctive relief.<sup>213</sup>

The unfair prong of the UCL makes unlawful practices that violate legislatively stated public policy,<sup>214</sup> even if the practice is not technically prohibited by statute. It also prohibits practices that are “immoral, unethical, [or] oppressive.”<sup>215</sup> For example, even though

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<sup>208</sup> *See, e.g.,* *Vogan v. Wells Fargo Bank, N.A.*, 2011 WL 5826016, at \*6-7 (E.D. Cal. Nov. 17, 2011) (allowing a UCL claim when borrowers alleged that assignment was executed after the closing date of securities pool, “giving rise to a plausible inference that at least some part of the recorded assignment was fabricated”).

<sup>209</sup> *See, e.g.,* *Gaudin v. Saxon Mortg. Servs. Inc.*, 2013 WL 4029043, at \*10 (N.D. Cal. Aug. 5, 2013) (Borrowers in a class action certification hearing were held to possess UCL “unlawful” standing based on Rosenthal Act claims.); *People v. Persolve, LLC*, 218 Cal. App. 4th 1267, 1275 (2013) (The litigation privilege does not bar UCL claims based on the Rosenthal Act and FDCPA.).

<sup>210</sup> *See, e.g.,* *Peterson v. Wells Fargo Bank, N.A.*, 2014 WL 3418870, at \*7 (N.D. Cal. July 11, 2014) (finding a viable UCL claim based on borrower’s fraud claim); *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148, at \*8-9 (E.D. Cal. Oct. 11, 2013) (finding a viable negligence claim serves as a basis for “unlawful” prong UCL claim).

<sup>211</sup> *See* CAL. BUS. & PROF. CODE § 17205 (2012) (UCL remedies cumulative to those provided under existing law); CAL. CIV. CODE §§ 2924.12(h), 2924.19(g) (2013) (HBOR remedies are cumulative). The UCL would not, however, provide relief if the servicer corrected its HBOR violation before the deed is recorded. *See, e.g.,* *Jent v. N. Tr. Corp.*, 2014 WL 172542, at \*5 (E.D. Cal. Jan. 15, 2014) (HBOR’s “safe harbor” provision, relieving servicers from HBOR liability if they correct their errors before a trustee’s deed upon sale is recorded, was fulfilled here, extinguishing the derivative UCL “unlawful” claim.).

<sup>212</sup> *See* CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013) (outlining remedies for large and small servicers, respectively).

<sup>213</sup> *See supra* section I.D.

<sup>214</sup> *See, e.g.,* *Foronda v. Wells Fargo*, 2014 WL 6706815, at \*10 (N.D. Cal. Nov. 26, 2014) (allegation of dual tracking also states a claim under the UCL as an unfair business practice).

<sup>215</sup> *McGarvey*, 2013 WL 5597148, at \*9 (quoting *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1260 (2006)). Some courts evaluate the allegedly unfair practice using a balancing test, weighing “the gravity of the harm to the [borrower]” against “the utility of the [servicer’s] conduct.” *Perez v. CitiMortgage, Inc.*, 2014 WL 2609656, at \*8 (C.D. Cal. June 10, 2014). Other courts use a much narrower definition of “unfair,” requiring borrowers to allege the conduct was “tethered to an underlying

HBOR did not become effective until 2013, courts have held pre-2013 dual tracking unfair under the UCL.<sup>216</sup> A borrower may also bring an “unfair” claim by alleging that a servicer’s conduct or statement was misleading.<sup>217</sup> A servicer’s failure to honor a prior servicer’s loan modification after servicing transfer can also be an unfair practice.<sup>218</sup>

The fraudulent prong of the UCL prohibits fraudulent practices that are likely to deceive the public.<sup>219</sup> For example, courts have allowed UCL fraudulent claims against banks that offered TPPs that did not comply with HAMP guidelines,<sup>220</sup> that induced borrowers to

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constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law.” *Graham v. Bank of Am.*, 226 Cal. App. 4th 594, 612-13 (2014).

<sup>216</sup> *See* *Ware v. Bayview Loan Servicing, LLC*, 2013 WL 6247236, at \*6-7 (S.D. Cal. Oct. 29, 2013) (finding a valid “unfair” UCL claim based on borrower’s 2010 loan modification application and servicer’s 2013 foreclosure activity); *Cabrera v. Countrywide Fin.*, 2012 WL 5372116, at \*7 (N.D. Cal. Oct. 30, 2012) (upholding borrower’s unfair prong claim because, “although the public policy was not codified until 2012, it certainly existed in 2011 as part the general public policy against foreclosures that were occurring without giving homeowners adequate opportunities to correct their deficiencies”); *Majd v. Bank of Am.*, 243 Cal. App. 4th 1293, 1302-04 (2015); *Jolley v. Chase Home Fin., LLC.*, 213 Cal. App. 4th 872, 907-08 (2012) (“[W]hile dual tracking may not have been forbidden by statute at the time, the new legislation and its legislative history may still contribute to its being considered ‘unfair’ for purposes of the UCL.”).

<sup>217</sup> *See, e.g., Zuniga v. Bank of America, N.A.*, 2014 WL 7156403, at \*8 (C.D. Cal. Dec. 9, 2014) (adopting a three-factor test and finding servicer’s verbal offer of a modification and subsequent foreclosure unfair because: 1) loss of property and loss of an *opportunity* to modify constitutes substantial injury; 2) dual tracking practices contribute nothing positive to consumers or to competition; and 3) other reasonable consumers could not have avoided being dual tracked in this situation, regardless of borrower’s responsibility for her default); *Perez*, 2014 WL 2609656, at \*9 (finding servicer’s misrepresentations and possible concealment of borrower’s application status led to a deliberately drawn-out and unsuccessful modification process, resulting in harm to the borrower that outweighed the utility of servicer’s actions); *Canas v. Citimortgage, Inc.*, 2013 WL 3353877, at \*5-6 (C.D. Cal. July 2, 2013) (Servicer’s promise of a permanent modification was misleading because after inducing the borrower to make TPP payments, no modification was forthcoming.); *Majd v. Bank of Am.*, 243 Cal. App. 4th 1293, 1304 (2015) (UCL claim stated when servicer “false asserted plaintiff had failed to provide the required documentation” that the servicer requested.); *Lueras v. Bank of Am.*, 221 Cal. App. 4th 49, 84 (2013) (UCL claim stated when servicer “[f]alsely representing that ... [plaintiff] did not qualify for HAMP modification when, in fact ... [plaintiff] did qualify for a HAMP modification”).

<sup>218</sup> *See* *Lewis v. Bank of Am., N.A.*, 2013 WL 7118066, at \*3 (C.D. Cal. Dec. 18, 2013).

<sup>219</sup> *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 838 (2006).

<sup>220</sup> *West v. JP Morgan Chase Bank N.A.*, 214 Cal. App. 4th 780, 806 (2013); *Pestana v. Bank of Am., N.A.*, 2014 WL 2616840, at \*5 (Cal. Ct. App. June 12, 2014) (Servicer

make TPP payments by promising permanent modifications and then not offering them,<sup>221</sup> and that misrepresented their fee posting method and misapplied service charges to mortgage accounts.<sup>222</sup> One court even found a lender's pursuit of foreclosure without any apparent authority to foreclose a business practice likely to deceive the public and a valid fraudulent-prong UCL claim.<sup>223</sup>

Because of Proposition 64, a borrower bringing a UCL claim must show: (1) lost money or property that is (2) directly caused by the unfair competition.<sup>224</sup> Courts have found the initiation of foreclosure proceedings to constitute lost property interest<sup>225</sup> but have demanded that the loss be directly caused by the wrongful conduct,<sup>226</sup> not simply

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incorrectly evaluated and denied HAMP applications, giving rise to a fraudulent UCL claim).

<sup>221</sup> *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148, at \*9-10 (E.D. Cal. Oct. 11, 2013) (finding that “a reasonable consumer” would be confused by servicer’s offering of a TPP agreement and then failure to modify because plaintiff was not “borrower” on DOT); *Gaudin v. Saxon Mortg. Servs., Inc.*, 297 F.R.D. 417 (N.D. Cal. 2013) (Servicer’s systemic practice of denying modifications based on certain criteria, after a borrower complied with their TPP, could deceive the public.); *Canas*, 2013 WL 3353877, at \*6 (“[M]embers of the public would likely be deceived by Defendant’s assurances concerning a permanent loan modification.”); *Pestana*, 2014 WL 2616840, at \*5.

<sup>222</sup> *See, e.g., Ellis v. JP Morgan Chase Bank, N.A.*, 2013 WL 2921799, at \*17 (N.D. Cal. June 13, 2013) (“Failure to adequately disclose [the posting method] can shape reasonable expectations of consumers and be misleading.”); *Gutierrez v. Wells Fargo Bank, N.A.*, 2013 WL 2048030, at \*5 (N.D. Cal. May 14, 2013) (finding defendant’s scheme to deceive borrowers about the posting order of transactions on their accounts, thereby increasing overdraft fees, a viable UCL fraudulent claim).

<sup>223</sup> *Subramani v. Wells Fargo Bank, N.A.*, 2013 WL 5913789, at \*6 (N.D. Cal. Oct. 31, 2013).

<sup>224</sup> CAL. BUS. & PROF. CODE § 17204 (2012).

<sup>225</sup> *See, e.g., Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at \*6 (N.D. Cal. Aug. 7, 2014) (Initiation of foreclosure, damaged credit, and attorney costs constituted damages (and adequate UCL standing) caused by servicer’s HBOR violations.); *Woodring v. Ocwen Loan Servicing, LLC*, 2014 WL 3558716, at \*8 (C.D. Cal. July 18, 2014); *Boring v. Nationstar Mortg.*, 2014 WL 66776, at \*5 (E.D. Cal. Jan. 7, 2014); *Barrioneuvo v. Chase Bank, N.A.*, 885 F. Supp. 2d 964, 977 (N.D. Cal. 2012). *But cf. Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, at \*6-7 (S.D. Cal. July 31, 2013) (Foreclosure risk, without the actual initiation of foreclosure proceedings, is not a particular enough injury to constitute UCL standing.).

<sup>226</sup> *See Nava v. JP Morgan Chase*, 2014 WL 6886071, at \*3 (C.D. Cal. Nov. 25, 2014) (finding servicer’s TPP, and its failure to comply with it, directly led to borrower’s injury); *Roche v. Bank of Am., Nat’l Ass’n*, 2013 WL 3450016, at \*9 (S.D. Cal. July 9, 2013) (denying servicer’s motion to dismiss borrower’s UCL claim because borrower was able to show that servicer’s conduct interfered with borrower’s attempt to “bring his payments back to *status quo*”); *Pestana*, 2014 WL 2616840, at \*5-7 (finding servicer’s inducement of borrower to become delinquent directly led to late fees and penalties associated with missed mortgage payments and adequate UCL standing);

the borrower's monetary default<sup>227</sup> or other actions.<sup>228</sup> Courts have accepted,<sup>229</sup> and rejected,<sup>230</sup> other sources of economic loss, but there does not appear to be a consistent pattern in this regard.

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*cf.* Peterson v. Wells Fargo Bank, N.A., 2014 WL 3418870, at \*7 (N.D. Cal. July 11, 2014) (finding borrowers may allege “causation more generally” at the pleading stage and plead property improvements as damages caused by servicer’s false assurances a modification would be forthcoming); Boessenecker v. JP Morgan Chase Bank, 2013 WL 3856242, at \*3 (N.D. Cal. July 24, 2013) (giving UCL standing to a borrower based on servicer providing them with inaccurate loan information, preventing them from refinancing their mortgage with favorable interest rates).

<sup>227</sup> See Hernandez v. Specialized Loan Servicing, 2015 WL 350223, at \*8 (C.D. Cal. Jan. 22, 2015) (finding borrower’s growing loan and clouded title were directly caused by borrower’s default, absent an allegation that servicer instructed borrower to become delinquent on her mortgage); Rahbarian v. JP Morgan Chase, 2014 WL 5823103, at \*10-11 (E.D. Cal. Nov. 10, 2014) (imminent sale was caused by borrower’s default, not servicer’s actions); Sholiay v. Fed. Nat’l Mortg. Ass’n, 2013 WL 3773896, at \*7 (E.D. Cal. July 17, 2013) (refusing the borrower standing because he could not show how he could have prevented the foreclosure sale without a modification that servicer was not obligated to provide); Lueras v. BAC Home Loan Servicing, LP, 221 Cal. App. 4th 49, 83 (2013) (Foreclosure sale constituted economic injury, but borrowers failed to allege sale was caused by something other than their default. The court granted leave to amend to allege servicer’s misrepresentations led to unexpected sale.); Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 520-23 (2013) (finding a “diminishment of a future property interest” sufficient economic injury and yet finding no standing because the foreclosure stemmed from debtor’s default, not because of alleged wrongful practices); *see also* Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at \*8-9 (C.D. Cal. Sept. 26, 2014) (distinguishing between damage caused by borrowers’ default and damage caused by servicer’s mishandling of borrowers’ modification application, the latter of which formed the basis for UCL standing because it affected borrowers’ property interest and/or their ability to lower their mortgage payments).

<sup>228</sup> See, e.g., Johnson v. PNC Mortg., 2014 WL 6629585, at \*8 (N.D. Cal. Nov. 21, 2014) (Borrowers failed to allege UCL standing where *their* rejection of servicer’s original modification offer—not servicer’s SPOC violations—led to borrower’s acceptance of a financially worse loss mitigation plan.).

<sup>229</sup> See, e.g., Johnson v. PNC Mortgage, 80 F. Supp. 3d 980, 988-89 (N.D. Cal. 2015) (accepting borrower’s assertion that inflated modified payments—due to servicer’s use of an improper income figure in calculating their modification—constituted an economic injury); Esquivel v. Bank of Am., N.A., 2013 WL 5781679, at \*4-5 (E.D. Cal. Oct. 25, 2013) (Servicer’s failure to honor an FHA-HAMP modification agreement led to borrower’s needless acceptance of a second HUD lien on their home and incorrect credit reporting, leading directly to economic damages.).

<sup>230</sup> See, e.g., Hernandez v. Specialized Loan Servicing, 2015 WL 350223, at \*8 (C.D. Cal. Jan. 22, 2015) (damaged credit and time/resources spent applying for modifications do not constitute economic damages for UCL standing); Bullwinkle v. U.S. Bank, N.A., 2013 WL 5718451, at \*2 (N.D. Cal. Oct. 21, 2013) (Loan payments paid to the “wrong” entity were nevertheless owed to the “correct” entity, so borrower was “not actually . . . deprived of any money;” legal fees are not considered a loss for purposes of UCL standing; a ruined credit score does not grant UCL standing.); Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065, \*7 (S.D. Cal. July 31, 2013)

## E. ECOA Notice Claims

Borrowers have brought claims under the Equal Credit Opportunity Act (ECOA), alleging servicers: (1) failed to provide a timely written notice that borrowers were denied a loan modification; or (2) failed to provide a sufficient statement of reasons for taking adverse action.<sup>231</sup> If the borrower submits a complete application,<sup>232</sup> servicers must give the borrower a written denial regardless of borrower's default status<sup>233</sup> or membership in a protected class.<sup>234</sup> To bring an adverse action claim, borrowers must also demonstrate they were current on their mortgage,<sup>235</sup> but courts have differed on whether the borrower must be current at the time of application or at the time of denial.<sup>236</sup>

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(rejecting the risk of foreclosure, forgone opportunities to refinance, and attorney and expert fees as bases for UCL standing); *Lueras*, 221 Cal. App. 4th at 81-83 (Time and effort spent collecting modification documentation is *de minimis* effort and insufficient for UCL standing.).

<sup>231</sup> 15 U.S.C.A. § 1691(d)(1)-(2) (West 2013) (“Within thirty days . . . after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application,” and “[e]ach applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor.”).

<sup>232</sup> See *Cooksey v. Select Portfolio Servicing, Inc.*, 2014 WL 4662015, at \*4-5 (E.D. Cal. Sept. 17, 2014); *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636, at \*4-5 (C.D. Cal. Oct. 22, 2013) (finding adequate pleading of complete application).

<sup>233</sup> See, e.g., *MacDonald v. Wells Fargo Bank, N.A.*, 2015 WL 1886000, at \*3 (N.D. Cal. Apr. 24, 2015); *Vasquez v. Bank of Am., N.A.*, 2014 WL 1614764, at \*2-3 (N.D. Cal. Apr. 22, 2014); *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636, at \*4 (C.D. Cal. Oct. 22, 2013).

<sup>234</sup> See *Banks v. JPMorgan Chase Bank, N.A.*, 2015 WL 2215220, at \*5-6 (C.D. Cal. May 11, 2015) (holding that “neither the borrower's membership in a protected class nor the lender's discrimination is an element of a[n ECOA] claim”). *But see* *Boyle v. Nationstar Mortg., LLC*, 2016 WL 347391, at \*10-11 (E.D. Cal. Jan. 25, 2016) (relying on a prior *Banks* opinion to hold membership in protected class required to state an ECOA notice claim).

<sup>235</sup> See *Rockridge Tr. v. Wells Fargo Bank, N.A.*, 985 F. Supp. 2d 1110, 1139-41 (N.D. Cal. 2013) (denying a modification while the borrower is in default is not an “adverse action”); *Piotrowski v. Wells Fargo Bank, N.A.*, 2013 WL 247549, at \*8 (D. Md. Jan. 22, 2013) (borrower's reduced payments under a “Special Forbearance Agreement” put borrower in default and precludes a § 1691(d)(2) claim, pertaining to borrower's second modification request); *cf.* *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204 (9th Cir. 2013) (borrower stated ECOA adverse action claim when Wells Fargo sent default notices without further explanation even though borrower was current on permanent modification).

<sup>236</sup> *Compare* *Davis v. CitiMortgage, Inc.*, 2011 WL 891209, at \*2-3 (E.D. Mich. Mar. 11, 2011) (dismissing an ECOA claim because the borrower was not current on the

## F. Liability After Servicing Transfer

If a transferee servicer refuses to honor a loan modification agreement the borrower has with the previous servicer, courts have allowed the borrower to hold the current servicer liable.<sup>237</sup> Even if the borrower only entered into a TPP with the original servicer, courts have found liability so long as the borrowers have complied with the terms of the TPP.<sup>238</sup>

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original mortgage when her permanent modification was denied, even though she made all TPP payments and was current at time of application), *with* *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636, at \*6 (C.D. Cal. Oct. 22, 2013) (borrower stated an ECOA claim when the borrower was current when applying for loan modification); *Bourdelaix v. J.P. Morgan Chase*, 2011 WL 1306311, at \*8 (E.D. Va. Apr. 1, 2011) (finding making reduced payments according to TPP does not make the borrower plainly delinquent).

<sup>237</sup> *See, e.g.*, *Randell v. Flagstar Bank FSB*, 2015 WL 2159595, at \*8 (E.D. Cal. May 7, 2015) (holding that the borrower has a valid loan modification agreement with the original servicer and is entitled to performance of the same agreement upon transfer to the new servicer); *Webb v. Bank of Am., N.A.*, 2013 WL 6839501, at \*6 (E.D. Cal. Dec. 23, 2013) (finding liability under the Rosenthal Act for collection activities after Bank of America refused to honor loan modification granted by previous servicer); *Lewis v. Bank of Am. NA*, 2013 WL 7118066, at \*3 (C.D. Cal. Dec. 18, 2013) (finding liability under UCL against transferee servicer when the original servicer reneged on the loan modification agreement and the new servicer also refused to honor the agreement); *Rampp v. Ocwen Fin. Corp.*, 2012 WL 2995066, at \*3-5 (S.D. Cal. Jul. 23, 2012) (allowing breach of contract and specific performance against the new servicer and granting preliminary injunction to enjoin the foreclosure); *Croschal v. Aurora Bank, F.S.B.*, 2014 WL 2796529, at \*5 (N.D. Cal. Jun. 19, 2014) (holding that the borrower has adequately pled breach of contract claim against the new servicer who has refused to honor the loan modification agreement entered by the borrower and original servicer); *Schubert v. Bank of Am., N.A.*, No. 34-2013-00148898-CU-OR-GDS, 2014 WL 3977856, at \*3 (Cal. Super. Ct. Sacramento Cnty. Aug. 11, 2014) (holding that both the original and new servicers are liable for promissory estoppel after breaking the promise that the original servicer made to the borrower); *cf. In re Pico*, 2011 WL 3501009, at \*3 (Bankr. S.D. Cal. Aug. 9, 2011). (holding loan modification enforceable against transferee servicer because the new servicer accepted modified payments).

<sup>238</sup> *Geake v. JP Morgan Chase Bank, N.A.*, 2015 WL 331104, at \*7-9 (C.D. Cal. Jan. 23, 2015) (holding that by complying with a TPP agreement made with his original servicer, the borrower has pled a viable breach of contract claim against the new servicer); *see also Tirabassi v. Chase Home Fin., LLC*, 2015 WL 1402016, at \*4-6 (C.D. Cal. Mar. 24, 2015) (holding the borrower has sufficiently alleged equitable estoppel to preclude the servicers' reliance on the statute of frauds defense for the borrower's breach of implied contract claims); *Mendonca v. Caliber Home Loan, Inc.*, 2015 WL 1566847, at \*1 (C.D. Cal. Apr. 6, 2015) (denying the new servicer's motion for summary judgment when the servicer refused to acknowledge the existence of the TPP agreement between borrower and the original servicer); *cf. Lansburg v. Fed. Home Loan Mortg. Corp.*, 607 F. App'x 738, 738 (9th Cir. 2015) (remanding to district

### III. Litigation Issues

#### A. Obtaining Injunctive Relief

Because HBOR's enforcement provisions do not allow borrowers to undo completed foreclosure sales, it is critical to seek preliminary injunctive relief before the sale occurs. Under HBOR, borrowers may obtain injunctive relief to stop an impending sale, but a borrower may only recover actual economic damages post-sale.<sup>239</sup>

A borrower only needs to meet a low bar to obtain a TRO in state court in order to determine whether there is sufficient evidence to support a temporary order to maintain the status quo.<sup>240</sup> To obtain a preliminary injunction in state court, a borrower must show (1) a likelihood of prevailing on the merits and (2) that they will be more harmed by the sale than the servicer will be by postponing the sale.<sup>241</sup>

In the Ninth Circuit, a plaintiff must show only "serious questions going to the merits[,] . . . [that] the balance of hardships tips sharply in [their] favor," that they will suffer irreparable harm, and that the injunction is in the public interest.<sup>242</sup> In federal court, an identical

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court to determine whether new servicer is contractually obligated to offer a permanent loan modification if the borrower complies with the terms of a TPP entered into with the original servicer).

<sup>239</sup> See CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013) (describing relief available against large and small servicers, respectively). Each statute provides for treble actual damages or \$50,000 in statutory damages if borrower can show servicer's conduct was willful. *Id.*; see also *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*9 (C.D. Cal. Nov. 19, 2014) (rejecting servicer's MTD borrower's SPOC and CC 2924.10 claims for failure to allege actual economic damages where borrower alleged the violations were intentional and could recover statutory damages). However, at least one court has recognized that a borrower may be able to bring an equitable wrongful foreclosure claim based on dual tracking violations after the foreclosure sale but before the trustee's deed is recorded. See *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6-7 (N.D. Cal. Apr. 16, 2014). The Bingham court seemed unclear on what type of relief should be available, but acknowledged that *some* type of relief should be available to borrowers in this situation.

<sup>240</sup> *Landmark Holding Group v. Super. Ct.*, 193 Cal. App. 3d 525, 528 (1987) ("All that is determined is whether the TRO is necessary to maintain the status quo pending the noticed hearing on the application for preliminary injunction.").

<sup>241</sup> *White v. Davis*, 30 Cal. 4th 528, 554 (2003).

<sup>242</sup> *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Generally, federal courts have held that delaying a foreclosure sale, to enable borrowers to bring valid HBOR claims, is in the public interest. See *Shaw v. Specialized Loan Servicing, LLC*, 2014 WL 3362359, at \*8 (C.D. Cal. July 9, 2014) (The public interest is served by allowing homeowners "the opportunity to pursue what appear to be valid claims before they are evicted from their homes.").

standard governs the issuance of a temporary restraining order.<sup>243</sup> In both state and federal court, the loss of one's home is considered irreparable harm.<sup>244</sup>

Both state and federal courts have enjoined pending foreclosure sales when the servicer violated HBOR.<sup>245</sup> Courts have also granted preliminary injunctions in non-HBOR cases.<sup>246</sup>

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<sup>243</sup> See *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

<sup>244</sup> CAL. CIV. CODE § 3387 (2012); *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988). The harm, however, must also be "likely and immediate," which some courts have found not the case where a servicer postpones a foreclosure sale to review borrowers for a loan modification. See, e.g., *Cooksey v. Select Portfolio Servicing, Inc.*, 2014 WL 4662015, at \*8-9 (E.D. Cal. Sept. 17, 2014) (denying borrowers' motion for a preliminary injunction).

<sup>245</sup> See, e.g., *Gonzales v. Citimortgage*, 2014 WL 7927627, at \*2 (N.D. Cal. Oct. 10, 2014) (PI granted on dual tracking claim); *Gilmore v. Wells Fargo Bank, N.A.*, 2014 WL 3749984, at \*2-5 (N.D. Cal. July 29, 2014) (same); *Shaw*, 2014 WL 3362359, at \*7 (PI granted on SPOC claim, denied on dual tracking claim); *Cooksey*, 2014 WL 2120026, at \*2-3 (TRO granted on dual tracking claim); *McKinley v. CitiMortgage, Inc.*, 2014 WL 651917, at \*8 (E.D. Cal. Feb. 19, 2014) (same); *Ware v. Bayview Loan Servicing, LLC*, 2013 WL 4446804, at \*5 (S.D. Cal. Aug. 16, 2013) (granting a PI based on servicer's failure to formally deny borrower's 2011 modification application and proceeding with a foreclosure in 2013); *Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS* (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (PI granted on dual tracking claim); *Monterrosa v. PNC Bank, No. 34-2014-00162063-CU-OR-GDS* (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (same); *Zanze v. Cal. Capital Loans Inc., 34-2014-00157940-CU-CR-GDS* (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (same); *Isbell v. PHH Mortg. Corp., No. 37-2013-00059112-CU-PO-CTL* (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013) (PI granted on dual tracking claim because servicer *requested* borrower's third application.). See generally discussion *supra* section I.

<sup>246</sup> See, e.g., *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*3-5 (E.D. Cal. Oct. 2, 2013) (enjoining sale due to servicer's noncompliance with former CC 2923.5); *Williams v. Wells Fargo Bank, N.A.*, 2013 WL 5444354, at \*2-3 (N.D. Cal. Sept. 30, 2013) (granting a PI because servicer may have breached the covenant of good faith and fair dealing in stopping automatic withdrawal of borrower's mortgage payments); *Miller v. Wells Fargo Bank, N.A.*, 2012 WL 1945498, at \*3 (N.D. Cal. May 30, 2012) (enjoining sale because MERS may not have had authority to assign deed of trust); *Jackmon v. Am.'s Servicing Co.*, 2011 WL 3667478, at \*3 (N.D. Cal. Aug. 22, 2011) (enjoining sale because the borrower fully complied with her TPP); *Jobe v. Kronsberg*, 2013 WL 3233607, at \*9-10 (Cal. Ct. App. June 27, 2013) (affirming the trial court's PI order based on borrower's forgery claim). *But cf.* *Vasquez v. Bank of Am., N.A.*, 2014 WL 1614764, at \*1-2 (N.D. Cal. Apr. 22, 2014) (rejecting the idea that injunctive relief is available for *substantive* wrongful foreclosure claims that attack the validity of an anticipated sale, but allowing that borrowers may win injunctions to delay an impending sale based on a servicer's *procedural* foreclosure violations).

## B. Bona Fide Purchasers

When a bona fide purchaser (BFP) buys a property at trustee sale, the recitals in the trustee deed become conclusive, and it can be very difficult to set aside a foreclosure sale.<sup>247</sup> However, if the challenge to the foreclosure goes to the authority to foreclose, or if the sale was void, then even a sale to a BFP can be overturned.<sup>248</sup> In one post-foreclosure case, the court issued a preliminary injunction against enforcement of the writ of possession,<sup>249</sup> and in an HBOR case, the court granted a TRO to prevent servicer from selling the home to a BFP.<sup>250</sup>

## C. Tender & Bond Requirements

To set aside a foreclosure sale, a borrower must generally “tender” (offer and be able to pay) the amount due on their loan.<sup>251</sup> This is especially true when the challenge is premised on a procedural defect in the foreclosure notices.<sup>252</sup> However, tender is not required if it would be inequitable.<sup>253</sup> In addition, courts have excused the tender

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<sup>247</sup> See CAL. CIV. CODE § 2924(c).

<sup>248</sup> See *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 999-1000 (2016); *Bank of Am., N.A. v. La Jolla Group II*, 129 Cal. App. 4th 706, 714-15 (2005).

<sup>249</sup> *Sencion v. Saxon Mortg. Servs., LLC*, 2011 WL 2259764, at \*2 (N.D. Cal. May 17, 2011).

<sup>250</sup> *Nguyen v. Trojan Capital Improvements*, 2015 WL 268919, at \*3 (C.D. Cal. Jan. 16, 2015) (Servicer sold the home without notice to borrower after removing the case to federal court, which dissolved the existing TRO. The federal district court granted a new TRO, finding that borrower will “be permanently denied an opportunity to determine whether his rights were violated, and whether he is entitled to obtain a loan modification” if the home was sold to a BFP.).

<sup>251</sup> See *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112 (2011) (stating the general tender rule).

<sup>252</sup> *Vogan v. Wells Fargo Bank, N.A.*, 2011 WL 5826016, at \*7 (E.D. Cal. Nov. 17, 2011) (citing *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1109 (1996)) (“A plaintiff is required to allege tender . . . to maintain any cause of action for irregularity in the non-judicial foreclosure sale procedure.”).

<sup>253</sup> See, e.g., *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6-7 (N.D. Cal. Apr. 16, 2014) (finding tender inequitable where it was unclear if injunctive relief or damages available to borrowers); *Moya v. CitiMortgage, Inc.*, 2014 WL 1344677, at \*5 (S.D. Cal. Mar. 28, 2014) (finding tender inequitable where servicer accepted borrower’s TPP payments and foreclosed anyway); *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291 (1911); *Fonteno v. Wells Fargo Bank*, 228 Cal. App. 4th 1358, 1368-69 (2014) (finding it would be inequitable to require tender where the circumstances being litigated—servicer’s failure to comply with HUD’s rules governing FHA loans—show that borrowers were unable to tender the amount due

requirement when (1) the sale is void (e.g., the trustee conducted the sale without legal authority);<sup>254</sup> (2) if the loan was reinstated;<sup>255</sup> (3) if the borrower was current on their loan modification;<sup>256</sup> (4) if the borrower is challenging the validity of the underlying debt;<sup>257</sup> and (5) if the sale has not yet occurred.<sup>258</sup>

Courts have also been reluctant to require tender for statutory causes of action. In *Mabry v. Superior Court*, the court considered tender in a claim under former Civil Code Section 2923.5.<sup>259</sup> The Legislature, the court reasoned, intended borrowers to enforce those

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on their loan); *Lona*, 202 Cal. App. 4th at 113 (outlining all the reasons for not requiring tender, including when it would be unfair to the borrower).

<sup>254</sup> *Aniel v. Aurora Loan Servs., LLC*, 550 F. App'x 416, 417 (9th Cir. 2013) (tender not required when the borrower alleged that the trustee was not properly substituted in); *Engler v. ReconTrust Co.*, 2013 WL 6815013, at \*7 (C.D. Cal. Dec. 20, 2013) (tender not required where borrower's lack of authority to foreclose claim, if true, would render the sale void, not voidable); *Subramani v. Wells Fargo Bank, N.A.*, 2013 WL 5913789, at \*4 (N.D. Cal. Oct. 31, 2013) (same); *Cheung v. Wells Fargo Bank, N.A.*, 2013 WL 6017497, at \*4-5 (N.D. Cal. Sept. 25, 2013) (same); *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1100 (2013).

<sup>255</sup> *In re Takowsky*, 2013 WL 5183867, at \*9-10 (Bankr. C.D. Cal. Mar. 20, 2013) (borrower reinstated loan by paying servicer amount due listed on NOD; foreclosure was wrongful because servicer then had no authority to foreclose under the NOD); *Bank of Am. v. La Jolla Group*, 129 Cal. App. 4th 706, 711 (2005).

<sup>256</sup> *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*7 (E.D. Cal. Dec. 3, 2014) (Borrowers were TPP-compliant when servicer foreclosed.); *Harris v. Bank of Am., N.A.*, 2014 WL 1116356, at \*7 (C.D. Cal. Mar. 17, 2014) (Borrowers were compliant with their permanent loan modification agreement when servicer foreclosed.); *Chavez v. Indymac Mortg. Servs.*, 219 Cal. App. 4th 1052, 1063 (2013); *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001, 1017 (2012).

<sup>257</sup> *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 307 (2014); *Lona*, 202 Cal. App. 4th at 103-04; *see also Sarkar v. World Savings Bank, FSB*, 2014 WL 457901, at \*3 (N.D. Cal. Jan. 31, 2014) (citing *Lona* and excusing tender where borrower alleged his loan originator wrongfully failed to verify borrower's income, agreeing to a loan it knew borrower could not afford); *Passaretti v. GMAC Mortg., LLC*, 2014 WL 2653353, at \*10 (Cal. Ct. App. June 13, 2014) (allowing borrower to amend his complaint to plead that his compliance with his Repayment Plan provides a basis for a no-default exception to the tender rule).

<sup>258</sup> *Schneider v. Bank of Am., N.A.*, 2014 WL 2118327, at \*13-14 (E.D. Cal. May 21, 2014) (finding no tender required pre-foreclosure); *Wickman v. Aurora Loan Servs., LLC*, 2013 WL 4517247, at \*3 (S.D. Cal. Aug. 23, 2013) (declining a tender requirement where borrower brought action after NTS was recorded, but before actual sale); *Intengan v. BAC Home Loans Servicing, LP*, 214 Cal. App. 4th 1047, 1053-54 (2013) (collecting cases that consider this issue); *see also Tang v. Bank of Am., N.A.*, 2012 WL 960373, at \*4 (C.D. Cal. Mar. 19, 2012) (explaining that pre-sale tender is less common than post-sale because post-sale actions are more demanding on courts).

<sup>259</sup> *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 213 (2010). HBOR amended the previous § 2923.5 and bifurcated it to apply to large and small servicers. *See CAL. CIV. CODE* §§ 2923.55 and 2923.5 (2013), respectively, and section I.A.

outreach requirements, and requiring tender would financially bar many claims.<sup>260</sup> Several federal and state courts have rejected servicers' tender arguments in HBOR cases.<sup>261</sup> More recently in *Valbuena v. Ocwen Loan Servicing*, the California Court of Appeal held that tender is not required to state a HBOR dual tracking claim.<sup>262</sup>

Advocates moving for TROs or preliminary injunctions should prepare for disputes over the amount of bond. In the foreclosure context, the bond amount is discretionary<sup>263</sup> and can be waived for indigent plaintiffs.<sup>264</sup> Courts consider a variety of factors in determining bond amounts. Some use fair market rent of comparable property,<sup>265</sup> the prior mortgage payment,<sup>266</sup> the modified mortgage

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<sup>260</sup> See *Mabry*, 185 Cal. App. 4th at 210-13 (“[I]t would defeat the purpose of the statute to require the borrower to tender the full amount of the indebtedness *prior* to any enforcement of the right to . . . be *contacted* prior to the notice of default.” (emphasis in original)). Tender was also inequitable here because borrowers sought to postpone, not to completely avoid, a foreclosure sale. *Id.* at 232.

<sup>261</sup> See *Medrano v. Caliber Home Loans*, 2015 WL 848347, at \*4-5 (C.D. Cal. Feb. 26, 2015) (noting that tender has been excused where borrowers bring statutory causes of action and where borrower merely seeks damages post-sale, rather than to undo the sale); *Stokes v. Citimortgage*, 2014 WL 4359193, at \*9 (C.D. Cal. Sept. 3, 2014) (refusing to require tender at the pleading stage because it is unknown whether requiring tender based on HBOR causes of action is inequitable without more facts); *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6 (N.D. Cal. Apr. 16, 2014) (holding that a plaintiff may seek injunctive relief under HBOR “regardless of tender”); *Pearson v. Green Tree Servicing, No. C-13-01822* (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013); *Senigar v. Bank of Am., No. MSC13-00352* (Cal. Super. Ct. Feb. 20, 2013) (rejecting defendant’s tender argument on a dual tracking and SPOC claim, and citing the *Mabry* tender principle).

<sup>262</sup> *Valbuena v. Ocwen Loan Servicing*, 237 Cal. App. 4th 1267, 1273-74 (2015).

<sup>263</sup> See FED.R.CIV.P. 65(c) (“The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security *in an amount that the court considers proper* . . . .” (emphasis added)); CAL. CIV. PROC. CODE § 529(a) (1994) (leaving the undertaking amount up to the court).

<sup>264</sup> CAL. CIV. PROC. CODE § 995.240 (1982). Similarly, federal courts have authority to waive the bond requirement for indigent plaintiffs. See, e.g., *Park Vill. Apts. Tenants Ass’n v. Howard*, 2010 WL 431458, at \*4 (N.D. Cal. Feb. 1, 2010), *aff’d in part, rev’d in part*, 636 F.3d 1150 (9th Cir. 2011) (excusing bond requirement for indigent plaintiffs); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (C.D. Cal. 1983), *aff’d in part, vacated in part*, 722 F.2d 1490 (9th Cir. 1984) (“Where . . . suit is brought on behalf of poor persons, preliminary injunctive relief may be granted with no payment of security whatever.”).

<sup>265</sup> See, e.g., *De Vico v. US Bank*, 2012 WL 10702854, at \*7 (C.D. Cal. Oct. 29, 2012); *Tamburri v. Suntrust Mortg., Inc.*, 2011 WL 2654093, at \*6 (N.D. Cal. July 6, 2011) (setting bond at the fair rental value of the property); *Magana v. Wells Fargo Bank, N.A.*, 2011 WL 4948674, at \*2 (N.D. Cal. Oct. 18, 2011) (same); cf. *Pugh v. Wells Fargo Home Mortg.*, No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (setting a one-time \$15,000 bond, plus requiring borrowers to pay \$1,600 monthly payments, the fair market rental value); *Monterrosa v. PNC Bank*,

payment,<sup>267</sup> or the amount of foreseeable damages incurred by a bank in delaying a foreclosure sale.<sup>268</sup> Others have deemed the deed of trust sufficient security and chose not to impose a separate, monetary bond.<sup>269</sup> Some courts set extremely low, one-time bonds.<sup>270</sup> Advocates

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No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (giving borrowers the option of paying a lump sum, or monthly installments, both based on the fair market rental value of the property).

<sup>266</sup> See *Gilmore v. Wells Fargo Bank, N.A.*, 2014 WL 3749984, at \*6 (N.D. Cal. July 29, 2014) (setting the bond at \$1,800 per month, borrower's previous payment, and requiring payments directly to a trust, not to servicer); *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*5 (E.D. Cal. Oct. 2, 2013) (considering borrower's time living in the home without making any payments, and that CC 2923.5 only delays foreclosure in setting the bond close to borrower's monthly mortgage payments, plus a one-time payment of \$2,800); *Martin v. Litton Loan Servicing LP*, 2013 WL 211133, at \*22 (E.D. Cal. Jan. 16, 2013) (setting the bond at plaintiff's pre-escrow account monthly mortgage payment); *Pearson v. Green Tree Servicing*, No. C-13-01822 (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013) (setting a \$1,000 one-time bond, coupled with monthly mortgage payments).

<sup>267</sup> See *Mazed v. JP Morgan Chase Bank*, 471 F. App'x 754, 755 (9th Cir. 2012) (District court did not abuse its discretion by setting the bond at borrower's modified mortgage payment.); *Shaw v. Specialized Loan Servicing, LLC*, 2014 WL 3362359, at \*9 (C.D. Cal. July 9, 2014) (setting bond at borrower's first, pre-HBOR modified loan payment); *Rampp v. Ocwen Fin. Corp.*, 2012 WL 2995066, at \*5 (S.D. Cal. July 23, 2012) (determining the proper amount for bond as the modified monthly payment); *Jackmon v. Am.'s Servicing Co.*, 2011 WL 3667478, at \*4 (N.D. Cal. Aug. 22, 2011) (requiring a bond that paid the arrearages, plus monthly payments specified in the Forbearance Agreement).

<sup>268</sup> *Gonzales v. Citimortgage*, 2014 WL 7927627, at \*2 (N.D. Cal. Oct. 10, 2014) (setting the bond at \$2,000 per month to cover servicer's potential damages caused by the PI); *Williams v. Wells Fargo Bank, N.A.*, 2013 WL 5444354, at \*3 (N.D. Cal. Sept. 30, 2013) (setting bond at borrower's arrearages, totaling 6-months of mortgage payments that servicer failed to automatically withdraw from borrower's bank account). *But cf.* *Flaherty v. Bank of Am., N.A.*, 2013 WL 29392, at \*8-9 (Cal. Ct. App. Jan. 3, 2013) (reversing the undertaking order because the borrower's "past arrearages allegedly owed [the bank] is not a proper measure of [the bank]'s future damages caused by a delay in the sale of the property").

<sup>269</sup> See, e.g., *Greene v. Wells Fargo Bank, N.A.*, 2016 WL 360756, at \*5 (N.D. Cal. Jan. 28, 2016); *Lane v. Citimortgage*, 2014 WL 5036512, at \*2 (E.D. Cal. Oct. 7, 2014) (deeming no monetary bond necessary because "there is no evidence [servicer] will suffer damages from the injunction"); *McKinley v. CitiMortgage, Inc.*, 2014 WL 651917, at \*7 (E.D. Cal. Feb. 19, 2014) (waiving bond requirement); *Bitker v. Suntrust Mortg. Inc.*, 2013 WL 2450587, at \*2 (S.D. Cal. Mar. 29, 2013) (citing *Jorgensen v. Cassidy*, 320 F.3d 906, 919-20 (9th Cir. 2003) and declining to set a bond because it was not in the public interest to set one, and because the defendant bank's interests were secured by the DOT); *Bhandari v. Capital One, NA*, 2012 WL 3792766, at \*2 (N.D. Cal. Aug. 30, 2012) (waiving bond because the loan is adequate security); *Tuck v. Wells Fargo Home Mortg.*, 2012 WL 3731609, at \*3 (N.D. Cal. Aug. 28, 2012) (security instrument sufficient to protect lender); *Reed v. Wells Fargo Bank*, 2011 WL 1793340, at \*7 (N.D. Cal. May 11, 2011) (same); *Rivera v. BAC Home Loans Servicing, LP*, 2010 WL 2280044, at \*2 (N.D. Cal. June 7, 2010); *Phleger v. Countrywide Home Loans, Inc.*, 2007 WL 4105672, at \*6 (N.D. Cal. Nov. 16, 2007);

arguing against a bond should reassure the court that the bank's interests are preserved in the deed of trust and unharmed by a mere postponement of foreclosure.<sup>271</sup> In any event, the court should not set the bond at the unpaid amount of the loan or the entire amount of arrearages.<sup>272</sup>

#### D. Judicial Notice

During litigation over whether the servicer complied with former Section 2923.5, servicers often request judicial notice of the NOD declaration to demonstrate compliance with the statute's contact and due diligence requirements.<sup>273</sup> Most courts have declined to grant judicial notice of the truth of the declaration and limited judicial notice

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Isbell v. PHH Mortg. Corp., No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013). *But see* Menis v. NDEX West, LLC, 2014 WL 2433687, at \*2-7 (Cal. Ct. App. May 30, 2014) (reversing the trial court's decision to set no monetary bond).

<sup>270</sup> Singh v. Bank of Am., N.A., 2013 WL 1858436, at \*2-3 (E.D. Cal. May 2, 2013) (setting a one-time bond of \$1,000); Jobe v. Kronsberg, 2013 WL 3233607, at \*8-9, 11-12 (Cal. Ct. App. June 27, 2013) (determining the trial court did not abuse its discretion in setting a \$1,000 bond because the "ample home equity" would more than adequately compensate defendants, should they prevail); Zanze v. Cal. Capital Loans Inc., No. 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (reducing its tentative bond set at \$24,000 based on fair market rental value and servicer's costs, to a \$500 bond after finding borrower indigent). *But see* Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (setting a one-time \$15,000 bond, plus requiring borrowers to pay \$1,600 monthly payments, the fair market rental value); Leonard v. JP Morgan Chase Bank, N.A., No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014) (one-time, \$4,000 bond); Pittell v. Ocwen Loan Servicing, LLC, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty., Dec. 5, 2013) (one-time, \$5,000 bond); Rogers v. OneWest Bank FSB, No. 34-2013-00144866-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013) (one-time, \$10,000 bond).

<sup>271</sup> *See* Jobe, 2013 WL 3233607, at \*11.

<sup>272</sup> *See* Bever v. Cal-Western Reconveyance Corp., 2013 WL 5493422, at \*5 (E.D. Cal. Oct. 2, 2013) (rejecting servicer's request for the full amount due on the loan as "tantamount to requiring tender" and "excessive"); Flaherty, 2013 WL 29392, at \*8 (finding the total amount of arrearages an inappropriate gauge of a bank's foreseeable damages).

<sup>273</sup> Servicers must declare that they have contacted the borrower to discuss foreclosure alternatives, or that they fulfilled due diligence requirements. CAL. CIV. CODE §§ 2923.5(b), 2923.55(c) (2013) (applying to small and large servicers, respectively). *See* discussion *supra*, section I.A.

to only the declaration's existence and legal effect.<sup>274</sup> Courts are more inclined to take judicial notice if the truth of the declaration's contents is undisputed.<sup>275</sup>

### E. Attorney's Fees

Prior to HBOR's enactment, loan documents were the only avenue to attorney's fees.<sup>276</sup> Now, HBOR statutes explicitly allow for attorney's fees, even if the borrower obtained only injunctive relief.<sup>277</sup> Until the recent *Monterossa* decision by the Court of Appeal, advocates had mixed success convincing courts that "injunctive relief" includes TROs and preliminary injunctions, as opposed to permanent injunctions.<sup>278</sup>

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<sup>274</sup> See, e.g., *Tavares v. Nationstar Mortg., LLC*, 2014 WL 3502851, at \*7 (S.D. Cal. July 14, 2014); *Intengan v. BAC Home Loans Servicing LP*, 214 Cal. App. 4th 1047, 1057 (2013); *Skov v. U.S. Bank Nat'l Ass'n*, 207 Cal. App. 4th 690, 698 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 266 (2011); *Lee v. Wells Fargo Bank, N.A.*, No. 34-2013-00153873-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 25, 2014). *But see* *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1102 (2013) (declining to take judicial notice of legal effect of assignment); *Herrera v. Deutsche Bank Nat'l Trust Co.*, 196 Cal. App. 4th 1366, 1375 (2011) (declining to take judicial notice of legal effect of a recorded document). This principle also applies outside of the pre-NOD declaration context. See, e.g., *Rosell v. Wells Fargo Bank*, 2014 WL 4063050, at \*3-4 (N.D. Cal. Aug. 15, 2014) (declining to take judicial notice of a county property tax statement, purportedly showing two missed payments, because borrowers disputed they had missed the payments).

<sup>275</sup> See *Mena v. JP Morgan Chase Bank*, 2012 WL 3987475, at \*3 (N.D. Cal. Sept. 7, 2012) (taking judicial notice of both the existence and the substances of foreclosure documents because the substance was not disputed); *Scott v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 754 (2013).

<sup>276</sup> CAL. CIV. CODE § 1717 (1987) (providing for two-way attorneys' fees if contract contains one-way fee clause); see, e.g., *In re Alpine Group, Inc.*, 151 B.R. 931, 932 (9th Cir. 1993) ("The loan documents contained a standard contract enforcement attorney's fees provision."); *Aozora Bank, Ltd. v. 1333 N. Cal. Blvd.*, 119 Cal. App. 4th 1291, 1295 (2004) (evaluating specific language in loan documents allowing for attorney fees if borrower commits waste); *Bergman v. JP Morgan Chase Bank, N.A.*, No. RIC 10014015 (Cal. Super. Ct. Riverside Cnty. Jan. 22, 2014) (awarding attorney's fees in a TPP case where borrowers prevailed at trial on their good faith and fair dealing and misrepresentation claims). See generally CEB, *supra* note 29, § 7.23.

<sup>277</sup> "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.*" CAL. CIV. CODE § 2924.12(i) (2013), (emphasis added); § 2924.19(h) (same).

<sup>278</sup> Compare *Pearson v. Green Tree Servicing, LLC*, 2014 WL 6657506, at \*4 (N.D. Cal. Nov. 21, 2014) (borrower is "prevailing party" based on issuance of PI which led to servicer's voluntary rescission of dual-tracked NOD); *Ingargiola v. Indymac Mortg.*

*Monterossa* dramatically shifted the fee recovery legal landscape by holding attorney’s fees available to the borrower after obtaining a preliminary injunction.<sup>279</sup> After *Monterossa*, at least one court has awarded attorney’s fees after a TRO stopped a foreclosure sale, and the servicer voluntarily postponing the sale in response to a preliminary injunction motion.<sup>280</sup>

Recently, some servicers have aggressively pursued attorney’s fees based on deeds of trust clauses and borrower’s HBOR claims, even after borrowers voluntarily dismiss their cases. Courts have generally rejected this argument, finding HBOR claims are “on a contract” and therefore subject to Civil Code Section 1717 requirements, which include the existence of a prevailing party.<sup>281</sup> Since voluntarily dismissing an action prevents any party from prevailing, courts have denied servicers’ motions for attorney’s fees in these situations.<sup>282</sup>

## F. Federal Preemption

Some state laws may be preempted by federal banking laws such as the Home Owner Loan Act (HOLA) and National Banking Act (NBA).<sup>283</sup> HOLA regulates federal savings associations, the NBA,

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Servs., No. CV1303617 (Cal. Super. Ct. Marin Cnty. May 21, 2014) (finding that HBOR’s statutory scheme allows interim fee awards because most HBOR cases are not fully tried), *and* Roh v. Citibank, No. SCV-253446 (Cal. Super. Ct. Sonoma Cnty Jan. 21, 2014) (awarding attorney’s fees following preliminary injunction because the statute does not distinguish between a preliminary injunction and a permanent injunction), *with* Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 3, 2013) (denying borrower’s motion for attorney fees because a preliminary injunction is “merely a provisional or auxiliary remedy to preserve the status quo until final judgment”); *see also* Le v. Bank Of N.Y. Mellon, \_\_ F. Supp. 3d \_\_, 2015 WL 9319487, at \*11 (N.D. Cal. Dec. 23, 2015) (borrower could be considered prevailing party when expiration of notice of trustee sale rendered HBOR claims moot); Pearson v. Green Tree Servicing, LLC, 2015 WL 632457, at \*4-6 (N.D. Cal. Feb. 13, 2015) (granting borrower’s attorney’s fees motion (see prior *Pearson* case, cited above) for work performed until the NTS was rescinded, and for the work on the attorney’s fees motion itself. Any work performed after the NTS was rescinded was not awarded attorney’s fees because the rescission “remedied” the HBOR violation under CC 2924.12.).

<sup>279</sup> *Monterossa v. Super. Ct.*, 237 Cal. App. 4th 747 (2015).

<sup>280</sup> *Lac v. Nationstar Mortg. LLC*, 2016 WL 1212582, at \*3 (Mar. 28, 2016).

<sup>281</sup> CAL. CIV. CODE § 1717(a) (1987).

<sup>282</sup> *See* *Masset v. Bank of Am.*, 2014 WL 3810364, at \*2-3 (C.D. Cal. July 25, 2014); *Caldwell v. Wells Fargo Bank, N.A.*, 2014 WL 789083, at \*4-5 (N.D. Cal. Feb. 26, 2014).

<sup>283</sup> HOLA is codified at 12 U.S.C. §§ 1461-1470 (2013), the NBA at 12 U.S.C. §§ 21-216 (2013).

national banks.<sup>284</sup> State statutes face field preemption under HOLA; the NBA only subjects them to conflict preemption.<sup>285</sup>

When the subject of the litigation is a national bank's misconduct, NBA preemption standards should apply, even if the loan was originated by a federal savings association. Some national banks, especially Wells Fargo, commonly assert a HOLA preemption defense where the loan at issue originated with a federal savings association (FSA or FSB) –in Wells Fargo's case, the FSA was World Saving's Bank. Wells argues that HOLA preemption attaches to the loan, and insulates Wells Fargo from HBOR liability, regardless of its own conduct as a national bank. Up until early 2014, most federal courts generally accepted this argument without independent analysis.<sup>286</sup> The tide turned in early 2014, however; most courts now hold that national banks and other servicers who are not savings associations *cannot* invoke HOLA preemption to defend their own conduct.<sup>287</sup>

Courts applying a proper preemption analysis have found former Section 2923.5 not preempted by the NBA.<sup>288</sup> Under a HOLA

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<sup>284</sup> See *Aguayo v. U.S. Bank*, 653 F.3d 912, 919, 921 (9th Cir. 2011).

<sup>285</sup> *Id.* at 922.

<sup>286</sup> See, e.g., *Terrazas v. Wells Fargo Bank, N.A.*, 2013 WL 5774120, at \*3 (S.D. Cal. Oct. 24, 2013) (finding HOLA preemption survives assignment and merger of the loan to a national bank); *Marquez v. Wells Fargo Bank, N.A.*, 2013 WL 5141689, at \*3-4 (N.D. Cal. Sept. 13, 2013) (acknowledging the growing split in authority, but siding with the (then) majority and allowing Wells Fargo to invoke HOLA preemption).

<sup>287</sup> See, e.g., *Kenery v. Wells Fargo, N.A.*, 2014 WL 4183274, at \*5-6 (N.D. Cal. Aug. 22, 2014) (“[Servicer] may not avail itself of the benefits of HOLA without bearing the corresponding burdens.”); *Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at \*3-4 (N.D. Cal. Aug. 7, 2014); *Hixon v. Wells Fargo Bank*, 2014 WL 3870004, at \*2-4 (N.D. Cal. Aug. 6, 2014) (finding borrowers, in signing their deed of trust, did *not* agree to be bound by HOLA preemption invoked by a national bank); *Boring v. Nationstar Mortg., LLC*, 2014 WL 2930722, at \*3 (E.D. Cal. June 27, 2014) (same); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 993-96 (N.D. Cal. 2014) (allowing national banks to hide behind HOLA preemption and avoid liability for their own conduct may result in a “gross miscarriage of justice”); *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*3-4 (N.D. Cal. May 13, 2014); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*7 (N.D. Cal. Mar. 3, 2014); *Roque v. Wells Fargo Bank, N.A.*, 2014 WL 904191, at \*3-4 (C.D. Cal. Feb. 3, 2014). *But see* *Hayes v. Wells Fargo Bank, N.A.*, 2014 WL 3014906, at \*4-6 (S.D. Cal. July 3, 2014) (citing OTS opinion letters, and that borrowers seemingly agreed to a HOLA preemption analysis at loan origination, in allowing Wells Fargo to invoke HOLA preemption).

<sup>288</sup> See *Cabrera v. Countrywide Home Loans, Inc.*, 2013 WL 1345083, at \*7 (N.D. Cal. Apr. 2, 2013); *Tamburri v. Suntrust Mortg.*, 875 F. Supp. 2d 1009, 1017-18 (N.D. Cal. 2012); *Skov v. U.S. Bank Nat'l Ass'n*, 207 Cal. App. 4th 690, 702 (2012).

preemption analysis, state courts have also upheld the statute,<sup>289</sup> but it has not fared as well in federal courts.<sup>290</sup> Few courts have considered NBA and HOLA preemption of HBOR specifically, but the federal courts that have, for the most part, determined HBOR is preempted by HOLA,<sup>291</sup> but not by the NBA.<sup>292</sup> Importantly, the Dodd-Frank Wall Street Reform and Consumer Protection Act amended HOLA in 2011 to adopt the NBA's less strict conflict preemption analysis.<sup>293</sup> Conflict preemption will apply to federal savings associations for conduct occurring in 2011 and beyond.<sup>294</sup> However, the new preemption standard does not affect the application of state law to contracts entered into before July 2010.<sup>295</sup>

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<sup>289</sup> See *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 218-19 (2010) (finding the former CC 2923.5 not preempted under HOLA); *Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182, 201-02 (2012) (State laws like CC 2923.5, which deal with foreclosure, have traditionally escaped preemption.).

<sup>290</sup> *Compare* *Nguyen v. JP Morgan Chase Bank N.A.*, 2013 WL 2146606, at \*6 (N.D. Cal. May 15, 2013) (preempted), *Rodriguez v. JP Morgan Chase*, 809 F. Supp. 2d 1291, 1295 (S.D. Cal. 2011) (preempted), *and* *Taguinod v. World Sav. Bank*, 755 F. Supp. 2d 1064, 1069 (C.D. Cal. 2010) (same), *with* *Ambers v. Wells Fargo Bank, N.A.*, 2014 WL 883752, at \*6 (N.D. Cal. Mar. 3, 2014) (no preemption), *Quintero v. Wells Fargo Bank, N.A.*, 2014 WL 202755, at \*3-6 (N.D. Cal. Jan. 17, 2014) (no preemption), *Osorio v. Wells Fargo Bank*, 2012 WL 1909335, at \*2 (N.D. Cal. May 24, 2012) (no preemption), *Pey v. Wachovia Mortg. Corp.*, 2011 WL 5573894, at \*8-9 (N.D. Cal. Nov. 15, 2011) (no preemption), *and* *Shaterian v. Wells Fargo Bank, N.A.*, 2011 WL 2314151, at \*5 (N.D. Cal. June 10, 2011) (same).

<sup>291</sup> See, e.g., *Aldana v. Bank of Am., N.A.*, 2014 WL 6750276, at \*5-6 (C.D. Cal. Nov. 26, 2014) (preempting HBOR); *Sun v. Wells Fargo*, 2014 WL 1245299, at \*2-4 (N.D. Cal. Mar. 25, 2014) (preempting CC 2923.55, 2923.6, & 2923.7); *Williams v. Wells Fargo Bank, N.A.*, 2014 WL 1568857, at \*10-13 (C.D. Cal. Jan. 27, 2014) (preempting CC 2923.6 and borrower's negligence and UCL claims, insofar as they are based on dual tracking); *Meyer v. Wells Fargo Bank, N.A.*, 2013 WL 6407516, at \*3-4 (N.D. Cal. Dec. 6, 2013) (same finding as *Sun*); *Deschaine v. IndyMac Mortg. Servs.*, 2013 WL 6054456, at \*7-10 (E.D. Cal. Nov. 15, 2013) (preempting CC 2923.6, 2923.7, and borrower's authority to foreclose (CC 2924) claims), *aff'd on other grounds*, 617 F. App'x 690 (9th Cir. 2015); *Marquez*, 2013 WL 5141689, at \*5 (preempting §§ 2923.55, 2923.6, 2923.7, and 2924.17). *But see* *Sese v. Wells Fargo Bank, N.A.*, No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. July 1, 2013) (dual tracking provision not preempted by HOLA).

<sup>292</sup> *McFarland v. JP Morgan Chase Bank*, 2014 WL 1705968, at \*6-7 (C.D. Cal. Apr. 28, 2014) (finding that the HOLA and NBA preemption analyses are not equivalent, and that the NBA does not preempt HBOR).

<sup>293</sup> See 12 U.S.C. § 1465(a) (2012) ("Any determination by a court . . . regarding the relation of State law to [federal savings associations] shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.").

<sup>294</sup> See 12 U.S.C. § 5582 (2010).

<sup>295</sup> 12 U.S.C. § 5553 (2010); see *Williams*, 2014 WL 1568857, at \*10 (declining to extend the Dodd-Frank Act to a loan originated before July 2010 (when the law went

Courts have been reluctant to find state tort law claims preempted by HOLA, especially if the laws are based in a general duty not to defraud.<sup>296</sup>

## G. Removal from State Court

### 1. Bases for Federal Jurisdiction

Federal courts are given jurisdiction by statute. Federal question jurisdiction and diversity jurisdiction are the two most common bases for federal jurisdiction. These two bases for jurisdiction are reviewed below.

Congress can also grant jurisdiction to federally-chartered corporations if the charter expressly authorizes such jurisdiction or contains a “sued and be sued” clause that specifically mentions federal

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into effect) and finding borrower’s HBOR claims therefore preempted by HOLA); *Deschaine v. IndyMac Mortg. Servs.*, 2014 WL 281112, at \*8 (E.D. Cal. Jan. 23, 2014) (same).

<sup>296</sup> *See, e.g.*, *Sun v. Wells Fargo*, 2014 WL 1245299, at \*2-4 (N.D. Cal. Mar. 25, 2014) (HOLA preempts HBOR claims, but not common law causes of action); *Sarkar v. World Savings FSB*, 2014 WL 457901, at \*2-3 (N.D. Cal. Jan. 31, 2014) (finding borrower’s authority to foreclose claims and her fraud based claims not preempted by HOLA because any effect on lending is only incidental); *Cheung v. Wells Fargo Bank, N.A.*, 2013 WL 6017497, at \*4-5 (N.D. Cal. Sept. 24, 2013) (Borrower’s wrongful foreclosure claim escaped HOLA preemption because lenders cannot rely on non-judicial foreclosure framework to foreclose, and then claim that framework is preempted by federal law.); *Wickman v. Aurora Loan Servs., LLC*, 2013 WL 4517247, at \*2-3 (S.D. Cal. Aug. 23, 2013) (Borrower’s fraud, negligent misrepresentation, and promissory estoppel claims were not HOLA preempted because those laws only prevent a servicer from defrauding a borrower – they do not require anything additional from the servicer and only incidentally affect their business practices.); *Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, at \*8-9 (S.D. Cal. July 31, 2013) (same). *But see* *Ambers v. Wells Fargo Bank, N.A.*, 2014 WL 883752, at \*6 (N.D. Cal. Mar. 3, 2014) (noting a distinction between fraud and misrepresentation claims based on “inadequate disclosures of fees, interest rates, or other loan terms,” and those based on a bank’s “general duty” not to “misrepresent material facts,” but declining to apply the HOLA preemption analysis to borrower’s ill-pled claims); *Terrazas v. Wells Fargo Bank, N.A.*, 2013 WL 5774120, at \*5-6 (S.D. Cal. Oct. 24, 2013) (HOLA preempts all of borrower’s authority to foreclose claims, negligence claim, and contract related claims); *Babb v. Wachovia Mortg., FSB*, 2013 WL 3985001, at \*3-7 (C.D. Cal. July 26, 2013) (finding borrower’s promissory estoppel, breach of contract, negligence, fraud, and UCL claims preempted by HOLA because all the claims were based on the modification process, which effects “loan servicing”).

court.<sup>297</sup> For example, Freddie Mac is granted federal question by statute.<sup>298</sup> At least in the Ninth Circuit, federal jurisdiction exists in any case where Fannie Mae is a party.<sup>299</sup>

### **Federal Question Jurisdiction**

Federal question jurisdiction exists in any case involving a federal claim. For example, if the suit is brought on a RESPA or an ECOA claim, then the plaintiff may choose to file in federal court because the claim based on federal law gives rise to federal question jurisdiction.

When a defendant removes a complaint based on federal question jurisdiction, the plaintiff wishing to stay in state court may amend the complaint to remove the federal claim. In that case, the amended complaint supersedes the original pleading in determining federal jurisdiction.<sup>300</sup>

### **Diversity Jurisdiction**

While some cases are removed to federal court through federal question jurisdiction, most removals in foreclosure cases are based on diversity jurisdiction. Diversity jurisdiction requires (1) complete diversity of citizenship between plaintiffs and defendants and (2) more than \$75,000 of amount in controversy.

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<sup>297</sup> See *Am. Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 258 (1992) (federal jurisdiction authorized when charter refers to “courts of law and equity, State or Federal).

<sup>298</sup> 12 U.S.C. § 1452(f).

<sup>299</sup> *Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 683 (9th Cir. 2014) (holding sue-and-be-sued clause in Fannie Mae’s charter confers federal jurisdiction over claims brought by or against Fannie Mae), *petition for cert. filed*, 83 U.S.L.W. 3720 (U.S. Feb. 17, 2015) (No. 14-1055).

<sup>300</sup> See *Arco Env’t Remediation, L.L.C. v. Dep’t of Health & Environmental Quality of Montana*, 213 F.3d 1108 (9th Cir. 2000); *Wellness Cmty-Nat’l v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) (no federal question jurisdiction where original complaint alleged both federal and state claims and amended complaint only stated state law claims but insufficient amount in controversy for diversity jurisdiction); *Farmer v. Ocwen Loan Servicing, LLC*, 2010 WL 653098 (E.D. Cal. Feb. 22, 2010).

## *Complete Diversity of Citizenship*

Complete diversity of citizenship is required for diversity jurisdiction.<sup>301</sup> In other words, *each* plaintiff must have a different citizenship from *each* defendant. A natural person's citizenship is determined by the person's domicile, the place where he or she resides with the intention to remain or to return. Simply alleging the person's residence is insufficient to ascertain citizenship.<sup>302</sup> Complete diversity is destroyed even if only one properly joined defendant shares common citizenship with a plaintiff.

National banks are deemed to a citizen of the state where their main offices are located as designated in their articles of association.<sup>303</sup> Mortgage servicers with national bank charters are generally not California citizens and therefore diverse from California plaintiffs. Except OneWest and Recontrust, most national banks' designated main offices are outside of California.<sup>304</sup>

Adding a California foreclosure trustee as a defendant may defeat complete diversity. Courts have wrestled with jurisdictional questions involving California trustees, including the effect of a Civil Code § 2924l declaration of nonmonetary status (DNS). Civil Code § 2924l permits a trustee to file a declaration of non-monetary status if it is named in an action concerning a deed of trust, and it has a reasonable belief that it has been named solely in its capacity as trustee, and not as a result of any wrongful acts or omissions in the

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<sup>301</sup> Pullman Co. v. Jenkins, 305 U.S. 534, 541 (1939) (In controversy primarily between citizens of different states, even one properly joined defendant defeats diversity jurisdiction.).

<sup>302</sup> See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001) ("A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state."); Dyer v. Wells Fargo Bank, N.A., 2015 WL 2061781 (C.D. Cal. Apr. 30, 2015) (remanding case when notice of removal only alleged plaintiff's California residence but not citizenship).

<sup>303</sup> See, e.g., Rouse v. Wachovia Mortg., FSB, 747 F.3d 707 (9th Cir. 2014) (holding that because Wells Fargo's articles of association identifies South Dakota as its main office, Wells Fargo is citizen of South Dakota despite principal place of business in California).

<sup>304</sup> See Office of Comptroller of Currency, National Banks Active as of 3/31/2015, <http://www.occ.gov/topics/licensing/national-bank-lists/national-by-name-pdf.pdf> (visited Apr. 28, 2015).

performance of its duties.<sup>305</sup> If no objection is served within 15 days, the trustee is not required to participate in the action and is not subject to any damages award.<sup>306</sup> The objection period is extended by five days if the notice was served by mail.<sup>307</sup>

As long as the 15-day period for objections passed before removal, some district courts recognize defendants who filed a declaration of non-monetary status without objection are nominal parties.<sup>308</sup> When removal is filed less than 15 days after the filing of the declaration, courts will consider the trustee's citizenship when evaluating jurisdiction.<sup>309</sup> Other courts, however, declined to give any

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<sup>305</sup> CAL. CIV. CODE § 2924l(a).

<sup>306</sup> CAL. CIV. CODE § 2924l(e).

<sup>307</sup> See *Roberts v. Greenpoint Mortg. Funding*, 2014 WL 3605934, at \*3 n.2 (C.D. Cal. July 22, 2014) (applying Civ. Code § 1013 to the time for objection under § 2924l).

<sup>308</sup> See, e.g., *Jenkins v. Bank of Am., N.A.*, 2015 WL 331114 (C.D. Cal. Jan. 26, 2015) (listing cases); *Chancellor v. OneWest Bank*, 2012 WL 3834951, at \*2 (N.D. Cal. Sept. 4, 2012) (concluding that a defendant trustee was “no longer considered a party to this action” where it filed a declaration of non-monetary status in Alameda Superior Court more than fifteen days prior to removal and no objection was asserted); *Smith v. Bank of Am., N.A.*, 2011 WL 1332035, at \*3 (E.D. Cal. Apr. 6, 2011).

<sup>309</sup> See, e.g., *Silva v. Wells Fargo Bank, N.A.*, 2011 WL 2437514, at \*4 (C.D. Cal. June 16, 2011) (“Here, Removing Defendants filed their notice of removal before the 15 days had passed. Cal–Western filed its declaration of non-monetary status on April 8, 2011, and Removing Defendants filed their notice of removal before the 15 days had passed. Thus, at the time of removal, Cal–Western had not yet become a nominal party by virtue of its declaration of non-monetary status. Removing Defendants must show that diversity of citizenship existed at the time of removal. At the time of removal, the declaration of non-monetary status had not rendered Cal–Western a nominal party whose citizenship was irrelevant for diversity purposes” (citations omitted)); *Moore v. Wells Fargo Bank, N.A.*, 2012 WL 4433323, \*3 (E.D. Cal. Sept. 24, 2012) (“California Civil Code section 2924l permits a trustee to declare ‘non-monetary status’ if it ‘maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee.’ Cal. Civ. Code § 2924l (a). However, that statute also provides for a 15–day objection period. *Id.* § 2924l (d). ‘A party that files a declaration of non-monetary status does not actually become a nominal party until 15 days pass without objection.’ Here, Cal–Western did not file its declaration of non-monetary status until August 13, 2012, the day before this action was removed to this court. Therefore, even if the declaration of non-monetary status could have transmuted Cal–Western into a nominal party, here it did not do so since the 15 day objection period did not run, and as a result, Cal–Western’s non-monetary status was not perfected” (citations omitted)); *Boggs v. Wells Fargo Bank NA*, 2012 WL 2357428, at \*3 (N.D. Cal. June 14, 2012) (“A party that files a declaration of non-monetary status does not actually become a nominal party until 15 days pass without objection.’ Here, Golden West filed its declaration of non-monetary status on April 28, 2011, and Wells Fargo Defendants filed their Notice of Removal fourteen days later on May 12, 2011. Because the removal occurred less

effect to the declaration of non-monetary status, even when the declaration was unopposed for the full 15-day period before removal, because the declaration is a state law procedural mechanism with no parallel in federal law.<sup>310</sup> For these latter courts, the trustee has nominal status only if the complaint states no substantive claims against the trustee.<sup>311</sup>

### *Amount in Controversy*

Even with diverse parties, the amount in controversy must also exceed \$75,000 for diversity jurisdiction to exist. In cases seeking an injunction against a foreclosure sale, courts have often counted the entire value of the home in the amount in controversy. Some recent decisions, however, have declined to include the entire amount of the loan when the borrower only seeks a temporary injunction. In *Olmos v. Residential Credit Solutions, Inc.*, the court held that when seeking an injunction to halt foreclosure until his loan modification application can be processed, borrower has not put the value of the home at issue.<sup>312</sup> At most, he has put the amount it would cost servicer to evaluate his application and any lost interest on the loan during the

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than fifteen days after Golden West filed its declaration of non-monetary status, Golden West had not yet been transmuted into a nominal party at the time of removal. Therefore, the Court cannot disregard Golden West's citizenship for purposes determining whether Plaintiffs and Defendants are completely diverse").

<sup>310</sup> See, e.g., *Duran v. Bank of Am., N.A.*, 2015 WL 794672, at \*4-5 (C.D. Cal. Feb. 24, 2015) (declining to give effect to declaration of non-monetary status because the declaration is a state law procedural mechanism with no parallel in federal law); *Raissan v. Quality Loan Service Corp.*, 2014 WL 6606802, at \*3-4 (C.D. Cal. Nov. 19, 2014); *Hershcu v. Wells Fargo Bank, N.A.*, 2012 WL 439698, at \*2 (S.D. Cal. Feb. 10, 2012).

<sup>311</sup> Compare *Raissan v. Quality Loan Service Corp.*, 2014 WL 6606802, at \*3-4 (C.D. Cal. Nov. 19, 2014) (trustee not nominal party when trustee recorded NOD in violation of HBOR); *Pardo v. Sage Point Lender Servs. LLC*, 2014 WL 3503095 (S.D. Cal. July 14, 2014) (trustee not nominal party because borrower sued trustee for wrongdoing); *with Duran v. Bank of Am., N.A.*, 2015 WL 794672, at \*5 (C.D. Cal. Feb. 24, 2015) (finding trustee to be nominal party because allegations in the complaint were all directed toward servicer, not trustee).

<sup>312</sup> *Olmos v. Residential Credit Solutions, Inc.*, 92 F. Supp. 3d 954, 956-57 (C.D. Cal. 2015).

evaluation.<sup>313</sup> Other courts have also declined to value the injunctive relief as the entire amount of the loan.<sup>314</sup>

## 2. Remand Considerations

In deciding whether to move to remand a removed case, counsel should consider the differences between the two forums.<sup>315</sup> For example, plaintiff's counsel may prefer state court out of familiarity with state court rules and local practices. Unanimous jury verdicts are required in federal court,<sup>316</sup> where only a  $\frac{3}{4}$  verdict is required in state court.<sup>317</sup> The jury will also be selected from different jury pools due to the larger geographic draw of a federal district court. Federal courts may also be more inclined to grant summary judgment or summary adjudication on selected issues in cases.<sup>318</sup> In rare cases, the forum choice can even affect substantive law, when the Ninth Circuit and the California Court of Appeal disagree over interpretation of a statute.<sup>319</sup>

## Conclusion

Advocates are working to maximize HBOR's impact so that it can protect as many homeowners as possible from avoidable foreclosures. Because there is little precedent, advocates should work together in constructing a body of case law around HBOR. Together, advocates can advance consumer-friendly interpretations of the law, so

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<sup>313</sup> *Id.*

<sup>314</sup> *See, e.g.,* Jaurequi v. Nationstar Mortg. LLC, 2015 WL 2154148, at \*4 (C.D. Cal. May 7, 2015); Vergara v. Wells Fargo Bank, N.A., 2015 WL 1240421, at \*2 (C.D. Cal. Mar. 17, 2015) (collecting cases and noting HBOR permits injunction only until violation has been remedied); Cheng v. Wells Fargo Bank, N.A., 2010 WL 4923045, at \*2 (C.D. Cal. Dec. 2, 2010).

<sup>315</sup> *See generally* James M. Wagstaffe et. al, Rutter Group Practice Guide: Federal Civil Procedure Before Trial, Ch. 2D (2015) for a comprehensive review of these considerations.

<sup>316</sup> FED. R. CIV. P. 48.

<sup>317</sup> Cal. Const. Art. I, § 16.

<sup>318</sup> Wagstaffe et al., *supra* note 315, § 2:2172.

<sup>319</sup> *Compare* King v. California, 784 F.2d 910, 913 (9th Cir. 1986) (holding a consumer loses right to rescind under TILA when the loan was subsequently refinanced) *with* Pacific Shore Funding v. Lozo, 138 Cal. App. 4th 1342 (2006) (holding rescission is available following refinancing and declining to follow *King*).

the Homeowner Bill of Rights can provide strong protections for homeowners across the state.

## Summaries of Recent Cases

### **Borrowers Have Standing to Assert Post-Sale Challenge of Void Assignments**

**Yvanova v. New Century Mortg.**, 62 Cal. 4th 919 (2016): In *Yvanova*, the California Supreme Court unanimously held that borrowers have standing to challenge a void, even if the borrowers are not parties to the assignment.

Plaintiff brought suit against New Century Mortgage challenging the validity of the foreclosure on her home on the basis that the deed of trust was assigned to an investment trust more than four years after the closing date of the trust. The trial court ruled that the plaintiff, as a non-party to the assignment, did not have standing to bring an action for wrongful foreclosure. The Court of Appeal affirmed while noting the conflict with *Glaski v. Bank of America*, a case holding borrowers, even if not a party to the assignment, have standing to challenge an assignment if the assignment is void. The Court took up this case to resolve the split in the Court of Appeal.

The California Supreme Court unanimously reversed the Court of Appeal. The Court ruled that a plaintiff has standing to bring a wrongful foreclosure challenge to a foreclosure sale if an assignment to the foreclosing party is void. The Court explained that “If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever, . . . the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure.”

The Court emphasized that its ruling was a narrow one, meaning that the ruling did not resolve whether the plaintiff adequately alleged that the assignment in her case was void, or whether additional elements, such as tender of the unpaid principal or prejudice from the assignment, must be shown as a part of a wrongful foreclosure claim.

The Court remanded the case to the Court of Appeal for further proceedings.

### **Purchase Money Loans' Anti-Deficiency Protections Includes Short Sales**

**Coker v. JP Morgan Chase Bank**, 62 Cal. 4th 667 (2016): Various anti-deficiency laws protect borrowers against personal liability from a lender when a foreclosure sale price does not satisfy the outstanding balance on the loan. CCP 580d's anti-deficiency protections apply when the loan is sold at trustee's sale. CCP 580b's protections apply to purchase money loans. CCP 580e protects borrowers against a deficiency after a short sale, but it only applies to short sales completed after September 2010 for first liens and July 2011 for second liens. In this case of first impression, the California Supreme Court found that CCP 580b prevents deficiency judgments on purchase money loans after a short sale. CCP 580b effectively declares purchase money loans to be "nonrecourse" loans for which a borrower cannot be held personally liable. The statutory language limits the type of loan (to "purchase money loans") but not the mode of sale. Additionally, the legislature drafted the statute to shift the risk of falling property values to the lender and stabilize the real property market. Accordingly, the Court applied CCP 580b to short sales and reversed trial court's judgment in favor of Chase.

### ***Yvanova* Does Not Apply to Pre-Sale Challenges; Late Transfer into Trust Voidable and not Void under NY Trust Law**

**Saterbak v. JP Morgan Chase Bank, N.A.**, \_\_ Cal. App. 4th \_\_, 2016 WL 1055062 (Mar. 16, 2016): Even though the California Supreme Court held in *Yvanova* that a foreclosed borrower has standing bring a wrongful foreclosure claim on the basis that the assignment is void, the Court of Appeal declined to extend the holding to a pre-foreclosure challenge. Because Saterbak brought a preforeclosure suit challenging the bank's ability to foreclose, the Court held that she lacks standing.

In addition, the Court held that Saterbak lacked standing because the defect in the assignment at issue in the case – a late transfer into a trust established under New York law – did not render the assignment void. In so holding, the Court followed the more recent New York appellate decisions holding that a late transfer into a trust after its closing date only rendered the assignment voidable, not void and noted that *Glaski*'s holding to the contrary was partly based on a New York trial court decision that was later overturned.

**Unaffordable Loan and Loan Modification, Combined with Borrowers' Limited English Proficiency and Education, Sufficient for Unconscionability Attack on Foreclosure Sale**

**Orcilla v. Big Sur, Inc.**, 244 Cal. App. 4th 982 (2016): An equitable cause of action to set aside a foreclosure sale has three elements: (1) an illegal, fraudulent, or willfully oppressive sale; (2) prejudice or harm; (3) tender of the amount of the secured indebtedness or excuse from tender. For the first element, unconscionability of the original loan may render a foreclosure of the loan illegal. Unconscionability has procedural and substantive aspects. Courts use a sliding scale approach in assessing the two elements. Here, the borrowers attacked a foreclosure sale on the basis that the loan payments exceeded their income; they have limited education and English proficiency; they did not understand the details of the transaction; and the loan documents were on standard, pre-printed forms in English. They also alleged that their 2008 loan modification agreement was unconscionable for the same reasons.

First, the court agreed with the borrowers that allegations of limited English fluency and education and that the loan documents were on pre-printed forms were sufficient for procedural unconscionability, such facts only presented a low level of procedural unconscionability because none of the key terms were hidden in fine print. Turning to substantive unconscionability, the borrowers alleged that the monthly loan payments exceeded their income by more than \$1,000. The court agreed that it was enough to allege substantive unconscionability.

Turning to the second element, harm, the borrowers alleged harm because of the sale of the home. They also pointed out harm from reliance on misrepresentations of a robo-signer that was alleged in their fraud cause of action. Even though the pleading was “technically deficient” because they failed to incorporate by reference the fraud cause of action, the court chose to overlook the technical deficiency given its duty to liberally construe the complaint.

Next, the court held that the borrowers adequately alleged excuses from tender because the facts were sufficient to allege that the loans were unconscionable, even though the allegations were in a separate part of the complaint.

Finally, the court rejected the argument that because the home was sold to bona fide purchasers, the foreclosure sale was entitled to a conclusive presumption of validity. Even assuming that Big Sur is a bona fide purchaser, the conclusive presumption for BFPs only applies to statutory compliance with default and sale notices, not to claims of unconscionability in the original loan documents. For these reasons, the Court of Appeal held that the complaint stated a cause of action to set aside the trustee’s sale. Based on the same reasoning, the Court held that the complaint alleged an UCL claim based on the same violations.

### **Violation of HAMP Dual-Tracking Prohibition May Form Basis for Unfair UCL and Wrongful Foreclosure Claims**

**Majd v. Bank of Am., N.A.**, 243 Cal. App. 4th 1293 (2015): HAMP Supplemental Directive 10-02 prohibits participating servicers from conducting a foreclosure until 30 days after a loan modification application is denied. Here, the plaintiff alleged that Bank of America foreclosed on his property in 2012 before completing loan modification review.

The Court also held that the borrower stated a claim for UCL for Bank of America’s ultimate denial based on failure to provide required documentation. Because the complaint alleged that the plaintiff repeatedly provided Bank of America with the documentation

requested, the complaint stated an UCL claim against the bank for falsely asserting that the plaintiff failed to provide the required documents.

### **TILA § 1941(g) Not Retroactive**

**Talaie v. Wells Fargo Bank, NA**, 808 F.3d 410 (9th Cir. 2015): The Truth in Lending Act, 15 U.S.C. § 1641(g), requires an assignee of a mortgage loan to provide the borrower a notice of the transfer with statutorily required information, including the name of the new creditor, the date of the transfer, and how to reach the creditor. The provision was enacted into law as a part of the Helping Families Save Their Homes Act of 2009. The borrowers brought sued Wells Fargo for failing to provide notice under the law, but judicially noticed securitization contract established that Wells Fargo transferred the deed of trust to U.S. Bank in 2006. The Ninth Circuit held that the claim fails because the statute was not retroactive because Congress did not express a clear intent for the statutory provision to be applied to loans that were transferred before its enactment.

### **Borrower Lacks Standing to Attack Foreclosure Sale Because Late Transfer of Trust is Voidable, not Void**

**Morgan v. Aurora Loan Servs.**, \_\_ F. App'x \_\_, 2016 WL 1179733 (9th Cir. Mar. 28, 2016): The borrower brought a post-foreclosure suit against a foreclosure on the basis that the loan was transferred into the trust after its closing date. Following *Yvanova*, the Ninth Circuit stated that a borrower does have standing “to challenge an assignment of her note and deed of trust on the basis of defects allegedly rendering the assignment void.” However, a late transfer into the trust is voidable, not void, under New York law, which governs the Pooling and Servicing Agreement. Therefore, the borrower lacked standing to bring this challenge.

### **HBOR Fee Award for Obtaining Temporary Restraining Order**

**Lac v. Nationstar Mortg. LLC**, 2016 WL 1212582 (E.D. Cal. Mar. 28, 2016): Under California law, the court may award reasonable

attorney's fees to a borrower who obtained injunctive relief under CC 2924.12. In *Monterossa v. Superior Court*, the Court of Appeal held that a preliminary injunction is a type of injunctive relief that qualifies for a fee award, even if the case is still pending. In this case, the borrower moved for attorney's fees after obtaining a TRO to stop the sale and subsequently obtained two more orders extending the TRO twice. The court found an interim fee award appropriate in this case because "there is no question Lac obtained 'injunctive relief' in response to his request for a temporary restraining order." Further, Nationstar cannot sidestep this result by offering to postpone the sale and consider his application, laudable as that offer may be; otherwise a lender could violate the statute with impunity and later correct its violations as a litigation tactic."

### **Declining to Follow *Jenkins* on Standing in Pre-Foreclosure Wrongful Foreclosure Claim**

**Lundy v. Selene Fin., LP**, 2016 WL 1059423 (N.D. Cal. Mar. 17, 2016): The borrower brings a pre-foreclosure suit challenging the authority of the bank to foreclose on the basis of a defective assignment. Here, the homeowner took out a loan with Washington Mutual (WAMU) in 2005. WAMU later became defunct, and Chase acquired WAMU's assets in 2008 and seeks to foreclose on the home. However, borrower alleges that Chase had no authority to foreclose on the loan because WAMU sold the loan to RESI Finance DE Corporation 2007-B (RESI) in 2007, prior to Chase's acquisition of WAMU.

The defendants argued that Lundy lacked standing to challenge the defective assignment before a foreclosure sale. Even though the California Supreme Court in *Yvanova* held that a borrower has standing to bring a post-foreclosure challenge to void assignments, the court expressly declined to say whether that holding extends to pre-foreclosure challenges. When a federal district court sits in diversity, the court must decide state law issues by predicting how the state supreme court would rule on the issue.

## **CC 2923.6(g) is Affirmative Defense, Not a Pleading Requirement**

**Norris v. Bayview Loan Servicing**, 2016 WL 337381 (C.D. Cal. Jan. 25, 2016): Under HBOR, a servicer is not obligated to consider a borrower's modification application if it considered a previous application. If a borrower can show she "documented" and "submitted" a "material change in financial circumstances" to servicer, however, dual tracking protections can reignite and protect the borrower while that subsequent application is pending. CC § 2923.6(g). Here, the servicer argues that because the borrower did not affirmatively plead that the application in question was the first application, the servicer does not have to make a written determination on the loan modification application before moving forward with foreclosure.

The Court rejected this argument. First, the Court held that even if the servicer need not evaluate such application, it still must inform the borrower of that decision. Otherwise, the borrower would not know when to appeal the denial of his request and when to argue that "there has been a material change in the borrower's financial circumstances since the borrower's [first] application." Second, the borrower needs not plead that the application was the first application he submitted to Bayview. The CC 2923.6(g) exception is at most an affirmative defense under the Federal Rules of Civil Procedure, and the FRCP does not require a plaintiff to plead around every affirmative defense.

## **Failure to Set Up Correct Payment Method Violated SPOC Duties**

**Nasseri v. Wells Fargo Bank, N.A.**, \_\_ F. Supp. 3d \_\_, 2015 WL 7429447 (N.D. Cal. Nov. 23, 2015): CC 2923.7 requires a servicer to provide a single point of contact (SPOC) to a borrower who applied for a loan modification. The SPOC must have general information regarding the status of the foreclosure prevention alternative. Here, the borrower executed a forbearance agreement with Wells Fargo. Her SPOC then set the borrower's account to automatically withdraw the monthly payment from her checking account despite the forbearance

plan indicating payment by check or phone. Wells Fargo withdrew the payments with no problems for six months but then stopped withdrawing the payments starting from the seventh month. The bank also declined to allow the borrower to resume regular payments as the SPOC told her she could do. In addition, the SPOC told the borrower to apply for a loan modification even though “the loan had exceeded the amount of modifications allowed by the investor.” Under these facts, the Court found that the SPOC failed to perform the duties required under CC 2923.7.

**RESPA Claim Stated When Servicer Used Incorrect Property Value in Loan Modification Review and Failed to Respond to Request for Information on Status of Loan Modification**

**Norris v. Bayview Loan Servicing**, 2015 WL 6745048 (C.D. Cal. Oct. 26, 2015): A plaintiff alleging a RESPA violation pursuant to 12 U.S.C. § 2605 “must show: (i) that the servicer failed to adhere to the rules governing a QWR; and (ii) that the plaintiff incurred ‘actual damages’ as a consequence of the servicer’s failure. Here, the borrowers sent Requests For Information asking whether the loan modification application was complete and a list of all loss mitigation options. Bayview, citing *Medrano v. Flagstar Bank*, argued that it did not have to respond to RFIs relating to loan modifications. The Court disagreed and distinguished *Medrano* because there, the borrower alleged the failure to respond to the loan modification request itself as the RESPA violation. Here, the borrower was requesting information about the status of a prior loan modification application and a list of loss mitigation options. Turning to actual damages, the Court held that the allegation of increased penalties, fees, and interest resulting from the failure to respond is sufficient to allege actual damages for the purpose of a motion to dismiss.

**Keep Your Home California Funds Constitute Reinstatement Payment for CC 2924c**

**Selznick v. Wells Fargo Bank, N.A.**, 2015 WL 4069076 (C.D. Cal. July 1, 2015): CC 2924c requires a lender to stop a foreclosure once the

borrower pays the lender entire amount due with respect to the loan. Here, the borrower sought assistance from Keep Your Home California after falling in default and was approved for up to \$22,000. At the time, she was about \$18,000 in arrears. When she asked Wells Fargo for a reinstatement quote, the bank told her that they would take the KYHC funds but would not reinstate her loan. Wells Fargo, which participates in KYHC, later followed through with a rejection of the tender of the KYHC funds. The borrower sued to enforce her reinstatement right. Wells Fargo argued that the case should be dismissed since the KYHC funds were not a valid tender because the funds may not be used to cover fees in connection for the arrears, therefore the tender is insufficient. The Court rejected the argument and ruled that because MRAP imposes the condition that participating servicer waives fees, once the servicer waives the fees the KYHC assistance becomes a full reinstatement payment under CC 2924c.

## **Regulatory Updates**

[HAMP Supplemental Directive 16-02](#) (Mar. 2, 2016): Supplemental Directive (SD) 16-02: Making Home Affordable Program – MHA Program Termination and Borrower Application Sunset was issued, providing guidance to servicers regarding the termination of MHA for Non-GSE Mortgages, particularly with respect to evaluation of borrowers who request assistance prior to December 31, 2016.

[HAMP Handbook v. 5.0](#) (Jan. 6, 2016): Version 5.0 of the Handbook incorporates administrative clarifications into existing sections of Version 4.5 of the Handbook. These clarifications are effective immediately and include the following topics:

- Minimum Payment Reduction Under Streamline HAMP
- Streamline HAMP Affidavit
- Principal Reduction Alternative Documents
- Recast of Non-GSE Mortgages
- HAMP Tier 2 Alternative Modification Waterfall
- Handbook Mapping Clean-Up and Clarifications

[HUD Single Family Housing Handbook](#) (Mar. 14, 2016): HUD has consolidated guidance for the FHA single family program into the new handbook. The servicing section is in Section III of the Handbook.

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