February 2015 Newsletter

In this issue—

HBOR Collaborative member NCLC has written a primer on how to advocate for successors-in-interest—who obtain title to their homes through death or divorce—in the loss mitigation process, (the "widows and orphans" issue).

Summaries of important new cases, including *Jesinoski*, as well as regulatory updates, including the new HUD mortgagee letter on reverse mortgages.

Helping Successor Homeowners Get Loan Modifications[1]

You might be seeing this problem a lot these days: your client is trying to get a loan modification but hitting a brick wall because he or she was not an original borrower on the loan. The client might have inherited the house after the death of the borrower, been awarded the house in a divorce, or received a quitclaim deed from the borrower. People who obtain an interest in a house through one of these transfers are commonly referred to as "successors" or "successors in interest." The question then arises: can you force the servicer to communicate with your client and let her apply for a loan modification? This article will walk you through the steps to handling one of these cases and hopefully getting a loan modification for your successor in interest client.

Does your client own the home?

[1] This article was written by Sarah Mancini, Of Counsel to the National Consumer Law Center.

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The first step is figuring out whether your client has a property interest in the house. Perhaps your client was on title to the home along with the original borrower as joint tenants with right of survivorship. If so, and the borrower has died, your client received the decedent's interest in the house by operation of law. The house passed outside of the deceased borrower's estate, and there is no need for probate (at least for purposes of the loan modification).

If the borrower has died and the property was not owned with right of survivorship, you will be researching whether the client inherited through a will or, if there was no will, through intestate law. If there was a will, your client may need to initiate the probate process and get appointed as the executor (or secure the cooperation of the person named as the executor). If the client is an heir at law, you will need to consider whether to advise client to file a probate action and get appointed as the administrator, or whether an affidavit of heirship might be sufficient to prove your client's ownership interest. In some states, an affidavit of heirship may be recorded in the deed records, obviating the need for probate.[2]

If your client was formerly married to the borrower and has now been divorced or legally separated, you will need a copy of the divorce decree or legal separation agreement. If the divorce decree or legal separation agreement does not clearly award the house to your client, you will likely also need a recorded quitclaim deed signed by the ex-spouse transferring ownership to your client.

Finally, your client may have become the owner of the house by virtue of a quitclaim deed signed by the borrower. If so, you will want to be prepared with a recorded copy of this quitclaim deed.

[2] In some states this is referred to as an affidavit of descent. You should check with a local title attorney to ensure that whatever procedure you use will give your client marketable title. In some states an affidavit of heirship or descent, attested by a non-heir who has personal knowledge of the identity of the heirs at law, is sufficient to convey marketable title if a certain amount of time has passed since the decedent's death.

Was your client a borrower on the note?

Remember that the document we colloquially refer to as a "mortgage" is in reality made up of two documents: the promissory note (the promise to repay a debt; often a negotiable instrument) and the deed of trust (the security instrument securing repayment of the debt). Your client may have signed one, both, or neither of these two documents. Most often, if a non-borrowing spouse was on title at the time a loan was taken out, she probably signed the deed of trust but not the promissory note. You can find out if client was a borrower on the promissory note by reviewing the original closing documents from the loan (if client still has them). Or, the monthly mortgage statements are usually addressed to the borrower(s) named in the note.

Even if your client did not sign the promissory note, most likely her interest is subject to the deed of trust. That is true if your client signed the deed of trust or received her interest in the house after the deed of trust was signed. If the client's interest is subject to the deed of trust, then although the client has no personal liability on the debt, the lender may foreclose if the loan is not paid.[3] If you think your client's interest is not subject to the deed of trust, talk with a title attorney to be sure, as your client may have much greater leverage in dealing with the mortgage creditor.

If your client was an original co-borrower on the promissory note, you might still be having problems dealing with the servicer if there is another co-borrower who is not participating in the loan mod application – because that person (whom we will call an "absent co-borrower") has died, divorced your client, or moved out and signed a quitclaim deed.

Dealing with an absent co-borrower situation can present challenges. The key is to cite to the appropriate rule of the loan modification program that controls your client's loan showing that the absent co-borrower need not participate. Fannie Mae, Freddie Mac, and HAMP rules all provide that a co-borrower need not provide proof

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[3] *See* Restatement (Third) of Property: Mortgages § 5.2, cmt. b. at 351 (1997) ("A non-assuming transferee has the risk of loss of title to the real estate by foreclosure if the secured obligation is not performed . . .").

of income nor sign loan mod documents if there has been a death or divorce. Fannie, Freddie, and HAMP rules also allow servicers discretion not to require a co-borrower's signature in situations like military deployment and contested divorce. Freddie and HAMP rules also make it clear that if the borrowers were not married, a co-borrower's participation is not required if that co-borrower is not residing in the house and has signed a quitclaim deed (which has been recorded) relinquishing his/her interest in the house. FHA has not clearly addressed this issue, but servicers of FHA loans should follow the same general industry practice as that laid out in Fannie, Freddie, and HAMP rules. Below is a chart with the applicable rules regarding applying for a loan modification without an absent co-borrower.

Rules for Absent Co-Borrowers

Applicable Rules	Citation for excusing participation/signature of an absent co-borrower
Freddie Mac	Freddie Mac Servicing Guide, Chapter C65.7
Fannie Mae	Fannie Mae Servicing Guide §§ D2-2-05; F-1-18
HAMP	Making Home Affordable Handbook Version 4.4, Ch. II, §§1.2, 5.7

If your client is not a co-borrower, then your next step will be evaluating whether the client is eligible for a simultaneous loan modification and assumption. An assumption is the legal step by which a person takes on personal liability for a debt.[4] There are no formal or necessary words to accomplish an assumption,[5] but under most applicable program rules, servicers will generate one document that is a simultaneous modification and assumption.

[4] *See, e.g.,* Yasuna v. Miller, 399 A.2d 68, 73 (D.C. 1979) ("In mortgage law, 'assumption' is a term of art, defined by reference to the transaction between buyer and seller. . . . The grantee may . . . specifically agree with the seller to assume personal and primary responsibility for payment of the debt secured by the mortgage.").

[5] Brush v. Wells Fargo Bank, N.A., 911 F.Supp.2d 445, 462 (S.D. Tex. 2012).

Is your client protected by the Garn-St Germain Act?

Most of the non-borrower homeowners we are concerned about in this article will have acquired their ownership interest in the home because of a transfer.[6] That transfer of the home could have been effectuated through a quitclaim deed signed by the borrower, through a divorce decree awarding the house to one spouse, or through the death of the borrower (by right of survivorship or by inheritance).

Most mortgage contracts are drafted to restrict transfers; they contain a clause called a "due-on-sale" or "due-on-transfer" clause that says that if the borrower transfers the home without the lender's approval, the mortgage becomes due and payable. Due-on-sale clauses allow the servicer to accelerate the mortgage loan, and then to foreclose, after an unauthorized transfer. In 1982, Congress passed the Garn-St Germain Act which preempted state laws limiting the enforcement of due-on-sale clauses, but also carved out important exceptions for certain kinds of transfers. If a transfer falls within a Garn-St Germain exception, the mortgagee may **not** enforce the due-on-sale clause.[7] These kinds of successors are sometimes referred to as Garn-exempt or Garn-protected transferees.

Garn-St. Germain carves out several kinds of protected transfers wherein a creditor may not enforce a due-on-sale clause, including:

- a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- a transfer to a relative resulting from the death of a borrower;
- a transfer where the spouse or children of the borrower become an owner of the property; or
- a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property.[8]

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[6] Or they acquired sole ownership, if perhaps they owned a half interest beforehand, through a transfer.
[7] 12 U.S.C. § 1701j-3(d).
[8] 12 U.S.C. § 1701j-3(d)(3), (5)-(7); *see also In re* Cady, 440 B.R. 16, 20 n.9 (Bankr. N.D.N.Y. 2010) (transfer from parents to son and his wife); *In re* Alexander, 2007 WL

Always review the mortgage to determine whether it contains a due-on-sale clause. If there is a due-on-sale clause, it is important to identify whether the transfer at issue falls under one of the Garn-protected categories. Absent an enforceable due-on-sale clause, the servicer has no authority to prevent or interfere in any way with the assumption of the mortgage and no legal recourse upon the event of the assumption.[9]

Because the due-on-sale clause is the only mechanism a servicer has to block assumption of the mortgage by the new owner, servicers must allow a successor homeowner to assume the loan if he or she falls within one of the Garn exceptions, even if there is an otherwise valid due-on-sale clause in the loan contract.[10] Without an enforceable due-on-sale clause, contracts are generally freely assumable and assignable under state contract law.[11]

Of course, having your client sign an Assumption Agreement and sending it to the servicer with a cover letter explaining the free assumability of loans under state contract law is not likely to go smoothly. You might decide to do this if you know you are heading for litigation. But generally, the better way to start out is by getting the servicer to acknowledge your client as a successor and to evaluate her for a simultaneous loan modification and assumption under whatever rules apply.

2296741 (Bankr. N.D. Fla. 2007) (transfer on death); Citicorp Mortg. v. Lumpkin, 144 B.R. 240, 241 (Bankr. D. Conn. 1992) (transfer from mother to daughter).

[9] *See, e.g.,* Fannie Mae, Transfers of Ownership, Questions and Answers, www.efanniemae.com/sf/guides/ssg/relatedservicinginfo/pdf/transowner.pdf ("If there is no due-on-sale clause, ownership of the property may be transferred without restriction.").

[10] *See, e.g.,* Fannie Mae, Single Family Servicing Guide § 408.02 (Jan. 31, 2003) ("Generally, the servicer must process these exempt transactions without reviewing or approving the terms of the transfer.").

[11] *See* RESTATEMENT (SECOND) OF CONTRACTS § 323, Comment a (1981) ("The assent of the obligor is not ordinarily necessary to make an assignment valid."); Brush v. Wells Fargo Bank, N.A., 911 F.Supp.2d 445, 460 (S.D. Tex. 2012) (finding daughter, who inherited property from her father, had right to assume the mortgage despite existence of due-on-sale clause); Olson v. Etheridge, 686 N.E.2d 563 (Ill. 1997) (contracting parties can modify who has primary responsibility for payment of a debt, without reference to the wishes of the creditor of that debt); Andrews v. Holloway, 231 S.E.2d 548, 549 (Ga. Ct. App. 1976) (holding that lender's consent to assumption was not required where mortgage contract provided it was binding on the borrower's "assigns").

Can your client qualify for a loan modification?

As in any loan modification case, you will want to determine what rules govern this mortgage loan. Is it a loan insured by the Federal Housing Administration (FHA) or the Veteran's Administration (VA)?[12] If so, FHA or VA rules apply. If not FHA or VA-insured, is the loan owned by Fannie Mae or Freddie Mac?[13] If so, then the servicer's evaluation of loss mitigation options is governed by Fannie or Freddie rules. Finally, if none of these apply, is the servicer participating in HAMP?[14] If so, then the servicer must comply with the rules contained in the Treasury Department's Making Home Affordable Handbook ("MHA Handbook").

Once you determine the program rules that apply, you will want to run the numbers to figure out if your successor client can qualify for a modification based on his or her income. Run the calculations as if your client were a borrower. If a client has zero income, only unemployment benefits, or income too low to qualify for a modification, then you will need to find out if there is any way to increase household income. Can client take on a housemate who could pay rent? Is there a possibility of getting child support or alimony from the ex- (or soon-to-be ex) spouse? If there is no way to increase household income enough to support a loan modification, the client should be advised that a modification is unlikely. It would not be in the client's best interest to assume an unaffordable loan if he or she cannot qualify for an affordable loan modification.

Once you determine that the client would qualify for a loan modification (under HAMP, Fannie, Freddie, or FHA rules) if she were the borrower, then you need to be able to point to the section of the

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[12] Usually the client will know if the loan is an FHA or VA loan. If unsure, look for an FHA or VA loan number on the mortgage statement or the first page of the deed of trust, or ask the servicer.

[13] If the client does not know, search the Fannie Mae and Freddie Mac loan lookup websites, https://knowyouroptions.com/loanlookup and https://ww3.freddiemac.com/loanlookup/. This will require you to know the last four digits of the borrower's Social Security number.

[14] Find HAMP participating servicers here: http://www.makinghomeaffordable.gov/get-started/contact-mortgage/Pages/default.aspx.

applicable rules that says the servicer should evaluate her for a modification as if she were the borrower, and once she is approved, allow her to execute a simultaneous loan modification and assumption agreement. The relevant citations are listed in the chart below. Note that all of the applicable rules allow for a non-borrower who inherits a home after the borrower's death to be evaluated "as if he or she was the borrower." Freddie Mac and FHA rules are not as clear regarding successors who are awarded the home in a divorce or legal separation. However, Freddie Mac acknowledges that servicers may not restrict a transfer of property to a Garn-protected transferee, so advocates should argue for the same result after a divorce or any other Garn-exempt transfer.[15] HUD may provide further guidance on this issue in its FHA Servicing Handbook, expected to be released in the first half of 2015.

Rules for Non-Borrower Owner Occupants

Applicable Rules	Citation for non-borrower simultaneous loan mod + assumption
Freddie Mac	Freddie Mac Servicing Guide, Chapter B65.28 (simultaneous loan modification and assumption after borrower's death; unclear regarding divorce). See also Chapter 60.5.
Fannie Mae	Fannie Mae Servicing Guide § D1-4.1-02 (simultaneous loan modification and assumption after death, divorce, or intra-family transfer).
HAMP	Making Home Affordable Handbook Version 4.4, §8.8 (simultaneous loan modification and assumption after death or divorce).
FHA	HUD Handbook § 4330.1 Rev-5 Chapter 6 (free assumability without a credit review after a borrower's death; unclear regarding divorce).

[15] *See* Freddie Mac Servicing Guide, Ch. 60.5.

Getting the servicer to acknowledge your client as a "successor in interest"

Once you figure out that your client can qualify for a loan modification and is entitled to be evaluated "as if he or she was the borrower," how do you get the servicer to act accordingly? The first step is usually to provide the servicer with the appropriate documentation proving that your client is a successor in interest – meaning that she is the owner of the home and she acquired her ownership interest through a Garn-exempt transfer – and asking the servicer to communicate with your client regarding the loan and available loss mitigation.[16]

If the borrower has died, you should cite to a regulation issued by the Consumer Financial Protection Bureau (CFPB) under the Real Estate Settlement Procedures Act (RESPA), which took effect January 10, 2014. Under this regulation, servicers are required to have policies and procedures reasonably designed to "[u]pon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan."[17] The CFPB issued a helpful Bulletin clarifying how servicers should comply with the regulation, and has issued proposed regulations that go much further to protect successors in interest.[18]

It is a good idea to send the servicer a letter (by fax or certified mail) specifically referencing this regulation (if applicable) and attaching documentation that shows that your client is the owner of the home. As discussed in section 1, that documentation will vary depending on how your client acquired his or her interest in the home.

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[16] If the transfer to your client did not fall within one of the Garn-St Germain protected transfer categories, you still may be able to obtain a loan modification. Particularly if the loan is governed by Fannie Mae or Freddie Mac rules, there is an argument that Fannie and Freddie allow for simultaneous loan modification and assumption after any "exempt transaction," which includes some transfers beyond those covered by Garn-St Germain. *See* Fannie Guide § D1-4.1-02, Freddie Guide Ch. 60.5.

[17] 12 C.F.R. § 1024.38(b)(1)(vi).

[18] CFPB Bulletin 2013-12 (Oct. 15, 2013); Proposed Regulations at 79 F.R. 74176 (Dec. 15, 2014).

It might include a right of survivorship deed and a death certificate (no probate documents are needed if the property passed by right of survivorship); an affidavit of heirship;[19] documents from a probate court showing your client is the estate representative; an executor's deed or administrator's deed conveying the house to your client; a divorce decree or legal separation agreement conveying the house to your client;[20] or a quitclaim deed from the borrower to your client.

You can opt to send this letter and proof of ownership before sending a loan modification application or along with the loan modification package. As always, keep a copy of what you send and proof that the documents were received.

What to do if the servicer stonewalls you?

Of course, these cases are not often resolved without a good deal of advocacy, so very likely your work is not yet done. You may encounter problems with a servicer requesting the same proof of ownership documents (like a divorce decree or probate order) over and over again, or requesting documents (like a probate order where the property passed through right of survivorship) that do not exist.[21] Or, the servicer may acknowledge that your client is a successor, but claim that he or she cannot apply for a loan modification or cannot assume the loan until the loan is brought current. This conduct by servicers flies in the face of the CFPB regulation and Bulletin as well as the applicable Fannie, Freddie, HAMP, or FHA rules.

When a servicer responds improperly to a successor's request to be evaluated for a loan modification, one option is to escalate the problem both internally (by asking to talk with a supervisor, sending a formal appeal, or contacting the office of the CEO, executive resolution

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[19] You should check with a local title attorney to ensure that whatever procedure you do use will give your client marketable title. Sometimes a recorded affidavit of heirship demonstrating that title has passed to the surviving homeowner is all that is necessary.

[20] Remember that if the divorce decree or separation agreement does not clearly award ownership of the house, you will likely also need a quitclaim deed signed by the non-resident ex-spouse.

[21] This kind of behavior was specifically denounced by the CFPB as unreasonable in CFPB Bulletin 2013-12 (Oct.15, 2013).

department, or general counsel's office) and externally (by contacting the HAMP Solutions Center, the Fannie or Freddie escalations portals, or the FHA National Servicing Center).[22]

Another option is to send the servicer a Notice of Error under RESPA. The refusal or failure to properly communicate with a successor in interest and evaluate him or her for available loss mitigation options is certainly an error related to the servicing of the mortgage loan.[23] This is a way to potentially set up a private right of action, as the regulation that requires servicers to identify and communicate with successors after the death of a borrower, 1024.38(b)(1)(vi), is not privately enforceable. The next section addresses whether a successor in interest may bring a claim under RESPA against their servicer, for failure to respond properly to a Notice of Error.

Finally, you might consider sending a legal demand letter and filing a lawsuit against the servicer. A number of legal claims may arise depending on the specific conduct at issue. If your client has executed an Assumption Agreement, then failing to treat the client as a borrower (with the attendant rights and responsibilities) may give rise to a claim for breach of contract or breach of the duty of good faith and fair dealing implied in the contract. If the servicer has strung your client along, soliciting her to submit all manner of income documentation or even to make payments under a trial modification, only to later deny a permanent modification, a claim might arise for promissory estoppel or negligence (breach of the duty of care in the loan mod process). If the servicer has made misrepresentations to your client that she cannot assume the loan or is not eligible for a loan modification and assumption, when in fact she can and is under applicable law and program rules, consider claims for unfair and deceptive practices, fraud, and negligent misrepresentation. In addition, if the servicer is a debt collector covered by the FDCPA (having become the servicer when the loan was already in default), your client may have a claim under the FDCPA for false or misleading

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[22] Information available here:
https://www.hmpadmin.com/portal/resources/advisors/escalation.jsp.
[23] *See* 12 C.F.R. § 1024.35(b)(11).

communications or unfair collection practices.[24] You might also consider raising equity, unclean hands, unconscionability, or fair lending laws. The practice of refusing to deal fairly with successors is disproportionately likely to impact the elderly and women (based on longer life expectancies and gender disparities in access to credit).[25]

Can a successor raise a claim under RESPA?

Of course, if you have opted for the strategy of sending a Notice of Error under RESPA, you might be considering including a RESPA claim in your complaint. The question will then arise whether a successor homeowner is a "borrower" who can bring a claim for damages under RESPA.

The proposed regulations issued by the CFPB in November 2014 would amend the definition of a borrower for purposes of RESPA to include any confirmed successor in interest pursuant to a Garn-exempt transfer. However, the rules are still open for comment; whatever final rule is issued will likely not take effect until around mid-2016.

In the meantime, there are several arguments to support a RESPA claim by a successor homeowner. First, if the successor client signed the deed of trust (even if not the promissory note), then she was defined as a borrower by that document. Relying on the deed of trust's definition of borrower, one could argue that the client is a borrower under RESPA. The term "borrower" is not currently defined in the RESPA regulation or statute.

Secondly, if the successor has gone ahead and signed an Assumption Agreement (which you could draw up – no formal words are necessary, so long as you can point to a document evidencing the intent to assume liability for the debt),[26] you could argue that the successor has assumed the note (as she is freely permitted to do under state contract law) and is therefore a borrower under RESPA.

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[24] *See* 15 U.S.C. § 1692(e); 1692(f).
[25] Gathering sufficient data to plead a violation of the Fair Housing Act or Equal Credit Opportunity Act may be challenging, but a number of advocates have alleged these types of claims on behalf of successor homeowners. *See, e.g.*, Gulembo v. Bank of Am., 1:11-CV-01352-JTN, W.D. Mich. (Amended Compl. Feb. 9, 2015).
[26] Brush v. Wells Fargo Bank, N.A., 911 F.Supp.2d 445, 462 (S.D. Tex. 2012).

Finally, if a successor has been appointed as the representative of the borrower's estate, several courts have held that an estate representative may pursue a RESPA claim on behalf of the deceased borrower.[27]

Would filing chapter 13 bankruptcy help?

If you find that a successor client cannot obtain a loan modification, consider whether he or she could afford to cure the mortgage arrearage in a chapter 13 bankruptcy. The vast majority of bankruptcy courts have held that a successor homeowner may treat the mortgage secured by her home in a chapter 13 plan, even if she is not the borrower on the note and has no personal liability on the debt.[28] Remember that this would require the successor to start making the regular mortgage payment on time, plus an additional amount sufficient to cure the mortgage arrearage over 36 to 60 months.

What about the new Proposed CFPB Regulations Issued in November 2014?

The CFPB issued proposed regulations under RESPA in November 2014 (published in the Federal Register on Dec. 15, 2014 at 79 F.R. 74176.) The proposed regulations, if adopted, would require servicers to communicate with all successors covered by the Garn-St Germain Act and would allow a potential successor to send a Request for Information for the limited purpose of asking how to prove his or her successor status. The proposed regulations would require servicers

[27] *See* Kralovic v. JP Morgan Chase Bank, N.A., 2015 WL 252315 (N.D. Ohio Jan. 20, 2015); Wilson v. Bank of Am., __ F. Supp. 3d __, 2014 WL 4744555 (E.D. Pa. Sept. 24, 2014).

[28] *See In re* Lumpkin, 144 B.R. 240 (Bankr. D. Conn. 1992) (daughter received home by quitclaim deed from mother); *In re* Hutcherson, 186 B.R. 546 (Bankr. N.D. Ga. 1995) (daughter inherited home from mother); *In re* McNeal, 2011 WL 4381725 (Bankr. M.D. Fla. Sept. 1, 2011) (finding son who inherited a one-tenth interest in the home from his mother and subsequently received quit claim deeds from 4 of 9 co-owners could include mortgagee's claim in his bankruptcy plan); *In re* Flores, 345 B.R. 615 (Bankr. N.D. Ill. 2006); *In re* Trapp, 260 B.R. 267, 268 (Bankr. S.C. 2001); *In re* Rutledge, 208 B.R. 624 (Bankr. E.D.N.Y. 1997).

to respond to this kind of request in the manner required for other Requests for Information. In addition, once it has been confirmed that a homeowner is a successor protected by the Garn-St Germain Act, the proposed rules would make the confirmed successor a borrower under RESPA (and a consumer under TILA), meaning that all of the protections of RESPA – the right to send Requests for Information and Notices of Error, specific loss mitigation procedures and timelines, and dual tracking restrictions – would apply. The CFPB has specifically asked for input from homeowners' advocates and servicers regarding the likely impact and importance of this proposed rule. The proposed rule is open for comment until March 16, 2015.

Summaries of Recent Cases

Federal Cases

TILA: Borrowers May Effect Loan Rescission by Notifying Lender of Intent to Rescind, Not Filing Suit

Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (Jan. 13, 2015):[29] If proper disclosures are not made at loan origination, borrowers may rescind their loan by "notifying the creditor . . . of [the borrower's] intention to do so." 15 U.S.C. § 1635(a). Borrowers must provide this notification within three years of origination. 15 U.S.C. § 1635(f). Here, borrowers sent their lender a letter of rescission exactly three years after loan origination. Lender refused to honor the rescission and, exactly one year and one day after sending the notice, borrowers filed suit. The district court granted the lender summary judgment and the Eighth Circuit affirmed. Each court found that, to exercise their rescission rights under TILA, borrowers had to file suit within three year of loan origination; notifying lender of their intent to rescind was insufficient to preserve that right. The Supreme Court, however, agreed with borrowers that TILA is clear: the right to rescind is exercised by "notifying" the lender. The statute does not require borrowers to also file suit in the three-year window. The Supreme Court reversed the judgment against borrowers.

[29] For a full background of this case, see Clare Lakewood, *U.S. Supreme Court to Resolve TILA Circuit Split: How Can Borrowers Rescind Their Mortgages?*, HBOR COLLABORATIVE FORECLOSURE NWSLR (July 2014), *available at* http://calhbor.org/wp-content/uploads/2014/07/HBOR-July2014Newsletter.pdf.

Negligence Claim Based Closely on *Alvarez* and *Biankaja* Factors; Borrower's Request for Loan Modification Triggers Servicer's Obligation to Provide SPOC, SPOCs May be Shuffled, but Must Perform SPOC Duties

Hild v. Bank of Am., N.A., 2015 WL 401316 (C.D. Cal. Jan. 29. 2015): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Many courts use the *Biankaja* test to determine whether a duty of care existed between a financial institution and borrower. Here, borrower alleged servicer's protracted application review, SPOC shuffling, repetitive requests for duplicative documents, and general mishandling of borrowers' loan modification amounted to negligence. The court closely followed the recent *Alvarez v. BAC Home Loans Servicing* decision, which also relied on the *Biankaja* factors, and evaluated each factor. Servicer's agreement to review the application was intended to affect borrowers, for it would impact their ability to keep their home. Second, it was foreseeable that servicer's bungling of the application could significantly harm borrowers. Third, injury has been adequately alleged as certain. In *Alvarez*, borrowers actually lost their home to foreclosure. And while a loan modification was not guaranteed, the *Alvarez* borrowers lost the *opportunity* to modify, and their home. Here, by comparison, borrowers' home has not yet been sold. Still, they have pled costs associated with trying to prevent foreclosure, "exorbitant" mortgage payments, and "severe emotional distress." The court found that these "less than robust allegations . . . are not so weak as to tip the balance away from finding . . . a duty of care." Fourth, there was a close connection between servicer's negligent handling of the application and the harm incurred—but for the negligence, borrowers *could* have qualified for a modification and avoided the damages listed above. Fifth, borrowers' "lack of bargaining power" in the servicing process, "coupled with conflicts of interest that exist in the modern loan servicing industry," impose a duty of care on servicers, who exercise complete control over the modification process and may be financially incentivized to mishandle it. Finally, public policy is served in preventing future application mismanagement. The passage of HBOR makes it clear that California legislators want servicers to "deal reasonably" with borrowers. Having found all six *Biankaja* factors fulfilled, the court denied servicer's MTD borrower's negligence claim.

HBOR requires servicers to provide a single point of contact (SPOC) "[u]pon request from a borrower who requests a foreclosure prevention alternative." CC § 2923.7(a). SPOCs may be individuals, or a "team" of people, and have several responsibilities, including making sure borrowers are considered for all possible foreclosure prevention alternatives and notifying borrowers of any missing documents in the loan modification process. Here, borrowers alleged their servicer violated these requirements by assigning them four SPOCs in three months, none of who made sure borrowers were considered for other loss mitigation options after they were denied a HAMP modification, and all of who failed to alert borrowers that their documents were stale after borrowers applied for an in-house modification. Servicer argued that because borrower failed to *affirmatively request a SPOC*, not just a foreclosure prevention alternative, servicer was under no duty to appoint a SPOC, according to a strict reading of the statute. The court disagreed, explaining that a plain reading of the statute contemplates a SPOC assignment upon borrower's request for a foreclosure prevention alternative. Borrower was entitled to a SPOC and adequately alleged that none of her SPOCs performed their statutorily required duties. The court did, however, allow that the mere shuffling of SPOCs did not violate the statute. Nevertheless, the court denied servicer's motion to dismiss borrower's SPOC claim.

Discovery Dispute: Deposing a SPOC

Discovery Order, Rijhwani v. Wells Fargo Home Mortg. Inc., No. C 13-05881 LB (N.D. Cal. Jan. 28, 2015):[30] If a plaintiff seeks to depose

[30] This discovery dispute stems from litigation summarized in our Case Compendium as *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016 (N.D. Cal. Mar. 3, 2014). There, the court denied servicer's MTD borrower's promissory estoppel and negligence claims, and rejected servicer's arguments: 1) that a national bank my

a non-party, he or she must subpoena that person under Rule 45 of the Federal Rules of Civil Procedure. When a plaintiff seeks to depose a corporate defendant, the corporation must appoint an "officer, director, or managing agent" to be deposed as the corporation's representative under Rule 30(b)(6). Here, borrowers served their servicer with a notice of intent to depose borrower's SPOC. Servicer objected to the notice because the SPOC is not a party to the litigation (and was not subpoenaed), and because the SPOC is not servicer's officer, director, or managing agent. Borrowers then asked the court to order servicer to designate borrower's SPOC as servicer's deponent, or to provide borrowers with the SPOC's contact information so borrowers can subpoena him. The court agreed with servicer that it was borrowers' burden to show that their SPOC was an officer, director, or managing agent to require him to testify. Servicer correctly objected to the notice and was within its rights to refuse to appoint the SPOC as its deponent. All servicer must do is appoint a representative who can "fully testify about [the specified] topics." The SPOC's personal knowledge of borrowers' loan is irrelevant. Further, borrowers provided no authority to show that servicer must accept service of a subpoena on the SPOC's behalf. The court noted, however, that due to the SPOC's special knowledge of the issues being litigated, it appears that he—and his contact information—is the "kind of [information servicer] ought to (and may) have listed in its initial disclosures." The court therefore ordered servicer to provide borrowers with the SPOC's contact information.

Diversity Jurisdiction: Procedural and Substantive Requirements of a Trustee's Nonmonetary Status Filing

Jenkins v. Bank of Am., 2015 WL 331114 (C.D. Cal. Jan. 26, 2015): A defendant may remove a state court action to federal court based on diversity jurisdiction if the amount in controversy exceeds $75,000 and

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invoke HOLA preemption to defend its own conduct; and 2) that borrower must plead servicer's noncompliance with the National Mortgage Settlement to assert HBOR claims.

the claim(s) arise between citizens of diverse (different) states. Diversity jurisdiction requires complete diversity between all opposing parties and the defendant bears the burden of showing that removal is proper. Original federal jurisdiction must exist at the time removal becomes effective. Here, California citizens brought state-law HBOR claims against their servicer, a "citizen" of North Carolina, and the foreclosing trustee, a "citizen" of California. Trustee filed a declaration of non-monetary status under Cal. Civ. Code § 2924*l*, claiming its California citizenship should be ignored for diversity purposes because it is a "nominal" defendant, acting as a mere agent of servicer and not sued for its own misconduct. Servicer, however, removed the case to federal court without waiting 15 days after trustee's declaration filing. It then moved to dismiss borrowers' complaint. In evaluating the motion to dismiss, the court addressed whether removal was proper and found it was not. Neither trustee nor servicer offered evidence that trustee's CC 2924*l* declaration had been filed at least 15 days prior to servicer's removal, as required, or that borrowers had *not* objected to the filing in the 15-day window. The court also evaluated whether trustee was substantively a nominal party, independent of its improper CC 2924*l* filing. Borrowers asserted substantive allegations against trustee in its own capacity and for its own misconduct: specifically, improperly recording NODs and NTSs against borrower's property. Borrowers also seek to recover damages against servicer and trustee, jointly and severally. The court therefore found that trustee was more than a nominal defendant, as it had a "sufficient stake" in the case. The court remanded the case to state court since complete diversity jurisdiction does not exist.

Delayed Discovery Doctrine

Hines v. Wells Fargo Mortg., 2015 WL 351818 (E.D. Cal. Jan. 26, 2015): All claims must be filed within each claim's statute of limitation (SOL), unless the plaintiff adequately alleges delayed discovery of the facts constituting the claim. Here, borrower brought various common law claims rooted in a loan modification agreement that originated outside the SOL for any of the claims. Borrower had relied on a broker to negotiate the modification and to explain its terms to her. Broker represented that the modification included a fixed interest rate when, in fact, the interest rate was adjustable and skyrocketed borrower's mortgage payments within three years of origination. In the first two years, however, the increases were not substantial enough that borrower noticed them or became suspicious. She only discovered the true nature of the modification agreement three years after she signed the agreement. The court previously dismissed her complaint with leave to amend to assert delayed discovery. Because borrower now adequately alleged she hired broker specifically to explain the modification terms to her, and that broker misrepresented the modification terms, the court agreed that borrower had sufficiently pled her reasonably delayed discovery of the loan's true terms. Whether or not it was reasonable for borrower to allow smaller interest-rate increases pass unnoticed for two years is a question of fact inappropriate for resolution at the pleading stage. The court denied broker and servicer's MTD based on their statute of limitations argument.

Distinguishing *Alvarez*; Servicing Transfer Breach of Contract Claim

Geake v. JP Morgan Chase Bank, 2015 WL 331104 (C.D. Cal. Jan. 23, 2015): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. A recently published Court of Appeal decision, *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014), found that while servicers have no duty to initiate the modification process or to grant a modification, once they agree to negotiate a modification they owe a duty to borrowers not to mishandle that process. Here, after borrower completed his TPP obligations, his servicer transferred the servicing rights to his loan. Rather than offering borrower a permanent modification, the new servicer sent borrower a letter offering a new TPP that required borrower to accept by a date three months past. Borrower alerted his new servicer of the impossibility of acceptance but never received an explanation. Eventually, the new servicer denied borrower a loan modification for failing to accept its offer and recorded an NOD. While this court seemingly agreed with the reasoning in *Alvarez*, it distinguished that case. There, borrowers' negligence claim was based on servicer's failure to timely review their application, foreclosing during review, and using inaccurate income information in the review. Here, borrower's "negligence claim is focused on [the new servicer's] preparation of a confusing modification letter and failure to address [borrower's] subsequent requests for clarification. This conduct falls short of that alleged in *Alvarez*." The court explained that nothing in the complaint distinguished the new servicer's activity from "traditional money-lending activity" and dismissed the negligence claim with leave to amend.

Breach of contract claims require borrowers to show: 1) a contract; 2) borrower's performance or excused non-performance; 3) servicer's breach; and 4) damages. The statute of frauds requires certain types of contracts (and agreements modifying existing contracts) to be memorialized in writing, and invalidates contracts not meeting this standard. The statute of frauds applies to agreements pertaining to the sale of real property. Here, borrower alleged he successfully complied with a TPP agreement made with his original servicer. At TPP completion, that servicer transferred servicing to a second servicer, which did not honor the TPP by offering borrower a permanent modification. The court agreed that borrower had pled a viable breach of contract claim against the second servicer. First, the second servicer did not rebut borrower's contention that it purchased not only the servicing rights from the original servicer, but the servicing obligations as well—including the obligation to comply with any agreements entered into by the original servicer. Second, the second servicer's failure to sign the TPP does not give it a viable statute of frauds defense. Because the original servicer signed the TPP, the new servicer was bound to adhere to that agreement. Third, the second servicer's "offer" of a new modification agreement does not absolve it from breaching the TPP. It was obligated to offer a permanent modification based on the original TPP. Finally, borrower adequately pled damages resulting from the new servicer's failure to permanently modify: fees and penalties, servicer's demands of unmodified loan payments, lost equity, damaged credit, and severe emotional distress. Rather than borrower's default causing these damages, as servicer alleged, it was the new servicer's failure to accept borrower's continued TPP payments that caused the mounting fees and other damages. Borrower's breach of contract claim against the second servicer survived the MTD.

Dual Tracking: "Fair Opportunity to be Evaluated"; Shuffling of SPOCs Does Not, By Itself, Violate SPOC Statute; Fraudulent Misrepresentation Claim

Johnson v. Bank of Am., 2015 WL 351210 (N.D. Cal. Jan. 23, 2015): Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification is pending. Servicers are under no obligation, however, to review a subsequent application if a previous application was already evaluated, or "afforded a fair opportunity to be evaluated." CC § 2923.6(g). Here, borrower alleged servicer recorded two NTSs while complete loan modification applications were pending. Servicer argued it was under no obligation to review these applications, however, since borrower already applied for–and was denied—a modification pre-HBOR. Specifically, borrower had submitted an application and then received written confirmation from servicer that the application was complete and sent to underwriting. Two months later, borrower timely complied with servicer's request for additional documents. Servicer nevertheless denied borrower's application for her failure to submit those documents. Under these circumstances, the court found it could not "conclude as a matter of law that [borrower's] application was evaluated or that she was afforded a fair opportunity to be evaluated." Servicer's denial letter itself acknowledged that it never evaluated the substance of borrower's application, but denied her because it did not receive requested documents. Additionally, servicer's "review" does not appear to have been a fair one: it denied borrower for failing to submit documents she in fact submitted, after acknowledging that her application was complete. Borrower's dual tracking claim survived the MTD.

SPOCs may be an individual or a "team" of people and have several responsibilities, including informing borrowers of missing documents and the status of their applications. Here, borrower alleged she was shuffled between at least eight SPOCs over four years, and each new SPOC either erroneously claimed she had no modification applications on file, or closed her applications for failure to submit documents she had in fact submitted to her previous SPOC. Servicer correctly argued that the shuffling of SPOCs does not, by itself, violate CC 2923.7. The allegations in borrower's complaint, however, make clear that none of her assigned SPOCs were able to perform their duties under the statute. Specifically, the SPOCs routinely botched the coordination of her documents and applications. Borrower's SPOC claim, insofar as it seeks injunctive relief, survived servicer's MTD.

Fraudulent misrepresentation claims require a borrower to show: 1) servicer's misrepresentation; 2) that servicer knew was false; 3) made with the intention that borrower rely on the misrepresentation; 4) and that borrower actually relied on the misrepresentation; 5) to her detriment. Like other fraud-based claims, the factual circumstances surrounding a fraudulent misrepresentation claim require a high-level of pleading specificity. Here, borrower alleged servicer acknowledged her modification applications as complete five different times, and each time later told her no application was received at all, or denied her for failing to provide requested documents. This sufficiently pleads material misrepresentations because the statements "directly impacted [borrower's] ability to obtain a loan modification." Borrower reasonably relied on servicer's representations in not pursuing other foreclosure alternatives, like a short sale. Borrower failed to properly allege damages, however, because she pled them in her opposition papers, not in her complaint. The court granted servicer's MTD borrower's fraud claim, with leave to amend to plead damages.

Negligence Claims Require Demonstration of *Biakanja* Factors; UCL Standing; Economic Damages Not Required to Bring SPOC Claim Pre-Sale

Hernandez v. Specialized Loan Servicing, 2015 WL 350223 (C.D. Cal. Jan. 22, 2015): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Many courts use the *Biakanja* six-factor test to determine whether a duty of care existed between a financial institution and borrower. Here, borrower alleged servicer's missteps amounted to a negligent handling of her loan modification application. The court curiously did not mention *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014), the leading negligence case in California. Instead, the court referred to an older case, *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872 (2013), which held that servicers *may* owe borrowers a duty of care in handling loan modifications. The court also found that borrower failed to address any of the *Biakanja* factors in her complaint or opposition briefing. The complaint was "devoid of allegations suggesting that the loan modification process was anything other than a normal, arm's-length negotiation." The court granted servicer's MTD borrower's negligence claim.

To bring a UCL claim, borrowers must assert injury in fact (loss of property or money) directly caused by servicer's unfair, unlawful, or fraudulent conduct. Here, borrower alleged that servicer's undue delay in processing her modification application "increased the amount owed" on her loan, cost hours of her time, energy, and resources, resulted in her diminished credit rating, and clouded the property's title. The court found that borrower's growing loan and clouded title did not amount to damages directly caused by servicer's actions *without* the allegation that servicer instructed borrower to become delinquent on her mortgage. As pled, these damages were caused by borrower's own default. The court also found that damaged credit does not grant a borrower UCL standing, acknowledging "authority to the contrary." Finally, the court found that time and resources spent applying for a modification does not, without more, constitute "lost money or property as a result of" servicer's misconduct. The court granted servicer's MTD.

Pre-sale, HBOR provides borrowers a private right of action to enjoin a servicer from foreclosing. Post-sale, borrowers may recover actual economic damages "resulting from" material violations of specific HBOR provisions, including the pre-NOD outreach requirement. CC § 2924.12(b). Here, borrower asserted a SPOC claim based on servicer's failure to comply with several provisions of the SPOC statute. Servicer argued the claim could not proceed because borrower failed to allege actual economic damage stemming directly from the SPOC violations. The sale, however, has not yet occurred, so the court allowed the claim to survive the MTD insofar as borrower seeks injunctive relief.

Dual Tracking Denial & Appeal: Servicer Must Accurately Process a Loan Modification Application; Negligence Per Se Based on HBOR Violation

Weber v. PNC Bank, 2015 WL 269473 (E.D. Cal. Jan. 21, 2015): If a servicer denies a borrower a loan modification based on the borrower's net present value (NPV), the servicer must provide borrower a written denial that includes "the monthly gross income and property value used to calculate the [NPV] and a statement that the borrower may obtain all of the inputs used in the net present value calculation upon written request to the mortgage servicer." CC § 2923.6(f)(3). Here, servicer used an income figure more than $10,000 less than the income borrowers reported on their application, ultimately denying that application. Borrowers timely appealed the denial, pointing out the significant discrepancy between their actual income and the income servicer used in its calculations. Servicer responded to the appeal with a vague form letter, explaining that an independent review determined that "the information provided in [the application] was correctly evaluated for a loan modification according to [servicer] rules and investor . . . guidelines." At no point did servicer explain to borrowers why it refused to use their actual income in the NPV calculation.

Under these facts, the court determined, borrowers had adequately pled a dual tracking claim. "The conduct complained of by [borrowers] is in direct contravention of HBOR." The court denied servicer's MTD borrower's dual tracking claim.

Negligence per se is a rule of evidence and, though not a cause of action, can be "a vehicle for proving negligence." It "codifies the rule that a presumption of negligence arises from the violation of a statute which was enacted to protect a class of person of which the plaintiff is a member against the type of harm that the plaintiff suffered as a result of the violation." Here, borrowers pled negligence per se based on servicer's dual tracking violation, described above. The court denied servicer's motion to dismiss because: 1) borrowers are members of the class of people meant to be protected by HBOR's dual tracking statutes; and 2) servicer offered no case law to support its contention that borrowers must present actual evidence to prove their allegations in the complaint. Further, borrowers need not prove servicer owed them a duty of care under a negligence per se theory, since the doctrine "'borrows' statutes to prove duty of care." In failing to comply with dual tracking protections, servicer failed to review borrowers for a loan modification in good faith. Borrowers' negligence claim therefore survived the MTD.

TRO to Prevent Sale to BFP

Nguyen v. Trojan Capital Improvements, 2015 WL 268919 (C.D. Cal. Jan. 16, 2015): To win a temporary restraining order (TRO) in a California federal court, a borrower must show, *inter alia*: 1) a likelihood of success on the merits of his claim (or at least serious questions going to the merits); 2) imminent and irreparable harm if the TRO does not issue; and 3) that the balance of harms tips in their favor. Here, borrower had won a TRO in state court, stopping the foreclosure on his home. Servicer then removed the case to federal court, which dissolved the TRO and denied borrower's preliminary injunction motion without prejudice. Shortly after removal, servicer sold the home at a foreclosure sale to the loan's lender. Now, borrower seeks a TRO to prevent the lender from selling the property to a bona fide purchaser (BFP). The court agreed that borrower may succeed on the merits of his (unspecified) HBOR and improper notice claims, as he alleged he never received proper notice of the foreclosure sale. He also alleged that the home is owner-occupied, as required by HBOR. Serious harm will befall borrower if the home is sold to a BFP; he will "be permanently denied an opportunity to determine whether his rights were violated, and whether he is entitled to obtain a loan modification." And servicer's and lender's position will not be significantly affected by the imposition of a TRO. The court granted the TRO.

Viable SPOC and Dual Tracking Claims Stem from Servicer's Failure to Assign a SPOC or to Acknowledge Receipt of Borrower's Documents

Pura v. Citimortgage, Inc., 2015 WL 81980 (C.D. Cal. Jan. 2, 2015): "Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." CC § 2923.7. SPOCs may be a "team" of people, or an individual, and must "coordinate" receipt of all loss mitigation documents, update the borrower on the status of the application, and advise the borrower of pertinent deadlines. Once a borrower does submit all, or any part of, a loan modification application, the servicer must provide the borrower with written acknowledgment of receipt within 5 business days. CC § 2924.10. Here, a month after submitting her "Request for Loan Modification" (RMA), borrower contacted her servicer to get a status update and received no response. One month later, borrower took it upon herself to update her application with a current tax return and bank statements, still receiving no response. Another month passed and borrower again requested an update, and a SPOC. Finally, a servicer representative—not a SPOC—contacted borrower and verbally acknowledged that her application was complete and under review. Almost a year later, another non-SPOC representative requested updated information, which borrower promptly supplied. At no point did borrower ever receive written acknowledgement of any document she has submitted as part of her RMA, nor has she ever been assigned a SPOC. The court agreed that borrower had adequately pled her dual tracking, SPOC, and (unspecified) common law claims emanating from these same facts. The court therefore denied servicer's motion to dismiss.

Recent Regulatory Updates

Protections for Tenants Facing Post-Foreclosure Unlawful Detainer Actions: New Claim and Pre-judgment Claim of Right to Possession Forms

Both the claim of right to possession form, and the prejudgment claim of right to possession form have been modified to reflect the tenant protections enacted in 2012. Consistent with legislative changes, the forms now clarify that tenants can use a claim of right to possession form in post-foreclosure evictions even when a pre-judgment claim form was served with the complaint. The forms are available on pages 73-83 of AB 2747.

HUD Mortgagee Letter 15-03 (Jan. 29, 2015)

HUD issued a new mortgagee letter as part of its ongoing response to the *Bennett* and *Plunkett* litigation over reverse mortgages.[31] In this letter, HUD purportedly extends foreclosure protections to surviving, non-borrowing spouses of reverse mortgage borrowers if the loans in question originated before August 4, 2014. (HUD had previously extended similar protections to loans originating on or after August 4, 2014.)

To qualify for the foreclosure protection offered by this Mortgagee Letter, however, non-borrowing spouses must meet HUD's Mortgage Optional Election (MOE) standards. Basically, the non-borrowing spouse must have been older than the deceased borrower to qualify for protection. Because reverse mortgages are engineered to give larger loans to older borrowers, many younger spouses agreed have their older spouse take out the reverse mortgage alone, so the couple would receive more money. Advocates believe that the relief granted by this mortgagee letter, then, will not help most non-borrowing spouses.

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[31] For a review of those cases updated through August, 2014, see Henna Choi, *Reverse Mortgages: Recent Updates for Surviving, Non-borrowing Spouses*, HBOR COLLABORATIVE FORECLOSURE NWSLR (Aug. 2014), *available at* http://calhbor.org/wp-content/uploads/2014/08/HBOR-Aug-2014-Nwsltr.pdf.

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

MANOJ RIJHWANI, et al.,

Plaintiffs,

v.

WELLS FARGO HOME MORTGAGE, INC.,

Defendant.

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No. C 13-05881 LB

ORDER REGARDING THE PARTIES' THREE JOINT DISCOVERY DISPUTE LETTERS DATED JANUARY 23, 2015

[Re: ECF Nos. 37-39]

Plaintiffs Manoj Rijhwani and Lisa Rijhwani ("Plaintiffs") sued Wells Fargo Bank, N.A. ("Wells Fargo")[1] for its alleged misconduct in relation to Plaintiffs' attempt to get a loan modification and the concurrent foreclosure proceedings on Plaintiffs' property. *See* Second Amended Complaint ("SAC"), ECF No. 1-1 at 1-24.[2] The parties now have filed three joint discovery dispute letters. *See* First 1/23/2015 Letter, ECF No. 37; Second 1/23/2015 Letter, ECF No. 38; Third 1/23/2015 Letter, ECF No. 39. Upon consideration of the letters and the record before it, the court rules as follow.

I. WELLS FARGO'S DISCOVERY

In the First 1/23/2015 Letter, Wells Fargo asks the court to order Plaintiffs to respond, without objection, to its Special Interrogatories, Set One, and its Request for Production ("RFPs"), Set Two, no later than February 10, 2015. *See* First 1/23/2015 Letter, ECF No. 37. Wells Fargo served the

[1] Plaintiffs erroneously sued Wells Fargo as "Wells Fargo Home Mortgage, Inc."

[2] Record citations are to documents in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

discovery at issue on Plaintiffs on December 17, 2014. This means that Plaintiffs' deadline to respond to it was January 16, 2015. *See* Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A). In the letter, Plaintiffs say they have not responded because one of the two Plaintiffs (Manoj Rijhwani) was injured in early January 2015, but Plaintiffs fail to explain why they did not seek or get an extension of time to respond or seek a protective order prior to January 16, 2015, or why the other Plaintiff (Lisa Rijhwani) could not have assisted with the responses. Plaintiffs nevertheless say that they agree to respond by Wells Fargo's proposed date of February 10, 2015.

The dispute, then, is whether Plaintiffs may object to the discovery. Wells Fargo provides authority supporting its argument that Plaintiffs' failure to timely respond means that they waived their right to object. *See* Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection."); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) ("Generally, in the absence of an extension of time or good cause, the failure to object to interrogatories within the time fixed by Rule 33, FRCivP, constitutes a waiver of any objection."). And although some courts "read into Rule 34 the discretion granted under Rule 33(b)(4) (dealing with interrogatories) to excuse untimely objections to requests for production," Cal. Prac. Guide: Civ. P. before Trial § 11:1905 (The Rutter Guide 2015) (citing *Blumenthal v. Drudge*, 186 F.R.D. 236, 240 (D.D.C. 1999)), and other courts have granted relief from such a waiver "upon a proper showing," *see id.* § 11:1906 (citing In *re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1149 (N.D. Il. 1979), Plaintiffs make no effort to argue that they meet such a standard and in fact do not ask the court to excuse their untimeliness. *See* First 1/23/2015 Letter, ECF No. 37 at 2.[3] On this record, then, the court finds that Plaintiffs have waived their rights to object to Wells Fargo's propounded discovery.

Accordingly, the court orders Plaintiffs to provide written responses to Wells Fargo's Special

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[3] The court found the authorities cited in this sentence on its own; Plaintiffs cited no authority in their section of the parties' joint letter.

Interrogatories, Set One and its Request for Production, Set Two, without objections, and produce copies of all documents responsive to the requests that are currently within Plaintiffs' possession, custody or control, no later than February 10, 2015.

II. PLAINTIFFS' DISCOVERY

In the Third 1/23/2015 Letter, Plaintiffs ask the court to order Wells Fargo to further respond, without objection, to their Requests for Admissions ("RFAs"), Set One, and their Request for Production, Set Two, no later than February 10, 2015. *See* First 1/23/2015 Letter, ECF No. 39.

As an initial matter, the court notes that Plaintiffs' RFAs consist of 405 separate requests, roughly one-third of which appropriately ask Wells Fargo to admit the truth of certain matters related to this action. *See* Fed. R. Civ. P. 36(a)(1) (scope of requests for admission). The remaining two-thirds inappropriately ask Wells Fargo to "state all facts" if the response to the preceding question was not an admission or to "produce all documents" that supported the denial of the request for admission. *Compare id. with* Fed. R. Civ. P. 33(a)(2) (scope of interrogatories) and Fed. R. Civ. P. 34(a)(1) (scope of requests for the production of documents). The court finds that Wells Fargo does not need to further respond to any so-called RFAs that ask Wells Fargo to "state all facts" or "produce all documents." Whether Wells Fargo has to further respond to RFAs that actually seek admissions, or to Plaintiffs' RFPs, is discussed below.

As for the remaining RFAs and the RFPs, Wells Fargo argues that it appropriately objected to them and should not have to respond to them because they were not timely served. Plaintiffs' RFAs and RFPs, which were received by Wells Fargo on December 22, 2014, are dated December 12, 2014. Plaintiffs say that their counsel placed the envelopes containing the requests into his law firm's mailing system that same day. The proof of service also states that the requests were served by regular mail on December 12, 2014. If this is true, then Wells Fargo would have had to respond to the requests by January 14, 2015, two days before the close of fact discovery. *See* Fed. R. Civ. P. 6(a) (calculating time), 6(d) (add three days to response time when service is by regular mail), 36(a)(3) (a party must respond to RFAs within 30 days of being served with them).

Wells Fargo, however, says that Plaintiffs' position is betrayed by the envelope's postmark, which indicates that the requests were processed as received by the postal service on December 19,

2014. If the requests were not delivered to the postal service and mailed until that date, responses to them would not have been due until January 21, 2015, five days after the close of discovery, making them untimely served. Wells Fargo also notes that the proof of service signed by Plaintiffs' counsel states: "I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in the affidavit."

In light of the conflicting evidence, and with the postal service annual holiday inundation in mind, the court will not find that Plaintiffs' requests were untimely. Wells Fargo must respond to Plaintiffs' Requests for Admissions, Set One (to the extent that they actually seek admissions and not to the extent that they ask Wells Fargo to "state all facts" or "produce all documents"), and their Requests for Production, Set Two, no later than February 10, 2015.

III. MR. TERAN'S DEPOSITION

In the Second 1/23/2015 Letter, Plaintiffs ask the court to order Wells Fargo to either designate Juan Teran as Wells Fargo's deponent for its upcoming Rule 30(b)(6) deposition, provide them with Mr. Teran's contact information so they can serve him with a Rule 45 subpoena, or accept service of a Rule 45 subpoena on his behalf.

Mr. Teran, who apparently is a current employee of Wells Fargo in San Antonio, Texas, is important to Plaintiffs' case because he allegedly was designated as their "single point of contact" during their attempts to stave off the foreclosure of their property and to seek a loan modification. Mr. Teran, however, is not a party to the litigation, which means that, if Plaintiffs wanted to depose him, they needed to have served with him a subpoena under Rule 45. They didn't. Instead, on December 26, 2014, they served Wells Fargo with a notice of their intent to depose Mr. Teran on January 6, 2015. And when Wells Fargo objected to the notice on the grounds that Mr. Teran is neither a party to this litigation (and thus must be subpoenaed) nor an "officer, director, or managing agent" of Wells Fargo (such that he could be deposed under Rule 30(b)(1)), Plaintiffs then asked Wells Fargo to require Mr. Teran to testify on its behalf at its upcoming Rule 30(b)(6) deposition. Wells Fargo refused.

Wells Fargo was within its rights to object as it did. As one district court has made clear:

> Only a party to litigation may be compelled to give testimony pursuant to a notice of deposition. If the party is a corporation, it may be noticed pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, in which case it must designate an officer, director, . . . managing agent[, or other person who consents] to testify on its behalf. Fed. R. Civ. Proc. 30(b)(6). If the party seeking the deposition wishes to depose a specific employee of the corporation, it may identify a specific officer, director or managing agent to be deposed and notice that person under Federal Rule of Civil Procedure 30(b)(1). However, a corporate employee or agent who does not qualify as an officer, director, or managing agent is not subject to deposition by notice. *Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y.1985). Such employees must be subpoenaed pursuant to Rule 45 of the Federal Rules of Civil Procedure.

Calderon v. Experion Information Solutions, Inc., 290 F.R.D. 508, 516 (D. Id. 2013) (footnote omitted); *see* Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:1406.2 (The Rutter Group 2014) ("A subpoena is required to take the deposition of an entity's nonmanaging agents.") (citing *Calderon*). If Plaintiffs wanted to depose Mr. Teran under Rule 30(b)(1), it was their burden to show that he was an officer, director, or managing agent of Wells Fargo. *See Calderon*, 290 F.R.D. at 517. And while "this burden is a modest one, and doubts about an individual's status as 'managing agent,' at the pretrial discovery stage, are resolved in favor of the examining party," *id.*, Plaintiffs do not try to show that Mr. Teran is a managing agent of Wells Fargo. *See* Second 1/23/2015 Letter, ECF No. 38 at 3.

Wells Fargo also is not required to designate Mr. Teran as their Rule 30(b)(6) deponent. "[I]t is settled law that a party need not produce the organizational representative with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding on the party." *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003); *see* Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:1414 (The Rutter Group 2014) ("The person(s) so designated must be able to testify fully as to the matters designated," but "[a] party need not produce the person most knowledgeable about the matters designated.") (citations omitted). Thus, even though Mr. Teran may have a lot of knowledge about Plaintiffs' deposition topics, all Wells Fargo has to do is designate a deponent who can fully testify about those topics.

The court also rejects Plaintiffs' request that the court order Wells Fargo to accept service on his behalf. Plaintiffs have cited no authority for such relief. Rule 45 requires a subpoena to be "delivered" to the named person, and most courts have interpreted that word to require personal service. *See* Fed. R. Civ. P. 45(b)(1); Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:2271-72 (The Rutter Group 2014) (citations omitted). And while counsel often stipulate to produce their client's employees without requiring the service of subpoenas, *see* Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:2229 (The Rutter Group 2014), that did not occur here, and Plaintiffs have not provided the court with any authority that would suggest that Wells Fargo has to accept service on Mr. Teran's behalf. Plaintiffs statement that there are "at least seven Juan Teran's residing in San Antonio, Texas" does not change this outcome.

That said, Mr. Teran appears to be central to this case, which would make him the kind of person Wells Fargo ought to (and may) have listed in its initial disclosures. *See* Fed. R. Civ. P. 26(a)(1)(A)(i). This also means that his address and telephone number, if known, should have been included, too. *See id.* The Federal Rules of Civil Procedure also require parties to supplement their initial disclosures when they discover information at a later date. *See* Fed. R. Civ. P. 26(e)(1)(A). The court also believes that, while Plaintiffs perhaps could have discovered Mr. Teran's contact information through other means (e.g., an interrogatory, the use of an investigator, etc.), it seems like a waste of time at this point of the litigation to require Plaintiff to jump through such hoops when Wells Fargo can (and should have, if it didn't) provide it now. The court thus orders Wells Fargo to provide it (if known) to Plaintiffs by February 2, 2015.

Accordingly, the court will not require Wells Fargo to designate Juan Teran as Wells Fargo's deponent for its upcoming Rule 30(b)(6) deposition or accept service of a Rule 45 subpoena on his behalf. It must, however, provide them with Mr. Teran's contact information.

IT IS SO ORDERED.

Dated: January 28, 2015

LAUREL BEELER
United States Magistrate Judge