July 2014 Newsletter

In this issue—

Article on the circuit court split over TILA rescission rights and the Supreme Court's impending decision.

Case law updates including important, published California Court of Appeal cases: *Erlach*, *Keshtgar*, & *Rufini*.

Announcements—

The Collaborative's PLI training on June 16 is now available online. Viewing the training is free and can provide MCLE credit.

U.S. Supreme Court to Resolve TILA Circuit Split: How Can Borrowers Rescind Their Mortgages?[1]

On April 28, 2014, the U.S. Supreme Court granted certiorari to the homeowner-petitioners in *Jesinoski v. Countrywide Home Loans*.[2] The Court is expected to resolve a deepening circuit split that has developed since 2012 regarding borrower rescission rights under the Truth in Lending Act (TILA). The following article briefly describes and assesses the framework behind the split.

Background: Legal Framework and Case on Appeal

At its heart, TILA "protects consumers from fraud, deception, and abuse" within the residential mortgage marketplace by requiring lenders to disclose certain information to borrowers during the loan

[1] This article originally appeared in the National Housing Law Project's *Housing Law Bulletin*. *See* Clare Lakewood, *Certiorari Granted in TILA Circuit Split: How Can Borrowers Rescind Their Mortgages?*, 44 HOUS. L. BULL. 103 (June 2014). Ms. Lakewood is a volunteer at NHLP and is admitted as a barrister and Solicitor of the High Court of Australia and the Supreme Court of Western Australia (2009).
[2] Jesinoski v. Countrywide Home Loans Inc., 729 F.3d 1092 (8th Cir. 2013), *cert. granted,* 82 U.S.L.W. 3366 (U.S. Apr. 28, 2014) (No. 13-684).

This project was made possible by a grant from the Office of the Attorney General of California, from the National Mortgage Fraud Settlement, to assist California consumers.

origination process.[3] TILA grants borrowers the absolute right to rescind their mortgage loan agreement in the three days following loan origination.[4] If a lender fails to provide the required disclosures, the borrower has an extended right to rescind that expires three years from loan origination.[5] Importantly, "to exercise the right to rescind, the consumer shall notify the creditor of the rescission [in writing]. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business."[6]

The Jesinoskis gave written notice to their lender that they were exercising their right to rescind within the three-year time period specified by TILA. They did not, however, file suit to enforce this rescission until after this time period expired. The Eighth Circuit, following its own precedent (and the majority view within the circuit split) held that written notice alone was insufficient to rescind the Jesinoskis' loan agreement.[7] In order to exercise their right to rescind, the Jesinoskis had to *file suit* against their lender within three years of loan origination.[8]

A minority of circuits have found that rescission merely requires written notice to the lender in the three-year time period, not the commencement of litigation. In hearing *Jesinoski*, the Supreme Court will likely decide which view will prevail.

Current Circuit Split

Three circuits have definitively held that written notice alone is insufficient to rescind a mortgage loan and that borrowers must file suit to enforce their rescission rights in the first three years after loan origination.[9] An additional two circuit courts have aligned themselves

---

[3] McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1327 (9th Cir. 2012).
[4] 15 U.S.C. § 1635(a) (2011).
[5] 15 U.S.C. § 1635(f) (2011).
[6] 12 C.F.R. § 226.23(a)(2).
[7] *See Jesinoski*, 729 F.3d at 1093.
[8] *See id.*
[9] *See generally* Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325 (9th Cir. 2012).

with the majority opinion, but only in an unpublished decision[10] and in dicta.[11] However, two other circuit courts have held the opposite: *written notice* is *sufficient to rescind*, if given within the three-year time limit.[12] A third circuit court joined the minority opinion, but only in a decision where the TILA rescission issue was not dispositive.[13]

Majority View: Litigation Required to Exercise Rescission Right under Beach v. Ocwen

The circuit courts comprising the majority have principally relied on the U.S. Supreme Court's opinion in *Beach v. Ocwen*.[14] *Beach*, however, entailed a different fact pattern and addressed a different legal question than the circuit court cases giving rise to the split. Unlike the borrowers in the circuit court cases, the borrowers in *Beach* had taken absolutely no steps to rescind their loan, either by giving notice or by filing suit, within three years of loan origination.[15] When sued by their lenders, the Beaches asserted their right to rescind defensively. Specifically, they argued that the TILA provision at issue, Section 1635(f), governed only the initiation of a lawsuit.[16] Therefore, the general rescission right survived the three-year period and could be raised as an affirmative defense, even after the three-year period had expired.[17] The Supreme Court then considered the expiration of the right to rescind, not the manner in which a borrower may exercise that right. In answering the expiration question, the Court considered whether Section 1635(f) was a statute of limitation or of repose,[18]

[10] *See generally* Lumpkin v. Deutsche Bank Nat'l Tr. Co., 534 F. App'x 335 (6th Cir. 2013).
[11] *See* Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 55-56 (1st Cir. 2002) (dicta).
[12] *See generally* Sherzer v. Homestar Mortg. Servs. 707 F.3d 255 (3d Cir. 2013); Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. 2012).
[13] *See generally* Williams v. Homestake Mortg. Co., 968 F.2d 1137 (11th Cir. 1992).
[14] Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998).
[15] *Id*. at 410. They even acknowledged that any right that they had to institute proceedings to enforce the right of rescission had expired. *Id*. at 415.
[16] *Id*. at 415.
[17] *Id*.
[18] A statute of limitation acts as a procedural bar to recovery but does not affect or extinguish the validity of the underlying right. *See id*. at 416-17. A statute of repose, by contrast, extinguishes a statutory right unless some action is taken to exercise that right within a particular time period. *See id*. at 417 (not referring to a statute of "repose" by name, but describing that type of statute).

concluding the latter.[19] Thus, the Court found, TILA "permits no federal right to rescind, defensively or otherwise, after the 3-year period . . . has run."[20]

Each majority court in the circuit split has cited the *Beach* quote above in reasoning that written notice is insufficient to exercise a borrower's rescission rights. The Ninth Circuit was the first court to do so in *McOmie-Gray v. Bank of America*.[21] Acknowledging that *Beach* considered whether a borrower could raise the right to rescind defensively, the court nevertheless found that "[t]he language the [Supreme] Court used . . . broadly assumes that a three-year limitation governs cases where a borrower, as plaintiff, seeks rescission of the mortgage transaction."[22] By extension, then, the Ninth Circuit reasoned that to rescind a loan, a borrower must timely file suit.[23] In doing so, the court ignored the seemingly plain language of the federal regulation governing the method of notice.[24] Though this regulation specifically provides that written "notification is the means by which borrowers exercise their right to rescind," the Ninth Circuit maintained that "[r]escission is not automatic upon a borrower's mere notice. . . . [T]he statute and regulations contemplate that a borrower, who by sending notice has 'advanced a claim seeking rescission,' will seek a determination that rescission is proper."[25] That is, written notice merely notifies the lender of a borrower's intention to rescind by ultimately filing suit.[26] The Tenth Circuit cited the same language from *Beach* in arriving at the same holding,[27] and the Eighth Circuit quickly followed suit.[28]

---

[19] The statute "provides that the 'right of rescission . . . shall expire' at the end of the time period. It talks not of a suit's commencement but of a right's duration." *Id.* at 417.
[20] *Id.* at 419.
[21] McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325 (9th Cir. 2012).
[22] *Id.* at 1328-29.
[23] *Id.* at 1329-30.
[24] 12 C.F.R. § 226.23(a)(2); *see also supra* text accompanying note 6.
[25] *McOmie-Gray*, 667 F.3d at 1327.
[26] *See id.* at 1326.
[27] *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1187 (10th Cir. 2012). "[T]he mere invocation of the right to rescission via a written letter, without more, is not enough to preserve a court's ability to effectuate (or recognize) a rescission claim after the three-year period has run." *Id.* at 1182.
[28] *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013) (expressly following *Rosenfield*).

Minority View: **Beach** *is Inapposite; Written Notice Sufficient under TILA*

Though in the minority, two circuit courts have recognized the problems with applying *Beach* to the factual and legal issues presented by borrowers who seek to assert their rescission rights in *affirmative* suits after the three-year period has expired. Both the Third and Fourth Circuits determined that *Beach* was concerned with the duration of the right to rescind, rather than how that right can be exercised,[29] and can therefore not be used as authority on the latter question. The Third Circuit noted that the critical phrase from *Beach* upon which the majority relies[30] does not indicate or address *how* the right is to be exercised. It merely clarifies that, whatever action is required, it must occur within three years.[31] Any inference or extrapolation then, regarding how a rescission right can be exercised, comes from *Beach* dicta, not conclusive authority.[32]

In addition to distinguishing *Beach*, the minority points to the plain language of the TILA statute and governing regulation to support its view.[33] As neither Section 1635 nor its accompanying notice regulation[34] refers to the filing of a lawsuit, the Fourth Circuit "refuse[d] to graft such a requirement upon them."[35] It held, instead, that a borrower may exercise his or her rescission right by providing notice to the lender by any of the methods established by regulation, including written notice to the lender.[36] The Third Circuit likewise found that to adopt an interpretation of the statute that required

---

[29] *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 262-63 (3d Cir. 2013); Gilbert v. Residential Funding LLC, 678 F.3d 271, 278 (4th Cir. 2012).

[30] "[TILA] permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." Beach v. Ocwen Fed. Bank, 523 U.S. 410, 419 (1998).

[31] *Sherzer*, 707 F.3d at 263.

[32] *See id*. Interestingly, the dissent in a majority case, *Keiran v. Home Capital, Inc*., 720 F.3d 721 (8th Cir. 2013), also questioned *Beach* as appropriate authority, given the different factual scenario and legal issue under consideration by that court. *See Keiran*, 720 F.3d at 731-32 (Murphy, J., dissenting).

[33] "[I]f the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." Gilbert v. Residential Funding LLC, 678 F.3d 271, 276 (4th Cir. 2012) (quoting Textron Inc. v. Comm'r, 336 F.3d 26, 31 (1st Cir. 2003)).

[34] 12 C.F.R. § 226.23(a)(2); *see also supra* text accompanying note 6.

[35] *Gilbert*, 678 F.3d at 277.

[36] *See id*. at 277-78.

borrowers to file suit would "infer that the statute contains additional, unwritten requirements with which obligors must comply – an inference that seems particularly inappropriate in light of the fact that TILA is a remedial statute that [the Court] must construe liberally."[37]

Weakness of Each Position

If the majority is correct that *Beach* settles the issue, it would seem that those courts did not take *Beach* far enough. The Supreme Court stressed that Section 1635(f) establishes the *life of the rescission right*, not the deadline for filing a suit.[38] If the very life of the right dies within three years then, it would seem that not only must borrowers file suit within those three years, but that the matter be actually *resolved* by the courts within those three years. Nothing in *Beach* indicates that the right to rescind is preserved or tolled upon filing a suit. To the contrary, the Court contrasted Section 1635(f) with other limitation provisions, where filing suit *did* preserve the borrower's right until the suit was resolved.[39] Taking this interpretation of *Beach* to its logical conclusion, if the right to rescind expires absolutely in three years, it is unclear why filing a suit would be any more effective than giving written notice: both would be insufficient to assert *and fulfill* the right to rescind.

Additionally, the right to rescind triggered by a lender's nondisclosure is not the only rescission right provided by TILA. Borrowers also have an absolute right to rescind within the first three days following loan origination.[40] No appellate court in the majority (or the minority) has suggested that to rescind under this provision, a borrower must file suit in those three days; a borrower need only notify their lender in writing that they are rescinding their loan.[41] Indeed, it would seem unreasonable, if not absurd, to require a borrower to file

---

37 Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 261 (3d Cir. 2013).
38 "[Section 1635(f)] says nothing in terms of bringing an action but instead provides that the 'right of rescission [under the Act] shall expire' at the end of the time period. It talks not of a suit's commencement but of a right's duration." Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417 (1998).
39 *See id*. at 417-18.
40 15 U.S.C. § 1635(a) (2011); *see also supra* text accompanying note 4.
41 *Sherzer*, 707 F.3d at 264 ("If, after twenty days have passed, the lender fails to respond to the obligor's notice [of rescission], the obligor may file suit against the lender—even though the three-day period in which he has the absolute right of rescission has long since passed.").

suit within three days of loan origination to exercise their absolute right to rescind. And yet, there is no obvious distinction between the "right to rescind" in the two operative provisions: Sections 1635(a) and 1635(f).[42] The right to rescind should therefore require the same notice method in each situation—three days or three years. The only possible and consistent interpretation would deem written notice sufficient to rescind in either case.

The difficulty with at least the Fourth Circuit's position is that it fails to address a timeframe for filing a lawsuit to enforce rescission. Where a borrower gives notice, but the lender declines to actually unwind the transaction, the ownership rights in the property become uncertain. The Fourth Circuit addressed this difficulty by distinguishing the exercise of the right to rescind from whether rescission actually occurred.[43] The court, though, was silent as to a deadline for bringing a lawsuit to achieve actual rescission. The Third Circuit identified the same problem, but explained that in the absence of a federal limitation period for the enforcement of those rights, an analogous limitation period would be "borrowed" from state law.[44] The court also noted that the uncertainty on title would occur only in the small number of cases where the borrower timely rescinded the loan by notification, and lenders can protect themselves by filing for declaratory relief.[45]

Secondary Issue: Deference to Agency Interpretation

While not considered by the Eighth Circuit in *Jesinoski*, this case presents the Supreme Court with an opportunity to revisit the law regarding deference to federal agency interpretations of the agency's own regulations. The Supreme Court held in *Auer v. Robbins* that

[42] It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Comm'r v. Lundy, 516 U.S. 235, 250 (1996) (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).
[43] Upon written notification, the parties "must unwind the transaction amongst themselves," or the borrower must file a lawsuit so that the court may enforce the right to rescind. Gilbert v. Residential Funding LLC, 678 F.3d 271, 277 (4th Cir. 2012).
[44] Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 266 (3d. Cir. 2013)
[45] *Id.* (noting that "the uncertainty is substantially more cabined because it would exist only as to those loans for which obligors have sent the bank written notice of rescission within the three-year period").

courts must accept an agency's interpretation of its own regulation, including when the interpretation is only expressed in an amicus brief, unless the interpretation is plainly erroneous.[46] In the lower courts, the Consumer Financial Protection Bureau (CFPB), the agency charged with interpreting the statute, [47] filed amicus briefs interpreting the governing regulation[48] and Section 1635(f) to require only written notice for a borrower to exercise his or her right of rescission. While some circuit courts acknowledged the CFPB's position, none gave due deference to the agency's interpretation or considered what weight or deference the CFPB should be afforded.[49]

As the CFPB will likely submit a brief consistent with the view taken in the lower courts, the Court's decision may turn on the level of deference accorded to CFPB's interpretation. Some Justices have indicated a willingness to reconsider the *Auer* doctrine,[50] and *Jesinoski* may prove a suitable vehicle for the Court to do so. Whether the issue is ultimately addressed will depend upon whether the Supreme Court finds that the statute is clear and the view that the CFPB and the Solicitor General's Office will advance in the United States' amicus brief.

Conclusion

Federal appellate courts are currently split over whether a borrower must go beyond providing written notice of rescission, by filing suit, to enforce his or her rescission right. This split, though, is really over the authority of the Supreme Court's *Beach* decision. The

---

[46] Auer v. Robbins, 519 U.S. 452, 462 (1997).
[47] Regulation Z, of which the operative regulation (12 C.F.R. § 226.23(a)(2)) is a part, was promulgated by the Federal Reserve Board in 1969. Gambardella v. G. Fox & Co., 716 F.2d 104, 112 (2d Cir. 1983). In 2010, the Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 2021 of the Dodd-Frank Act transferred rule-making authority under TILA from the Federal Reserve Board to the CFPB. Mary Curtin, *Cleaning House: Achieving Effective Consumer Protection Through TILA Reform*, 45 ARIZ. ST. L.J. 1685, 1687, n.19 (2013).
[48] 12 C.F.R. § 226.23(a)(2).
[49] *See, e.g.*, *Sherzer*, 707 F.3d at 257 (3d Cir. 2013) (acknowledging the CFPB's position that a mortgage may be rescinded "simply by sending written notice to the lender within the three-year period," but remaining silent on the weight to be accorded to that position).
[50] Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 265-71 (2013) (describing the possibility of revisiting *Auer*).

Eighth, Ninth, and Tenth Circuits have found *Beach* dispositive and controlling authority, requiring borrowers to file suit in the three-year timeframe. The Third and Fourth Circuits have found *Beach* inapposite, and that the plain language of the TILA provisions and the notice regulation require written notice only. *Jesinoski* will, at the very least, determine the applicability of *Beach*. It will also, hopefully, provide much-needed clarity about what is required of borrowers exercising their right to rescind a mortgage loan transaction. Until the Court decides the issue, advocates representing clients outside the Third and Fourth Circuits can consider preserving their client's rescission rights by filing suit within three years of loan origination.

Summaries of Recent Cases

Published State Cases

Tenancy Survives Red-Tagging; Habitability Claims Available Despite Unit's Illegality; Constructive Eviction; PTFA

Erlach v. Sierra Asset Servicing, LLC, 226 Cal. App. 4th 1281 (2014): Building inspectors may vacate substandard property that endangers the health and safety of its occupants, a practice known as "red-tagging." Health & Safety Code § 17920.3. Here, the landlord shut off utilities at her property before the expiration of her tenant's fixed-term lease. The county subsequently red-tagged the property and the tenant moved out. Sierra Asset Servicing subsequently acquired the property through foreclosure and did nothing to remedy the utility shutoff. Tenant then sued Sierra for various habitability and eviction related claims. As part of its general defense, Sierra argued that the red-tagging terminated tenant's pre-foreclosure lease and Sierra therefore had no relationship with tenant. The California Court of Appeal rejected this argument because red-tagging only affects a tenant's occupancy rights, not the right to enforce other provisions of the lease. Nothing in the health and safety code indicates that red-tagging extinguishes a lease. Rather, all the relevant statutes refer to *existing* tenants, not *former* tenants. Here, then, tenant's fixed-term lease survived the red-tagging. Further, property conditions that did not conform to code were correctable and, as the new landlord, Sierra had a statutory obligation to repair those defects. Having found the tenancy to have survived the red-tagging, the court then addressed tenant's claims.

To bring an affirmative habitability claim, tenants must show: 1) "the existence of a material defective condition affecting the premises' habitability;" 2) that they provided notice of the condition, to their landlord, within a reasonable time after their discovery of the defect; (3) that landlord had a reasonable time to repair and did not adequately repair; and (4) damages. Here, Sierra not only failed to repair the existing, pre-foreclosure defects, but then proceeded to render the property *more* inhabitable by removing carpets, flooring, and fixtures, all over the tenant's sustained objections. Sierra then extended tenant's lease an additional month, but refused to cease its construction activity or make the property habitable. Tenant brought several statutory and common law habitability claims. Sierra argued that, despite its extension of tenant's lease, there was no landlord-tenant relationship because the rental agreement involved property that lacked a certificate of occupancy, rendering the unit illegal and the contract void. The court rejected this argument. First, although illegal contracts are generally unenforceable, if applying this rule will "permit the defendant to be unjustly enriched at the expense of the plaintiff," as it would in this case, courts may enforce the contract. Second, new owners of rental property must repair outstanding code violations even if the previous owner caused those violations. Having found tenant able to bring habitability claims despite the unit's "illegal" status, and that Sierra had a duty to maintain the property as tenant's new landlord, the court then found tenant to have adequately pled the elements of a habitability claim. The court reversed the trial court's grant of Sierra's demurrer.

Every lease includes a covenant of quiet possession and enjoyment. A landlord breaches this covenant by actually or constructively evicting a tenant. Constructive eviction occurs if a landlord renders the property unfit for occupancy and the tenant chooses to vacate within a reasonable time of the landlord's actions. Here, the court is not clear on tenant's precise motivations for vacating the property. Tenant had previously moved out when the property was "red-tagged," pre-foreclosure. It appears that tenant either wholly or partially moved back in, post-foreclosure, due to Sierra's assurance that the property was ready for habitation. Finding the property filled with construction equipment, some of his belongings missing, and the unit generally uninhabitable (and still red-tagged), tenant vacated again. The court found that tenant adequately pled Sierra had "interfere[d] with [his] right to use and enjoy the premises for the purposes contemplated by the tenancy," and that Sierra's action (or inaction), at least in some way, influenced his decision to move. Accordingly, the court reversed the trial court's grant of Sierra's demurrer to tenant's constructive eviction, breach of the covenant of quite possession and enjoyment, and retaliatory eviction claims.

Under the Protecting Tenants at Foreclosure Act (PTFA), tenants with bona fide, fixed-term leases may maintain their tenancy through the lease term. The lease, in other words, survives foreclosure and the entity that purchases the home at foreclosure becomes the existing tenant's new landlord. The Court of Appeal cited the PTFA in preemptively rejecting Sierra's possible future argument (on remand to the trial court), that foreclosure extinguished tenant's fixed-term lease. The court also reaffirmed its earlier ruling (in *Nativi v. Deutsche Bank*, 223 Cal. App. 4th 261 (2014)), that illegal units are protected by the PTFA.

Rejection of *Glaski*

Keshtgar v. U.S. Bank, N.A., 226 Cal. App. 4th 1201 (2014): In general, California borrowers do not have standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower brought a claim modeled on the wrongful foreclosure claim in *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on PSA violations and New York trust law. As in *Glaski*, this borrower's loan was assigned to a trust after the trust's closing date, violating the controlling PSA. The assignment then, was void and the purported owner of the loan has no authority to foreclose. The Court of Appeal affirmed the trial court's grant of defendants' demurrer, explicitly rejecting *Glaski*. The court found this case more in line with two pre-*Glaski* cases. First, like the borrowers in *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149 (2011), borrower here seeks to *prevent*, not undo, a foreclosure sale. As the *Gomes* court explained, the California non-judicial statutory framework does not allow for any "preemptive action to challenge the authority of the person initiating foreclosure." Notably, the *Glaski* plaintiffs brought a *post*-foreclosure challenge, so the *Glaski* court did not have to closely consider the purpose of the non-judicial foreclosure statutes—to provide foreclosing entities with "a quick, inexpensive and efficient method of foreclosure." Second, in *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497 (2013), borrowers brought specific, factually-based allegations that their loan was "not transferred into the . . . trust with a complete and unbroken chain of endorsements and transfers." Citing *Gomes*, the *Jenkins* court found that no matter how specific the borrower's allegations, borrowers have no standing to challenge the authority to foreclose because such a challenge is beyond the scope of the non-judicial foreclosure statutes. Lastly, in keeping with California foreclosure case law, borrowers must also allege prejudice to have standing. They must, in other words, explain how a botched assignment hurt them in some way, or affected their ability to pay their mortgage. The *Glaski* court did not discuss prejudice. Like the recent case, *Yvanova v. New Century Mortg. Corp.*, 226 Cal. App. 4th 495 (2014) (petition for review by the California Supreme Court and de-publication requests are currently pending), the publication of this case is important for California foreclosure law. There is now a clear (and growing) conflict in the California Court of Appeal over *Glaski* that may prompt the Supreme Court to grant review to resolve the split.

Leave to Amend Contract Claims in Light of Recent California TPP Case Law; "Primary Residence" under HAMP; "No Default" Exception to Tender Requirement; Valid Negligent Misrepresentation Claim

Rufini v. CitiMortgage, Inc., __ Cal. App. 4th __, 2014 WL 2205639 (May. 28, 2014): Over the past two years, California courts have consistently held that borrowers who are compliant with HAMP TPP agreements are entitled to permanent modifications and, if a servicer refuses to offer a modification, borrowers may sue for breach of contract. Here, borrower alleged he timely made his TPP payments. Instead of offering a permanent modification, servicer transferred borrower's loan and the new servicer foreclosed. The trial court granted servicer's demurrer to borrower's contract and wrongful foreclosure claims, without leave to amend, but did so before California TPP case law had fully developed. The Court of Appeal found that borrower should therefore be allowed to amend his pleadings in light of *Wigod*, *West*, *Bushell*, *Chavez*, *Barroso*, and *Corvello*, cases the trial court did not have the benefit of reviewing. If borrower can plead that he not only made TPP payments, but was eligible to participate in the HAMP TPP program and complied with every aspect of that process, he will have valid contract and wrongful foreclosure claims. The court also preemptively rejected one of servicer's arguments against borrower's HAMP compliance: that the home was not owner-occupied. Pointing to HAMP Directive 09-01, the court found "temporarily renting out his home" did not prevent borrower from demonstrating that it was still his "primary residence," as defined by HAMP. The court reversed and remanded for further proceedings.

California law requires borrowers bringing wrongful foreclosure claims to tender the amount due on their loan. There are several exceptions to this rule, including when the borrower pleads compliance with their loan modification. Here, the court excused tender, noting that "since [borrower] did not default under the terms of the modified agreement, he was not required to tender."

Negligent misrepresentation claims require a borrower to show: 1) servicer made a false representation about a past or existing fact; 2) without reasonable grounds of its veracity; 3) intending to deceive borrower; 4) and borrower justifiably relied on the misrepresentation; 5) to borrower's detriment. Many courts require an additional element, borrowed from general negligence claims: servicer owed borrower a duty of care. This court correctly found that, regardless of whether servicers owe a general duty of care, servicers do not "have a free pass to misrepresent important facts with impunity when they negotiate loan modifications." Accordingly, the court evaluated only the five elements listed above and found a valid claim for negligent misrepresentation. Servicer told borrower he had been approved for a permanent modification while simultaneously foreclosing, rendering the modification representation untrue. Borrower "spent hundreds of hours in loan modification negotiations and lost the opportunity to pursue other ways to avoid foreclosure," sufficiently pleading detrimental reliance. The court speculated that lost equity could bolster this claim. The court reversed and remanded.

Unpublished & Trial Court Decisions[51]

Promissory Estoppel Based on Repayment Plan; Valid Wrongful Foreclosure Claim & Possible Tender Exception

Passaretti v. GMAC Mortg., LLC, 2014 WL 2653353 (Cal. Ct. App. June 13, 2014): Promissory estoppel claims require servicer's clear and unambiguous promise, borrower's reasonable and foreseeable reliance, and resulting damages. Here, servicer representatives assured borrower they would "work on a loan modification" with him, and that the foreclosure would be postponed, if he would participate in a repayment program. Borrower ultimately paid servicer over $50,000 in reasonable and foreseeable reliance on those promises, and servicer foreclosed without notice and without working toward a modification. The court found that, as a matter of law, borrower had stated a meritorious promissory estoppel claim and reversed the trial court's grant of summary judgment to servicer.

To bring a wrongful foreclosure claim, a borrower must show: 1) servicer's noncompliance with foreclosure requirements; 2) how that noncompliance prejudiced borrowers; and 3) tender -- offer and be able to pay the amount due on their loan. There are several exceptions to the tender rule, including when the borrower "attacks the validity of the underlying debt." Here, borrower alleged servicer did not properly record a substitution of trustee and never provided borrower with proper notice of the trustee's sale. Both allegations sufficiently plead noncompliance with foreclosure procedures. While borrower could not show how an unrecorded substitution of trustee prejudiced him, his

---

[51] Cases without Westlaw citations can found at the end of the newsletter. Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.

second allegation, if true, prejudiced him a great deal. Without actual notice of the impending trustee sale, borrower took no action to avoid the sale (which would have been in keeping with his past payments to cure his defaults). The court advised borrower to amend his complaint to allege the underlying debt exception to tender. Specifically, borrower's allegation of "a modification of the original loan" (the repayment plan) "might arguably provide a basis for an attack on the validity of the underlying debt." The court reversed the trial court's grant of servicer's demurrer to borrower's wrongful foreclosure claim (and his attendant UCL unlawful prong claim).

Promise to Review Application is Not Promise to Review in Good Faith or to Negotiate; UCL Standing & Fraudulent Claim; Lack of Federal PRA to Enforce HAMP Does Not Bar State Law Claims

Pestana v. Bank of Am., N.A., 2014 WL 2616840 (Cal. Ct. App. June 12, 2014): To assert a promissory estoppel claim, borrowers must allege servicer made a clear and unambiguous promise, and "cannot rely on extrinsic evidence to explain an ambiguous statement." Here, borrower alleged three separate servicer representatives made three separate promises: 1) if borrower became delinquent, he would receive a modification; 2) if borrower submitted a HAMP application, he would be evaluated for a HAMP modification; and 3) because borrower had submitted all required HAMP documentation, servicer would initiate the review process immediately. Ultimately, borrower was denied a HAMP modification and was instead offered (and accepted) a proprietary modification with less favorable terms. Borrower alleged that servicer representatives implied, through their promises, that borrower would be "honestly" evaluated for a HAMP modification, "in good faith." The court disagreed. None of the representatives agreed to review borrower's application in "a particular manner." Further, the first promise did not specify a *HAMP* modification, and that promise ultimately materialized—borrower *was* offered a proprietary mod. The second two promises also materialized—borrower was *reviewed* for a modification. Unlike the borrower in *Aceves v. U.S. Bank*, 192 Cal.

App. 4th 218 (2011), this borrower did not allege that his servicer agreed to *negotiate* a loan modification. All he was promised was a review, which he received. The Court of Appeal sustained the trial court's grant of servicer's demurrer to borrower's PE claim.

Viable UCL claims must establish that the borrower suffered economic injury *caused by* defendant's misconduct. If borrower's default occurred prior to any alleged misconduct, standing is difficult to show because the default most likely caused the economic injury (foreclosure), regardless of a defendant's misdeeds. Here, borrower alleged servicer misled him about the "availability and requirements for a loan modification and the nature of [servicer's] review process." Essentially, servicer convinced borrower to become delinquent, assuring him it was the only way he could qualify for a modification. Consequently, borrower incurred late fees and penalties associated with his missed mortgage payments. Servicer's pre-default activity, then, directly caused borrower's alleged injury. The court granted borrower standing to allege his UCL claim.

To bring a claim under the "fraudulent" prong of the UCL, borrowers must show that members of the public are likely to be deceived by servicer's actions. Here, servicer's assurance that becoming delinquent would eventually lead to a modification, and then servicer's subsequent delay in processing applications and incessant requests for repetitious documentation, resulted in increasing late fees and penalties. Additionally, servicer incorrectly evaluated and denied HAMP applications. These practices could be construed as deceptive to the public and the court reversed the trial court's grant of servicer's demurrer to borrower's UCL claim.

The vast majority of state and federal courts have held: 1) HAMP does not give borrowers a private right of action to enforce its requirements; and 2) borrowers are not parties to, or third party beneficiaries of, Servicer Participation Agreements (SPAs), contracts between servicers and the Treasury Department (which administers HAMP). Borrowers have therefore found it impossible to get into court asserting HAMP violations against servicers. Their only successful avenue has been using TPP or permanent modification agreements to allege contract claims between *themselves* and their servicer. This court considered whether a borrower could bring state law claims (including his successfully pled UCL claim) that allege HAMP violations, but *without* relying on a written TPP or permanent modification agreement. The court found that borrower could bring these state law claims. First, a lack of a federal private right of action does not render state law claims that invoke "some element of the federal law" invalid. Second, while the cases holding this general principal (*Wigod*, *West*) *did* involve borrowers with written agreements, those holdings were not specific to contract claims brought under those agreements. Rather, those cases "stated generally that the absence of a private right of action under HAMP does not displace state law claims." The court held borrower could bring state law claims that involved alleged HAMP violations, even without a written contract.

PTFA: UD Court Lacks Jurisdiction to Enter Default Judgment when Notice is Invalid; Protections Apply to Unrecorded Leases Exceeding One-Year

Wedgewood Cmty Fund II, LLC v. Hernandez, No. ACIAS 1300030 (Cal. App. Div. Super. Ct. San Bernardino Cnty. June 30, 2014):[52] "A default judgment is void . . . if the court granted relief which it had no power to grant." The Appellate Division here considered whether the trial court had jurisdiction to grant a default UD judgment where the plaintiff-bank gave improper notice to quit. The federal Protecting Tenants at Foreclosure Act (PTFA) requires purchasers of foreclosed property to allow existing, bona fide tenants the opportunity to maintain possession through their fixed-term leases. If a new owner wants to occupy the home, however, he or she can terminate a fixed-term lease, but still must provide tenants with a 90-day notice. *All* bona fide tenants, those with fixed-term *and* month-

[52] This case first appeared in our newsletter as *Wedgewood Cmty. Fund II, LLC v. Sheffield*, 2013 WL 6924725 (Cal. Super. Ct. App. Div. San Bernardino Cnty. Dec. 30, 2013). There, the Appellate Division reversed a UD judgment because the 3-day notice to quit was improper. As bona fide tenants, appellants were entitled to a 90-day notice under the PTFA. Plaintiff then brought this second UD against tenants.

to-month leases, must receive a 90-day notice before the new owner can begin eviction. Here, the bank served bona fide tenants a 3-day notice and received a default judgment. The Appellate Division reversed; as bona fide tenants under the PTFA, tenants should have received a 90-day notice, rendering the 3-day notice invalid and the default judgment improper. Bank then brought a second UD, the subject of this case. It is unclear from the opinion whether bank again served tenants a 3-day notice (tenants argued the UD judgment was "based on a fraudulent three-day notice"), or a 90-day notice. Either way, the Appellate Division found that notice improper, based on tenant's fixed-term lease. Bank could only terminate tenants' lease if it intended to occupy the property as its primary residence, a fact not alleged in the complaint. So even if bank *did* serve a 90-day notice, that notice was untimely and improper, served before tenants' lease was set to expire. The Appellate Division found that the trial court lacked jurisdiction to enter a default judgment based on the allegations in the complaint. The court reversed and entered judgment in favor of tenants.

In California, unrecorded leases exceeding one year terms are void against subsequent purchasers, if the subsequent purchaser duly records their purchase. CC 1214. Here, tenants' unrecorded, fixed-term lease exceeded one year. Bank's purchase of the property, and its recorded trustee's deed upon sale, it argued, therefore voided tenants' lease. The court allowed that the lease may be void and unenforceable under California law. However, because the PTFA does not require that "bona fide" leases be recorded, tenants still receive the benefit and protection of the PTFA, including the right to maintain their tenancy through their lease term.

Servicer's SJM Denied on Deceit & Promissory Estoppel Claims

Griffith v. JP Morgan Chase, No. 34-2012-00123065-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. June 27, 2014): Deceit (a type of common law fraud) requires: 1) misrepresentation; 2) knowledge of falsity; 3) intent to defraud; 4) justifiable reliance; and 5) causal damages. Here, servicer represented that borrowers' permanent modification payments would mirror their TPP payments. Instead, the permanent modification payments jumped significantly, to over 31% of borrowers' income, in violation of HAMP guidelines. Servicer then assured borrowers their modification payments would decrease, convincing them not to file bankruptcy. The payments decreased, but not to TPP levels. Servicer argued that since borrowers could not identify the exact representative making the misrepresentations, the claim lacked the required specificity. Further, borrowers "conceded" they *believed* the representative did not knowingly or intentionally attempt to deceive them. Even if true, these allegations were insufficient for summary judgment. First, servicer offered no evidence that a representative did *not* make the alleged misrepresentations to borrowers. Second, borrowers' belief "as to whether [servicer] intentionally made false statements has no import on the element of [servicer's] intent to defraud." Servicer provided no evidence that it did *not* intend to deceive borrowers. The court therefore denied servicer's SJM on borrower's fraud claim. Similarly, because servicer offered no evidence its representative did *not* make a clear an unambiguous promise to modify at TPP payment levels, the court also denied servicer's SJM on borrowers' promissory estoppel claim.

Federal Cases

Borrowers' "Show Me the Note" Argument Fails Against MERS

***In re* Mortg. Electronic Registration Sys., Inc.**, __ F.3d __, 2014 WL 2611314 (9th Cir. June 12, 2014): To bring a wrongful foreclosure claim, a borrower must show: 1) servicer's noncompliance with foreclosure requirements; 2) how that noncompliance prejudiced borrowers; and 3) tender the amount due on their loan (or plead they should be excused from tendering). Here, borrowers attempted to bring wrongful foreclosure claims against MERS, premised in a "show me the note" theory. Basically, borrowers argued that the MERS system "impermissibly 'splits' ownership of the note from ownership of the deed of trust, thereby making the promissory note unsecured and unenforceable in any foreclosure proceeding." The court acknowledged that this principle has some common law merit, but ultimately declined to address borrower's split note theory because they had failed to plead the essential elements of a wrongful foreclosure claim. The Ninth Circuit affirmed the Mulitdistrict Litigation Court's grant of servicer's motion to dismiss borrowers' wrongful foreclosure claims.

Execution of Unlawful Detainer Judgment Violated Stay

***In re* Perl**, __ B.R. __, 2014 WL 2446317 (B.A.P. 9th Cir. May 30, 2014): Filing a bankruptcy petition stays all debt-related activity, including foreclosure activity, against the debtor until the case is dismissed or discharged. Creditors may petition the court for relief from the stay, enabling them to continue debt-collecting activities like foreclosure or post-foreclosure eviction. To bring a claim for a stay-violation (here, a motion to enforce the automatic stay), a debtor must establish, *inter alia*: 1) creditor had notice of the petition; 2) creditor willfully violated the stay; and 3) damages. Here, a bona fide purchaser (BFP) purchased debtor's home at a foreclosure sale and subsequently recorded the trustee's deed upon sale and commenced eviction proceedings. After BFP prevailed in the UD and obtained a writ of possession, debtors filed chapter 13 bankruptcy. Debtor's attorney gave written notice to BFP of the petition and the stay. While BFP's motion for relief from stay was still pending, however, the sheriff evicted debtors. The court considered whether debtor held any remaining interest in the property, post-foreclosure and post-UD, which would have been protected by the automatic stay. Title undoubtedly transferred to BFP at the foreclosure sale. Possession was a trickier question. The court acknowledged the general rule governing this situation: "Although the debtor may still be in possession of the premises, his or her status is essentially that of a 'squatter.' The [BFP] is entitled to the property and thus relief from the stay should be granted." Here, BFP did not receive relief from the stay: it allowed the sheriff to conduct the eviction despite a *pending* motion for relief.

Additionally, the threshold level of property interest litigated in violation of stay matters (like this) is much lower than the interest required of creditors to obtain relief from stay. Even if debtors were considered "squatters" in this instance, they still had a modicum of a possessory interest that was protected by the stay. Because BFP had actual notice of debtor's petition, the B.A.P. agreed with the bankruptcy court that its violation of the stay was willful. The B.A.P. affirmed the bankruptcy court's ruling that the post-petition eviction violated the stay and was void.

Rosenthal: Harassing Phone Calls May be "Debt Collection" if Unrelated to Foreclosure; Electronic Funds Transfer Act SOL

Benedict v. Wells Fargo Bank, N.A., 2014 WL 2957753 (C.D. Cal. June 30, 2014): California's Rosenthal Act prohibits unfair debt collection practices, defining "debt collection" as "any act or practice in connection with the collection of consumer debts." Communications regarding foreclosures have generally not been regarded as "debt collection," but not so with activities outside the foreclosure process. Here, borrowers alleged servicer made continuous phone calls "stating that the purpose of the call was to collect[ ] an alleged debt owed." Allegedly, servicer knew borrower was current on her mortgage when it made these calls. Because these phone calls could fall outside of the "ordinary foreclosure process," the court denied servicer's MTD borrower's Rosenthal claim.

The Electronic Funds Transfer Act (EFTA) prevents servicers from unlawfully deducting money from borrowers' financial accounts. The SOL is one year from the first unlawful deduction. Borrower here alleged servicer began making unauthorized deductions from borrower's bank account after denying her a modification. At loan origination, borrower had authorized servicer to deduct her mortgage payments from her account, but the alleged unlawful deductions exceeded her mortgage payments. Servicer argued that borrower's original authorization and first lawful deduction started the SOL clock, putting borrower's EFTA claim well outside the one-year limit.

Borrower, however, argued the deductions only became unlawful much later, when they started exceeding her mortgage payment amount. The court agreed that, at the pleading stage, borrower had stated a valid EFTA claim and brought that claim within the SOL. The court denied servicer's MTD.

Rotating SPOCs Insufficient for SPOC Claim; Borrower Did Not Agree to Permanent HOLA Preemption in Loan Documents

Boring v. Nationstar Mortg., LLC, 2014 WL 2930722 (E.D. Cal. June 27, 2014):[53] "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 facilitate the loan modification process and document collection, possess current information on the borrower's loan and application, and have the authority to take action. Importantly, the SPOC "shall remain assigned to the borrower's account until the mortgage servicer determines that all loss mitigation options offered by, or through, the mortgage servicer have been exhausted . . . ." Here, borrower asserted servicer changed his SPOC three times in one month, and that none of the SPOCs answered or returned his phone calls, or communicated in any way. These allegations were insufficient for a SPOC claim, according to this court. Without analysis, the court recited the SPOC statute and simply stated: "Since [borrower's] allegations do not indicate that [servicer] failed to provide . . . a SPOC, this claim is dismissed." Notably, the court in *Mann v. Bank of Am., N.A.*, 2014 WL 495617 (C.D. Cal. Feb. 3, 2014) came to the exact opposite conclusion based on similar facts. The *Mann* court focused on the SPOCs' inability to perform their statutory duties, not how many SPOCs were assigned.

[53] This case first appeared in our February 2014 Newsletter as *Boring v. Nationstar Mortg.*, 2014 WL 66776 (E.D. Cal. Jan. 7, 2014).

The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Here, borrower brought HBOR claims against his servicer Nationstar, who argued that it is entitled to assert HOLA preemption because the loan was originated by a federal savings association, despite the fact that Nationstar is not a FSA. Without much analysis, this court followed a rapidly growing minority view that only allows non-FSAs to invoke HOLA preemption to defend the conduct of the FSA. Any conduct occurring *after* the loan passed to the non-FSA would escape HOLA preemption analysis. Here, the conduct at issue revolved around loan modification negotiations and foreclosure activity, conducted by Nationstar, occurring well after Nationstar purchased borrower's loan. Nationstar argued that, in "stepp[ing] into the shoes" of a federal savings association, it should be allowed to invoke HOLA preemption. Specifically, borrower agreed to be bound by HOLA preemption when he signed the DOT. The court, however, found no language in the DOT that would indicate HOLA preemption applies to a non-FSA like Nationstar. The court denied Nationstar's MTD borrower's HBOR claims based on preemption.[54]

(Former) CCP 580b Prevented Lawsuits, It Did Not Extinguish Liens; FCRA & CCRAA May Require Servicers to Notate Their Inability to Collect a Deficiency Judgment in Reporting Debt

Murphy v. Ocwen Loan Servicing, LLC, 2014 WL 2875635 (E.D. Cal. June 24, 2014): California has several "anti-deficiency" statutes that prevent creditors from seeking deficiency judgments in certain situations. For instance, (the former)[55] CCP 580b "bars a purchase

---

[54] Notably, the vast majority of these HOLA inheritance arguments are proffered by Wells Fargo; this is the first case the Collaborative has identified where Nationstar invoked this argument.

[55] CCP 580b was amended in 2013 by Senate Bill No. 426. The current version of the law (effective Jan. 1, 2014) specifies: "No deficiency *shall be owed or collected*, and no deficiency judgment shall lie, on a loan, refinance, or other credit transaction . . . that

money mortgagee, following foreclosure, from seeking a deficiency judgment for the balance owed on the mortgage." Basically, if a house sells at foreclosure for less than what the borrowers owed, the statute prevents the borrowers' creditors from recovering the balance of the loan. Additionally, a foreclosure on the first lien prevents a creditor holding a purchase money second lien from seeking a judgment against the borrowers on the junior loan. Here, borrowers tried to use (the former) CCP 580b as a basis for affirmative Fair Credit Reporting Act (FCRA) and California's Consumer Credit Reporting Agencies Act (CCRAA) claims. The FCRA requires that, upon notice from a credit reporting agency, "furnishers" of credit information "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" The CCRAA addresses the same issue: "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." These borrowers argued that, not only did CCP 580b prevent a deficiency judgment, it also "obliterate[d]" the second lien on their property. In reporting unpaid debt *that did not exist* to credit reporting agencies, then, servicer reported inaccurate information, violating the FCRA and CCRAA. Borrowers emphasized the misleading and inaccurate nature of reporting that a debt is "owed" when no deficiency judgment is recoverable. Servicer argued that a debt is a debt regardless of its recoverability, and therefore reportable. This court had previously granted servicer's motion to dismiss the original complaint, but now, after considering the statute's legislative history and recent California cases like *Johnson v. Wells Fargo*, 2013 WL 7211905 (C.D. Cal. Sept. 13, 2013), reversed itself and denied the present motion to dismiss. The court agreed with the *Johnson* court that, while CCP 580b did not wipe out borrower's deficiency, borrowers could nevertheless sue servicer for misleading credit reporting agencies by failing to report that a debt, while still outstanding, is not subject to a deficiency judgment in court.

---

is used to refinance a purchase money loan . . ." (emphasis added to highlight the additional language).

Breach of Contract Claim against Transferee Servicer for Failing to Honor Transferor's Offered Repayment Agreement

Croshal v. Aurora Bank, F.S.B., 2014 WL 2796529 (N.D. Cal. June 19, 2014): To state a contract claim, borrowers must show: 1) a contract (including the elements of contract formation: offer, acceptance, consideration); 2) borrower's performance, or excused nonperformance; 3) servicer's breach; and 4) damages caused by servicer's breach. "An essential element of any contract is the consent of the parties, or mutual assent," "manifested by an offer communicated to the offeree and an acceptance communicated to the offeror." Acceptance may be a signature, but also an act or omission. Here, borrowers pled their original servicer offered them a Repayment Agreement, signed by a servicer representative. Borrowers called servicer to submit their first payment but soon discovered their loan had been transferred to a second servicer, which refused to honor the Agreement. The court agreed that borrowers had adequately pled breach of contract. First, borrowers' failure to sign and return the Agreement does not render it unenforceable. Nothing in the Agreement required borrowers to accept by signing and returning it. And "in the absence of a showing that the contract is not intended to be complete until signed by all parties, the parties who did sign will be bound," the servicer. Additionally, second servicer is successor-in-interest to the first servicer—and bound by its agreements—a fact ignored by second servicer. Finally, borrowers' call to second servicer to begin making payments under the agreement, manifested borrowers' assent to agreement. The court denied second servicer's MTD borrowers' contract claim.

Breach of Contract: SOL Clock Begins When Damages Accrue; Valid DOT Breach Claim Based on Improper Property Tax Escrow

Vincent v. PNC Mortg., Inc., 2014 WL 2766116 (E.D. Cal. June 18, 2014): To state a contract claim, borrowers must show: 1) a contract; 2) borrower's performance, or excused nonperformance; 3) servicer's breach; and 4) damages caused by servicer's breach. Here, the court found a valid contract claim. To ascertain when a statute of limitations (SOL) period begins to run, courts look to "when the last element required for that claim occurs." In contract claims, then, damages determine the SOL period. California has a four-year statute of limitations for written contract claims. So any claim must be brought within four-years of the damage that is being litigated. Here, borrower's surviving spouse (as executrix of his estate) brought a contract claim against borrower's servicer for breaching borrower's DOT. Servicer had miscalculated property taxes, doubled borrower's mortgage payments, refused to accept borrower's normal payments, and failed to correct its mistake, even after a representative admitted that the property taxes were incorrectly doubled. Instead, servicer foreclosed on the property, based on an erroneous default. Servicer argued the claim was untimely because the breach occurred more than four years before the suit: when servicer sent the first incorrect escrow account statement to borrower. The court disagreed. The executrix commenced litigation within four years of the foreclosure sale, "the last of [borrower's] damages." Because the sale started the SOL clock, the suit is timely. The court also found every contract element fulfilled. Since borrower made all his originally required monthly mortgage payments, up until servicer started rejecting them, executrix had successfully alleged borrower's compliance with the DOT. She satisfied the damages element by pleading the loss of borrower's home, damage to his credit, and increased "interest and arrears" that would not have accumulated, but for servicer's breach. The court denied servicer's MTD executrix's contract claim.

Class Certification in Force-Placed Insurance Case: Unjust Enrichment & Contract Claims May Coexist, Common Issues Predominate for Unjust Enrichment Claim

Ellsworth v. U.S. Bank, N.A., 2014 WL 2734953 (N.D. Cal. June 13, 2014): Many DOTs and mortgage agreements include clauses allowing servicers to "force-place" insurance (purchase hazard insurance on borrower's property and charge the borrower) if the borrower refuses to purchase that insurance, or allows a policy to lapse. This purported class accuses servicer of engaging in a scheme with an insurance company, whereby servicer would force-place flood insurance on borrowers' properties, backdate that insurance to cover time periods where no loss had been incurred (constituting "worthless" insurance), and receive kickbacks (compensation) from the insurance company for its increased business. The purported class brought breach of contract claims, breach of the implied covenant of good faith and fair dealing claims, unjust enrichment, and UCL claims involving both California and New Mexico properties. The court previously denied servicer's motion to dismiss.[56] Here, the court considered borrowers' motion for class certification, analyzing (in part) whether individual issues predominate borrowers' claims.

Unjust enrichment claims involve: 1) servicer's receipt of a benefit; and 2) servicer's unjust retention of the benefit at borrower's expense. Servicer here argued against allowing borrowers to simultaneously plead contract claims and unjust enrichment claims because "the two theories of recovery were inconsistent for claims grounded in a contract." The court disagreed, finding that restitution (the remedy for unjust enrichment claims) may provide borrowers relief even if their contract claims are defeated. Specifically, the court reasoned, "that situation exists now for claims arising out of FPI when U.S. Bank is the servicer (and not the owner) of the mortgages. . . . If U.S. Bank merely services a loan, then the borrower is limited to the unjust enrichment and UCL claims."

By their very nature, unjust enrichment claims are specific to individual borrowers because the *unjustness* of the enrichment will depend on a borrower's situation, conduct, knowledge, etc. The court acknowledged this servicer argument, but reframed the issue: "the case is about the appropriateness of backdating and passing along [kickbacks] and tracking costs to buyers in the form of increased charges. In the context of FPI, that inquiry does not require the kind of

[56] This case was originally summarized in our April 2014 Newsletter as *Ellsworth v. US Bank, N.A.*, __ F. Supp. 2d __, 2014 WL 1218833 (N.D. Cal. Mar. 21, 2014).

individualized inquiry that defeats predominance." The court certified the class and subclasses.

A National Bank Cannot Invoke HOLA Preemption to Defend its Own Conduct; CC 2924.17 Claim; Dual Tracking's "Complete Application;" Borrower's Request for Loan Modification Triggers Servicer's Obligation to Provide SPOC

Penermon v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 2754596 (N.D. Cal. June 11, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Normally, national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Here, borrower brought HBOR claims against her servicer, a national bank. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. This court acknowledged that many district courts allow Wells Fargo to invoke HOLA preemption if the subject loan originated with a federal savings bank, but pointed to the lack of controlling authority from the Ninth Circuit. The court then followed a rapidly growing minority view that only allows a national bank to invoke HOLA preemption to defend the conduct of the federal savings association. Any conduct occurring *after* the loan passed to the national bank would be subject to an NBA preemption analysis. Here, the conduct at issue revolved around loan modification negotiations and foreclosure activity that occurred well after borrower's loan was transferred to Wells Fargo. "To find that some homeowners cannot avail themselves of HBOR protection based solely on their original lender, and without regard to the entity engaging in the otherwise illegal conduct, is arbitrary at best, and, at worst, could result in a gross miscarriage of justice." Having found

Wells Fargo unable to use HOLA preemption as a defense, the court evaluated borrower's claims on their merits.

One of the most well-known aspects of HBOR is its "robo-signing" statute, CC 2924.17. Specifically, section (b) requires a servicer to "ensure that it has reviewed competent and reliable evidence to substantiate . . . [its] right to foreclose." But the lesser-known section (a) also mandates that foreclosure documents be "accurate and complete and supported by competent and reliable evidence." Here, borrower alleged both (a) & (b) violations: servicer recorded an NOD that misstated the total arrearage and the date of her default. Specifically, servicer did not apply several mortgage payments it actually accepted, evidenced by a significant jump in arrearage in just one month. Servicer must have therefore failed to review "competent and reliable evidence to substantiate [borrower's] default," and, consequently, lacked the right to foreclose. The court agreed that, at least at the pleading stage, borrower demonstrated a possible CC 2924.17 violation (that notably had nothing to do with the popular conception of "robo-signing"). Whether or not servicer incorrectly applied mortgage payments, and in what amount, is a question of fact appropriate for summary judgment. The court denied servicer's MTD.

Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification is pending. An "application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." Here, borrower pled "facts to support the *inference* that she submitted a complete . . . application" (emphasis added) but did not explicitly plead compliance with the "complete" requirement outlined in CC 2923.6(h). Without approving or denying the application, servicer recorded an NOD, an NTS, and finally sold her home. The court noted servicer's failure to communicate with borrower *in any way* after she submitted her application.[57] Servicer did not, for example, tell borrower her

[57] Notably, this allegation provided grounds for borrower's CC 2924.10 claim. A servicer must acknowledge receipt of borrower's complete application, "or any document in connection with a[n] . . . application." Borrower's allegation that she

application was incomplete. The court dismissed borrower's dual tracking claim, but granted borrower leave to amend to specifically allege she submitted a complete application.

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 have several responsibilities, including informing borrowers of the status of their applications and helping them apply for all available loss mitigation options. Here, borrower alleged her servicer violated these requirements by failing to return phone call, inform her of the status of her loan, or explain other loss mitigation options. 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 her SPOC did not perform the statutorily required duties. The court denied servicer's motion to dismiss borrower's SPOC claim.

Unfair Prong of UCL: Modification Delays and Mishandling

Perez v. CitiMortgage, Inc., 2014 WL 2609656 (C.D. Cal. June 10, 2014): The "unfair" prong of a UCL claim is satisfied, according to this court, if "the gravity of the harm to the [borrower] outweighs the utility of the [servicer's] conduct." The court considered the "public policy" test, which looks for conduct that is "tethered to an underlying constitutional, statutory or regulatory provision," but chose the broader approach instead. The court then applied the balancing test to borrower's complaint. Borrower alleged servicer failed to comply with HAMP in executing its loss mitigation programs, failed to supervise its employees properly, sent borrower conflicting messages, and "routinely

---

submitted "the loan modification application along with the required documents," and that servicer failed to respond, sufficiently states a 2924.10 claim; alleging a "complete" application is not necessary with this type of HBOR claim.

demand[ed] information it already had, and fail[ed] to communicate accurately or consistently with [borrower] about the status of his loan modification application." Essentially, borrower identified the nearly ubiquitous allegations brought by borrowers in foreclosure cases: that servicer's mishandling of loan modifications led to a *deliberately* drawn-out and unsuccessful process. The gravity of borrower's harm – never knowing if he would receive a modification, or if he should take other steps to avoid foreclosure—outweighs the utility of servicer's delay of the modification process. The court denied servicer's MTD borrower's "unfair" prong UCL claim.

TRO Granted for Dual Tracking Violation: Material Change in Circumstances; NMS Safe Harbor

Gilmore v. Wells Fargo Bank, N.A., 2014 WL 2538180 (N.D. Cal. June 5, 2014): Under HBOR, a servicer need only evaluate a borrower for a loan modification once, either before or after HBOR became effective. If a borrower submits documentation of a "material change" in his financial circumstances, however, the servicer is required to review the new application and HBOR's dual tracking protections apply to that application. Here, the court evaluated borrower's dual tracking claim under the federal TRO standard: borrower had to show a likelihood of success on the merits of his claim, or at least "serious questions going to the merits . . . and [that] the balance of hardships tips sharply in [his] favor." Borrower also had to demonstrate imminent, irreparable harm if the TRO does not issue, and that granting the TRO was in the public interest. Here, borrower submitted a second modification application after his first application was denied, and after his income increased and his monthly bills decreased, resulting in a $1,000 swing in monthly savings. Servicer gave borrower written acknowledgement that it was reviewing this second application, but nevertheless scheduled a foreclosure sale. The court agreed that borrower had raised at least serious questions going to the merits of his dual tracking claim. Because he "experienced substantial improvement in his financial circumstances and documented this with his mortgage servicer," HBOR's dual tracking protections re-ignited and prevent servicer from proceeding with foreclosure while reviewing this second application. Additionally, losing a home is considered irreparable harm, and the balance of hardships tips in borrower's favor: a TRO only temporarily postpones a foreclosure and is not overly burdensome to the servicer. Finally, this TRO serves the public interest because unlawful foreclosures adversely impact homeowners. The court therefore extended the TRO borrower won in state court (before servicer removed the case to federal court).

As long as the NMS is in place, a signatory that is NMS-compliant, with respect to the individual borrower bringing suit, is not liable for various HBOR violations, including dual tracking. CC § 2924.12(g). The court pointed to servicer's two alleged NMS violations, which prevent it from invoking the safe harbor. In addition to dual tracking, servicer had not provided borrower with an online portal to check the status of his loan modification as required by the NMS. The court rejected servicer's safe harbor argument, rendering borrower more likely to prevail on the merits of his dual tracking claim. The court granted the TRO for the reasons described above.

Borrower's Request for Loan Modification Triggers Servicer's Obligation to Provide SPOC; Pre-NOD Outreach Requirement

Mungai v. Wells Fargo Bank, 2014 WL 2508090 (N.D. Cal. June 3, 2014): 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 an individual or a "team" of people and have several responsibilities, including informing borrowers of the status of their applications and helping them apply for all available loss mitigation options. Here, borrower alleged her servicer violated these requirements by failing to return phone calls and voicemail messages and by generally remaining unavailable throughout the modification process. Further, none of the servicer representatives borrower *did* speak with could provide her with the status of her application. These representatives only referred borrower to her chronically absent SPOC. Servicer argued that because borrower failed to specifically *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, interpreting the word "request" in the phrases "upon request" and "a borrower who requests," "to refer to the *same* request, namely, the borrower's request for a foreclosure prevention alternative." "Upon request" merely "indicates *when* the SPOC must be assigned (i.e., upon the borrower's *request* for a foreclosure prevention alternative, as opposed to the borrower's *selection* of a foreclosure prevention alternative)." Having established that borrower was entitled to a SPOC, the court then concluded that an uncommunicative SPOC cannot fulfill her statutory obligation to inform borrower about the status of an application, or make sure that borrower is considered for all loss mitigation options. The court denied servicer's motion to dismiss borrower's SPOC claim.

Servicers must contact (or diligently attempt to contact) borrowers at least 30 days prior to recording an NOD, to assess the borrower's financial situation and explore foreclosure alternatives. Here, borrower submitted a modification application and received servicer's acknowledgement letter before servicer recorded the NOD. The court considered this exchange "coincidental contact" that did not excuse servicer from its pre-NOD outreach requirement. Because the statute requires servicer contact "via specific means about specific topics," the court rejected servicer's argument that *any* pre-NOD contact fulfills the statutory requirement and denied servicer's motion to dismiss.

Recent Regulatory Updates

HAMP Extended through 2016 (June 26, 2014)

When HAMP was created, the Obama Administration set a goal of modifying between three and four million mortgages by the end of 2012. To date, HAMP has provided 1.3 million permanent modifications. Continually struggling toward its original goal, HAMP has been extended several times. It is now set to continue through December 2016. For more information on recent HAMP statistics, see the April 2014 HAMP performance report.

FHA INFO #14-34: HECM Reasonable Diligence Timeframe Extensions (June 25, 2014)

Pursuant to a court order in the ongoing case *Plunkett v. Donovan*, the Federal Housing Administration issued a determination to the lenders and servicers holding Home Equity Conversion Mortgages (HECM) ("reverse mortgages") for the *Plunkett* plaintiffs. The determination also applies to the lenders and servicers with mortgages involved in the *Bennett v. Donovan* case.[58] These plaintiffs are surviving, non-borrower spouses of borrowers with HECM mortgages. After borrowers died, their surviving spouses inherited title to their homes but, because they were not "borrowers" on the mortgage, faced the prospect of losing their home through the HECM foreclosure process. FHA's determination gave participating lenders and servicers the option of assigning those mortgages to HUD.

FHA is "reviewing its policies" to explore if the above assignment option can be made available to all surviving, non-borrower spouses similarly situated. In the meantime, FHA issued this notice, giving lenders and servicers "an indefinite extension of time in which to take first legal action to commence foreclosure and to comply with reasonable diligence timeframes." This extension is available until

[58] *See* Bennett v. Donovan, __ F. Supp. 2d __, 2013 WL 5424708 (D.D.C. Sept. 30, 2013) (summarized in our November 2013 Newsletter).

FHA issues an official policy change (likely through a Mortgagee Letter). Servicers may use this extension if a surviving spouse's situation meets several. Survivors must, for example, have been married to the HECM borrower at HECM origination, and maintained the marriage until borrower's death. While delaying foreclosure is optional, it appears that FHA is encouraging servicers to hold off on foreclosing on qualified survivors until FHA comes up with a solution to the surviving spouse problem.

Fannie Mae Servicing Announcement SVC 2014-10 (June 4, 2014) (effective September 1, 2014)

Servicers may now approve a borrower for an initial unemployment forbearance program if: 1) the borrower is in imminent danger of default or delinquent for a year or less, and 2) all other applicable eligibility requirements are met.

Freddie Mac Bulletin 2014-10 (June 3, 2014) (effective dates as noted)

Short Sales and Deeds-in-Lieu (effective August 1, 2014)

Expansion of these options for servicemembers. Servicemembers may now qualify for a short sale or DIL if the property is, *or was*, the borrower's primary residence and was purchased on or before June 30, 2012. This expansion will help servicemembers who may have moved due to Permanent Change of Station ("PCS") orders and want to sell their former residence.

New "lookback" period to determine which borrowers are eligible. Servicers must now review a borrower's credit report to ensure that the borrower did not obtain a new mortgage in the six months preceding their original delinquency or, if the borrower is current, in the six months preceding their short sale or DIL evaluation. The borrower is ineligible for those options if the borrower obtained a new mortgage during those six months. An exception is made for borrowers with distant employment transfers.

Borrowers must be evaluated for cash contributions toward deficiencies. Servicers must now look only to borrowers' cash reserves and promissory note payment capacities to determine whether a borrower is capable of making a cash contribution as part of their short sale or DIL agreement. This evaluation is required for all borrowers who are at least 31 days delinquent. The cash contribution should be 20% of the borrower's cash reserves (if those reserves exceed the greater of $10,000 or six times the borrower's total monthly payment). If a borrower is unable to meet the cash contribution requested, the servicer may accept a lower contribution. If a borrower is unwilling to make a requested contribution, then the short sale or DIL proposal must be submitted to Freddie Mac. The minimum allowed cash contribution is now $500.

Decreased relocation assistance. If servicer determines that a borrower has the means to make a cash contribution toward their short sale or DIL deficiency, the borrower is not eligible for relocation assistance.

Requirements in Response to the CFPB Mortgage Servicing Final Rule (effective August 1, 2014)

TPP adjustments after borrower exercises appeal rights. Currently, if a borrower appeals a TPP payment amount, loses the appeal, and then accepts the original TPP offer, the servicer may revise the TPP payment amount, but is not required to do so. Now, servicers still have this choice –to revise the amount or to offer the original amount—but must make the same choice for all the Freddie Mac mortgages it services.

Expansion of foreclosure suspension period after a loss mitigation plan is offered. Currently, once a borrower accepts a loss mitigation plan that requires a payment (like a TPP), servicer has to postpone any foreclosure activity until the last day of the month in which the first payment is due. Now, this delay in foreclosure activity is expanded to apply in situations where a borrower *rejects* a loss mitigation offer, but nevertheless submits a “complete Borrower Response Package” to their servicer.

Borrower solicitation letters. Borrowers experiencing long-term or permanent hardships (as opposed to temporary difficulties) who wish to transition out of their homes must submit Guide Form 710 to their servicer, to be evaluated for a short sale or DIL. Servicers may still consider these borrowers for modifications. Additionally, servicers must acknowledge receipt of a Borrower Response Package within five business days of receipt and must tell borrowers what, if any, documents are missing.

Unemployment Forbearance (effective September 1, 2014)

For a borrower to be eligible for short-term unemployment forbearance, the delinquency must not exceed twelve months of the scheduled monthly payment. Servicers are no longer required to obtain an applicant’s credit report and tax transcript to evaluate them for extended unemployment forbearance.

New Standard Modification and Streamlined Modification TPP Notices (effective immediately)

The model clauses (in Exhibit 93) have been revised for standard and streamlined TPP notices. The revisions reflect the choices borrowers have of 40, 30, or 20-year term modifications, and the policy that servicers may not permit borrowers to change their plan once the borrower has started their TPP.

Simultaneous Assumption and Modification (effective immediately)

Servicers are permitted to evaluate a non-borrower for a simultaneous assumption and modification when all borrowers are deceased. This guidance is now updated to include HAMP as an additional modification option that servicers may consider when evaluating a non-borrower applicant for a simultaneous assumption and modification. In addition, servicers must now provide appropriate adverse action notices to non-borrower applicants who are determined ineligible for a simultaneous assumption and modification.

Judgment With Opinion

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUN 30 2014

BY Carolyn Solberg
CAROLYN SOLBERG, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
APPELLATE DIVISION

SCANNED

WEDGEWOOD COMMUNITY FUND II, LLC, Plaintiff and Respondent, v. LUIS HERNANDEZ and STEPHANIE WRIGHT, Defendants and Appellants.	Case No: ACIAS 1300030 (Trial Court: UDVS 1300847) PER CURIAM OPINION

Appeal from judgment, San Bernardino County Superior Court, Victorville District, Patrick L. Singer, Commissioner. Reversed.

Luis Hernandez and Stephanie Wright, Defendants and Appellants in propria persona.

Law Offices of Sam Chandra, APC and Sam Chandra for Plaintiff and Respondent.

THE COURT:

FACTS

On July 10, 2012, plaintiff and respondent, Wedgewood Community Fund II, LLC (Fund), filed an unlawful detainer action against defendants and appellants, Luis Hernandez and Stephanie Wright.[1] A default

---

[1] On our own motion, we take judicial notice, under Evidence Code section 452, subdivision (d), and section 459, of this background fact from our per curiam opinion in *Wedgewood Community Fund II, LLC v. Sheffield* ACIAS 1200089 (*Sheffield*).

judgment was entered against them. On December 30, 2013, this court reversed that judgment and remanded the action with instructions to vacate the default judgment on the ground that it was based on service of a three-day notice following the sale of the property at foreclosure and, as bona fide tenants of the prior owner, the appellants were entitled to a ninety-day notice.

On April 3, 2013, while the appeal of that action was pending, Fund filed a new unlawful detainer action against appellants.[2] On April 12, 2013, the trial court granted Fund's motion for an order allowing it to serve the summons and complaint by posting a copy on the premises and mailing a copy to the appellants.[3] Although the court granted the motion for service by posting, on that same day, the appellants were served by substitute service. On May 3, 2013, a default judgment was entered against the appellants.[4] On June 4, 2013, after Fund obtained a writ of possession, appellants filed an application for ex parte relief from the trial court and on that same day filed their Notice of Appeal of the default judgment.[5]

DISCUSSION

Appellants argue that the trial court erred in entering the default judgment against them because it was based on a fraudulent three-day notice and because the appellants were not actually served with either the

---

2 Clerk's Transcript (CT) 1.
3 CT 2.
4 CT 2.
5 CT 3.

three-day notice or the summons and complaint. They argue that they were unaware of the new action until the sheriff served a Notice to Vacate upon them.

Appellants ask this court to vacate the judgment against them pursuant to Code of Civil Procedure section 473.5. That relief is not available from this court. "Under such statutes the court which rendered the judgment has power, in its discretion, for a definite period of time and upon specified grounds to open, vacate or modify its own final judgment." (*Olivera v. Grace* (1942) 19 Cal.2d 570, 573-574, citations omitted.) "In general, '[relief] from a judgment must be obtained by means of a motion for that purpose in the court that rendered the judgment....'" (*Southern Cal. White Trucks v. Teresinski* (1987) 190 Cal.App.3d 1393, 1407.)

Although this court does not have the power to provide appellants relief from their default, that does not prevent this court from considering the validity of the default judgment. "A default judgment is void ... if the court granted relief which it had no power to grant including a default judgment which exceeds the amount demanded in the complaint." (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830.) Because the trial court granted relief that it lacked the power to grant the default judgment is void.

The Protecting Tenants at Foreclosure Act of 2009 limits the ability of a property owner who has acquired property in foreclosure to evict tenants residing on the property. The Act provides that "any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to ... the rights of any bona fide tenant, as of the date of such notice of foreclosure...." (Protecting Tenants at Foreclosure Act of 2009 (Act) 111 P.L. 22, § 702, 12 U.S.C. § 5220 Note.) The property owner may terminate the tenancy of a bona fide tenant by providing "a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice...." (*Id.* at § (a)(1).) Where that tenant occupies the property "under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease," the property owner may only terminate such a lease on 90 days' notice where the property owner is "a purchaser who will occupy the unit as a primary residence...." (*Id.* at § (a)(2)(A).)

Although respondent's complaint alleges that "No landlord/tenant relationship exists between the purchaser and the Defendants[,]" (Complaint ¶ 6), in the previous unlawful detainer action between these parties, this court determined that appellants were bona fide tenants under a bona fide lease for the purposes of the Act and reversed the judgment due to the failure of respondent to provide more than three-day's notice.[6] (*Sheffield*, *supra*, at p. 4.) Respondent is collaterally estopped from

[6] Although the appellate opinion in *Sheffield* indicates only that the appellants were bona fide tenants based on the rental agreement, the same facts govern the determination of bona fide tenancy and bona fide lease under the act. (Act, § 702(b).)

disputing this fact that was determined in the prior action. "A judgment or final order, in respect to the matter directly adjudged, is conclusive between the parties and their successors in interest…." (Code Civ. Proc., § 99.)

Because it has already been determined that the appellants are bona fide tenants under a bona fide lease, the respondent may only evict them prior to the end of the lease if it will occupy the premises as its primary residence.[7] The complaint does not allege that the respondent intends to occupy the property as its primary residence and, as a business entity rather than an actual person, it seems unlikely that it can do so. For this reason, the trial court did not have the power to enter the default judgment based on the complaint and that judgment must be reversed and judgment entered in favor of the appellants. Although this terminates the present unlawful detainer action, it does not prevent respondent from bringing another unlawful detainer action to the extent that it is based on grounds other than the respondent's purchase of the premises occupied by the appellants under their bona fide lease.

---

[7] Respondent argues that Civil Code section 1214, which provides, "Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action[,]" makes the appellants' lease void because it is for a term of more than one year and is not recorded. However, the federal Act does not require that the lease be recorded to be a bona fide lease and for this reason, even if the lease is not otherwise enforceable under California law, it is still sufficient to trigger the protections of the Act.

DISPOSITION

The judgment of the trial court is reversed.

DAVID COHN, Presiding
Judge of the Appellate Division

KATRINA WEST,
Judge of the Appellate Division

R. GLENN YABUNO,
Judge of the Appellate Division

Superior Court State of California
County of San Bernardino

Appellate Division

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) vs. Case # ACIAS 1300030
COUNTY OF SAN BERNARDINO) Trial Court# UDVS 1300847

The undersigned hereby declares: I am a citizen of the United States of America, over the age of eighteen years, a resident of the above-named State, and not a party to nor interested in the proceedings named in the title of the annexed document. I am a Deputy Appellate Clerk of said County. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. On the date of mailing shown below, I placed for collection and mailing following ordinary business practices, at the request and under the direction of the Superior Court in and for the State of California and County above-named, whose office is at the Courthouse, San Bernardino, California, a sealed envelope which contained a true copy of each annexed document, and which envelope was addressed to the addressee, as follows:

LUIS HERNANDEZ
STEPHANIE WRIGHT
8521 WAGON WHEEL COURT
HESPERIA, CA 92344

LAW OFFICE OF SAM CHANDRA
710 S MYRTLE AVE., #600
MONROVIA, CA 91016-2171

cc: Honorable Commissioner PATRICK L. SINGER, Victorville Courthouse

Date and Place of Mailing: June 30, 2014, San Bernardino, California.

Document Mailed: **PER CURIAM OPINION**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2014, at San Bernardino, California.

SUPERIOR COURT OF CALIFORNIA EUREKA COUNTY OF SAN BERNARDINO

Carolyn Solberg Deputy Clerk
CAROLYN SOLBERG

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 06/27/2014 TIME: 09:00:00 AM DEPT: 54

JUDICIAL OFFICER PRESIDING: Raymond Cadei
CLERK: K. Pratchen
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers

CASE NO: **34-2012-00123065-CU-OR-GDS** CASE INIT.DATE: 04/24/2012
CASE TITLE: **Griffith vs. JP Morgan Chase Bank NA**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Summary Judgment and/or Adjudication - Civil Law and Motion - MSA/MSJ/SLAPP

APPEARANCES

Tina Naicker, counsel, present telephonically for the Defendant.
Rando Rodriguez, counsel, present for the Plaintiff.

Nature of Proceeding: Motion for Summary Judgment and/or Adjudication

TENTATIVE RULING

***** If oral argument is requested, the parties are directed to notify the clerk and opposing counsel at the time of the request which of the 44 Undisputed Material Facts offered by the moving defendants in support of summary judgment will be addressed at the hearing and the parties should be prepared to point to specific evidence which is claimed to show the existence or non-existence of a triable issue of material fact. *****

Defendant JP Morgan Chase Bank, N.A.'s ("Chase") motion for summary judgment, or in the alternative, summary adjudication is ruled upon as follows.

Chase's request for judicial notice is granted. (*See Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-18; *see also Startford Irrig. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61, 68 [recorded land documents, not contracts, are the subject of judicial notice on demurrer].) The court, however, does not accept the truth of any facts within the judicially noticed documents except to the extent such facts are beyond reasonable dispute. (*See Poseidon Devel., supra,* 152 Cal.App.4th at 1117-18, *see also Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ["[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity."].)

Plaintiffs allege that Chase promised them that if their loan modification was approved, the payments would be the same as their trial payments of $1,623.16. Plaintiffs also allege that a Chase employee told them that this payment amount included taxes and insurance. Plaintiffs also allege that when their loan modification was finally approved, the payment was much higher than promised, exceeding 31% of their gross monthly income in violation of HAMP guidelines. Plaintiffs allege that the Chase employee told them that she did not understand why the payments were raised to $1,927 and that the payment should have been $1,623.16. Plaintiffs allege they were induced not to file for bankruptcy because they were told that the HAMP loan would be modified. Plaintiffs were eventually offered a loan modification of $1,888.59 that they could not afford and they stopped making payments. (Complaint ¶¶ 10-48.) A notice of default was recorded March 6, 2012.

Chase moves for summary judgment, or in the alternative, summary adjudication on the Fraud/Deceit (COA 1), Promissory Estoppel (COA 2) and Violation of B&P Code section 17200 (COA 4).

As an initial matter, the Court notes that pursuant to CCP §437c(h) Plaintiffs have requested a continuance as they are awaiting discovery responses that may reveal the identity of the Chase employee. The request must be denied because Plaintiffs have failed to show through a competent declaration not only that there likely exists evidence which would support an opposition to the present motion but also that such discovery could not have reasonably been completed prior to the opposition's due date. (*See, Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 251, 255-256; *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270.)

<u>Fraud/Deceit</u>

Chase argues that Plaintiffs cannot demonstrate that a misrepresentation was made because Plaintiffs received a permanent HAMP loan modification, and Plaintiffs cannot identify the Chase representative who purportedly told them that the trial payment amount included taxes and insurance and the permanent payments would be the same as the trial payments. Chase proffers evidence that Plaintiffs "concede that they do not believe that Chase intentionally made false statements regarding the final terms for the loan modification." (*See* Defendant's separate statement, UMF 17.) Chase also proffers evidence that Plaintiffs "cannot point to a particular person at Chase that made any alleged representation or promises regarding any final terms for the loan modification - whether it was a telephone representative or a loan officer at a local Chase branch." (*See* Defendant's separate statement, UMF 16.)

However, Chase fails to satisfy its initial burden. Here, Chase fails to present evidence that neither the telephone representative or loan officer made the statements to Plaintiff. Moreover, Chase fails to show that it did not act with the intent to defraud. Plaintiffs' <u>belief</u> as to whether Chase intentionally made false statements has no import on the element of <u>Chase's</u> intent to defraud.

Accordingly, the motion for summary adjudication is DENIED.

<u>Promissory Estoppel</u>

Chase argues that Plaintiffs cannot establish a clear and unambiguous promise made by Chase. Chase relies on UMF 16 for the proposition that Plaintiffs cannot point to any evidence that Chase clearly promised them a final HAMP Loan Modification that would be equal to their trial payments. (Defendant's MPA's 11:14-15.) UMF 16, however, does not stand for the above proposition. UMF 16 merely provides that Plaintiffs cannot identify, by name, the Chase representative(s) who made the statements to them. (*See* Defendant's separate statement, UMF 16.) Chase has not proffered evidence that no such statements were made to Plaintiffs.

The motion for summary adjudication is DENIED as Chase fails to satisfy its initial burden to demonstrate that Chase's representative(s) did not make a clear and unambiguous promise.

B&P Code §17200

The motion is DENIED as this cause of action is derivative of the Fraud/Deceit cause of action.

As Chase has failed to obtain summary adjudication on all of Plaintiffs' causes of action, the motion for summary judgment is DENIED.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

The notice of motion does not provide notice of the Court's tentative ruling system, as required by Local Rule 1.06(A). Defendant's counsel is directed to contact Plaintiffs' counsel forthwith and advise counsel of Local Rule 1.06 and the Court's tentative ruling procedure. If Defendant's counsel is unable to contact Plaintiffs' counsel prior to hearing, Defendant's counsel shall be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 1.06(A).

The court notes that moving party has indicated the incorrect address in its notice of motion. The correct address for Department 54 of the Sacramento County Superior Court is 800 9th Street, Sacramento California 95814. Moving party shall notify responding party(ies) immediately.

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.