California Homeowner Bill of Rights COLLABORATIVE

National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

May 2014 Newsletter

In this issue—

Loss Mit Part II: the follow-up to last month's article on the new loss mitigation rules from the CFPB.

Case summaries including: *McLaughlin*, *McFarland*, *Rothman* & *Bingham*

Announcements—

The HBOR Collaborative is conducting a free training at PLI in San Francisco, **June 16**. The training will also be webcast. Please see the information at the end of the newsletter for details or sign-up at our website's training calendar!

New RESPA Loss Mitigation Procedures[1]

Important RESPA regulations concerning loss mitigation procedures went into effect on January 10. The new rules specify procedures a servicer must follow if a mortgage loan borrower requests loss mitigation assistance. This article covers the following topics:

- New restrictions on foreclosure actions during the first 120 days of delinquency
- New restrictions on foreclosure actions after that 120 day period if the homeowner has submitted a complete loss mitigation application
- Borrower right for time to respond to loss mitigation offer
- Borrower's new appeal rights for loan modification denials
- Exclusion to the above requirements for "duplicative" applications and when the duplicative application exclusion does not apply
- The small servicer and other exemptions

[1] This article is the second in a two-part series authored by John Rao (with assistance from Geoff Walsh) for the National Consumer Law Center's *eReports* service. Part I appeared in the HBOR Collaborative's April 2014 newsletter. Printed here with permission of the author and NCLC. *Copyright 2014 National Consumer Law Center, Inc. All rights reserved.*

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New Restrictions on Dual Tracking

Regulation X's loss mitigation rule limits mortgage servicers' "dual tracking" practices. Dual tracking refers to a common servicer practice of proceeding with foreclosure while evaluating a borrower for loss mitigation options. As a consequence of this practice borrowers lose their homes, or are subjected to emotional distress related to the fear of losing their homes, before proper evaluations for foreclosure alternatives have been completed.

Regulation X § 1024.41 applies restrictions to dual tracking during two distinct stages. The first period (discussed starting in the next section) runs 120 days from the beginning of the borrower's delinquency. Here, the intent of the rule is to encourage servicers to review all loss mitigation options prior to the commencement of foreclosure, before substantial costs have been incurred, and while the likelihood of a successful loss mitigation outcome is greatest.

Many borrowers, however, do not seek legal help or are not directed by counselors to loss mitigation until after the foreclosure process has begun. Therefore, some restrictions on dual tracking are also placed on servicers during a second stage, during the period after a foreclosure has been initiated (as discussed later in this article). During this second period servicers must continue to seek out borrowers for applications, complete evaluations, and, in certain situations, refrain from completing a foreclosure.

The 120-day Pre-Foreclosure Review Period

During the initial 120 days of a delinquency, a borrower should be insulated from foreclosure activity.[2] Section 1024.41(f)(1) prohibits, during this time period, servicers from taking the first step to initiate foreclosure proceedings under state law—called "first notice or filing."[3] Instead, during the early months of a delinquency Regulation X mandates that servicers take affirmative steps through verbal and

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[2] *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 10,833 (Feb. 14, 2013) ("The Bureau further believes it necessary and appropriate for borrowers, servicers, and courts to have a known early period during which a servicer shall not begin the foreclosure process.").

[3] Reg. X, 12 C.F.R. § 1024.41(f)(1) (effective Jan. 10, 2014).

written solicitation to engage borrowers in the process of submitting a loss mitigation application for evaluation.[4] The requirement to give the borrower a forty-five-day early intervention written notice regarding loss mitigation is one aspect of this mandated solicitation effort.[5]

The import of Regulation X's 120-day rule is significant. Both the GSE servicing guidelines and the National Mortgage Settlement had restricted in some ways the servicer's flexibility in referring a case to foreclosure during the initial 120 days of delinquency.[6] However, § 1024.41(f)(1) impacts foreclosure timelines in a more significant way. Section 1024.41(f)(1) preempts state foreclosure timelines to the extent that they allow an earlier commencement of foreclosure.[7] The GSE guidelines and National Mortgage Settlement applied a 120-day time frame to the servicer's "referral" of a foreclosure case to an attorney or trustee to commence foreclosure. Section 1024.41(f)(1), on the other hand, sets an absolute bar to the commencement of foreclosure by

[4] Reg. X, 12 C.F.R. § 1024.39 (effective Jan. 10, 2014).

[5] Reg. X, 12 C.F.R., § 1024.39(b) (effective Jan. 10, 2014). *See* NCLC *eReports*, Jan. 2014, No. 5; NCLC *Foreclosures*, § 9.2.6.2 (4th ed. and 2013 Supp.), discussing the early intervention written notice.

[6] Before § 1024.41 became effective, the general strategy of the GSE servicing standards had been to authorize financial incentives to servicers who obtained completed loss mitigation applications from borrowers during the initial 120-day delinquency period and to impose financial sanctions on servicers who had not complied with state-specific time frames for completing foreclosures, regardless of the status of loss mitigation applications at the end of 120 days pre-foreclosure referral period. *See e.g., Fannie Mae Single Family Servicing Guide,* ch. VIII § 103.04, 801-8 through 801-10 (Mar. 14, 2012); *Freddie Mac Servicing Alignment Initiative FAQs* (Jan. 8, 2013), No. 66. Because the GSE guidelines had encouraged only delays in *referrals* to foreclosure during the initial 120 days of delinquency, the GSE guidelines allowed the servicer to give a notice of breach or acceleration to the borrower *before* the 120 days expired if giving the notice earlier is required under state law. *Freddie Mac Servicing Alignment Initiative FAQs (Jan. 8, 2013),* No. 34. The CFPB rule preempts such state laws and this is therefore no longer permitted if the notice is the "first notice" for purposes of § 1024.41(f)(1). The National Mortgage Settlement servicing guidelines prohibit referral to foreclosure while a loss mitigation application is under review. *See e.g.* Settlement Term Sheet, Exhibit B (Servicing Standards) Part IV, ¶ B.1. The Settlement provision limits referrals during the initial 120-days of delinquency. However, like the prior GSE rules, the Settlement appears to allow the referral earlier than 120 days if the servicer completed the review at an earlier date.

[7] *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 10,833 (Feb. 14, 2013) ("The Bureau understands and intends that any such requirement will preempt State laws to the extent such laws permit filing of foreclosure actions earlier than after the 120th day of delinquency.").

applying the 120-day limitation to the "first notice *or* filing required by applicable law for any judicial or non-judicial foreclosure process."[8]

What is the "First Notice or Filing?"

The "first notice or filing" of a foreclosure is defined broadly as "any document required to be filed with a court, entered into a land record, or provided to a borrower as a requirement for proceeding with a judicial or non-judicial foreclosure process."[9] Examples of a "first notice or filing" include "a foreclosure complaint, a notice of default, a notice of election or demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation."[10] The question of whether a document is the first notice or filing is determined by the foreclosure procedure under applicable state law.[11]

Under certain state laws, to begin a foreclosure the foreclosing party must give the borrower a notice sixty, ninety, or more days before accelerating a mortgage or before filing certain documents in land records or with a court.[12] In response to questions from the mortgage industry and consumer advocates about whether these state law notices must be delayed until after the borrower is 120 days delinquent, the CFPB amended the Official Bureau Interpretation before its effective date to include additional commentary.[13] The amended CFPB's Interpretation clarifies that such notices may be sent

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[8] Reg. X, 12 C.F.R. § 1024.41(f)(1) (effective Jan. 10, 2014; emphasis added).
[9] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(f)(1)-1 (effective Jan. 10, 2014).
[10] *Id.*
[11] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(f)-1 (effective Jan. 10, 2014).
[12] *See e.g.* Ariz. Rev. Stat. Ann. § 33-807(D) (power of sale may not be executed until 91st day after recording notice of sale); Cal. Civ. Code § 2924(a)(2),(3) (foreclosing entity must record notice of default and right to cure three months before notice of sale); Mass. Gen. Laws ch. 244§ 35(foreclosing entity must serve borrower with 90-day notice of right to cure before recording notice of sale, potentially 150 days before recording notice of sale if foreclosing party elects to refrain from a statutory loss mitigation review); N.Y. Real Prop. Acts. Law § 1304 (notice sent at least 90 days before filing foreclosure action); Nev. Rev. Stat. 107.080(c),(d) (power of sale may not be exercised until three months after recording notice of breach and election to sell). *See generally,* § 4.2.5 (discussing right to cure notices under state law) and § 4.3 (other notice requirements under state foreclosure laws).
[13] *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 60404 (Oct. 1, 2013).

in many instances during the 120-day delinquency period, by describing the following three categories of foreclosure proceedings:

- Where foreclosure procedure requires a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be filed with a court or other judicial body to commence the action or proceeding (e.g., a complaint, petition, order to docket, or notice of hearing).
- Where foreclosure procedure does not require an action or court proceeding, such as under a power of sale, a document is considered the first notice or filing if it is the earliest document required to be recorded or published to initiate the foreclosure process.
- Where foreclosure procedure does not require any court filing or proceeding, and also does not require any document to be recorded or published, a document is considered the first notice or filing if it is the earliest document that establishes, sets, or schedules a date for the foreclosure sale.[14]

Some state laws provide that any notice required to be sent to the borrower before a judicial foreclosure action is filed must be attached to the complaint, or compliance with such a requirement must be alleged and proven as a condition precedent to a foreclosure judgment.[15] However, the fact that a document or notice must later be filed with a court is not determinative of the first notice or filing for purposes of the rule. The Official Bureau Interpretation states that "a document provided to the borrower but not initially required to be filed, recorded, or published is not considered the first notice or filing on the sole basis that the document must later be included as an

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[14] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(f)-1 (effective Jan. 10, 2014).

[15] *See e.g.* Md. Code Ann. Real Prop. § 7-105.1(c)(1) (affidavit stating that notice of intent to foreclosure was sent at least 45 days earlier must be attached to Order to Docket or complaint in action to foreclose).

attachment accompanying another document that is required to be filed, recorded, or published to carry out a foreclosure."[16]

Thus, in judicial foreclosure states, the first notice or filing is likely to be the filing of the initial complaint with the court. In nonjudicial foreclosure states, the first notice or filing will, in most instances, be the document that first sets the date of the foreclosure sale that is recorded in the land records, published in a newspaper, or sent to the borrower. The 120 days from commencement of delinquency must have passed *before* these preforeclosure complaints or notices may be filed, given, published, or recorded.[17] In other words, the 120-day time period under Regulation X and the time period for making the first notice or filing under state law run consecutively and not concurrently.

Complete Loss Mitigation Application May Extend the 120-day Pre-Foreclosure Period.

Under certain circumstances the bar on initiation of foreclosure can extend beyond 120 days from the beginning of the delinquency. If a borrower submits a complete loss mitigation application at any time before the first filing or notice of foreclosure has been given or recorded (even after 120 days), the servicer must evaluate the application, provide a written decision, and allow for appeal rights before initiating foreclosure.[18] More specifically, the servicer may not make the first notice or filing for any judicial or non-judicial foreclosure process unless:

- The servicer has sent the borrower a notice under § 1024.41(c)(1)(ii)[19] stating that the borrower is not eligible for any loss mitigation option and the appeal process under § 1024.41(h)[20] is not applicable, the borrower has not requested an

[16] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(f)-1.iv (effective Jan. 10, 2014).
[17] Although a definition of "delinquency" is not provided for purposes of section 1024.41(f), the Commentary to Regulation X defines "delinquency" for purposes of another Regulation X provision. *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-1 and 39(b)-1 (effective Jan. 10, 2014). *See also* NCLC *eReports*, Jan. 2014, No. 5; NCLC *Foreclosures*, § 9.2.6.2 (4th ed. and 2013 Supp.).
[18] Reg. X, 12 C.F.R. § 1024.41(f)(2) (effective Jan. 10, 2014).
[19] *See* NCLC *Foreclosures*, § 9.2.8.2.3 (4th ed. and 2013 Supp.).
[20] *See* NCLC *Foreclosures*, § 9.2.8.5 (4th ed. and 2013 Supp.).

appeal within the applicable time period, or the borrower's appeal has been denied;

- The borrower rejects all loss mitigation options offered by the servicer; or
- The borrower fails to perform under an agreement on a loss mitigation option.[21]

For borrowers facing foreclosure, this provision raises two important questions. First, during the initial 120 days of delinquency or before the first notice of foreclosure under state law was given, did the borrower submit a complete loss mitigation application? Second, if the borrower submitted a complete application, did the servicer follow required steps to evaluate and give notice to the borrower of the outcome of the application? As to the first question, it should be kept in mind that Regulation X does not define the content of a "complete loss mitigation application," other than to reference the information a servicer requires based on guidelines set by investors, owners of loans, and other non-RESPA law.[22] The servicer may have erred in failing to treat as complete an application that qualified as complete under ascertainable non-RESPA guidelines that apply to the loan.

A borrower who believes that a servicer gave the first notice to commence foreclosure under state law without evaluating a complete application should invoke RESPA's error resolution procedures by sending the servicer a notice of error.[23] The borrower should request that the servicer correct any errors in its treatment of a complete application submitted before the first notice was given. The correction should include a proper evaluation of the borrower for all loss mitigation options that were available before the servicer erroneously commenced foreclosure. An evaluation should proceed in accordance

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[21] Reg. X, 12 C.F.R. § 1024.41(f)(2) (effective Jan. 10, 2014).
[22] *See* NCLC *Foreclosures*, § 9.2.6.2 (4th ed. and 2013 Supp.).
[23] Reg. X, 12 C.F.R. § 1024.35(b)(9) (effective Jan. 10, 2014; scope of error resolution procedures expressly includes "[m]aking the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j)."). *See* NCLC *Foreclosures*, § 9.2.2.2.2 (4th ed. and 2013 Supp.).

with the procedural requirements that should have been implemented before the foreclosure began.

If the servicer receives such an error notice at least seven days before a scheduled foreclosure sale, the servicer must comply with the requirements for responding to an error notice.[24] These include acknowledging receipt of the notice of error within five business days.[25] The servicer must then comply with the response options within thirty business days or prior to any foreclosure sale, whichever is earlier.[26] The CFPB's Official Bureau Interpretation indicates that the appropriate response for a servicer that receives an error notice under this provision at least seven days before a scheduled foreclosure sale is to cancel or postpone the sale and satisfy the response requirements during the full thirty-day period allowed under the rule.[27]

Obviously, a servicer who ignores the error notice and proceeds with a scheduled sale does so at its peril. If the borrower asserted a valid error involving the decision to proceed to the first notice of foreclosure, the completion of the foreclosure sale under these circumstances would expose the servicer to liability under multiple provisions of Regulation X.

Dual Tracking Restrictions after Initiation of Foreclosure

The servicer's obligation to evaluate borrowers for all available loss mitigation options does not end once the servicer has made the first notice or filing of the foreclosure process. After taking the first step in the foreclosure process, the servicer may still be required to follow up on verbal loss mitigation applications, attempt to finalize incomplete applications, and evaluate complete applications.

If a borrower who has never had a complete loss mitigation application evaluated submits a complete application that is received

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[24] Reg. X, 12 C.F.R. § 1024.35(f)(2) (effective Jan. 10, 2014). *See* NCLC *Foreclosures*, § 9.2.2.5 (4th ed. and 2013 Supp.).
[25] Reg. X, 12 C.F.R. § 1024.35(d) (effective Jan. 10, 2014). *See* NCLC *Foreclosures*, § 9.2.2.5.3 (4th ed. and 2013 Supp.).
[26] Reg. X, 12 C.F.R. § 1024.35(e)(3)(i)(B) (effective Jan. 10, 2014). *See* NCLC *Foreclosures*, § 9.2.2.5.3 (4th ed. and 2013 Supp.).
[27] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 35(e)(3)(i)(B)-1 (effective Jan. 10, 2014). *See also* NCLC *Foreclosures*, § 9.2.2.5.3 (4th ed. and 2013 Supp.).

by the servicer more than thirty-seven days before a scheduled foreclosure sale, the servicer must not conduct a sale or move for a foreclosure judgment or order of sale until the application has been evaluated and notice of decision given.[28] More specifically, § 1024.41(g) prohibits a servicer from taking these actions related to the sale of the property unless:

- The servicer has sent the borrower a notice under § 1024.41(c)(1)(ii)[29] stating that the borrower is not eligible for any loss mitigation option and the appeal process under § 1024.41(h)[30] is not applicable, the borrower has not requested an appeal within the applicable time period, or the borrower's appeal has been denied;

- The borrower rejects all loss mitigation options offered by the servicer; or

- The borrower fails to perform under an agreement on a loss mitigation option.[31]

The prohibition on a servicer moving for a foreclosure judgment or order of sale includes making a dispositive motion, such as a motion for default judgment, judgment on the pleadings, or summary judgment, which may directly result in a foreclosure judgment or order of sale.[32] A servicer that has made such a motion before receiving a complete loss mitigation application does not violate the rule if it takes reasonable steps to avoid a ruling on the motion or issuance of an order, until it completes the requirements under § 1024.41.[33] A servicer is responsible for promptly instructing foreclosure counsel it has retained, once it has received a complete loss mitigation application, not to take actions in violation of § 1024.41(g).[34] This may

[28] Reg. X, 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).
[29] *See* NCLC *Foreclosures*, § 9.2.8.2.3 (4th ed. and 2013 Supp.).
[30] *See* NCLC *Foreclosures*, § 9.2.8.5 (4th ed. and 2013 Supp.).
[31] Reg. X, 12 C.F.R. § 1024.41(f)(2) (effective Jan. 10, 2014).
[32] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(g)-1 (effective Jan. 10, 2014).
[33] *Id*.
[34] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(g)-3 (effective Jan. 10, 2014).

include instructing counsel to move for a continuance with respect to the deadline for filing a dispositive motion.[35]

Section 1024.41(g) does not prevent a servicer from proceeding with the foreclosure process, including any publication, arbitration, or mediation requirements under applicable law, when the first notice or filing for a foreclosure proceeding occurred before a servicer receives a complete loss mitigation application, so long as these actions do not result in the issuance of a foreclosure judgment, order of sale, or sale of the property.[36]

Critical Time Periods before Scheduled Foreclosure Sale

Although the servicer's obligation to review for loss mitigation continues after commencement of foreclosure, the Regulation X loss mitigation rules modify certain procedures in the later stages of foreclosure. As a foreclosure sale date approaches, the borrower's procedural protections against dual tracking become more limited. Incrementally, the limitations restrict appeal rights and cut back on notices that servicers must give regarding application status and evaluation outcomes. The diminished procedural protections have the greatest impact on borrowers in non-judicial foreclosure states where the prescribed time from the initial notice of foreclosure to the date of sale is relatively short.

Particularly under these fast-moving foreclosure regimes, advocates must pay careful attention to certain time frames that come into play under § 1024.41 after the initial notice of foreclosure has been given. The dual tracking and other protections under § 1024.41 that apply to the borrower based on the timeframe between receipt of a complete loss mitigation application and a scheduled foreclosure sale remain in effect even if a foreclosure sale is later scheduled or rescheduled.[37]

The important limitations on the borrower's procedural rights under the loss mitigation rules go into effect as follows:

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[35] *Id.*
[36] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(g)-2 (effective Jan. 10, 2014).
[37] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(3)-2 (effective Jan. 10, 2014).

(1) if the borrower submits a complete loss mitigation application less than ninety days before a scheduled foreclosure sale date, the servicer is no longer required to offer appeal rights to the borrower;[38]

(2) if the borrower submits a loss mitigation application less than forty-five days before a scheduled foreclosure sale date, the servicer is no longer required to give the borrower the five-day notice acknowledging receipt of a complete loss mitigation application or a notice describing actions needed to complete an incomplete application;[39]

(3) if the borrower submits a complete loss mitigation application less than thirty-seven days before a scheduled foreclosure sale date, the servicer is not required to evaluate and give a written notice of decision on all available loss mitigation options, or notice of denial of all loan modification options;[40]

(4) if the borrower submits a complete loss mitigation application less than thirty-seven days before a scheduled foreclosure sale date, the servicer may conduct a sale or move for a foreclosure judgment or order of sale without complying with the requirements under § 1024.41;[41]

(5) if the borrower sends a notice of error asserting violations of section 1024.41(f),(g), or (j), and the servicer receives the error notice seven days or less before a scheduled foreclosure sale, the servicer is not required to comply with the requirements for responding to an error notice.[42]

It is important to keep in mind that these time limits curtail only certain procedural rights of borrowers created under the Regulation X loss mitigation rules. To the extent that other RESPA requirements (such as error resolution), servicing guidelines, consent decrees, regulations promulgated by government insurers, or state law create greater procedural or substantive rights for borrowers, those rights are

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[38] Reg. X, 12 C.F.R. § 1024.41(h)(1) (effective Jan. 10, 2014).
[39] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i) (effective Jan. 10, 2014).
[40] Reg. X, 12 C.F.R. § 1024.41(c)(1), (d) (effective Jan. 10, 2014).
[41] Reg. X, 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).
[42] Reg. X, 12 C.F.R. § 1024.35(f)(2) (effective Jan. 10, 2014).

unaffected by the Regulation X loss mitigation rules.[43] This is true particularly for rights borrowers may have under non-RESPA law to assert claims accruing during the thirty-seven days before a scheduled foreclosure sale date.

Finally, the error resolution procedures under § 1024.35 remain an option even in later stages of foreclosure. As was the case for error notices regarding violation of the 120-day bar on initiation of foreclosure, discussed above, violations of the post-initiation dual tracking restrictions are specifically subject to the error resolution procedures.[44] The borrower may challenge violations of the pre-sale and prejudgment dual tracking restrictions by giving an error notice. If the servicer receives this notice of error more than seven days before a scheduled foreclosure sale, the servicer may have to postpone the sale in order to comply with the error notice response requirements.[45]

Deadline for Borrower's Response to Loss Mitigation Offer

As with other timing issues under § 1024.41, the deadline for a borrower to respond to a loss mitigation offer is determined by when the borrower's complete application is received by the servicer. If a complete loss mitigation application is received ninety days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than fourteen days after the offer is provided to the borrower.[46] If a complete loss mitigation application is received less than ninety days but more than thirty-seven days before a foreclosure sale, a servicer may require that

[43] Under the National Mortgage Settlement (NMS) and FHFA/GSE servicing guidelines, unlike the CFPB rules, the servicer must conduct an expedited loss mitigation evaluation if the borrower submits a complete application during the period 37 to 15 days before the foreclosure sale date. *See, e.g., Bank of America*, Appendix B § IV.B.7; Fannie Mae Single Family 2012 Servicing Guide § 107.01.03. The CFPB acknowledges that servicers must comply with these more extensive procedural protections where they apply. *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 10,833 (Feb. 14, 2013).

[44] Reg. X, 12 C.F.R. § 1024.35(b)(10) (effective Jan. 10, 2014; stating that covered errors include "[m]oving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

[45] Reg. X, 12 C.F.R. § 1024.35(f)(2) (effective Jan. 10, 2014).

[46] Reg. X, 12 C.F.R. § 1024.41(e)(1) (effective Jan. 10, 2014).

a borrower accept or reject an offer of a loss mitigation option no earlier than seven days after the offer is provided to the borrower.[47]

In general, the failure of a borrower to accept a loss mitigation option within a deadline established by the servicer in accordance with § 1024.41(e)(1) may be treated by the servicer as a rejection of the offer.[48] However, if a borrower has a right to appeal pursuant to § 1024.41(h) and requests an appeal, the borrower's deadline for accepting a loss mitigation option is extended until fourteen days after the servicer provides the appeal determination notice.[49] In addition, if a borrower does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments required by the plan within a deadline established pursuant to § 1024.41(e)(1), the deadline shall be extended for a reasonable period of time to permit the borrower to fulfill any remaining requirements for acceptance of the trial modification plan.[50]

Appeal Rights for Loan Modification Denials

The loss mitigation rule includes an appeal procedure that covers only servicers' decisions involving eligibility for loan modifications. Borrowers may appeal a servicer's decision to deny a borrower's application for a trial or permanent loan modification.[51] However, this right to appeal a loan modification denial applies only if the servicer receives a complete application from the borrower at least ninety days before a scheduled foreclosure sale or during the 120-day pre-foreclosure review period under § 1024.41(f) discussed below.[52] If no foreclosure sale has been scheduled as of the date a complete loss mitigation application is received by the servicer, the application is considered to be received more than ninety days before any foreclosure

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[47] *Id.*
[48] Reg. X, 12 C.F.R. § 1024.41(e)(2) (effective Jan. 10, 2014).
[49] Reg. X, 12 C.F.R. § 1024.41(e)(2)(iii) (effective Jan. 10, 2014).
[50] Reg. X, 12 C.F.R. § 1024.41(e)(2)(ii) (effective Jan. 10, 2014).
[51] Reg. X, 12 C.F.R. § 1024.41(h)(1) (effective Jan. 10, 2014).
[52] Reg. X, 12 C.F.R. § 1024.41(h)(1) (effective Jan. 10, 2014).

sale, thereby preserving the borrower's right to appeal a loan modification denial.[53]

The notice of denial, which is included as part of the notice sent to the borrower under § 1024.41(c)(1)(ii),[54] must inform the borrower of the right to request an appeal. The borrower must request an appeal within fourteen days after the servicer provides the notice of denial within the § 1024.41(c)(1)(ii) evaluation notice.[55]

The "appeal" is a review by "different personnel than those responsible for evaluating the borrower's complete loss mitigation application."[56] Supervisory personnel that are responsible for oversight of the personnel that conducted the initial evaluation of the borrower's application may perform the review, as long as the supervisory personnel were not directly involved in the initial evaluation.[57] The appeal process resembles the "escalation" procedures available under certain standard loan modification programs, such as HAMP.

The servicer must make an appeal determination and provide the borrower with a notice of the determination within thirty days of the borrower's appeal request.[58] A servicer's determination is not subject to any further appeal.[59] If the servicer offers a loss mitigation option as part of the appeal determination, it may require the borrower to accept or reject the offer no earlier than fourteen days after the appeal determination notice is provided to the borrower.[60] Even when the appeal decision is ultimately negative, the notice should give the borrower additional information that may aid in determining whether to challenge the servicer's actions on grounds other than the Regulation X requirements.

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[53] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(3)-1 (effective Jan. 10, 2014).
[54] This notice requirement is discussed in part 1 of this article.
[55] Reg. X, 12 C.F.R. § 1024.41(h)(2) (effective Jan. 10, 2014).
[56] Reg. X, 12 C.F.R. § 1024.41(h)(3) (effective Jan. 10, 2014).
[57] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(h)(3)-1 (effective Jan. 10, 2014).
[58] Reg. X, 12 C.F.R. § 1024.41(h)(4) (effective Jan. 10, 2014).
[59] *Id.*
[60] *Id.*

Exclusion for “Duplicative” Applications

The most significant limitation on the borrower’s procedural rights under the various components of the loss mitigation rule is that a servicer is not required to comply with § 1024.41 if a borrower has been evaluated previously by that servicer for loss mitigation options for the borrower’s mortgage loan account. Section 1024.41(i) provides that a servicer is “only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower’s mortgage loan account.”[61] This exclusion from the application of § 1024.41 will greatly undermine the effectiveness of the CFPB’s loss mitigation rule and present challenges for borrowers and their advocates.

One plausible interpretation of this brief provision is that the exclusion applies only to any follow-up or request related to an initial application, but not to a totally separate request coming at a different time and under different circumstances. The caption for the provision is “Duplicative requests.” The word “duplicative” is a derivative of “duplicate,” which is defined as “exactly like something else,” or as having “two corresponding or identical parts: *a duplicate* application form.”[62] This suggests that the provision would not be referring to a loss mitigation request being made years after an earlier request, as the two requests could not possibly be viewed as “duplicative.”

Moreover, in explaining the provision at the time of its issuance, the CFPB repeatedly referred it as dealing with “renewed applications.”[63] The word “renew” describes an attempt to “resume (an activity) after an interruption.”[64] Again, this is consistent with a request being made in close proximity to an earlier request and involving the same nucleus of facts. A request made five years after an earlier request does not involve a resumption after an interruption of the earlier request. Thus, the phrase “single complete loss mitigation application” in § 1024.41(i) must be referring to one application made during a particular time period, in order to exclude multiple

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[61] Reg. X, 12 C.F.R. § 1024.41(i) (effective Jan. 10, 2014).
[62] New Oxford American Dictionary, Oxford University Press, Third Ed., 2010.
[63] *See* Section-by-Section Analysis, § 1024.41(i), 78 Fed. Reg. 10,836 (Feb. 14, 2013).
[64] New Oxford American Dictionary, Oxford University Press, Third Ed., 2010.

overlapping and contemporaneous requests for loss mitigation. This interpretation is certainly most consistent with the consumer protection purposes of RESPA.

However, further explanation by the CFPB when the rule was promulgated suggests that the scope of the duplicative application exclusion is broad. During the rulemaking proceeding, the CFPB requested comment on whether there should be some time limitation for the exclusion, such that the procedures would apply again if a new application were submitted after a specific time period has passed since the initial evaluation.[65] Consumer organizations requested that the CFPB include at a minimum an exception for new applications submitted after a material change in circumstances. The CFPB refused to include a time or material change limitation in the final rule, noting that limiting the loss mitigation procedures to a "single complete loss mitigation application provides appropriate incentives for borrowers to submit all appropriate information in the application and allows servicers to dedicate resources to reviewing applications most capable of succeeding on loss mitigation options."[66]

The adoption of this ill-conceived exclusion may mean that a borrower could lose the few important rights provided under § 1024.41 by simply having requested years earlier a short, six-month forbearance agreement to deal with a temporary job layoff. If the borrower in this example submits a complete loss mitigation application, it will be evaluated for all applicable loss mitigation options under the CFPB's rules even though the borrower was requesting only a short-term forbearance agreement. Because the duplicative request exclusion is not limited to an application for a loan modification, this request for a forbearance would be the borrower's one and only opportunity (with that servicer) to access the consumer protections under the Regulation X loss mitigation rules.

Even if there were an economic crisis five or ten years later not unlike that which preceded the adoption of the HAMP program, any request by the borrower at that later time for loss mitigation assistance for that mortgage account would not be subject to § 1024.41.

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[65] *See* Section-by-Section Analysis, § 1024.41(i), 78 Fed. Reg. 10,836 (Feb. 14, 2013).
[66] *Id.*

The borrower would lose the regulation's notification requirements for incomplete applications and loan modification denials, evaluation and appeal rights, and protections from dual tracking. Of course, the servicer would still be required to comply with any investor or GSE guidelines, or any applicable non-RESPA legal requirements, that might provide similar rights.

When Does the Duplicative Application Exclusion *Not* Apply?

When application made to a different servicer.

One exception to the duplicative request exclusion applies when a loss mitigation application is made to a different servicer on the borrower's mortgage account, most often when there has been a transfer of servicing. A transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer.[67]

The CFPB's commentary does not address whether this transferee exception covers transfers between affiliates or that result through merger or acquisitions of servicers. Another section of Regulation X that deals with mortgage servicing transfers, § 1024.33(b)(2), provides that such transfers are not assignments, sales, or transfers of mortgage loan servicing for purposes of that section if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due. However, given the harshness of the duplicative request rule and the CFPB's failure to include language similar to § 1024.33(b)(2) in § 1024.41, any change in servicer, even if through merger or acquisition, should give the borrower another opportunity to have a loss mitigation application considered under the § 1024.41 procedures.

When borrower's application is not completed.

In addition, the duplicative request exclusion does not apply if the borrower's application is never completed. As discussed in Part I of this

[67] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(i)-1 (effective Jan. 10, 2014).

article,[68] a servicer may offer certain loss mitigation options based on an incomplete application without violating the duty to evaluate the borrower for all loss mitigation options. This may occur 1) when the servicer exercises reasonable diligence to obtain needed information and the application remains incomplete for a significant period of time, [69] and 2) when the servicer offers a borrower a short-term payment forbearance program based on an incomplete loss mitigation application.[70] If the borrower is offered a short-term payment forbearance or other loss mitigation option under these circumstances in response to an incomplete application, the duplicative request exclusion does not apply to a subsequent loss mitigation application submitted by the borrower to that servicer. For borrowers who wish to be considered only for a short-term payment forbearance program, it may be advisable to not complete the loss mitigation application so as to preserve rights under § 1024.41 for future applications.

In order to claim the benefit of the duplicative request exception, servicers may be eager to assert that a borrower's prior application was "complete," when in fact it was not. A servicer must not be permitted to take inconsistent positions in its treatment of a borrower's loss mitigation applications. For example, if the servicer deemed a prior application to be complete and the application was received 45 days or more before a foreclosure sale, the servicer must have given the borrower a written notice within five days of receipt of the application stating that it determined the application to be complete.[71]

When servicer does not properly evaluate borrower's application.

In addition, advocates may argue that the exclusion does not apply if the servicer never properly evaluated the borrower's initial loss

[68] *See* "New RESPA Loss Mitigation Procedures," NCLC eReports, Feb. 2014, No. 3.
[69] Reg. X, 12 C.F.R. § 1024.41(c)(2)(ii) (effective Jan. 10, 2014). The CFPB notes that any such evaluation and offer in this situation is "not subject to the requirements of § 1024.41 and shall not constitute an evaluation of a single complete loss mitigation application for purposes of § 1024.41(i)." *See* Section-by-Section Analysis, § 1024.41(c), 78 Fed. Reg. 10,829 (Feb. 14, 2013).
[70] Reg. X, 12 C.F.R. § 1024.41(c)(2)(iii) (effective Jan. 10, 2014).
[71] Reg. X, § 1024.41(b)(2)(A) (effective Jan. 10, 2014).

mitigation application. The precise wording of § 1024.41(i) suggests that it applies only if the servicer did in fact "comply with the requirements of this section" with respect to the initial application. Upon receipt of a "complete application," the servicer must evaluate the borrower for all available loss mitigation options within thirty days.[72] When the evaluation is complete, the servicer must give the borrower notice of specific reasons for denial of loan modification options as well as a description of appeal rights, if applicable.[73]

If the servicer cannot produce copies of required notices and documentation of a review for all available loss mitigation options, the servicer cannot claim the benefit of an exception that assumes it satisfied all requirements for evaluation of a complete loss mitigation application in the past. Because the one review of a complete application may be the only opportunity a borrower has for a review for all available loss mitigation options, the rules governing all aspects of how servicers process a complete application must be strictly construed.

Scope of Duplicative Application Exclusion

The exclusion under § 1024.41(i) is limited to the procedures under the § 1024.41 loss mitigation rule. The servicer must still comply with the early intervention requirements under § 1024.38,[74] and the continuity of contact requirements under § 1024.39,[75] even if the borrower has previously been evaluated for loss mitigation options. The servicer is also required to comply with any notice of error sent by the borrower under § 1024.35, or any request for information under § 1024.36, in relation to a subsequent loss mitigation application.[76]

Even when the exclusion does apply, the CFPB was careful to note that Regulation X § 1024.38(b)(2)(v) nevertheless applies, which requires servicers to implement policies and procedures to achieve the objective of "[p]roperly evaluat[ing] a borrower who submits an

[72] Reg. X, §§ 1024.41(c)(1)(i) and (ii) (effective Jan. 10, 2014).
[73] Reg. X, §§ 1024.41(d) (effective Jan. 10, 2014).
[74] *See* NCLC *Foreclosures*, § 9.2.6 (4th ed. and 2013 Supp.).
[75] *See* NCLC *Foreclosures*, § 9.2.7 (4th ed. and 2013 Supp.).
[76] *See* NCLC *Foreclosures*, § 9.2.2 (4th ed. and 2013 Supp.).

application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan and, where applicable, in accordance with the requirements of §1024.41."[77] In other words, a servicer must still review a borrower's subsequent application for any applicable loss mitigation options, but in doing so it need not comply with § 1024.41. [78]

For example, if the HAMP, GSE, or investor guidelines require a borrower's subsequent request to be considered based on a change in circumstances, nothing in § 1024.41 prohibits a servicer from complying with these requirements. In fact, § 1024.38(b)(2)(v) makes clear that a servicer must comply with these investor guidelines, and if § 1024.41 also happens to be applicable, then the servicer must comply with the procedural requirements of § 1024.41.

Duty to Comply Following Transfer of Servicing

The requirements for responding to a loss mitigation application may continue to apply even after the servicing of the borrower's loan has been transferred. Although a servicer is required to comply with § 1024.41 only for a single complete loss mitigation application for a borrower's mortgage loan,[79] a transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer.[80] Documents and information transferred from a transferor servicer to a transferee servicer may constitute a loss mitigation application and may require a transferee servicer to comply with the § 1024.41 loss mitigation requirements.[81]

In addition, if the borrower is in process of having an application evaluated when the mortgage is transferred, the transferee servicer must obtain any documents and information submitted by the

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[77] Reg. X, §§ 1024.38(b)(2)(v) (effective Jan. 10, 2014).
[78] *See* Section-by-Section Analysis, § 1024.41(i), 78 Fed. Reg. 10,836 (Feb. 14, 2013).
[79] Reg. X, 12 C.F.R. § 1024.41(i) (effective Jan. 10, 2014).
[80] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(i)-1 (effecive Jan. 10, 2014).
[81] *Id.*

borrower to the transferor servicer in connection with the loss mitigation application and should "continue the evaluation to the extent practicable."[82] For purposes of the time deadlines and other requirements in §§ 1024.41(e)(1), 1024.41(f), 1024.41(g), and 1024.41(h), a transferee servicer must consider documents and information received from a transferor servicer that amount to a complete loss mitigation application to have been received by the transferee servicer as of the date such documents and information were provided to the transferor servicer.[83]

Small Servicer and Other Exemptions from Coverage

Small servicers[84] are required to comply with the prohibition under § 1024.41(f) on starting the foreclosure process before the borrower is more than 120 days delinquent.[85] After the loan is more than 120 days delinquent, small servicers are also barred from making the first notice or filing required to start the foreclosure process, moving for a foreclosure judgment or order of sale, or conducting a foreclosure sale. But, unlike larger servicers, this requirement applies only if the borrower is performing pursuant to the terms of a loss mitigation agreement.[86]

Unlike the dual tracking requirements for larger servicers, small servicers after the 120 day period need not postpone various steps in the foreclosure process with the submission of a complete loss mitigation application, unless the borrower is offered and accepts a loss mitigation option, and performs under the terms of that loss

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[82] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(i)-2 (effective Jan. 10, 2014). *See also* Reg. X, 12 C.F.R. § 1024.38(b)(4) (effective Jan. 10, 2014).
[83] *Id.*
[84] A small servicer, as defined by Regulation Z § 1026.41(e)(4), is a servicer that "services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee." Reg. Z, 12 C.F.R. § 1026.41(e)(4)(ii)(A) (effective Jan. 10, 2014). The small servicer definition also includes "Housing Finance Agencies, as defined in 24 C.F.R. § 266.5," without regard to the number of mortgage loans serviced by such agencies. Reg. Z, 12 C.F.R. § 1026.41(e)(4)(ii)(B) (effective Jan. 10, 2014). *See also* NCLC *Foreclosures*, § 9.1.4.3 (4th ed. and 2013 Supp.). (discussing definition of small servicer).
[85] Reg. X, 12 C.F.R. § 1024.41(j) (effective Jan. 10, 2014).
[86] *Id.*

mitigation agreement. Small servicers are exempt from all other requirements in § 1024.41, including those related to various notices, reasonable diligence in obtaining documents and information, and the appeal procedure.[87]

A servicer with respect to a reverse mortgage loan transaction is also exempt from all of the § 1024.41 requirements.[88] In addition, the loss mitigation procedures under § 1024.41 only apply to a closed-end mortgage loan that is secured by property that is the debtor's principal residence.[89] There is no exemption from the Regulation X loss mitigation procedures when a borrower is in a bankruptcy proceeding.

[87] Reg. X, 12 C.F.R. § 1024.30(b)(1) (effective Jan. 10, 2014).

[88] Reg. X, 12 C.F.R. § 1024.30(b)(2) (effective Jan. 10, 2014). A reverse mortgage transaction is defined at 12 C.F.R. § 1026.33(a).

[89] Reg. X, 12 C.F.R. § 1024.30(c)(2) (effective Jan. 10, 2014) (making §§ 1024.39 through 1024.41 applicable only to a "mortgage loan that is secured by a property that is the borrower's principal residence'). Reg. X, 12 C.F.R. § 1024.31 excludes "open-end lines of credit (home equity plans)" from the definition of "mortgage loans."

Summaries of Recent Cases

Unpublished & Trial Court Decisions[90]

Leave to Amend after Dismissal to Allege *Glaski* Claim

Cotton v. Mortg. Elec. Registration Sys., 2014 WL 1394629 (Cal. Ct. App. Apr. 10, 2014): The trial court abuses its discretion when it sustains a demurrer without leave to amend when there is a reasonable probability that borrower can cure the defect by amendment. Borrowers can make this showing for the first time on appeal, and base it on a legal theory, or facts not in the record. Here, citing *Glaski v. Bank of America*, *Nat'l Ass'n*, 218 Cal. App. 4th 1079 (2013), borrower argued that he should be allowed to amend the complaint to allege that the foreclosure was wrongful because the deed of trust was never properly assigned according to the terms of the governing PSA. While acknowledging that a borrower cannot bring an action to determine *whether* the owner of the note has authorized its nominee to initiate the foreclosure process, the Court of Appeal agreed that this borrower has established a "reasonable possibility" that he can amend his complaint to state *a specific factual basis,* under *Gomes* and *Glaski*, alleging a wrongful foreclosure claim. Similarly, the court reversed the demurrer ruling to allow leave to amend to state an UCL claim predicated on the wrongful foreclosure claim.

Preliminary Injunction Based on Misrepresentation and Concealment Claims

DiRienzo v. OneWest Bank, FSB, 2014 WL 1387329 (Cal. Ct. App. Apr. 9, 2014): To receive a preliminary injunction in California state court, a borrower must show a likelihood of prevailing on the merits and that they will be more harmed if the injunction does *not* issue, than the servicer would be if the injunction *did* issue. "[T]he greater the [borrower's] showing on one, the less must be shown on the other to

[90] Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.

support an injunction." Courts have overwhelmingly found the potential loss of one's home to be irreparable harm. Here, borrower won an injunction at the trial court, based on the likelihood that she would prevail on misrepresentation and concealment claims. Specifically, the court found borrower likely to demonstrate that her servicer either misrepresented that she would qualify for a HAMP modification, or concealed that borrower's loan was too large to qualify for HAMP and that servicer maintained a policy of rejecting all principal reduction requests. Borrower claimed she relied on these representations, and on servicer's assurance that she could only qualify for HAMP if she became delinquent. Instead of leading to a modification, her delinquency only resulted in ruined credit, which led to servicer's denial of her modification application, and to her inability to find alternative financing. The court found borrower likely to show she relied on servicer's representations (and/or concealments) and that her reliance caused her injury. Further, the court found borrower's potential loss of her home to constitute irreparable harm, while servicer's potential loss was minimal: if the preliminary injunction is eventually lifted, servicer will be able to foreclose. The court therefore affirmed the preliminary injunction.

Majority & Dissent: Prejudice Requirement to Challenge Nonjudicial Foreclosure

Peng v. Chase Home Fin. LLC, 2014 WL 1373784 (Cal. Ct. App. Apr. 8, 2014): "[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal. App. 4th 256, 272 (2011). Here, servicer foreclosed even though it had sold borrower's promissory note to another entity years before. Despite this, the majority upheld the dismissal of the borrowers' wrongful foreclosure claim. Even assuming that the wrong servicer foreclosed, borrowers failed to show prejudice: they defaulted on their loan and it therefore made no difference *who* owned the note – the foreclosure would have occurred anyway.

Justice Rubin dissented, troubled by cases such as *Fontenot* holding that the "only party prejudiced by an illegitimate creditor-beneficiary's enforcement of the homeowner's debt, courts have reasoned, is the bona fide creditor-beneficiary, not the homeowner." Justice Rubin wondered:

> [W]hether the law would apply the same reasoning if we were dealing with debtors other than homeowners. I wonder how most of us would react if, for example, a third-party purporting to act for one's credit card company knocked on one's door, demanding we pay our credit card's monthly statement to the third party. Could we insist that the third party prove it owned our credit card debt? By the reasoning of *Fontenot* and similar cases, we could not because, after all, we owe the debt to someone, and the only truly aggrieved party if we paid the wrong party would, according to those cases, be our credit card company. I doubt anyone would stand for such a thing.

More broadly, the dissent took aim at the majority's failure to account for the ongoing mortgage crisis and the securitization practices that created it. California's nonjudicial foreclosure framework, Judge Rubin wrote, was created in, and for, a "bygone era:" "I believe we have reached a time to make clear a homeowner's right to challenge a foreclosure based on the foreclosing party's absence of authority from the beneficiary of the homeowner's deed of trust." Like the borrowers in *Glaski*, *Herrera*, *Barrionuevo*, *Sacchi*, *Ohlendorf*, and *Javaheri*, the borrowers should be allowed discovery and trial to ask which entity really owned their loan and had the authority to foreclose.

Federal Cases

Debtor May Recover Attorneys' Fees, as "Actual Damages," for Defending Creditor's Appeal of an Automatic Stay Violation

***In re* Schwartz-Tallard**, __ F.3d __, 2014 WL 1465698 (9th Cir. Apr. 16, 2014): In a bankruptcy case, creditors may move for relief from an automatic stay to continue their debt collection activities, such as foreclosure. If a creditor is found to have willfully violated the stay, however, a debtor may recover "actual damages, including costs and attorneys' fees" for any resulting injury. 11 U.S.C. § 362(k)(1). The Ninth Circuit has interpreted this provision to allow for the recovery of damages associated purely with injury incurred as a result of the stay violation. After the stay violation is remedied, "any fees the debtor incurs after that point *in pursuit* of a damage award would not be to compensate for 'actual damages' under § 362(k)(1)" (emphasis added). *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010). Here, servicer violated the stay by selling debtor's property at foreclosure. The bankruptcy court consequently awarded debtor punitive damages and attorneys' fees under § 362(k)(1). Servicer appealed the ruling and the award, but also re-conveyed the property to debtor, "remedying" the stay violation. After prevailing in the appeal, debtor moved for attorneys' fees incurred in litigating the appeal. The majority distinguished this situation from *Sternberg* because here, debtor *defended* an appeal of both the stay violation *ruling*, and the damages associated with that ruling. The appeal, in other words, put the "remedy" of the stay-violation in jeopardy. In *Sternberg*, conversely, debtor brought an adversary proceeding against his creditor *in pursuit* of damages after the violation had been permanently remedied by the bankruptcy court. The Ninth Circuit panel decided this debtor sought attorneys' fees "relate[d] to her 'enforcing the automatic stay and remedying the stay violation,'" rather than seeking "independent" damages through an adversary proceeding as the debtor did in *Sternberg*. Accordingly, the court affirmed the BAP's reversal of the bankruptcy court's ruling disallowing attorneys' fees under § 362(k)(1). The debtor was allowed to recover attorneys' fees as "actual damages."

The dissent argued that *Sternberg* precluded the fee award. Rather than focusing on *Sternberg's* sword/shield analysis as the majority did, the dissent claimed that *Sternberg* focused more on the relationship of debtor's injury to the stay violation, and that a stay is intended solely to "effect an immediate freeze of the status quo." Here, the parties were returned to the status quo as soon as servicer re-conveyed the property to debtor. Once the foreclosure was undone, the stay violation was remedied. Any injury caused *after* that date (which includes the appeal) would be unassociated with the stay violation itself, and therefore not recoverable under § 362(k)(1) and *Sternberg*.

Prompt Correction of Automatic Stay Violation Precludes a Finding of Willfulness

***In re* Duarte**, 2014 WL 1466451 (B.A.P. 9th Cir. Apr. 15, 2014): Filing a bankruptcy petition automatically stays all debt-related activity against the debtor, including foreclosure activity, until the case is dismissed or discharged. Debtors may recover damages for injury incurred by a creditor's willful violation of the automatic stay. Further, even a non-willful violation can be considered "willful," for damages purposes, if the creditor fails to remedy their violation after receiving notice of that violation. Here, the trustee of debtor's mortgage loan violated the automatic stay by foreclosing on debtor's home. The court found, however, that trustee's stay violation was not willful. Even though the sale itself was intentional, the trustee had very little (if any) notice of the bankruptcy and stay. Debtor had faxed the notice to servicer only 18 minutes before the scheduled sale. Without actual or effective notice of debtor's bankruptcy filing, then, the trustee did not willfully violate the stay. Plus, the servicer remedied the stay violation by rescinding the sale within an hour of its completion. Finally, even if trustee *had* received adequate notice before the sale, debtor failed to provide evidence of any damages incurred between the time of sale and the rescission – a total of 49 minutes. The BAP affirmed the bankruptcy court's denial of debtor's motion for damages for violation of the automatic stay.

SPOC Shuffling & Unavailability; Dual Tracking Claim Based on Appeal; Negligent Misrepresentation Claim Cannot Involve Future Promises

McLaughlin v. Aurora Loan Servs., 2014 WL 1705832 (C.D. Cal. Apr. 28, 2014): HBOR requires servicers to provide borrowers with a single point of contact, or "SPOC," during the loan modification process. SPOCs may be an individual or a "team" of people and have several responsibilities, including: facilitating the loan modification process and document collection, possessing current information on the borrower's loan and application, and having the authority to take action, like stopping a sale. Here, borrower requested and initially received a SPOC, but was shuffled between many different representatives, including a SPOC who doubled as servicer's attorney. Borrower left unreturned voicemail messages, sent unreturned emails and faxes, and attempted to call incorrectly provided phone numbers. Many of these failed communications occurred during borrower's appeal period, a "critical time" in the loan modification process. In denying servicer's motion to dismiss borrower's SPOC claim, the court pointed to the failure of all of her assigned SPOCs to "timely communicate . . . adequate and accurate information to [borrower]." The court rejected servicer's argument that participating in "active litigation" somehow excused servicer's behavior.

Dual tracking prevents a servicer from "record[ing]" an NOD or "conduct[ing]" a foreclosure sale while a borrower's modification application is pending. Further, if a servicer denies borrower's application, the servicer may not record an NOD or conduct a sale until the borrower's appeal period has passed, or until the servicer gives borrower a written denial of borrower's appeal. This borrower alleged two bases for her dual tracking claim. First, servicer *scheduled* a trustee's sale and *posted* a notice of sale to borrower's property while her modification application was pending. An NTS was never *recorded*, however, and the court found that scheduling and posting a notice does not violate HBOR's dual tracking statute.[91] Second, after borrower appealed her application's denial, servicer *recorded* an NTS without providing borrower with a written determination of that appeal. Servicer argued borrower's appeal was ineffective because she faxed

[91] Note that this ruling directly conflicts with another recent Central District case, *Copeland v. Ocwen Loan Servicing*, 2014 WL 304976 (C.D. Cal. Jan. 3, 2014), summarized in our February Newsletter. The *Copeland* court read HBOR's dual tracking statute to prohibit *serving* an NTS, not just recording one. Holding otherwise, the court reasoned, would allow servicers to "circumvent the ban on dual tracking."

her information rather than emailing or mailing it in accordance with servicer's instructions. The court rejected this attempt to sidestep dual tracking liability, pointing to servicer's egregious SPOC violations. Borrower attempted to contact several representatives about her appeal and no one returned her calls or emails until the appeal period had expired. A servicer should not be allowed to violate the SPOC rule and then argue that borrower failed to comply with appeal instructions that were never effectively communicated. Borrower's second dual tracking claim (based on her appeal) survived servicer's motion to dismiss.

To state a valid negligent misrepresentation claim, a borrower must plead, *inter alia*, that her servicer misrepresented a "past or existing material fact." Promises or statements about future or possible events cannot form the basis for a negligent misrepresentation claim. This court acknowledged some authority for the proposition that "promises and predictions may sometimes be treated as implying [existing] knowledge that makes the predictions possible and thus serve as a basis for a misrepresentation claim." It decided however, that this was a minority view and rejected borrower's argument that her servicer had negligently misrepresented that it *would* refrain from foreclosure when her application was pending and that she *would* qualify for a modification. The court granted the MTD borrower's negligent misrepresentation claim.

NBA Preemption is *Not* Analogous to HOLA Preemption and Does *Not* Preempt HBOR

McFarland v. JP Morgan Chase Bank, 2014 WL 1705968 (C.D. Cal. Apr. 28, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) regulations govern lending and servicing practices of federal savings banks. These rules "occupy the field," preempting any state law touching on lending and servicing. National banks, however, are regulated by the National Banking Act (NBA) and Office of the Comptroller of the Currency (OCC). Under these rules, state laws are subject to the less-rigorous conflict preemption. Here, borrowers brought state-law HBOR claims against their servicer Chase, a national bank. The court rejected servicer's suggestion that the HOLA analysis is analogous to the NBA and should be used as an equivalent substitute. Field and conflict preemption are *not* equivalent or interchangeable, so the court applied the NBA analysis. Relying on precedent that analyzed former CC 2923.5, this court found that HBOR is not preempted by the NBA and denied servicer's MTD on preemption grounds. Notably, the only two cases servicer cited for the proposition that the NBA *does* preempt former CC 2923.5 both arrived at that conclusion by applying the HOLA preemption analysis.

CC 2924.17 Claim: Robosigning Allegations Are Not Required & a Material Violation is Eligible for Injunctive Relief, Even If Servicer *Could* Have Recorded NOD Based on Accurate Default

Rothman v. US Bank Nat'l Ass'n, 2014 WL 1648619 (N.D. Cal. Apr. 24, 2014): 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 a CC 2924.17(a) violation: servicer recorded an NOD that misstated the total arrearage based on inappropriate fees and charges. The court disagreed with servicer that a robosigning allegation is a necessary part of a CC 2924.17 claim; borrower clearly relied on the first section of the statute, not its robosigning section. The court further decided that the alleged material violation of CC 2924.17, if true, calls for injunctive relief under HBOR's enforcement statute, whether or not servicer *could* have recorded the NOD anyway, based on accurate default information and not on the allegedly improper escrow fees and charge. Borrower's CC 2924.17 claim survived the MTD.

Wrongful Foreclosure Injunctive Relief Claim: "More Time" vs. Foreclosure Validity; ECOA: Borrower May be Delinquent to Assert Purely Time-Based Violation, Not Adverse Action Violation

Vasquez v. Bank of Am., N.A., 2014 WL 1614764 (N.D. Cal. Apr. 22, 2014):[92] There are two types of pre-sale "wrongful foreclosure" claims: procedural claims that may "entitle a homeowner to more time in her home," and substantive claims that attack the very validity of an anticipated sale. The former can be remedied with injunctive relief, preventing a sale until the servicer complies with the procedural requirement at issue. Injunctive relief is unavailable, however, for the latter claim. California courts have consistently held there is no express or implied private right of action applied to the substantive aspects of the foreclosure statutes. Equitable relief may be available, but only post-sale. Here, borrower attempted to re-plead her substantively-based, pre-sale wrongful foreclosure claim, asserting that servicer lacks authority to foreclose. Because servicers in California need not prove anything beyond the procedural aspects of the nonjudicial foreclosure process, the court dismissed borrower's pre-sale wrongful foreclosure claim. A *procedural* claim, like an NOD notice issue, may have bought borrower more time in her home.

The Equal Credit Opportunity Act (ECOA) requires lenders to provide credit applicants with a determination within 30 days of receiving applicant's request. The lender must also explain reasons for any adverse actions against the applicant. This second requirement only applies if applicant is *not* delinquent or in default. Here, borrower claimed her servicer failed to provide her with a written determination within 30 days of her request. She did not plead anything related to the adverse action part of the statute. She therefore did not have to demonstrate that she was not delinquent or in default. Her 30-day violation claim survived servicer's MTD.

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[92] This court previously ruled on a MTD, originally summarized in the Collaborative's December 2013 Newsletter as *Vasquez v. Bank of Am., N.A.*, 2013 WL 6001924 (N.D. Cal. Nov. 12, 2013).

Negligence: Establishing a Duty of Care

Kramer v. Bank of Am., N.A., 2014 WL 1577671 (E.D. Cal. Apr. 17, 2014): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Here, borrower claimed servicer mishandled borrower's modification attempts, telling him he was eligible for a modification and then ultimately denying his application because his loan was too large. This court held that, broadly, "renegotiation and loan modification are traditional money lending activities" that do not trigger a duty of care. It provided a more detailed and fairly bright-line rule, however (at least compared to other courts' statements on this issue): "The Court recognizes a duty of care during the loan modification process upon a showing of either a promise that a modification would be granted or the successful completion of a trial period." Because the borrower pled neither here, the court dismissed his negligence claim.

Pleading Performance under TPP

Gopar v. Nationstar Mortg. LLC, 2014 WL 1600324 (S.D. Cal. Apr. 17, 2014): Breach of contract claims require: (1) the existence of a contract; (2) borrower's performance or excused non-performance; (3) servicer's breach; and (4) borrower's resultant damages. Here, servicer argued that borrower's TPP-based contract claim failed because borrower could not meet the second requirement. Borrower admitted he failed to make the trial payments in his initial compliant: "[borrower] has not made recent payments on the property." But the court found this statement ambiguous as to whether borrower made his *trial* payments at issue in his breach claim (rather than referring to payments due during the pending litigation, for example). This was especially true in light of borrower's instance elsewhere in this complaint that he "has not failed to make Trial Period Plan Payments and is current on said payments," and "[i]n fact[,] . . . has performed in excess of the requirements of the Trial Period Plan Agreement."

Accordingly, the court denied to motion to dismiss the breach of contract, breach of good faith, promissory estoppel, and fraud claims.

Dual Tracking: Borrower's Submission of Application Seven Days Pre-Sale, Remedies Available Post-Sale but Before Recording of Trustee's Deed; Tender

Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005 (N.D. Cal. Apr. 16, 2014): To successfully plead a dual tracking claim, a borrower must demonstrate that he submitted a complete loan modification application "*offered by*, or through, the borrower's [servicer]" (emphasis added). Unlike the National Mortgage Settlement or CFPB servicing rules, the HBOR dual tracking statute does not specify *when* a borrower must submit his application to receive dual tracking protection. Instead, it simply prevents servicers from moving forward with foreclosure while that application is "pending." Here, borrower followed application submission instructions outlined on servicer's website and emailed his application to servicer seven days before the scheduled foreclosure sale. Servicer nevertheless conducted the sale without providing borrower a written denial. Servicer argued that it maintained an internal policy of not offering loan modifications to borrowers who submit their applications less than seven days pre-sale, so no modification was technically "*offered by*" servicer in this case, rendering the dual tracking statute inapposite. The court disagreed, citing servicer's "offer" of a modification through its website, and borrower's submission of the application, provided by that website, before a foreclosure sale. The court therefore denied servicer's motion to dismiss borrower's dual tracking claim.

HBOR's dual tracking enforcement statute provides for different types of relief, dictated by the recording of the trustee's deed. If a trustee's deed upon sale has *not* been recorded, a borrower may halt a sale with an injunction. After the deed is recorded, a borrower may seek actual and statutory damages. This court had to consider the ill-defined hinterland between the actual foreclosure sale and the recording of the trustee's deed. Here, the sale had occurred, but nothing had been recorded. Servicer argued that because it had not recorded a trustee's deed, borrower could not recover monetary damages. The court found that, "despite the literal language of [the enforcement statute], [servicer's] failure to record a trustee's deed upon sale may not necessarily preclude recovery of monetary damages." As the court did in *Copeland v. Ocwen Loan Servicing, LLC*,[93] this court noted that holding otherwise would allow servicers to elude dual tracking liability by simply refusing to record foreclosure documents. The court seemed more puzzled by the possibility of injunctive relief *post*-sale, only addressing servicer's argument that tender is required for injunctive relief. Because relief for HBOR violations do not require tender, the court quickly rejected this argument. It failed however, to address whether an injunction can issue *after* a sale is conducted. Without any clear answer on what type of relief is available, the court noted that borrower "is entitled to *some* remedy" (emphasis added), and dismissed servicer's motion to dismiss.

To set aside a foreclosure sale, a borrower must generally "tender" (offer and be able to pay) the amount due on their loan. Tender may be excused, however, where it would be inequitable. Here, the foreclosure sale has already occurred, so the servicer encouraged the court to interpret borrower's dual tracking claim for injunctive relief as a wrongful foreclosure claim to set aside the sale. The court seems to agree with this premise, but excused the tender requirement anyway, as inequitable. First, whether an injunction or damages are available in this context remains unclear (see above) and, depending on the outcome of that inquiry, a wrongful foreclosure claim for injunctive relief may be borrower's only remedy. In that case, it would be unfair to require tender. Second, and similarly, it would be unfair to require full tender in cases where a servicer refuses to record a trustee's deed upon sale (preventing the recovery of monetary damages) because borrower would effectively be without any remedy. The court denied servicer's request to dismiss for failure to tender.

[93] Summarized in our February Newsletter.

Breach of Contract: Borrower's Belief That Servicer's Letter Describing Short Sale Program was an Offer is "Objectively Reasonable"

Brooksbank v. Private Capital Group, LLC, 2014 WL 1493939 (N.D. Cal. Apr. 16, 2014): To assert a breach of contract claim, borrowers must plead the existence of a contract, which can come down to whether the parties exhibited "mutual assent." Offer and acceptance are the hallmarks of mutual assent, but discerning what constitutes an *actual* offer, rather than just a preliminary negotiation step, is sometimes difficult. It depends on "all the surrounding circumstances" but a key factor is "whether the individual to whom the communication was made had reason to believe that it was intended as an offer." In this case, borrower expressed an interest in pursuing a short sale and servicer responded with a letter describing all the steps borrower must take to qualify for servicer's short sale plan. The letter included these phrases: "[borrower] may qualify for a short sale," "please contact us . . . or sign and return this form to us . . . and we will call you to discuss the program," and "take advantage of [this] short sale offer." The letter also specified terms: borrower's monthly payment under the short sale plan and the percentage she would receive from any sale. Borrower complied with all listed requirements but servicer foreclosed anyway. The court pointed to the letter's conflicting phraseology, concluding that whether the letter constituted an "offer" was ambiguous, but that it was "objectively reasonable" for borrower to *believe* it was an offer. Facts may emerge at a later stage that effect the court's final determination of the existence of a contract, but borrower adequately pled the contract's existence at this stage. Having also fulfilled the other elements of a contract claim (performance, breach, damages), borrower's contract claim survived the MTD.

Intentional & Negligent Misrepresentation; Promissory Estoppel

Izsak v. Wells Fargo Bank, N.A., 2014 WL 1478711 (N.D. Cal. Apr. 14, 2014): To bring intentional and negligent misrepresentation claims, borrowers must allege, *inter alia*, servicer's misrepresentation and damages. Here, borrower claimed servicer assured borrower that it would not foreclose or report late payments to credit agencies while reviewing borrower's loan modification application. While borrower's application was pending, servicer initiated foreclosure and reported borrower's unpaid payments to credit agencies. The court found borrower to have adequately pled the misrepresentation piece. The court also found that borrower sufficiently stated damages: inappropriate late fees, attorney's fees, and credit damage. That borrower was also in default did not preclude a finding of damages, which, in this case, "[were] independent of [borrower's] obligation to meet his mortgage payments." The court denied servicer's motion to dismiss borrower's misrepresentation claims.

Promissory estoppel claims require a clear and unambiguous promise, reasonable and foreseeable reliance, and damages. Here, servicer's assurance that it would refrain from foreclosure and not report borrower to credit reporting agencies during the modification process constituted clear, unambiguous promises. Borrower reasonably and foreseeably relied on those promises by becoming delinquent and applying for a modification. Borrower's injuries included excessive fees, a negative credit rating, and severe emotional distress. Having found a viable PE claim, the court denied servicer's motion to dismiss.

"Security First" Rule; Application of Payments under Promissory Note; Good Faith and Fair Dealing Claim; Duty of Care during Modification Process

Lanini v. JP Morgan Chase Bank, 2014 WL 1347365 (E.D. Cal. Apr. 4, 2014): Under the "security first" aspect of California's one action rule, a secured creditor must first proceed against the security before enforcing the underlying debt. Here, servicer retained over $6,000 in borrowers' impound account and refused to return it. Servicer did not initiate foreclosure, however, until nine months later. Because servicer did not first proceed against the deed of trust, borrowers stated a valid claim under the security first rule. In turn, borrowers also stated a valid UCL unlawful prong claim predicated on the violation of the security first rule.

Breach of contract claims require, *inter alia*, a showing of servicer's breach. In this case, borrowers' promissory note specified how payments were to be applied to the principal and interest due under the note. Because servicer held borrowers' payments in an impound account instead of applying them to the note, borrowers adequately pled breach of contract.

"There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." Here, borrowers adequately pled that servicer's decision to offer them a TPP, knowing borrowers could not qualify for a permanent modification because their property was too valuable to meet HAMP requirements, caused borrowers' default. Borrowers were offered their TPP when they were current on their loan, and the TPP reduced their payments. Once they were notified their permanent modification was denied, the TPP had put them behind on the mortgage. Servicer's actions, then, ultimately impaired borrowers' ability to perform on, *and benefit from*, their loan agreement. Borrower's good faith and fair dealing claim survived the MTD.

Negligence claims require a duty of care owed from servicer to borrower. Generally, when the activities are "sufficiently entwined with money lending so as to be within the scope of typical money lending activities," there is no duty of care. Here, borrowers allege servicer had a duty to properly apply their loan payments and to maintain accurate records. The court found these activities "sufficiently entwined with money lending" and that they failed to give rise to a duty of care. However, the court allowed borrowers leave to amend to argue that servicer breached a duty of care by offering borrowers a HAMP TPP *knowing* they could not qualify for a permanent modification.

Debt Collection: Invasion of Privacy, Rosenthal Claims; Negligence vs. Negligent Training & Supervision Claims

Inzerillo v. Green Tree Servicing, LLC, 2014 WL 1347175 (N.D. Cal. Apr. 3, 2014): California invasion of privacy claims have four possible and independent prongs, including intrusion upon seclusion. After showing an objectively reasonable expectation of privacy, borrowers must also show: 1) servicer's "intrusion into a private place, conversation, or matter; 2) in a manner highly offensive to a reasonable person." In the debt collection context, a qualified economic privilege can operate alongside intrusion upon seclusion claims. Broadly, "the right of a debtor to privacy is subject to the right of a creditor to take reasonable steps to collect the debt," though the privilege does not apply to "outrageous and unreasonable" means of debt collection. Here, borrowers alleged horrendous servicer conduct, including calling borrowers six times a day (at all hours), contacting borrowers' parents, contacting borrowers' tenants, and threatening to change locks and to send appraisers to the house unannounced. Perhaps most egregiously, a servicer representative promised borrowers that she would "personally . . . see that this property gets foreclosed on" and that borrowers would never be approved for a short sale. These allegations sufficiently state an intrusion upon seclusion claim, and because the debt collection attempts were "knowingly and intentionally" made, damages are available. Servicer's economic privilege defense was unavailing at this stage. Whether servicer's conduct was "beyond . . . the bounds of decency" is a factual determination. Borrower's invasion of privacy claim survived.

California's Rosenthal Act prohibits "harassment, threats . . . [and] profane language" in debt collection activities. Here, servicer brought a motion for a more definite statement of borrower's Rosenthal claim, asserting that servicer should not have "to guess" at which aspects of the Rosenthal Act borrower cites as violations. The court disagreed that a more definite statement was needed: "it is not necessary to guess when [servicer] can use discovery 'to learn the specifics of the claims being asserted.'" Borrowers' allegations (see privacy claim above) have sufficiently met the minimal pleading standards and alleged a Rosenthal claim. "Specifics" may be unearthed in discovery.

Negligence claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. An exception applies, however, if a lender's activities extend beyond this relationship. Here, the court simply stated that servicers have "no legal duty to engage in fair, honest, and respectful practices in the collection of consumer debts" and that borrowers' allegations only show that their servicer was attempting to collect their mortgage debt, even if the conduct was atrocious.

Employers may be held liable for negligent hiring, retaining, or supervising "unfit" employees. Rather than a duty of care, this type of negligence claim requires borrowers to show servicer *knew* that the employee in question was "a person who could not be trusted to act properly without being supervised." Here, borrowers alleged servicer knew, or should have known, that its employees would attempt to collect debt in violation of the Rosenthal Act because the servicer provided the very training necessary to collect those debts. At the pleading stage, the court agreed that servicer could be liable for negligently training its employees in this manner.

Wrongful Foreclosure: Specific Factual Basis and Prejudice Requirements; Rejection of *Glaski*

Rubio v. US Bank, N.A., 2014 WL 1318631 (N.D. Cal. Apr. 1, 2014): Under *Gomes*, a borrower may challenge a foreclosing entity's "authority to foreclose" only if the complaint provides a specific factual basis. Here, borrower did not "clearly allege" a factual basis, but he did allege that servicer *had no authority* to foreclose, rather than "seek[ing] to determine *whether* [servicer is] authorized to foreclose." The court decided "not [to] apply *Gomes* to preclude [borrower] from challenging [servicer's] standing to foreclose."

To challenge a foreclosure sale successfully in California, a borrower must allege that servicer's wrongdoing—either its failure to comply with the procedural requirements of foreclosure, or it lacked authority to foreclose—somehow prejudiced the borrower. When a foreclosure sale has not yet occurred, courts have found the threat of foreclosure sufficient prejudice at the pleading stage. Because foreclosure has not occurred here, the court found the threat of foreclosure sufficient to satisfy the prejudice requirement.

However, the court ultimately dismissed the wrongful foreclosure claim because it was based on alleged noncompliance with the Pooling and Servicing Agreement, and the court declined to follow *Glaski*. "Every court in this district that has evaluated *Glaski* has found it unpersuasive." The court followed these cases and concluded that borrower lacked standing to challenge noncompliance with the PSA in the securitization process, unless he was a party to the PSA or a third party beneficiary, which he was not.

Barroso's **Permanent Mod Logic Applied to TPP; Tender**

Moya v. CitiMortgage, Inc., 2014 WL 1344677 (S.D. Cal. Mar. 28, 2014): Contract claims require the existence of a valid contract. Contracts involving real property must be memorialized in writing and signed by the party against whom the breach is alleged to comply with the statute of frauds. Here, borrower pled servicer breached her trial period plan (TPP) by foreclosing while she was plan-compliant. The court applied the principles from *Barroso*,[94] which dealt with a *permanent* modification agreement, to borrower's TPP-based claim. Here, and in *Barroso*, the operative agreements were unsigned by servicer but borrowers' monthly plan payments were nevertheless accepted by those servicers. The court found no real difference between the TPP at issue here and the permanent modification at issue in *Barroso*. The court therefore found a valid contract because both borrower and servicer acted as if a contract existed. Finding otherwise

[94] *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001 (2012) is summarized in our May 2013 Newsletter.

would allow the servicer unilateral control over contract formation because they could simply refuse to sign the agreement. The court rejected servicer's motion to dismiss borrower's contract claim.

Borrowers bringing wrongful foreclosure claims must tender the amount due on their loan. There are several exceptions to this general rule including where it would be inequitable. Here, borrower argued she should not have to tender because she seeks to recover *damages* with her wrongful foreclosure claim, rather than to set aside the sale. The court rejected this argument as unsupported by any authority, but still excused tender. Not only did servicer accept borrower's TPP payments and foreclose in violation of that agreement, but it even sent borrower a letter informing her of loss mitigation opportunities *after* foreclosure. In this circumstance, it would be unfair to require borrower to tender where she has stated a valid wrongful foreclosure claim. Servicer's motion to dismiss for failure to tender was denied.

CC 2923.5 Claim Unavailable if Servicer Rescinds NOD and No Sale Pending; Promissory Estoppel: Written DOT Controls Verbal Forbearance Agreement

Crane v. Wells Fargo, 2014 WL 1285177 (N.D. Cal. Mar. 24, 2014): Servicers cannot record a NOD without first contacting (or making a diligent attempt to contact) borrowers, to discuss their financial situation and possible foreclosure alternatives. Here, the NOD was recorded pre-HBOR, so the pre-HBOR version of this pre-NOD outreach statute was in effect. Under that statute, a borrower's only available remedy was an injunction to prevent a sale and force servicer to comply with the outreach requirements. (Under the HBOR version, borrowers may recover post-sale damages.) Servicer rescinded the NOD at issue and there is no sale pending. Borrower then, has no available remedy and the court dismissed her claim.

Promissory estoppel claims require a clear and unambiguous promise, borrower's reasonable and foreseeable reliance on that promise, and damages caused by that reliance. Here, borrower claimed her servicer verbally agreed to a forbearance, wherein borrower would make reduced monthly mortgage payments but she would nevertheless "be deemed current and in good standing at the end of the [forbearance]." At the conclusion of the forbearance, servicer of course demanded the arrearage that had accrued. The court agreed with servicer that any verbal forbearance was controlled by the forbearance language in the original DOT, which stated explicitly that a forbearance agreement was "not a waiver of [servicer's] right to collect all amounts due." Borrower was *really* describing an alleged verbal modification agreement, not a forbearance. And in that case, the agreement had to be in writing to satisfy the statute of frauds. But the court held that the possibility of a verbal modification is "irrelevant" because the DOT language about a forbearance agreement controls this situation. Borrower's PE claim fails on the other elements as well. Her reliance on, and belief in, a verbal modification was unreasonable because modifications must be in writing to be enforceable. She was not injured, but rather benefited from the forbearance agreement because she made reduced payments for a lengthy period and postponed foreclosure during that time. The court granted servicer's motion to dismiss borrower's PE claim.

"Debt Collector," "Collection," & "Debt" under FDCPA & Rosenthal Act

Lopez v. AM Solutions, LLC, 2014 WL 1272773 (C.D. Cal. Mar. 3, 2014): Under the FDCPA, a "debt collector" is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts." A servicer that purchases a loan *prior* to default may not be a "debt collector" under this definition. However, "[t]he FDCPA 'treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee.'" Here, servicer purchased the servicing rights to borrower's loan *after* borrowers were already in default. It knew then, that it would be attempting to collect borrower's debt, so collection debt was its "principal purpose," applied to this loan.

The court determined servicer to be a "debt collector" under the FDCPA.

The FDCPA regulates communications "in connection with the collection of [a] debt." The "absence [or presence, presumably] of a demand for payment is just one of several factors that come into play in the commonsense inquiry" determining if an activity constitutes debt collection. Here, servicer left a voicemail for borrowers promising "to give [borrowers] a little bit of time to get an arrears payment put together so . . . it's not like [borrowers] are going to have to send in the check the following day." Servicer also sent borrowers a letter stating that it was "still willing to modify [borrower's] loan under any one of the three options we discussed." The court found it "reasonable to assume" that the options referred to "entailed some method of making payments on the outstanding [HELOC] debt." The voicemail and letter, then, could be construed as debt collection attempts, even without an explicit demand for payment.

The FDCPA provides for actual and statutory damages, which can be recovered independently from each other. Here, borrower's complaint included a relatively vague demand for actual damages. The court found this lack of detail not fatal since he may be entitled to statutory damages regardless of his ability to show actual damages. Thus the court declined to dismiss borrower's FDCPA claim.

The Rosenthal Act defines "debt collector" more broadly than the FDCPA: *any entity* who, "in the ordinary course of business, regularly, on behalf of himself for herself or others, engages in debt collection." "Debt collector," then, includes creditors collecting their own debts, as servicer was doing in this case. The Rosenthal definition of "debt" refers to "consumer credit transactions" between "a natural person and another person in which property, services or money is acquired on credit . . . primarily for personal, family, or household purposes." The court determined that borrower's HELOC loan at issue here meets that description, even though some district courts have held that residential mortgage loans are not protected by the Rosenthal Act. Those decisions, though, wrongly subjected Rosenthal claims to an FDCPA definition of "debt collection," which precluded the act of foreclosure. This court found a difference between foreclosing on a property and "communications requesting payment of a debt in order to avoid foreclosure." Here, the debt collection attempts at issue fell into the second category. Therefore, the court concluded that borrower had a viable Rosenthal claim and denied servicer's motion to dismiss.

Dual Tracking: "Document" & "Submit" Requirements for a "Material Change in Financial Circumstances;" National Banks May Invoke HOLA, Which Preempts HBOR; Dodd-Frank Nonretroactivity

Williams v. Wells Fargo Bank, N.A., 2014 WL 1568857 (C.D. Cal. Jan. 27, 2014): Ordinarily, a servicer need only evaluate a borrower for a loan modification once, and that may have been before or after HBOR became effective. If a borrower submits documentation of a "material change" in their financial circumstances, however, HBOR's dual tracking protections apply to that borrower and new application. Here, borrowers had submitted and been evaluated for two previous applications. Their attorney sent servicer a letter stating: "[Borrowers'] gross disposable household income is approximately $12,000 per month, and the borrowers have also been faced with an increase in their expenses." The letter was unaccompanied by any supporting documentation or detail, or an actual modification application. The court deemed the letter "insufficient" to reignite dual tracking protections. There is not even a new application for dual tracking provisions to protect. Borrowers may not simply document and submit a change in circumstances and then demand their servicer *re*evaluate an existing application that servicer already denied. The court dismissed borrower's dual tracking claim.

The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) regulations govern lending and servicing practices of federal savings banks. HOLA and OTS regulations "occupy the field," preempting any state law that attempts to regulate lending and servicing. Here, borrowers brought state law foreclosure claims against their servicer, a national bank. 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. Borrowers' loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo. Without independent analysis, this court decided that a national bank like Wells Fargo can assert HOLA preemption based solely on the loan's origination with a federal savings association. It then found HBOR's dual tracking statute preempted by HOLA because the statute regulates how servicers evaluate loan modification applications, which affects the "processing" or "servicing" of mortgages. Insofar as borrower's negligence and UCL claims were based on borrower's dual tracking allegations, those claims were also preempted. Insofar as they related to borrower's misrepresentation claims, however, the negligence and UCL claims were *not* preempted because the requirement that servicers not misrepresent statements of fact only "incidentally affects" servicing.

The Dodd-Frank Wall Street Reform Act of 2010 dissolved the OTS and transferred its authority to the OCC, explicitly replacing HOLA's field preemption with conflict preemption. Dodd-Frank is not retroactive, however, and this court tied the retroactivity gauge to when a loan was entered into. So borrower's loan, entered into pre-July 2010, when Dodd-Frank became effective, is still subject to HOLA field preemption, not NBA conflict preemption.

Negligence in Force Placed Insurance Context; UCL "Unfair" Prong

Monday v. Saxon Mortg. Servs., Inc., 2010 WL 10065312 (E.D. Cal. Nov. 29, 2010): Negligence claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care. An exception applies, however, if a lender's activities extend beyond this relationship. Some courts use the six-factor test from *Biakanja v.*

Irving, 49 Cal. 2d 647 (1958) to analyze whether an activity extends beyond this relationship. Here, borrower accused servicer of force-placing homeowner's insurance when borrower actively maintained acceptable insurance. Even after servicer's representatives acknowledged servicer's mistake, and attempted to correct it by crediting her account, it misapplied the credit to her principal, not her "delinquency." Eventually, servicer foreclosed because of borrower's "default," based completely on the erroneously placed homeowner's insurance. The court applied the *Biakanja* factors to borrower's allegations and determined that servicer had overstepped its role as a traditional bank. Specifically: (1) servicer's mistake and refusal to correct it were both intended to effect borrower, because they pertained to *her* mortgage; (2) it was foreseeable that servicer's actions would ultimately lead to an false "default" that would harm the borrower; (3) borrower actually suffered the loss of her home; (4) servicer's actions directly led to the foreclosure because they caused borrower's "default"; (5) servicer was morally blameworthy because borrower repeatedly tried to correct the mistake and servicer failed to adequately correct it; and (6) it is consistent with public policy that servicers be held liable for these types of mistakes that lead to wrongful foreclosures, to prevent future harm. With all six *Biakanja* factors met, the court found that servicer owed borrower a duty of care and denied servicer's motion to dismiss borrower's negligence claim.

There are three independent prongs of a UCL claim: unlawful, unfair, and fraudulent. The "unfair" prong requires a borrower to show that servicer's conduct was misleading, against legislatively stated public policy, or "immoral, unethical, oppressive, unscrupulous and causes injury to consumers." Here, borrower alleged servicer unfairly foreclosed without a right to do so because servicer was aware that borrower was not actually in default. Foreclosing without a legal right could be characterized as "unfair," so the court denied servicer's motion to dismiss borrower's UCL claim.

Out of State Cases

Breach of TPP: Lack of Investor Approval is Not Acceptable Reason to Deny Permanent Mod

Johnson v. IndyMac Mortg. Servicing, 2014 WL 1652594 (D. Mass. Apr. 22, 2014): To state a breach of contract claim, a borrower must allege that servicer breached an existing contract. Here, borrower alleged servicer breached her TPP agreement by denying her a permanent modification after she successfully completed the TPP. The TPP explicitly stated servicer "will modify" borrower's loan upon successful completion of the TPP conditions precedent, which included: 1) all borrower's representations continued to be true; 2) borrower makes all required TPP payments; 3) borrower provides all requested documentation; and 4) servicer determines borrower qualifies for a modification. The court agreed with borrower that she had complied with all four requirements. Servicer nevertheless denied her a permanent modification, citing its inability to obtain the loan investor's "prior written consent" as required by its servicing agreement between it and the investor. Nothing in the TPP mentioned investor approval, so the issue boiled down to the fourth condition precedent, that servicer determines borrower "qualifies" for a modification. Reading the TPP as a whole, all other references to "qualification" refer to the documentation provided by borrower. "Accordingly, under the language in the TPP, the parties intended [servicer] to use the documents provided by [borrower] to determine if she qualified for the modification as opposed to the servicing agreement between [servicer] and [investor] and its requirement of prior written consent." The court declined to examine "extrinsic evidence," like HAMP Directives, because there was no ambiguity to resolve—the servicing agreement was simply not part of the TPP and the servicer's determination of borrower's eligibility "is not based upon an investor's prior written consent required in a servicing agreement." The court denied servicer's motion for summary judgment.

Standing to Challenge SPA Agreement for HAMP Violations: Borrower May Bring State-Law Claims

Gretsch v. Vantium Capital Inc., __ N.W.2d __, 2014 WL 1304990 (Minn. Apr. 2, 2014): 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 case involved the usual private right of action and SPA arguments, but with a twist: a pair of Minnesota statutes that give borrowers a private right of action against servicers that "fail to perform in conformance with its written agreements with borrowers, investors, other licensees, or exempt persons." Minn. Stat. § 58.13, subd. 1(a)(5). "A borrower injured by a violation of the standards, duties, prohibitions, or requirements of § 58.13 . . . shall have a private right of action." Minn. Stat. § 58.18, subd. 1. Here, borrower alleged her servicer breached its SPA with Fannie Mae, which bound it to follow HAMP rules. Borrower insisted she qualified for HAMP but was never offered a modification, in violation of HAMP rules. She was injured in that she never received a modification and eventually lost her home to foreclosure, "prematurely." The court found borrower's claim to fall squarely within the plain language of the state statutes providing her with a private right of action to enforce the SPA. While the statutes did not explicitly state they were "abrogating the common law," which would deny borrower a private right of action, "that is the necessary implication of the words used in the statute." "By giving the borrower this new cause of action, the Legislature, to the extent necessary, abrogated the common law regarding third party standing." The court also rejected servicer's argument that HAMP's lack of a private right of action somehow preempted the state statutes. Specifically, servicer argued for conflict preemption, forecasting that the state statutes "pose[d] an obstacle to the federal objective of increasing servicer participation and lowering foreclosure rates because allowing a private right of action to borrowers . . .would 'have a chilling effect on servicer participation.'" Servicers that violate existing SPA agreements are already liable to their other contractual party (in this case, Fannie Mae) and the state statutes do not impose any extra requirements on the servicers. Finding nothing to indicate that Congress intended to preempt laws like the ones under scrutiny here, the court declined to find conflict preemption. The non-existence of a federal private right of action does not automatically "displace[ ] remedies otherwise available." The Supreme Court of Minnesota reversed and remanded the Court of Appeals decision to dismiss borrower's claim.

Regulatory Updates

[HUD Mortgagee Letter 2014-07](#) (Apr. 25, 2014) (effective for HECM mortgages issues on or after August 4, 2014)

More Protections for Survivors of Reverse Mortgage "Borrowers"

Background: HUD-insured HECMs (Home Equity Conversion Mortgages), or "reverse mortgages," are creatures of federal statute. HUD regulation at 24 C.F.R. § 206.27 allows lenders to accelerate the loan upon the death of the borrower, *if* the house is no longer the principle residence "of at least one surviving *mortgagor*" (emphasis added). A conflicting federal statute, 12 U.S.C. § 1715z-20(j) (part of the body of statutes that created and govern HECMs), states:

> The Secretary may not insure a [reverse mortgage] under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death . . . . For purposes of this subsection, the term "homeowner" includes the spouse of the homeowner.

In *Bennett v. Donovan*, __ F. Supp. 2d __, 2013 WL 5424708 (D.D.C. Sept. 30, 2013), the court agreed with two widows of deceased borrowers (the widows were not borrowers themselves) that the loan obligation should be deferred until the deaths of both the homeowner *and* their spouse, regardless of whether the spouse was a "borrower" on the HECM note. HUD regulation 24 C.F.R. § 206.27 was found invalid, as applied to the plaintiffs in this case. For HECM mortgages issued after August 2014, this new Mortgagee Letter brings HUD regulations on HECMs in-line with the holding of *Bennett*.

Mortgage Letter: If only one spouse is a "borrower" on the HECM note, and that borrower dies, the loan may not be accelerated as long as the non-borrower spouse remains in the home and all other program requirements are met. Specifically:

> [I]n order to be eligible for FHA insurance, the HECM must contain a provision deferring the due and payable

> status that occurs because of the death of the last surviving mortgagor, if a mortgagor was married at the time of closing and the Non-Borrower Spouse was identified at the time of closing. . . . . [T]he documents must contain a provision deferring due and payable status until the death of the last surviving Non-Borrowing Spouse . . .

The Mortgage Letter contains other specifications a surviving, non-borrower spouse must comply with, and advocates who handle reverse mortgage cases should read the letter in full.

Freddie Mac Bulletin 2014-6 (Apr. 24, 2014)

Obtaining constructive or physical possession of a promissory note

While not immediately applicable in California because of current case law, this Bulletin acknowledges that in some instances and/or jurisdictions, a servicer "may be required to be in physical or constructive possession of the Note" in order to foreclose or take legal action. To facilitate this for its servicers, Freddie Mac has implemented new document retention and access guidelines.

HAMP Supplemental Directive 14-02 (Apr. 22, 2014) (effective July 1, 2014)

Assistance for Limited English Proficiency (LEP) Borrowers

The operative HAMP Handbook (version 4.4) requires servicers to develop and implement policies for providing effective relationship management to LEP borrowers. This Directive clarifies two different ways servicers may accomplish this: either employ their own multilingual staff, or hire outside interpretation services. Borrowers should *not* incur associated costs. Whichever way servicers choose to implement this guidance, they must provide meaningful communication opportunities to LEP borrowers.

HAMP Tier 2 Updates Applied to HAMP Handbook 4.4

§ 6.3.2.2 provides that under Step 2 of the HAMP Tier 2 Standard Modification Waterfall, the NPV model adjusts the interest rate to a fixed rate based on the weekly Freddie Mac Primary Mortgage Market Survey (PMMS) Rate for 30-year fixed rate conforming loans rounded up to the nearest 0.125% plus a risk adjustment (currently 50 basis points). **Update**: servicers that the risk adjustment is reduced to zero basis points.

§ 6.3.3 provides that the post-modification principal and interest payment under HAMP Tier 2 must be at least 10% less than the pre-modification principal and interest payment. **Update**: this required percentage is completely erased, and the new requirement is that the post-modification principal and interest payment be less than the pre-modification principal and interest payment. Still, servicers may require a minimum principal and interest payment reduction as long as a reduction of no more than 10% is required. Servicers that choose to establish a minimum reduction must include such information in a written policy by July 1, 2014.

§ 9.4 provides that a loan permanently modified under HAMP Tier 1 that loses good standing may be eligible to receive a HAMP Tier 2 modification on the earlier of (i) the date that is 12 months after the HAMP Tier 1 Modification Effective Date or (ii) following a change in circumstance. **Update**: an additional instance that such a loan may be eligible to receive a HAMP Tier 2 modification prior to the loss of good standing if more than five years have passed since the HAMP Tier 1 Modification effective date.

§ 9.4 provides that a servicer may not re-modify a loan that has received a HAMP permanent modification until either (i) the loan has lost good standing or (ii) more than five years has passed since the effective date of the permanent modification. **Update**: in both instances, a loan permanently modified under HAMP Tier 1 must be considered for HAMP Tier 2 prior to consideration for other loss mitigation alternatives.

Post-Modification Counseling Updates

HAMP § 6.7 requires certain servicers to offer financial counseling to certain borrowers who have received a TPP or permanent modification. The Directive provides that a servicer may discontinue previously required solicitation efforts (including efforts to contact the borrower by phone and by mail) as of the effective date on which a loan is assigned or assumed (or an earlier date, if applicable). However, if a borrower has accepted an offer of financial counseling or is in counseling on or before the effective date of the servicing transfer, the transferor servicer must provide the full financial counseling engagement offered to the borrower. A borrower is deemed to have "accepted" the offer of financial counseling when the borrower has scheduled an appointment with the servicer's financial counseling vendor. The transferor servicer must communicate to a borrower who is in counseling that such counseling may continue even after the loan is transferred. As of August 1, 2014, the transferor servicer must send a written notice no later than 15 calendar days prior to the effective date on which the loan is transferred (or earlier date, if applicable) to any borrower whose loan is included in a transfer and who has not yet accepted an offer of financial counseling. The notice must include certain dates and facts, as described in the Supplemental Directive. The transferor servicer and transferee servicer may agree that the latter will provide the financial counseling, as long as the borrower is able to complete the full counseling engagement with the same financial counselor without interruption. A transferee servicer that acquires a loan that is in a trial period plan at the time of transfer must send written notice and use reasonable efforts to contact the borrower to offer financial counseling if the effective date of the servicing transfer is fewer than 90 days after the trial period plan's effective date. In this instance, within 30 calendar days of the servicing transfer's effective date the transferee servicer must commence reasonable efforts to contact the borrower or send its designated vendor an inclusion file of such borrowers, and require its vendor to use reasonable efforts to contact the borrower within 30 calendar days of receipt of the file. In addition, servicers are now required to provide written notice to borrowers entering a TPP and those identified as Risk of Default Borrowers are encouraged to use the model notice informing borrowers of available financial counseling services at www.HMPadmin.com.

Notice of Interest Rate Step-Up Updates

Handbook § 9.7 requires servicers to provide notice to borrowers of any interest rate step-ups that will occur as the HAMP Tier 1 modifications reach the end of their initial 5-year terms at least 120 calendar days, but no more than 240 calendar days, before the first payment is due at the first adjusted level. The Directive amends this guidance to require that an additional notice must be sent 60-75 calendar days before the first payment is due at the first adjusted level. Servicers are not required to send this second notice if the first step-up is scheduled to occur within 60 days after the effective date of the Supplemental Directive, but may do so at their discretion. The notice requirement for subsequent adjusted levels is unchanged. The Supplemental Directive also extends this guidance to 2MP. Servicers must provide similar notice to borrowers of any interest rate step-ups that will occur as the 2MP modifications reach the end of their initial 5-year terms before the first payment is due at the first adjusted level and at subsequent adjusted levels in the time periods provided in the Handbook. The Supplemental Directive identifies all of the information that the notice, as it relates to 2MP, must include. A model notice to inform borrowers of interest rate step-ups is available online.

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