California Homeowner Bill of Rights COLLABORATIVE

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

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Defending Post-Foreclosure Evictions

(Current through August 2013 – please see our Practice Guide Section for an updated version)

Unlawful detainer (UD) actions are typically associated with landlord-tenant law. Former borrowers, though, often defend eviction after foreclosure.[1] They face different timelines and challenges, but both tenants and former borrowers continue to struggle against unlawful detainer actions as lenders and investors buy up foreclosed properties and attempt to evict residents soon after purchase. Various affirmative defenses arise from improper foreclosure procedures, so these types of UDs are intimately related to foreclosure law. This article reviews federal, California, and local measures that govern post-foreclosure unlawful detainer actions.

Overview

Foreclosure purchasers seeking to remove tenants or former borrowers must comply with both UD notice requirements and with statutory foreclosure procedures. Specifically, plaintiffs bear the burden of establishing:[2] 1) compliance with CC § 2924;[3] 2) duly

[1] The bona fide purchaser (BFP) of a foreclosed home must serve the previous homeowner with a 3-day notice to quit. If the former homeowner continues to occupy the property after this notice expires, or "holdover," the BFP must bring a judicial unlawful detainer action to evict. CAL. CIV. PROC. CODE § 1161 (2012).

[2] *See* CAL. EVID. CODE § 500 (2011) ("[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."); Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (citing § 500 and putting the evidentiary burden on the UD plaintiff).

[3] Including specific *foreclosure* (not UD) notice and recording requirements, and requiring the foreclosing entity to have the proper authority to foreclose. CAL. CIV. CODE § 2924(a)(1)-(6).

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perfected title; 3) proper service of a valid notice to quit; and 4) that the tenant or former borrower is holding over.[4]

I. Notice Requirements and Local Protections

Prior to 2009, tenants renting in states without post-foreclosure protections were at the mercy of their new landlords once the property sold at foreclosure.[5] All tenants are now protected by federal notice requirements, but California has added stricter state protections, and California "just cause" localities often give the greatest amount of protection.

A. Tenants

1. Federal protections

To address widespread tenant displacement brought on by the housing crisis, Congress enacted the Protecting Tenants at Foreclosure Act of 2009.[6] Under the PTFA, a successor in interest must provide bona fide tenants with a 90-day notice to vacate before moving to evict.[7] If there is an existing lease, the tenant can remain in possession until the lease expires.[8] This protection does not apply if the purchaser

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[4] CAL. CIV. PROC. CODE § 1161a(b)(3) (2013); *see also* Vella v. Hudgins, 20 Cal. 3d 251, 255 (1977) (requiring UD plaintiffs to show that the foreclosure sale was proper and demonstrate duly perfected title); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *7 (Cal. App. Div. Super. Ct. July 31, 2012) (listing plaintiff's affirmative burdens).

[5] NHLP, *The Protecting Tenants at Foreclosure Act: Three Years Later*, 42 HOUS. L. BULL. 181, 181 (Sept. 2012); NAT'L LOW INCOME HOUS. COAL., RENTERS IN FORECLOSURE: A FRESH LOOK AT AN ONGOING PROBLEM, 1 (Sept. 2012), available at http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf ("[The PTFA] provides the first national protection for renters.").

[6] The Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111- 22, div. A, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (enacted May 20, 2009), *as amended by* Pub. L. No. 111-203, tit. XIV, § 1484 (July 21, 2010) [hereinafter PTFA]. For a more thorough treatment of the first three years of the PTFA and related case law, refer to NHLP, *supra* note 5.

[7] PTFA § 702(a)(2)(B); Bank of N.Y. Mellon v. De Meo, 254 P.3d 1138, 1141 (Ariz. Ct. App. 2011) (90-day period must be specified in the notice); Curtis v. US Bank Nat'l Ass'n, 50 A.3d 558, 564-65 (Md. 2012) (90-day period begins the day tenant receives notice, not the day of foreclosure). *See generally* NHLP, *supra* note 5, at 185.

[8] PTFA § 702(a)(2)(A); Fontaine v. Deutsche Bank Nat'l Trust Co., 372 S.W.3d 257, 260 (Tex. App. 2012). To benefit from this provision, tenants must enter into their leases before "notice of foreclosure:" when title is transferred to the new landlord at

intends to occupy the property as their primary residence. In that case, a bona fide tenant is still entitled to a 90-day notice, but their tenancy can be terminated before the expiration of their fixed term lease.[9]

A tenant must be "bona fide" to qualify for PTFA protection: the tenant cannot be the borrower or the child, spouse or parent of the borrower, and the lease must have been an "arm's length" transaction for not substantially less than fair market value.[10] Housing Choice Voucher tenants are automatically bona fide tenants.[11]

2. California protections

a. Time requirements

As part of the Homeowner Bill of Rights, the California Legislature passed tenant protections that go beyond those in the PTFA.[12] Effective January 1, 2013, all tenants occupying a foreclosed home require a 90-day notice to quit, even tenants who do not qualify as "bona fide" under the PTFA.[13] Like the PTFA, tenants with fixed term leases may maintain their tenancy through the lease term, paying rent to their new landlord.[14] Tenants with fixed-term leases must meet

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the foreclosure sale. PTFA § 702(a)(2)(A); *see* 28th Trust No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *2 (Cal. App. Div. Super. Ct. June 27, 2013) (pointing to the PTFA amendment that clarified this definition of "notice of foreclosure"). See NHLP, *supra* note 5, at 184-85, for a more thorough discussion of this definition.

[9] *See* PTFA § 702(a)(2)(A). *See generally* CEB, California Eviction Defense Manual, § 20.8.3 (2d ed. 1993, June 2013 update).

[10] PFTA § 702(b). *See generally* NHLP, *supra* note 5, at 182, 185 (reviewing these qualifications in more detail). To demonstrate fair market value, a tenant may offer evidence of services they performed in exchange for rent. Rent does not require monetary payment. 28th Trust No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *1 (Cal. App. Div. Super. Ct. June 27, 2013).

[11] Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. at 30,107, 30,108 (June 24, 2009) ("[T]he Section 8 tenant's lease is, in effect, a bona fide lease.").

[12] The PTFA established a base of protections that state and local jurisdictions can expand upon: "[N]othing under this section shall affect the requirements for termination of any . . . State or local law that provides longer time periods or other additional protections for tenants." PTFA § 702(a)(2)(B). For a more thorough review of California statutory notice requirements for UD actions, refer to CEB, *supra* note 9, § 1.8.

[13] *See* CAL. CIV. PROC. CODE § 1161b (2013).

[14] *Id*; PTFA § 702(c). Also like the PTFA, there is an exception for purchasers who intend to use the property as their primary residence. In that case, tenants still require a 90-day notice. CAL. CIV. PROC. CODE § 1161b(b)(1) (2013).

criteria identical to the PTFA's "bona fide" conditions to qualify for protection throughout their lease term.[15] Under state law, the plaintiff in a UD action bears the burden of showing a tenant with a fixed term lease does not meet these requirements.[16]

b. Cover sheet & method of notice

California law also mandates additional notice requirements. Unless the notice unambiguously provides at least 90 days to vacate, notices must be accompanied by "cover sheets" with exact language dictated by statute, advising tenants to seek legal counsel, to respond to all forthcoming notices, and of the 90-day and fixed-term lease protections.[17]

California law also governs the method of service of notices to quit, requiring attempts at personal service first, and then outlining the posting and mailing alternatives.[18] Plaintiffs must strictly comply with the method of service requirements and advocates can use flaws in service to successfully defend a UD.[19]

3. Local protections

The California Homeowner Bill of Rights set a floor of tenant protections that localities can build upon.[20] There are sixteen California cities and towns that provide some level of "just cause for

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[15] CAL. CIV. PROC. CODE § 1161b(b)(2)-(4) (2013) (The tenant cannot be the child, spouse, or parent of the landlord-mortgagor and the lease must be an arm's length transaction for fair market value).
[16] *See* CAL. CIV. PROC. CODE § 1161b(c) (2013).
[17] CAL. CIV. PROC. CODE § 1161c (2013) ("[T]he immediate successor in interest . . . *shall* attach a cover sheet, in the form as set forth [below].") (emphasis added). *See* 28th Trust No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *2 (Cal. App. Div. Super. Ct. June 27, 2013) (reversing the trial court's judgment for plaintiff in part due to plaintiff's failure to notify tenant of her right to remain in possession until the expiration of her lease, violating § 1161c(c) cover sheet requirements).
[18] *See* CAL. CIV. PROC. CODE § 1162 (detailing personal delivery and "nail and mail" methods).
[19] *See*, *e.g.*, 28th Trust No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *3 (Cal. App. Div. Super. Ct. June 27, 2013) (finding the failure to list a tenant name on the proof of service a fatal defect in plaintiff's UD case).
[20] "Nothing in this section is intended to affect any local just cause eviction ordinance." CAL. CIV. PROC. CODE § 1161b(e) (2013); *see also* Gross v. Superior Court, 171 Cal. App. 3d 265 (1985) (California foreclosure laws do not preempt local eviction protections).

eviction" protection, including San Francisco, Los Angeles, Oakland, and San Diego.[21] In these localities, foreclosure is not considered a "just cause" for eviction, which prevents landlords from evicting tenants simply for leasing a home purchased at foreclosure.[22] Accordingly, tenants retain possession until there is a "just cause" to evict.[23]

B. Former Borrowers

In terms of notice, former borrowers enjoy far fewer UD protections than tenants. Absent any federal regulation, once title is transferred to the new owner in a foreclosure sale, the purchaser may give the former borrower a 3-day notice to quit.[24] If the former borrower continues in possession, the new owner can file an UD.[25] The same service requirements that apply to tenant notices to quit also apply to notices served on former borrowers.[26]

II. Compliance with California Foreclosure Procedures

Without a proper foreclosure sale, the purchaser does not hold valid title to the property, and cannot satisfy the perquisite to bringing an UD action under CCP § 1161a.[27] One way to show an invalid

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[21] Refer to Tenants Together, Foreclosure Related Laws, http://tenantstogether.org/article.php?id=935, for a complete list and links to municipal websites.

[22] *See*, *e.g.*, BERKELEY MUN. CODE, Rent Stabilization and Eviction for Good Cause Ordinance § 13.76 (Ord. 5467-NS § 1, 1982: Ord. 5261-NS § 1, 1980).

[23] For more information on this topic, see CEB, *supra* note 9, at § 20.10.C.

[24] *See* CAL. CIV. PROC. CODE § 1161a(b).

[25] *Id*. *See generally* CEB, *supra* note 9, at § 20.4.II.

[26] *See* CAL. CIV. PROC. CODE § 1162; U.S. Bank v. Cantartzoglou, 2013 WL 443771, at *10-11 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (finding service improper because plaintiff used the "nail and mail" method before attempting personal service on former borrower holding over).

[27] *See* Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *7 (Cal. App. Div. Super. Ct. July 31, 2012) (linking invalid title with plaintiff's lack of standing to sue for possession); U.S. Bank Nat'l Ass'n v. Espero, 2011 WL 9370474, at *4 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (same).

foreclosure sale is by alleging the beneficiary or trustee did not have the authority to foreclose.[28]

A. Improper foreclosure notice & recording procedures

Once a trustee's deed upon sale is recorded, there is a presumption that the foreclosing entity complied with the notice and recording requirements of CC § 2924.[29] Absent evidence to the contrary, this presumption may be difficult for former borrowers and tenants to overcome.[30] The presumption becomes conclusive for bona fide purchasers of the property.[31] Importantly, this presumption does not apply to the authority to foreclose aspect of § 2924.[32]

B. Duly perfected title & authority to foreclose

Pre-HBOR, former borrowers generally had a limited ability to challenge plaintiff's title in a UD action: only noncompliance with foreclosure statutes and the legitimacy of the sale itself could be litigated.[33] However, if a defendant could show defects or serious questions going to the validity of assignments or substitutions of trustees, or if a plaintiff simply failed to provide any evidence showing duly perfected title, courts generally reversed judgments for plaintiffs and prevented evictions.[34] HBOR has since codified this requirement in CC § 2924.

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[28] *See generally* HBOR Collaborative, *Litigating Under the California Homeowner Bill of Rights*, part II.A (July 2013) (discussing the authority to foreclose and its relation to CC § 2924(a)(6)).

[29] Biancalana v. T.D. Serv. Co., 56 Cal. App. 4th 807, 814 (2013); Moeller v. Lien, 25 Cal. App. 4th 822, 831-32 (1994).

[30] *See*, *e.g.*, Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *6-7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (accepting the trial court's finding that defendant borrower's allegations that they never received foreclosure notices were not credible and applying the presumption of compliance to § 2924's notice requirements, but not its authority to foreclose element); U.S. Bank Nat'l Ass'n v. Espero, 2011 WL 9370474, at *2 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (same).

[31] Biancalana v. T.D. Serv. Co., 56 Cal. App. 4th 807, 814 (2013).

[32] *See* Bank of Am., N.A. v. La Jolla Group II, 129 Cal. App. 4th 706 (2005) (statutory presumptions do not apply to purchasers at invalid sales).

[33] Cheney v. Trauzettel, 9 Cal. 2d 158, 160 (1937); Old Nat'l Fin. Servs., Inc. v. Seibert, 194 Cal. App. 3d 460, 465 (1987).

[34] *See*, *e.g.*, Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *5-6 (Cal. App. Div. Super. Ct. July 31, 2012) (finding plaintiff's lack of evidence showing valid assignment and substitution of trustee fatal to their UD action, in the face of

Even when the authority to foreclose is not an issue, there may be some defect that would void the foreclosure sale and destroy the plaintiff's claim of "duly perfected title." In *Barroso v. Ocwen Loan Servicing, LLC*, for example, borrowers were compliant with their permanent modification when their servicer foreclosed and the purchaser brought a UD action.[35] The borrowers defended the UD action as part of larger litigation initiated by the borrowers against their servicer.[36] The court did not reach the unlawful detainer question, but found that the servicer breached the permanent modification contract and that borrowers had a valid wrongful foreclosure claim to void the foreclosure.[37]

III. Litigation Issues Unique to Post-Foreclosure Unlawful Detainers

A. Tender

As a general rule, parties seeking to undo a foreclosure sale must "tender" (offer and be able to pay) the amount due on their loan.[38] There are several exceptions to this general rule, including the excusal of tender when the sale itself would be void.[39] However, when a borrower defends a UD action by asserting that the plaintiff failed to comply with CC § 2924 and perfect the sale, most courts do not require

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irregularities in the recording of those documents); Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (reversing judgment for plaintiff because plaintiff could not show a valid, recorded substitution of trustee that would have given the foreclosing entity authority to foreclose); U.S. Bank Nat'l Ass'n v. Espero, 2011 WL 9370474, at *4 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (reversing trial court's judgment for plaintiff because plaintiff provided no evidence that it was assigned the property from the purchaser after foreclosure). *But see* Aurora Loan Servs. v. Akins, No. BV-029730 (Cal. App. Div. Super. Ct. Apr. 26, 2013) (rejecting former borrower's argument on appeal that plaintiff had to produce evidence of duly perfected title because in an appeal, defendant borrower had to offer some evidence of her own to reverse a trial court's error).

[35] Barroso v. Ocwen Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1007 (2012).

[36] *Id*.

[37] *Id*. at 1017.

[38] *See* Lona v. Citibank, N.A., 202 Cal. App. 4th 89 (2011) (stating the general tender rule).

[39] *See*, *e.g.*, Dimock v. Emerald Props., 81 Cal. App. 4th 868, 877-78 (2000). A full discussion of the tender rule and its exceptions in a foreclosure context is in HBOR Collaborative, *supra* note 27, at part III.C.

tender.[40] In addition, because tenants are not parties to the loan, courts have not imposed the tender requirements on tenants who challenge the plaintiff's compliance with CC § 2924.[41]

B. Res Judicata

If a bank proved "duly perfected" title in a UD action, then a subsequent wrongful foreclosure claim brought by the former borrower against the bank is often barred by res judicata, if the basis for the borrower's claim is also validity of title. This is true even if the borrower did not allege improper title as an affirmative defense to the UD action, but *could have* used this defense.[42] This is a difficult problem to address because advocates defending UD actions are unlikely to also represent former borrowers in wrongful foreclosure cases. Accordingly, UD counselors should prepare to bring all relevant wrongful foreclosure claims as part of a UD defense.

C. Rights of Unnamed Occupants

A new landlord who wishes to evict existing, holdover tenants must serve a summons and complaint to begin the UD process. To evict

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[40] *See*, *e.g.*, Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587 (Cal. App. Super. Ct. Mar. 28, 2012) (excusing tender when the sale was found void due to an invalid trustee substitution); REO Seastone v. Perez, 2012 WL 6858725 (Cal. Super. Ct. Dec. 13, 2012) (finding tender excused because defendant (former borrower) brought a statutory attack on plaintiff's title under Cal. CC § 2924); *cf.* MCA, Inc. v. Universal Diversified Enterprises, 27 Cal. App. 3d 170 (1972) (requiring tender when the defendant combined statutory defenses with claims for affirmative relief to invalidate the sale).

[41] JP Morgan Chase Bank v. Callandra, No. 1371026 (Cal. Super. Ct., Santa Barbara Co. Oct. 21, 2010) (allowing tenant to challenge the foreclosure without tender because the foreclosing entity had failed to post a notice of trustee sale).

[42] *See, e.g.,* Hopkins v. Wells Fargo Bank, N.A., 2013 WL 2253837, at *4-5 (E.D. Cal. May 22, 2013) (barring former borrower's wrongful foreclosure claim because defendant bank had already established duly perfected title in a previous UD action and the borrower *could have* litigated their § 2923.5 issue there); Castle v. Mortg. Elect. Registration Sys., Inc., 2011 WL 3626560, at *4-9 (C.D. Cal. Aug. 16, 2011) (dismissing plaintiff borrower's wrongful foreclosure claims because title was "litigated" in the previous UD action, even though there was a default judgment in that action); Lai v. Quality Loan Serv. Corp., 2010 WL 3419179, at *4 (C.D. Cal. Aug. 26, 2010) (finding borrower's requests for declaratory relief and to set aside the foreclosure sale were issues already litigated in a previous UD action); Malkoskie v. Option One Mortg. Corp., 188 Cal. App. 4th 968, 973 (2010) (applying the same reasoning described in *Hopkins*).

unnamed tenants, they must also include a blank prejudgment right to possession form.[43] Any unnamed tenants residing on the property need to complete this form and file it with the court within 10 days of being served notice.[44] If they do not, these tenants lose all rights to assert possession by defending the UD,[45] or to object to the enforcement of a judgment for possession.[46] Beginning in 2013, however, unnamed tenants in *post-foreclosure* UD actions can file a prejudgment claim of right to possession *or* object to a judgment, at any time before a lockout.[47]

D. Masking Rule

Finding rental housing with an eviction as part of your rental history can be difficult and often puts another strain on already stressed tenants and former borrowers. Usually, court documents related to unlawful detainer cases are "masked," or not available to the public, for only 60 days after the complaint is filed.[48] After the 60-day "curtain," the case file becomes available to the public unless the defendant prevailed in the UD.[49] Since 2010, tenants and borrowers defending post-foreclosure evictions have been afforded more protection: UD documents are masked for 60 days following the filing of the complaint, and then permanently masked unless the plaintiff prevails within those 60 days, against all defendants, after a trial.[50]

IV. Evictions of Tenants for Nonpayment of Rent and Breach of Lease

Because California law now has clarified that the landlord-tenant relationship continues after foreclosure, a tenant may also face evictions due to non-payment of rent or breach of a lease term. Because

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[43] *See* CAL. CIV. PROC. CODE § 415.46 (2012).
[44] *See* CAL. CIV. PROC. CODE § 1174.25(a) (2007).
[45] *Id*.
[46] *See* CAL. CIV. PROC. CODE & 1174.3 (2007). For more on this subject, see CEB, *supra* note 9, at § 24.2.
[47] *See* CAL. CIV. PROC. CODE § 415.46(e)(2) (2012); *see also* CEB, *supra* note 9, at § 24.6.
[48] *See* CAL. CIV. PROC. CODE § 1161.2(a)(5) (2013).
[49] CAL. CIV. PROC. CODE § 1161.2(a)(6)
[50] CAL. CIV. PROC. CODE § 1161.2(a)(6) (2013). Documents are still available to parties listed as exceptions in § 1161.2(a)(1)-(4).

these evictions are based on CCP § 1161, the 90-day notice protection in CCP §1161b and the cover sheet requirement of CCP § 1161c do not apply. Even in that situation, however, courts have held that bona fide tenants under the PTFA still must receive a 90-day notice.[51]

Finally, successors-in-interest (new landlords) must provide notice to existing tenants of the change in ownership within 15 days of assuming ownership.[52] A new landlord must comply with the notice requirement before the landlord can evict for non-payment of rent.[53] They may, however, request back-rent for any time the tenant was not paying them rent.[54]

Conclusion

Defending tenants and former borrowers in post-foreclosure unlawful detainer actions requires advocates to become versed in California foreclosure law. These types of cases also open up a number of UD defenses uncommon in landlord-tenant cases: improper foreclosure notice, imperfect title, noncompliance with CC § 2924's authority to foreclose provision, and voided sales.

The California Homeowner Bill of Rights Collaborative works to train advocates, provide technical assistance, and create a space where California consumer attorneys can share information on tenant and homeowner legal developments in California. Visit our website to access updated information on these topics: www.calhbor.org.

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[51] PNMAC Mortg. v. Stanko, 2012 WL 845508 (Cal. Super. Ct. Mar. 7, 2012); Fed. Nat'l Mortg. Ass'n v. Vidal, 2012 WL 597929 (Mass. Hous. Ct. Feb 17, 2012).
[52] CAL. CIV. CODE § 1962(c) (2013).
[53] *Id.*
[54] "Nothing in this subdivision shall relieve the tenant of any liability for unpaid rent." *Id.*

Summaries of Recent Cases[55]

State Cases

Borrower's Standing to Allege Voided Assignment of Loan to a Trust

Glaski v. Bank of America, N.A., __ Cal. App. 4th __, 2013 WL 4037310 (July 31, 2013): In *Glaski*, the appellant alleged that Bank of America, as Trustee for the WaMu Securitized Trust, had no right to foreclose because it never received an assignment of the note and deed of trust, as any purported transfer happened after the closing date of the trust. Nevertheless, the trial court dismissed the complaint on the ground that there is no legal basis to challenge the authority of the beneficiary to foreclose.

The Court of Appeal reversed. First, the Court held that a borrower may challenge a foreclosure, as long as the borrower alleges "facts that show the defendant who invoked the power of sale was not the true beneficiary." Second, the Court concluded that a borrower has standing to challenge void assignments of their loans that violate the terms of the trust agreement, even if the borrower is not a party to the agreement. Third, the Court held that a transfer occurring after the closing date of the trust is void, rather than voidable. Finally, the Court explained that Glaski was not required to tender the balance of the loan to maintain his claims when the foreclosure sale is void, as here, rather than voidable.

CCP § 580b: Anti-deficiency Protections Apply to Nonjudicial Foreclosures and Short Sales

Coker v. JP Morgan Chase Bank, N.A., __ Cal. App. 4th __, 2013 WL 3816978 (July 23, 2013): In this case of first impression, the Court of Appeal found that CCP § 580b prevents deficiency judgments on purchase money loans after a short sale. CCP § 580b effectively declares purchase money loans to be "nonrecourse" loans for which a borrower cannot be held personally liable. The statutory language

[55] Cases without Westlaw citations can found at the end of the newsletter.

limits the type of loan (to "purchase money loans") but not the mode of sale. Additionally, the legislature drafted the statute to "shift[ ] the risk of falling property values to the lender" and stabilize the real property market. Accordingly, the Court of Appeal applied CCP § 580b to short sales and reversed trial court's judgment in favor of Chase.

CC §§ 1367.1 & 1367.4: HOA Pre-foreclosure Notice Requirements

Diamond v. Superior Court, __ Cal. App. 4th __, 2013 WL 3551736 (June 18, 2013): The Davis-Sterling Act governs HOA-initiated judicial foreclosures on assessment liens. Here, the borrower alleged that their HOA had not strictly complied with the relevant notice requirements. *See* CC § 1367.1(d) (HOA must send the borrower a copy of the notice of delinquent assessment, by certified mail, within 10 days of recording the notice); CC § 1367.4(c)(2) (the HOA board must record their vote to foreclose in the next meeting's minutes); CC § 1367.1(a)(6) (borrower must be notified of their right to demand pre-foreclosure ADR); CC § 1367.4(c)(3) (borrower must be notified of the board's vote before the HOA takes any foreclosure actions). The Court of Appeal found that all four statutes require strict compliance and ordered summary judgment for the borrower.

CCP § 580e Non-retroactivity; One-Action Rule

Bank of America v. Roberts, __ Cal. App. 4th __, 2013 WL 3754831 (July 17, 2013): Junior lien holder BofA sued borrower for the deficiency after the lender-approved short sale of her home. The short sale occurred before CCP § 580e was amended to extend short sale anti-deficiency protections to junior liens. Previously, the statute only applied to the first lien. Nothing in the statute's language or history overcame the presumption that statutes do not apply retroactively. Further, the court found that applying the statute retroactively would unfairly void a valid contract negotiated to under the previous CCP § 580e. In determining the date from which to evaluate retroactivity, the court used the date of the short sale, not the date BofA sued for the deficiency.

The "one-action" rule requires senior lien holders to exhaust the loan security by judicially foreclosing first, before going after the borrower individually for any deficiency. CCP § 726. A borrower may assert this rule as a defense to any action brought by their creditor for the indebted amount *before* a judicial foreclosure action. Borrowers waive this defense by "consenting to an arrangement in which the beneficiary of the trust deed relinquishes the security without retiring the note." Here, BofA had to release their second deed of trust for the short sale to occur, rendering them unable to bring a foreclosure action. By agreeing to this arrangement, the borrower waived her right to a CCP § 726 defense.

CCP § 580b: Anti-deficiency Protections Apply to Post-Escrow Liens

Enloe v. Kelso, 217 Cal. App. 4th 877 (2013): CCP § 580b prevents lenders from collecting deficiencies on purchase money loans (*see Coker*, above). Here, borrowers bought the property from plaintiffs. As part of the purchase price, plaintiffs agreed to a DOT as a third lien. The first and second lien holder, however, objected to a third lien so the parties agreed to record the third DOT *after* escrow closed. This DOT secured part of the purchase price, so it was a "purchase money loan," covered by CCP § 580b. Because "nothing in the language or purpose of § 580b . . . requires a purchase money transaction to be completed simultaneously with the close of escrow," plaintiffs are barred from seeking a deficiency.

California Preliminary Injunction Standards Applied to Forgery Claim; Discretionary Bond

Jobe v. Kronsberg, 2013 WL 3233607 (Cal. Ct. App. June 27, 2013): A preliminary injunction analysis involves two factors: 1) the plaintiff's likelihood of prevailing on the merits, and 2) the balance of harms likely to result from granting the injunction or denying it. California state courts use a sliding scale: "The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue," and vice versa. Here, the court held that the borrower is likely to prevail on her forgery

(fraud) claim, even though it is unclear whether *defendants* changed the loan documents after borrower signed them. Regardless of who committed the forgery, this type of fraud voids the loan documents and would prevent defendants from foreclosing. And because irreparable foreclosure is at stake, the balance of harms also weighs in borrower's favor. The trial court did not abuse its discretion in granting a PI.

The court rejected defendant's argument that the one-time $1,000 bond increased their financial loss by delaying the trial and foreclosure. Not only does a PI do nothing to delay a trial, but the "ample home equity" would more than adequately compensate defendants, should they prevail. In this case, the significant equity in the property "suggests the trial court reasonably could have imposed a lower bond amount . . . because the equity alone adequately protected defendants."

Servicer Required to Process Modification "In Good Faith," Tender, Negligence Claim

Leal v. Wells Fargo Bank, N.A., No. 30-2013-00644154-CU-BC-CJC (Cal. Super. Ct. July 17, 2013): As part of a UD settlement agreement, Wells Fargo agreed "to process [borrower's] complete loan modification package." They then used an inflated income number to calculate borrower's TPP payments. The court found Wells Fargo's failure to accurately calculate TPP payments constituted a breach of the settlement agreement. Wells Fargo's argument that a modification and/or a "good faith" assessment were not part of the contract, were unavailing. The court did not require tender because the action is unrelated to foreclosure and stems from the settlement agreement. Borrower's negligence claim failed because Wells does not owe a duty of care outside of the duty to perform under the contract. The court acknowledged the split among federal courts over whether a bank owes a duty of care once they offer a modification, but that issue has not been reached in this case. If it is reached, borrower must do more than plead a breach of contract to prove negligence.

Dual Tracking: "Material Change in Financial Circumstances," NTS Recording Violation

Sevastyanov v. Wells Fargo Bank, N.A., 2013 WL 3859478 (Cal. Super. Ct. July 24, 2013): If a borrower submits documentation of a "material change" in their financial circumstances to their servicer, HBOR's dual tracking protections apply to that borrower and second application. *See* CC § 2923.6(g). Here, borrower's bare statement that they have "had a change of circumstance as their income and expenses have changed" was deemed insufficient to trigger dual tracking protection. However, borrowers still have a viable dual tracking claim because Wells Fargo recorded the Notice of Trustee Sale within 30 days of borrower's receipt of their application denial. *See* CC § 2923.6(e)(1) (prohibiting foreclosure actions until 31 days after borrower receives notice of an application denial).

Dual Tracking: "Material Change in Financial Circumstances," Tender, Attendant UCL Claim

Tha v. Suntrust Mortg., Inc., No.KC066003 (Cal. Super. Ct. July 22, 2013): This court agreed that CC § 2923.6(g) dual tracking protections were triggered by borrower's evidence of increased income (more than $2000 per month) and two-year income stability. The servicer could not cite any authority to show that the borrower's documentation was not specific enough to qualify them for a re-evaluation. The quality of documentation showing a change in financial circumstances is not a proper issue to decide on a demurrer. This differs from *Sevastyanov*, where the court *did* weigh in on the quality of documentation on a demurrer. Tender was not required in this pre-foreclosure action where borrower's claim would negate the necessity for a foreclosure (CC § 2923.6 prohibits foreclosure actions during the evaluation of a modification application). Because it is based in the dual tracking violation, borrower's UCL claim moves forward also (dual tracking would be "unlawful").

Federal Cases

HAMP: TPP Agreement Constitutes a Binding Contract under State Law

Corvello v. Wells Fargo Bank, N.A., __ F.3d __, 2013 WL 4017279 (9th Cir. Aug. 8, 2013): A bank that enters into a trial period plan with a borrower, under HAMP, is contractually obligated to offer the borrower a permanent modification *if* the borrower complies with the TPP by making all required payments and if their financial representations were accurate. A Treasury Directive and the TPP agreement itself requires servicers to alert the borrowers of any discovered ineligibility during the TPP period, and to stop requesting or accepting TPP payments. If the servicer fails to notify the borrowers and continues accepting TPP payments, that obligates the servicer to offer a permanent modification. Wells Fargo's argument that a TPP clause requires the borrowers to actually *receive* a permanent modification offer for a contract to form is unavailing, as it renders a contract's formation based "solely on action of the bank, and conflict[s] with other provisions of the TPP." This Ninth Circuit panel follows Seventh Circuit precedent laid out in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), that a TPP forms an enforceable contract, and *West v. JP Morgan Chase Bank, N.A.*, 213 Cal. App. 4th 780 (2013), which applied California contract law to *Wigod*'s reasoning, and concluded that servicers are required to offer permanent modifications if a borrower paid their TPP payments and accurately represented their financial situation.

PTFA: No Private Right of Action

Logan v. U.S. Bank Nat'l Ass'n, __ F.3d __, 2013 WL 3614465 (9th Cir. July 16, 2013): In this case involving an issue of first impression, the Ninth Circuit held that the Protecting Tenants at Foreclosure Act (PTFA) does not give tenants a private right of action. The court noted the statute's focus on the new landlord ("the immediate successor in interest") and reference to the tenant as "only . . . an object" of the new landlord's obligation. *See* PTFA § 702. If Congress intended to create a

private right of action, it would have focused on tenants. Further, the PTFA was passed as part of a larger piece of legislation, the Helping Families Save Their Homes Act of 2009, where another section of the bill amending the Truth in Lending Act *did* grant a private right of action, implying that Congress considered granting one in the PTFA, but decided not to. Congress had a second chance to include that right, in its 2010 Dodd-Frank amendment to the PTFA, and declined again. Finally, the PTFA serves its purpose: as a shield for tenants in UD actions. Failing to find a private right of action does nothing to weaken the PTFA's effectiveness.

"Debt Collector" under the FDCPA; Equal Credit Opportunity Act Notice Requirements

Schlegal v. Wells Fargo Bank, N.A., __ F.3d __, 2013 WL 3336727 (9th Cir. July 3, 2013): Wells Fargo does not qualify as a "debt collector" regulated by the FDCPA because 1) debt collecting is not its principal business, and 2) Well Fargo is not collecting the debts of "another." *See* 15 U.S.C. § 1692a(6). "Debts owed to another" does not mean debts that were *originally* owed to another. As long as the debt is now owed to Wells Fargo, they do not qualify as a debt collector under the FDCPA. The court dismissed borrower's FDCPA claim.

The ECOA requires a creditor to give a borrower notice, including a statement of reasons, before taking "adverse actions" like revoking credit. *See* 15 U. S. C § 1691(d)(2). Here, the court found that by accelerating their loan, Wells Fargo revoked borrower's credit: "a lender revokes credit when it annuls, repeals, rescinds or cancels a right to defer payment of a debt." It made no difference that the acceleration (and five erroneous NODs) was a mistake. Wells Fargo mistakes were "egregious" and went "beyond clerical error," and violated the modification agreement. The ECOA claim survived the motion to dismiss.

RESPA 12 U.S.C. § 2607(b) Ban on Fee Splitting, other than for Services Actually Performed

Tubbs v. N. American Title Agency, Inc., __ F. App'x __, 2013 WL 3767838 (3d Cir. July 19, 2013): Settlement agent's charge for "Release Recording Fees," in addition to lender's charge for "Recording Fees" was not a RESPA violation because settlement agent performed additional services for fee. But description of agent's fee on HUD-1 may have been an unlawful misrepresentation.

Plaintiffs refinanced two mortgages with a new lender. The original lender imposed a charge of $80 that was described as a "Recording Fee." On the settlement statement, the title agency imposed additional charges of $150 for "Release Recording Fees" and $325 for a "Settlement or Closing Fee." The homeowners claimed the title agency violated RESPA § 8 (12 U.S.C. § 2607(b)), which bans splitting fees except for services that are actually performed, and violated the New Jersey Consumer Fraud Act.

The Third Circuit found no RESPA violation because the title agency showed that it had performed services in addition to recording releases of the old mortgages in return for the $150 fee. The court distinguished "markups" and "kickbacks," which violate RESPA, from "overcharges," which do not. A markup occurs when one party adds to the cost of a service provided by a third-party and retains the difference without performing any additional work in return for the additional cost. A kickback occurs when one party arranges for the homeowner to use the services of a third party in return for a share of the fee. In contrast, an overcharge is when a settlement service provider performs work and charges a fee that exceeds the actual cost. At worst, the title agent here overcharged the homeowner.

But, because the title agency listed the $150 charge on the line for government recording fees, the agency may have made an unlawful misrepresentation where the fees were not actually paid out for government fees. A fact finder could determine that the title agency's $325 closing fee covered all the agency's services so the $150 charge would be an ascertainable loss to the consumers.

The Third Circuit found the misrepresentation claim was not duplicative of the RESPA allegation based on the U.S. Supreme Court's decision in *Freeman, et al. v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012). In *Freeman* the Supreme Court held that RESPA did not prohibit charges that were not split by at least two parties. In doing so, the Supreme Court observed: "Congress may well have concluded that existing remedies, such as state-law fraud actions, were sufficient to deal with the problem of entirely fictitious fees, whereas legislative action was required to deal with the problems posed by kickbacks and fee splitting."

NBA Preemption & Force-Placed Insurance

Leghorn v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2013 WL 3064548 (N.D. Cal. June 19, 2013): Because the National Banking Act regulates the conduct of national banks, an NBA preemption analysis is appropriate to evaluate the conduct of Wells Fargo, a national bank. That borrower's loan originated with Wachovia, a federal savings association regulated by the Home Owners Loan Act, does not affect this conclusion. The "timing of the challenged conduct" determines which preemption analysis is appropriate. Here, the alleged backdating of and kickbacks for force-placed insurance occurred after Wells Fargo purchased the loan from Wachovia, so Wells Fargo's conduct as a national bank is under scrutiny. Rather than challenging Wells Fargo's *right* to force-place insurance, borrowers challenged its practice of charging for backdated insurance and for using an insurance carrier specifically because that carrier gave Wells Fargo kickbacks. This conduct is not regulated or preempted by the NBA.

Dual Tracking; CC § 2923.5 Declaration; Ex-Parte TRO Requirements

Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808 (N.D. Cal. July 16, 2013): CC § 2923.6(g) provides dual-tracking protections for resubmission of an application for a loan modification if there has been a "material change in the borrower's financial circumstances since the date of the borrower's previous application," which has been documented and submitted to the servicer. Here, the court determined

that Wells Fargo evaluated the borrower's second loan modification application and denied the application based on its internal policy of denying second modifications to borrowers who previously defaulted on a modification constitutes an "evaluation" under HBOR. The borrower was deemed unlikely to prevail on the merits of her dual tracking claim because of *Wells Fargo's* proper denial under its internal modification evaluation policy, not because her previous default disqualified her from HBOR's dual tracking protections on a second modification evaluation. Under CC § 2923.6, she was entitled to a second evaluation because of her change in financial circumstances. She received an evaluation and was denied.

The borrower was also found unlikely to prevail on her CC § 2923.5 claim. The court relied on Wells Fargo's NOD declaration: "To the extent Wells Fargo acted with due diligence in attempting to contact Plaintiff, this is sufficient to satisfy Section 2923.5." Compare this with the reasoning in *Intengan v. BAC Home Loans Servicing LP*, 214 Cal. App. 4th 1047 (2013) and *Skov v. U.S. Bank Nat'l Ass'n,* 207 Cal. App. 4th 690 (2012), state courts which granted judicial notice to the *existence* of a CC § 2923.5 declaration, but not to its *substance*, which the court seems to do here.

A party requesting ex-parte TRO relief must demonstrate that they did nothing to create the crisis that demands an ex-parte hearing. In this case, the court found the borrower to have deliberately created the emergency to increase her chances of success and to have abused the judicial system for years. After two loan defaults, she and her husband had stopped foreclosures on their home five times, thrice by filing bankruptcy petitions on the eve of foreclosures and twice with emergency TROs. This sixth effort was also filed on the eve of the scheduled sale even though she had notice of the sale three weeks prior. The court denied the ex-parte TRO request.

Dual Tracking & CC § 2924.11

Lindberg v. Wells Fargo Bank, N.A., 2013 WL 3457078 (N.D. Cal. July 9, 2013): The borrower in this case had previously sought a preliminary injunction to stop the foreclosure of her home, basing her claim on Wells Fargo's dual tracking violation. *See Lindberg v. Wells*

Fargo Bank N.A., 2013 WL 1736785 (N.D. Cal. Apr. 22, 2013). The court denied the request mostly because borrower could not show that she submitted a "complete application" according to Wells Fargo's standard, as required by statute.

Here, the same court dismissed borrower's dual tracking claim but did not evaluate the applicable statute (and the statute evaluated in the first action): CC § 2923.6. Instead, the court cited CC § 2924.11, which outlines a servicer's responsibilities "[i]f a foreclosure prevention alternative is approved in writing" before or after a NOD is filed. *See* CC § 2924.11(a)-(b). Because borrower had not entered into any modification plan, the court dismissed her dual tracking claim. It is unclear why this court would evaluate CC § 2923.6 in one hearing and then CC § 2924.11 in another when dual tracking on a *first lien loan modification* application was at issue in both. If borrower had applied for a non-modification foreclosure alternative, then CC § 2914.11 would have been the appropriate analysis, but that was not the case here.

FCRA & Preemption of California's CCRAA

Lovejoy v. Bank of America, N.A., 2013 WL 3360898 (N.D. Cal. July 3, 2013): There is no private right of action under the Fair Credit Reporting Act against a furnisher unless the furnisher was negligent or willfully noncompliant. Here, borrowers sufficiently pled "how" BoA's reporting was inaccurate ("delinquent" payment was actually waived by BoA as part of a deed-in-lieu agreement) and that BoA willfully failed to comply with the "reasonable investigation" requirement. See 15 U.S.C. § 1681s–2b (requiring "furnishers" of credit information to conduct a reasonable investigation into any reported discrepancies or disputes). The particulars of the deed-in-lieu and BoA's failure to investigate should not be determined on a motion to dismiss. Because the borrower successfully pled a FCRA claim, his state Consumer Credit Reporting Agencies Act claim is preempted: the state claims are based on conduct covered by 15 U.S.C. § 1681s–2b.

"Debt Collector" and "Debt Collection" Under FDCPA, Application to California's Rosenthal Act

Moriarty v. Nationstar Mortg., LLC, 2013 WL 3354448 (E.D. Cal. July 3, 2013): 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 . . . ." Here, Nationstar purchased the servicing rights to borrower's loan after the loan was in default. Nationstar therefore knew it would be attempting to collect borrower's debt, so collecting debt was its "principal purpose," at least applied to this loan. A servicer that purchases a loan *prior* to default may not be a "debt collector" under this definition. California courts have dismissed foreclosure related FDCPA and RFDCPA claims because foreclosure is not a "debt collection" practice under either law. This reasoning, though, does not apply to *mortgage loans* themselves. Mortgage loans are not exempted by the FDCPA, and because "a violation of the FDCPA is a violation of the RFDCPA," borrower also has a viable RFDCPA claim.

Negligence: Duty of Care

Yau v. Deutsche Bank Nat'l Trust Co., N.A., 2013 WL 3296265 (C.D. Cal. June 21, 2013): On remand from the Ninth Circuit (*Yau v. Deutsche Bank Nat'l Trust Co. Am.*, 2013 WL 2302438 (9th Cir. May 24, 2013)), the district court reconsidered borrower's negligence claims in light of *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872 (2013). Accordingly, the district court granted a TRO to stop foreclosure proceedings until the parties can submit briefs on borrowers' request for a preliminary injunction. Further, the court noted that if it grants the PI, it would "only extend for a sufficient time to . . . permit plaintiffs to file an amended complaint asserting a negligence theory under [*Jolley*]" and for appropriate motions.

UCL: "Fraudulent" and "Unfair"

Canas v. Citimortgage, Inc., 2013 WL 3353877 (C.D. Cal. July 2, 2013): A UCL claim may proceed under three different theories: that the conduct was unfair, unlawful, or fraudulent. To allege that conduct

was "unfair," a plaintiff must identify the misleading conduct or statement and demonstrate economic damages caused by that conduct or statement. Here, Citi's promise of a permanent modification was misleading because after inducing the borrower to make TPP payments, Citi did not consider borrower for a permanent modification. The payments themselves are the economic injury. For a "fraudulent claim," a plaintiff need only show that "members of the public are likely to be deceived" by defendant's conduct. This is a lower standard that common law fraud claims. Here, the public is likely to be deceived by Citi's modification promises, as this borrower was.

California's Rosenthal Act, Negligent Misrepresentation, RESPA, and UCL Claims

Roche v. Bank of America, Nat'l Ass'n, 2013 WL 3450016 (S.D. Cal. July 9, 2013): 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." Unlike the FDCPA, the RFDCPA's legislative history does not indicate that mortgage servicing companies were meant to be excluded from the "debt collector" definition. "Specifically, the RFDCPA does not exclude banks which collect debts owed on debts which they originated." Here, BofA is the servicer and the original lender on the loan, so they are "debt collectors" under the RFDCPA. This is a similar holding to that in *In re Landry*, 493 B.R. 541 (Bankr. E.D. Cal. 2013). Additionally, a mortgage loan is a "debt" under the statute. A foreclosure may not qualify as a "debt," but a mortgage is not a foreclosure. Borrower's RFDCPA claim is not dismissed.

To prove negligent misrepresentation, a borrower must demonstrate that the servicer owed them a duty of care. This duty does not exist in a normal lender-borrower relationship. A servicer may, however, create this duty by: 1) offering to modify borrower's account, 2) charging unauthorized interest, or by 3) reporting incorrect, negative information to credit reporting agencies. In this case, BofA accomplished all three: 1) after creating an escrow account to pay borrower's tax assessment, it offered to remove (modify) the account if borrower paid the amount due; 2) by misapplying borrower's payments, BoA charged borrower inappropriate fees and penalties; and

3) it reported incorrect and negative information to credit reporting agencies, resulting from its own misapplication of borrower's payments. With these actions, BoA went "beyond the domain of a usual money lender" (quoting *Johnson v. HBSC Bank USA, Nat'l Ass'n*, 2012 WL 928433, at *4 (S.D. Cal. Mar. 19, 2012)). Borrower's negligence claim therefore survives the motion to dismiss.

To successfully allege a RESPA violation based in a servicer's failure to respond to a QWR, a borrower must allege damages resulting directly from the non-response. Here, allegations of higher monthly mortgage payments, inappropriate fees, a 165-point credit score plunge, and emotional distress sufficiently allege a RESPA claim.

To bring a UCL claim, a borrower's harm must have resulted from the servicer's alleged misconduct. Because borrower's damages can be directly traced to BoA's alleged unfair, unlawful, and fraudulent treatment, his UCL claim is not dismissed.

HBOR Non-Retroactivity & SPOC

Emick v. JP Morgan Chase Bank, 2013 WL 3804039 (E.D. Cal. July 19, 2013): This court dismissed borrower's CC § 2923.7 SPOC claim in part because the borrower did not allege specific SPOC violations between January 1, 2013 (the effective date of HBOR) and the date she filed her action. Borrower was allowed leave to amend her SPOC claim to allege that at least some of the conduct occurred between January 1, 2013 and her filing date.

Effect of State Court PI After Removal; Servicer Harassment Post-PI

Santos v. Reverse Mortg. Solutions, Inc., 2013 WL 3814988 (N.D. Cal. July 22, 2013): On the plaintiff's motion for sanctions for violating a preliminary injunction order, the defendants first argued that the state court issued preliminary injunction never took effect since defendant filed for removal on the same day the state court issued its tentative ruling granting the PI. Defendants failed, however, to give notice to the state court until a week later, after the state court's final order on the PI. This failure to alert the state court of removal

proceedings resulted in state court's continued jurisdiction. *See* 28 U.S.C. § 1446(d) (a state court retains jurisdiction over a matter until a defendant gives notice of removal to the state court). The PI was therefore effective and applied to defendants from the date of, at least, the tentative ruling. Even if the state court had lacked jurisdiction, the federal court's order denying defendants' motion to dissolve the PI still covered defendants.

The defendants next argued that sanctions were inappropriate because the PI only prevented defendants from selling the property. It did not require them to refrain from postponing the sale or from mailing notices of postponement to the deceased borrower or her daughter. The court accordingly denied the daughter's motion for sanctions but acknowledged the harassing nature of defendant's conduct (repeatedly postponing the sale, mailing dozens upon dozens of postponement notices, sending unannounced assessors to the home). It ordered defendant to stop these activities.

HAMP: No Private Right of Action and No Contract Claim Without a TPP; UCL Standing

Sholiay v. Fed. Nat'l Mortg. Ass'n, 2013 WL 3773896 (E.D. Cal. July 17, 2013): The Ninth Circuit has consistently found no private right of action allowing borrowers to enforce HAMP. Borrower's wrongful foreclosure claim based on his allegation that he qualified for a HAMP modification, was therefore dismissed. This situation differs from *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) and *West v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 780 (2013). In *Wigod*, the court found a TPP agreement's language constituted an enforceable contract (to offer borrower a permanent modification if she fulfilled the contract's provisions). In *West*, the court incorporated HAMP directive language into borrower's TPP agreement, creating an enforceable contract that way. Without a TPP agreement, the borrower here does not have an enforceable contract to bring claims under.

Viable UCL claims must establish that the borrower suffered economic injury *caused by* defendant's misconduct. If borrower's default occurred prior to any alleged misconduct, standing is difficult to show because

the default most likely caused the economic injury, regardless of a defendant's misdeeds. Here, because the plaintiff could not show how he could have prevented the sale without a loan modification that U.S. Bank was not required to provide, the court held that the plaintiff lacked standing to bring an UCL claim.

CC § 2923.5's "Owner-Occupied" Requirement; Pre-foreclosure Robosigining Claim

Patel v. U.S. Bank, 2013 WL 3770836 (N.D. Cal. July 16, 2013): The court dismissed borrower's CC § 2923.5 claim (with leave to amend) because borrower had not alleged that the property in question was "owner-occupied." The court did not discuss borrower's basis for the CC § 2923.5 claim.

A pre-foreclosure wrongful foreclosure claim may proceed if it would void a potential foreclosure sale, as opposed to rendering the sale voidable. Because borrower's robosigning claim attacks the validity of assignments, and therefore the chain of title, it would (if true) void a sale. Tender is not required for the same reason. Therefore the court allowed the claim to survive the motion to dismiss.

HOLA Preemption; Implied Covenant of Good Faith and Fair Dealing

Cockrell v. Wells Fargo Bank, N.A., 2013 WL 3830048 (N.D. Cal. July 23, 2013): The court applied a HOLA preemption analysis – applicable to federal savings associations—to Wells Fargo, a national bank. Without analysis, the court noted that borrower's loan originated with a federal savings association, which was purchased by Wells Fargo. Even though borrower's claims pertained to the post-purchase servicing of the loan, rather than loan origination, the court reasoned: "[Wells Fargo] itself is not subject to HOLA . . . [but] the loan's origination from a HOLA-regulated entity makes HOLA applicable in this case." In applying a HOLA analysis, the court noted that though borrower's claims (promissory estoppel, breach of contract, breach of implied covenant of good faith and fair dealing, IIED, and UCL) all relate to servicing (which would normally preempt them), they "serve

only to make defendant tell the truth and abide by its promises – not to impose additional requirements specifically related to loan servicing." This allows the claims to escape HOLA preemption.

A claim for a breach of implied covenant of good faith and fair dealing requires a borrower to show that their servicer unfairly interfered with the borrower's right to see the contract (the DOT) fully performed. Here, servicer's agent promised borrower that if he became delinquent, he would qualify for a modification and no negative actions would be taken. As soon as borrower did become delinquent, servicer reported him to credit reporting agencies and accelerated his loan. These allegations do not show that the servicer "actively hindered" borrower's right to benefit from the DOT: "dishonesty is not necessarily an active interference with the right to receive a contract's benefits." In other words, the agent did not "actively hinder" borrower from making loan payments on time. This same set of allegations was enough, however, to adequately plead promissory estoppel.

QWR Requirements & RESPA SOL; FCRA

Papapietro v. Trans Union LLC, 2013 WL 3803315 (N.D. Cal. July 19, 2013): To validly claim a RESPA violation related to a QWR, a borrower must demonstrate that they solicited information regarding loan servicing, not foreclosure. Though borrower's home was foreclosed upon and sold, the QWR pertained to payments borrowers had made, which falls under "servicing," not foreclosure. Nor were borrowers questioning the validity of the foreclosure. Their QWR related to allegedly inaccurate credit reporting. The court nevertheless dismissed borrower's RESPA claim because they did not allege damages caused by defendant's failure to answer the QWR. "Mere allegations of damage to credit rating without some resulting effect are insufficient." Emotional harm may be successfully pled in the Ninth Circuit, but only if a borrower can show a direct connection between the harm and the failure to respond to the QWR. Also, RESPA claims must be pled within 1 year of: 1) the transfer of servicing, or 2) when the loan was paid in full (through foreclosure, for example). Borrower's QWR was sent more than 1 year after foreclosure. The RESPA claim was dismissed with leave to amend to allege both causal damages and that

the SOL should be tolled (because borrowers did not become aware of the damage to their credit until after the SOL expired).

Borrower's FCRA claim is similar to that is *Lovejoy*, *supra*: defendant servicer failed to respond to a credit reporting agency's notice of borrower's credit dispute. And, as in *Lovejoy*, defendant here argued borrower's claim was barred because there is no private right of action in the FCRA against "furnishers" of credit information. Without reaching the question of whether defendant's conduct was willful or neglectful, the court cited Congress's additions to the FRCA, granting a private right of action if plaintiffs go through the "filtering mechanism" of 15 U.S.C. § 1681s-29(b), *i.e.*, notifying the credit reporting agency of the disagreement and giving the "furnisher" the chance to investigate. Here, borrowers jumped through this hoop and have an actionable claim.

RESPA & UCL Standing; California's Rosenthal Act: "Debt Collection" & "Consumer Debt"

Boessenecker v. JP Morgan Chase Bank, 2013 WL 385642 (N.D. Cal. July 24, 2013): To recover on a RESPA claim involving a QWR, a borrower must demonstrate that their servicer's failure to respond to the QWR (or to respond adequately) led to monetary damages. Here, borrowers successfully demonstrated that by not providing them with accurate loan information, their servicer prevented them from taking advantage of extremely low interest rates to refinance their mortgage. This showing was sufficient for both borrower's RESPA claim, and provided standing for their UCL claim (borrowers must allege actual harm/damages to bring a UCL claim).

California's RFDCPA applies to "debt collection:" "any act or practice in connection with the collection of consumer debts." CC § 1788.2(b). In their RESPA and UCL claims, borrowers alleged defendant refused to provide them with accurate loan information, and in so doing, used unfair means of collecting on the mortgage (by demanding higher payments, calculated in error). Communications regarding foreclosures have not been regarded as "debt collection." Here, however, Chase communicated with borrowers regarding their home mortgage loan, not foreclosure. This activity is a "debt collection" within the meaning

of the RFDCPA. While courts are split on whether mortgage loans qualifies as a "consumer debt" under the RFDCPA, this court sided with the reasoning that nothing in the RFDCPA language prevents mortgages from being considered a "debt." Borrower's RFDPCA claim was not dismissed.

Out of State Cases

HAMP Directives & Illinois State Law

Citimortgage, Inc. v. Johnson, __ N.E. 2d __, 2013 WL 3866138 (Ill. App. Ct. July 26, 2013): A month before a scheduled foreclosure sale, borrowers filed a second HAMP application. Their servicer foreclosed on their property anyway and brought this action in Illinois state court to confirm the sale. The trial court confirmed the foreclosure and then denied borrower's motion to reconsider. On appeal, the appellate court broke the analysis down to two inquiries: 1) were the borrowers allowed to file a second application under HAMP, and 2) if so, did the servicer hold the foreclosure sale "in material violation" of HAMP guidelines, mandating that the court set aside the sale, in compliance with Illinois law?

The court first analyzed borrower's submission of a second HAMP application. A borrower may resubmit an application if they failed in their first attempt because of a negative NPV number *and* if they then experienced a change in circumstances. HAMP allows servicers to define a "change in circumstances" that would qualify a borrower for reconsideration. Citi did not allege any internal policy disqualifying bankruptcy discharge as a change, and because a discharge affects credit ratings, which in turn affect NPV scores, a discharge would logically have an impact on a borrower's eligibility for HAMP. Accordingly, the court deemed borrower's discharge from chapter 7 bankruptcy a sufficient change in circumstances, allowing them to reapply for HAMP.

Answering the first inquiry in the affirmative, the court moved to the second. Illinois law directs courts to set aside foreclosure sales if the servicer conducted the sale in "material violation" of HAMP guidelines.

HAMP Guideline 3.3 requires servicers to suspend foreclosure sales if the borrower timely submits a HAMP application. Here, borrowers timely submitted a legitimate HAMP application (established by the first inquiry) and their application was still pending when Citi foreclosed, resulting in a material violation of the HAMP guidelines. The trial court therefore erred in confirming the foreclosure sale and in dismissing borrower's motion to reconsider. The appellate court reversed and vacated the sale, requiring Citi to consider borrower's second HAMP application.

Upcoming Trainings

Wednesday September 18th, 2013

The HBOR Collaborative presents:

REPRESENTING TENANTS & HOMEOWNERS UNDER THE HOMEOWNER BILL OF RIGHTS

This free training will be held at:

Housing Opportunities Collaborative, Achievement Academy
1045 11th Avenue, San Diego, CA 92101

5 Hours of MCLE Credit, including 1 hour of Ethics
Continental breakfast and lunch will be provided.

The HBOR Collaborative presents a free all-day training on the nuts and bolts of representing tenants and homeowners under the Homeowner Bill of Rights. The training will cover HBOR basics and provide practical tips for representing clients. HBOR became effective on January 1, 2013 and codifies the broad intentions of the National Mortgage Settlement's pre-foreclosure protections. It also provides tenants in foreclosed properties with a host of substantive and procedural protections. The training will cover the interplay of HBOR with NMS, CFPB servicing rules, and the Protecting Tenants at Foreclosure Act. We will also discuss HBOR's attorney fee provisions.

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

Register for this training at http://www.eventbrite.com/event/7790253859. To contact the HBOR Collaborative team or for more information on our services for attorneys, please visit http://calhbor.org/

SAVE THE DATE!

Wednesday October 23rd, 2013

The HBOR Collaborative presents:

REPRESENTING HOMEOWNERS & TENANTS UNDER THE HOMEOWNER BILL OF RIGHTS

This free training will be held at:

Sierra Curtis Neighborhood Association
2791 24th Street, Sacramento

5 Hours of MCLE Credit, including 1 hour of Ethics

The HBOR Collaborative presents a free all-day training on the nuts and bolts of representing tenants and homeowners under California's **Homeowner Bill of Rights (HBOR)**. The training will cover HBOR basics and provide practical tips for representing clients. HBOR became effective on January 1, 2013 and codifies the broad intentions of the National Mortgage Settlement's pre-foreclosure protections. It also provides tenants in foreclosed properties with a host of substantive and procedural protections. The training will cover the interplay of HBOR with NMS, CFPB servicing rules, and the Protecting Tenants at Foreclosure Act. We will also discuss HBOR's attorney fee provisions. **Registration information will be available in August.**

The HBOR Collaborative, a partnership of four organizations, **National Housing Law Project, National Consumer Law Center, Tenants Together and Western Center on Law and Poverty,** offers free training, technical assistance, litigation support, and legal resources to California's consumer attorneys and the judiciary on all aspects of the new California Homeowner Bill of Rights, including its tenant protections. The goal of the Collaborative is to ensure that California's homeowners and tenants receive the intended benefits secured for them under the Homeowner Bill of Rights by providing legal representation with a broad array of support services and practice resources.

The HBOR Collaborative and its services, including these free trainings for attorneys, are funded by a grant from the Office of the Attorney General of California from the National Mortgage Settlement to assist California

consumers. These trainings would not be possible without the invaluable support of our partners the California State Bar and Housing Opportunities Collaborative.

Note: Please visit our web site at www.calhbor.org for information on other upcoming trainings.