July 2013 Newsletter

Litigating Under the California Homeowner Bill of Rights

(Current through July 1, 2013 – please see our Practice Guide Section for an updated version)

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

I. Homeowner Bill of Rights

A few months before HBOR became law, 49 state attorneys general agreed to the National Mortgage Settlement (NMS) with five of the country's largest mortgage servicers.[4] The servicers agreed to provide $20 billion worth of mortgage-related relief to homeowners and to

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

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

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

[4] The U.S. Department of Justice, HUD, and state attorneys general filed claims against the five signatories (Ally/GMAC, Citigroup, Bank of America, J.P. Morgan Chase, and Wells Fargo) for deceptive and wrongful foreclosure practices. *See* Complaint at 21-39, United States v. Bank of Am., No. 1:12-cv-00361-RMC (D.D.C. Mar. 12, 2012), *available at* https://d9klfgibkcquc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf.

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abide by new servicing standards meant to address some of the worst foreclosure abuses.[5] Under the NMS, state attorneys general can sue noncompliant banks, but borrowers cannot.[6] The California Legislature passed HBOR to give borrowers a private right of action to enforce these protections in court[7] and to apply these requirements to all servicers, not just the five NMS signatories.[8] These protections include pre-NOD outreach requirements and restrictions on dual-tracking.

There are limits to HBOR's application. First, HBOR applies only to foreclosures of first liens on owner-occupied, one-to-four unit properties.[9] Second, HBOR only provides procedural protections to foster alternatives to foreclosure, and nothing in HBOR requires a loan modification.[10] Third, HBOR offers fewer protections for borrowers with small servicers.[11] Fourth, as long as the National Mortgage Settlement is effective, a signatory who is NMS-compliant with respect to the individual borrower is not liable under HBOR.[12] Finally, HBOR exempts bona fide purchasers from liability.[13]

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[5] For example, "robosigning" and dual tracking. *See* Servicing Standards Highlights 1-3, https://d9klfgibkcquc.cloudfront.net/Servicing%20Standards%20Highlights.pdf.
[6] *See*, *e.g.*, Citi Consent Judgment Ex. E, § J(2), United States v. Bank of Am., No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at* https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_Citibank-4-11-12.pdf ("An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee.").
[7] *See* CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013); *see also* A.B. 278, *supra* note 2, at 22 (After California's nonjudicial foreclosure process was hit with the foreclosure crisis, this "place[ed] an overwhelming amount of authority and judgment in the hands of servicers . . .)."
[8] Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., California Homeowner Bill of Rights Takes Key Step to Passage (June 27, 2012), http://oag.ca.gov/news/press-releases/california-homeowner-bill-rights-takes-key-step-passage ("The goal of the Homeowner Bill of Rights is to take many of the mortgage reforms extracted from banks in a national mortgage settlement and write them into California law so they could apply to all mortgage-holders in the state.").
[9] CAL. CIV. CODE § 2924.15(a) (2013).
[10] § 2923.4(a).
[11] *Compare* § 2924.12 (listing sections with private right of action against large servicers), *with* § 2924.19 (small servicers, defined as servicers who conducted fewer than 175 foreclosures in the previous fiscal year, as determined by CAL. CIV. CODE § 2924.18(b)).
[12] CAL. CIV. CODE § 2924.12(g) (2013).
[13] §§ 2924.12(e), 2924.19(e).

A. Pre-NOD Outreach Requirements

HBOR continued the existing requirement that a servicer may not record a notice of default (NOD) until 30 days after contacting (or attempting to contact) the borrower to discuss possible alternatives to foreclosure.[14] HBOR's pre-NOD outreach requirements also expand upon the outreach requirements under existing law. For example, the former Civil Code section 2923.5 only applied to deeds of trust originated between 2003 and 2007; HBOR removed this limitation.[15] Borrowers who successfully brought claims under pre-HBOR law were limited to postponing a foreclosure until the servicer complied with the outreach requirements.[16] Enjoining a sale is still a remedy, but HBOR makes damages available even after a foreclosure sale.[17]

HBOR requires a number of additional outreach requirements from large servicers. These servicers must alert borrowers that they may request documentation demonstrating the servicer's authority to foreclose.[18] They are required to provide post-NOD outreach if the borrower failed to request a loan modification before an NOD was recorded.[19] Finally, large servicers must provide a single point of contact to borrowers.[20]

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[14] *See* CAL. CIV. CODE §§ 2923.5(a) & 2923.55(a) (2013) (applying to small and large servicers, respectively). The statutes provide specific instructions on the nature and content of the communication. For due diligence requirements, see CAL. CIV. CODE §§ 2923.5(e)(1)-(5) & 2923.55(f)(1)-(5) (2013), applying to small and large servicers, respectively.

[15] *Compare* CAL. CIV. CODE § 2923.5 (2012), *with* CAL. CIV. CODE §§ 2923.5 & 2923.55. Refer to CEB, California Mortgages, Deeds of Trust, and Foreclosure Litigation, § 10.8A (4th ed. Feb. 2013), for a more detailed explanation of the similarities and differences between pre-existing law and HBOR.

[16] *See*, *e.g.*, Mabry v. Superior Court, 185 Cal. App. 4th 208, 214 (2010) ("The right of action is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.").

[17] CAL. CIV. CODE § 2924.12 (2013) (large servicers); CAL. CIV. CODE § 2924.19 (2013) (small servicers).

[18] *Compare* CAL. CIV. CODE § 2923.5 (2012), *with* CAL. CIV. CODE § 2923.55 (2013).

[19] CAL. CIV. CODE § 2924.9 (requiring servicers that routinely offer foreclosure alternatives must contact the borrower within five days of the NOD recordation, explain those alternatives, and explain exactly how to apply for them).

[20] CAL. CIV. CODE § 2923.7 (2013); *see* Lapper v. Suntrust Mortg., N.A., 2013 WL 2929377, at *3 (C.D. Cal. June 7, 2013) (finding borrower's allegation that she never received a SPOC sufficient to show a likelihood of success on the merits for a TRO); Senigar v. Bank of Am., No. MSC13-00352 (Cal. Super. Ct. Feb. 20, 2013) (same).

B. Dual Tracking

In addition to mandating outreach and communication, the California Legislature has reined in dual tracking, the practice of evaluating a borrower for a modification while simultaneously proceeding with a foreclosure. If the borrower has submitted a complete loan modification application, HBOR prohibits the servicer from moving forward with the foreclosure process.[21]

Within five days of receiving a loan modification application, the servicer must provide borrowers with written acknowledgement of receipt that includes a description of the modification process, pertinent deadlines, and notification if documents are missing.[22] When an application is denied, the servicer must explain appeal rights, give specific reasons for investor-based denials, report NPV numbers, and describe foreclosure alternatives still available.[23]

Court decisions to date have illustrated the importance of submitting a complete application to trigger HBOR's dual tracking protections. The grant or denial of a TRO or preliminary injunction has often turned on whether the borrower had a complete modification application.[24] Even though there is currently no clear guidance on what constitutes a "complete application," if a borrower is applying for a HAMP modification, compliance with the HAMP handbook requirements should satisfy this requirement.[25]

To prevent abuse, HBOR's dual tracking protections do not apply to borrowers who resubmit multiple applications, unless the borrower experienced a material change in financial circumstances.[26] For borrowers who had prior reviews, this provision is critical because a re-application under that circumstance will still trigger dual tracking protections.[27]

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[21] *See* CAL. CIV. CODE §§ 2923.6(c), 2924.18(a)(1) (2013) (applying to large and small servicers, respectively).
[22] CAL. CIV. CODE § 2924.10 (2013).
[23] CAL. CIV. CODE § 2923.6(f) (2013).
[24] *Compare* Singh v. Bank of America, 2013 WL 1858436, at *2 (E.D. Cal. May 1, 2013), *and* Bitker v. Suntrust Mortgage Inc., 2013 WL 2450587, at *2 (S.D. Cal. Mar. 29, 2013), *with* Lindberg v. Wells Fargo Bank, N.A., 2013 WL 1736785 (N.D. Cal. Apr. 22, 2013) (denying TRO when borrower failed to respond to servicer's request for further documentation).
[25] See Making Home Affordable, *Handbook for Servicers of Non-GSE Mortgages*, ch. II, §§ 4 & 5 (version 4.2 May 1, 2013), for the list of required documents.
[26] *See* CAL. CIV. CODE 2923.6(g) (2013).
[27] *Compare Bitker*, 2013 WL 2450587, at *2 (granting a TRO when borrower demonstrated a material change in financial circumstances to the servicer), *with*

HBOR also provides protections for borrowers approved for a temporary or permanent loan modification or other foreclosure alternative. A servicer may not record an NOD as long as the borrower remains compliant with an approved loss mitigation plan.[28] If a plan is approved after an NOD is recorded, a servicer may not proceed with the foreclosure process as long as the borrower is plan-compliant.[29] The servicer must also rescind the NOD and cancel a pending sale.[30]

II. Non-HBOR Causes of Action

Because injunctive relief under HBOR is limited to before the trustee's deed is recorded,[31] advocates with post-foreclosure cases should explore whether other claims could overturn a completed foreclosure sale. HBOR explicitly preserves remedies available under other laws.[32]

A. Wrongful Foreclosure Claims

Because HBOR only provides for pre-sale injunctive relief and only damages after trustee deed has been recorded, wrongful foreclosure claims (which can set aside or "undo" foreclosure sales)[33] are important for borrowers who were unable to bring a pre-sale claim.[34] Generally, claims challenging the foreclosing party's authority to foreclose are not available before the sale because courts are hesitant to add new

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Winterbower v. Wells Fargo Bank, N.A., 2013 WL 1232997, at *3 (C.D. Cal. Mar. 27, 2013) (denying TRO when borrowers simply wrote their servicer that they "decreased their expenses from $25,000 per month down to $10,000 per month."). Repeats quote in fn 24.

[28] CAL. CIV. CODE § 2924.11(a)(1) (2013).

[29] *Id.*

[30] § 2924.11(d).

[31] *See* CAL. CIV. CODE §§ 2924.12(a)(1), 2924.19(a)(1) (2013).

[32] *See* CAL. CIV. CODE §§ 2924.12(h), 2924.19(g) (2013).

[33] See CEB, *supra* note 15, §§ 7.67A, 10.75, & 10.76, for descriptions of the different bases for wrongful foreclosure claims. *Pre*-sale wrongful foreclosure claims are also possible. *See* Nguyen v. JP Morgan Chase Bank N.A., 2013 WL 2146606, at *4 (N.D. Cal. May 15, 2013) (A claim for wrongful foreclosure may be brought pre-sale if plaintiff alleges inaccurate or false mortgage documents and if plaintiff has received a notice of trustee sale.). *But see* Rosenfeld v. JP Morgan Chase Bank, N.A., 732 F. Supp. 2d 952, 961 (N.D. Cal. 2010) (finding a pre-sale wrongful foreclosure claim premature); Vega v. JP Morgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1113 (E.D. Cal. 2009).

[34] *See* CAL. CIV. CODE § 2924(a)(6) (2013).

requirements to the non-judicial foreclosure statute.[35] As a result, most wrongful foreclosure claims are brought after the sale. Borrowers may find it easier to challenge the validity of the foreclosure in post-sale unlawful detainer actions, where the servicer must affirmatively demonstrate proper authority.[36]

1. Assignments of the deed of trust

Only the holder of the beneficial interest may substitute a new trustee or take action in the foreclosure process. A beneficiary's assignee must obtain an assignment of the deed of trust before moving forward with the foreclosure process, by recording a notice of default, for example.[37] HBOR codified this requirement in Civil Code Section 2924(a)(6).[38] Courts have allowed wrongful foreclosure claims to proceed when borrowers specifically alleged that the lender is not the current beneficiary under the deed of trust.[39] Courts in California have allowed claims that servicers backdated assignments to reach the trial

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[35] *See* Gomes v. Countrywide Home Loans, 192 Cal. App. 4th 1149, 1154 (2011).
[36] *See* U.S. Bank v. Cantartzoglou, 2013 WL 443771, at *9 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (If the defendant raises questions as to the veracity of title, plaintiff has the affirmative burden to prove true title.); Aurora Loan Servs. v. Brown, 2012 WL 6213737, at *5-6 (Cal. App. Div. Super. Ct. July 31, 2012) (voiding a sale where plaintiff servicer could not demonstrate authority to foreclose and refusing to accept a post-NOD assignment as relevant to title).
[37] *See* Nguyen v. JP Morgan Chase Bank, N.A., 2013 WL 2146606, at *5 (N.D. Cal. May 15, 2013) (denying motion to dismiss wrongful foreclosure claim because JP Morgan Chase could not demonstrate that it received an assignment from the original beneficiary WaMu).
[38] CAL. CIV. CODE § 2924(a)(6) (2013) (Entities with the authority to foreclose are: 1) the holder of the beneficial interest in the loan, 2) the original or substituted trustee, or 3) the agent of the beneficial interest, acting in the scope of their authority designated by the beneficial interest.).
[39] *See* Miller v. Carrington Mortg. Servs., No. C-12-2282 EMC (N.D. Cal. July 3, 2013) (holding that plaintiff stated a wrongful foreclosure claim when the assignment was made while the original beneficiary was in bankruptcy); *Nguyen*, 2013 WL 2146606, at *2; Mena v. JP Morgan Chase Bank, N.A., 2012 WL 3987475, at *6 (N.D. Cal. Sept. 7, 2012); Barrionuevo v. Chase Bank, 85 F. Supp. 2d 964, 969 (N.D. Cal. 2012) (deciding not to require tender where plaintiffs alleged that defective notice would make the scheduled sale void); Sacchi v. Mortg. Electronic Registration Sys., Inc., 2011 WL 2533029, at *9-10 (C.D. Cal. June 24, 2011); Javaheri v. JP Morgan Chase Bank, N.A., 2011 WL 213786, at *5-6 (C.D. Cal. June 2, 2011); Ohlendorf v. Am. Home Mortg. Servicing, 279 F.R.D. 575, 583 (E.D. Cal. 2010).

stage.[40] California law, however, does not require the assignment to be recorded.[41]

Cases alleging that MERS may not assign the deed of trust have also generally failed. California law is clear: once a beneficiary signs the deed of trust over to MERS, MERS has the power to assign the beneficiary's interests (as the beneficiary's nominee or agent).[42] However, if a borrower alleges that a signer actually lacked an agency relationship with MERS, that issue can reach the discovery or trial stage.[43]

2. Possession of promissory note

Challenges based on possession of the note have generally not been successful because assignees need not demonstrate physical possession of the promissory note to foreclose in California.[44] However, borrowers may succeed if they allege specific facts claiming a servicer lacked authority to foreclose.[45]

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[40] *See* Johnson v. HBSC Bank U.S.A., 2012 WL 928433, *3 (S.D. Cal. Mar. 19, 2012); Tamburri v. Suntrust Mortg., Inc., 2011 WL 6294472, at *12 (N.D. Cal. Dec. 15, 2011); Castillo v. Skoba, 2010 WL 3986953, at *2 (S.D. Cal. Oct. 8, 2010).

[41] *See*, *e.g.*, Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 517-19 (2013) (Civil Code Section 2932.5 does not require recording of assignments of deeds of trust); Haynes v. EMC Mortg. Corp., 205 Cal. App. 4th 329, 336 (2012) (same); Calvo v. HSBC Bank USA, N.A., 199 Cal. App. 4th 118, 121-22 (2011) (same). *But see In re* Cruz, 2013 WL 1805603, at *2-8 (Bankr. S.D. Cal. Apr. 26, 2013) (finding section 2932.5 applicable to both mortgages and deeds of trust).

[42] *See* Herrera v. Fed. Nat'l Mortg. Ass'n, 205 Cal. App. 4th 1495, 1503-04 (2012); Hollins v. Recontrust, N.A., 2011 WL 1743291, at *3 (C.D. Cal. May 6, 2011).

[43] *See* Halajian v. Deutsche Bank Nat'l Trust Co., 2013 WL 593671, at *6-7 (E.D. Cal. Feb. 14, 2013) (warning that if the MERS "vice president" executing the foreclosure documents was not truly an agent of MERS, then she "was not authorized to sign the assignment of deed of trust and substitution of trustee [and] both are invalid"); Tang v. Bank of Am., N.A., 2012 WL 960373, at *11 (C.D. Cal. Mar. 19, 2012); Johnson v. HBSC Bank U.S.A., 2012 WL 928433, at *3 (S.D. Cal. Mar. 19, 2012) (Whether or not the MERS board of directors approved the appointment of an "assistant secretary" is relevant to that secretary's authority to assign a DOT.).

[44] Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 513 (2013); Debrunner v. Deutsche Bank Nat'l Trust Co., 204 Cal. App. 4th 433, 440 (2012).

[45] *See Jenkins*, 216 Cal. App. 4th at 511-13 (A borrower may not enjoin a foreclosure without asserting specific facts that the beneficiary or the beneficiary's agent lacked proper authority.); Wise v. Wells Fargo, 850 F. Supp. 2d 1047 (C.D. Cal. 2012); *Sacchi*, 2011 WL 2533029, at *23; Ohlendorf v. American Home Mortg. Servicing, 279 F.R.D. 575, 583 (E.D. Cal. 2010).

3. Substitutions of trustee

Only the original trustee or a properly substituted trustee may carry out a foreclosure, and unlike assignments of a deed of trust, substitutions of trustee must be recorded.[46] Without a proper substitution of trustee, any foreclosure procedures (including sales) initiated by an unauthorized trustee are void.[47] Courts have upheld challenges when the signer of the substitution may have lacked authority or the proper agency relationship with the beneficiary.[48] Courts have also allowed cases to proceed when the substitution of trustee was allegedly backdated.[49]

4. Foreclosure notice requirements

Attacks on completed foreclosure sales based on noncompliance with notice requirements are rarely successful. Borrowers need to demonstrate prejudice from the notice defect and must tender the unpaid principal balance of the loan.[50]

5. Loan modification related claims

If the servicer foreclosed when the borrower is in compliance with a loan modification, the borrower may bring a wrongful foreclosure claim to set aside the sale.[51]

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[46] CAL. CIV. CODE § 2934a (2012).
[47] *See, e.g.,* Dimock v. Emerald Props. LLC, 81 Cal. App. 4th 868, 876 (2000) (finding the foreclosing entity had no power to foreclose because the substitution of trustee had never been recorded as required by section 2934a); Pro Value Properties, Inc. v. Quality Loan Servicing Corp., 170 Cal. App. 4th 579, 581 (2009).
[48] *See* Halajian v. Deutsche Bank Nat'l Trust Co., 2013 WL 593671, at *6-7 (E.D. Cal. Feb. 14, 2013) (warning that if the MERS "vice president" executing the foreclosure documents was not truly an agent of MERS, then she "was not authorized to sign the assignment of deed of trust and substitution of trustee [and] both are invalid"); Michel v. Deutsche Bank Trust Co., 2012 WL 4363720, at *6 (E.D. Cal. Sept. 20, 2012); Tang v. Bank of Am., N.A., 2012 WL 960373, at *11 (C.D. Cal. Mar. 19, 2012); Sacchi v. MERS, 2011 WL 2533029, at *24 (C.D. Cal. June 24, 2011) (denying servicer's motion to dismiss because an unauthorized entity executed a substitution of a trustee).
[49] *See* Makreas v. First Nat'l Bank of N. Cal., 856 F. Supp. 2d 1097, 1100 (N.D. Cal. 2012).
[50] *See, e.g.,* Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 112 (2011).
[51] *See* Barroso v. Ocwen Loan Servicing, 208 Cal. App. 4th 1001, 1017 (2012) (finding that the borrower may state a wrongful foreclosure claim when the servicer foreclosed while the borrower was in compliance with the modification agreement).

6. FHA loss mitigation rules

Servicers of FHA loans must meet strict loss mitigation requirements, including a face-to-face meeting with the borrower, before they may accelerate the loan.[52]

B. Contract Claims

Breach of contract claims have been successful against servicers that foreclose while the borrower is compliant with their Trial Period Plans (TPP) or permanent modification.[53] Courts have rejected arguments that TPP agreements do not require servicers to offer borrowers permanent modifications.[54]

Because promissory estoppel claims are exempt from the statute of frauds,[55] borrowers often bring promissory estoppel claims when there is no written agreement. To state a claim, borrowers must show not only that the servicer promised a beneficial arrangement (like postponing the foreclosure sale) and went back on that promise, but that the borrower detrimentally relied on that promise. Some courts require borrowers to demonstrate specific changes in their actions to show this reliance, while others take for granted that the borrowers *would* have acted differently absent the promise.[56] Even though a

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[52] 12 U.S.C. § 1715u(a) (2012) ("Upon default of any mortgage insured under this title [12 U.S.C. § 1707 et seq.], mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure."). For a more in depth review of FHA loss mitigation requirements, see Nat'l Consumer Law Center, Foreclosures § 3.2 (4th ed. 2012).

[53] *See*, *e.g.*, Barroso v. Ocwen Loan Servicing, 208 Cal. App. 4th 1001, 1013-14 (2012) (finding the language and intent of a permanent modification forms an enforceable contract even if the agreement is not countersigned by the servicer; once the borrower performs under that contract by making payments, the servicer must perform as well); West v. JP Morgan Chase Bank, 214 Cal. App. 4th 780, 799 (2013) (same for Trial Period Plan).

[54] West, 214 Cal. App. 4th at 799; *see also* Young v. Wells Fargo Bank, N.A., __ F.3d __, 2013 WL 2165262, at *7-8 (1st Cir. May 21, 2013) (servicer must offer permanent modification before the Modification Effective Date); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, at 565-66 (7th Cir. 2012).

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

[56] *Compare Panaszewicz*, 2013 WL 2252112, at *5 (requiring a borrower to show pre-promise "preliminary steps" to address an impending foreclosure and then a post-

promissory estoppel claim may not, in most cases, overturn a completed sale,[57] if the lender promised to postpone a foreclosure sale, a Section 2924g(c) claim could cancel the sale.[58] This type of claim does not require a borrower to show detrimental reliance.[59]

C. Tort Claims

Until very recently, servicers were immune to negligence claims because, under normal circumstances, a lender does not owe a duty of care to a borrower.[60] The decision in *Jolley v. Chase Home Finance, LLC*, dramatically changed this state of the law, proposing that the rule may be outdated. The court cited HAMP, SB 1137, and HBOR, as indicative of a shifting public policy. Now, it may be appropriate to impose a duty of care on banks, encouraging them to negotiate loan modifications with borrowers and to treat borrowers fairly in this process.[61] "Courts should not rely mechanically on the 'general rule'" that a duty of care does not exist, and the loan modification process itself can create a duty of care relationship.[62] Courts' views on this

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promise change in their activity), *and* Aceves v. U.S. Bank, N.A., 192 Cal. App. 4th 218, 222, 229-30 (2011) (finding that foregoing a Chapter 13 bankruptcy case was sufficiently detrimental), *with* West v. JP Morgan Chase Bank, N.A., 214 Cal. App. 4th 780, 804-05 (2013) (finding plaintiff's allegation that she would have pursued other options if not for servicer's promise to stop the foreclosure, sufficient detrimental reliance).

[57] *See Aceves*, 192 Cal. App. 4th at 231.

[58] *See* Aharonoff v. Am. Home Mortg. Servicing, 2012 WL 1925568, at *4 (Cal. Ct. App. May 29, 2012) (allowing a 2924g(c) claim to cancel the sale when Wells Fargo representative conducted trustee sale despite promises to put the sale on hold).

[59] *See id.* (allowing claim without requiring detrimental reliance).

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

[61] Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 902-03 (2013).

[62] *Id*. at 903. *See also, e.g.,* Robinson v. Bank of America, 2012 WL 1932842, at *7 (N.D. Cal. May 29, 2012) (finding a duty of care arising from a TPP and a breach of that duty when the servicer failed to offer a permanent modification and instead reported the borrower to credit rating agencies); Ansanelli v. JP Morgan Chase Bank, N.A., 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011) (finding that offering a loan modification went "beyond the domain of a usual money lender." (quoting *Nymark*, 231 Cal. App. 3d at 1096)); Kennedy v. Wells Fargo Bank, N.A., 2011 WL 4526085, at *11 (C.D. Cal. Sept. 28, 2011) (addressing the foreseeability of harm coming to a borrower who was treated negligently by her servicer).

duty are not universal,[63] however, and advocates should note recent courts that considered the same issue and found no duty of care.[64]

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim.[65] An intentional wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress claim.[66]

D. UCL Claims

California's Unfair Competition Law (UCL), which provides for restitution and injunctive relief against any unlawful, unfair, and fraudulent practice, provides another opportunity for borrowers to obtain injunctive relief to stop or postpone a foreclosure.[67]

Unlawful prong claims may be brought regardless of whether the underlying statute provides a private right of action.[68] For example, borrowers have used UCL claims to challenge assignments that are alleged to be unlawful, even though the underlying statute does not provide a right of action.[69] In addition, because UCL's remedies are cumulative to existing remedies, an unlawful prong claim might provide injunctive relief for HBOR violations even after the trustee's deed is recorded. Such post-sale relief would be unavailable under HBOR's statutory remedies.[70]

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[63] *See* Yau v. Deutsche Bank Nat'l Trust Co. Am., 2013 WL 2302438, at *3 (9th Cir. May 24, 2013) (explaining the split in the case law and remanding a case for consideration of plaintiff's possible negligence claim in light of *Jolley*).

[64] *See* Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 207 (2012) (finding no duty because the issue of loan modification falls "within the scope of [servicer's] conventional role as a lender of money").

[65] *See* West v. JP Morgan Chase Bank, 214 Cal. App. 4th 780, 793-94 (2013) (upholding fraud and misrepresentation claims); Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230, 249 (2011).

[66] *See* Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 203-05 (2012).

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

[68] *See* Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 562 (1998).

[69] Vogan v. Wells Fargo Bank, N.A., 2011 WL 5826016, at *6-7 (E.D. Cal. Nov. 17, 2011) (allowing § 17200 claim when plaintiffs alleged that assignment was executed after the closing date of securities pool, "giving rise to a plausible inference that at least some part of the recorded assignment was fabricated").

[70] *See* CAL. BUS. & PROF. CODE § 17205 (2012) (UCL remedies cumulative to those provided under existing law); CAL. CIV. CODE §§ 2924.12(h), 2924.19(g) (2013) (HBOR remedies cumulative).

The unfair prong of the UCL makes unlawful practices that violate legislatively stated public policy, even if that activity is not technically prohibited by statute. For example, even though HBOR did not become effective until 2013, courts have held pre-2013 dual tracking unfair under the UCL.[71]

The fraudulent prong of the UCL prohibits fraudulent practices that are likely to deceive the public.[72] For example, courts have allowed UCL fraudulent claims against banks that offered trial period plans that did not comply with HAMP guidelines,[73] and that misrepresented their method of posting fees and service charges to mortgage accounts.[74]

Because of Proposition 64, a borrower bringing a UCL claim must show: (1) lost money or property that is (2) caused by the unfair competition.[75] Courts have found the initiation of foreclosure proceedings to constitute lost property interest but have demanded that the loss be caused by the wrongful conduct, not simply the borrower's monetary default.[76]

III. Litigation Issues

A. Obtaining Injunctive Relief

Because HBOR's enforcement provisions do not allow borrowers to undo completed foreclosure sales, it is critical to seek preliminary

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[71] *See* Cabrera v. Countrywide Fin., 2012 WL 5372116, at *7 (N.D. Cal. Oct. 30, 2012) (upholding unfair prong claim because "although the public policy was not codified until 2012, it certainly existed in 2011 as part the general public policy against foreclosures that were occurring without giving homeowners adequate opportunities to correct their deficiencies"); Jolley v. Chase Home Fin., LLC., 213 Cal. App. 4th 872, 907-08 (2012) ("[W]hile dual tracking may not have been forbidden by statute at the time, the new legislation and its legislative history may still contribute to its being considered 'unfair' for purposes of the UCL.").

[72] Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 838 (2006).

[73] West v. JP Morgan Chase Bank N.A., 214 Cal. App. 4th 780, 806 (2013).

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

[75] CAL. BUS. & PROF. CODE § 17204 (2012).

[76] *See* Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 520-23 (2013) (finding a "diminishment of a future property interest" sufficient economic injury and yet finding no standing because the foreclosure stemmed from debtor's default, not because of alleged wrongful practices).

injunctive relief before the sale occurs. Under HBOR, borrowers may obtain injunctive relief to an impending sale, but a borrower may only recover actual economic damages post-sale.[77]

To obtain a preliminary injunction in state court, a borrower must show (1) they will likely prevail on the merits and (2) they will be more harmed by the sale than the servicer will be by postponing the sale.[78] In the Ninth Circuit, a plaintiff must show "serious questions going to the merits[,] . . . [that] the balance of hardships tips sharply in [their] favor," that they will suffer irreparable injury without the relief, and that the injunction is in the public interest.[79] At least in federal court, an identical standard governs the issuance of a temporary restraining order.[80] In either state or federal court, the loss of one's home is irreparable harm.[81]

Courts have enjoined pending foreclosure sales when the servicer violated HBOR.[82] Courts have also granted preliminary injunctions in non-HBOR cases.[83]

B. Bona Fide Purchasers

When a bona fide purchaser (BFP) buys a property at trustee sale, the recitals in the trustee deed become conclusive, and it can be more difficult to set aside a foreclosure sale. However, if the challenge to the foreclosure goes to the authority to foreclose, or if the sale was void,

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[77] *See* CAL. CIV. CODE § 2924.12 (2013) (describing relief available against large servicers); CAL. CIV. CODE § 2429.19 (2013) (describing relief available against small servicers, conducting less than 175 foreclosures in the previous fiscal year, as determined by CAL. CIV. CODE § 2924.18(b)).

[78] White v. Davis, 30 Cal. 4th 528, 554 (2003).

[79] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

[80] *See* Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001).

[81] CAL. CIV. CODE § 3387 (2012); Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 661 (9th Cir. 1988).

[82] *See, e.g.,* Dierssen v. Specialized Loan Servicing LLC, 2013 WL 2647045, at *2 (E.D. Cal. June 12, 2013); Lapper v. Suntrust Mortg., N.A., 2013 WL 2929377, at *3 (C.D. Cal. June 7, 2013); Singh v. Bank of America, 2013 WL 1858436 (E.D. Cal. May 1, 2013) (PI); Bitker v. Suntrust Mortgage Inc., 2013 WL 2450587, at *2 (S.D. Cal. Mar. 29, 2013) (TRO); Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Sacramento, Cal. Super. Ct. July 1, 2013) (PI).

[83] *See, e.g.,* Heflebower v. J.P. Morgan Chase Bank, N.A., 2012 WL 5879589, at *3 (E.D. Cal. Nov. 20, 2012) (enjoining sale because of noncompliance with former CC § 2923.5); Miller v. Wells Fargo Bank, 2012 WL 1945498, at *3 (N.D. Cal. May 30, 2012) (enjoining sale because MERS may not have had authority to assign deed of trust); Jackmon v. Am.'s Servicing Co., 2011 WL 3667478, at *3 (N.D. Cal. Aug. 22, 2011) (enjoining sale because the borrower fully complied with her Trial Period Plan)

then even a sale to a BFP can be overturned.[84] In one case where the sale already took place, the court issued a preliminary injunction against enforcement of the writ of possession.[85]

C. Tender & Bond Requirements

To set aside a foreclosure sale, a borrower must generally "tender" (offer and be able to pay) the amount due on their loan.[86] This is especially true when the challenge is premised on a procedural defect in the foreclosure notices.[87] However, tender is not required if it would be inequitable.[88] In addition, courts have excused the tender requirement when (1) the sale is void (e.g., the trustee conducted the sale without legal authority);[89] (2) if the loan was reinstated;[90] (3) if the borrower was current on their loan modification;[91] and (4) if the borrower is challenging the validity of the debt.[92] Another important exception to the tender rule is the recent, strong trend toward finding tender inapplicable in cases seeking to enjoin a pending foreclosure sale (as opposed to actions seeking to set aside a completed sale).[93]

Courts have also leaned toward not requiring tender for statutory causes of action. In *Mabry v. Superior Court*, the court considered tender in a claim under former Civil Code Section 2923.5.[94] The

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[84] *See* Bank of Am., N.A. v. La Jolla Group II, 129 Cal. App. 4th 706, 714-15 (2005).
[85] Sencion v. Saxon Mortg. Servs., LLC, 2011 WL 2259764, at *2 (N.D. Cal. May 17, 2011).
[86] *See* Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 112 (2011) (stating the general tender rule).
[87] Vogan v. Wells Fargo Bank, N.A., 2011 WL 5826016, at *7 (E.D. Cal. Nov. 17, 2011) (citing Abdallah v. United Sav. Bank, 43 Cal. App. 4th 1101, 1109 (1996)) ("A plaintiff is required to allege tender . . . to maintain any cause of action for irregularity in the non-judicial foreclosure sale procedure.").
[88] Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 291 (1911); Lona v. CitiBank, N.A., 202 Cal. App. 4th 89, 113 (2011) (outlining all the reasons for not requiring tender, including that it would not be fair to the borrower in certain circumstances).
[89] Dimock v. Emerald Props., 81 Cal. App. 4th 868, 877-78 (2000).
[90] Bank of Am. v. La Jolla Group, 129 Cal. App. 4th 706, 711 (2005).
[91] Barroso v. Ocwen Loan Servicing, 208 Cal. App. 4th 1001, 1017 (2012).
[92] Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 103-04 (2011).
[93] *See* Barrionuevo v. Chase Bank, 85 F. Supp. 2d 964, 969 (N.D. Cal. 2012) (deciding not to require tender where plaintiffs alleged that defective notice would make the scheduled sale void); Tang v. Bank of America, N.A., 2012 WL 960373, at *4 (C.D. Cal. Mar. 19, 2012) (explaining why requiring pre-sale tender is less common than requiring post-sale tender: because post-sale actions are more demanding on courts); Intengan v. Bank of Am., 214 Cal. App. 4th 1047, 1053-54 (2013); Pfeifer v. Countrywide Home Loans, 211 Cal. App. 4th 1250, 1281 (2012).
[94] Mabry v. Superior Court, 185 Cal. App. 4th 208, 213 (2010).

Legislature, the court reasoned, intended borrowers to enforce those outreach requirements, and requiring tender would financially bar many claims.[95] A recent state court cited this principle when rejecting defendant servicer's tender argument in a dual tracking and SPOC case.[96] In another case, the court found tender unnecessary simply because "the California Home Owner Bill of Rights . . . imposes no tender requirement."[97]

Advocates moving for TROs or preliminary injunctions should prepare for disputes over the amount of bond. Bonds can be discretionary,[98] and courts vary on the amount required: some use fair market rent of comparable property[99] and others set it at the amount of the borrower's mortgage payments.[100] In a recent federal case, the court set an extremely low bond;[101] in another, the court set no bond at all.[102] Advocates arguing against a bond should reassure the court that the bank's interests are preserved in the deed of trust and unharmed

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

[96] *See* Senigar v. Bank of America, No. MSC13-00352 (Cal. Super. Ct. Feb. 20, 2013).

[97] Mojanoff v. Select Portfolio Servicing Inc., No. LC100052 (Cal. Super. Ct. May 28, 2013). The mandatory language in HBOR's enforcement statutes would be irrationally optimistic if courts regularly applied strict tender rules. *See*, *e.g.*, CAL. CIV. CODE § 2924.12(b) ("After a trustee's deed upon sale has been recorded [a servicer] *shall* be liable to a borrower for actual economic damages." (emphasis added)).

[98] *See* F.R.C.P. 65(c); CAL. CIV. PROC. CODE § 529(a) (1994). In California, courts can waive a bond completely if the party seeking injunctive relief is indigent. CAL. CIV. PROC. CODE § 995.240 (1982).

[99] *See* Tamburri v. Suntrust Mortg., Inc., 2011 WL 2654093, at *6 (N.D. Cal. July 6, 2011) (setting bond at the fair rental value of the property); Magana v. Wells Fargo Bank, N.A., 2011 WL 4948674, at *2 (N.D. Cal. Oct. 18, 2011) (same).

[100] *See* Martin v. Litton Loan Servicing L.P., 2013 WL 211133, at *22 (E.D. Cal. Jan. 16, 2013) (setting the bond at borrower's pre-escrow monthly mortgage payment); Rampp v. Ocwen Fin. Corp., 2012 WL 2995066, at *5 (S.D. Cal. July 23, 2012) (setting the bond at the modified monthly mortgage payment). *Cf.* Flaherty v. Bank of Am., 2013 WL 29392, at *8-9 (Cal. Ct. App. Jan. 3, 2013) (reversing the undertaking order because the borrower's "past arrearages allegedly owed [the bank] is not a proper measure of [the bank]'s future damages caused by a delay in the sale of the property").

[101] Singh v. Bank of Am., N.A., 2013 WL 1858436, at *2-3 (E.D. Cal. May 1, 2013) (setting a one-time bond of $1,000).

[102] Bitker v. Suntrust Mortg. Inc., 2013 WL 2450587, at *2 (S.D. Cal. Mar. 29, 2013) (declining to set a bond because it was not in the public interest to set one, and because the defendant bank's interests were secured by the DOT).

by a mere postponement of a foreclosure.[103] In any event, the court should not set the bond at the unpaid amount of the loan or the entire amount of arrearages.[104]

D. Judicial Notice

During litigation over whether the servicer complied with former Section 2923.5, servicers often request judicial notice of the NOD declaration to demonstrate compliance with the statute's contact and due diligence requirements.[105] Most courts have declined to grant judicial notice of the truth of the declaration and limited judicial notice to only the declaration's existence and legal effect.[106] Courts are more inclined to take judicial notice if the truth of the contents is undisputed.[107]

E. Attorney's Fees

Prior to HBOR's enactment, loan documents were the only avenue to attorney's fees.[108] HBOR's enforcement statutes explicitly allow for attorney's fees, even if the borrower obtained only preliminary injunctive relief.[109]

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[103] *See id*.
[104] *See Flaherty*, 2013 WL 29392, at *8 (finding the total amount of arrearages an inappropriate gauge of a bank's foreseeable damages).
[105] Servicers must declare that they have contacted the borrower to discuss foreclosure alternatives, or that they fulfilled the due diligence requirements. CAL. CIV. CODE §§ 2923.5(b) & 2923.55(c) (2013) (applying to small and large servicers, respectively).
[106] *See*, *e.g.*, Intengan v. BAC Home Loans Servicing LP, 214 Cal. App. 4th 1047, 1057 (2013); Skov v. U.S. Bank Nat'l Ass'n, 207 Cal. App. 4th 690, 698 (2013); Fontenot v. Wells Fargo Bank, NA, 198 Cal. App. 4th 256, 266 (2011). *But see* Herrera v. Deutsche Bank Nat'l Trust Co., 196 Cal. App. 4th 1366, 1375 (2011) (declining to take judicial notice of legal effect of a recorded document).
[107] *See* Mena v. JP Morgan Chase Bank, 2012 WL 3987475, at *3 (N.D. Cal. Sept. 7, 2012) (taking judicial notice of both the existence and the substances of foreclosure documents because the substance was not disputed); Scott v. JP Morgan Chase Bank, N.A., 214 Cal. App. 4th 743, 754 (2013).
[108] *See*, *e.g.*, *In re* Alpine Group, Inc., 151 B.R. 931, 932 (9th Cir. 1993) ("The loan documents contained a standard contract enforcement attorney's fees provision."); Aozora Bank, Ltd. v. 1333 N. Cal. Blvd., 119 Cal. App. 4th 1291, 1295 (2004) (evaluating specific language in loan documents allowing for attorney fees if borrower commits waste). *See generally* CEB *supra* note 15, § 7.23.
[109] CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013).

F. Federal Preemption

Some state laws may be preempted by federal banking laws such as the Home Owner Loan Act (HOLA) and National Banking Act (NBA).[110] HOLA regulates federal savings associations, the NBA, national banks.[111] State statutes face field preemption under HOLA; the NBA only subjects them to conflict preemption.[112]

Courts applying a proper preemption analysis have found former Section 2923.5 not preempted by the NBA.[113] Under a HOLA preemption analysis, state courts have upheld the statute,[114] but the statute has not fared as well in federal court.[115] The only court presented with the preemption question under the Homeowner Bill of Rights declined to find HOLA preemption.[116] Importantly, the Dodd-Frank Wall Street Reform and Consumer Protection Act amended HOLA in 2011 to adopt the NBA's less strict conflict preemption analysis.[117] Conflict preemption will apply to federal savings associations for conduct originating in 2011 and beyond.[118]

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[110] HOLA is codified at 12 U.S.C. §§ 1461-1470 (2013), the NBA at 12 U.S.C. §§ 21-216 (2013).
[111] *See* Aguayo v. U.S. Bank, 653 F.3d 912, 919, 921 (9th Cir. 2011).
[112] *Id.* at 922.
[113] *See* Cabrera v. Countrywide Home Loans, Inc., 2013 WL 1345083, at *7 (N.D. Cal. Apr. 2, 2013); Tamburri v. Suntrust Mortg., 875 F. Supp. 2d 1009, 1017-18 (N.D. Cal. 2012); Skov v. U.S. Bank Nat'l Ass'n, 207 Cal. App. 4th 690, 702 (2012).
[114] *See* Mabry v. Superior Court, 185 Cal. App. 4th 208, 218-19 (2010) (finding the former section 2923.5 not preempted under HOLA); Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 201-02 (2012) (State laws like section 2923.5, which deal with foreclosure, have traditionally escaped preemption.).
[115] *Compare* Nguyen v. JP Morgan Chase Bank N.A., 2013 WL 2146606, at *6 (N.D. Cal. May 15, 2013) (preempted), Rodriguez v. JP Morgan Chase, 809 F. Supp. 2d 1291, 1295 (S.D. Cal. 2011) (preempted), *and* Taguinod v. World Sav. Bank, 755 F. Supp. 2d 1064, 1069 (C.D. Cal. 2010) (same), *with* Osorio v. Wells Fargo Bank, 2012 WL 1909335, at *2 (N.D. Cal. May 24, 2012) (no preemption), Pey v. Wachovia Mortg. Corp., 2011 WL 5573894, at*8-9 (N.D. Cal. Nov. 15, 2011) (no preemption), *and* Shaterian v. Wells Fargo Bank, N.A., 2011 WL 2314151, at *5 (N.D. Cal. June 10, 2011) (same).
[116] Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Sacramento, Cal. Super. Ct. July 1, 2013).
[117] *See* 12 U.S.C. § 1465(a) (2012) ("Any determination by a court . . . regarding the relation of State law to [federal savings associations] shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.").
[118] *See* 12 U.S.C. § 5582 (2010).

Conclusion

Advocates are working to maximize HBOR's impact so that it can protect as many homeowners as possible from avoidable foreclosures. Because there is little precedent, advocates should work together in constructing a body of case law around HBOR.[119] Together, advocates can advance consumer-friendly interpretations of the law, so the Homeowner Bill of Rights can provide strong protections for homeowners across the state.

[119] Consumer attorneys should visit the California Homeowner Bill of Rights Collaborative's website at http://www.calhbor.org to access trainings, technical assistance, case updates, and information on how to share information with other California attorneys.

Summaries of Recent Cases[120]

State Cases

PTFA: "Bona Fide" Tenancy; Cal. CPC §§ 1161 & 1162: Notice and Service Requirements

98th Trust #119 City Investment Capital v. Crouch, No. 30-2012 00586073 (Cal. App. Div. Super. Ct. June 28, 2013): "Bona fide" tenants in possession of foreclosed properties are afforded various protections by the federal PTFA. One of the requirements to be a bona fide tenant under the PTFA is that the rent under the lease is not substantially less than fair market rent. Here, the lease gave tenant a "discounted" rental rate in exchange for services, including acting as the property manager. The trial court focused on the discounted rate, finding this sufficient to disprove defendant's bona fide tenancy. The appellate court disagreed, focusing rather on the services provided by defendant, reasoning that rent does not require monetary payment.

The trial court also erred in evaluating the requirement that bona fide tenancies be entered into prior to "notice of foreclosure." Here, the tenant and former landlord signed the lease the same day the NOD was recorded. The trial court found this timing proof that the tenancy was not bona fide. The PTFA states, however, that the "notice of foreclosure" does not occur until the actual sale, or the recording of the sale. The timing of this lease then, met the bona fide standard under the PTFA.

In unlawful detainer actions, plaintiffs must prove they properly notified and served tenants, in accordance with CCP § 1162. A defendant is free to assert that plaintiff failed to prove this element, even if raised for the first time on appeal. Here, plaintiff's notice was defective in two ways. First, the notice of possession did not inform the tenant of her rights under CCP § 1161c (including her right to remain in her home until the end of her lease term). Second, the proof of service documentation was ineffective because, among other defects, it did not identify the tenant served.

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

Plaintiff's Burden of Proof in Unlawful Detainer Cases

Fed. Nat'l Mortg. Ass'n v. Whitaker, No. BV 029665 (Cal. App. Div. Super. Ct. June 24, 2013): Plaintiffs bear the burden of proof to establish the right to possession in unlawful detainer actions. In a post-foreclosure UD against a tenant, a plaintiff must establish: 1) compliance with Civ. Code § 2924 and duly perfected title according to CCP § 1161a(b)(3); 2) a proper notice to quit which was duly served on the tenant defendant; and 3) defendant's continued possession of the property past the period specified in the NTQ.

Here, plaintiff Fannie Mae did not present any evidence fulfilling the first element, and the trial court erred by relying on Fannie Mae's offer of proof because an offer of proof from one party does not constitute evidence unless both parties so stipulate.

Short Sale Dual Tracking Claim, Investor Rejection, and Tender

Mojanoff v. Select Portfolio Servicing, Inc., No. LC100052 (Cal. Super. Ct. May 28, 2013): Dual tracking during a short sale negotiation (a violation of either CC §§ 2923.6 or 2924.18, depending on the size of the servicer) and a servicer's refusal to explain an investor's rejection of a short sale (violating CC § 2923.4) are both sufficiently pled HBOR claims that survive a demurrer. Injunctive relief is the appropriate remedy under HBOR's enforcement statute. *See* CC § 2924.19.

Borrowers litigating under HBOR are not required to tender the amount owed on the subject property because HBOR statutes do not impose a tender requirement.

Judicial Notice of a CC § 2923.5 Declaration, Sufficient Evidence to Plead Dual Tracking and SPOC Violations, Tender & Bond

Senigar v. Bank of America, No. MSC13-00352 (Cal. Super. Ct. Feb. 20, 2013): Judicial notice may be given to the existence of a Cal. Civ.

Code § 2923.5 notice declaration, but not to the contents of that declaration. In the face of a borrower's contention that they received no pre-NOD outreach from the servicer, a servicer's declaration to the contrary creates a factual dispute to be resolved at trial.

A borrower's declaration that they submitted a modification application after HBOR became effective (1/1/13) constitutes sufficient evidence for a dual tracking claim, if the servicer offers no contrary evidence of compliance. A borrower's declaration is also sufficient to establish a SPOC claim under CC § 2923.7.

Tender is not required when the remedy sought would postpone the foreclosure, rather than completely avoid it. Both dual tracking and SPOC claims only ask for injunctive relief, rendering a tender requirement inappropriate. A bond requirement that would reinstate borrower's loan is excessive when the sale is postponed for a limited time. Here, the court set bond at $10,000 instead of $85,000, as requested by the servicer.

NMS Immunity, HBOR Retroactivity, a "Complete Application," and Preemption

Sese v. Wells Fargo Bank, N.A., No. 2013-00144287-CU-WE (Cal. Super. Ct. July 1, 2013): Signatories to the National Mortgage Settlement (NMS) may avoid liability under HBOR's dual tracking provisions if they are compliant with the NMS terms as applied to the plaintiff borrower. Civ. Code § 2924.12(g). A previous modification offer, alone, does not prove compliance. And because dual tracking itself violates the terms of the NMS, a CC § 2923.6 dual tracking claim sufficiently alleges noncompliance with the NMS, and here, Wells Fargo became liable for a CC § 2923.6 violation.

HBOR's dual tracking provisions do not protect borrowers who were previously offered a modification and subsequently defaulted. CC § 2923.6(c)(3). Because HBOR became effective January 1, 2013, any modification that was approved *prior* to that date does not fall under § CC 2923.6(c)(3). Here, borrower's first modification and default predated HBOR, so borrower still has a viable dual tracking claim on their second modification application.

Borrowers must submit a "complete application" to have dual tracking protection. *See* CC § 2923.6. A servicer may request additional information from a borrower to complete an application, but evidence of these requests does nothing to negate a borrower's allegation that the requested information was previously submitted.

The court also ruled that HBOR is not preempted by the HOLA and rejected the bank's argument that under *Mabry*, the additional remedies provided by HOLA meant that it was preempted. This ruling is the first decision on HOLA preemption and HBOR.

Federal Cases

Wrongful Foreclosure: Assignment of the Deed of Trust Without Bankruptcy Court Approval; Tender

Miller v. Carrington Mortg. Servs., No. C-12-2282 EMC (N.D. Cal. July 3, 2013): Plaintiff is entitled to summary judgment on a wrongful foreclosure claim when the original beneficiary, Fremont, assigned the deed of trust while in bankruptcy and no admissible evidence exists that the bankruptcy court approved the assignment. In addition, tender is not required if the defendants did not own the loan in the first place.

CC § 2923.6 Dual Tracking Claim: "Complete Application;" Proper Timing of a TRO Remedy

Carroll v. Nationstar Mortg., LLC, 2013 WL 3188725 (C.D. Cal. June 21, 2013): To successfully plead a dual tracking claim, a borrower must provide "real evidence" of a complete loan application. Against evidence of a servicer's written communication requesting specific documents and failure to receive those documents, a borrower must provide evidence showing the contrary. A borrower cannot merely allege that she provided all required documentation.

If a foreclosure sale has already taken place, a TRO can accomplish little. Preventing the recording of a trustee sale would not affect the finality of the sale. And absent the filing of an unlawful detainer action, a borrower's request for a TRO is premature.

Force-Placed Insurance Claims

Lane v. Wells Fargo Bank, N.A., 2013 WL 3187410 (N.D. Cal. June 21, 2013): In assessing the commonality and predominance factors in a class action certification motion, this court assessed the viability of the class's claims. These claims revolved around Wells Fargo's scheme to force-place flood insurance on homeowners who let their policies lapse. WF contracted exclusively with two insurance companies which then gave WF unearned commissions (kickbacks) for the force-placed policies (the cost of which were ultimately tacked onto borrower's loans). Additionally, WF allegedly backdated insurance policies to receive even larger kickbacks. The force-placed insurance itself is not the issue. Instead, borrowers claim that WF illegally inflated their insurance premiums because WF's kickbacks were taken as a percentage of those premiums. The court certified the California class based, in part, on these common and predominating fraud-based claims.

The imposition of artificially inflated insurance premiums –even if class members have not yet paid the premiums—constitutes an economic injury for the purposes of both class certification and for standing to assert California UCL claims.

Authority to Foreclose; Trial Period Plans and Unjust Enrichment & UCL Claims

Lester v. JP Morgan Chase Bank, 2013 WL 3146790 (N.D. Cal. June 18, 2013): Securitizing a loan, by itself, does not extinguish a beneficiary's (or their trustee's) right to foreclose. Borrowers have "no standing to challenge foreclosure based on a loan's having been securitized." Allegations of robosigning, including those attacking the securitization process, must be pled with specificity to survive a motion to dismiss.

To make a preliminary showing of unjust enrichment, a plaintiff must demonstrate the existence of an underlying contract. A trial period plan (TPP) can constitute such a contract. A borrower's failure to attach the TPP document, or to directly quote from the TPP in their pleadings, is not fatal to an unjust enrichment (or breach of contract) claim.

To prove fraud, a plaintiff must show, inter alia, that they relied on defendant's fraudulent statements and suffered harm in doing so. Here, borrower was told by defendant Chase that to qualify for a TPP, he would have to stop making mortgage payments and go into default. Borrower sufficiently showed reliance on this statement by following Chase's advice and stopping his payments. He also demonstrated resultant harm in Chase's ultimate denial of a permanent loan modification.

Plaintiffs must allege injury-in-fact to bring UCL claims. A ruined credit rating and clouded title on borrower's property both qualify as bases for UCL standing. These may not qualify, however, if they resulted solely from the borrower's loan default. But if that default was made in reliance on a servicer's promise to provide a TPP (and ultimately a permanent modification), a borrower may still have standing to allege UCL claims.

UCL Claims and NBA Preemption; Unjust Enrichment

Ellis v. J.P. Morgan Chase & Co., __ F. Supp. 2d __, 2013 WL 2921799 (N.D. Cal. June 13, 2013): A borrower's declaration that they have paid "some or all" of the alleged fraudulent fees charged to their mortgage accounts qualifies as an "economic injury" for purposes of UCL claims.

California Bus. & Prof. Code § 17200 (commonly referred to as "Unfair Competition Law" or UCL) prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Here, borrowers claimed that JP Morgan charged excessive and unnecessary default fees and service charges to their accounts and deceptively misled borrowers regarding those fees. Under the fraudulent prong of § 17200, these claims are not preempted

by the National Banking Act. The Ninth Circuit has decided that § 17200 "is a non-discriminatory state law of general applicability that [does] not impose disclosure requirements in conflict with federal law." The "posting" of additional fees itself is regulated by the OCC, so any posting-related UCL claim under the "unfair" prong is preempted by the NBA. The manner in which a bank represents their "posting method," however, is liable to a § 17200 "fraudulent" claim if, as here, the bank misled or refused to disclose their posting method.

Unjust enrichment claims may survive a motion to dismiss if plaintiff can show: 1) the defendant's receipt of a benefit and 2) defendant's unjust retention of the benefit at plaintiff's expense. Here, borrowers effectively showed that JP Morgan's excessive fees and service charges were financially beneficial and unjustly retained at borrower's expense. The borrower's mortgage contracts may have agreed to such fees, but these contracts do not affect borrower's initial showing of unjust enrichment elements at the pleading stage.

CC § 2923.6 Dual Tracking Claim: First Application Requirement

Dierssen v. Specialized Loan Servicing LLC, 2013 WL 2647045 (E.D. Cal. June 12, 2013): Borrower's showing that his servicer recorded an NTS while their modification application was pending was sufficient to show a likelihood of success on the merits in a TRO hearing. Borrower did not explicitly affirm that his pending application was his *first* application, but the court reasonably inferred as much from the pleadings and timeline provided by borrower. The prospect of losing a home sufficiently meets the irreparable harm element required for a TRO.

CC § 2923.6 Dual Tracking Claim: Servicer's Failure to Respond to a Submitted Application; SPOC Violation

Lapper v. SunTrust Mortg., N.A., 2013 WL 2929377 (C.D. Cal. June 7, 2013): A borrower's allegation that their servicer never supplied them with a written determination of their modification application sufficiently states a claim for a violation of CC § 2923.6, even if the

borrower does not specify *when* the NOD or NTS were recorded. If the application was pending after HBOR's effective date (1/1/13), and a foreclosure sale is scheduled without a written determination of that application, injunctive relief to postpone the foreclosure sale is appropriate.

A TRO is also appropriate if a borrower can show that they never received a single point of contract, as required by CC § 2923.7. Here, the borrower demonstrated she was likely to succeed on the merits of both the dual tracking and SPOC claims, that losing her home constitutes irreparable harm, that the balance of equities is in her favor since a TRO only temporarily postpones a foreclosure sale, and that a TRO is in the public's interest because it "vindicates" the HBOR legislation "designed to protect borrowers."

Promissory Estoppel and a Statute of Frauds Defense

Ren v. Wells Fargo Bank, N.A., 2013 WL 2468368 (N.D. Cal. June 7, 2013): The statute of frauds holds that certain types of agreements, including transfers of real property, are unenforceable unless memorialized in writing. In asserting a statute of frauds defense in a wrongful foreclosure context, servicers often claim that an oral promise to delay the foreclosure process modifies an original deed of trust and requires written documentation (negating a PE claim). Here, servicer promised to withhold foreclosure actions if the borrower stopped her mortgage payments, allowing her to qualify for a modification. The servicer *did* report the borrower to credit rating agencies and accelerated her mortgage. It then raised a statute of frauds defense to bar borrower's PE claim. The court allowed the PE claim to move forward, reasoning that promises to refrain from taking negative actions against borrowers do not modify the DOT and therefore do not require written documentation.

Promissory Estoppel and a Statute of Frauds Defense

Postlewaite v. Wells Fargo Bank, N.A., 2013 WL 2443257 (N.D. Cal. June 4, 2013): Here, the servicer agreed to postpone a foreclosure sale in return for a reinstatement of the loan and borrower's promise to

not pursue litigation or file for bankruptcy. Servicer's statute of frauds defense failed because, as confirmed in *Ren* (above), while the statute of frauds may apply to loan modification agreements, it does not apply to promises to postpone a foreclosure sale. Notably, both the *Ren* and *Postlewaite* courts disagree with another Northern District opinion that found a servicer's promise to withhold foreclosure proceedings subject to the statute of frauds.