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Foreclosure Case Summaries (May 2012 – May 2013)

State Cases:

Multani v. Witkin & Neal, __ Cal. App. 4th __, 2013 WL 1818613 (May 1, 2013): HOA's pre-sale notices do not absolve them of their post-sale statutory duty to notify homeowner of a 90-day redemption period (CCP § 729.050). HOA's failure to comply with § 729.050 may be grounds to set aside the FC sale (remanded to trial court). In addition, no tender is required because imposing one would financially bar most potential plaintiffs, rendering 729.050 ineffectual. Therefore, "a debtor is properly excused from complying with the tender requirement where the nonjudicial foreclosure is subject to a statutory right of redemption and the trustee has failed to provide the notice required under section 729.050."

West v. JP Morgan Chase Bank, N.A., 214 Cal. App. 4th 780 (2013): Homeowner's compliance with trial period plan (TPP) contractually requires servicer to offer a permanent loan modification (*Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556-57 (7th Cir. 2012)). That contractual obligation does not require express language in a TPP agreement, but is imposed through HAMP Supplemental Directive 09-01 (Apr. 6, 2009). A promissory estoppel claim is also possible in a TPP arrangement because the lender promises to offer a permanent loan modification if borrower fulfills TPP requirements. If borrower complies with the TPP, they forgo other options to their detriment, fulfilling another requirement of a PE claim. (*Wigod*, 673 F.3d at 566). A California unfair competition claim is also possible where lender holds out to the public that TPPs offered are HAMP compliant.

Intengan v. BAC Home Loans Servicing LP, 214 Cal. App. 4th 1047 (2013): A court may take judicial notice of the existence of a declaration from a servicer asserting compliance with the notice requirements in former CC § 2923.5, but cannot take judicial notice of the contents of that declaration. If

disputed by the borrower, it is a matter of fact to be determined at trial whether or not a servicer actually attempted to make contact with the borrower 30 days prior to recording a notice of default. At trial, a finding of non-compliance with § 2923.5 would only delay the foreclosure sale until the servicer became compliant.

Akopyan v. Wells Fargo Home Mortg., Inc., ___ Cal.Rptr.3d ___, 2013 WL 1352018 (Apr. 4, 2013): Federal banking laws preempt California restrictions (Cal. Bus. & Prof. Code § 10242.5) on late charges when a national bank or federal savings association is servicing a mortgage loan, even when the bank or savings association did not originate the loan. Under HOLA, the OTS meant to "occupy the field," negating a claim based on wrongful late fees. (Note: the Dodd-Frank Act got rid of this field preemption for post-2011 transactions). Under NBA, the OCC does not claim field preemption, but plaintiff's claim of wrongful late fees fails anyways because a state's regulation of late fees "significantly interferes" with the bank's powers under NBA.

Jolley v. Chase Home Fin., LLC., 213 Cal. App. 4th 872 (2012): Substantive information and contents of documents taken from websites, even "official" government websites, do not deserve judicial notice under California evidentiary rules, even where there are no factual disputes over the content or substance of the documents.

HAMP, the former California CC §§ 2923.5 & 2923.6, and HBOR all reflect the general attitude of legislatures that banks should be required to work with borrowers to modify their loans and avoid foreclosure. As to a negligence claim, these policy considerations "indicate[…] that courts should not rely mechanically on the 'general rule' that lenders owe no duty of care to their borrowers." Several recent federal cases have correctly found a duty of care arising from modification negotiations where a lender promises a modification through one channel, and then uses another to foreclose or otherwise deny a modification (dual tracking). Notably, *Jolley* finds a duty of care after *Ragland* (below) failed to find one between a borrower and lender in a similar dual tracking scenario.

Pfeifer v. Countrywide Home Loans, 211 Cal. App. 4th 1250 (2012): Deeds of trust in FHA insured mortgages incorporate by reference HUD

servicing requirements (express in the note and mortgage), which servicers must comply with *before* nonjudicial foreclosure. *Mathews v. PHH Mortg. Corp.*, 283 Va. 723 (2012). One of those requirements is a face-to-face meeting between the borrower and servicer. That this meeting requirement is not expressly listed in HUD's loss mitigation measures does not render it optional or immaterial. Without this meeting (or attempt to make contact) the lender is prevented from initiating foreclosure proceedings. 24 C.F.R. § 203.604. Tender is not required in these situations and where the borrower is bringing a defensive action to enjoin a foreclosure sale. A completed foreclosure sale could not be voided using this claim.

The act of foreclosure, by itself, does not constitute "debt collection" under the FDCPA. Nor does the notification of a pending foreclosure sale constitute a "debt collection activity." Simply listing the amount owed in the sale notice does not create a debt collection relationship between the lender's trustee and the borrower under the FDCPA. A trustee whose only role is to carry out the foreclosure process does not constitute a "debt collector" as defined by the FDCPA and it cannot be sued under that Act.

Barroso v. Ocwen Loan Servicing, 208 Cal. App. 4th 1001 (2012): In a breach of contract claim involving a permanent loan modification, express language requiring lender to send the executed agreement signed by both parties to the borrower is *not* a condition precedent to the formation of that contract. That interpretation would defeat both the spirit of the contract and the express language guaranteeing a HAMP modification when all the terms in the TPP are met. When a borrower signs and otherwise fulfills the demands of the contract, the contract is formed, even without lender's signature or delivery of the contract to borrower. The servicer who foreclosed on a borrower with a permanent loan modification agreement is also subject to a wrongful foreclosure claim.

Skov v. U.S. Bank Nat'l Ass'n, 207 Cal. App. 4th 690 (2012): As *Intengan* later confirmed, it may be appropriate to take judicial notice of the existence of a lender's declaration that it complied with notice requirements in former CC. § 2923.5. It is inappropriate, however, to take judicial notice of the validity of that declaration or of the contents of that declaration, where borrower disputes those aspects. An individual borrower had a private right of action under CC § 2923.5. Without one, the statute would have been

meaningless. It was capable of postponing a foreclosure sale, but not voiding one.

OCC regulations, through the National Bank Act, do not preempt former CC § 2923.5. Foreclosure regulations, including those associated with notice, have traditionally been left to the states, and the OCC could have expressly preempted state foreclosure law but it did not. The requirements of § 2923.5 are not onerous on the banks and do not require them to enter into modification agreements with borrowers, which would create a preemption scenario.

Cadlerock Joint Venture, L.P. v. Lobel, 206 Cal. App. 4th 1531 (2012): If the lender of both the senior and junior lien on the same property assigns the junior lien to a different entity soon after its origination, that second entity and holder of the junior lien can go after the borrower for the deficiency after a foreclosure of the senior lien. In other words, this junior lien holder is not bound by the § 580d anti-deficiency statute, or case law forbidding such conduct when the junior lien is assigned *after* the trustee's sale of the senior lien. There is no definite time period by which to judge how quickly after origination the senior lien holder must assign the junior lien to ensure their right to sue for the deficiency, but it must be clear that the two loans were not "created . . . as an artifice to evade section 580d."

Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182 (2012): Summary judgment in favor of a lender is inappropriate based on borrower's inability to tender the amount due when that inability is due solely to improperly imposed late fees and assessments. Late fees and assessments could be improper when, as in this case, the lender's agents improperly instructed borrower to withhold mortgage payments.

CC § 2924(g)(d) prevents foreclosure sales from happening in the seven days following either a dismissal of an action brought by the borrower, or the expiration of a TRO or court-ordered postponement. There is a private right of action implied in CC § 2924(g)(d), as it would be rendered useless without one. Sec. 2924(g)(d) is not preempted by federal law. As part of a state foreclosure scheme, the statute does not deal with loan servicing and therefore falls outside of the preemption envisioned by the Home Owners' Loan Act.

Wrongful foreclosure may give rise to a claim for intentional infliction of emotional distress. A claim of negligent infliction of emotional distress, however, cannot prevail without establishing a duty owed by the lender to the borrower. In arm's length transactions, there is no fiduciary duty between those two parties. Even when a lender's agents advise a borrower to withhold payment, that advice falls within the scope of normal money-lender activity and does not, by itself, create a fiduciary duty that would give rise to a NIED claim.

Herrera v. Fed. Nat'l Mortg. Ass'n, 205 Cal. App. 4th 1495 (2012): Affirms California case law finding that MERS, as nominee and beneficiary of lender, has the power to assign lender's interests. That power stems from the lender signing the deed of trust over to MERS. Any assignment from MERS to a second entity does not require an agency agreement or relationship. Also, the promissory note (debt) and DOT (security) do not have to "travel" together. If a lender assigns the note to a second entity, that second entity could have the power to foreclose regardless of whether it was also assigned the DOT by MERS.

CC § 2932.5 requires an assignee to record the assignment of a mortgage before they sell or foreclose on the property. Sec. 2932.5 is inapplicable in the case of deeds of trust, however; there is no similar requirement demanding that the assignee of a deed of trust record the assignment before invoking their power to sell or foreclose.

Heritage Pacific Fin., LLC v. Monroy, __ Cal. App. __, 2013 WL 1779278 (Mar. 29, 2013): The assignee of a promissory note is not assigned the right to bring tort claims against the borrower on the note if that right is not explicitly part of the assignment. "No California legal authority [has] held that the assignment of a promissory note automatically constituted an assignment of a lender's fraud claims." Communications made by the assignee to the borrower claiming otherwise may violate the FDCPA (if all other conditions are met). For the purposes of the FDCPA, tort claims can be considered "debts."

If the assignee was assigned a second lien *after* the first lien foreclosed, the second lien is extinguished and the assignee is prevented from collecting the balance of their loan due to anti-deficiency statutes. If the assignee

nevertheless sends the borrower notices that they wish to collect the second lien, those notices may also violate the FDCPA as false and deceptive attempts to collect a debt.

Aurora Loan Services v. Brown, 2012 WL 6213737 (Cal. App. Div. Super. Ct. July 31, 2012): In an unlawful detainer (UD) action the only issue is whether plaintiff has the authority to possess the property. The only title issue that relates to the possession question is: can plaintiff prove acquisition of title at the trustee sale? Code Civ. Proc. § 1161a. Here, defendants put the validity of the title at issue in an effort to reclassify the case from a UD to an unlimited civil action. Code Civ. Proc. § 403.040. To qualify as an unlimited civil action, the value of the property in question has to exceed $25,000. Defendants argued that putting the title at issue necessarily raises the amount at stake to the value of the property, which was over $25,000. The court found that alleging improprieties surrounding title and trustee sale do not put the monetary value of the property at issue and the case cannot be reclassified as an unlimited civil action.

Personal service of a Notice to Vacate is adequately attempted under CC § 1162 by going to the recipient's home *or* business and trying to make contact. Just one attempt is adequate before a service processor resorts to posting a copy of the Notice on the property and then mailing the Notice ("nail and mail"). Sec. 1162(a)(3). Service does not need to be attempted at both a residence *and* a business to be effective. Nor is a plaintiff required to discover defendant's place of business. The court, though, admits that "nail and mail" may not be effective if defendant refuses to attempt personal service at plaintiff's *known* business address.

As explained further in *U.S. Bank v. Cantartzoglou* (below), the plaintiff in a UD action has the burden to prove they had the right to foreclose, including perfected title. CC § 1161a. Here, the beneficiary and trustee that foreclosed on the property and that were listed in the NOD and NTS were not the same beneficiary and trustee listed on the DOT. Further, Plaintiff offered no evidence that the DOT beneficiary had assigned their interest to the foreclosing beneficiary, or that the DOT beneficiary had substituted a trustee. The court did not accept as relevant a post-NOD and post-NTS recorded Corporate Assignment of Deed of Trust purportedly transferring the DOT from MERS to the foreclosing beneficiary. Without a showing that MERS

had an interest in the DOT, a "transfer" from MERS to another beneficiary does nothing to show perfected title. In this case, the sale was declared void.

U.S. Bank v. Cantartzoglou, 2013 WL 443771 (Cal. App. Div. Super. Ct. Feb. 1, 2013): To bring a UD action a plaintiff must show that they purchased the property at a trustee sale that was compliant with both the relative statutes and the DOT. If the defendant raises questions as to the veracity of title, plaintiff has the affirmative burden to prove true title. The plaintiff must prove every aspect of the UD case, while the defendant has no burden of proof whatsoever. This differs from wrongful foreclosure actions where the homeowner plaintiff has the burden to show that something would void the sale (like an improper assignment).

Federal Cases:

Singh v. Bank of America, 2013 WL 1759863 (E.D. Cal. Apr. 23, 2013) (TRO); 2013 WL 1858436 (E.D. Cal. May 1, 2013) (PI): A preliminary injunction (and a TRO, under the same evaluation) to postpone a foreclosure sale may be appropriate under the new HBOR rule against dual tracking. If a borrower submits a "complete application" on a first mortgage, the servicer cannot move forward with a notice of default, notice of sale, or an actual trustee sale, while the modification application is pending. CC § 2923.6(c) (2013). Here, a lender's failure to respond to a borrower's complete application signaled that "negotiations" were still pending and triggered § 2923.6(c).

Preliminary injunction was ordered because the essential elements were met: 1) borrower was likely to prevail on the merits because lender violated the anti-dual tracking aspect of HBOR (§ 2923.6(c)); 2) losing the property at the FC sale would cause "irreparable harm" to borrower; 3) lender is not inequitably treated – the sale might only be delayed, not completely prohibited; and 4) a PI is in the public's best interest because it follows the newly enacted HBOR scheme of laws and regulations which were created to protect the public.

BofA asked that a monthly bond be set at $2,700 per month. The judge instead found a one-time $1,000 bond to be more appropriate. F.R.C.P. 65(c).

Lindberg v. Wells Fargo Bank N.A., 2013 WL 1736785 (N.D. Cal. Apr. 22, 2013): HBOR law CC § 2923.6 does not apply when a borrower has failed to submit a "complete application" to the lender or servicer. Here, borrower's failure to timely respond (30 days) to lender's written request for further documentation prevented her from demonstrating that her application was complete. Because she would neither prevail on the merits, nor could she show that there were serious questions of fact, her motion for preliminary injunction to stop the FC sale failed.

Rex v. Chase Home Fin. LLC, __ F. Supp. 2d __, 2012 WL 5866209 (C.D. Cal Nov. 19, 2012): CCP § 580e was passed as an anti-deficiency statute applying to short sales and became effective in July 2011. For sales conducted prior to that date, it may still be possible to prevent a deficiency suit after short sales involving a purchase money loan. This court found CCP § 580b's anti-deficiency protections applicable in a short sale for three reasons: 1) § 580b's plain language does not qualify the type of sale covered – it simply says "sale;" 2) the legislature passed § 580b to stabilize the mortgage market and state economy, goals which would be defeated if lenders could opt for a short sale instead of foreclosure and then contract out of 580b in the short sale agreement; and 3) reading § 580b to apply to short sales does not render § 580e superfluous. Sec. 580b applies to all modes of sale, but limits the loans involved to purchase money loans, whereas § 580e limits the type of sale to a short sale but does not limit the type of loan.

Gale v. First Franklin Loan Servs., 701 F.3d 1240 (9th Cir. 2012): The TILA provision requiring a servicer to respond to a borrower's request for information pertaining to the owner of the mortgage only applies to servicers who are also assignees of the loan. A servicer does not have the obligation to respond if it is not also an assignee. If the servicer is the original creditor, they are also not obligated. TILA 15 U.S.C. § 1641(f)(2).

Medrano v. Flagstar Bank, 704 F.3d 661 (9th Cir. 2012): RESPA provision 12 U.S.C. § 2605(e) requires a servicer to timely respond to a borrower's "qualified written request" (QWR). A QWR must include the name and account of the borrower and either a statement that the borrower believes the account to include an error (listing the reasons for believing such), or a request for specific information described with sufficient detail. *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 687 (7th Cir. 2011). Additionally, any information sought must relate to the *servicing* of the loan.

§ 2605(e)(1)(A)-(B). Questions regarding anything that preceded the servicer's role (like questions about the loan origination, terms, or validity) do not qualify as servicing. Notably, a request for a modification of the loan terms does not, by itself, amount to a valid QWR that triggers a response under § 2605(e). A request for a modification would need to be accompanied by a finding of an error regarding the loan's servicing, or by a request of information related to that servicing.

Michel v. Deutsche Bank Trust Co., 2012 WL 4363720 (E.D. Cal. Sept. 20, 2012): When a beneficiary substitutes the trustee of a DOT, that substitution may be valid where the person signing on behalf of the beneficiary does not, in fact, work for the beneficiary. In *Michel*, the person who signed the substitution held herself out to be a "Vice President" of the beneficiary. The borrowers argued that she in fact had no real relationship with the beneficiary but was instead employed by an unrelated third party. Many courts have required borrowers to demonstrate in their complaints that a signor lacked the beneficiary's authority to substitute a trustee for the claim to move forward. *See Selby v. Bank of Am., Inc.*, 2011 WL 902182 (S.D. Cal. Mar. 14, 2011). Others, though, have found that simply alleging that the signor lacked this authority is a valid claim and a triable issue of fact. *See Tang v. Bank of Am., N.A.*, 2012 WL 960373 (C.D. Cal. Mar. 19, 2012). The *Michel* court ruled this issue appropriate for adjudication in summary judgment.

If it were proved that an invalid trustee executed the foreclosure sale, that sale would be void, not voidable.

Winterbower v. Wells Fargo Bank, N.A., 2013 WL 1232997 (C.D. Cal. Mar. 27, 2013): Under HBOR provision CC § 2923.6(g), servicers must re-evaluate a borrower for a loan modification when there has been a "material change in the borrower's financial circumstances" and the borrower submits evidence of that change. Such a re-evaluation would halt the foreclosure process because of HBOR's anti dual-tracking rule. In documenting changed financial circumstance, borrowers must do more than state the change in broad terms and/or list their new expenses or earnings.

Signatories to the National Mortgage Settlement (including Wells Fargo) are not liable for CC § 2923.6 violations as long as they are otherwise compliant with the Settlement.

This court takes care to note that it evaluated the above issues in regards to borrower's request for a preliminary injunction stopping the FC sale. PIs set a high bar for the moving party (see *Singh* above) and this opinion is not "conclusive . . . as to the meaning of relatively new portions of the California Civil Code, and of the meaning of the National Mortgage Settlement."

Weber Living Trust v. Wells Fargo Bank, N.A., 2013 WL 1196959 (N.D. Cal., Mar. 25, 2013): HBOR provision CC § 2924.15 prohibits dual tracking when the property at issue is the borrower's principal residence. In an action to stop a FC sale rooted in this HBOR claim, the borrower has the burden to prove that their principal residence is the property in question.

Makreas v. First Nat'l Bank of N. Cal., 856 F. Supp. 2d 1097 (N.D. Cal. 2012): If a borrower claims that an assignment or substitution of a trustee was backdated to hide the fact that it occurred *after* the notice of default, it would follow that the assignee or substituted trustee did not have the authority to foreclose, voiding the sale. *Tamburri v. Suntrust Mortg.*, 2011 WL 6294472 (N.D. Cal. Dec. 15, 2011).

Foreclosure, alone, is not considered a "debt collection activity" under FDCPA. If a servicer or lender went beyond the foreclosure process though, and engaged in debt collection attempts or threats, that could give rise to a FDCPA claim. A borrower should allege specific instances of debt collection attempts that are separate and distinct from foreclosure activity.

Mena v. JP Morgan Chase Bank, 2012 WL 3987475 (N.D. Cal. Sept. 7, 2012): Judicial notice may be granted to both the existence and the authenticity of certain foreclosure-related documents and government documents if they are not disputed and if they can be verified by public record. Fed. R. Ev. 201(b)(2). This differs from the *Jolley* court's holding in a state of California case (above) that even official government documents not in dispute do not deserve judicial notice beyond the fact that they exist.

CC § 2932.5 does not require a foreclosing beneficiary-assignee to have recorded the assignment of the DOT prior to foreclosing. Whether or not the assignment was valid and whether the foreclosing entity had the power to foreclose may be valid claims, but there is no § 2932.5 claim based on failure to record the DOT.

Barrioneuvo v. Chase Bank, 2012 WL 3235953 (N.D. Cal. Aug. 6, 2012): Tender is normally required when borrowers allege defects in the notice or procedural aspects of a foreclosure sale. If a borrower contends the validity of the foreclosure sale itself, however, tender should not be required. *Tamburri v. Sunset Mortg.*, 2012 WL 2367881 (N.D. Cal. June 21, 2012). Some courts have also found tender unnecessary when, as here, a borrower brings an action to prevent a sale from taking place and where the harm to the borrower has not yet occurred.

If a sale is (or would be) void, rather than voidable, that situation also frees the borrower from their tender burden. In a case where a lender does not comply with CC § 2923.5 notice requirements, the question becomes whether or not a notice defect –which usually *would* trigger the tender requirement— is of a nature so as to make the sale void, thus negating the tender requirement. If the DOT does not contain language "providing for a conclusive presumption of the regularity of sale," *and* there is defective notice, the sale is considered void. *Little v. C.F.S. Serv. Corp.*, 188 Cal. App. 3d 1354, 1359 (1987). In this situation, tender is not required.

Tamburri v. Suntrust Mortg., 2012 WL 2367881 (N.D. Cal. June 21, 2012): To bring a RESPA § 2605 claim for failure to respond to QWRs, a borrower must also allege actual damages resulting from a servicer's noncompliance. The complaint must allege a specific financial harm stemming from the RESPA violation itself, rather than a broad, amorphous allegation of "harm" stemming from a default or foreclosure.

Requesting the identity of the loan's owner(s), by itself, does not constitute a valid QWR falling under § 2605 protection because it does not relate to the servicing of the loan.

Halajian v. Deutsche Bank Nat'l Trust Co., 2013 WL 593671 (E.D. Cal. Feb. 14, 2013): In a CC § 2923.5 claim, a borrower needs to overcome a presumption that the trustee or servicer acted properly in regards to notice. The borrower needs to allege and demonstrate that notice was defective and resulted in prejudice to borrower. *Knapp v. Doherty*, 123 Cal. App. 4th 76, 86 n.4 (2004). Further, § 2923.5 only provides a pre-sale remedy of foreclosure postponement. The statute cannot be used to un-do a foreclosure sale that has already occurred.

This court agrees with *Michel* (above) on the substitution/agency issue. *Michel* held that deciding whether a purported agent of a beneficiary (who is not an employee of that beneficiary) has the power to substitute a trustee is an issue for summary judgment and this court concurs. A borrower may allege in a complaint that a signor of a substitution was not a proper agent of the beneficiary, and discovery on that allegation is appropriate before a SJ motion is decided. Judicial notice of servicer's "list of corporate officers" is inappropriate in cases where a servicer (like MERS, in this case) has thousands of these "officers."

Harris v. Wells Fargo Bank, N.A., 2013 WL 1820003 (N.D. Cal. Apr. 30, 2013): If a borrower's default results from a lender or servicer's misconduct (ex: improperly imposed late fees), tender should not be required to bring suit. (This finding is similar to the *Ragland* case described above).

State-law claims based on a general duty "not to misrepresent material facts" or not to engage in fraud in business dealings, are generally not preempted by HOLA. *DeLeon v. Wells Fargo Bank, N.A.*, 2011 WL 311376 at *6 (N.D. Cal. Jan. 26, 2011). Allegations that a servicer improperly instructed a borrower to withhold mortgage payments and that withholding would not result in foreclosure are such state law claims and are not preempted by HOLA.

Oral representations made by agents or employees of a servicer or lender and pertaining to the DOT (as opposed to the promissory note) may give rise to a valid breach of contract claim.

Skinner v. Green Tree Servicing, LLC, 2012 WL 6554530 (N.D. Cal. Dec. 14, 2012): CC § 580b does not bar a creditor from "merely contacting" the borrower, asking for any unpaid debt. While the ability to *sue* for a deficiency is barred by § 580b, the debt still theoretically exists and a creditor may ask for payment.

If the creditor asks for the debt in a manner rising to the level of harassment or making false representations to the borrower, the borrower may have valid FDCPA claims under 15 U.S.C. §§ 1692d & 1692e. There are no "bright line" rules as to what type of conduct qualifies as harassment or false representation, but the language of §§ 1692d & 1692e provide examples. In

this case, repeated phone calls to borrowers' home and places of employment rose to the level of a § 1692d harassment claim. The creditor's accusation of "stealing" –insinuating that the borrower was committing a crime— was evidence of a valid § 1692e claim.

Stitt v. Citibank, 2013 WL 1787159 (N.D. Cal. Apr. 25, 2013): A fiduciary duty owed by a lender or servicer to the borrower (which does not exist in ordinary mortgage or DOT transactions) is not necessary to establishing a fraud claim. Nor does a fraud claim require an express duty (like a duty to disclose) stated in the loan agreement. When the alleged fraud is affirmative in nature, this may constitute special circumstances forming a duty. Here, the loan servicer exacted improper fees by marking-up actual costs for services like property inspections and then refused to disclose information related to those fees. The court allowed the fraud claim to move forward.

Out of State Cases:

Curtis v. US Bank Nat'l Ass'n, 50 A.3d 558 (Md. 2012): The Protecting Tenants at Foreclosure Act mandates that the purchaser of foreclosed property provide a *bona fide* month-to-month tenant with, at minimum, a 90-day notice to vacate. The notice is effective the day it is received by tenant, not the day of the foreclosure sale. Pre-foreclosure notices that provide tenants with advanced warning of the foreclosure and possible end to their tenancies may give the tenant actual knowledge of a foreclosure sale date, but are irrelevant to the 90-day notice required by the PTFA. Moreover, defective notices to vacate that do not comply with the PTFA do not become effective once 90 days pass. The 90-day clock can only begin when the tenant receives an effective 90-day notice.

The court also held that even a 90-day notice may not satisfy the PTFA if it is coupled with other misleading and contradictory communications. Here, the bank provided the tenant one notice to "immediately vacate, quit, and surrender possession," but another notice instructed her that she did not have to vacate the property until March 2011, more than three months from the notice date. To add to the confusion, the bank filed a motion one month later asserting that it had the right to immediate possession. The court concluded the bank's notice "was confusing and ineffective for the purpose of

the PTFA" because "this succession of post-sale correspondence would have left anyone perplexed."

Fontaine v. Deutsche Bank Nat'l Trust Co., 372 S.W.3d 257 (Tex. App. 2012): Under the PTFA, a bona fide lease must be honored by the new purchaser, unless that purchaser will be an owner-occupier (in that case, tenant still gets the 90-day notice protection). PTFA § 702(a)(2)(A). A new purchaser steps into the old landlord's shoes and assumes all the obligations and rights of the old landlord, including the obligation to honor the existing lease.

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