California Homeowner Bill of Rights COLLABORATIVE

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

Litigating under California's Homeowner Bill of Rights & Nonjudicial Foreclosure Framework (Updated through October 1, 2014)

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 practice guide provides an overview of the legislation, quickly developing case law, and related state-law causes of action often brought alongside HBOR claims. Finally, the guide 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

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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, JP 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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$20 billion worth of mortgage-related relief to homeowners and to 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 several significant limits to HBOR's application. First, HBOR applies only to foreclosures of first liens on owner-occupied, one-to-four unit properties.[9] Advocates should plead the "owner-occupied" requirement in the complaint,[10] but only one plaintiff need comply with

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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 . . . .)." Borrowers with active bankruptcy cases are not considered "borrowers" under HBOR. CAL. CIV. CODE § 2920.5(c)(2)(C) (2013). Individuals acting as trustees for a trust that owns the subject property may be considered "borrowers" for HBOR purposes. *See*, *e.g.*, Zanze v. Cal. Capital Loans Inc., No. 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (The mortgage note indicated that plaintiff, through his capacity as trustee, was a "borrower" with standing to allege a dual tracking claim.).

[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] "'Owner-occupied' means that the property is the principal residence of the borrower." CAL. CIV. CODE § 2924.15(a) (2013).

[10] Failure to do so may be grounds for dismissal of HBOR claims. *See*, *e.g.*, Banuelos v. Nationstar Mortg., LLC, 2014 WL 1246843, at *3 (N.D. Cal. Mar. 25, 2014); Kouretas v. Nationstar Mortg. Holdings, Inc., 2013 WL 6839099, at *3 (E.D. Cal. Dec. 26, 2013); Patel v. U.S. Bank, 2013 WL 3770836, at *6 (N.D. Cal. July 16, 2013) (dismissing, with leave to amend, borrower's CC § 2923.5 pre-foreclosure outreach claim because borrowers had not alleged that the property was "owner-occupied"). *But cf.* Cerezo v. Wells Fargo Bank, N.A., 2013 WL 4029274, at *7 (N.D. Cal. Aug. 6, 2013) (finding failure to allege the "owner-occupied" element not fatal to borrower's claim where defendant servicer had requested judicial notice of their NOD declaration in which defendant did not dispute owner-occupancy).

it.[11] Second, HBOR only provides procedural protections to foster alternatives to foreclosure; nothing in HBOR requires a loan modification.[12] Third, HBOR offers fewer protections for borrowers with small servicers.[13] Fourth, as long as the National Mortgage Settlement is effective, a signatory who is NMS-compliant with respect to the individual borrower may assert compliance with the NMS as an affirmative defense.[14] Relatedly, there is also a "safe harbor" provision protecting servicers that remedy their HBOR violations before completing the foreclosure by recording a trustee's deed upon sale."[15] Finally, HBOR exempts bona fide purchasers from liability.[16]

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[11] Corral v. Select Portfolio Servicing, Inc., 2014 WL 3900023, at *5 (N.D. Cal. Aug. 7, 2014); Agbowo v. Nationstar Mortg., 2014 WL 3837472, at *5-6 (N.D. Cal. Aug. 1, 2014). Notably, the "owner-occupied" requirement may be different under HAMP rules, which is important for pre-HBOR causes of action dealing with TPP agreements. *See*, *e.g.*, Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 306-07 (2014) (finding that "temporarily renting out [borrower's] home" did not prevent him from demonstrating the home was still his "primary residence" as defined by HAMP).

[12] CAL. CIV. CODE § 2923.4(a) (2013).

[13] *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)). "Large servicers" are the commonly known banks and the entities listed on the California Department of Business Oversight's website, *available at* http://www.dbo.ca.gov/Laws_&_Regs/legislation/ca_foreclosure_reduction_act.asp. Advocates can verify a lesser-known servicer's licensing on that Department's webpage, *available at* http://www.dbo.ca.gov/fsd/licensees/, or can simply ask a servicer how many foreclosures they have conducted in the previous fiscal year.

[14] CAL. CIV. CODE § 2924.12(g) (2013); Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *5-6 (C.D. Cal. Sept. 26, 2014) (HBOR immunity based on NMS compliance is an affirmative defense best asserted by servicer at summary judgment); Stokes v. Citimortgage, 2014 WL 4359193, at *8 (C.D. Cal. Sept. 3, 2014) (same); Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at *3-4 (N.D. Cal. July 29, 2014 (Servicer's dual tracking and failure to provide borrower with an online portal to check his application status violated the NMS and prevented servicer from invoking the safe harbor to defend a preliminary injunction.); Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829, at *4 (N.D. Cal. May 13, 2014) (finding NMS safe harbor an affirmative defense not properly resolved on a motion to dismiss); Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016, at *9 (N.D. Cal. Mar. 3, 2014) (same); *cf*. Sese v. Wells Fargo Bank, N.A., No. 2013-00144287-CU-WE (Cal. Super. Ct. July 1, 2013) (granting a PI on borrower's dual tracking claim because a servicer's offering of a modification does not, by itself, prove compliance with the NMS and because dual tracking violates the NMS, making servicer liable to a HBOR dual tracking claim).

[15] CAL. CIV. CODE §§ 2924.12(c), 2924.19(c) (2013). "Correct[ing] and remed[ying]" an HBOR violation should require rescinding any improperly recorded NOD or NTS. *See* Diamos v. Specialized Loan Servicing, LLC, 2014 WL 3362259, at *5 (N.D. Cal. July 7, 2014) (servicer's rescinding of dual tracked NTS mooted borrower's dual tracking claim); Jent v. N. Tr. Corp., 2014 WL 172542, at *6 (E.D. Cal. Jan. 15, 2014) (servicer's rescinding of an improper NOD protected it from borrower's negligence

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,[17] or diligently attempting to contact, the borrower to discuss alternatives to foreclosure.[18] With each version of the law, some courts accept bare assertions that a borrower was never contacted pre-NOD as sufficient to pass the pleading stage,[19] while others require more specific allegations to overcome a servicer's NOD declaration attesting to its due diligence.[20] Because the statute requires the servicer to initiate

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claim based on a CC 2923.55 violation); Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (A servicer must rescind a dual tracked NTS before moving forward with foreclosure; simply denying borrower's modification application does not remedy a dual tracking violation.).

[16] CAL. CIV. CODE §§ 2924.12(e), 2924.19(e).

[17] Contact is specifically required 30 days *before* recording an NOD. If a servicer fulfills this requirement and then does not contact borrower within the 30 days *leading up to* the NOD, that is not a violation of either the pre-HBOR or HBOR version of the law. *See* Rossberg v. Bank of Am., N.A., 219 Cal. App. 4th 1481, 1494 (2013).

[18] *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. *See* Maomanivong v. Nat'l City Mortg., Co., 2014 WL 4623873, at *8-9 (N.D. Cal. Sept. 15, 2014) (servicer's failure to discuss every foreclosure alterative available, not just the fact that borrower must be delinquent to qualify for one, led to borrower's valid pre-NOD outreach claim). For due diligence requirements, see §§ 2923.5(e)(1)-(5) & 2923.55(f)(1)-(5) (2013), applying to small and large servicers, respectively.

[19] *See* Tavares v. Nationstar Mortg., LLC, 2014 WL 3502851, at *6-7 (S.D. Cal. July 14, 2014); Garcia v. Wells Fargo Bank, N.A., 2014 WL 458208, at *4 (N.D. Cal. Jan. 31, 2014); Cerezo v. Wells Fargo Bank, N.A., 2013 WL 4029274, at *7 (N.D. Cal. Aug. 6, 2013); Intengan v. BAC Home Loans Servicing, LP, 214 Cal. App. 4th 1047, 1057-58 (2013) (overruling trial court's sustaining of servicer's demurrer to borrower's 2923.5 claim because borrower disputed veracity of NOD declaration); Skov v. Bank Nat'l Ass'n, 207 Cal. App. 4th 690, 696 (2012) (same).

[20] *See* Bever v. Cal-Western Reconveyance Corp., 2013 WL 5493422, at *2-4 (E.D. Cal. Oct. 2, 2013) (reading a CC 2923.5 claim into borrower's pleading based on his allegations that: 1) servicer never made pre-NOD contact; 2) borrower was available by phone and mail; and 3) borrower's answering machine recorded no messages from servicer); Weber v. PNC Bank, N.A., 2013 WL 4432040, at *5 (E.D. Cal. Aug. 16, 2013) (Borrower successfully pled servicer did not and *could not* have possibly contacted borrower pre-NOD because: 1) borrower's home telephone number remained the same since loan origination; 2) servicer had contacted borrower in the past; 3) answering machine recorded no messages from servicer; and 4) borrower never received a letter from servicer.); *cf.* Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808, at *6 (N.D. Cal. July 16, 2013) (finding borrower unlikely to prevail on her CC 2923.5 claim, relying on servicer's NOD declaration that it had attempted to contact borrower with "due diligence" before recording the NOD).

specific contact, borrower-initiated loan modification inquiries, or general contact, does not satisfy the pre-NOD contact requirements.[21]

HBOR's pre-NOD outreach requirements also expand upon existing communication requirements. For example, the former Civil Code Section 2923.5 only applied to deeds of trust originated between 2003 and 2007; HBOR removed this time limitation.[22] Borrowers who successfully brought claims under the pre-HBOR law were limited to postponing a foreclosure until the servicer complied with the outreach requirements.[23] Enjoining a sale is still a remedy, but HBOR makes damages available even after a foreclosure sale.[24]

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

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[21] *See*, *e.g.*, Castillo v. Bank of Am., 2014 WL 4290703, at *5 (N.D. Cal. Aug. 29, 2014) (modification eligibility discussions do not, by themselves, satisfy the requirements of CC 2923.55); Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at *3-4 (C.D. Cal. July 18, 2014) (finding borrower's multiple, pre-NOD modification applications not fatal to her CC 2923.55 claim because servicer failed to "respond meaningfully" to these applications and no real foreclosure alternative discussion took place); Mungai v. Wells Fargo Bank, 2014 WL 2508090, at *10-11 (N.D. Cal. June 3, 2014) (considering borrower's modification application submission and servicer's acceptance letter "coincidental contact" that did not absolve servicer of its obligation to reach out to borrower "via specific means about specific topics"); Schubert v. Bank of Am., N.A., 34-2013-00148898-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 11, 2014) (borrower's application and servicer's request for missing documents do not satisfy pre-NOD outreach requirement). *But see Maomanivong*, 2014 WL 4623873, at *8-9, n.9 (Borrower-initiated contact can meet statutory requirements.); Johnson v. SunTrust Mortg., 2014 WL 3845205, at *4 (C.D. Cal. Aug. 4, 2014) (dismissing borrower's CC 2923.55 claim because he admitted to multiple, pre-NOD discussions with servicer regarding his financial situation and loan modification options. That servicer did not explicitly inform borrower about the face-to-face meeting opportunity, or provide HUD information, does not violate CC 2923.55.).

[22] *Compare* CAL. CIV. CODE § 2923.5 (2012), *with* §§ 2923.5 & 2923.55 (2013). Refer to CEB, *California Mortgages, Deeds of Trust, and Foreclosure Litigation*, § 10.8A (4th ed. Jan. 2014), for a more detailed explanation of the similarities and differences between pre-existing law and HBOR.

[23] *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.").

[24] CAL. CIV. CODE §§ 2924.12 & § 2924.19 (2013) (large and small servicers, respectively). Proving those damages has not been litigated extensively. *Compare* Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *7 (C.D. Cal. Sept. 26, 2014) (agreeing with borrowers that losing the *opportunity* to modify due to servicer's SPOC and dual tracking violations can constitute damages, at least at the pleading stage), *with* Stokes v. Citimortgage, 2014 WL 4359193, at *9 (C.D. Cal. Sept. 3, 2014) (Borrowers failed to adequately allege how servicer's purported dual tracking directly caused them harm and the court dismissed their claims.).

foreclose.[25] They are also required to provide *post*-NOD outreach if the borrower has not yet exhausted the loan modification process.[26]

B. Single Point of Contact

Large servicers must also provide borrowers with a single point of contact, or "SPOC." Specifically, "upon request from a borrower who requests a foreclosure prevention alternative, the . . . servicer shall promptly establish a [SPOC]"[27] and provide borrower with a "direct means of communication" with that SPOC.[28] Some servicers have argued the statutory language requires borrowers to specifically request a SPOC to be assigned one. Though this argument initially gained some traction in state trial courts, several federal district courts have recently rejected it, finding a borrower's request for a foreclosure alternative triggers servicer's duty to assign a SPOC.[29]

The SPOC provision was intended to reduce borrowers' frustrations as they attempt to contact their servicers and to gain useful information about the loan modification process. SPOCs may be a "team" of people, not necessarily a single person,[30] but they must

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[25] *Compare* § 2923.5 (2013), *with* § 2923.55(b)(1)(B) (2013). *See Johnson*, 2014 WL 3845205, at *4 (finding a viable pre-NOD outreach claim where borrower pled he never received written notice regarding his option to request loan documents).
[26] § 2924.9 (requiring servicers that routinely offer foreclosure alternatives to contact the borrower within five days of NOD recordation, explain those alternatives, and explain exactly how to apply).
[27] 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); Rogers v. OneWest Bank FSB, No. 34-2013-00144866-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013) (preliminary injunction); Senigar v. Bank of Am., No. MSC13-00352 (Cal. Super. Ct. Feb. 20, 2013) (preliminary injunction).
[28] CAL CIV. CODE § 2923.7 (2013); *Johnson*, 2014 WL 3845205, at *6 (Borrower adequately pled his SPOC claim by alleging no one from his SPOC "team" was directly reachable.).
[29] *See*, *e.g.*, McFarland v. JP Morgan Chase Bank, 2014 WL 4119399, at *11 (C.D. Cal. Aug. 21, 2014); Penermon v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 2754596, at *12 (N.D. Cal. June 11, 2014); Mungai v. Wells Fargo Bank, 2014 WL 2508090, at *10 (N.D. Cal. June 3, 2014); *cf.* Hixson v. Wells Fargo Bank, 2014 WL 3870004, at *5, n.4 (N.D. Cal. Aug. 6, 2014) (servicer's argument that borrower must specifically request a SPOC is mooted by servicer's assignment of SPOCs).
[30] CAL. CIV. CODE § 2923.7(e); *see* Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at *7 (C.D. Cal. July 9, 2014) (granting a PI based on borrower's allegations he was shuffled from SPOC to SPOC and none could provide him with the status of his modification application); Diamos v. Specialized Loan Servicing, LLC, 2014 WL 3362259, at *4 (N.D. Cal. July 7, 2014) (borrower pled viable SPOC claim where none of servicer representatives had the "knowledge or authority" to perform SPOC duties

provide the borrower with information about foreclosure prevention alternatives, deadlines for applications, how and where a borrower should submit their application, and must alert the borrowers if any documents are missing.[31] Critically, the SPOC must have access to the information and servicer personnel "to timely, accurately, and adequately inform the borrower of the current status of the [application]"[32] and be able to make important decisions like stopping a foreclosure sale.[33] SPOC violations have been a persistent problem even after HBOR went into effect and SPOC litigation seems to have increased in HBOR's second year.

C. 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[34] with the foreclosure process.[35] These

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(complaint dismissed on jurisdictional grounds)); Mann v. Bank of Am., N.A., 2014 WL 495617, at *4 (C.D. Cal. Feb. 3, 2014) (finding shuffling SPOCs to violate the statute; even if the SPOCs were a team, no member of the "team" was able to perform the required duties). *But see* Boring v. Nationstar Mortg., LLC, 2014 WL 2930722, at *3 (E.D. Cal. June 27, 2014) (rejecting borrower's argument that multiple SPOCs, none of whom could perform SPOC duties, stated a valid CC 2923.7 claim).

[31] CAL. CIV. CODE § 2923.7(b)(1)-(2); *see* Garcia v. Wells Fargo Bank, N.A., 2014 WL 458208, at *4 (N.D. Cal. Jan. 31, 2014) (finding SPOC's failure to follow up on loan modification request to violate CC 2923.7).

[32] CAL. CIV. CODE § 2923.7(b)(3)-(4) (2013); *see*, *e.g.*, McLaughlin v. Aurora Loan Services, LLC, 2014 WL 1705832, at *5 (C.D. Cal. Apr. 28, 2014) (denying motion to dismiss because borrower sufficiently alleged that SPOC did not timely return borrower's calls and emails).

[33] CAL. CIV. CODE § 2923.7(b)(5) (2013); Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *6-7 (C.D. Cal. Sept. 26, 2014) (finding a valid SPOC claim where borrowers alleged servicer representative falsely informed borrowers the sale would be postponed).

[34] Specifically, upon borrower's submission of a complete application, a servicer "shall not record a notice of default or notice of sale or conduct a trustee's sale" while the application is pending. CAL. CIV. CODE § 2923.6(c) (2013). Courts disagree on the meaning of the statutory language. *Compare* Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976, at *5 (C.D. Cal. Jan. 3, 2014) (finding the *serving* of an NOD and NTS on borrowers to violate CC 2923.6), *and* Pittell v. Ocwen Loan Servicing, LLC, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (dual tracking protections require a servicer to postpone or cancel an impending sale, regardless of the exact statutory language), *with* Johnson v. SunTrust Mortg., 2014 WL 3845205, at *5 (C.D. Cal. Aug. 4, 2014) (merely keeping a

protections apply even if the loan modification application was submitted prior to 2013, as long as the servicer moves forward with a foreclosure after January 1, 2013 with the application still pending.[36] HBOR does not include deadlines or timetables related to application submission: a borrower may therefore submit an application up to the day of the sale, and a servicer may not avoid HBOR liability by imposing its own, internal deadlines.[37] Servicers may maintain internal policies with regards to their ultimate denial or grant of a modification, including a policy denying all applications submitted on the eve of sale, but that servicer would still need to notify the borrower in writing of the denial, and wait for the appeal period to pass (or process borrower's appeal) before proceeding with foreclosure.

Within five business days of receiving a loan modification application –"or any document in connection with a[n] . . .

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sale 'scheduled' (*i.e.*, refusing to cancel it) does not violate CC 2923.6); McLaughlin v. Aurora Loan Servs., 2014 WL 1705832, at *6 (C.D. Cal. Apr. 28, 2014) (finding that only a *recording* of an NTS, not simply *serving* an NTS or scheduling a sale, violates HBOR's dual tracking statute), *and* Dominguez v. Nationstar Mortg. LLC, No. 37-2013-00077183-CU-OR-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 19, 2014) (same). *See also* Singh v. Wells Fargo Bank, N.A., No. 34-2013-00151461-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Feb. 24, 2014) (finding servicer's notice to borrower that a sale had been briefly postponed (but would ultimately occur) as "conducting a sale" and a dual tracking violation).

[35] *See* CAL. CIV. CODE §§ 2923.6(c) & 2924.18(a)(1) (2013) (applying to large and small servicers, respectively). Injunctive relief based on dual tracking claims is still possible even when the sale has been postponed. *See*, *e.g.*, Young v. Deutsche Bank Nat'l Trust Co., 2013 WL 3992710, at *2 (E.D. Cal. Aug. 2, 2013) (allowing borrowers leave to amend their complaint to include a dual tracking claim even though servicer had voluntarily postponed the sale and was negotiating a modification with borrowers); Leonard v. JP Morgan Chase Bank, N.A., No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014) (granting preliminary injunction even though servicer postponed the sale).

[36] *See* Boring v. Nationstar Mortg., 2014 WL 66776, at *4 (E.D. Cal. Jan. 7, 2014) (application submitted in 2012); Ware v. Bayview Loan Servicing, LLC, 2013 WL 6247236, at *5-6 (S.D. Cal. Oct. 29, 2013) (application submitted in 2010); *Lapper*, 2013 WL 2929377, at *1-2 (application submitted sometime in 2011 or 2012); Singh v. Bank of Am., N.A., 2013 WL 1858436, at *2 (E.D. Cal. May 2, 2013) (application submitted in 2012).

[37] *See* Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *5 (N.D. Cal. Apr. 16, 2014) (rejecting Ocwen's argument that borrower's application does not deserve dual tracking protection because Ocwen does not offer loan modifications to borrowers who submit their applications less than seven days before a foreclosure sale); *see also* Penermon v. Wells Fargo Home Mortg., 2014 WL 4273268, at *4 (N.D. Cal. Aug. 28, 2014) (finding a viable dual tracking claim where borrower alleged she submitted a complete application within one month of receiving servicer's request for additional documents; borrower did not need to allege the specific date she submitted the application, or that it complied with servicer's internal submission deadline).

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.[38] 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.[39] Further, servicers may not proceed with the foreclosure until 31 days after denying borrower's application, in writing,[40] or 15 days after denying borrower's appeal.[41] HBOR creates a procedural framework for requiring a decision on pending loan modification applications before initiating or proceeding with a foreclosure, but the statute does not require any particular result from that process.[42]

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[38] CAL. CIV. CODE § 2924.10(a) (2013); Penermon v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 2754596, at *13 (N.D. Cal. June 11, 2014) (denying servicer's motion to dismiss borrower's HBOR claim based on her allegation she never received the proper acknowledgement); Carlson v. Bank of Am., N.A., No. 34-2013-00146669-CU-OR-GDS (Cal. Super. Ct. Mar. 25, 2014) (holding servicer's failure to provide a description of loan modification process violates CC 2924.10).

[39] CAL. CIV. CODE § 2923.6(f) (2013); Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829, at *5 (N.D. Cal. May 13, 2014) (borrower pled viable dual tracking claim based on servicer's failure to provide reason for modification denial or notice of appeal rights). This provision only applies to loan *modification* applications, not to other foreclosure prevention alternatives. *See Ware*, 2013 WL 6247236, at *5 (S.D. Cal. Oct. 29, 2013) (granting servicer's motion to dismiss borrower's CC 2923.6(f) claim because servicer was not required to give reasons for a short sale denial).

[40] CAL. CIV. CODE § 2923.6(d) (2013); *see* Monterrosa v. PNC Bank, No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (granting borrower's preliminary injunction because servicer recorded an NTS before providing a written denial of borrower's pending modification application).

[41] CAL CIV. CODE § 2923.6(e)(1)-(2) (2013); *see* McLaughlin v. Aurora Loan Services, LLC, 2014 WL 1705832, at *6 (C.D. Cal. Apr. 28, 2014) (finding a dual tracking violation when servicer moved forward with foreclosure during pending appeal); Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976, at *5 (C.D. Cal. Jan. 3, 2014) (denying motion to dismiss because the borrower received denial only seven days before sale); Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at *6, 9 (N.D. Cal. Nov. 12, 2013) (denying servicer's motion to dismiss because servicer recorded an NTS without waiting the 30-day appeal period after denying borrower's application); Sevastyanov v. Wells Fargo Bank, N.A., No. 30-2013-00644405-CU-OR-CJC (Cal. Super. Ct. Orange Cnty. July 24, 2013) (same, but overruling a demurrer).

[42] CAL. CIV. CODE § 2923.4 (2013) ("Nothing in this act that added this section, however, shall be interpreted to require a particular result of that process.); Young v. Deutsche Bank Nat'l Tr. Co., 2013 WL 4853701, at *2 (E.D. Cal. Sept. 10, 2013) (rejecting borrower's claim that offered modification was unreasonable or not in good faith); Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808, at *5-6 (N.D. Cal. July 16, 2013); *cf.* Dotter v. JP Morgan Chase Bank, No. 30-2011-00491247 (Cal. Super. Ct. Orange Cnty. Oct. 31, 2013) (*TPP contract*, not HBOR, required servicer to offer a permanent modification similar to TPP and "better than" original loan agreement.).

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.[43] An application may be complete even if the servicer states that it may request further documentation.[44] Some courts have declined to decide the "completeness" of an application during the pleading stages of litigation.[45] Recently, courts have considered whether servicers may request duplicative or unnecessary information and escape dual tracking liability by claiming the application was incomplete. So far, courts have sided with borrowers on this issue.[46]

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[43] *Compare* Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at *5 (N.D. Cal. July 29, 2014) (granting the PI and finding "at least serious questions" going to the completeness of borrower's application where servicer verbally requested unnecessary information from borrower in a confusing manner); *and* Massett v. Bank of Am., N.A., 2013 WL 4833471, at *2-3 (C.D. Cal. Sept. 10, 2013) (granting a TRO in part because borrower produced emails from the servicer, acknowledging receipt of an application and stating "no further documentation" was required), *with* Lindberg v. Wells Fargo Bank, N.A., 2013 WL 1736785, at *3 (N.D. Cal. Apr. 22, 2013) (denying TRO when borrower failed to respond to servicer's request for further documentation). *See also* Penermon v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 2754596, at *11 (N.D. Cal. June 11, 2014) (granting borrower leave to amend her claim to explicitly state she submitted a "complete" application, but noting servicer's neglect to inform borrower that her application was *incomplete*). *But see* Stokes v. Citimortgage, 2014 WL 4359193, at *7 (C.D. Cal. Sept. 3, 2014) (denying borrowers' dual tracking claim because, even though they pled compliance with HAMP document requirements, they did not provide every document requested by servicer).

[44] McKinley v. CitiMortgage, Inc., 2014 WL 651917, at *4 (E.D. Cal. Feb. 19, 2014) (holding the fact that servicer "may hypothetically request additional information in the future does not render implausible [borrower's] claim that the loan modification application was complete"); Flores v. Nationstar, 2014 WL 304766, at *4 (C.D. Cal. Jan. 6, 2014) (determining borrower had successfully alleged he submitted a "complete" application by complying with servicer's additional document requests over the course of two months).

[45] *Cf. Penermon*, __ F. Supp. 2d __, 2014 WL 2754596, at *11 (granting borrower leave to amend her claim to explicitly state she submitted a "complete" application, but noting servicer's neglect to inform borrower that her application was *incomplete*); Murfitt v. Bank of Am., N.A., 2013 WL 7098636 (C.D. Cal. Oct. 22, 2013) (determining that the completeness of an application is a triable issue of fact, allowing borrower's ECOA claim (which has the same "complete" definition as HBOR's dual tracking provision) to survive the pleading stage). *But see* Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at *7 (C.D. Cal. July 18, 2014) (dismissing borrower's dual tracking claim because borrower did not allege the dates she submitted her "complete" applications to servicer, or any documents showing servicer deemed her applications "complete").

[46] *See*, *e.g.*, *Gilmore*, 2014 WL 3749984, at *5 (granting the PI and finding "at least serious questions" going to the completeness of borrower's application where servicer verbally requested unnecessary information from borrower in a confusing manner);

To prevent abuse, HBOR's dual tracking protections do not apply to borrowers who submit multiple applications, unless the borrower experienced a material change in financial circumstances and documented and submitted that change to their servicer.[47] For borrowers who had prior reviews,[48] this provision is critical because a second application under that circumstance will still trigger dual tracking protections.[49] Alleging a change in financial circumstances in a complaint, rather than in a second modification application, does not fulfill the "document" and "submit" requirements under the statute.[50] Courts have differed over the degree that a borrower must document a change in financial circumstances.[51] Courts have also extended dual tracking protections to borrowers who can show that their servicer

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Velez v. JP Morgan Chase Bank, N.A., No. 34-2013-00149821-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (Borrower alleged his application was complete and that any "missing" documents were duplicative. "Whether the application was *actually* complete within the meaning of [CC 2923.6] is a factual question not appropriately resolved on demurrer.").

[47] *See* CAL. CIV. CODE 2923.6(g) (2013).

[48] These reviews could have occurred pre-2013. CAL. CIV. CODE § 2923.6(g) (2013); *see* Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at 2, *6-9 (N.D. Cal. Nov. 12, 2013); Rogers v. OneWest Bank FSB, No. 34-2013-00144866-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013).

[49] *Compare Gilmore*, 2014 WL 2538180, at *2 (accepting borrower's allegation that he documented and submitted a $1,000 difference in monthly income to servicer and granting the TRO), *and* Lee v. Wells Fargo Bank, N.A., 34-2013-00153873-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 25, 2014) (finding that evidence of a material change in financial circumstances is not required at the pleadings stage), *with* 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"), *and* Sevastyanov v. Wells Fargo Bank, N.A., No. 30-2013-00644405-CU-OR-CJC (Cal. Super. Ct. Orange Cnty. July 24, 2013) (finding borrower's bare statement that their income and expenses had "changed" insufficient to trigger dual tracking protections).

[50] *See* Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at *6 (C.D. Cal. July 9, 2014); Rosenfeld v. Nationstar Mortg., LLC, 2013 WL 4479008, at *4 (C.D. Cal. Aug. 19, 2013); c*f.* Hixson v. Wells Fargo Bank, 2014 WL 3870004, at *5 (N.D. Cal. Aug. 6, 2014) (that borrower's complaint, not her new application, omitted the amount of rent she was now collecting does not moot her dual tracking claim based on a material change in financial circumstances).

[51] *Compare* Rosenfeld v. Nationstar Mortg., LLC, 2014 WL 457920, at *4 (C.D. Cal. Feb. 3, 2014) (finding that the borrower subsequently satisfied the documentation requirement when she pled that she wrote the servicer that she eliminated her credit card debt), *with* Williams v. Wells Fargo Bank, N.A., 2014 WL 1568857, at *5 (C.D. Cal. Jan. 27, 2014) (court declined to find a documented change in financial circumstances in a letter citing borrowers' monthly income and declaring that their expenses have increased). *See also* Stokes v. Citimortgage, 2014 WL 4359193, at *6 (C.D. Cal. Sept. 3, 2014) (Borrower's submission of previously requested tax returns does not, by itself, constitute a material change in financial circumstances.).

voluntarily agreed to review a subsequent application,[52] or that the servicer never reviewed borrower's previous applications.[53] Importantly, the manner in which a loan servicer reviews a subsequent application is not regulated by statute.[54]

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.[55] 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.[56] The servicer must also rescind the NOD and cancel a pending sale.[57]

D. HBOR's Interplay with the CFPB Mortgage Servicing Rules

Created by the Dodd-Frank Act,[58] the Consumer Financial Protection Bureau's (CFPB) new mortgage servicing rules add to and amend the existing federal framework provided by the Real Estate Settlement and Procedures Act (RESPA) and the Truth in Lending Act

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[52] Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at *9 (N.D. Cal. Nov. 12, 2013) (allowing borrower's dual tracking claim to survive a motion to dismiss because servicer *solicited* borrower's second application and CC 2923.6(g) only specifies that servicers are not "obligated" to review subsequent applications); Isbell v. PHH Mortg. Corp., No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013) (CC 2923.6(g) does not extinguish dual tracking protections if the servicer chooses to review borrower's subsequent application.).

[53] Cooksey v. Select Portfolio Servs., Inc., 2014 WL 2120026, at *2 (E.D. Cal. May 21, 2014) (finding it "unlikely" servicer evaluated borrower's previous applications, or that borrower was ever "afforded a fair opportunity to [be] evaluated," and granting borrower's TRO based on a dual tracking claim).

[54] In *Caldwell v. Wells Fargo Bank, N.A.*, 2013 WL 3789808, at *5-6 (N.D. Cal. July 16, 2013), for example, Wells Fargo evaluated borrower's second application based on *Wells Fargo's* internal policy of denying modification to borrowers who previously defaulted on a modification. The court found this process constituted an "evaluation" and fulfilled the requirements of CC 2923.6. *Id*.

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

[56] *Id*; *see also* Taylor v. Bank of Am., N.A., No. 34-2013-00151145-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 22, 2014) (denying servicer's demurrer to borrower's dual tracking claim because servicer received proof of short sale financing before foreclosing).

[57] § 2924.11(d).

[58] Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

(TILA),[59] and became effective January 10, 2014. As advocates weigh whether to bring RESPA claims using the new rules (for servicer conduct occurring after January 10, 2014), they should consider whether HBOR actually gives greater protection, or better remedies, to their client.[60] Advocates should consider that the CFPB rules only provide for damages under various RESPA statutes. Borrowers cannot use the CFPB rules to stop a foreclosure sale,[61] but injunctive relief *is* available under HBOR. On the other hand, a pre-foreclosure cause of action for damages is available under RESPA but unavailable under HBOR. The contrast between the two sets of laws is highlighted in their pre-foreclosure outreach requirements and dual tracking provisions.

The CFPB has created an absolute freeze on initiating foreclosure activity: servicers must wait for borrowers to become more than 120 days delinquent before recording the notice of default.[62] HBOR, by contrast, only prevents servicers from recording a notice of default for 30 days after servicer made (or attempted to make) contact with a delinquent borrower.[63] HBOR specifies that pre-NOD contact be made "in person or by telephone," to discuss foreclosure alternatives,[64] but the CFPB requires two separate forms of contact. First, a servicer must make (or attempt) "live contact" by a borrower's 36th day of delinquency.[65] Next, by the borrower's 45th day of delinquency, a servicer must make (or attempt) written contact.[66] Notably, HBOR requires a post-NOD notice,[67] where the CFPB does not. While most California foreclosures are non-judicial, the CFPB rules also apply to judicial foreclosures in California, while HBOR does not.

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[59] RESPA is codified as "Regulation X," at 12 C.F.R. § 1024; TILA as "Regulation Z," at 12 C.F.R. § 1026.

[60] Very few of the CFPB rules preempt more protective state laws so advocates will generally be able to select whichever law (or combination of laws) is more tailored to their client's situation. A notable exception includes the transferring of servicing rights. *See* 12 C.F.R. § 1024.33(d) (effective Jan. 10, 2014).

[61] *But see* discussion *infra* section II.D (using the UCL to enforce CFPB rules).

[62] § 1024.41(f) (effective Jan. 10, 2014).

[63] CAL. CIV. CODE §§ 2923.5, 2923.55 (2013); *see* discussion *supra* section I.A.

[64] § 2923.55(b)(2) (2013). Servicers must also send written notice that a borrower may request certain documents, but that notice need not explain foreclosure alternatives. § 2923.55(b)(1)(a)(B).

[65] 12 C.F.R. § 1024.39(a) (effective Jan. 10, 2014).

[66] § 1024.39(b) (effective Jan. 10, 2014).

[67] CAL. CIV. CODE § 2924.9(a) (2013). The notice is only required if the borrower has not yet "exhausted" modification attempts. *Id*.

Generally, HBOR provides greater dual tracking protections. First, borrowers may submit more than one modification application under HBOR, if they can document and submit a material change in financial circumstances to their servicer.[68] By contrast, the CFPB rules allow only one foreclosure alternative application, no matter how significantly a borrower's financial circumstances may change after that application.[69] Second, borrowers have no deadline under HBOR: as long as a borrower submits a complete first lien loan modification application before a foreclosure sale, the servicer cannot move ahead with the sale while the application is "pending."[70] The CFPB rules provide complete dual tracking protections to borrowers who submit their application in their first 120 days of delinquency or before their loan is referred to foreclosure.[71] Post-NOD, however, CFPB protections are dictated by when a borrower submits his or her complete loan modification. If submitted more than 37 days pre-sale, a servicer cannot conduct the sale until making a determination on the application,[72] but only borrowers who submit their application 90 or more days pre-sale are entitled to an appeal of this decision.[73] By contrast, all borrowers (with large servicers)[74] receive an appeal opportunity under HBOR.[75] Borrowers who submit their application less than 37 days before a scheduled foreclosure sale receive no dual

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[68] § 2923.6(g); *see also* discussion *supra*, section I.C.

[69] 12 C.F.R. § 1024.41(i) (effective Jan. 10, 2014). This rule excludes all subsequent applications even if the first application was for a non-modification foreclosure alternative, like a short sale. *Id.* A borrower may, however, submit a new application to a new servicer after a servicing transfer. Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(i)-1.

[70] CAL. CIV. CODE § 2923.6(c) (2013). Servicers may maintain policies of denying those applications, but they must comply with the denial and appeal timelines and procedures outlined in the dual tracking provisions. *See supra* note 37 and accompanying text.

[71] Servicers cannot even begin the foreclosure process in this case, until making a determination on borrower's application and allowing the 14-day appeal period to pass. 12 C.F.R. § 1024.41(f)(2) (effective Jan. 10, 2014).

[72] § 1024.41(g) (effective Jan. 10, 2014).

[73] § 1024.41(h) (effective Jan. 10, 2014).

[74] Borrowers with small servicers do not receive an appeal period. *Compare* CAL. CIV. CODE § 2924.18 (2013) (explaining dual tracking protections applied to borrowers with small servicers), *with* § 2923.6 (2013) (explaining dual tracking protections for borrowers with large servicers).

[75] *See* § 2923.6(d) (2013). Under the CFPB rules, borrowers who do receive an appeal opportunity have only 14 days to appeal. 12 C.F.R. § 1024.41(h)(2) (effective Jan. 10, 2014). California borrowers have 30 days to appeal a denial. CAL. CIV. CODE § 2923.6(d) (2013).

tracking protections from the CFPB rules.[76] Some CFPB dual tracking rules are more protective than HBOR, however: a "facially complete application" (where a servicer receives all requested information but later determines that more information or clarification is necessary), for instance, must be treated as "complete" as of the date that it was facially complete.[77] HBOR contains no such distinctions and leaves the "completeness" of an application up to the servicer and to the courts.[78]

An HBOR Collaborative chart gives a more thorough breakdown of the differences between HBOR, the CFPB servicing rules, and the National Mortgage Settlement servicing standards.[79]

II. Non-HBOR Causes of Action

Because HBOR limits injunctive relief to actions brought before the trustee's deed upon sale is recorded,[80] advocates with post-foreclosure cases should explore whether other claims could overturn a completed foreclosure sale. HBOR explicitly preserves remedies available under other laws.[81]

A. Wrongful Foreclosure Claims

Wrongful foreclosure claims (which can set aside or "undo" foreclosure sales)[82] are important for borrowers who were unable to bring pre-sale claims. Generally, claims challenging the foreclosing party's authority to foreclose[83] are unavailable before the sale because courts are hesitant to add new requirements to the non-judicial

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[76] *See* 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).
[77] § 1024.41(c)(2)(iv) (effective Jan. 10, 2014).
[78] *See* discussion *supra* notes 43-46 and accompanying text.
[79] *See also* HBOR Collaborative, *Too Many Choices: Navigating the Mortgage Servicing Maze*, SEPTEMBER FORECLOSURE NEWSLETTER (Sept. 2014).
[80] *See* CAL. CIV. CODE §§ 2924.12(a)(1) & 2924.19(a)(1) (2013). It is a closer and unsettled question whether injunctive relief is available post-*sale*, but before a trustee's deed upon sale is *recorded*. *See*, *e.g.*, Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *6-7 (N.D. Cal. Apr. 16, 2014) (declining to determine at the pleading stage what type of remedy is available in this situation, but noting that *some* remedy should be available for a dual tracking violation and denying servicer's motion to dismiss).
[81] *See* CAL. CIV. CODE §§ 2924.12(h) & 2924.19(g) (2013).
[82] See CEB, *supra* note 22, §§ 7.67A, 10.75, & 10.76, for descriptions of the different bases for wrongful foreclosure claims.
[83] Only certain entities possess the "authority to foreclose": the beneficiary under the deed of trust, the original or properly substituted trustee, or the authorized agent of the beneficiary. CAL. CIV. CODE § 2924(a)(6) (2013).

foreclosure statutes.[84] As a result, most wrongful foreclosure claims are brought after the sale.[85] Advocates may find it easier to challenge the validity of the foreclosure in a post-sale unlawful detainer action,[86] where the servicer must affirmatively demonstrate proper authority.[87]

1. Assignments of the deed of trust

Only the holder of the beneficial interest may substitute a new trustee, assign the loan, or take action in the foreclosure process.[88] A

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[84] *See* Gomes v. Countrywide Home Loans, 192 Cal. App. 4th 1149, 1154 (2011) ("'Because of the exhaustive nature of this [statutory] scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.'") (quoting Lane v. Vitek Real Estate Indus. Group, 713 F. Supp. 2d 1092, 1098 (2010)). Courts sometimes describe these unsuccessful claims as "preemptive." *See*, *e.g.*, Siliga v. Mortg. Elec. Registration Sys., Inc., 219 Cal. App. 4th 75, 82 (2013) (describing "preemptive" actions as those that require the foreclosing entity to prove its authority to foreclose, without alleging a specific factual basis attacking that authority).

[85] *See*, *e.g.*, Glaski v. Bank of Am. N.A., 218 Cal. App. 4th 1079 (2013). *Pre*-sale wrongful foreclosure claims are also possible, if less frequent. *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.); *cf.* Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065, at *6 (S.D. Cal. July 31, 2013) (allowing pre-*default* foreclosure-related claims because economic injury (due to drastically increased mortgage payments) was "sufficient to satisfy the ripeness inquiry."). *But cf.* 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).

[86] Not only is this tactic often easier, but it is sometimes necessary to avoid *res judicata* issues in any subsequent wrongful foreclosure action. *See*, *e.g.*, Hopkins v. Wells Fargo Bank, N.A., 2013 WL 2253837, at *4-5 (E.D. Cal. May 22, 2013) (barring a wrongful foreclosure claim because servicer had already established duly perfected title in a UD action). Advocates can refer to the HBOR Collaborative's *Defending Post-Foreclosure Evictions* practice guide, *available at* http://calhbor.org/wp-content/uploads/2014/08/Representing-California-Tenants-Former-Homeowners-in-Post-Foreclosure-Evictions.pdf, for more information on litigating title in the context of a post-foreclosure UD. The Collaborative also has a webinar, and a PLI segment on this issue titled "Eviction Defense after Foreclosure."

[87] *See* Bank of N.Y. Mellon v. Preciado, 224 Cal. App. Supp. 1, 9-10 (2013) (reversing UD court's judgment for plaintiff because plaintiff had failed to show compliance with CC 2924 –specifically, plaintiff failed to explain why DOT and Trustee's Deed listed two different trustees); U.S. Bank v. Cantartzoglou, 2013 WL 443771, at *9 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (If the UD 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 servicer could not demonstrate authority to foreclose and refusing to accept a post-NOD assignment as relevant to title).

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

beneficiary's assignee must obtain an assignment of the deed of trust before moving forward with the foreclosure process.[89] While foreclosing entities have always required the authority to foreclose, HBOR codified this requirement in Civil Code Section 2924(a)(6).[90] Both before and after HBOR, courts have allowed wrongful foreclosure claims to proceed only when borrowers can assert standing by making specific, factual allegations that the lender is not the current beneficiary under the deed of trust.[91]

A notable California Court of Appeal case, *Glaski v. Bank of Am. N.A.*, 218 Cal. App. 4th 1079 (2013), allowed a borrower to challenge a foreclosure by alleging very specific facts to show that the foreclosing entity was not the beneficiary. In so doing, the court had to grant borrower standing to challenge the assignment of his loan, which was attempted after the closing date of the transferee-trust.[92] This failed assignment attempt rendered the assignment void, not voidable, and led to the wrong party foreclosing.[93] *Glaski* initially gave hope to many borrowers whose loans had been improperly securitized. The case, though, has been roundly rejected by the other Court of Appeal districts and by federal district courts.[94] The California Supreme Court

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[89] *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 foreclosing assignee could not demonstrate that it received an assignment from the original beneficiary).

[90] *See supra* note 88.

[91] *See* Subramani v. Wells, 2013 WL 5913789, at *1, 4 (N.D. Cal. Oct. 31, 2013) (holding that borrower sufficiently stated a claim for wrongful foreclosure based on his allegations that lender's pre-foreclosure sale of the DOT precluded lender from retaining a beneficial interest in the DOT); Cheung v. Wells Fargo Bank, N.A., 987 F. Supp. 2d 972, 978 (N.D. Cal. Sept. 25, 2013) (distinguishing between a securitization argument and a failed *attempt to securitize* argument); Kling v. Bank of Am., N.A., 2013 WL 7141259, at *2 (C.D. Cal. Sept. 4, 2013) (granting standing to borrowers alleging their loan was transferred to a trust after that trust's closing date, voiding the transfer and extinguishing the foreclosing entity's "authority to foreclose"); Mena v. JP Morgan Chase Bank, N.A., 2012 WL 3987475, at *6 (N.D. Cal. Sept. 7, 2012); Sacchi v. Mortg. Elec. 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).

[92] Glaski v. Bank of Am., N.A., 218 Cal. App. 4th 1079, 1094 (2013).

[93] *Id.*

[94] *See*, *e.g.*, *In re* Davies, 565 F. App'x 630, 633 (9th Cir. 2014) (declining to follow *Glaski*); *In re* Sandri, 501 B.R. 369, 374-77 (Bankr. N.D. Cal. 2013) (rejecting the *Glaski* court's reasoning and siding with the majority of California courts that have found borrowers have no standing to challenge problems with the authority to foreclose); Rubio v. US Bank, N.A., 2014 WL 1318631, at *8 (N.D. Cal. Apr. 1, 2014) (same); Diunugala v. JP Morgan Chase Bank, N.A., 2013 WL 5568737, at *8 (S.D.

recently granted review of two cases that explicitly rejects *Glaski*,[95] and will decide whether borrowers have standing to challenge loan assignments within the next year or two.

In any case, generally alleging that the foreclosing entity is not the "true beneficiary" will fail.[96] To survive summary judgment, a borrower must produce evidence supporting his or her allegations attacking the authority to foreclose.[97] Some courts side-step the standing issue altogether, requiring the borrower to allege prejudice—not caused by their default—as an element of a wrongful foreclosure claim based on defective assignments.[98]

Courts in California have allowed claims that servicers backdated assignments to reach the trial stage.[99] California law, however, does not require that assignments be recorded.[100]

Cal. Oct. 3, 2013) (same); Mendoza v. JP Morgan Chase Bank, N.A., 228 Cal. App. 4th 1020, 1034 (2014) (same).

[95] Yvanova v. New Century Mortg., 226 Cal. App. 4th 495 (2014), *depublished and review granted*, 331 P.3d 1275 (Cal. Aug. 27, 2014) (No. S218973); Keshtgar v. US Bank, N.A., 226 Cal. App. 4th 1201 (2014), *depublished and review granted*, __ P.3d __ (Cal. Oct. 1, 2014) (No. S220012) (deferring the matter, pending consideration and disposition of *Yvanova*).

[96] *See* Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 511-15 (2013) (concluding that borrowers lack standing to challenge alleged improper assignments of their DOT from the original beneficiary to another entity); Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1155-56 (2011) (denying a wrongful foreclosure claim because borrower's suit was brought to "find out *whether* MERS has [the] authority [to foreclose]," rather than alleging a specific, factual basis challenging MERS' authority) (emphasis original); Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 270 (2011) (Nonjudicial foreclosures are presumed valid and a borrower has the burden of alleging specific facts that rebut this presumption.).

[97] *See* Barrionuevo v. Chase Bank, 2013 WL 4103606, at *2-4 (N.D. Cal. Aug. 12, 2013) (granting summary judgment to defendant because, though borrower specifically alleged securitization facts to plead an authority to foreclose-based wrongful foreclosure claim, borrower could not then produce actual evidence the loan was improperly securitized).

[98] *See Sandri*, 501 B.R. at 376-77; Rivac v. NDeX West, LLC, 2013 WL 6662762, at *7 (N.D. Cal. Dec. 17, 2013) (requiring borrowers to show how robo-signing allegations, even if true, affected the validity of their debt, and dismissing the wrongful foreclosure claim because borrowers could not show prejudice); *Diunugala*, 2013 WL 5568737, at *8-9; Dick v. Am. Home Mortg. Servicing, Inc., 2014 WL 172537, at *2-3 (E.D. Cal. Jan. 15, 2014); *Fontenot*, 198 Cal. App. 4th at 272; *Mendoza*, 228 Cal. App. 4th at 1034-36; Peng v. Chase Home Fin. LLC, 2014 WL 1373784, at *3 (Cal. Ct. App. Apr. 8, 2014) (finding no prejudice where borrower asserted foreclosing entity sold their loan years before attempting to foreclose). *Peng* includes a dissent that argues against requiring prejudice in certain wrongful foreclosure cases. *See id*. at *3-5.

[99] *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); Ohlendorf v. Am. Home Mortg. Servicing, 279 F.R.D. 575, 583 (E.D. Cal. 2010).

Cases alleging that MERS may not assign the deed of trust have 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, acting as the beneficiary's nominee or agent.[101] However, if a borrower alleges that a signer actually lacked an agency relationship with MERS, or that MERS lacked an agency relationship with the beneficiary, that issue has reached the discovery or trial stage.[102]

2. Possession of promissory note

Challenges based on possession of the note have generally been unsuccessful because assignees need not demonstrate physical

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[100] *See* CAL. CIV. CODE § 2932.5 (1987) ("Where a power to sell real property is given to a *mortgagee* . . . in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded."). *See*, *e.g.*, *Jenkins*, 216 Cal. App. 4th at 517-19 (CC 2932.5 does not require recording 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).

[101] *See* Siliga v. Mortg. Elec. Registration Sys., Inc., 219 Cal. App. 4th 75, 83 (2013) ("[A] trustor who agreed under the terms of the deed of trust that MERS, as the lender's nominee, has the authority to exercise all of the rights and interests of the lender, including the right to foreclose, is precluded from maintaining a cause of action based on the allegation that MERS has no authority to exercise those rights."); 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).

[102] *See* Alimena v. Vericrest Fin., Inc., 964 F. Supp. 2d 1200, 1221-22 (E.D. Cal. 2013) (allowing a wrongful foreclosure claim to advance past the pleading stage where borrower alleged that a different entity was the true beneficiary and did not make MERS its agent before MERS attempted to assign its (nonexistent) interest in the DOT to a third entity); Engler v. ReconTrust Co., 2013 WL 6815013, at *6 (C.D. Cal. Dec. 20, 2013) (allowing borrowers to assert a claim based on an improperly substituted trustee: MERS was the listed beneficiary but the signature on the substitution belonged to an employee of the *servicer*, not an employee of MERS); 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.).

possession of the promissory note to foreclose in California.[103] However, borrowers may succeed if they allege specific facts claiming a servicer lacked authority to foreclose.[104]

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.[105] Without a proper substitution of trustee, any foreclosure procedures (including sales) initiated by an unauthorized trustee are void.[106] Courts have upheld challenges when the signer of the substitution may have lacked authority or the proper agency relationship with the beneficiary.[107]

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[103] *Jenkins*, 216 Cal. App. 4th at 513; Debrunner v. Deutsche Bank Nat'l Tr. Co., 204 Cal. App. 4th 433, 440 (2012); *cf. In re* Mortg. Electronic Registration Sys., Inc., 754 F.3d 772, 784-85 (9th Cir. 2014) (declining to decide borrower's "show me the note" theory because borrowers could not allege servicer's noncompliance with foreclosure statutes, prejudice, or tender the amount due—the essential elements of a wrongful foreclosure claim).

[104] *See* Wise v. Wells Fargo, 850 F. Supp. 2d 1047, 1052 (C.D. Cal. 2012) (allowing borrowers to challenge the loan securitization because they alleged "a unique set of facts" pertaining to the terms of the PSA and New York trust law); Sacchi v. Mortg. Elec. Registration Sys., Inc., 2011 WL 2533029, at *23 (C.D. Cal. June 24, 2011); Ohlendorf v. Am. Home Mortg. Servicing, 279 F.R.D. 575, 583 (E.D. Cal. 2010); Glaski v. Bank of Am., N.A., 218 Cal. App. 4th 1079, 1094 (2013) ("[A] plaintiff asserting [a wrongful foreclosure theory] must allege facts that show the defendant who invoked the power of sale was not the true beneficiary."). *But see Jenkins*, 216 Cal. App. 4th at 511-13 (affirming the trial court's sustaining of defendant's demurrers because borrower did not assert specific facts that the beneficiary or the beneficiary's agent lacked proper authority).

[105] CAL. CIV. CODE § 2934a (2012).

[106] *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 Props., Inc. v. Quality Loan Servicing Corp., 170 Cal. App. 4th 579, 581 (2009). *But see* Maomanivong v. Nat'l City Mortg., Co., 2014 WL 4623873, at *6-7 (N.D. Cal. Sept. 15, 2014) (denying borrower's CC 2924(a)(6) claim because the acting trustee eventually recorded a proper substitution in compliance with CC 2934a(c), even if after it recorded an NOD).

[107] *See* Engler v. ReconTrust Co., 2013 WL 6815013, at *6 (C.D. Cal. Dec. 20, 2013) (allowing borrowers to assert a claim based on an improperly substituted trustee: MERS was the listed beneficiary but the signature on the substitution belonged to an employee of the *servicer*, not an employee of MERS); Patel v. U.S. Bank, N.A., 2013 WL 3770836, at *1, 7 (N.D. Cal. July 16, 2013) (allowing borrowers' pre-sale wrongful foreclosure claim, based partly on robo-signing allegations pertaining to the substitution of trustee and assignment of the DOT, to proceed); *Halajian*, 2013 WL 593671, at *6-7 (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

Courts have also allowed cases to proceed when the substitution of trustee was allegedly backdated.[108]

4. Procedural 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[109] and must tender the unpaid principal balance of the loan.[110]

5. Loan modification related claims

If the servicer foreclosed when the borrower was compliant with a loan modification, the borrower may bring a wrongful foreclosure claim to set aside the sale.[111]

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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*, 2011 WL 2533029, at *24 (denying servicer's motion to dismiss because an unauthorized entity executed a substitution of a trustee).

[108] *See* Makreas v. First Nat'l Bank of N. Cal., 856 F. Supp. 2d 1097, 1100 (N.D. Cal. 2012).

[109] *See*, *e.g.*, Siqueiros v. Fed. Nat'l Mortg. Ass'n, 2014 WL 3015734, at *4-5 (C.D. Cal. June 27, 2014) (servicer's failure to mail borrower NOD and NTS directly contributed to the loss of borrower's home); Passaretti v. GMAC Mortg., LLC, 2014 WL 2653353, at *12 (Cal. Ct. App. June 13, 2014) (improper notice of sale prejudiced the borrower a great deal since he was unable to take any action to avoid the sale (the court found it important that borrower had previously cured his defaults)). One court seemed to limit prejudice *only* for claims that attacked a procedural aspect of the foreclosure process, rather than a substantive element like an improper assignment. *See* Deschaine v. IndyMac Mortg. Servs., 2014 WL 281112, at *11 (E.D. Cal. Jan. 23, 2014) (The presumption that a foreclosure was conducted properly "may only be rebutted by substantial evidence of prejudicial procedural irregularity." "On a motion to dismiss, therefore, a [borrower] must allege 'facts showing that [he was] prejudiced by the alleged procedural defects,'" or that a "'violation of the statute[s] themselves, and not the foreclosure proceedings, caused [his] injury.'").

[110] *See, e.g.,* Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 112 (2011). For a brief description of prejudice, refer to section II.A.1; for a full discussion of tender, refer to section III.C.

[111] *See* Chavez v. Indymac Mortg. Servs., 219 Cal. App. 4th 1052, 1062-63 (2013) (holding that the borrower stated a wrongful foreclosure claim based on the servicer's breach of the modification agreement); 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). Besides an attendant breach of contract claim, borrowers may also have HBOR claims under these facts. *See* CAL. CIV. CODE §

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.[112] Borrowers may bring equitable claims to enjoin a sale or to set aside a completed sale based on a servicer's failure to comply with these requirements; monetary damages, however, are currently unavailable.[113]

7. Misapplication of payments or borrower not in default

A borrower may bring a wrongful foreclosure claim if the servicer commenced foreclosure when the borrower was not in default or when borrower had tendered the amount in default.[114] If the foreclosure commenced on or after 2013, it may also form the basis for a Civil Code Section 2924.17 claim.[115]

2924.11 (2013) (prohibiting foreclosure action where borrower is compliant with a written foreclosure prevention alternative).

[112] 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."); *see also* Pfeifer v. Countrywide Home Loans, 211 Cal. App. 4th 1250, 1267-78 (2012) (finding the face-to-face meeting a condition precedent 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).

[113] *See Pfeifer*, 211 Cal. App. 4th at 1255 (allowing borrowers to enjoin a pending sale); Fonteno v. Wells Fargo Bank, N.A., 228 Cal. App. 4th 1358 at *8 (2014) (extending *Pfeifer* to allow borrowers to bring equitable claims to set aside a completed sale); *see also* Urenia v. Public Storage, 2014 WL 2154109, at *7 (C.D. Cal. May 22, 2014) (declining to dismiss borrower's wrongful foreclosure claim on the grounds that *Pfeifer* only contemplates pre-sale injunctions).

[114] *See In re* Takowsky, 2013 WL 5183867, at *9-10 (Bankr. C.D. Cal. Mar. 20, 2013) (recognizing wrongful foreclosure claim when the borrower tendered amount due on the notice of default).

[115] Servicers may not record a document related to foreclosure without ensuring its accuracy and that it is supported by "competent and reliable evidence." Before initiating foreclosure, a servicer must substantiate borrower's default and servicer's right to foreclose. CAL. CIV. CODE § 2924.17(a)-(b) (2013). While straight robo-signing claims under this statute have generally failed (*see Mendoza v. JP Morgan Chase Bank, N.A.*, 228 Cal. App. 4th 1020 (2014) for an example), some borrowers have successfully asserted CC 2924.17 claims unrelated to robo-signing. *See*, *e.g.*, Penermon v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 2754596, at *10 (N.D. Cal. June 11, 2014) (denying servicer's motion to dismiss borrower's CC 2924.17 claim based on servicer's failure to credit her account with accepted mortgage payments, evidence that servicer failed to substantiate her default); Rothman v. U.S. Bank Nat'l Ass'n, 2014 WL 1648619, at *7 (N.D. Cal. Apr. 24, 2014)

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)[116] or permanent modification.[117] An increasing number of state and federal courts have found that TPP agreements require servicers to offer TPP-compliant borrowers with permanent modifications.[118] This is now established law in both California state court and the Ninth Circuit.[119]

(allowing borrowers to state a CC 2924.17 claim based on an incorrect NOD which included inappropriate fees and charges, and rejecting servicer's argument that CC 2924.17 only applies to robo-signing claims); Doster v. Bank of Am., N.A., No. 34-2013-00142131-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 1, 2014) (finding two possible CC 2924.17 violations: 1) servicer failed to discover borrower was current on his forbearance agreement before initiating foreclosure; and 2) servicer could not correctly identify the beneficiary of the loan, on whose behalf it was foreclosing, instead naming two separate entities).

[116] *See*, *e.g.*, Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 883-84 (9th Cir. 2013) (HAMP participants are contractually obligated to offer borrowers a permanent modification if the borrower complies with a TPP by making required payments and by accurately representing their financial situation.); Harris v. Bank of Am., 2014 WL 1116356, at *4-6 (C.D. Cal. Mar. 17, 2014) (breach of contract claim (among others) based on TPP agreement); Karimian v. Caliber Home Loans Inc., 2013 WL 5947966, at *3 (C.D. Cal. Nov. 4, 2013) ("Having entered into the TPP, and accepted payments, CitiMortgage could not withhold a permanent modification simply because it later determined that plaintiff did not qualify for HAMP."); West v. JP Morgan Chase Bank, 214 Cal. App. 4th 780, 799 (2013) (same for Trial Period Plan).

[117] *See*, *e.g.*, Desser v. US Bank, 2014 WL 4258344, at *7 (C.D. Cal. Aug. 27, 2014) (leaving a servicer to decide whether to execute and return the final agreement to borrower unfairly imbues servicer with complete control over contract formation; borrower's acceptance of the modification creates a contract); 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).

[118] *See*, *e.g.*, *Corvello*, 728 F.3d at 883-84; Bushell v. JP Morgan Chase Bank, N.A., 220 Cal. App. 4th 915, 925-28 (2013); *West*, 214 Cal. App. 4th at 799; *see also* Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 233 (1st Cir. 2013) (servicer must offer permanent modification before the Modification Effective Date); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 565-66 (7th Cir. 2012); Neep v. Bank of Am., N.A., No. 34-2013-00152543-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 18, 2014) (denying servicer's summary judgment motion because servicer could not demonstrate borrower's noncompliance with his TPP: specifically, that his modification application was *actually* incomplete, as opposed to missing unnecessary documents).

[119] *See* California state and federal cases cited *supra* note 118; *see also* Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 305-06 (2014) (allowing a borrower to amend his complaint to allege not only TPP payments, but continued HAMP eligibility to plead valid contract and wrongful foreclosure claims).

1. The statute of frauds defense

Servicers have invoked the statute of frauds to defend these contract claims.[120] In *Corvello v. Wells Fargo Bank*, for example, a borrower's oral TPP agreement modified her written deed of trust, so her servicer argued statute of frauds.[121] The Ninth Circuit reasoned the borrower's full TPP performance allowed her to enforce the oral agreement, regardless of the statute of frauds.[122]

The statute of frauds defense has also failed when a servicer merely neglects to execute a permanent modification agreement by signing the final documents.[123] In that case, the borrower's modified payments, servicer's acceptance of those payments, and the language of the TPP and permanent modification estopped the servicer from asserting the statute of frauds.[124]

Other courts have declined to dismiss a case based on a statute of frauds defense on the ground that a signed TPP or permanent modification agreement may be found in discovery.[125] Another court explained that a TPP does not fall within the statute of frauds because it only contains the promise of a permanent modification and does not, by itself, actually modify the underlying loan documents.[126]

2. Non-HAMP breach of contract claims

Breach of contract claims are also possible outside the HAMP context.[127] A year ago, a California Superior Court held[128] that *Corvello*

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[120] The statute of frauds requires agreements concerning real property to be memorialized in writing. Chavez v. Indymac Mortg. Servs., 219 Cal. App. 4th 1052, 1057 (2013).

[121] *Corvello*, 728 F.3d at 882, 885.

[122] *Id.* at 885.

[123] Ordinarily, agreements subject to the statute of frauds must also be signed "by the party to be charged" with breach of contract. Harris v. Bank of Am., N.A., 2014 WL 1116356, at *6 (C.D. Cal. Mar. 17, 2014).

[124] *Chavez*, 219 Cal. App. 4th at 1057-61; *see also* Moya v. CitiMortgage, Inc., 2014 WL 1344677, at *3 (S.D. Cal. Mar. 28, 2014); *Harris*, 2014 WL 1116356, at *6.

[125] *See*, *e.g.*, Orozco v. Chase Home Fin. LLC, 2011 WL 7646369, at *1 (Bankr. E.D. Cal. Aug. 16, 2011); *Chavez*, 219 Cal. App. 4th at 1062.

[126] *Chavez*, 219 Cal. App. 4th at 1062.

[127] *See*, *e.g.*, Menan v. U.S. Bank, Nat'l Ass'n, 924 F. Supp. 2d 1151, 1156-58 (E.D. Cal. 2013) (finding a "Forbearance to Modification Agreement" document an enforceable contract and that defendant breached the agreement by failing to cancel the NOD); Lueras v. BAC Home Loan Servicing, LP, 221 Cal. App. 4th 49, 71-72 (2013) (finding an agreement under the HomeSaver Forbearance Program an enforceable contract obligating servicer to consider borrower for foreclosure

and *Barroso* could apply to borrower's breach of contract claim even though those cases dealt with *HAMP* TPPs and permanent modifications and the "Loan Workout Plan" relied upon by this borrower was a "proprietary" modification, created by the servicer, not HAMP. The borrower argued there was no material difference between a HAMP TPP and the agreement at issue, for the two contracts used almost identical language. Indeed, the *Corvello* court relied on the *language* in the TPP agreement, not the fact that it was created by HAMP, to find a valid breach of contract claim.[129] The court agreed and overruled servicer's demurrer.[130] More recently, another Superior Court held that borrowers successfully couched a seemingly proprietary TPP, an "FNMA Apollo Trial Period Program," as a HAMP TPP, citing servicer's HAMP participation and that the TPP was "offered as a HAMP modification."[131] The court found that nothing in the TPP itself contradicted this allegation, and treated the TPP as a HAMP TPP, concluding that servicer was obligated to offer a permanent modification after borrowers' successful TPP completion.[132] The Court of Appeal has also found viable deceit, promissory estoppel, and negligence claims based on a borrower's proprietary TPP agreement.[133]

Conversely, in a recent California federal district court case, the borrower argued that *Corvello*'s reasoning applied to her Workout Agreement and Foreclosure Alternative Agreement. But because neither contract contained the mandatory language found in Corvello's HAMP agreement (servicer "*will* provide" a modification), the court

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alternatives in "good faith," relying on the reasoning in *West*, 214 Cal. App. 4th 780); Leal v. Wells Fargo Bank, N.A., No. 30-2013-00644154-CU-BC-CJC (Cal. Super. Ct. July 17, 2013) (Rather than evaluate borrower's modification application in "good faith," servicer used inflated income numbers to calculate payments, thereby breaching the unlawful detainer settlement agreement.).

[128] Hamidi v. Litton Loan Servs. LLP, No. 34-2010-00070476-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 10, 2013).

[129] *See* Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 883-85 (9th Cir. 2013).

[130] *Hamidi*, No. 34-2010-00070476-CU-OR-GDS ("After reviewing *Barroso* [citation], the court concludes that [borrower's] allegations can be construed to state breach of the implied covenant of good faith and fair dealing, as well as breach of contract, notwithstanding the absence of [servicer's] signature on the Loan Workout Plan.").

[131] Dominguez v. Nationstar Mortg., LLC, No. 37-2013-00077183-CU-OR-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 19, 2014).

[132] *Id.*

[133] Akinshin v. Bank of Am., N.A., 2014 WL 3728731, at *4-8 (Cal. Ct. App. July 29, 2014) (unpublished).

found *Corvello* inapposite.[134] A California Superior Court came to a similar conclusion.[135]

As the above cases illustrate, the enforceability of a non-HAMP trial modification agreement – and whether it promises a permanent modification – will depend on the precise language of that particular agreement. Claims based on *permanent* proprietary modifications are easier to assert since these agreements contain no condition precedent triggering a servicer obligation, as trial period plans do.[136]

3. Promissory estoppel claims

Because promissory estoppel claims are exempt from the statute of frauds,[137] borrowers often bring them when there is no written modification agreement. To state a claim, borrowers must show not only that the servicer promised a benefit (like postponing the sale,[138] not reporting a default to a credit reporting agency,[139] or offering a permanent modification[140]) and went back on that promise, but that

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[134] Morgan v. Aurora Loan Servs., LLC, 2014 WL 47939, at *4-5 (C.D. Cal. Jan. 6, 2014).

[135] *See* Pittell v. Ocwen Loan Servicing, LLC, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (distinguishing the proprietary agreement at issue with the situations in *West* and *Corvello* in three ways: 1) this borrower made only two of three TPP payments; 2) the TPP dictated that servicer "may" grant borrower a permanent modification upon TPP completion, not "will"; and 3) the proprietary agreement received no outside support from HAMP directives).

[136] *See*, *e.g.*, Le v. Bank of New York Mellon, 2014 WL 3533148, *4 (N.D. Cal. July 15, 2014) (finding a valid contract claim based on servicer's failure to accept borrower's permanently modified payments).

[137] *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).

[138] *See* Izsak v. Wells Fargo Bank, N.A., 2014 WL 1478711, at *4 (N.D. Cal. Apr. 14, 2014) (allowing promissory estoppel claim to proceed when servicer induced borrower to default to qualify for loan modification and promised not to foreclose during review).

[139] *See*, *e.g.*, Cockrell v. Wells Fargo Bank, N.A., 2013 WL 3830048, at *4 (N.D. Cal. July 23, 2013) (finding a valid PE claim where servicer convinced borrower to go into default to qualify for a modification and promised to take no negative actions against borrower for doing so; the servicer reported borrower to credit rating agencies).

[140] *See*, *e.g.*, Alimena v. Vericrest Fin., Inc., 964 F. Supp. 2d 1200, 1216 (E.D. Cal. 2013) (advising borrowers to amend their complaint to allege they fulfilled all TPP requirements, including their continuous HAMP eligibility throughout the TPP process, to successfully plead two promissory estoppel claims based on two separate

the borrower detrimentally relied on that promise. Some courts require borrowers to demonstrate specific changes in their actions to show reliance,[141] while others take for granted that the borrowers *would* have acted differently absent servicer's promise.[142] If the claim *is* based in a written TPP agreement (sometimes brought in conjunction with a breach of contract claim),[143] the court may count the TPP payments themselves as reliance and injury.[144] Even though a promissory

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TPP agreements, each promising to permanently modify the loan if borrower fulfilled TPP requirements); Passaretti v. GMAC Mortg., LLC, 2014 WL 2653353, at *6-7 (Cal. Ct. App. June 13, 2014) (finding a valid promissory estoppel claim based on servicer's assurance it would "work on a loan modification" with borrower if borrower participated in a repayment plan, ultimately paying over $50,000). *But see* Fairbanks v. Bank of Am., N.A., 2014 WL 954264, at *4-5 (Cal. Ct. App. Mar. 12, 2014) (a verbal promise to permanently modify upon successful completion of a verbal TPP is conditional because it is based on a future event (TPP completion), so the promise is ambiguous).

[141] *See*, *e.g.*, Izsak v. Wells Fargo Bank, N.A., 2014 WL 1478711, at *2 (N.D. Cal. Apr. 14, 2014) (Borrower's decision to become delinquent, in reliance on servicer's promise it would not foreclose during modification evaluation, was enough to show detrimental reliance.); Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016, at *10-12 (N.D. Cal. Mar. 3, 2014) (Borrowers demonstrated detrimental reliance by not appearing at the actual foreclosure sale due to lack of notice, where they would have placed a "competitive bid."); Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976, at *6 (C.D. Cal. Jan. 3, 2014) (Borrowers demonstrated detrimental reliance by pointing to their signed short sale agreement, which they ultimately rejected in reliance on servicer's promise that a modification was forthcoming.); Panaszewicz v. GMAC Mortg., LLC, 2013 WL 2252112, at *5 (N.D. Cal. May 22, 2013) (requiring a borrower to show pre-promise "preliminary steps" to address an impending foreclosure and then a post-promise change in their activity); 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).

[142] *See*, *e.g.*, Curley v. Wells Fargo & Co., 2014 WL 2187037, at *2-3 (N.D. Cal. May 23, 2014) (borrower successfully argued, as part of his motion for leave to add a promissory fraud claim, that he passed up opportunities to file bankruptcy, obtain private financing, or sell his home, relying on servicer's promise to offer a permanent modification after TPP completion); Faulks v. Wells Fargo & Co., 2014 WL 1922185, at *5 (N.D. Cal. May 13, 2014) (accepting borrower's assertion that he chose not to pursue "other alternatives" to foreclosure as adequate detrimental reliance); Loftis v. Homeward Residential, Inc., 2013 WL 4045808, at *3 (C.D. Cal. June 11, 2013) (accepting borrower's claims that they would have refinanced with a different lender, considered bankruptcy, or tried to sell their home as sufficient detrimental reliance); 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).

[143] See *Harris v. Bank of Am., N.A.*, 2014 WL 1116356 (C.D. Cal. Mar. 17, 2014) and *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005 (N.D. Cal. Mar. 12, 2014) for discussions on pleading a PE claim in the alternative with a breach of contract claim.

[144] *See* Alimena v. Vericrest Fin., Inc., 964 F. Supp. 2d 1200, 1218 (E.D. Cal. 2013); *cf.* Lovelace v. Nationstar Mortg. LLC, No. 34-2012-00119643-CU-BC-CDS (Cal. Super.

estoppel claim may not, in most cases, overturn a completed sale,[145] if the lender promised to postpone a foreclosure sale, a Section 2924g(c) claim could cancel the sale.[146] This type of claim does not require a borrower to show detrimental reliance.[147]

4. Breach of Covenant of Good Faith & Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing, "meaning that neither party will do anything which will injure the right of the other to receive the contract's benefits."[148] Advocates have been successful with these claims (sometimes brought alongside breach of contract claims), by asserting that servicers have frustrated borrowers' realization of the benefits of their TPP or permanent

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Ct. Sacramento Cnty. Aug. 22, 2013) (The time and energy required to apply for a modification was sufficient to allege consideration and damages in a breach of contract claim.).

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

[146] A trustee "shall postpone the sale in accordance with . . . [*inter alia*] . . . mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee. CAL. CIV. CODE § 2924g(c)(1)(C) (2005). *See* Chan v. Chase Home Fin., 2012 WL 10638457, at *11 (C.D. Cal. June 18, 2012) (holding tender not required under 2924g(c) when servicer foreclosed after agreeing to postpone sale); 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).

[147] *See Aharonoff*, 2012 WL 1925568 at *4 (allowing CC 2924g claim without requiring (or discussing) detrimental reliance).

[148] Bushell v. JP Morgan Chase Bank, N.A., 220 Cal. App. 4th 915, 928-29 (2013).

modification agreements.[149] They have been less successful bringing these claims based on original deeds of trust.[150]

C. Tort Claims

Until very recently, servicers that mishandled modification applications were immune to negligence claims because, under normal circumstances, a lender does not owe a duty of care to a borrower.[151]

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[149] *See*, *e.g.*, *id*. at 929 (servicer frustrated borrower's ability to benefit from a successful TPP agreement in finally receiving a permanent modification offer); Lanini v. JP Morgan Chase Bank, 2014 WL 1347365, at *6 (E.D. Cal. Apr. 4, 2014) (valid good faith claim based on servicer offering borrowers a TPP knowing borrower's property was too valuable to qualify for a permanent mod); Curley v. Wells Fargo & Co., 2014 WL 988618, at *5-8 (N.D. Cal. Mar. 10, 2014) (borrower's good faith claim based on their TPP agreement survived summary judgment); Reiydelle v. JP Morgan Chase Bank, N.A., 2014 WL 312348, at *9-10 (N.D. Cal. Jan. 28, 2014) (Permanent modification included a balloon payment; TPP was silent on balloon payments, rending the contract ambiguous and borrower's good faith claim survived the pleading stage.); Fleet v. Bank of Am., __ Cal. App. 4th __, 2014 WL 4711799, at *3-4 (Aug. 25, 2014) (allowing borrower's good faith claim because servicer allegedly foreclosed before borrowers' third and final TPP payment was due, frustrating borrowers' ability to realize the benefits of that agreement); Nersesyan v. Bank of Am., N.A., 2014 WL 463538, at *4-5 (Cal. Ct. App. Feb. 5, 2014) (granting borrower leave to amend their fair dealing claim based on an oral TPP agreement, in light of *Wigod*, *West*, *Corvello*, and *Bushell*).

[150] *See*, *e.g.*, MacKenzie v. Flagstar Bank, FSB, 738 F.3d 486, 491-93 (1st Cir. 2013) (Borrower argued that their servicer must act "in good faith" and "use reasonable diligence to protect the interests of the mortgagor" under the mortgage contract. Nothing in that contract required servicer to modify the loan, or even to consider a modification, so servicer's failure to extend a modification did not breach the implied covenant.); Fevinger v. Bank of Am., 2014 WL 3866077, at *5 (N.D. Cal. Aug. 4, 2014) (agreeing to forestall foreclosure if borrower stops making mortgage payments is mere "encouragement," and does not deprive the borrower of realizing the benefits of their DOT); Cockrell v. Wells Fargo Bank, N.A., 2013 WL 3830048, at *3-4 (N.D. Cal. July 23, 2013) (declining to find a good faith and fair dealing claim where servicer *encouraged* borrowers to become delinquent on their mortgage to qualify for a modification, but did not *actively interfere with* their ability to perform on their DOT). *But see* Castillo v. Bank of Am., 2014 WL 4290703, at *4 (N.D. Cal. Aug. 29, 2014) (servicer's representation that missing mortgage payments would "assist" borrower's modification process interfered with his ability to pay his loans under the DOT); Siqueiros v. Fed. Nat'l Mortg. Ass'n, 2014 WL 3015734, at *6-7 (C.D. Cal. June 27, 2014) (viable good faith and fair dealing claim based on servicer's failure to provide borrower with an accurate reinstatement amount, frustrating her ability to benefit from the DOT by reinstating and avoiding foreclosure); Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at *14 (N.D. Cal. Nov. 12, 2013) (allowing borrower's good faith claim based on the same scenario as that in *Cockrell*, noting that servicer "consciously and deliberately frustrated the parties' common purpose" outlined in the DOT).

[151] *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

The decision in *Jolley v. Chase Home Finance, LLC*, was the first published opinion that started to shift this state of the law. The *Jolley* court proposed that the general no-duty rule may be outdated, citing HAMP, SB 1137, and HBOR, as indicative of an evolving public policy toward the creation of a duty. *Jolley* involved a construction loan, not a residential loan, but suggested 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.[152] "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.[153]

A recent, published, Court of Appeal case has advanced this negligence theory further, applying it specifically to residential loans. In *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014), the court found that, though a servicer is not obligated to initiate the modification process or to offer a modification, once it agrees to engage in the process with the borrower it owes a duty of care not to mishandle the application or negligently conduct the modification process.[154] Though most courts have, in the past, failed to find a duty

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involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.").

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

[153] *Id*. at 903. *See also*, *e.g.*, Harris v. Bank of Am., N.A., 2014 WL 1116356, at *13-14 (C.D. Cal. Mar. 17, 2014) (finding *Jolley* applicable, not distinguishable, because like *Jolley*, this case involved "ongoing loan servicing issues"); Rowland v. JP Morgan Chase Bank, N.A., 2014 WL 992005, at *6-11 (N.D. Cal. Mar. 12, 2014) (denying motion to dismiss negligence claim and finding that the economic loss rule does not bar recovery); Ware v. Bayview Loan Servicing, LLC, 2013 WL 6247236, at *9 (S.D. Cal. Oct. 29, 2013) (denying motion to dismiss borrower's negligence claim because servicer may owe a duty of care to maintain proper records and timely respond to modification applications); McGarvey v. JP Morgan Chase Bank, N.A., 2013 WL 5597148, at *5-7 (E.D. Cal. Oct. 11, 2013) (deeming servicer's solicitation of plaintiff-owner's loan modification application as giving rise to a duty to treat her with reasonable care); Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065, at *11-12 (S.D. Cal. July 31, 2013) (using the California Supreme Court's six-factor test from *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) to establish a duty of care where defendant induced borrowers to skip mortgage payments so defendant could ultimately foreclose); Roche v. Bank of Am., N.A., 2013 WL 3450016, at *7-8 (S.D. Cal. July 9, 2013) (finding that defendant created a duty of care by: 1) offering to modify borrower's account; 2) charging unauthorized interest; and 3) reporting negative, incorrect information to credit reporting agencies); Robinson v. Bank of Am., 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).

[154] Alvarez v. BAC Home Loans Servicing, 228 Cal. App. 4th 941, 945-50 (2014).

of care created by engaging in the modification process,[155] *Alvarez* should begin to shift judges' calculus on the negligence issue.[156]

Borrowers may of course also bring negligence claims outside of or tangentially related to the modification process but, there too, they must usually demonstrate that the servicer owed the borrower a duty of care and breached it.[157]

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[155] *See* Benson v. Ocwen Loan Servicing, LLC, 562 F. App'x 567, 570 (9th Cir. 2014) (distinguishing *Jolley* as a construction loan case); Kramer v. Bank of Am., N.A., 2014 WL 1577671, at *9 (E.D. Cal. Apr. 17, 2014) ("The Court recognizes a duty of care during the loan modification process upon a showing of either a promise that a modification would be granted or the successful completion of a trial period."); Sun v. Wells Fargo, 2014 WL 1245299, at *4 (N.D. Cal. Mar. 25, 2014) (A duty may arise when a TPP or mod is offered, but the "mere engaging" in the modification process is a traditional money lending activity.); Meyer v. Wells Fargo Bank, N.A., 2013 WL 6407516, at *5 (N.D. Cal. Dec. 6, 2013) (same); Newman v. Bank of N.Y. Mellon, 2013 WL 5603316 (E.D. Cal. Oct. 11, 2013) (dismissing borrower's negligence claim because there was no TPP in place, acknowledging that a clear promise to modify or trial agreement *may* have created a duty of care); 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").

[156] *See*, *e.g.*, Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *12-13 (C.D. Cal. Sept. 26, 2014) (citing *Alvarez* and finding servicer was obligated to handle borrowers' application with "reasonable care," and denying servicer's MTD borrowers" negligence claim); Penermon v. Wells Fargo Home Mortg., 2014 WL 4273268, at *5 (N.D. Cal. Aug. 28, 2014) (not citing *Alvarez*, but relying on its reasoning, finding that once servicer "provided [borrower] with the loan modification application and asked her to submit supporting documentation, it owed her a duty to process the completed application"). This shift began with the court's decision in *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49 (2013). Though that court declined to follow *Jolley*, it allowed borrower to amend her complaint to state a claim for negligent misrepresentation instead of negligence. It held that servicers owe a duty *not to misrepresent* the status of borrower's loan modification application or of a foreclosure sale. Indeed, some courts had already started to apply this reasoning to negligence claims before *Alvarez* was decided. *See*, *e.g.*, Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829, at *5-6 (N.D. Cal. May 13, 2014) (applying the *Biakanja v. Irving*, 49 Cal. 2d 647 (1958) factors to find servicer owed borrower a duty of care once it accepted borrower's modification application); Akinshin v. Bank of Am., N.A., 2014 WL 3728731, at *7-8 (Cal. Ct. App. July 29, 2014) (reversing the trial court's grant of servicer's demurrer to borrower's negligence claim based on *Lueras* reasoning).

[157] *See*, *e.g.*, Mahoney v. Bank of Am., N.A., 2014 WL 2197068, at *7 (S.D. Cal. May 27. 2014) (finding a duty of care to accurately credit borrower's mortgage payments and to provide a reinstatement amount); Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016, at *14 (N.D. Cal. Mar. 3, 2014) (finding a valid negligence claim related to servicer's SPOC violations); Barber v. CitiMortgage, 2014 WL 321934, at *3-4 (C.D. Cal. Jan. 2, 2014) (Borrower successfully pled a negligence claim related to servicer's imposition of an escrow even though she provided proof of her property tax payments. If borrower was *actually* current on her taxes, then servicer owed her a duty of care not to impose an unnecessary escrow.); Hampton v. US Bank, N.A., 2013

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim against the servicer,[158] and possibly the servicer representatives.[159] An intentional wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress claim.[160]

WL 8115424, at *3-4 (C.D. Cal. May 7, 2013) (finding a duty of care to accurately credit borrower's accounts with her payment to "cure her default").

[158] *See* Newsom v. Bank of Am., N.A., 2014 WL 2180278, at *5-7 (C.D. Cal. May 22, 2014) (finding a valid fraud claim based on servicer's promise that borrowers would not receive a negative credit report or go through foreclosure if they engaged in the modification process); Ferguson v. JP Morgan Chase Bank, N.A., 2014 WL 2118527, at *10-11 (E.D. Cal. May 21, 2014) (finding servicer's advice to borrowers not to sell their home and to modify instead, coupled with a drawn out modification process that reduced borrowers' equity, sufficient to allege intentional and negligent misrepresentation claims and damages); Alimena v. Vericrest Fin., Inc., 964 F. Supp. 2d 1200, 1212-14 (E.D. Cal. 2013) (upholding intentional misrepresentation claims based on a two separate TPP agreements); Roche v. Bank of Am., N.A., 2013 WL 3450016, at *7-8 (S.D. Cal. July 9, 2013) (upholding fraud and negligent misrepresentation claims); Fleet v. Bank of Am., __ Cal. App. 4th __, 2014 WL 4711799, at *4 (Aug. 25, 2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); Bushell v. JP Morgan Chase Bank, N.A., 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify); West v. JP Morgan Chase Bank, 214 Cal. App. 4th 780, 793-94 (2013) (same); Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230, 249 (2011); Rigali v. OneWest Bank, No. CV10-0083 (Cal. Super. Ct. San Luis Obispo Cnty. Feb. 14, 2013) (Evidence that servicer entered into modification negotiations with no real intent to modify was enough to defeat summary judgment.). *But see Wickman*, 2013 WL 4517247, at *4-5 (upholding a claim for fraud, but granting defendant's motion to dismiss on the negligent misrepresentation claim because the court found no duty of care owed from servicer to borrower); Fairbanks v. Bank of Am., N.A., 2014 WL 954264, at *2-3 (Cal. Ct. App. Mar. 12, 2014) (distinguishing *West* as applying to a written TPP agreement, and finding borrowers here failed to allege their fraud claim, based on a verbal TPP, with specificity).

[159] *See*, *e.g.*, Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976, at *5-6 (C.D. Cal. Jan. 3, 2014) (allowing borrower to impose fraud liability on a SPOC); *Fleet*, __ Cal. App. 4th __, 2014 WL 4711799, at *5 (Borrowers successfully alleged a fraud claim against servicer representatives who assured borrowers their TPP payments were received and credited, and that a foreclosure sale would not occur, which of course it did.); Schubert v. Bank of Am., N.A., No. 34-2013-00148898-CU-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 11, 2014) (allowing borrower to impose fraud liability on a SPOC).

[160] *See* Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 203-05 (2012). Borrowers have been somewhat more successful in alleging emotional distress *damages* related to other types of claims. *See*, *e.g.*, Izsak v. Wells Fargo Bank, N.A., 2014 WL 1478711, at *4 (N.D. Cal. Apr. 14, 2014) (allowing borrower's promissory estoppel claim, which alleged severe emotional distress as part of her damages, to

D. UCL Claims

California's Unfair Competition Law (UCL) provides another opportunity for borrowers to obtain restitution or to stop or postpone a foreclosure[161] if they can show the servicer engaged in an unlawful, unfair, or fraudulent practice.[162]

Unlawful prong claims are based on a violation of an underlying statute, but may be brought regardless of whether that underlying statute provides a private right of action.[163] For example, borrowers have used UCL claims to challenge allegedly unlawful assignments, even though the underlying statute does not provide a right of action.[164] An "unlawful" UCL claim may also be based on statutory violations *with* a private right of action,[165] and even common law causes of action.[166] 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

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survive servicer's motion to dismiss); Rowland v. JP Morgan Chase Bank, N.A., 2014 WL 992005, at *9 (N.D. Cal. Mar. 12, 2014) (allowing borrower to claim emotional distress damages related to her negligence claim, invoking an exception to the economic loss doctrine); Barber v. CitiMortgage, 2014 WL 321934, at *4 (C.D. Cal. Jan. 2, 2014) (allowing borrower to allege emotional distress as part of her damages to her breach of contract claim); Goodman v. Wells Fargo Bank, N.A., 2014 WL 334222, at *3 (Cal. Ct. App. Jan. 30, 2014) (same).

[161] CAL. BUS. & PROF. CODE § 17203 (2004). For a full explanation of UCL claims and available remedies in the foreclosure context, see CEB, *supra* note 22, § 12.27.

[162] *See* CAL. BUS. & PROF. CODE § 17200 (2012). Conduct can be unlawful, *or* unfair, *or* fraudulent to be liable under the UCL. *See West*, 214 Cal. App. 4th at 805 (The statute was written "in the disjunctive . . . establish[ing] three varieties of unfair competition . . . .").

[163] *See* Rose v. Bank of Am., 57 Cal. 4th 390, 395-96 (2013) (holding that the federal Truth in Savings Act is enforceable through an UCL claim, even though TISA provides no private right of action); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 562 (1998).

[164] *See*, *e.g.*, Vogan v. Wells Fargo Bank, N.A., 2011 WL 5826016, at *6-7 (E.D. Cal. Nov. 17, 2011) (allowing a § 17200 claim when borrowers 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").

[165] *See*, *e.g.*, Gaudin v. Saxon Mortg. Servs. Inc., 2013 WL 4029043, at *10 (N.D. Cal. Aug. 5, 2013) (Borrowers in a class action certification hearing were held to possess UCL "unlawful" standing based on Rosenthal Act claims.); People v. Persolve, LLC, 218 Cal. App. 4th 1267, 1275 (2013) (The litigation privilege does not bar UCL claims based on the Rosenthal Act and FDCPA.).

[166] *See*, *e.g.*, Peterson v. Wells Fargo Bank, N.A., 2014 WL 3418870, at *7 (N.D. Cal. July 11, 2014) (finding a viable UCL claim based on borrower's fraud claim); McGarvey v. JP Morgan Chase Bank, N.A., 2013 WL 5597148, at *8-9 (E.D. Cal. Oct. 11, 2013) (finding a viable negligence claim serves as a basis for "unlawful" prong UCL claim).

deed is recorded.[167] Such post-sale relief would be unavailable under HBOR's statutory remedies.[168] Additionally, advocates should be able to use the UCL to enforce the new CFPB servicing rules, which became effective January 10, 2014, to obtain pre-sale injunctive relief.[169]

The unfair prong of the UCL makes unlawful practices that violate legislatively stated public policy, even if the practice is not technically prohibited by statute. It also prohibits practices that are "immoral, unethical, [or] oppressive."[170] For example, even though HBOR did not become effective until 2013, courts have held pre-2013 dual tracking unfair under the UCL.[171] A borrower may also bring an "unfair" claim by alleging that a servicer's conduct or statement was misleading.[172] A

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[167] *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 are cumulative). The UCL would not, however, provide relief if the servicer corrected its HBOR violation before the deed is recorded. *See*, *e.g.*, Jent v. N. Tr. Corp., 2014 WL 172542, at *5 (E.D. Cal. Jan. 15, 2014) (HBOR's "safe harbor" provision, relieving servicers from HBOR liability if they correct their errors before a trustee's deed upon sale is recorded, was fulfilled here, extinguishing the derivative UCL "unlawful" claim.).

[168] *See* CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013) (outlining remedies for large and small servicers, respectively).

[169] *See supra* section I.D.

[170] *McGarvey*, 2013 WL 5597148, at *9 (quoting Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1260 (2006)). Some courts evaluate the allegedly unfair practice using a balancing test, weighing "the gravity of the harm to the [borrower]" against "the utility of the [servicer's] conduct." Perez v. CitiMortgage, Inc., 2014 WL 2609656, at *8 (C.D. Cal. June 10, 2014). Other courts use a much narrower definition of "unfair," requiring borrowers to allege the conduct was "tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law." Graham v. Bank of Am., 226 Cal. App. 4th 594, 612-13 (2014).

[171] *See* Ware v. Bayview Loan Servicing, LLC, 2013 WL 6247236, at *6-7 (S.D. Cal. Oct. 29, 2013) (finding a valid "unfair" UCL claim based on borrower's 2010 loan modification application and servicer's 2013 foreclosure activity); Cabrera v. Countrywide Fin., 2012 WL 5372116, at *7 (N.D. Cal. Oct. 30, 2012) (upholding borrower's 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.").

[172] *See*, *e.g.*, *Perez*, 2014 WL 2609656, at *9 (finding servicer's misrepresentations and possible concealment of borrower's application status led to a deliberately drawn-out and unsuccessful modification process, resulting in harm to the borrower that outweighed the utility of servicer's actions); Canas v. Citimortgage, Inc., 2013 WL 3353877, at *5-6 (C.D. Cal. July 2, 2013) (Servicer's promise of a permanent modification was misleading because after inducing the borrower to make TPP payments, no modification was forthcoming.).

servicer's failure to honor a prior servicer's loan modification after servicing transfer can also be an unfair practice.[173]

The fraudulent prong of the UCL prohibits fraudulent practices that are likely to deceive the public.[174] For example, courts have allowed UCL fraudulent claims against banks that offered TPPs that did not comply with HAMP guidelines,[175] that induced borrowers to make TPP payments by promising permanent modifications and then not offering them,[176] and that misrepresented their fee posting method and misapplying service charges to mortgage accounts.[177] One court even found a lender's pursuit of foreclosure without any apparent authority to foreclose a business practice likely to deceive the public and a valid fraudulent-prong UCL claim.[178]

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.[179] Courts have found the initiation of foreclosure proceedings to constitute lost property interest[180] but have demanded

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[173] *See* Lewis v. Bank of Am., N.A., 2013 WL 7118066, at *3 (C.D. Cal. Dec. 18, 2013).
[174] Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 838 (2006).
[175] West v. JP Morgan Chase Bank N.A., 214 Cal. App. 4th 780, 806 (2013); Pestana v. Bank of Am., N.A., 2014 WL 2616840, at *5 (Cal. Ct. App. June 12, 2014) (Servicer incorrectly evaluated and denied HAMP applications, giving rise to a fraudulent UCL claim).
[176] McGarvey v. JP Morgan Chase Bank, N.A., 2013 WL 5597148, at *9-10 (E.D. Cal. Oct. 11, 2013) (finding that "a reasonable consumer" would be confused by servicer's offering of a TPP agreement and then failure to modify because plaintiff was not "borrower" on DOT); Gaudin v. Saxon Mortg. Servs., Inc., 297 F.R.D. 417 (N.D. Cal. 2013) (Servicer's systemic practice of denying modifications based on certain criteria, after a borrower complied with their TPP, could deceive the public.); *Canas*, 2013 WL 3353877, at *6 ("[M]embers of the public would likely be deceived by Defendant's assurances concerning a permanent loan modification."); *Pestana*, 2014 WL 2616840, at *5.
[177] *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).
[178] Subramani v. Wells Fargo Bank, N.A., 2013 WL 5913789, at *6 (N.D. Cal. Oct. 31, 2013).
[179] CAL. BUS. & PROF. CODE § 17204 (2012).
[180] *See*, *e.g.*, Corral v. Select Portfolio Servicing, Inc., 2014 WL 3900023, at *6 (N.D. Cal. Aug. 7, 2014) (Initiation of foreclosure, damaged credit, and attorney costs constituted damages (and adequate UCL standing) caused by servicer's HBOR violations); Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at *8 (C.D. Cal. July 18, 2014); Boring v. Nationstar Mortg., 2014 WL 66776, at *5 (E.D. Cal. Jan. 7, 2014) (initiation of foreclosure and borrower's damaged credit provided UCL standing); Barrioneuvo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 977 (N.D. Cal.

that the loss be directly caused by the wrongful conduct,[181] not simply the borrower's monetary default.[182] Courts have accepted,[183] and rejected,[184] other sources of economic loss, but there does not appear to be a consistent pattern in this regard.

2012); Tamburri v. Suntrust Mortg., Inc., 2011 WL 6294472, at *17 (N.D. Cal. Dec. 15, 2011). *But cf*. Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065, at *6-7 (S.D. Cal. July 31, 2013) (Foreclosure risk, without the actual initiation of foreclosure proceedings, is not a particular enough injury to constitute UCL standing.).

[181] *See* Roche v. Bank of Am., Nat'l Ass'n, 2013 WL 3450016, at *9 (S.D. Cal. July 9, 2013) (denying servicer's motion to dismiss borrower's UCL claim because borrower was able to show that servicer's conduct interfered with borrower's attempt to "bring his payments back to *status quo*"); *Pestana*, 2014 WL 2616840, at *5-7 (finding servicer's inducement of borrower to become delinquent directly led to late fees and penalties associated with missed mortgage payments and adequate UCL standing); *cf*. Peterson v. Wells Fargo Bank, N.A., 2014 WL 3418870, at *7 (N.D. Cal. July 11, 2014) (finding borrowers may allege "causation more generally" at the pleading stage and plead property improvements as damages caused by servicer's false assurances a modification would be forthcoming); Boessenecker v. JP Morgan Chase Bank, 2013 WL 3856242, at *3 (N.D. Cal. July 24, 2013) (giving UCL standing to a borrower based on their servicer providing them with inaccurate loan information, preventing them from refinancing their mortgage with favorable interest rates).

[182] *See* Sholiay v. Fed. Nat'l Mortg. Ass'n, 2013 WL 3773896, at *7 (E.D. Cal. July 17. 2013) (refusing the borrower standing because he could not show how he could have prevented the foreclosure sale without a modification that servicer was not obligated to provide); Lueras v. BAC Home Loan Servicing, LP, 221 Cal. App. 4th 49, 83 (2013) (Foreclosure sale constituted economic injury, but borrowers failed to allege sale was caused by something other than their default. The court granted leave to amend to allege servicer's misrepresentations led to unexpected sale.); 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); *see also* Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *8-9 (C.D. Cal. Sept. 26, 2014) (distinguishing between damage caused by borrowers' default and damage caused by servicer's mishandling of borrowers' modification application, the latter of which formed the basis for UCL standing because it affected borrowers' property interest and/or their ability to lower their mortgage payments).

[183] *See*, *e.g.*, Esquivel v. Bank of Am., N.A., 2013 WL 5781679, at *4-5 (E.D. Cal. Oct. 25, 2013) (Servicer's failure to honor an FHA-HAMP modification agreement led to borrower's needless acceptance of a second HUD lien on their home and incorrect credit reporting, leading directly to economic damages.); Mikesell v. Wells Fargo Bank, N.A. No. 34-2014-00160603-CU-OR-CDS (Cal. Super. Ct. Sacramento Cnty. Aug. 21, 2014) (finding UCL standing because a TPP agreement led to borrowers' continued TPP payments, a prolonged modification process, and ultimately "overcharges and penalties" that would not have accrued absent servicer's TPP offer).

[184] *See*, *e.g.*, Bullwinkle v. U.S. Bank, N.A., 2013 WL 5718451, at *2 (N.D. Cal. Oct. 21, 2013) (Loan payments paid to the "wrong" entity were nevertheless owed to the "correct" entity, so borrower was "not actually . . . deprived of any money;" legal fees are not considered a loss for purposes of UCL standing; a ruined credit score does not grant UCL standing.); Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065, *7 (S.D. Cal. July 31, 2013) (rejecting the risk of foreclosure, forgone opportunities to

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 injunctive relief before the sale occurs. Under HBOR, borrowers may obtain injunctive relief to stop an impending sale, but a borrower may only recover actual economic damages post-sale.[185]

To obtain a preliminary injunction in state court, a borrower must show (1) a likelihood of prevailing on the merits and (2) that they will be more harmed by the sale than the servicer will be by postponing the sale.[186] In the Ninth Circuit, a plaintiff must show only "serious questions going to the merits[,] . . . [that] the balance of hardships tips sharply in [their] favor," that they will suffer irreparable harm, and that the injunction is in the public interest.[187] At least in federal court, an identical standard governs the issuance of a temporary restraining order.[188] In both state and federal court, the loss of one's home is considered irreparable harm.[189]

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refinance, and attorney and expert fees as bases for UCL standing); *Lueras*, 221 Cal. App. 4th at 81-83 (Time and effort spent collecting modification documentation is *de minimis* effort and insufficient for UCL standing.).

[185] *See* CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013) (describing relief available against large and small servicers, respectively). Each statute provides for treble actual damages or $50,000 in statutory damages if borrower can show servicer's conduct was willful. *Id*. However, at least one court has recognized that a borrower may be able to bring an equitable wrongful foreclosure claim based on dual tracking violations after the foreclosure sale but before the trustee's deed is recorded. *See* Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *6-7 (N.D. Cal. Apr. 16, 2014). The Bingham court seemed unclear on what type of relief should be available, but acknowledged that *some* type of relief should be available to borrowers in this situation. *See supra* note 80.

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

[187] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Generally, federal courts have held that delaying a foreclosure sale, to enable borrowers to bring valid HBOR claims, is in the public interest. *See* Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at *8 (C.D. Cal. July 9, 2014) (The public interest is served by allowing homeowners "the opportunity to pursue what appear to be valid claims before they are evicted from their homes.").

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

[189] CAL. CIV. CODE § 3387 (2012); Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 661 (9th Cir. 1988). The harm, however, must also be "likely and immediate," which some courts have found not the case where a servicer postpones a foreclosure sale to review borrowers for a loan modification. *See*, *e.g.*,

Both state and federal courts have enjoined pending foreclosure sales when the servicer violated HBOR.[190] Courts have also granted preliminary injunctions in non-HBOR cases.[191]

Cooksey v. Select Portfolio Servicing, Inc., 2014 WL 4662015, at *8-9 (E.D. Cal. Sept. 17, 2014) (denying borrowers' motion for a preliminary injunction).

[190] *See*, *e.g.*, Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at *2-5 (N.D. Cal. July 29, 2014) (PI granted on dual tracking claim); *Shaw*, 2014 WL 3362359, at *7 (PI granted on SPOC claim, denied on dual tracking claim); *Cooksey*, 2014 WL 2120026, at *2-3 (TRO granted on dual tracking claim); McKinley v. CitiMortgage, Inc., 2014 WL 651917, at *8 (E.D. Cal. Feb. 19, 2014) (same); Massett v. Bank of Am., N.A., 2013 WL 4833471, at *2-3 (C.D. Cal. Sept. 10, 2013) (TRO granted on dual tracking claims); Ware v. Bayview Loan Servicing, LLC, 2013 WL 4446804, at *5 (S.D. Cal. Aug. 16, 2013) (granting a PI based on servicer's failure to formally deny borrower's 2011 modification application and proceeding with a foreclosure in 2013); 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 Am., 2013 WL 1858436, at *2-3 (E.D. Cal. May 2, 2013) (PI); Bitker v. Suntrust Mortg. Inc., 2013 WL 2450587, at *2 (S.D. Cal. Mar. 29, 2013) (TRO); Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (PI granted on dual tracking claim); Monterrosa v. PNC Bank, No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (same); Zanze v. Cal. Capital Loans Inc., 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (same); Pearson v. Green Tree Servicing, LLC, No. C-13-01822 (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013) (TRO on dual tracking claim); Isbell v. PHH Mortg. Corp., No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013) (PI granted on dual tracking claim because servicer *requested* borrower's third application.); Rogers v. OneWest Bank FSB, No. 34-2013-00144866-CU-WE-CDS (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013) (PI granted based on SPOC claim, not on dual tracking claim.); Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. July 1, 2013) (PI). *See generally* discussion *supra* Sections I.A-C.

[191] *See*, *e.g.*, Bever v. Cal-Western Reconveyance Corp., 2013 WL 5493422, at *3-5 (E.D. Cal. Oct. 2, 2013) (enjoining sale due to servicer's noncompliance with former CC 2923.5); Heflebower v. JP Morgan Chase Bank, N.A., 2012 WL 5879589, at *3 (E.D. Cal. Nov. 20, 2012) (same); De Vico v. US Bank, 2012 WL 10702854, at *3-5 (C.D. Cal. Oct. 29, 2012) (same); *see also* Williams v. Wells Fargo Bank, N.A., 2013 WL 5444354, at *2-3 (N.D. Cal. Sept. 30, 2013) (granting a PI because servicer may have breached the covenant of good faith and fair dealing in stopping automatic withdrawal of borrower's mortgage payments); Miller v. Wells Fargo Bank, N.A., 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); DiRienzo v. OneWest Bank, FSB, 2014 WL 1387329, at *2-5 (Cal. Ct. App. Apr. 9, 2014) (upholding the trial court's issuing of a PI based on borrower's misrepresentation and concealment claims, which were premised on HAMP violations); Jobe v. Kronsberg, 2013 WL 3233607, at *9-10 (Cal. Ct. App. June 27, 2013) (affirming the trial court's PI order based on borrower's forgery claim. *But cf.* Vasquez v. Bank of Am., N.A., 2014 WL 1614764, at *1-2 (N.D. Cal. Apr. 22, 2014) (rejecting the idea that injunctive relief is available for *substantive* wrongful foreclosure claims that attack the validity of an anticipated

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 very difficult to set aside a foreclosure sale.[192] However, if the challenge to the foreclosure goes to the authority to foreclose, or if the sale was void, then even a sale to a BFP can be overturned.[193] In one post-foreclosure case, the court issued a preliminary injunction against enforcement of the writ of possession.[194]

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.[195] This is especially true when the challenge is premised on a procedural defect in the foreclosure notices.[196] However, tender is not required if it would be inequitable.[197] In addition, courts have excused the tender requirement when (1) the sale is void (e.g., the trustee conducted the sale without legal authority);[198] (2) if the loan was reinstated;[199] (3) if

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sale, but allowing that borrowers may win injunctions to delay an impending sale based on a servicer's *procedural* foreclosure violations).

[192] *See* CAL. CIV. CODE § 2924(c).

[193] *See* Bank of Am., N.A. v. La Jolla Group II, 129 Cal. App. 4th 706, 714-15 (2005).

[194] Sencion v. Saxon Mortg. Servs., LLC, 2011 WL 2259764, at *2 (N.D. Cal. May 17, 2011).

[195] *See* Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 112 (2011) (stating the general tender rule).

[196] 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.").

[197] *See*, *e.g.*, Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *6-7 (N.D. Cal. Apr. 16, 2014) (finding tender inequitable where it was unclear if injunctive relief or damages available to borrowers); Moya v. CitiMortgage, Inc., 2014 WL 1344677, at *5 (S.D. Cal. Mar. 28, 2014) (finding tender inequitable where servicer accepted borrower's TPP payments and foreclosed anyway); Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 291 (1911); Fonteno v. Wells Fargo Bank, 228 Cal. App. 4th 1358, 1368-69 (2014) (finding it would be inequitable to require tender where the circumstances being litigated—servicer's failure to comply with HUD's rules governing FHA loans—show that borrowers were unable to tender the amount due on their loan); *Lona*, 202 Cal. App. 4th at 113 (outlining all the reasons for not requiring tender, including when it would be unfair to the borrower).

[198] Aniel v. Aurora Loan Services, LLC, 550 F. App'x 416, 417(9th Cir. 2013) (tender not required when the borrower alleged that the trustee was not properly substituted in); Engler v. ReconTrust Co., 2013 WL 6815013, at *7 (C.D. Cal. Dec. 20, 2013) (tender not required where borrower's lack of authority to foreclose claim, if true,

the borrower was current on their loan modification;[200] (4) if the borrower is challenging the validity of the underlying debt;[201] and (5) if the sale has not yet occurred.[202]

Courts have also been reluctant to require 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.[203] The Legislature, the court reasoned, intended borrowers to enforce those outreach requirements, and requiring tender would financially bar many claims.[204] Two federal courts and two state courts have rejected

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would render the sale void, not voidable); Subramani v. Wells Fargo Bank, N.A., 2013 WL 5913789, at *4 (N.D. Cal. Oct. 31, 2013) (same); Cheung v. Wells Fargo Bank, N.A., 2013 WL 6017497, at *4-5 (N.D. Cal. Sept. 25, 2013) (same); Glaski v. Bank of Am., N.A., 218 Cal. App. 4th 1079, 1100 (2013); Dimock v. Emerald Props., 81 Cal. App. 4th 868, 877-78 (2000).

[199] *In re* Takowsky, 2013 WL 5183867, at *9-10 (Bankr. C.D. Cal. Mar. 20, 2013) (borrower reinstated loan by paying servicer amount due listed on NOD; foreclosure was wrongful because servicer then had no authority to foreclose under the NOD); Bank of Am. v. La Jolla Group, 129 Cal. App. 4th 706, 711 (2005).

[200] Harris v. Bank of Am., N.A., 2014 WL 1116356, at *7 (C.D. Cal. Mar. 17, 2014) (Borrowers were compliant with their loan modification agreement when servicer foreclosed.); Chavez v. Indymac Mortg. Servs., 219 Cal. App. 4th 1052, 1063 (2013); Barroso v. Ocwen Loan Servicing, 208 Cal. App. 4th 1001, 1017 (2012).

[201] Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 307 (2014); *Lona*, 202 Cal. App. 4th at 103-04; *see also* Sarkar v. World Savings Bank, FSB, 2014 WL 457901, at *3 (N.D. Cal. Jan. 31, 2014) (citing *Lona* and excusing tender where borrower alleged his loan originator wrongfully failed to verify borrower's income, agreeing to a loan it knew borrower could not afford); Passaretti v. GMAC Mortg., LLC, 2014 WL 2653353, at *10 (Cal. Ct. App. June 13, 2014) (allowing borrower to amend his complaint to plead that his compliance with his Repayment Plan provides a basis for a no-default exception to the tender rule); Iskander v. JP Morgan Chase Bank, No. 37-2012-00086676-CU-FR-CTL (Cal. Super. Ct. San Diego Cnty. Nov. 22, 2013) (Pre-foreclosure, borrower tendered full amount due on the loan to servicer, resulting in a valid claim for failure to accept tender under CC § 1485.).

[202] Schneider v. Bank of Am., N.A., 2014 WL 2118327, at *13-14 (E.D. Cal. May 21, 2014) (finding no tender required pre-foreclosure); Wickman v. Aurora Loan Servs., LLC, 2013 WL 4517247, at *3 (S.D. Cal. Aug. 23, 2013) (declining a tender requirement where borrower brought action after NTS was recorded, but before actual sale); Intengan v. BAC Home Loans Servicing, LP, 214 Cal. App. 4th 1047, 1053-54 (2013) (collecting cases that consider this issue)*; see also* Tang v. Bank of Am., N.A., 2012 WL 960373, at *4 (C.D. Cal. Mar. 19, 2012) (explaining that pre-sale tender is less common than post-sale because post-sale actions are more demanding on courts).

[203] Mabry v. Superior Court, 185 Cal. App. 4th 208, 213 (2010). HBOR amended the previous § 2923.5 and bifurcated it to apply to large and small servicers. *See* CAL. CIV. CODE §§ 2923.55 and 2923.5 (2013), respectively, and section I.A.

[204] *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."

servicers' tender arguments in HBOR dual tracking cases.[205] In another case, the court found tender unnecessary simply because "[HBOR] . . . imposes no tender requirement,"[206] and in another, the servicer conceded at the preliminary injunction hearing that tender is not required in HBOR, pre-sale cases.[207]

Advocates moving for TROs or preliminary injunctions should prepare for disputes over the amount of bond. In the foreclosure context, the bond amount is discretionary[208] and can be waived for indigent plaintiffs.[209] Courts consider a variety of factors in determining bond amounts. Some use fair market rent of comparable property,[210] the prior mortgage payment,[211] the modified mortgage

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(emphasis in original)). Tender was also inequitable here because borrowers sought to postpone, not to completely avoid, a foreclosure sale. *Id*. at 232.

[205] *See* Stokes v. Citimortgage, 2014 WL 4359193, at *9 (C.D. Cal. Sept. 3, 2014) (refusing to require tender at the pleading stage because it is unknown whether requiring tender based on HBOR causes of action is inequitable without more facts); Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *6 (N.D. Cal. Apr. 16, 2014) (holding that a plaintiff may seek injunctive relief under HBOR "regardless of tender"); Pearson v. Green Tree Servicing, No. C-13-01822 (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013); Senigar v. Bank of Am., No. MSC13-00352 (Cal. Super. Ct. Feb. 20, 2013) (rejecting defendant's tender argument on a dual tracking and SPOC claim, and citing the *Mabry* tender principle).

[206] 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)).

[207] Cooksey v. Select Portfolio Servicing, Inc., 2014 WL 4662015, at *8 (E.D. Cal. Sept. 17, 2014).

[208] *See* FED.R.CIV.P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security *in an amount that the court considers proper* . . . ." (emphasis added)); CAL. CIV. PROC. CODE § 529(a) (1994) (leaving the undertaking amount up to the court).

[209] CAL. CIV. PROC. CODE § 995.240 (1982). Similarly, federal courts have authority to waive the bond requirement for indigent plaintiffs. *See*, *e.g.*, Park Vill. Apts. Tenants Ass'n v. Howard, 2010 WL 431458, at *4 (N.D. Cal. Feb. 1, 2010), *aff'd in part, rev'd in part*, 636 F.3d 1150 (9th Cir. 2011) (excusing bond requirement for indigent plaintiffs); Toussaint v. Rushen, 553 F. Supp. 1365, 1383 (C.D. Cal. 1983), *aff'd in part*, *vacated in part*, 722 F.2d 1490 (9th Cir. 1984) ("Where . . . suit is brought on behalf of poor persons, preliminary injunctive relief may be granted with no payment of security whatever.").

[210] *See, e.g.,* De Vico v. US Bank, 2012 WL 10702854, at *7 (C.D. Cal. Oct. 29, 2012); 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); *cf*. Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (setting a one-time $15,000 bond, plus requiring borrowers to pay $1,600 monthly payments, the fair market rental value); Monterrosa v. PNC Bank,

payment,[212] or the amount of foreseeable damages incurred by a bank in delaying a foreclosure sale.[213] Others have deemed the deed of trust sufficient security and chose not to impose a separate, monetary bond.[214] Some courts set extremely low, one-time bonds.[215] Advocates

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No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (giving borrowers the option of paying a lump sum, or monthly installments, both based on the fair market rental value of the property).

[211] *See* Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at *6 (N.D. Cal. July 29, 2014) (setting the bond at $1,800 per month, borrower's previous payment, and requiring payments directly to a trust, not to servicer); Bever v. Cal-Western Reconveyance Corp., 2013 WL 5493422, at *5 (E.D. Cal. Oct. 2, 2013) (considering borrower's time living in the home without making any payments, and that CC 2923.5 only delays foreclosure in setting the bond close to borrower's monthly mortgage payments, plus a one-time payment of $2,800); Martin v. Litton Loan Servicing LP, 2013 WL 211133, at *22 (E.D. Cal. Jan. 16, 2013) (setting the bond at plaintiff's pre-escrow account monthly mortgage payment); Pearson v. Green Tree Servicing, No. C-13-01822 (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013) (setting a $1,000 one-time bond, coupled with monthly mortgage payments).

[212] *See* Mazed v. JP Morgan Chase Bank, 471 F. App'x 754, 755 (9th Cir. 2012) (District court did not abuse its discretion by setting the bond at borrower's modified mortgage payment.); Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at *9 (C.D. Cal. July 9, 2014) (setting bond at borrower's first, pre-HBOR modified loan payment); Rampp v. Ocwen Fin. Corp., 2012 WL 2995066, at *5 (S.D. Cal. July 23, 2012) (determining the proper amount for bond as the modified monthly payment); Jackmon v. Am.'s Servicing Co., 2011 WL 3667478, at *4 (N.D. Cal. Aug. 22, 2011) (requiring a bond that paid the arrearages, plus monthly payments specified in the Forbearance Agreement).

[213] Williams v. Wells Fargo Bank, N.A., 2013 WL 5444354, at *3 (N.D. Cal. Sept. 30, 2013 (setting bond at borrower's arrearages, totaling 6-months of mortgage payments that servicer failed to automatically withdraw from borrower's bank account). *But cf.* Flaherty v. Bank of Am., N.A., 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").

[214] *See, e.g.,* McKinley v. CitiMortgage, Inc., 2014 WL 651917, at *7 (E.D. Cal. Feb. 19, 2014) (waiving bond requirement); Bitker v. Suntrust Mortg. Inc., 2013 WL 2450587, at *2 (S.D. Cal. Mar. 29, 2013) (citing Jorgensen v. Cassiday, 320 F.3d 906, 919-20 (9th Cir. 2003) and 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); Bhandari v. Capital One, NA, 2012 WL 3792766, at *2 (N.D. Cal. Aug. 30, 2012) (waiving bond because the loan is adequate security); Tuck v. Wells Fargo Home Mortg., 2012 WL 3731609, at *3 (N.D. Cal. Aug. 28, 2012) (security instrument sufficient to protect lender); Reed v. Wells Fargo Bank, 2011 WL 1793340, at *7 (N.D. Cal. May 11, 2011) (same); Rivera v. BAC Home Loans Servicing, LP, 2010 WL 2280044, at *2 (N.D. Cal. June 7, 2010); Phleger v. Countrywide Home Loans, Inc., 2007 WL 4105672, at *6 (N.D. Cal. Nov. 16, 2007); Isbell v. PHH Mortg. Corp., No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013). *But see* Menis v. NDEX West, LLC, 2014 WL 2433687, at *2-7 (Cal. Ct. App. May 30, 2014) (reversing the trial court's decision to set no monetary bond).

[215] Singh v. Bank of Am., N.A., 2013 WL 1858436, at *2-3 (E.D. Cal. May 2, 2013) (setting a one-time bond of $1,000); Jobe v. Kronsberg, 2013 WL 3233607, at *8-9, 11-

arguing against a bond should reassure the court that the bank's interests are preserved in the deed of trust and unharmed by a mere postponement of foreclosure.[216] In any event, the court should not set the bond at the unpaid amount of the loan or the entire amount of arrearages.[217]

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.[218] 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.[219] Courts are more

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12 (Cal. Ct. App. June 27, 2013) (determining the trial court did not abuse its discretion in setting a $1,000 bond because the "ample home equity" would more than adequately compensate defendants, should they prevail); Zanze v. Cal. Capital Loans Inc., No. 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (reducing its tentative bond set at $24,000 based on fair market rental value and servicer's costs, to a $500 bond after finding borrower indigent). *But see* Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (setting a one-time $15,000 bond, plus requiring borrowers to pay $1,600 monthly payments, the fair market rental value); Leonard v. JP Morgan Chase Bank, N.A., No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014) (one-time, $4,000 bond); Pittell v. Ocwen Loan Servicing, LLC, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty., Dec. 5, 2013) (one-time, $5,000 bond); Rogers v. OneWest Bank FSB, No. 34-2013-00144866-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013) (one-time, $10,000 bond).

[216] *See Jobe*, 2013 WL 3233607, at *11.

[217] *See* Bever v. Cal-Western Reconveyance Corp., 2013 WL 5493422, at *5 (E.D. Cal. Oct. 2, 2013) (rejecting servicer's request for the full amount due on the loan as "tantamount to requiring tender" and "excessive"); *Flaherty*, 2013 WL 29392, at *8 (finding the total amount of arrearages an inappropriate gauge of a bank's foreseeable damages).

[218] Servicers must declare that they have contacted the borrower to discuss foreclosure alternatives, or that they fulfilled due diligence requirements. CAL. CIV. CODE §§ 2923.5(b), 2923.55(c) (2013) (applying to small and large servicers, respectively). *See* discussion *supra*, section I.A.

[219] *See*, *e.g.*, Tavares v. Nationstar Mortg., LLC, 2014 WL 3502851, at *7 (S.D. Cal. July 14, 2014); 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, N.A., 198 Cal. App. 4th 256, 266 (2011); Lee v. Wells Fargo Bank, N.A., No. 34-2013-00153873-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 25, 2014). *But see* Glaski v. Bank of Am., N.A., 218 Cal. App. 4th 1079, 1102 (2013) (declining to take judicial notice of legal effect of assignment); 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). This principle also applies

inclined to take judicial notice if the truth of the declaration's contents is undisputed.[220]

E. Attorney's Fees

Prior to HBOR's enactment, loan documents were the only avenue to attorney's fees.[221] Now, HBOR statutes explicitly allow for attorney's fees, even if the borrower obtained only injunctive relief.[222] Advocates have experienced mixed success convincing courts that "injunctive relief" includes TROs and preliminary injunctions, as opposed to permanent injunctions.[223] This presents a significant challenge to fee recovery because the likelihood of settlement dramatically increases after a preliminary injunction is granted; usually, there *is* no permanent injunction or final adjudication on the merits on which to base an attorney's fees motion.

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outside of the pre-NOD declaration context. *See*, *e.g.*, Rosell v. Wells Fargo Bank, 2014 WL 4063050, at *3-4 (N.D. Cal. Aug. 15, 2014) (declining to take judicial notice of a county property tax statement, purportedly showing two missed payments, because borrowers disputed they had missed the payments).

[220] *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).

[221] CAL. CIV. CODE § 1717 (1987) (providing for contractual attorneys' fees); *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); Bergman v. JP Morgan Chase Bank, N.A., No. RIC 10014015 (Cal. Super. Ct. Riverside Cnty. Jan. 22, 2014) (awarding attorney's fees in a TPP case where borrowers prevailed at trial on their good faith and fair dealing and misrepresentation claims). *See generally* CEB, *supra* note 22, § 7.23.

[222] "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision *if the borrower obtained injunctive relief* or was awarded damages pursuant to this section." CAL. CIV. CODE § 2924.12(i) (2013), (emphasis added); § 2924.19(h) (same).

[223] *Compare* Ingargiola v. Indymac Mortg. Servs., No. CV1303617 (Cal. Super. Ct. Marin Cnty. May 21, 2014) (finding that HBOR's statutory scheme allows interim fee awards because most HBOR cases are not fully tried), *and* Roh v. Citibank, No. SCV-253446 (Cal. Super. Ct. Sonoma Cnty Jan. 21, 2014) (awarding attorney's fees following preliminary injunction because the statute does not distinguish between a preliminary injunction and a permanent injunction), *with* Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 3, 2013) (denying borrower's motion for attorney fees because a preliminary injunction is "merely a provisional or auxiliary remedy to preserve the status quo until final judgment").

Recently, some servicers have aggressively pursued attorney's fees based on deeds of trust clauses and borrower's HBOR claims, even after borrowers voluntarily dismiss their cases. Courts have generally rejected this argument, finding HBOR claims are "on a contract" and therefore subject to Civil Code Section 1717 requirements, which include the existence of a prevailing party.[224] Since voluntarily dismissing an action prevents any party from prevailing, courts have denied servicers' motions for attorney's fees in these situations.[225]

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).[226] HOLA regulates federal savings associations, the NBA, national banks.[227] State statutes face field preemption under HOLA; the NBA only subjects them to conflict preemption.[228]

When the subject of the litigation is a national bank's misconduct, NBA preemption standards should apply, even if the loan was originated by a federal savings association.[229] Courts applying a proper

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[224] CAL. CIV. CODE § 1717(a) (1987).

[225] *See* Massett v. Bank of Am., 2014 WL 3810364, at *2-3 (C.D. Cal. July 25, 2014); Caldwell v. Wells Fargo Bank, N.A., 2014 WL 789083, at *4-5 (N.D. Cal. Feb. 26, 2014).

[226] HOLA is codified at 12 U.S.C. §§ 1461-1470 (2013), the NBA at 12 U.S.C. §§ 21-216 (2013).

[227] *See* Aguayo v. U.S. Bank, 653 F.3d 912, 919, 921 (9th Cir. 2011).

[228] *Id.* at 922.

[229] Some national banks, especially Wells Fargo, commonly assert a HOLA preemption defense where the loan at issue originated with World Savings Bank, a federal savings association. Wells argues that HOLA preemption attaches to the loan, regardless of their conduct as a national bank. Up until early 2014, most federal courts generally accepted this argument without independent analysis. *See*, *e.g.,* Terrazas v. Wells Fargo Bank, N.A., 2013 WL 5774120, at *3 (S.D. Cal. Oct. 24, 2013) (finding HOLA preemption survives assignment and merger of the loan to a national bank); Marquez v. Wells Fargo Bank, N.A., 2013 WL 5141689, at *3-4 (N.D. Cal. Sept. 13, 2013) (acknowledging the growing split in authority, but siding with the (then) majority and allowing Wells Fargo to invoke HOLA preemption). Now, however, the tide seems to be turning as more courts hold that national banks and other servicers who are not savings associations *cannot* invoke HOLA preemption to defend their own conduct. *See*, *e.g.*, Kenery v. Wells Fargo, N.A., 2014 WL 4183274, at *5-6 (N.D. Cal. Aug. 22, 2014) ("[Servicer] may not avail itself of the benefits of HOLA without bearing the corresponding burdens."); Corral v. Select Portfolio Servicing, Inc., 2014 WL 3900023, at *3-4 (N.D. Cal. Aug. 7, 2014); Hixon v. Wells Fargo Bank, 2014 WL 3870004, at *2-4 (N.D. Cal. Aug. 6, 2014) (finding borrowers, in signing their deed of trust, did *not* agree to be bound by HOLA preemption invoked by a national bank); Boring v. Nationstar Mortg., LLC, 2014 WL 2930722, at *3 (E.D.

preemption analysis have found former Section 2923.5 not preempted by the NBA.[230] Under a HOLA preemption analysis, state courts have also upheld the statute,[231] but it has not fared as well in federal courts.[232] Few courts have considered NBA and HOLA preemption of HBOR specifically, but the federal courts that have, for the most part, determined HBOR is preempted by HOLA,[233] but not by the NBA.[234] Importantly, the Dodd-Frank Wall Street Reform and Consumer

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Cal. June 27, 2014) (same); Penermon v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 2754596, at *7-9 (N.D. Cal. June 11, 2014) (allowing national banks to hide behind HOLA preemption and avoid liability for their own conduct may result in a "gross miscarriage of justice"); Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829, at *3-4 (N.D. Cal. May 13, 2014); Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016, at *7 (N.D. Cal. Mar. 3, 2014); Roque v. Wells Fargo Bank, N.A., 2014 WL 904191, at *3-4 (C.D. Cal. Feb. 3, 2014). *But see* Hayes v. Wells Fargo Bank, N.A., 2014 WL 3014906, at *4-6 (S.D. Cal. July 3, 2014) (citing OTS opinion letters, and that borrowers seemingly agreed to a HOLA preemption analysis at loan origination, in allowing Wells Fargo to invoke HOLA preemption).

[230] *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).

[231] *See* Mabry v. Superior Court, 185 Cal. App. 4th 208, 218-19 (2010) (finding the former CC 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 CC 2923.5, which deal with foreclosure, have traditionally escaped preemption.).

[232] *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* Ambers v. Wells Fargo Bank, N.A., 2014 WL 883752, at *6 (N.D. Cal. Mar. 3, 2014) (no preemption); Quintero v. Wells Fargo Bank, N.A., 2014 WL 202755, at *3-6 (N.D. Cal. Jan. 17, 2014) (no preemption); 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).

[233] *See*, *e.g.*, Sun v. Wells Fargo, 2014 WL 1245299, at *2-4 (N.D. Cal. Mar. 25, 2014) (preempting CC 2923.55, 2923.6, & 2923.7); Williams v. Wells Fargo Bank, N.A., 2014 WL 1568857, at *10-13 (C.D. Cal. Jan. 27, 2014) (preempting CC 2923.6 and borrower's negligence and UCL claims, insofar as they are based on dual tracking); Meyer v. Wells Fargo Bank, N.A., 2013 WL 6407516, at *3-4 (N.D. Cal. Dec. 6, 2013) (same finding as *Sun*); Deschaine v. IndyMac Mortg. Servs., 2013 WL 6054456, at *7-10 (E.D. Cal. Nov. 15, 2013) (preempting CC 2923.6, 2923.7, and borrower's authority to foreclose (CC 2924) claims); *Marquez*, 2013 WL 5141689, at *5 (preempting §§ 2923.55, 2923.6, 2923.7, and 2924.17). *But see* Stowers v. Wells Fargo, 2014 WL 1245070, at *3 (N.D. Cal. Mar. 25, 2014) (finding that borrower's dual tracking claim (pled as a UCL claim) and pre-NOD outreach claim were not preempted); Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. July 1, 2013) (dual tracking provision not preempted by HOLA).

[234] McFarland v. JP Morgan Chase Bank, 2014 WL 1705968, at *6-7 (C.D. Cal. Apr. 28, 2014) (finding that the HOLA and NBA preemption analyses are not equivalent, and that the NBA does not preempt HBOR).

Protection Act amended HOLA in 2011 to adopt the NBA's less strict conflict preemption analysis.[235] Conflict preemption will apply to federal savings associations for conduct occurring in 2011 and beyond.[236] However, the new preemption standard does not affect the application of state law to contracts entered into before July 2010.[237]

Courts have been reluctant to find state tort law claims preempted by HOLA, especially if the laws are based in a general duty not to defraud.[238]

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[235] *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.").

[236] *See* 12 U.S.C. § 5582 (2010).

[237] 12 U.S.C. § 5553 (2010); *see Williams,* 2014 WL 1568857, at *10 (declining to extend the Dodd-Frank Act to a loan originated before July 2010 (when the law went into effect) and finding borrower's HBOR claims therefore preempted by HOLA); Deschaine v. IndyMac Mortg. Servs., 2014 WL 281112, at *8 (E.D. Cal. Jan. 23, 2014) (same).

[238] *See*, *e.g.*, Sun v. Wells Fargo, 2014 WL 1245299, at *2-4 (N.D. Cal. Mar. 25, 2014) (HOLA preempts HBOR claims, but not common law causes of action); Sarkar v. World Savings FSB, 2014 WL 457901, at *2-3 (N.D. Cal. Jan. 31, 2014) (finding borrower's authority to foreclose claims and her fraud based claims not preempted by HOLA because any effect on lending is only incidental); Cheung v. Wells Fargo Bank, N.A., 2013 WL 6017497, at *4-5 (N.D. Cal. Sept. 24, 2013) (Borrower's wrongful foreclosure claim escaped HOLA preemption because lenders cannot rely on non-judicial foreclosure framework to foreclose, and then claim that framework is preempted by federal law.); Wickman v. Aurora Loan Servs., LLC, 2013 WL 4517247, at *2-3 (S.D. Cal. Aug. 23, 2013) (Borrower's fraud, negligent misrepresentation, and promissory estoppel claims were not HOLA preempted because those laws only prevent a servicer from defrauding a borrower – they do not require anything additional from the servicer and only incidentally affect their business practices.); Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065, at *8-9 (S.D. Cal. July 31, 2013 (same); Cockrell v. Wells Fargo Bank, N.A., 2013 WL 3830048, at *2-3 (N.D. Cal. July 23, 2013) (same). *But see* Ambers v. Wells Fargo Bank, N.A., 2014 WL 883752, at *6 (N.D. Cal. Mar. 3, 2014) (noting a distinction between fraud and misrepresentation claims based on "inadequate disclosures of fees, interest rates, or other loan terms," and those based on a bank's "general duty" not to "misrepresent material facts," but declining to apply the HOLA preemption analysis to borrower's ill-pled claims); Terrazas v. Wells Fargo Bank, N.A., 2013 WL 5774120, at *5-6 (S.D. Cal. Oct. 24, 2013) (HOLA preempts all of borrower's authority to foreclose claims, negligence claim, and contract related claims); Babb v. Wachovia Mortg., FSB, 2013 WL 3985001, at *3-7 (C.D. Cal. July 26, 2013) (finding borrower's promissory estoppel, breach of contract, negligence, fraud, and UCL claims preempted by HOLA because all the claims were based on the modification process, which effects "loan servicing").

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.[239] 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.

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